

# **Free Movement of European Union Citizens and Employment in the Public Sector**

Current Issues and State of Play

Part II – Country Files

*Report for the European Commission*

*by Jacques Ziller*

*Professor of European Union Law, Università degli Studi di Pavia*

*European Group for Public Administration (EGPA)*

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## Abbreviations

Art.	Article
EEA	European Economic Area (all EU Member States + Iceland, Liechtenstein and Norway)
EEC	European Economic Community
EC	European Community
ECJ	Court of Justice of the European Union (formerly Court of Justice of the European Communities)
EUPAN	European Public Administration Network – informal cooperation of Member States on public administration issues
ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development
SIGMA	Support for Improvement and Management in Government (OECD-EU programme)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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# Template of *Country files*

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## Sources of Information and Precautions for Use

The following *Country files* are based mainly upon the information given by Member States' authorities in response to questionnaires addressed to them by the European Commission in 2009.

Information has been completed with the reports written by the Network of experts in the field of free movement of workers established by the European Commission, which are published together with the Member States' comments and with information published by Member States authorities in the framework of the Human Resources Working Group, which is a working party of the EUPAN [*European Public Administration Network – informal cooperation of Member States on public administration issues*] (see *Part I – General Report - References*). The *Country files* further rely on information gathered by the author in specialised literature (law journals, handbooks and monographs, as well as specialised databases and documents available in research centres and on the Internet).

There is no attempt to standardise the vocabulary used for legal sources, i.e. legislation is sometimes called Law, sometimes Act, etc. The 27 EU Member States are EEA Member States, together with Iceland, Liechtenstein and Norway. The *Country files* nevertheless often mention EU and EEA Member States (or citizens); this is both for the sake of clarity and also because some of the quoted legislation is worded in such a way.

The order of the *Country files* follows the official order of EU Member States in EU documents, i.e. the alphabetical order of Member States in their official language (see list on page 3).

Contrary to the general report (Part I), where the issue of post reserved to nationals has been dealt with after the general issues of free movement of workers in the public sector, *Country files* deal first with the issue of application of Art. 45 (4) TFEU, for the sake of clarity. It should never be forgotten however that posts which may be reserved to nationals are not ipso facto outside of the scope of free movement of workers.

*Country files* are not up to date at exactly the same period for all Member States, due to the fact that answers to the Commission have come in at different moments, and to the different degree of availability of supplementary information at the time of writing.

***If Country files contain misinterpretations of the documents used to establish them, it is of sole the responsibility of the author of this report: the Country files do not commit the European Commission.***

*General comments to the Country files, as well as references, are provided in Part I – General Report.*



**BELGIUM**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which contain data are limited to 2009 or sometimes earlier and might not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

**1. General data****1.1. Date of applicability of EU law**

Belgium is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

**1.2. State form and levels of government**

Belgium is a federal State with four levels of government: the Federation, the Regions (*gewesten, régions*) and Communities (*gemeenschappen, communautés, Gemeinschaften*): Brussels-Capital city Region, Flanders, French speaking Community, German speaking Community, Walloon Region; 10 provinces (*provinciën, provinces*) and 589 municipalities (*gemeenten, communes, Gemeinden*). Regions are competent for the regulation of the public service of provinces and communes.

**1.3. Official languages**

There are three official languages in Belgium.

Dutch, French and German are the three official languages of the Federal State. Dutch

and French are the two official languages of the Brussels-Capital City Region.

Dutch is the official language of Flanders and of the provinces and communes situated in Flanders.

French is the official language of the French speaking Community and the Walloon Region as well as of the provinces and communes situated in the Walloon Region, with the exception of German speaking communes.

German is the official language of the German speaking Community and the corresponding communes in the Walloon Region.

**1.4. Statistical data**

Total population: 10 584 500 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of active population for 2000 (*Based on ILO Laborsta*)

Total public sector	905 500	20,6 %
Public enterprises	149 100	3,4 %
Total government	756 300	17,2 %

Government employment in 2000 (*Based on EUPAN – Structure of the civil and public services*)

<i>Federal</i>	268 229	32,11 %
<i>Communities/Regions</i>	281 240	33,67 %
<i>Provinces</i>	17 283	2,07 %
<i>Municipalities</i>	268560	32,15 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment, especially Art. 10 (2), according to which “*Belgians are equal before the law. They alone are eligible for civil and military service, apart from the exceptions which can be made by law for special cases.*” Art. 107 provides for the King to appoint civil servants and thus to regulate their employment.

The Constitution is complemented by “special laws” (*lois spéciales*) for its implementation. Art. 87 of the *Special law of 8 August 1980* provides that each government level has its own administration, institutions and personnel and the power to regulate employment therein (with the exception of pensions).

As far as federal administration is concerned, employment with tenure is regulated by Royal decrees (*Arrêtés royaux* - government regulations). *Royal Decree of 2 October 1937 concerning the status of servants of the State* has a prominent place, as general status of (State) civil servants. It is complemented by Royal decrees with sectorial scope. Employment by contract is regulated by *Royal Decree of 25 April 2005 determining the conditions of recruitment under a contract of employment in certain public services*.

Employment in public administration of the Regions and Communities as well as in local government is regulated according to a common framework by a Royal Decree of 22 December 2000 (*Arrêté royal fixant les principes généraux du statut administratif et pécuniaire des agents de l'Etat applicables au personnel des services des Gouvernements de Communauté et de Région et des Collèges de la Commission communautaire commune et de la Commission communautaire française ainsi qu'aux personnes morales de droit public qui en dépendent*). The status of employees of each of those governments and of the bodies which depend upon them are regulated by corresponding decrees of the relevant governments (e.g. decree of 6 May 1999 on the status of personnel of the Ministry for the Brussels-Capital region, decree of 13 January 2006 decree on the Flemish framework status of

personnel; code of the Walloon civil service of 18 December 2003).

Specific regulations apply to teachers in public schools as well as in private schools receiving public finances. Part of these regulations are common to the Flemish, French and German speaking Communities as they were adopted before 1970. As a matter of principle, Communities are competent for the amendment and application of these regulations.

### 2.2. Public sector employers

The (federal) State, of Regions and Communities (5 in total), provinces (10) and communes (589) are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense. At federal level, each ministerial department (about 14 “federal public services”) may be considered as an employer of its own.

According to *EUPAN – Structure of the civil and public services*, federal public services employ 268 229 permanent public servants (32,1% of the total); Communities and regions 281 240 (33,7%); provinces 17 283 (2,1%); and municipalities 268 560 (32,1%).

Recruitment procedures for federal regional and community governments are centralised with the Staff and Organisation federal public service *Selor* (under Minister for the Civil Service), with the exception of the Flemish ministries, for which recruitment is centralised with “*Jobpunt Vlaanderen*”.

Public schools and hospitals are established and financed by the Communities, and thus the public medical and educational services, are part of public employers.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of Regions, with the exception of Railways, which is under the Federation.

### 2.3 Public sector workers

Employees of the State, of Regions and Communities, Provinces and Communes, as well as of public bodies created by them are submitted to specific Federal or regional regulations (mentioned under 2.1.).

Statistical data for the year 2000 indicated (*Source: EUPAN – Structure of the civil and public services*):

Federal Level: federal public services: 59 662; organisations of public interest: 20 823; scientific institutions: 2 735; autonomous public companies: 107 434; special corps (justice, army, police...): 77 575.

Communities and Regions: ministries: 26 809; organisations of public interest: 55 169; scientific institutions: 304; education: 279 736; community commissions: 1 200.

Provinces: 17 283.

Communes: 268 560.

Since 1937, Belgium has a civil service based upon career system, inspired by the British Civil service of the time. As a rule, employees of the State, of Regions and Communities, Provinces and Communes have the status of civil servants, while contractual employees should be an exception, applicable solely for temporary posts; no figures are available about the actual percentage of civil

servants v. employees. In Flanders, there is a tendency towards a post based system, but the civil service regulations remain based upon a career system.

Employees of public enterprises are submitted to general labour law.

### 2.4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with the State Council, acting as administrative court. Matters relating to contract are submitted to civil courts.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the Federation, Regions and Communities, as well as for the application of the principle of equality.

The federal Ombudsman (*Médiateur fédéral*) may handle complaints with regard to federal administration. Ombudsmen of the Regions and Communities may handle complaints with regard to federal administration. Some local governments have also installed ombudsmen. They may make recommendations to the relevant public authorities but have no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

The Constitution sets as a principle in Art. 10(2) that only Belgian citizens are eligible to public employment, with the possibility of making exceptions by law.

For employees of federal administration, Art. 16 of the status of (federal) State servants of 1937 and Art. 2 (2) of the *Royal Decree determining the conditions of recruitment under a contract of employment in certain (federal) public services* are limiting the Belgian nationality condition to cases corresponding to the criteria set by the ECJ (functions involving the participation in the exercise of public authority and the safeguard of the general interests of the State).

When such functions are not at stake, access to tenured employment is reserved to Belgian citizens and citizens of other Member States of the European Economic Area or of the Swiss Confederation, and access to contractual employment is not submitted to any nationality condition.

The status of personnel for the Brussels-Capital Region contains clauses which are similar to those of the *Federal status*.

The statuses of the Flemish and of the Walloon civil service do not mention any nationality clause. It is not obvious at first reading whether this means that there is no nationality clause for their employees, or on the contrary that it would imply that according

to Art. 10 (2) of the Constitution, employment is reserved to Belgians. On the other hand, both the *Flemish* and *Walloon statutes* refer to EU directives on mutual recognition of diplomas and to experience acquired in EU and EEA Member States.

Employees of public enterprises are submitted to general labour law, which does not provide for any exclusion based upon nationality.

### 3.2. Definition of posts

The general regulations applicable to federal administrations indicate the criteria of functions involving the participation in the exercise of public authority and the safeguard of the general interests of the State. This should imply a case by case examination for each post.

There are furthermore some special regulations that reserve certain categories of posts for Belgian nationals, e.g. those of finance inspectors (*Royal Decree of 1 April 2003 determining the status of members of Inter-federal Finance Inspectorate*) and posts in the diplomatic service (*Royal Decree of 25 April 1956 determining the status of officials of the Ministry of Foreign Affairs and External Trade*).

A Royal Decree of 12 September 2007 has suppressed the condition of nationality for commander functions on ships registered in Belgium.

### 3.3 Practice and monitoring

A *Circular of the Minister of civil service of 24 February 1995 on the Application of Art. 16 of the status of (federal) State servants* gives indications on the way in which the nationality condition should be applied:

- For recruitment purposes, each ministerial department or public body has to establish whether the functions relating to a vacant post “*is involving the participation in the exercise of public authority*”; this analysis has to be transmitted to the *Personnel Recruitment Office* together with the decision of the relevant minister or body “*to open or not recruitment to EU citizens*”. For the personnel of State scientific institutions, the

same type of analysis has to be transmitted to the recruiting board.

- For promotion, each administration, public body or scientific institution has to examine on a case by case basis whether the post may be opened or not to EU citizens. This examination has to occur on the basis of the indicated criteria, by an analysis of the functions to be exercised.

Recruitment procedures for federal regional and community governments are centralised with *Selor*, with the exception of the Flemish ministries, for which recruitment is centralised with “*Jobpunt Vlaanderen*”.

However there is no office in charge of monitoring recruitment and promotion practices for the whole country.

### 3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been a goal of (federal) State regulations and circulars for administrative practice, since the amendment of the *status of (federal) State servants of 1937* and the *Royal Decree determining the conditions of recruitment under a contract of employment*. It was the result of a *Royal decree of 18 April 2005*, opening to EU citizens and citizens of other EEA Member States and Switzerland the posts which do not involve the participation in the exercise of public authority and in the safeguard of the general interests.

The wording of the status of employees of Regions and Communities and local government does not contain an explicit clause comparable to that of the federal regulations. This difference in wording is not as such a source of infringement of EU law, especially as recruitment is centralized with offices which should be aware of the applicable criteria for reserving posts to national. However indications on nationality conditions (or the absence thereof) should be given with vacancies in order not to discourage candidates from other EU Member States of applying.

Available documentation gives no indication as to possible problems for free movement of dependent workers in the public sector that would be due to a nationality condition.

It may be worthwhile signalling that the situation is different in the case of self employed persons (which are normally not in the

scope of this report): there seem to be limitations of freedom of establishment for the profession of notary.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions: for federal government and public bodies *Royal Decree of 2 October 1937 concerning the status of servants of the State* and *Royal Decree of 25 April 2005 determining the conditions of recruitment under a contract of employment in certain public services*; for the government and public bodies of Regions, Communities, Provinces and Communes, the framework *Royal Decree of 22 December 2000* as well as the *Flemish framework status* and the *Code of the Walloon civil service* of 18 December 2003. There are

also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

#### **4.1.2. Practice**

Government departments and public bodies may have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

There is no general condition of professional experience for access to permanent employment as well as fixed term contract employment.

For a specific comparative selection, *Selor* (or *Jobpunt Vlaanderen*) may require some specific knowledge or experience which has to be acquired in a Member State of the EU or of the EEA or Switzerland.

In the federal public service, for access to the two upper grades of level A (posts reserved to holders of University degrees), a professional experience of six or nine years is necessary. Regulations explicitly indicate that experience acquired in an EU or EEA Member State or in Switzerland may be taken into account. There are equivalent provisions in the Flemish and Walloon statuses.

#### **4.2.2. Seniority**

Seniority is taken into account for remuneration and career purposes.

The regulation on the financial status of federal public services' staff (*Royal Decree of 29 June 1973*, Art. 14(1)) provides for automatic recognition of working periods spent in the public services of EU and EEA Member States or the Swiss Confederation. These periods are automatically included in the calculation of seniority for remuneration purposes. The private or public law nature of the employer is irrelevant as far as they employ staff on a legal basis unilaterally defined by the competent public authority.

Work carried out in other public services, in the private sector or on a freelance basis is also included if recognised as professional experience highly relevant to the post. This recognition is made by the Chairperson of the Management Board or his/her representative.

Staff member applying for the recognition of such professional experience have to provide proof of its relevance to the office.

In case of disagreement between a staff member the authority, the final decision is taken by the Chair of the Management Board of *Selor*.

Taking into account professional experience and seniority is not subject to any special conditions, such as continuity of the employment relationship.

There are equivalent provisions in the Flemish and Walloon statuses.

#### 4.2.3. Language requirements

Dutch, French, and German, which have the status of official languages in Belgium, are also official languages in other EU Member States, i.e. Austria, France, Germany, Luxembourg and – at regional level – Italy. Language legislation applicable to public sector employment takes relevant education abroad into account.

Sufficient knowledge of the official languages of the relevant authorities (see under 1-3) is required in for employment by public authorities. Proofs and interviews for the relevant positions are held in the relevant language.

Holders of positions in the federal public service are integrated in either the Dutch or the French “role” according to the language they have been educated in, in Belgium or abroad. If they have been educated in German language or a foreign language choose in which “role” they want to serve and have to pass a language exam.

There is no case law from Belgian courts on litigation about language requirements. There are indications in the reports of the Network of Free Movement of Workers that language requirements are sometimes applied too broadly especially in the Brussels district; there are however no indications that this is the case with public sector employment: on the contrary, monitoring of published vacancies do not show language requirements.

#### 4.2.4. Other specific requirements

The present report does not cover the issue of regulated professions. A special mention of mutual recognition of professional diplomas, certificates and other qualifications needs however to be made here.

As far as federal government is needed, the Minister for the public service may decide, if needed, that some specific diplomas or certificates be required for recruitment or promotion. The relevant diplomas are mentioned in tables annexed to the Status of State employees. The relevant annex explicitly refers in Chapter II § 2 to the EC directives on mutual recognition of diplomas.

The decision to accept a diploma or certificate of another EU Member State is taken by the Head of *Selor*, after consultation of the (Belgian) authorities competent for education. Similar provisions are foreseen in the status of the Flemish and Walloon civil service. For the Flemish civil service, *Jobpunt Vlaanderen* is in charge of the relevant decisions. The advantage of this system is that it is clearly foreseen in the relevant staff regulations, and therefore transparent.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

First, there is a difference in wording between the status of *State servants* that of the *Royal Decree of 25 April 2005* determining the conditions of recruitment under a contract of employment. Whereas in Art. 16 of the status of State servants the conditions of participa-

tion in the exercise of public authority and in the safeguard of the general interests of the State are presented as cumulative, the *Royal Decree of 25 April 2005* seems to consider them as alternative.

According to the settled case law of the ECJ, the two criteria are cumulative. The question is whether some posts are reserved

to nationals, which imply only functions related to safeguard of general interests, but not direct or indirect participation in the exercise of public authority. Available information is insufficient for such an assessment from outside.

*Second*, the wording of the Flemish and of the Walloon Status of civil servants is such that it might give the impression that employment in the relevant services is only open to Belgian nationals. The wording of the status of employees of Regions and Communities and local government does not contain an explicit clause comparable to that of the federal regulations.

These problems of wording are not as such an infringement of EU law. Recruitment is centralized with offices which should be aware of the applicable criteria for reserving posts to Belgian national. However indications on nationality conditions (or the absence

thereof) should be given with vacancies in order not to discourage candidates from other EU Member States of applying.

**5.2.** A further point to mention is the absence of a central point for the monitoring of practice in the public sector. It seems that it would be rather easy to remedy to this absence, especially as recruitment is concerned: *Selor*, for the federal and French speaking public authorities, and *Jobpunt Vlaanderen*, for the Flemish authorities, could be in charge of such a monitoring function, or could be used as a model for installing a monitoring office.

**5.3.** More generally, the lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

An important reform of Belgian regulations applicable to employment in the public sector took place in 2005, as indicated under 3.4, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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България  
**BULGARIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Bulgaria became a member of the EU on 1 January 2007. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the relevant ECJ case law on the public sector apply since 1 January 2007.

### 1.2. State form and levels of government

Bulgaria is a unitary State with two levels of government: the State, and 264 municipalities (*obshtini*).

### 1.3. Official language

There is one official language: Bulgarian.

### 1.4. Statistical data

Bulgaria has a total population of 7 679 300 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	627 600	26 %
Public enterprises	219400	9,1 %
Total government	408100	16,9 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 105 (2) of the Constitution, “*The Council of Ministers shall ensure the public order and national security and shall exercise overall guidance over the State administration and the Armed Forces*”. Art. 116 provides that the conditions for appointment and removal of State servants shall be established by law. *Chapter 6* (Art 135-146) contains the provisions on local self government and local administration. The Constitution contains no specific provision on the nationality required to access public employment, with the exception of positions in the army and elected political offices.

The *Law for the Civil Servant*, Art. 7 (1) 1, as amended in 2008 provides that appointment as a civil servant is open to Bulgarian citizens

or other EU citizens and citizens of other EEA Member States and Switzerland.

Public employers may also employ workers under labour contracts, submitted to the provisions of the Labour code.

The Law on Administration, the Law on the Judiciary and the Law on the Ministry of the Interior are also relevant to the determination of the status of civil servants.

### 2.2. Public sector employers

The State and the 264 municipalities are public employers. There are also a number of State agencies and commissions (the *Ordinance on the application of the unified classifier of the official positions in administration* mentions 17 such

bodies). Schools and universities, as well as public hospitals; are autonomous public bodies.

No statistics are available on the relevant weight of different public sector employers in terms of employment.

### 2.3 Public sector workers

The legal status of Servants of the State and of Municipalities is laid down in the Law for the Civil servants. Positions for which recruitment is not by open competition, employment contracted are regulated by the Labour Code

Statistical data for the year 2004 indicated a total number of employees in the administration (central, regional and local) of 85 340 out of which 36 943 (30,21 %) were civil servants (*Source: EUPAN – Structure of the civil and public services*).

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

Art. 116 of the Constitution provides that the conditions for appointment and removal of State servants shall be established by law.

The *Law on the Civil servant*, as amended in 2008, provides that EU citizens and citizens of EEA Member States or of the Swiss Confederation may be appointed as civil servants. Access to contractual employment is not submitted to any nationality condition.

Certain positions are however reserved to Bulgarian nationals by the laws on Administration, on the Judiciary and on the Ministry of the Interior.

### 3.2. Definition of posts

Posts reserved to Bulgarian nationals are defined by law on the basis of categories.

The *Law on Administration* requires Bulgarian nationality for the posts of chairmen, vice-chairmen and members of State agencies, commissions, and institutions functioning in connection with the implementation of the executive power and established by a law or

### 2.4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Civil Servants law is provided for by a possibility of action with administrative courts. However decisions relating to the outcome of competition and recruitment are not submitted to court control.

Matters relating to contract are submitted to civil courts.

The Constitutional court exercises judicial review on laws and may be asked to give a binding interpretation of the Constitution.

The Parliamentary Ombudsman may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

decree of the Council of Ministers. The *Law on the Judiciary* requires Bulgarian nationality for judges, assistant judges and prosecutors.

All the posts of the Ministry of the Interior require Bulgarian nationality whether held by State servants or contractual agents.

An amendment to Art. 88, paragraph 4 of the Code of Commercial Shipping (*State Gazette ed. 71 as of 12.08.2008*) has suppressed the condition of nationality for commander functions on ships registered in Bulgaria.

### 3.3 Practice and monitoring

The *State Administration Inspectorate*, a directorate in the Ministry of State Administration and Administrative Reform is in charge of general and specialised inspections over the application of Law for the Civil Servant and the secondary legislation.

### 3.4. Compliance with EU law

The amendments introduced in 2008 to the *Law on the Civil Servant's principles* were adopted in order to comply with the require-

ment of EU law on free movement of workers in the public sector.

However, there are not sufficient indications about the exact scope of those positions which remain reserved to nationals, in order to assess whether they all correspond indeed to the criteria for the application of Art. 45 (4)

TFEU. The fact that all the posts of the Ministry of the Interior require Bulgarian nationality whether held by State servants or contractual agents might lead to impose a nationality condition for posts which do not correspond to the criteria for the application of Art. 45 (4) TFEU.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions. Specific conditions are set by secondary legislation, especially by a *Decree on the unified classification of positions in administration* and *Ordinance on the application of the unified classifier of the official positions in administration*.

For public enterprises, general labour law is applicable.

#### **4.1.2. Practice**

Government departments and public bodies may have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

According to the applicable legislation, professional experience is taken into account for recruitment procedures, except for junior ranks, and for promotion as well as for additional remuneration, which is added to the basic wage.

The relevant required duration of professional experience is indicated for each category of positions in the *Decree on the unified classification of positions in administration*.

Art. 2 (2) of the *Ordinance on the application of the unified classifier of the official positions* provides that the minimum required professional experience “shall comprise the time during which the servant has been carrying out activity in a sphere or spheres, which are relevant to the functions specified in the office profile of the respective official position”.

Art. 2 (3) specifies that professional experience shall be proven by official documents

for: 1. length of service; 2. length of official service; 3. length of insurance; and 4. carrying out activities abroad. There are no specific indications in the law and regulations about the way in which activities abroad are taken into account. The legal assumption is thus that no difference is made between experience gained in Bulgaria and experience gained in another Member State. This applies as well for experience in the private as in the public sector.

The *Ordinance on the structure and organisation of the salary* has been amended in 2008, in order to recognize periods of employment in other Member States.

There are no indications about unequal treatment on the basis of case law or other sources. More specific information is not available, which confirms the absence of differentiation in the treatment of professional

experience on the basis of the country and/or the sector in which it has been acquired.

#### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

#### 4.2.3. Language requirements

According to Art. 3 of the Constitution, Bulgarian is the official language. There are no explicit language requirements in the laws and regulations applicable to employment in the public sector.

Information on how knowledge of Bulgarian is being verified and on what level of knowledge of the language is required in practice was not available to the author of this report.

### 5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

*First*, the absence of court control on competitions and decisions about recruitment (see 2.4) is not in line with the requirements of the ECJ jurisprudence, as it might lead to exclude judicial review of decisions that would be based upon nationality or the country of acquisition of professional experience or seniority.

*Second*, the definition of posts reserved to nationals seems at first sight not in line with the criteria on the application of Art. 45 (4) TFEU when reserving all posts in a ministry (the Ministry on the Interior) to Bulgarian citizens.

5.2. The information provided is not detailed enough to assess whether in practice there are no discriminations or obstacles to free movement. As the relevant laws and regulations have been amended very recently (2008) this is not astonishing. A special effort should therefore be made by the responsible authorities to monitor practice.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

### 6. Reforms and Coming Trends

As indicated *under* 3.4, an important reform of Bulgarian legislation and regulations applicable to employment in the public sector took place in 2008, in order to meet the requirements of EU law, and especially the criteria

for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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Česká Republika  
**CZECH REPUBLIC**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

The Czech Republic became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

The Czech Republic is a unitary State with three levels of government: the State, 13 regions (*kraje*) and 6 254 municipalities (*obec*).

### 1.3. Official language

There is one official language: Czech.

### 1.4. Statistical data

The Czech Republic has a total population of 10 287 200 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	1 003 900	19,9 %
Public enterprises	337 800	6 %
Total government	661 100	13,10 %

Government employment in 2006 (*Based on ILO Laborsta*)

<i>State</i>	194 500	29 %
<i>Local</i>	476 300	71 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 79 of the Constitution “(1) Ministries and other administrative agencies and their jurisdiction may be established only by law. (2) The legal status of government employees in ministries and other administrative agencies shall be defined by law. (3) Ministries, other administrative agencies and territorial self-government bodies may issue on the basis and within the scope of a law legal regulations, if they are authorized to do so by law.” Chapter VII of the Constitution contains the provisions about territorial self-government.

There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions, and Art. 93 (2), according to which: “Any citizen with full integrity, who is the graduate of a university law school, may be appointed judge”.

Employment in the area of public administration in the Czech Republic is governed in particular by *Act 218 of April 26, 2002 on service of public servants in administrative authorities and on remuneration of such servants and other employees in*

*administrative authorities (the Service Act)*. The Service Act contains not only the status of public servants but also some provisions on public service employees, to whom the *Labour Code* is applicable. The entry into force of the Act, and of the relevant transitional measures has however been postponed several times, and at present until 1 January 2012. As the Act is partly a codification of existing law, only the innovations it contains see their effect postponed, but it is rather complicated to understand the exact legal situation of public servants in many respects.

Some sectorial laws are already in force and will continue applying once the Service Act will apply, such as *Act N° 312/2002 Coll., on Officers of Municipalities, Act No.182/1993 Coll., on the Constitutional Court, Act N° 6/2002 Coll., on Courts and Judges, Act N° 283/1993 Coll., on Public Prosecutors, Act N° 349/1999 Coll., on the Ombudsman, Act 361/2003 on Service Contract of Members of Security Corps, Act N° 221/1999 Coll., on Professional Soldiers, Act N° 154/1994 Coll., on Security Information Service, and Act N° 18/2004 Coll., on Mutual Recognition of Qualifications*.

## 2. 2. Public sector employers

The State, 13 regions and 6 254 municipalities are public employers. There are also a number of State and regional or local agencies and offices.

According to Chapter II *Section 1 §* of the *Service Act*: “*For the purposes of this Act, administrative authorities shall consist in the Ministries, 4) central administrative authorities 5) and other administrative authorities 6) (state administration bodies) 7) if these have been established by special laws, if they are explicitly designated in such laws as the Ministries or administrative authorities or State administration bodies, and if they perform State administration on the basis of such laws*”.

The public sector furthermore includes State or regional/local provided medical and educational services.

On the basis of *ILO Laborsta* statistics, it may be indicated that government employment in 2006 is divided between central government (194 500) and regional and local gov-

ernment (476 300) in a proportion of 29 % to 71 %.

## 2.3 Public sector workers

The *Service Act* makes a distinction between “*public servants*” who are “*employees performing State administration in administrative authorities as a service provided by the Czech Republic to the public*” and “*other employees*”.

As mentioned under 2.1., the Service Act is not yet in force, and the rationalisation of the distinction between “*public servants*” and “*other employees*” has not yet been put in place. There are a number of positions – especially in the State service – occupied by “*public servants*” who are appointed permanently, like in the judiciary, police, security, army and intelligence service, while most others are employed on contract under general labour law.

On the basis of figures of *EUPAN – Structure of the civil and public services*, administrative authorities employ 101 071 public servants and regional authorities 5 342 (no indication of the year), while no information is available on municipalities. These figures seem to indicate that at State level the relative proportion of public servants and other employees would be of about 51 % to 49%. On the assumption that most local authorities employ only “*other employees*”, it seems that for the total government sector (central, regional and local), the relative proportion of public servants and other employees might be of about 30 % to 70 %.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Service Act* (in the future) and under some applicable sector specific laws is provided for by a possibility of action with administrative courts. For contract relationships, competence is with the labour chambers of civil courts, which deal with labour law employment.

The Constitutional Court exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Public Defender of Rights) may handle complaints with regard to

public administration. He may make recommendations to the relevant public authorities

but has no power to make binding decisions.

### 3. Posts reserved to nationals

#### 3.1. Relevant laws and regulations

Only Art. 93 (2) of the Constitution is setting a nationality requirement for public employment, namely as a judge. Other provisions of the Constitution which require Czech citizenship apply to elected political positions.

Various Acts require Czech nationality for some of occupations or functions. These laws require Czech citizenship for policemen, security corps (firemen, members of counter-intelligence service etc.) and professional soldiers, for all judges or public prosecutors for assistants of the Constitutional Court and High Court. Czech citizenship is not required for officers of the municipal authorities, but they are submitted to a condition of permanent residence.

The *Service Act*, which has not yet come into force, requires Czech citizenship for the employment in public service as a *public servant*. According to Chapter 1 *Section 3 § 6 (2)* public servants exercise functions including:

- “a) preparation of draft legal regulations and providing for legal activities of administrative authorities,*
- b) preparation of draft international treaties,*
- c) preparation of draft conceptions and programs,*
- d) management and directing of activities of subordinate administrative authorities,*
- e) establishment and administration of information systems in public administration,*
- f) statistical service (state statistics),*
- g) administration of the relevant Chapter of the State budget in relation to organizational departments of the State and legal entities, with the exception of the service authority in which service is performed,*
- h) protection of confidential information, i) providing for State defence,*
- j) defending of interests of the Czech Republic abroad,*
- k) the policy of subsidies,*
- l) administration of research and development,*
- m) administrative decision-making,*

- n) State control, supervision or surveillance,*
- o) provision for organizational matters of the service and administration of service relations and remuneration of public servants pursuant to this Act,*
- p) management, r) preparation and drawing up of expert substantive basic documents for activities as referred to in letters a) to d), g), j), m) and n), with the exception of basic documents consisting in physical measurements, chemical analyses, or control, comparison and determination of technical parameters”.*

Czech citizenship is not a requirement for “other employees” ”, defined according to *Section 1 § 2 e)* as “employees who only carry out auxiliary, maintenance or manual work in administrative authorities, as well as to employees who only direct, organize and control performance of auxiliary, maintenance or manual work.”

#### 3.2. Definition of posts

Under applicable law, the definition of posts reserved to Czech citizens is based on sector specific regulations, as mentioned under 3.1., for which no specific criteria are indicated. It appears from the list that it has mainly to do with the judiciary and with police, security and armed forces.

The *Service Act*, which has not yet entered into force, establishes a nationality requirement for all “*public servants*” positions, which appears to be based mainly on a functional approach, that does not however coincide with the criteria for the application of Art. 45 (4) TFEU, as appears from the functions mentioned under letters e), f), g), l), o). As it seems that the functions mentioned under Chapter 1 *Section 3 § 6 (2)* correspond to the safeguard of general interests, the question is whether they do indeed also involve at least indirectly the exercise of public authority: it seems doubtful for the statistical service, administration of research and development and would need to be further checked for the others.

An amendment to Art. 28 par. 4 of Act n° 61/2000, introduced by Act n° 310/2008 (published 21.08.08 and which entered into force on 01.01.09) allows for EU to may become captains on boats flying the Czech flags.

### **3.3 Practice and monitoring**

Information on practice is not available. Furthermore the lack of transparency due to the non entry into force of the *Service Act* renders it difficult to have a clear overview of applicable law.

### **3.4. Compliance with EU law**

Under applicable legislation, there does not seem at first sight to be cases of non compliance with EU law due to the wording of relevant Acts. The *Service Act* which is not due to enter into force before 1 January 2012, would contain restrictions which are questionable with regard to the criteria for application of Art. 45 (4) TFEU.

Further examination of applicable legislation and assessment of the exact scope of positions reserved to national and of administrative practice in recruitment will be indispensable.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions. This means in particular that most of public employment is still regulated by the labour code, as the *Service Act* is not yet into force.

#### **4.1.2. Practice**

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

As long as the *Service Act* has not entered into force, and with the exception of the public servants mentioned under 3.1. (mainly policemen, security corps, professional soldiers, judges and public prosecutors), conditions of employment are depending upon each public employer and possibly on relevant collective agreements (if any).

Professional experience often appears in advertisement for public sector positions. Professional experience means the knowledge or capability necessary for pursuance of the activity. The knowledge or capabilities may be documented by a formal document on education or training, or by a document establishing that a person actually exercises an activity

where he/she uses the required knowledge or capability. Requests must be reviewed in applying the principle of non discrimination, and ultimately courts would have to decide upon compliance.

Apart from the legislation for the recognition of professional diplomas, certificates and other qualifications for regulated professions, there are no general provisions on the recognition of professional experience acquired abroad in Czech laws and regulations. There is no information on practice applied by public sector employers.

#### 4.2.2. Seniority

Seniority is taken into account in the same way as professional experience (see 4.2.2). There seem to be no general provisions on the recognition of working periods abroad in Czech laws and regulations.

#### 4.2.3. Language requirements

Under the current legislation, language requirements depend on the conditions for

participation in a recruitment procedure, which are stated by the employer.

Knowledge of Czech language should be required to the extent necessary to the execution of the employment. The conditions must not be discriminatory.

There is no information on practice, which would allow assessing compliance with the principle of proportionality.

### 5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

*First*, the definition of positions reserved to nationals according to the *Service Act* is based upon the functions for which employment should occur under the status of public servant, and it is most probable that a number of posts do not correspond to functions that correspond to the criteria for the application of Art. 45 (4) TFEU. This is not yet an infringement of EU law, as the *Service Act* will not enter into force before 2012, and as current legislation reserves access to Czech citizens only for a very limited number of posts. Closer examination of the *Service Act* is indispensable before it enters into force in order to avoid infringements in the future.

*Second*, where professional experience and/or seniority is or may be taken into account for working conditions, there is no

provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States, apart from regulated professions.

5.2. There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which would allow detecting possible non-compliance due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

### 6. Reforms and Coming Trends

As indicated under 2.1, Czech legislation has been reformed in 2002 in order to introduce a general public *Service Act*, but the date of entry into force of the Act has been postponed four times, and it is set at present for 1 January 2012.

Although this legislation was prepared to a certain extent in view of accession to the EU, it does not contain provisions which can directly be related to an obligation stemming from EU law as regards public employment,

i.e. provisions on free movement of workers in the EU.

According to Parliamentary debates as well as the Governmental report accompanying the bill which deferred the entry into force of the *Service Act*, the Government would be working on a completely new codification of the law of public service, which should include not just the status of State officials, but all public servants (including also the employees of regional self-administration units and others).





Danmark  
**DENMARK**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Denmark joined the European Communities on 1 January 1973. No transition period was foreseen for free movement of workers.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

Denmark is a unitary State, with three levels of government: the State, 5 regions and 98 municipalities (*kommuner*).

The Kingdom of Denmark also includes two autonomous regions: the Faroe Islands and Greenland; EU law does not apply at all to the Faroe Islands, and the provisions on the free movement of workers do not apply to Greenland.

### 1.3. Official languages

There is one official language: Danish.

In Greenland, Greenlandic (*Kalaallisut*) is also official language.

### 1.4. Statistical data

Denmark has a total population of 5 447 100 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	922 900	32,3 %
Public enterprises	82 000	2,9 %
Total government	840 900	24,4 %

Government employment in 2008 (*Based on ILO Laborsta*)

<i>State</i>	200 100	24,7 %
<i>Regional</i>	132 900	16,4%
<i>Local</i>	475 300	71 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. *Section 27* establishes the principles applicable to the appointment dismissal, transfer, and pensioning of civil servants. It provides that “*No person shall be appointed a civil servant unless he is a Danish subject.*”

Employment of civil servants is regulated by the *Civil Servants Act*, the provisions of which also apply to posts occupied by non nationals that would be conferred to civil servants if Danish nationals.

Employment of non civil servants in the public sector is regulated by labour law and (sectorial) collective agreements.

## 2.2. Public sector employers

The State, the Regions (5) and Municipalities (98) are all public employers, as well as the agencies and autonomous bodies they are controlling.

Public schools and hospitals are self-governed bodies under the authority of the ministries for education and health and thus the public medical and educational service are part of public employers.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of municipalities, with the exception of railways, which is under the State.

According to responses from the Danish government to the Commission, for 2009, in terms of persons employed in Denmark, the public sector employs about 730 000 (converted into fulltime/man-years FTE's), which corresponds to one third of the entire labour market. The State sector employs approximately 178 000 (24,8 %), regions about 120 000 (16,4 %); and municipalities about 435 000 (53,3 %).

## 2.3 Public sector workers

Public sector workers are divided in civil servants and employees: the latter about 86 % of the employees of the State, municipalities and regions, are submitted to labour law and collective agreements.

According to responses from the Danish government to the Commission, for 2009 Civil servants positions represent about 14 % of the total of public sector employment, i.e. 36% of State employment (about 64 000), 4 % of regions employees (about 5 000) and 9 % of municipal employment (about 40 000).

## 2.4. Appeals and remedies

Judicial review on decisions of public authorities (including those relating to employment), as well as matters relating to contract, are dealt with by civil courts.

There is no constitutional court, but all courts may rule on the compatibility of a relevant law with the Constitution. Danish courts have always shown a very high level of self-restraint in that matter.

The ombudsman (*Ombudsmand*) may handle complaints with regard to all parts of the public administration, including regional and municipal administration. He may make recommendations but cannot adopt decisions that would be binding upon the administration.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

The Constitution, Art. 27, sets as a principle that only Danish citizens may be civil servants. The *Civil servants act* of 1969 applies to all posts where workers in principle have the status of civil servant. Since an amendment adopted in 1990, the *Civil servants act* provides in Chapter 15a Section 58 c. that “Persons without Danish nationality shall be employed on terms similar to those of civil servants where persons with Danish nationality are employed as civil servants. The provisions regarding appointment by the King shall, however, not apply.”

For positions under labour law, there are no conditions of nationality whatsoever.

In some ministries, there are posts reserved to Danish nationals on the basis of the relevant sectorial rules. There are no positions reserved to Danish nationals in municipal and regional government.

## 3.2. Definition of posts

Some posts are reserved to Danish nationals within the Ministry of Justice: judges, police officers, governors and deputy governors of prisons and prison officers. A non-national may however be employed on probation as prison officer if it is expected that (s)he will obtain Danish citizenship shortly after

(approx. within a year after) employment on probation.

Within the Ministry of Defence, clergymen, private first class, officers of the line and reserve have to be Danish nationals in principle. However the Ministry of Defence can, after assessment of the individual case, and provided that specific circumstances in the native country of the applicant does not prevent this, grant an exemption to the requirement of Danish nationality.

A decree n° 1010 of 9 of October 2006 opened access to the post of master of Danish commercial and fishing vessels to Danish nationals to EU citizens. Persons covered by these provisions shall hold a Danish certificate of recognition. The rules also provide that a requirement for masters to have Danish nationality can be introduced when evidence is produced that the powers conferred by public law on masters of passenger vessels or vessels transporting troops, military equipment or nuclear waste are exercised on a regular basis and do not represent a very minor part of the activities.)

### **3.3 Practice and monitoring**

The provision according to which “*Persons without Danish nationality shall be employed on terms similar to those of civil servants where persons with Danish nationality are employed as civil servants*” is applied in the sense that (s)he will in all aspects be treated like a civil servant, with respect to salary, redundancy pay, pensions, disciplinary proceedings, working conditions etc. etc.

The provision according to which appointment of civil servants is done by the

King or by the relevant minister, foresee that the Minister for Finance decides which civil servants are to be appointed by the King. This has been regulated in a circular of 18 May 2004, stating that appointment by the King will take place regarding employment as civil servants in the State or in the national church in positions belonging to salary grade 36 or above.

In 2004 the State Employers’ Authority (*Personalestyrelsen*, an agency within the Ministry of Finance) carried out a survey on the extent to which a requirement on Danish citizenship exists regarding positions in the State public sector. A supplementary survey from 2006 has shown that in practice, for certain other posts, mainly within the police, the judicial system and the foreign services, Danish nationality is required. The conclusions of these surveys are mentioned under 3.2.

There are no statistics about employment of non nationals. Municipalities have made efforts to attract foreign labour, and in this sector there are a small amount of Swedes in eastern Denmark and a small amount of Germans in southern Jutland.

### **3.4. Compliance with EU law**

The Constitution, laws and regulations comply with EU law in so far as they do not explicitly reserve to Danish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

Compliance with EU law of the nationality condition for the formal status of civil servant will be discussed under 5.1.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and em-

ployment conditions for positions which are in principle be filled by civil servants. Labour law.

Collective agreement and specific sectorial regulations on pay etc. apply to other posts.

Rules on salary grading/pay determination are to be found in the *Collective framework agreement on new pay systems*, the *Collective agreements for different State sector personnel groups*, the *Circular on salary and seniority for civil servants* and the *Personnel Administrative Guidelines*.

Persons working in central government are as a main rule employed under collective agreements; about one third are employed as civil servants.

Since 1 January 2001, appointment as civil servants is confined to special positions that are specified in *Circular of 11 December 2000 on the application of civil servants employment in the State sector and the national church*. Accordingly, it is typically senior managers, judges as well as police, prison and defence staff that are employed as civil servants.

Other groups are typically employed on collective agreement terms. A few individual personnel groups are employed according to regulations, and in a small number of cases, employment is based on individual contracts.

In connection with employment under a collective agreement, the Minister for Finance

and various organisations have concluded the terms of the agreements.

In connection with individual employment, the basis of employment is an individual contract that is concluded between the employee and the employment authority.

Employment regulations apply to groups whose work area is not subject to any collective agreement.

The most significant difference between civil servants and other groups of employees is that civil servants have no right to strike; they are entitled to three years' pay if they are dismissed due to abolition of positions; and their pension scheme is a defined-benefit plan; non nationals filling the same type of positions as civil servants are submitted to identical rules, albeit being formally employees.

#### **4.1.2. Practice**

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

## **4.2. Special requirements for access to employment and working conditions**

### **4.2.1. Professional experience**

Previous work experience or specific qualifications of relevance to the performance of the work to be done may lead the appointing authority to grant additional seniority.

### **4.2.2. Seniority**

The Danish system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system). Applicants who are already employed in central, regional or municipal government have no preferential right to vacant positions.

Promotion depends upon the individual employee who has always an option to decide to give notice in the current job and apply for

another post in the public sector, i.e. also a post at a lower salary level than the previous post. In such cases, the salary level linked to the previous employment cannot be guaranteed.

For appointments that require an educational qualification, seniority shall be determined on the basis of the length of time the person in question has been employed in a job that requires the qualifications in question. Any period of military service after the qualification was obtained shall be counted.

For appointments not requiring an educational qualification, the appointing authority may grant additional seniority where the person has acquired specific work experience or specific qualifications of relevance to the performance of the work.

No difference is made between periods in Denmark or abroad or between periods in the public or private sector.

Salary grading for civil servants (or employment on terms similar to civil servants) shall be determined on the basis of length of time the person has been employed as civil servant. Salary grading from a period before appointment as civil servant (or employment on terms similar to civil servants) can be counted where the person has acquired specific work experience or specific qualifications of relevance to the performance of the work (including appointment in other Member States).

The principle according to which the formal status of civil servant cannot be granted to non nationals might be considered as discrimination based upon nationality, even if on content there is no difference of treatment

## **5. Issues for free movement of workers in the public sector**

**5.1.** Available information reveals one potential issue of compliance with EU law.

As indicated under 3.1 and 3.3., the formal status of civil servant cannot be granted to non nationals and this might be considered as an indirect discrimination based upon nationality, even in the absence of difference in the content of working conditions. As the ECJ's interpretation of EU law is centred upon a functional approach, one may claim that a discrimination that would be only formal, resulting in a denomination, but having no practical consequences is not incompatible with the obligations resulting from the treaty. On the other hand it remains to be examined whether the fact that an EU citizen who is not a Danish national might be deterred from moving to Denmark because of this difference.

## **6. Reforms and Coming Trends**

As indicated under 3.1, an important reform of Danish legislation applicable to employment in the public sector took place in 1991, in order to meet the requirements of

### **4.2.3. Language requirements**

There are no legal provisions on language requirements.

In isolated cases, a certain linguistic knowledge may be required in practice by reason of the nature of the posts. This may for instance be the case where the job requires communication with citizens and authorities on medical and pharmaceutical issues.

### **4.2.4. Other specific requirements**

between a (Danish) civil servant and a (foreign) employee for the same position. This is a delicate issue to assess, and it is not obvious that it constitutes an infringement to EU law (see. 5.5).

The fact that the Danish Constitution is especially difficult to amend is not relevant from a strictly legal perspective, as the Constitution gives no indication as to which positions have to be filled by civil servants: this is demonstrated by Chapter 15a *Section 58 c.* of the civil servants Act.

**5.2.** As indicated under 3.3. surveys on practice have been conducted by Danish authorities in the past years.

It would nevertheless be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on

the free movement of workers in the public sector.

\* \* \*

Deutschland  
**GERMANY**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Germany is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

Germany is a federal State with, as a rule, four levels of government: the Federation (*Bund*), the 16 *Länder* (literally: countries), 439 districts (*Kreise*) and 12 432 municipalities (*Gemeinden*). The number of levels of government is not the same in all *Länder*, due to the existence of *Länder* which correspond to cities (Berlin, Bremen, Hamburg) and to 116 cities which constitute a district on their own (*Kreisfreie Städte*). The *Länder* are competent for the

regulation of the public service of districts and communes.

### 1.3. Official language

The official language of Germany is German.

In some districts of Northern Germany Danish is a minority language; in some districts of Eastern Germany, Sorbian is a minority language.

### 1.4. Statistical data

Germany has a total population of 82 314 900 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	5699000	14,3 %
Public enterprises	1639000	4,1 %
Total government	4060000	10,2 %

Government employment in 2008 (*Based on ILO Laborsta*)

<i>Federation</i>	849 000	20,9 %
<i>Länder</i>	2 160 000	53,2 %
<i>Local</i>	1 051 000	25,9 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Basic Law (*Grundgesetz* - constitution) contains one specific provision that is appli-

cable to public employment: Art. 33, which establishes equal access of all Germans to public offices, and provides that "(4) The exer-

*cise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law. (5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.”*

Employment of civil servants (*Beamtete*) is regulated by specific laws of the Federation and the *Länder*.

Employment of workers and employees (*Arbeiter und Angestellten*) of public authorities is submitted to labour law and collective agreements.

## 2.2. Public sector employers

The Federation the *Länder* (16), districts (439, of which 116 are cities and thus also exercise the powers of communes) and communes (12 432, including the 116 cities) are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

Public schools and hospitals are established and financed by the *Länder* and local government and thus the public medical and educational services are part of public employers.

The public sector in a broad sense also includes public enterprises, i.e. enterprises with a majority of public capital or which are otherwise controlled by government.

Public transport falls under the competence of the *Länder* and local government, with the exception of federal railways, which are under the Federation. Transport services are considered public enterprises.

According to answers to the Commission, in 2009 the public sector employed about 4 400 000, which corresponded to about 10% of the entire labour market. The Federation employed approximately 462 000, the *Länder* about 1 900 000, local government about 1 300 000 and agencies and autonomous public bodies about 790 000.

## 2.3 Public sector workers

Personnel in the public service are divided into two groups: civil servants (*Beamte*); employees and workers (*Angestellte und Arbeiter*).

Employment of civil servants is regulated by the *Federal Law on civil servants (Bundesbeamtengesetz)* as far as federal authorities are concerned. Each of the 16 *Länder* has its own civil service law, which applies to the relevant *Land* and local government authorities. The framework law on the civil service which was setting rules common to all *Länder* is not in force any more since the constitutional revision of 2006, which has suppressed civil service law from competences shared by the Federation and the *Länder*. There are also special laws relating to the status of judges and prosecutors (federal laws for the supreme courts and the federal constitutional court; *Länder* laws for lower degrees of courts and *Länder* constitutional courts), and to the military (federal law).

Employment of workers and employees (*Arbeiter und Angestellten*) is submitted to labour law and collective agreements. Labour law is in the field of shared legislation and regulated mainly by federal law and collective agreements for the entire federation.

Whereas functions relating to the exercise of public authority may not be performed by workers or employees, the civil servants' status is not limited to posts relating to that exercise: for instance, teachers and university professors are usually civil servants.

The main differences in status between civil servants and workers/employees is that civil servants are submitted to a specific unilateral legal status and are normally employed on career terms for lifetime, whereas workers/employees are employed on contractual base; civil servants but have no right to strike, no right to participate in trade unions (only in associations) and are submitted to specific regulations for remuneration, career progression and pensions.

Out of the total of 4 400 000 employed by government at all levels, about 1 900 000 (43,2 %) are civil servants, judges or military; 2 600 000 (59,1 %) are employed under labour law and collective agreements. In federal government, the relative proportion of civil servants is much higher than in the *Länder* or local government.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to the employment of civil servants – is provided for by actions administrative courts. Matters relating to contract are submitted to civil courts.

Infringement to fundamental rights (including professional freedom) by public au-

thorities and the legislator may be appealed to the *Federal Constitutional Court*.

Most *Länder* have an ombudsman who may handle complaints with regard to the relevant *Land* and local administration. They may make recommendations to the relevant public authorities but have no power to make binding decisions. There is no equivalent institution at federal level (except for the military).

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

The *Basic Law*, Art. 33 (2) guarantees equal access to the civil service to Germans, but this is not an impediment for access of foreigners.

Since an amendment of 1993, the *Federal Law on the civil service* sets as a principle in Art. 7 (1) that access to the civil service is open to German nationals and to citizens of other EU Member States or other EEA Member States as well as third countries for which there is an agreement with the EU on mutual recognition of qualifications. Art. 7 (2) provides, as an exception, that access may be restricted to nationals “if the duties to be performed necessitate it”. Art. 7 (3) in turn provides that the Federal ministry of the Interior may provide for exceptions to this restriction (i.e. nevertheless recruit foreigners) in case of urgent necessities of service.

The relevant *Länder* laws usually contain similar provisions. Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

For employees and workers, no equivalent provisions are provided by labour law: as they may not be entrusted with the exercise of public authority there is no nationality requirement.

### 3.2. Definition of posts

The civil service laws give no definition of the posts for which access may be limited to German nationals. The assumption is that limitations have to comply with the criteria for the application of Art. 45 (4) TFEU; posts

corresponding to these criteria may nevertheless be opened to non nationals.

The only – non binding – general document giving indications about this is the circular of 20 May 1996 from the Federal Ministry of the Interior to the upper federal authorities, known as *Recommendations for the application of the legal provisions on access of EU citizens to the German civil service (Koordinierung der Anwendung der gesetzlichen Regelung über den Zugang von EU-Mitbürgern zum deutschen Beamtenverhältnis)*.

The circular indicates that the wording of Art. 7 (2) was chosen on purpose, in order to guarantee compliance with possible developments of the jurisprudence of the ECJ as well as agreements with third countries. It then indicates a catalogue of criteria upon which the Federation and the *Länder* have reached agreement, in order to facilitate decision on how to assess groups of positions.

The list includes 14 categories of posts. These are linked to the “heart of State activities” (top positions and counsel positions in upper State institutions); posts in the sectors of defence; diplomacy; justice; security; posts implying the power to make decisions which have an impact on rights and freedoms; posts implying legal and financial control of public authorities; or horizontal functions (personnel, budget and organisation); as well as positions where there might be a conflict of interests between nationality and the specific loyalty obligations towards the employer.

The *Circular* indicates that in deciding upon the allocation of groups of functions the centrality of activities to the post has to be considered. It also indicates that exceptions to the

list may be made due to specific legislation (such as legislation on elected municipal employees) or the field of administration (such as universities).

The circular only applies to federal civil servants since the constitutional reform of 2006. No equivalent guiding document has been published for the *Länder*.

As a consequence of the ECJ's judgment of 30 September 2003 in *Case Anker C-47/02*, an amendment to Art. §2 of the *Schiffsbesatzungsverordnung* (Ship's Crews Regulation) and amendment of §7 of the *Schiffsoffizier-Ausbildungsverordnung* (Ship's engineer training order) opened access to EU citizens for commander functions on ships registered in Germany. They need hold a valid German or a recognised foreign certificate of competence; or alternatively to demonstrate his knowledge of the respective German sea law through participating in training, as well as knowledge of the German language before taking up service on a ship.

### 3.3 Practice and monitoring

The circular of 20 May 1996 of the Federal Ministry of the Interior cited under 32 is available on the Internet (<http://www.eu-info.de/static/common/files/view/1260/beamte.pdf>). There is no more recent document of the kind at federal level, and no equivalent document at the level of the *Länder*. The federal authorities do not have the right to address injunctions to the authorities of the *Länder* and local government.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. There are also federal and *Länder* regulations about remunerations, pensions and working conditions. The Federal

Recruitment procedures are handled by each relevant ministry or agency of the Federation and of the *Länder* and by each relevant local government.

For the federal government, the Ministry of the Interior has the necessary authority to provide for monitoring. There is no central monitoring service with competence for all levels of government.

There are no statistics about employment of non nationals in the civil service or in the public sector as a whole

### 3.4. Compliance with EU law

Federal and *Länder* legislation have the goal of complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU, since the amendments introduced in 1993. The criteria indicated (“if the duties to be performed necessitate it”) are vague and depend entirely on their application by public employers. This is not an infringement of EU law, but might be a source of non compliance if public employers are not aware of the existence, content and scope of the criteria for the application of Art. 45 (4) TFEU. As a consequence of the constitutional reform of 2006, it would be advisable that the *Länder* governments issue at least non binding circulars similar to the recommendations of 1996 quoted under 3.3.

No case law is signalled on the application of the possibility to restrict access to the civil service by administrative authorities.

and *Länder* Regulations on careers (*Laufbahnverordnung*) are particularly relevant.

Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

#### 4.1.2. Practice

Government departments and public bodies may have their own complementary rules or practices.

A general administrative circular of 14 July 2009 relative to the Federal Regulation on careers (*Allgemeine Verwaltungsvorschrift zur Bundeslaufbahnverordnung*) gives further details on how to apply the Regulation.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free

movement of workers in the public sector for Germany as a whole. For federal authorities, the federal Ministry of the Interior has the necessary powers to enquire.

The case law on employment in the civil service is generally abundant in Germany and therefore deemed to be an indicator of compliance with law by public authorities. No cases have been published on the issue of discriminatory treatment with regard to professional experience or seniority of EU citizens.

### 4.2. Special requirements for access to employment and working conditions

#### 4.2.1. Professional experience

There is no general condition of professional experience for access to the civil service or to contract employment. The relevant authorities may set specific conditions for the access to specific careers (*Laufbahngruppen*), as well as for access to specific posts.

The general administrative regulation of 14 July 2009 mentioned under 4.1.2. provides that professional activity in an administration of another EU Member State has to be taken into account in order to calculate the length of the probation period preceding appointment with tenure.

Professional experience may also have an impact upon the level of remuneration for a specific post. The experience taken into account is assessed with a view to its relevance to the type and difficulty of the activities to be carried out in the relevant position.

Professional experience abroad and in the private sector is taken into account.

The Regulations on careers provide for a probation period. They provide for the recognition of professional activities in the public service or public authorities of EU Member States as parts of the probation period (e.g. Art. 19 of the Federal Regulation on careers *Bundeslaufbahnverordnung*). There are similar provisions on promotion (e.g. Art. 33 of the *Federal Regulation on careers - Bundeslaufbahnverordnung*).

The laws on remuneration also provide for recognition of work in the in the public service or public authorities of EU Member States as parts of the probation period (e.g. Art. 29 of the *Federal law on civil servants remunerations - Bundesbeoldungsgesetz*).

As mentioned under 4.2.3. the federal law on the civil service refers to *Directive 2005/36 on the mutual recognition of professional qualifications*, and provides for the possibility of levying taxes and the reimbursement of expenses for mutual recognition when it is necessary to access civil service employment.

#### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

The indications given under 4.2.2. for professional experience are applicable for the computation of previous working periods for career purposes.

#### 4.2.3. Language requirements

According to Art. 18 (2) of the federal law on the civil service, language knowledge is required only in so far as it is necessary to perform tasks in a specific career path.

There is no information on practice which may help to assess to what extent the principle of proportionality is observed in the application of language requirements.

#### 4.2.4. Other specific requirements

Art. 18 of the federal law on the civil service refers to *directive 2005/36 on the mutual recognition of professional qualifications*. Art. 18 (3) and (4) provides that the relevant authority levies taxes and reimbursement of expenses for the recognition of qualifications for the purpose of entry in the civil service, and that

the Ministry of the Interior may regulate the basis and level of the relevant taxes.

Similar provisions might exist in *Länder* legislation. Due to the constitutional reform of 2006, all civil service laws of the *Länder* have to be revised; the process is not yet fully accomplished.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

*First*, as indicated under 4.2.4, Art. 18 (3) and (4) of the federal law on the civil service provides that the relevant authority levies taxes and reimbursement of expenses for the recognition of qualifications for the purpose of entry into the civil service, and that the Ministry of the Interior may regulate the basis and level of the relevant taxes. Similar provisions might be found in the relevant *Länder* legislation. It would have to be examined if such taxes are indeed levied, and if so, to what extent they could be considered as an obstacle to free movement of workers, as they would make it more costly to rely on professional qualifications acquired abroad than for equivalent qualifications acquired in Germany.

*Second*, the criteria indicated in the federal law on the civil service for reserving posts to German citizens (“if the duties to be performed necessitate it”) are vague and depend entirely on their application by public employers. This is not an infringement of EU law, but might be a source of non compliance if public employers are not aware of the existence, content and scope of the criteria for the

application of Art. 45 (4) TFEU. As a consequence of the constitutional reform of 2006, it would be advisable that the *Länder* governments issue at least non binding circulars similar to the recommendations of 1996 quoted under 3.3.

5.1. More generally, the lack of statistics on the number of posts reserved to nationals, and on the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are in practice obstacles to the free movement of workers in the public sector.

5.3. With the constitutional reform of 2006 which suppressed civil service legislation from competences shared by the Federation and the *Länder*, the mechanisms which permitted an overall monitoring of practice in civil service recruitment and personnel management have ceased to be available. An issue might arise if no appropriate new mechanism is being set up, for instance through horizontal collaboration between the relevant *Länder* authorities.

## 6. Reforms and Coming Trends

As indicated under 3.1., an important reform of civil service law took place in 1993, in order to comply with the criteria for the application of Art. 45(4) TFEU. It also included a reform in recruitment conditions in order to exempt non nationals and nationals who had made use of their right to free movement in

the EU from the specific traineeship that traditionally takes place between the first and second State examinations for lawyers and teachers.

As a consequence of the constitutional reform of 2006 which suppressed civil service legislation from competences shared by the

Federation and the *Länder*, the laws on the civil service of the 16 *Länder* are being partially rewritten. German authorities will have to monitor the new legislation in order to check

that the results of the 1993 reform are not being questioned by new wording of laws and regulations, or by subsequent practice.

\* \* \*



Eesti  
**ESTONIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Estonia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

Estonia is a unitary State with two levels of government: the State and 227 municipalities (*omavalitsus*).

### 1.3. Official language

There is one official language: Estonian.

Russian is a minority language spoken by a rather important number of residents.

### 1.4. Statistical data

Estonia has a total population of 1 342 400 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	155 500	23,7 %
Public enterprises	25 300	3,8 %
Total government	130 200	19,8 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 30 of the Constitution *“Offices in State agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These offices may, as an exception, be filled by citizens of foreign States or Stateless persons, in accordance with law.”* According to Art. 94: *“Corresponding ministries shall be established, pursuant to law, for the administration of the areas of government. - A minister shall direct a ministry, shall manage issues within its area of government, shall issue regulations and directives on the basis and for the implementation of law, and shall perform other duties assigned to him or her on the bases of and pursuant to procedure provided by law.”*

Chapter XIV (Art 154 to 160) contains provisions about local government. According to Art. 160 *“The administration of local governments and the supervision of their activities shall be provided by law.”*

The *Public service Act of 1996* regulates the status of public servants.

### 2.2. Public sector employers

The State and the 227 municipalities are public employers. According to *Eupan – Structure of the Civil and Public Services*, Central government employed about 19 300 civil servants and local government about 4 500 public ser-

vants. Central government is composed of 11 Ministries (about 2 900 civil servants), State administrations, boards and Inspectorates (about 14 860), constitutional institutions (about 820 civil servants) and County governments (about 730 civil servants).

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies, whose workers are not public servants.

### 2.3 Public sector workers

The legal status of Servants of the State and of Municipalities is laid down in the *Public Servants Act*. Other public sector employees who are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

According to Estonian government, public sector employees (129 400) represent 20 % of

the total workforce (656 500). The total number of public servants was 29 384 (4,5 % of the total workforce) on 31 December 2008.

### 2.4 Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Public Servants law is provided for by a possibility of action with administrative courts.

The Supreme court, to which decisions of subordinate courts may be appealed, exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Legal Chancellor – *Oiguskantsler*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. 30 of the Constitution “Offices in State agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These offices may, as an exception, be filled by citizens of foreign States or stateless persons, in accordance with law.””.

The *Public service Act, 1996*, Art. 14 (1) provides that Estonian citizenship is a requirement to be employed as State or local government official; but Art. 14 (1) extends the possibility of employment to EU citizens “who conform to the requirements established by law and on the basis of law”. Art. 14 (1) further provides that “only Estonian citizens shall be appointed to positions which involve exercise of public authority and protection of public interest. Such positions are, for example, the positions related to the directing of the administrative agencies specified in subsections 2 (2) and (3) of this Act, exercise of State supervision, national defence and judicial power, processing of State secrets, representing of public prosecution and diplomatic representation of the State, and the positions in which an official has the right, in order to guarantee

*public order and security, to restrict the basic rights and freedoms of persons”.*

Special legislation is applicable to the diplomatic corps, the police, the judiciary and the military, as well as e.g. to the Bank of Estonia, Financial Supervisory Authority and Estonian Health Insurance Fund.

### 3.2. Definition of posts

Posts reserved to Estonian nationals are defined by law on the basis of a mix between the relevant agencies and the functions which have to be exercised.

Employment is reserved to nationals in the following agencies: Chancellery of the *Riigikogu* (Parliament); Office of the President of the Republic; Office of the Chancellor of Justice; courts (including land registries and their departments); government agencies; Headquarters of the National Defence League; State Audit Office; Office of Gender Equality and Equal Treatment Commissioner; a number of Local government administrative agencies (office of a rural municipality or city

council; rural municipality and city governments (as agencies) together with their structural units; governments of a district of a rural municipality and of a district of a city (as agencies); city government executive agencies; bureaus of local government associations.

Employment is also reserved to nationals for the following positions: diplomats; military; police officers; judges; prosecutors, as well as lifesaving (rescue) officers; border guard officers; and prison officers.

In certain cases, like the Bank of Estonia the Financial Supervision Authority or Estonian Health Fund, membership of the Boards is reserved to Estonian nationals.

An amendment to the law on the flag of vessels and to the law on ship registration has been made by a Law of 12 May 2005, which entered into force on 1 July 2002, opened access to EU citizens for commander functions on ships registered in Estonia.

### **3.3 Practice and monitoring**

Information on practice was not available to the author of this report.

### **3.4. Compliance with EU law**

With the amendments introduced on 1 May 2005 to the *Public service Act, 1996*, a first

step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Estonian nationals.

However, a first examination of the relevant laws and regulations indicates that the criteria for the application of Art. 45(4) TFEU are not entirely applied, as the positions that are reserved to nationals do not result from a post by post analysis of the functions which have to be exercised. The discussion in Parliament of the draft for a new Public Service Act might lead to better compliance with EU law in so far as the definition for public official would derive from functions and not from working in an administrative agency; furthermore the draft act broadens to a large extent the possibilities for the citizens from European Union to access in Estonian public service.

Compliance will be conditioned by the application of the new criteria in implementing norms, and even more by practice.

The lack of information on practice under the present legislation also indicates that a monitoring system and procedure by Estonian authorities is missing and should be established.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

A new Public Service Act is in discussion with Parliament.

#### **4.1.2. Practice**

Information on practice was not available to the author of this report. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

According to the legislation applicable before the entry into force of the new Public Service Act, professional experience was not necessarily taken into account for recruitment procedures. Professional experience could however be taken into consideration by the head of the agency where the public servant will work for a part of remuneration.

Professional experience in State or local government was also taken into account for accession to certain categories of officials.

There were no legal provisions that related to taking into account professional experience acquired outside of the Estonian State or local government.

### 4.2.2. Seniority

Seniority was taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

### 4.2.3. Language requirements

The Public Service Act (§ 14 subsections 1 and 2) was requiring proficiency in Estonian to be employed in the service as a State or local government official. The level of proficiency differs according to the level of the official. This requirement did not apply for supporting staff.

## 5. Issues of compliance with free movement of workers in the public sector

**5.1.** Available information reveals two issues of compliance with EU law.

*First*, the definition of positions reserved to nationals in the *Public Service Act*, 1996, as amended in 2005, was based upon the nature of the agency in which the person would be working; it is most probable that a number of posts therefore did not correspond to functions that correspond to the criteria for the application of Art. 45 (4) TFEU. This problem might be corrected with the adoption of a new *Public Service Act*.

*Second*, where professional experience and/or seniority is or may be taken into account for recruitment, promotion and salaries, there is no provision in the *Public Service Act*, 1996, as amended in 2005 to ensure rec-

ognition of equivalent professional experience and seniority in similar positions in other EU Member States. No information was available in order to foresee whether this issue will be dealt with in the new *Public Service Act*.

**5.2.** There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## 6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Bulgarian legislation applicable to employment in the public sector took place in 2005, in order to try and meet the require-

ments of EU law as far as opening posts in the public service are concerned.

In 2009, a draft for a new Public Service Act has been introduced for discussion in

Parliament. By November 2009, the new Act had been adopted. One of the most significant changes is linking of the definition of an official with the function of exercising public authority which means that the employment of officials who do not exercise public authority is to be based on employment contract

relationships. A Public Service Act Implementation Bill (598 SE), had been presented to Parliament by the Government, as a transition regulation was necessary because the new Public Service Act provides a number of fundamental changes in the legal regulation of the public service in Estonia.

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ÉIRE - IRELAND  
**IRELAND**

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## 1. General data

### 1.1. Date of applicability of EU law

Ireland joined the European Communities on 1 January 1973.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

Ireland is a unitary State, with three levels of government: the State, 25 county councils (or city councils for 5 of them) and 80 municipalities (5 borough councils and 75 town councils).

### 1.3. Official languages

There are two official languages: Irish and English. English is also an official language in Malta and the UK.

### 1.4. Statistical data

Ireland has a total population of 4 312 500 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	373 300	17,70 %
Public enterprises	41 700	2 %
Total government	334 600	15,9 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	293 100	88,4 %
Local	38 500	11,6 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 28 (12) of the Constitution “The following matters shall be regulated in accordance with law, namely, the organization of, and distribution of business amongst, Departments of State, [...]”. Art.28 A contains the provisions applicable to local government. The Constitution contains no provisions applicable to public employment.

Employment of civil servants is regulated by the *Civil Service Regulation Act 1956*, which

provides that the Minister for Finance shall be responsible for the regulation and control of the Civil Service, as well as the fixing of the terms and conditions of service of civil servants and the conditions governing their promotion. The Minister may, for this purpose, make such arrangements as he thinks fit and may cancel or vary such arrangements.

*The Public Service Management (Recruitment and Appointments) Act 2004*, confers responsibility to the same Minister for running competitions on the Public Appointments Service. *Section 58*

makes it plain that the Minister for Finance is responsible for all matters relating to recruitment in the Civil Service, including “eligibility criteria”.

*Codes of Practice* are published by the Commission for Public Service Appointments under the *Public Service Management (Recruitment and Appointments) Act 2004*.

## 2. 2. Public sector employers

The State (*Civil service*) the 25 County councils and 5 city councils, the 5 borough councils and 75 town councils are all public employers.

Mainstream national schools, second level schools, universities, the Health Service and the Police (*An Garda Síochána*) are also public employers.

According to the *Public Service Superannuation (Miscellaneous Provisions) Act 2004*, a “public service body” means: the Civil Service, the Police (*Garda Síochána*), the Permanent Defence Force, local authorities, health boards, vocational education committee, as well as other bodies established by or under any enactment other than the Companies Acts and bodies wholly or partly funded out of moneys provided by Parliament or from the Central

Fund or the growing produce and their subsidiaries.

## 2.3 Public sector workers

The same laws and regulations apply usually both to the Civil service and to local government and the police (Public service).

According to *EUPAN – Structure of the civil and public services*, Central government Bodies employ about 36 900 public servants, local authorities about 33 500; Health services about 98 700; Education services about 79 700; The Police about 12 200, non commercial State sponsored bodies about 9 000 and the police about 12 200.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment –, as well as matters relating to contract are dealt with courts and tribunals.

There is no constitutional court, but the High Court and Supreme Court may rule on the compatibility of a relevant law with the constitution.

The Ombudsman may handle complaints with regard to government departments, the Health Service Executive (including public hospitals), local authorities and the Post.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

There is no provision reserving positions in the public sector to nationals, neither in the Constitution, nor the *Civil Service Regulation Act 1956* or in *The Public Service Management (Recruitment and Appointments) Act 2004*. There is no legal provision stating that employment would be open to EU citizens. Only the *Defence Act, 1954* explicitly states that Irish nationality is, in principle, a requirement to be appointed as an officer, with a possibility for the Minister to grant exceptions.

The *Civil Service Regulation Act, 1956* gives authority to the Minister for Finance for fixing the terms and conditions of service of civil servants and the conditions governing their

promotion. The *Public Service Management (Recruitment and Appointments) Act 2004*, confers responsibility to the same Minister in order to regulate matters relating to recruitment in the Civil Service, including “eligibility criteria”. There are recruitment practices which reserve certain posts to nationals.

## 3.2. Definition of posts

The definition of posts reserved to Irish nationals results from practice.

Recruitment to professional posts is fully open to nationals of the other EU Member States, but recruitment to certain administrative posts is limited to restricted to Irish na-

tionals in areas considered to be essential to the national interest (such as the diplomatic service and security posts). There is no published list of such posts.

There is no legislation or regulation reserving access to posts of captains of vessels under Irish flag to nationals.

### **3.3 Practice and monitoring**

When posts are advertised, it is specified whether they are only open to Irish nationals.

In relation to the Department of Foreign Affairs, all posts in the Irish Diplomatic Service (Third Secretary, Counsellor and Ambassador) which require the holding of a diplomatic passport are reserved for Irish citizens (the basis of this restriction is Art. 8 of the *Vienna Convention on diplomatic relations*). Other reserved posts have included posts in the Department of *An Taoiseach* (Prime Minister), the Office of the Revenue Commissioners, the Department of Defence and the Depart-

ment of Justice, Equality and Law Reform and the Department of Foreign Affairs.

There are no indications on the method or specific criteria used in order to decide whether a post should be reserved to nationals.

There are no available statistics about employment of non nationals in the public sectors.

### **3.4. Compliance with EU law**

The Constitution, laws and regulations comply with EU law in so far as they do not explicitly reserve to Irish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

There is not enough detailed information about practice reserving posts to nationals in order to know whether it always complies with the relevant criteria.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions for positions in the civil service and with other public employers. The *Public Service Superannuation (Miscellaneous Provisions) Act 2004* provides for further relevant regulation.

#### **4.1.2. Practice**

There is no specific permanent monitoring of practices in personnel management that could be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

Professional experience may be taken into account where such experience is specified as being relevant to a particular post. Credit will then be given for such experience. This will be the case for competitions for certain technical and professional posts.

Incremental credit for previous experience in the public service does not play a part in establishing an order of merit in the selection process, but may be relevant for salary purposes. The question of incremental credit for previous service has been addressed in agreements between the Minister for Finance and

trade unions. In December 2007, the Minister of Finance agreed to provide for the granting of incremental credit for previous service for certain other entry level grades. This is stated to apply to those who have been previously employed in the public service in Ireland in the public service or an equivalent body in the EU Member States or in EFTA countries as well as in the EU Commission.

The person concerned must apply for credit and provide proof of relevant previous service. Departments are invited to check with the previous employer to establish whether the purpose of job and level of responsibility are equivalent. The Department of Finance is to make final decision on new cases.

In general, recognition is not given for experience in the private sector.

#### **4.2.2. Seniority**

There are no specific provisions on seniority. As far as relevant, the indications given under 4.2.2. for professional experience apply.

#### **4.2.3. Language requirements**

English language competence is required for almost all posts in the public sector. Save for the primary education sector, there is no formal Irish language requirement applying to all applicants. However, applicants for certain Irish-speaking posts may have to show that they have the necessary qualifications or competence. Some posts – for example, in the Department of Community, Rural and *Gael-tacht* Affairs – require a competency in Irish.

In addition, as part of the State's policy to ensure that services are available in Irish, applicants may be assessed for Irish language ability and Irish-speakers may be favoured in the selection process. A certain advantage is given to applicants for posts in the Civil Service who may take an optional Irish language test and are awarded extra marks which may give them a higher ranking in a competition. There are equivalent practices for the Health Service. Recent reforms have reduced the requirements to know both English and Irish in the Police force

## **5. Issues for free movement of workers in the public sector**

**5.1.** Available information reveals no specific issue of compliance with EU law, apart from the lack of published procedures on the recognition of diplomas and more generally of monitoring of the practices relevant to free movement of workers in the public sector.

**5.2.** It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## **6. Reforms and Coming Trends**

No specific reform has been needed in Ireland in order to open posts in the public sector to non nationals. This is due to the fact that employment conditions are not indicated in legally binding instruments, but are a result of practice.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ΕΛΛΑΔΑ  
**GREECE**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Greece became a member of the European Communities on 1 January 1981. The Act of accession foresaw a transitional period of 7 years for free movement of workers.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 January 1988.

### 1.2. State form and levels of government

Greece is a unitary State with three levels of government: the State, 54 prefectures (*nomoi*) and 1 033 local authorities (*dimoi*).

### 1.3. Official language

The official language of Greece is modern Greek..

### 1.4. Statistical data

Greece has a total population of 11 171 700 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	1 022 100	22,3 %
Public enterprises	629 800	13,7 %
Total government	392 300	8,6 %

Government employment in 2008 (*Based on ILO Laborsta*)

State	315 900	80,5 %
Local	76 400	19,5 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. According to Art. 4(4), “*only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.*” Art 103 and 104 contain provisions about public authorities’ employees.

Employment by public authorities is regulated by law, i.e. the *Civil Servants’ Code*, the present version of which has been ratified by virtue of *Act 3528/2007*. Other specially relevant laws are *Act 2190/1994*, creating the *Civil Service Staffing Council (ASEP)* and *Act 2431/1996*, which and regulates the appoint-

ment of citizens of the EU Member States in the civil service.

### 2.2. Public sector employers

State public services (Ministries, Regional Services, corporate public bodies), the 54 Prefectural Self-Governments, the 1 033 Municipalities, and other bodies of the public sector including legal entities under private law that are supervised by the State or regularly subsidized by State resources by at least 50% of their annual budget are considered as public sector employers, and select their staff

on the basis of the aforementioned *Act 2190/1994*, creating the *Civil Service Staffing Council (ASEP)*.

According to *EUPAN – Structure of the civil and public services*, public services (Ministries and Regional administration) employ 90 854 permanent public servants; legal entities of public law 116 642; local authorities 80 391; to which one should add military, security bodies, educational personnel judiciaries and clergymen 237 595 (no indication of the year).

### 2.3 Public sector workers

Employees of the State, of Prefectural Self-Governments and Municipalities, as well as of public bodies created by them are submitted to the legislation mentioned under 2.1.

Special Scientific Personnel, are employed under a labour contract under private law.

There are also often non permanent staff employed on a contract basis.

### 2.4 Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with the administrative courts, and in appeal with the State council. Matters relating to contract are submitted to civil courts.

There is no constitutional court, but all courts may review the constitutionality of laws.

The Greek Ombudsman may handle complaints with regard to public administration. he may make recommendations to the relevant public authorities but have no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

The Constitution sets as a principle in Art. 4 (4)) that only Greek citizens are eligible to public employment, with the possibility of making exceptions by law.

The Civil service code art. 4, provides that “*The citizens of other EU Member States can be appointed to or recruited for posts or specialties, the competencies of which do not involve direct or indirect participation in the exercise of public authority as well as performance of duties designed to safeguard the general interests of the State or of other public authorities.*” This provision has been introduced by virtue of Act 2431/1996.

### 3.2. Definition of posts

Posts or specialties reserved to Greek citizens are defined by presidential decrees, which are adopted upon proposal of the Minister of the Interior, Public Administration and Decentralization, the Minister of Economy and the competent Minister.

37 presidential decrees have already been issued that define in detail the disciplines and specialties for which appointment of citizens

of the EU Member States is permitted as well as those reserved to the Greek citizens. These include General Directors, Directors and Seniors of *Sections* of the Ministry of Finance, counsellors to the Ministers, security guards, policemen, firemen, frontier guards, special guards, rural policemen or civil servants of the Police, but also data base-network-software-hardware specialists in the Ministry of Finance, special collaborators and journalists in the Ministry of Transports, civil servants of the Fire Brigade.

Access to posts of captains of ships under Greek flag is restricted to Greek citizens. A judgement of the ECJ of 10 December 2009 in *Case Commission v Greece C-460/08* confirmed that this is contrary to EU law. Reform is pending

### 3.3 Practice and monitoring

The competent body for the application of the personnel selection system is the *Civil Service Staffing Council (ASEP)*. *ASEP* functions as an independent authority, enjoys operational independence and is not subject to

supervision and control by government bodies or other administrative authorities.

The selection of the regular staff of public employers is carried out either by the ASEP or by the bodies themselves subject to ASEP's control.

No precise list of positions and specialties reserved to Greek citizens is available for non-Greek-speakers.

No special organizations or practices have been established to address the issue of appointment of citizens of the EU Member States, and no statistics about employment of EU citizens in the public sector are available.

### **3.4. Compliance with EU law**

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of *Act 431/1996*.

It should be possible to establish a list of positions and specialties reserved to Greek citizen on the basis of a detailed study of the relevant Presidential degrees in Greek language, in order to check whether they seem to correspond at first sight to the criteria for the application of Art. 45 (4) TFEU; however supplementary work would be needed in order to determine whether the functions to be exercised indeed correspond to those criteria.

On the basis of information available in the English language, some doubts arise about for instance special collaborators and journalists in the Ministry of Transports, civil servants of the Fire Brigade.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

#### **4.1.2. Practice**

As mentioned under 3.3, the selection of the regular staff of public employers is carried out either by the *Civil Service Staffing Council (ASEP)*, or by the bodies themselves subject to ASEP's control.

As far as employment conditions are concerned, it is up to each public employer to apply the relevant laws and regulations.

Case law of the State Council (supreme administrative court) indicates that administrative courts are taking care of ensuring that promotion and working conditions do not entail discrimination on the basis of nationality.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

There is no general condition of professional experience for access to permanent

employment, but professional experience may constitute a compulsory precondition for recruitment to certain posts. Professional

experience is taken into account if it is followed by the acquisition of a degree, in the cases where recruitment is based upon previous acquisition of a permit to exercise the relevant functions. Marks for written tests are increased taking into account previous professional experience.

Professional experience and length of service in Greek public services, in public services of Member States and of the EU is taken into account for promotion and for wage augmentation.

#### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes. As indicated under 4.2.2., length of service in Greek public services, in public services of Member States and of the EU is taken into account for promotion and for wage augmentation.

#### 4.2.3. Language requirements

Legislation indicates how to define the level of the required knowledge of Greek, as well as the way to certify it. More particularly, the provisions of Art. 28, par. 4 of the Qualifications List stipulate that, for the citizens of EU member-states, the level of the required knowledge of Greek is defined in the vacancy notice for posts and is certified through a certificate in the Greek language, which is granted either by virtue of Act2413/1996,

(Art. 10, para 3) or by a Greek language school.

In the framework of the monitoring of EU legislation relative to mutual recognition of diplomas, the European Commission has adopted a reasoned opinion asking Greece to amend its legislation requiring qualified EU teachers to have an “excellent knowledge” of the Greek language.

#### 4.2.4. Other potential obstacles to free movement

The State Council ruled in *Case 50/2007* that if the status of citizen of a certain municipality is required as a condition for the access to a position, it should be replaced by the status of resident of the municipality for EU citizens.

Residence in the municipality as a condition for employment could however be an obstacle to free movement, depending on the way residence conditions are formulated. It remains to be verified whether this condition is the result of an imperative requirement of general interest, and if it respects the test of proportionality. Otherwise it should be considered as an obstacle to free movement of workers.

There are also indications that public authorities do not always recognise diplomas of higher education acquired in other EU member states in the same way as Greek diplomas.

## 5. Issues for free movement of workers in the public sector

**5.1.** Available information reveals three specific issue of compliance with EU law.

*First*, as indicated under 4.2.3., there is an issue, which has already been taken up by the Commission, with the legislation requiring qualified EU teachers to have an “excellent knowledge” of the Greek language.

*Second*, as indicated under 4.2.5., the ruling of the State Council in *Case 50/2007* requires replacing the citizenship of a municipality by the status of resident of the municipality for EU citizens might not meet the requirements

in order not to be considered as an obstacle to free movement of workers.

*Third*, there are indications that public authorities do not always recognise diplomas of higher education acquired in other EU member states in the same way as Greek diplomas.

**5.2.** Detailed examination of the Presidential decrees reserving certain specialities to Greek citizens would be needed in order to know whether they comply indeed with the criteria for the application of Art. 45 (4) TFEU.

**5.3.** Previous to Cyprus' accession to the EU, some provisions of laws and regulations provided for the recognition of professional experience in Cyprus for the admission to the Greek Civil service. It needs to be checked whether these provisions have been extended to all other EU citizens.

**5.4.** Generally speaking, information on practice seems to be lacking, and is at any rate non available to a non Greek-speaking readership.

A further issue to mention is the absence of a central point for the monitoring of practice in the public sector.

The lack of statistics on the number of posts reserved to nationals, and of the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## **6. Reforms and Coming Trends**

As indicated under 3.4, an important reform of Greek law applicable to employment in the public sector took place in 1996, in order to meet the requirements of EU law, and especially the criteria for the application

of Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ESPAÑA  
**SPAIN**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Spain became a member of the European Communities on 1 January 1986. A transition period of seven years was foreseen for free movement of workers, which was then reduced to six years.

EU law provisions on free movement of workers and the ECJ case law on the public sector fully apply since 1 January 1992.

### 1.2. State form and levels of government

Spain is a “regional” State (*Estado de las Autonomías*) with four levels of government: the Kingdom, 17 autonomous communities (*comunidades autónomas*), 50 provinces (*diputación Provincial* – 6 autonomous communities consist of a single province) and 8 109 municipalities (*municipios*).

### 1.3. Official languages

Spanish (Castilian) is an official language on the whole of the Spanish territory.

Basque (*Euskadi*) is also an official language in the Basque Autonomous Community and in some parts of the Community of Navarra.

Catalan is also an official language in the Autonomous communities of Catalonia and of the Balearic Islands, and Valencian, which is very close to Catalan, is an official language in the Autonomous Community of Valencia.

Galician is an official language in the Autonomous Community of Galicia.

Aranese, is also an official language in a valley in the Autonomous Community of Catalonia.

### 1.4. Statistical data

Spain has a total population of 44 474 600 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	2 958 600	14,6 %
Public enterprises	145 400	0,7 %
Total government	799 100	13,8 %

Government employment in 2008 (*Based on ILO Laborsta*)

<i>State</i>	566 900	20,2 %
<i>Regional</i>	1 600 700	57,18 %
<i>Local</i>	631 600	22,6 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 23 pro-

vides that Spanish citizens have equal rights to access public functions, but is not worded in a way that excludes non nationals to access to

public employment. Art. 103 provides that the legal status of civil servants, and especially access to the civil service, shall be regulated by law, a competence reserved to the State by Art. 149 as far as general principles are concerned.

Civil service legislation in force is the result of Law 7/2007 of 12 April 2007 providing for the *Basic Staff Regulations for Civil Servants (Estatuto Básico del Empleado Público)*, which amended the Law 30/1984 of 2 August 1984, *on Measures to reform the Civil Service*. Further relevant legislation includes Law 55/2003 of 16 December 2003 *on the Framework Staff Regulations for statutory health service personnel* and Organic Law 4/2000 of 11 January 2000 *on the rights, freedoms and social integration of foreigners in Spain*.

This State legislation is supplemented by specific legislation of the Autonomous communities.

When implementing the *Basic Staff Regulations*, the State and Autonomous Community legislators adopt or amend the laws governing civil service under their Administrations, and the rules applicable to local Administrations. These laws may also be general or refer to specific sectors of the civil service, as required: these 'specific sectors' will necessarily include those that concern teaching staff and statutory health service personnel.

## 2. 2. Public sector employers

The State, the 17 Autonomous Communities, 50 provinces and 8 109 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

According to *EUPAN – Structure of the civil and public services*, the State general administration employs 546 038; Autonomous communities 1 196 23; local government 579 899; and Universities 93 930 (no indication of the year).

Recruitment for the General State Administration is centralised with a Standing Selec-

tion Committee (*Comisión Permanente de Selección*). For posts in other Administration groups or categories a special temporary Selection Board is created for this purpose.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

## 2.3 Public sector workers

Employees of the State, of Autonomous Communities, Provinces and Communes, as well as of public bodies created by them are submitted to the *Basic Staff Regulations for Civil Servants* as well as related laws and regulations from the State and Autonomous communities (mentioned under 2.1.).

Personnel may also be employed by public authorities under contracts submitted to labour law (*personal laboral*).

Employees of public enterprises are submitted to general labour law.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative judges. Matters relating to contract are submitted to civil judges.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the State and Autonomous Communities, as well as verifying compliance of State and Autonomous legislation with the Constitution or with relevant State legislation.

The Ombudsman (*Defensor del Pueblo*) protects fundamental rights and civil liberties against encroachments by public administration. He ensures that Administration decides in time and form to requests and appeals it may have received. He may appeal to the Constitutional court on cases submitted to him.

### 3. Posts reserved to nationals

#### 3.1. Relevant laws and regulations

Art. 57 of the *Basic Staff Regulations for Civil Servants*, Law 7/2007 of 12 April 2007, concerning access to public-sector employment for nationals of other States, provides as follows:

“1. *Nationals of the Member States of the European Union may access public-sector posts as civil servants under the same conditions as Spanish nationals, with the exception of those posts which directly or indirectly involve participation in the exercise of public authority or in functions safeguarding the interests of the State or of the Public Administrations.*

*Accordingly, the Government bodies of the public administrations will define the groups of official posts alluded to in Art. 76 to which nationals of other States may not have access.*

2. *The above provisions will apply, irrespective of their nationality, to the spouses of Spanish nationals and nationals of other Member States of the European Union, provided they are not legally separated, and to their descendants and those of their spouse, provided they are not legally separated, who are below the age of 21 years or dependent descendants over this age.*

3. *Access to employment in the public sector as a civil servant shall also be available to the persons included in the scope of the International Treaties concluded by the European Union and ratified by Spain where the free movement of workers applies under the terms established in paragraph (1) of this Article.”*

4. *The foreign nationals referred to in the previous paragraphs and foreigners who are legally resident in Spain may have access to the Public Administrations as contracted staff under the same conditions as Spanish nationals.*

5. *Exemptions from the nationality requirement in the general interest and for the purpose of access to the status of civil servant can only be granted by Law of the Cortes Generales (Parliament) or of the Legislative Assemblies of the Autonomous Communities.”*

It is worth noticing that this very exhaustive provision extends access to public sector posts not only to EU citizens and citizens of EEA Member States and Switzerland, but also to their spouses and children nationals of

third countries. Furthermore, it should be noted that further opening of public sector posts can be granted by the State legislator as well as by the legislators of Autonomous communities.

As far as personnel under contracts and labour law are concerned, there are no posts reserved to Spanish nationals. Art. 10.2 of Organic Law 4/2000 of 11 January 2000 *on the rights, freedoms and social integration of foreigners in Spain*, provides that: “2. *Foreign nationals resident in Spain may access public sector posts as contracted staff under the same conditions as Spanish nationals, in accordance with the constitutional principles of equality, merit and ability, and the principle of publicity. They may therefore apply for any vacancies for public sector posts announced by the public administrations.”*

The legislation on the civil service of some Autonomous Communities (e.g. Balearic Islands, Galicia and Valencia) also contain provisions on nationality, which are complying with the provision of the *Basic Staff Regulations for Civil Servants*.

#### 3.2. Definition of posts

Art. 57 of the Basic Staff Regulations quoted under 3.3. takes up the wording of the ECJ case law on Art. 45 (4) TFEU, but it refers to alternative criteria, whereas the criteria are cumulative in the case law of the ECJ.

On the basis of this provision, each public employer has defined the positions reserved to Spanish nationals in two ways: by functions corresponding to career groups (*Cuerpos y Escalas*) and according to the duties related to each post.

On the basis of available information, it appears that in most State and Autonomous Communities administrations, career groups (*Cuerpos*) rather than specific posts are being reserved to nationals.

In order to comply with the ECJ’s rulings on merchant marine captains case law that followed case *Colegio de Oficiales de la Marina Mercante Española* C-405/01, a law 25/2009, of 22 December 2009 has opened up access to

posts of merchant ships under Spanish flag to EU citizens. The law entered into force on 27 December 2009

### 3.3 Practice and monitoring

The Directorate general of the civil service (*Direction general de la funcion publica*) in the Prime Minister's Office (*Ministerio de la Presidencia*) is monitoring the definition of career groups (*cuerpos*) and posts reserved to Spanish nationals in State administration as well as in the administration of Autonomous communities.

As far as recruitment practice is concerned, centralisation of recruitment for the General State Administration with the Standing Selection Committee (*Comisión Permanente de Selección*) means that this committee is able to monitor and guide practice in order to ensure compliance with the legal requirements – which correspond in their wording with the requirements of EU law.

There are however no statistics on employment of non nationals in public administrations, that could give indications about the effects of administrative practice.

### 3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of Royal Decree 240/2007 of 16 February 2007 on the entry, free movement and residence in Spain of nationals of European Union

*Member States and of other States party to the Agreement on the European Economic Area, transposing into Spanish Law Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and of the wording of Art. 57 of the Basic Staff Regulations for Civil Servants.*

The corresponding wording of Spanish legislation and of the relevant legislation of Autonomous communities is at first sight complying with the criteria for the application of Art. 45 (4) TFEU, albeit with a difference: the criteria in Spanish law are alternative (public authority and general interest) instead of cumulative (public authority or general interest) as in the jurisprudence of the ECJ. This difference in wording might be a source of infringement if it led to broadening the scope of posts reserved to Spanish citizens beyond the effects of a cumulative application of the criteria, especially to posts which involve safeguarding the general interest but not the direct or indirect participation in public authority.

Furthermore, it remains to be checked to what extent the definition of positions reserved to Spanish nationals on the basis of career groups (*cuerpos*) is complying with EU law for each of the relevant posts: the fact that that in most State and Autonomous Communities administrations, career groups (*Cuerpos*) rather than specific posts are being reserved to nationals is an indication of possible non compliance.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

#### 4.1.2. Practice

Government departments and public bodies may have their own complementary practices.

The Directorate general of the civil service (*Direction general de la funcion publica*) in the Prime Minister's Office (*Ministerio de la Presidencia*) is monitoring the application of civil service legislation by State administration as

well as in the administration of Autonomous communities.

It does not seem to monitor specifically the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

Professional experience obtained prior to entry as an official into public administration plays no role in recruitment. It may be taken into account when evaluating the knowledge and experience acquired for the purposes of career advancement. Such experience can also be taken into account for contracted staff or temporary officials, in accordance with the conditions of the corresponding vacancy notice.

Professional experience in the public service plays an important role in promotion, which can occur within the same career group (*cuerpo*) or by changing career group or public administration (State to Regional administration, for instance).

The *Basic Staff Regulations for Civil Servants* contains no specific provision as regard recognition of professional experience in other EU Member States. State administration and the administrations of Autonomous communities are deemed to be committed to guarantee that professional experience acquired in other Member States be recognised. However no precise indications on practice are available.

The cases dealt with by the Spanish Supreme Court from 2008 show that there are indeed problems in practice. It also seems that

the judicial review of the relevant administrative practice is limited to “manifest error of appreciation”.

### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

The *Basic Staff Regulations for Civil Servants* contains no specific provision as regard recognition of professional experience in other EU Member States. The observations regarding professional experience apply to the question of seniority.

### 4.2.3. Language requirements

The *Basic Staff Regulations for Civil Servants*, require to demonstrate knowledge of the Spanish language as a condition for access to a public sector post.

Some legislation enacted of Autonomous Communities do include a requirement to demonstrate language knowledge following completion of the tests for access to a public-sector post. This is the case for Catalonia, Galicia, and Valencia. There is not enough information of practice in order to assess whether these requirements are applied in a way which complies with EU law or if they exceed the proportionality test.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals three potential issues of compliance with EU law.

First, the method used for determining which positions are reserved to Spanish nationals – i.e. mainly reserving access to certain

career groups (*cuerpos*) – may have as a result that posts not corresponding to the criteria of application of Art. 45 (4) TFEU be closed to EU citizens.

*Second*, the corresponding wording of Spanish legislation and of the relevant legislation of Autonomous communities differs from the criteria for the application of Art. 45 (4) TFEU, being alternative (public authority or general interest) instead of cumulative (public authority and general interest) as in the jurisprudence of the ECJ. This difference in wording might be a source of infringement if it led to broadening the scope of posts reserved to Spanish citizens beyond the effects of a cumulative application of the criteria, especially to posts which involve safeguarding the general interest but not the direct or indirect participation in public authority.

*Third*, the absence of specific clauses on the recognition of professional experience in other EU Member States, although not being as such a source of infringement of EU law, may generate obstacles to free movement,

including discrimination on the ground of nationality.

**5.2.** A further point to mention is the lack of information on the practice relative to language requirements in the Autonomous communities with another official language than Spanish (*Castillan*). This does not enable to assess whether the practice complies with the principle of proportionality.

**5.3.** More generally, the lack of statistics on the number of posts reserved to nationals, and of the number of applications of non nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## **6. Reforms and Coming Trends**

As indicated under 3.4, an important reform of Spanish legislation applicable to employment in the public sector took place in 2007. It included specific provisions in order to meet the requirements of EU law, and especially the criteria for the application of

Art. 45 (4) TFEU to the recruitment of civil servants.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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# FRANCE

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

France is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

France is a unitary State with four levels of government: the State, 24 regions (*regions*) including 4 overseas regions, 100 departments (*departments*) including 4 overseas departments and about 36 560 municipalities (*communes*).

Special overseas communities (*collectivités d'outre-mer*) and New Caledonia are also part of the French Republic, although most of them are not part of the EU's internal market.

### 1.3. Official language

The official language of France is French.

German has an administrative status in Alsace and in the department of Moselle.

Alsatian; Breton; Catalan; Corsican; Flemish; Occitan as well as (overseas) Creole, Polynesian and Melanesian languages are minority languages, with a limited administrative status.

### 1.4. Statistical data

France has a total population of 63 392 100 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	6 719 000	29 %
Public enterprises	686 000	3 %
Total government	6 033 000	26 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	2 725 000	58,3 %
Regional and local	1 948 000	41,7 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 6 of the Declaration of Rights of Man and Citizen of 1789 – which is part of the Constitution, provides that “*All citizens, being equal in the eyes of*

*the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.*” Art. 34 of the Constitution requires Acts of Parliament to enact principles of civil service regulation. Title XII on Terri-

torial Communities (Art. 72 to 75-1) provides for the organisation of regional and local government.

Three general laws on civil service apply to respectively State civil servants (*General Status of the State Civil Service - Statut général de la fonction publique de l'Etat*), Civil servants of regional and local government (*General Status of the Territorial Civil Service - Statut général de la fonction publique territoriale*) and to the public hospitals (*General Status of the Hospital Civil Service - Statut général de la fonction hospitalière*). They are complemented by a series of specific regulations on different aspect of working conditions, as well as profession specific regulations applying to career groups (*corps* – there are several hundred of corps). There are also several general regulations applying to contractual employment in the public sector.

## 2. 2. Public sector employers

The State, the 24 regions, 100 departments and about 36 560 municipalities, as well as the Special overseas communities and New Caledonia are all public employers. All these governments have also created a big number of autonomous public authorities (*établissements publics*) which are public employers. Schools and hospitals are such autonomous authorities.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government. Their staff is submitted to ordinary labour law, with the exception of the chief executive and chief accountant who are under public service regulations.

About 2 725 000 civil servants are employed by the State and its autonomous public bodies, including teachers and university professors (about 1 000 000) and the medical service (about 700 000). Regional and local authorities and their autonomous public bodies employ about 1 948 000.

## 2.3 Public sector workers

Employees of the State, regional and local authorities and their autonomous public bodies are as a rule employed as civil servants with

tenure (*fonctionnaires*) under the respective general status (State, local and hospital). Teachers and university professors are as a rule civil servants. Judges and the military are also civil servants, but under a specific legislative status.

The French civil service is traditionally organised in career groups (*corps* or *cadre* – for the local government civil servants) submitted to a specific status, complementing the general status. Posts in government are to some extent reserved to one or more specific corps, but in most cases they may be held by members of other corps on secondment (*détachement*) for a limited period, or even by persons coming from the private sector, also for a limited period.

Personnel may also be employed by public authorities under contract, but submitted to special administrative law; this is an exception and normally corresponds to temporary work or to very specific posts in autonomous authorities. In the education sector auxiliary workforce is rather often recruited on contract basis

There are very limited cases of temporary fixed term contracts under civil law, as has been the case between 1997 and 2002 with the so-called “*contrats jeune employ*” which were part of a policy to combat youth unemployment.

Employees of public enterprises are submitted to general labour law.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative courts. Matters relating to employment contracts with government and public authorities are also normally submitted to administrative courts.

The Constitutional Council may be appealed to by courts in order to verify compliance of legislation with the Constitution.

The Ombudsman (*Médiateur de la République*, soon to become *Défenseur des droits*) may be appealed to in case of conflicts between individuals or legal persons and public administration. However he has no competence for litigation regarding the civil service.

### 3. Posts reserved to nationals

#### 3.1. Relevant laws and regulations

Art. 6 of the Declaration of Rights of Man and Citizen of 1789 – which is part of the Constitution, provides that “*All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.*”

This has been for a very long time the basis for a nationality requirement in French legislation for access to civil service employment. The nationality requirement was enshrined in the general status of the civil service since 1946 and restated in the three general statuses of 1983. The general nationality requirement has been withdrawn from the general statuses of civil servants in 1991, and since then a series of amending laws and regulations has progressively reduced the scope of posts reserved to nationals.

According to present legislation, as a result of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service* the general status provides that: “*Nationals of Member States of the European Community or of a State party to the European Economic Area agreement other than France, have access, under the conditions stated in the general civil service statuses, to the corps, levels of employment and posts. However, they do not have access to posts for which the qualifications either cannot be separated from the exercise of sovereignty or involve direct or indirect participation in the exercise of the prerogatives of the public authorities of the State or of other public authorities.*”

Furthermore, the law provides that “*The individual statuses stipulate, as far as needed, the conditions under which civil servants who are not of French nationality can be appointed to the consultative bodies whose opinions or proposals are imposed on the authority vested with decision-making power.*” The law then continues “*The conditions for application of the present Art. are established by decree in the Council of State [government decree]*”.

#### 3.2. Definition of posts

The commonly employed definition of a position involving sovereignty, results from an

opinion of the State Council (*Conseil d’Etat*) according to which the notion of a position that cannot be separated from the exercise of sovereignty enable to decide, on a case-by-case basis, whether or not a position can be reserved solely for nationals. Such an analysis has to be undertaken on the basis on a range of indices which lead to the view that the employment in question is linked to the exercise of the prerogatives of public authority. The range of indices include: taking oath when entering service in the post, prohibition of strike, access to confidential documents, level in hierarchy, giving advice to the government, having a delegation to sign in the name of a minister or elected politician.

The Council of State indicated in its opinion of 31 January 2002 that the ministerial sectors that could be described as sovereign, and therefore correspond to fields where employment may be closed to foreigners, are the following: Defence, Budget, Economy and Finance, Justice, Interior, Police, Foreign Affairs.

This opinion also indicates that the notion of direct or indirect participation in the exercise of public authority and the protection of the general interests of the State concerns the exercise of functions described as sovereign and the participation as a main activity within a public entity in at least one of the following elements: drafting laws, regulations and legally binding decisions, monitoring their application, sanctioning infringement, fulfilling measures that might involve the use of constraint, guardianship. According to the State Council, the presence of one of these elements is a necessary condition, but not sufficient to automatically determine that the relevant post may be reserved to French citizens.

As a consequence of the ECJ’s judgement of 11 March 2008 in *Case Commission v France C-89/07*, a law of 2008 on the nationality of ship’s crew (*Loi n° 2008-324 relative à la nationalité des équipages de navires*, published on 8 April 2008) has opened up access of posts of captains of ships under French flag to EU citizens.

### 3.3 Practice and monitoring

There are two levels to take into account in practice.

First, if a career group (*corps* or *cadre d'emploi*) entitles its members to accessing the posts mentioned under 3.2. the relevant special regulation (*statut particulier*) may contain a condition of nationality. All other *statuts particuliers* have to be amended in order to suppress – if any – the mention of nationality. The Directorate general of the civil service (DGAFP *Direction générale de la fonction publique*) in the Prime Minister's services is monitoring this adaptation of special regulations with the help of the EU law cell of the State council.

Second, posts for which French nationality remains a condition of access need to be defined as such. This needs further government regulations and is also monitored by the DGAFP. During the French Presidency of the EU, 2008, the DGAFP published a guide for the reception of Community nationals, which reminds the state of the law in force in terms of access conditions, the public in question and the procedures envisaged within this framework.

There is not yet a general document indicating the state of the art for the amendment of regulations. At any rate, if a regulation has not yet been amended and still contains a nationality clause, administrative courts would make the EU principles of application of Art. 45 (4) prevail over contrary regulations, as has already happened in the past.

There are no precise statistics on employment of non nationals in public administrations, which could give indications about the effects of administrative practice.

### 3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose of Law n° 2005-843. It uses the concept of “sovereignty” instead “general interest”, due to the fact that the concept of general interest as shaped in French administrative law is extremely broad and might go beyond the EU concept of general interest. The wording “*exercise of the prerogatives of the public authorities*” is the same wording, in the French language, as that of the ECJ when it comes to the exercise of public authority.

The wording of the general principle according to which posts may be reserved to French citizens such as embedded in the general statuses of civil service may be considered as complying with EU law, with two provisos.

First, it has to be checked whether using of alternative criteria i.e. “*the exercise of sovereignty*” or “*direct or indirect participation in the exercise of the prerogatives of the public authorities*” has the same effect as the application of the cumulative criteria in the ECJ case law (public authority “and” general interest).

Second, although it seems that compliance with EU law has also been achieved for special regulations of *corps* and *cadres d'emploi*, it remains to be indicated by French authorities that the amendments of regulations foreseen by Law n° 2005-843 have all been carried through.

The legislative reforms required by the ECJ's rulings on merchant marine captains have been carried through.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

#### 4.1.2. Practice

It has to be kept in mind that the French system of civil service is that of a highly regulated career system, which however combines also elements of an employment system, as there is no direct and automatic link between the elements of career and posts. Careers, i.e. title, basic remuneration and pension rights, are regulated on the basis of the special regulations of career groups (*corps* or *cadres d'emplois*), whether most other elements of working conditions are linked to the post, on the basis of general and sector specific regulations.

Government departments and public bodies may have their own complementary practices.

The Directorate general of the civil service (*Direction générale de la fonction publique*) in the Prime Minister's services, and the Directorate general for local government (*Direction générale des collectivités locales*) in the Ministry of Interior as far as regional and local government is concerned, are monitoring the application of civil service legislation, with the help if needed of the EU law cell of the State Council.

### 4.2. Special requirements for access to employment and working conditions

#### 4.2.1. Professional experience

Professional experience plays an important role in the French civil service system, according to different situations.

As far as access to career groups is concerned, there are two ways of taking into account professional experience.

First, the general system of competitive examination (*concours*) is usually composed of two different competitions: a general competition open to all those who have the necessary diplomas or certificates (if any), called *concours extérieur*, a specific competition open to persons who already are civil servants, in another career group than the one for which the competition is opened, called *concours interne*. In some cases, like for instance the competition to access the *Ecole Nationale d'Administration*, which leads to many of the generalist career groups of higher level, there is a third competition, called *troisième voie*, open to candidates with professional experience in the private sector. The *concours interne* and the *troisième voie* competitions take into account professional experience - respectively in public administration and in the private sector - without any difference being made according to the country where the experience has been acquired.

As a result of *Law n° 2009-972 of 3 august 2009 on mobility and professional routes in the civil service (Loi relative à la mobilité et aux parcours professionnels dans la fonction publique)*, Art. 26, access to *concours internes* is provided for candidates who have acquired a professional experience of the same duration in a body whose tasks are comparable to those of the relevant administrations in France.

In a number of special regulations, such as with teachers, it was however foreseen that only service without interruptions would be taken into account. The rationale for such a limitation is to avoid that successive short term contracts be used in order to by-pass the normal system of open competitions. However, such a system has a higher impact on persons who have made use of their right to free movement of workers, and should therefore be deemed contrary to EU law, in application of the criteria set by the ECJ in *O'Flynn C-237/94*.

On the basis of *Law n° 2007-148 of 2 February 2007 on the modernisation of the civil service (loi de modernisation de la fonction publique)*, open competitions may include, as one of the proofs, the presentation of a file relating the professional experience. No difference is made between professional experience in France and abroad.

For all competitions, it is up to the independent recruiting board (*jury de concours*) to

assess professional experience. It seems that some general guidance is given in circulars as to non discrimination between professional experience acquired in France and abroad.

*Second*, as indicated earlier, access to posts in the civil service is not necessarily tied to membership of the relevant career group in the French civil service. Posts can be accessed either civil servants by secondment from their career group or, in some cases, through temporary appointment of a non civil servants.

As a result of *Law n° 2005-843 of 26 July 2005 on various measures transposing Community measures to the civil service*, all posts in the civil service can be accessed through secondment from either the French civil service or equivalent bodies from EU Member States. As far as access from the private sector is concerned, no difference is made on the basis of the country of previous service.

The present legislation relating to the French civil service does not make any discrimination based upon the country where professional experience has been acquired. However the absence of possibilities of secondment equivalent to the French system of *détachement* in another EU Member State might lead to maintaining an obstacle, the compatibility of which with the principle of free movement remains to be assessed.

*Third*, the very specific issues illustrated by the *Burbaud* case, have also to be taken into account in relation to professional experience, as far as they concern training with internships (see 4.2.4.)

#### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

For career purposes, seniority is a formal condition of access to higher grades which correspond to a different *career group*: promotion is the result of a competition (*concours interne*). The relevant provisions on *concours interne* ensure taking into account seniority acquired outside of the French civil service.

Within a single career group, previously acquired seniority may be taken into account for the purpose of classification at a certain salary level. This depends upon the relevant

special regulation (*statut*) of the relevant career group. In some cases there are specific provisions about seniority acquired outside of the civil service, or even seniority acquired outside of France. In principle no difference should be made on the basis of the locus of previous employment, but due to the big number of special regulations of career groups, it is not possible to state that there are no more provisions which are not compatible with EU law.

Furthermore, French authorities should ascertain that there are no provisions the limiting the periods of service which can be taken into account, or requiring a continuity in service. Clearly, any regulation that would contain such a limitation only for services outside of France would be discriminatory and thus contrary to EU law. But even non discriminatory regulations (i.e. applying in the same way to duration of service in France and abroad) might be contrary to EU law if they have a bigger potential impact on persons having made use of their right to free movement of workers, as indicated by the ECJ in the *O'Flynn* C-237/94.

#### 4.2.3. Language requirement

The general statuses of civil servants require candidates to demonstrate knowledge of the French language as a condition for access to the civil service.

As open competitions always include specific proofs, both written and oral, knowledge of the French language is a practical requirement. The level of knowledge required in open competition is normally corresponding to the level of responsibility of the relevant posts. There is however no comprehensive information on the practice of examining boards when dealing with foreign candidates.

#### 4.2.4. Specific obstacles

A big number of career groups (*corps*) are based on initial training in a specialised school. This is a special feature of the French civil service, which has been first established for engineers in the XVIIIth century. Usually, access to posts corresponding to the qualifications acquired in these schools is reserved to members of the relevant career groups. This is

the origin of the *Burbaud case C-285-01*. The ECJ recalled in that case that if a candidate had acquired an equivalent training or professional experience which would be recognised by a diploma in another Member State, reserving access to a post to candidates who would have had their training in France is a discrimination that infringes with EU law.

The *Burbaud* case has led to the generalisation of assessment of a professional experience in competitive examinations. A specific board (*Commission d'équivalence pour le classement des ressortissants de la Communauté européenne ou d'un autre Etat partie à l'accord sur l'Espace Econo-*

*mique européen*) is in charge since 2005 of taking into account the professional experience acquired abroad for integration in the civil service.

The specific problem of the *Burbaud* case is however not entirely solved, as it remains difficult to assess to what extent the special training received in a civil service school amounts to a diploma for a regulated profession, as for hospital managers in the *Burbaud* case. If the profession does not meet criteria of regulated professions, the situation is different from the *Burbaud* case, and has not been addressed until now in ECJ case law.

## 5. Issues for free movement of workers in the public sector

**5.1.** Available information reveals three potential issues of compliance with EU law.

*First*, the definition of posts which may be reserved to French citizens does not coincide exactly with the criteria of application of Art. 45 (4) TFEU be closed to EU citizens. This being said, the criteria indicated by the State Council for the determination whether a post may or may not be reserved to French citizens seem to be complying with EU law; furthermore, the criterion of safeguard of general interest does not appear in French legislation, thus there is no risk that a post involving the safeguard of general interest but not the exercise of public authority be reserved to French nationals.

The main issue is that there is not yet a comprehensive list of reforms of secondary regulation carried out in order to implement *Law n° 2005-843* which set the criteria which may be applied to reserve posts to nationals, and therefore there is no

*Second*, the legislation and regulation relative to the recognition of professional experience provides for taking into account equivalent professional experience acquired abroad, but there are still some issues relating to the cases where a specialist career starts with training in a specialist school, as in the *Burbaud*

case. If the relevant posts correspond to regulated professions, the *Burbaud* jurisprudence would apply, and there would be an infringement of EU law. In the opposite case, it is not yet possible to assess to what extent the requirement of a special training in order to participate in a competition to access posts is compatible with EU law.

*Third*, in the absence of a general provision on recognition of seniority acquired abroad, the computing of seniority acquired outside of a specific career group (*corps* or *cadre d'emploi*) leaves room for discrimination or for obstacles to free movement. This is especially the case for specific regulations which limit the amount of working time that may be taken into account or which require continuity in the working period.

**5.2.** The monitoring role of the DGAFP for State civil service should help identifying issues and solving them in time, but the big number of special regulations for carer groups, and even more, the big number of autonomous bodies and local government makes it somewhat difficult to have a totally accurate overview of practice.

## 6. Reforms and Coming Trends

As indicated under 3.4, a series of reforms of French legislation applicable to employment in the public sector took place since 1991 in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants as well as eliminating obstacles linked to professional experience acquired outside of France.

A White Paper of 2008 on the future of the civil service in France puts forward over 40 proposals for modernising the service and the public sector in France. Specifically, it suggests evolving into a professional public

sector in which a new statutory organisation based on 7 professional sectors would replace the current segmentation based on several hundreds of corps. Such a reform might simplify complying with EU law at the level of legislation and regulations, but it is not obvious that deregulating would better guarantee free movement of workers in the public sector. It remains to be seen whether such a reform will be undertaken, or whether the method of incremental adjustments which has been followed with some success since the early nineties for civil service reform will be continued.

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ITALIA  
**ITALY**

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## 1. General data

### 1.1. Date of applicability of EU law

Italy is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

Italy is a “regional” State with four levels of government: the State, 20 regions (*regioni* – the region of Trentino-Alto Adige has no institutions of its own, it is composed of two provinces), 110 provinces (*province*) and 8 101 municipalities (*communi*).

### 1.3. Official languages

Italian is the official language in whole Italy. French is an official language in the Val d’Aoste Region, German in the region of Trentino-Alto-Adige-*Südtirol*.

Furthermore, twelve minority languages are protected by law: Sardinian, Friulian (Rhaeto-Romance), Occitan, Albanian, Franco-Provençal, Slovene, Ladin, Griko, Alguerese (Catalan), Molise Slavic dialect (Croatian).

### 1.4. Statistical data

Italy has a total population of 59 131 300 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	3 611 000	14,45 %
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Government employment in 2008 (*Based on ILO Laborsta*)

State	2 081 800	57,6 %
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Regional and Local	1 600 700	42,4 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The main relevant provision of the Constitution is Art. 97, which provides that: “(1) *The organization of public offices is determined by law ensuring the proper and fair operation of public affairs.*

*(2) Areas of competence, duties, and responsibilities of public officials must be defined in regulations on public offices. (3) Appointments for public administration are determined by public competition unless otherwise specified by law.*

Furthermore, according to Art. 51 on Public Offices “(1) Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To this end, the republic adopts specific measures in order to promote equal chances for men and women. (2) The law may, regarding their right to be selected for public positions and elective offices, grant to those italians who do not belong to the republic the same opportunities as citizens.”

Title V (Art. 114 to 133) contains the provisions applicable to Regions, Provinces and Communes.

*Legislative Decree 2001 n° 165, on the General Rules on the status of employment in the public sector*, regulates access to and employment in the public sector, including national, regional or local authorities and all public bodies.

Every Italian Region is free to organize its own regional public sector through Regional laws, but within the limitations set by the Italian Constitution (such as Art. 97), and the general principles of State legislation (*Legislative Decree n° 165 of 2001*).

Furthermore, sector based collective agreements contain a major part of the rules applicable to working conditions, career progression and salaries. Collective agreements may derogate to the general legislative rules applicable to public employment.

## 2. 2. Public sector employers

The State, 19 regions, 110 provinces and 8 101 municipalities are all public employers, as well as the numerous autonomous public bodies (*enti pubblici*) which they have created. These include amongst others schools and Universities, while hospitals are regional public bodies. An *Agency of public employers A.R.A.N. (Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni)* has been set up in 1994 to represent all public employers in negotiations for collective agreements.

There are also numerous corporations established under the relevant private law provisions, with often 100% of the shares owned by national, regional or local government. Their employees are not considered as public employees in the sense of Art. 97 of the Constitution.

On the basis of figures of *EUPAN – Structure of the civil and public services*, administrative authorities employed about 3 524 700 in 2002, including employees with flexible contracts. For full time employees the figures indicated were: This total includes: Ministries: 196.059; Prime Minister’s Office: 2.374; other State Institutions: 33.603; Fiscal Agencies: 54.493; Judges: 10.765; Diplomatic career: 1.014; Prefectoral career: 1.518; Police: 324.734; Army: 132.792; Public bodies: 62.247; National Health Service: 687.210; School: 1.129.474; Universities: 110.574; Research Institutions: 16.928; Regions and local autonomies: 597.199.

## 2. 3. Public sector workers

Since 1994, employees in the Italian public sector are recruited on the basis of a contract subject to the ordinary rules of the Italian Civil Code and labour law, on the same footing with employees in the private sector. Individual contracts are based on the collective agreements between the *Agency representing public employers A.R.A.N. (Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni)*, and the trade unions related to the public sector.

As an exception, some specific categories of workers in the public sector are civil servants subject to a public law regime, i.e. judges and prosecutors, State police and the military, professional firemen, diplomats and prefects, heads of prison wardens and university professors. Their working conditions and the relevant provisions on career progression and remuneration are only based upon law and regulations.

Access to public employment, as well for employees as for civil servants, has to be based upon an open competition. A proper notice of the selection procedure has to be given to the public in order to guarantee the open access on national basis.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative judges. This includes all decisions relating to

open competitions, which is the normal recruitment method of all employees of public bodies.

Matters relating to individual and collective contracts are submitted to civil judges, including all matters about working conditions, career progression and remuneration of public sector employees.

The Constitutional Court may be appealed to by courts in order to solve conflicts of

competence between the State and Regions, as well as by national regional governments verifying compliance of State and Regional legislation with the Constitution.

There is no Ombudsman at national level, but many regions, provinces and municipalities have their own ombudsman (*Difensore civico*). They can mediate between citizens and public administration, with no decision making power.

### 3. Posts reserved to nationals

#### 3.1. Relevant laws and regulations

It follows from Art. 51 (1) of the Constitution that Italian nationality is a general requirement for access to positions in the public sector.

Since 1994 however, access to public sector positions is open to other EU citizens (*Decree n. 487 of 2 May 1994*). The relevant provision is now Art. 38 (1) of *Legislative Decree n° 165 of 2001*, according to which “*Citizens of European Union Member States may access posts in public administrations that do not imply direct or indirect exercise of public authority or do not involve the safeguard of National interest.*” Art. 38 (2) empowers the Prime minister to adopt a decree which indicates “*posts and functions*” for which Italian citizenship is a requirement, as well as the indispensable requirements for access of EU citizens.

The relevant implementing regulation is of 7 February 1994, n. 174. “*Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche*”.

#### 3.2. Definition of posts

Posts and functions which are reserved to Italian nationals are listed in the regulation is of 7 February 1994.

A number of posts are listed, which amount to management posts in the State administrations; posts comprising senior administrative functions in branch offices of the State administrations; posts of judges State’s advocates and prosecutors; civil and military

posts in the office of the Prime Minister, Ministry of Foreign Affairs, Ministry of the Interior, Ministry of Justice, Ministry of Defence, Ministry of Finance and in the National forests corps (*Corpo forestale dello Stato*).

The types of functions which require Italian citizenship are defined as “a) functions which involve the elaboration, decision or execution of authorisations and binding orders; b) reviewing legality and appropriateness of decisions”.

#### 3.3 Practice and monitoring

According to Art. 2.2 of *Decree n. 487 of 2 May 1994*, in case of doubt on the nature of the functions to be performed by the employee, the President of the Council of Ministers, given a reasoned refusal, can deny access to a specific employment or to the conferral of specific responsibilities, if they involve reserved functions. Such a refusal has general prohibitive effect.

Recruitment occurs as a rule on the basis of an open competition (*concorso*) organised by the relevant employer. Notice of the competition has to be given in the official journal in order to ensure access from the whole territory. As indicated under 2.4. appeal against all aspects of open competition can be made to administrative courts.

The *Agency of public employers* A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*) represents all public employers in negotiations for collective agree-

ments, but it has no role in monitoring competitions.

There are no statistics on employment of non nationals in public administrations that could give indications about the effects of administrative practice.

As a consequence of the ECJ's judgement of 11 September 2008 in *Case Commission v Italy C-447/07*, a law n° 101 of 6 June 2008 has abolished the Italian nationality condition for access of posts of captains of ships under Italian flag.

### **3.4. Compliance with EU law**

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the purpose the relevant provision of the legislative decree of 1993 now replaced *Legislative Decree n° 165 of 2001* and of *Decree n. 487 of 2 May 1994*.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. Art. 38 (3) of *Decree n° 165 of 2001* provides that equivalence of diplomas, certificates and recognized services is decided by decree of the Prime minister upon proposal of the relevant Minister.

An important role is played for most of employments by collective agreements, which are usually concluded for three years.

There are also regulations on remuneration and pensions, as well as for specific sectors, especially education.

Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ Disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee* provides the necessary means to enforce the ECJ's judgement of 26

The wording of Italian legislation and regulations does not entirely coincide with the criteria for the application of Art. 45 (4) TFEU. As for general interest, it only envisages national interest, which is less broad a concept than that of the ECJ's case law, and therefore complies without any doubt with the latter. However, on the other hand, the two criteria of Italian law are alternative (or) whereas in the ECJ case law they are cumulative (*and*). This might be a source of non compliance with EU law.

Looking at the list contained in the regulation of 7 February 1994, some questions remain open as it is not clear which posts in the office of the Prime Minister, Ministry of Foreign Affairs, Ministry of the Interior, Ministry of Justice, Ministry of Defence, Ministry of Finance are reserved to nationals.

december 2006 in *Case C-371/04, Commission v. Italy*.

Art. 5 of the law provides that public administration has to recognize the professional experience and seniority gained by Union citizens in the exercise of a comparable activity within the public administration of another Member State (even before accession to the EU) as equivalent to the experience or seniority acquired in Italy, when professional experience or seniority is considered relevant by Public Administration for any economic or legal purpose. The experience or seniority has to be considered on equal footing with that acquired in Italy (*secondo condizioni di parità rispetto a quelle maturate nell'ambito dell'ordinamento italiano*). The wording of Art. 5 implies that recognition of professional experience and seniority has to be done as well for access to posts as for working conditions.

Law 2008 n° 101 does not modify Art. 38 of *Legislative Decree n° 165* but provides that contrary normative provisions (i.e. in laws or regulations) and provisions in collective agreements are not applicable.

Differently, in order to comply with an ECJ judgment in *Case C-278/03*, a decree of the Minister of Education n. 53 2006 corrected the table annexed a Law of 2004 (Legge 4 giugno 2004, n. 143) which provided for the attribution of a specific number of points for professional qualifications acquired in another EU Member State that was inferior to the maximum number of points which could be acquired according to the votes attributed to a similar Italian exam, the system constitutes a source of discrimination.

The technique adopted with Art. 5 of the Law of 2008 has the advantage that it has a far broader scope than e.g. the cited ministerial

decree, but its application in practice is conditioned by knowledge by all relevant public administration, and this is far from being guaranteed as long as there is not a special informative circular pointing to the consequences of Law 2008 n° 101.

#### 4.1.2. Practice

Public employers may have their own complementary practices.

The *Agency of public employers A.R.A.N. (Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni)* represents all public employers in negotiations for collective agreements. It does not the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

There are no general rules on the recognition of professional experience and seniority. Collective agreements mentioned under 4.1.1. are the normal source of relevant rules and practice. In the education sector, rules are in the relevant legislation (for schools and Universities). Some of them foresee time limits for taking into account professional experience or seniority acquired in another EU Member State.

Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ* mentioned under 4.1.1. prevails over any rule in collective agreements, laws or regulations, and should hence lead public administrations to dis-apply any norm that would for instance limit the way into professional experience acquired abroad is taken into account.

As Law 2008 n° 101 has not amended the relevant legal provisions and does not foresee a mechanism to amend laws and regulations, the issue is to what extent public administrations are aware of the content of Art. 5 and of its meaning.

### 4.2.2. Seniority

Seniority usually plays a role in remuneration and working conditions, on the basis of the relevant collective agreements. It is a key element in the career of those employees which have the status of civil servants.

What has been mentioned for professional experience applies to seniority. The problems mentioned about Art. 5 of Law 2008 n° 101 are even more complicated when it comes to civil servants, for whom there are strict rules of seniority for wages and careers.

### 4.2.3. Language requirements

According to Art. 3 of the *decree of 7 February 1994, n. 174*, EU citizens shall have an adequate knowledge of the Italian language in order to access to posts in the public sector. *Legislative Decree n° 165 of 2001*, Art. 37, requires the knowledge of at least one foreign language (beside the knowledge of Italian) for the access to posts in the public sector.

Italian is the official language on the whole territory, but a special status is reserved to French in Valle d'Aosta, German in Trentino-

Alto Adige *Siid Tirol* and Slovenian in Friuli-Venezia Giulia.

There is no relevant useful information about the practice relating to language re-

quirements in the public sector that would make it possible to verify compliance with the principle of proportionality.

## 5. Issues for free movement of workers in the public sector

**5.1.** Available information reveals two potential issues of compliance with EU law.

*First*, the wording of Italian legislation and regulations reserving posts to Italian citizens does not entirely coincide with the criteria for the application of Art. 45 (4) TFEU. It might be a source of non compliance with EU law in so far as the two criteria of Italian law are alternative (or) whereas in the ECJ case law they are cumulative (*and*). The question arises mainly for posts in the Ministries mentioned in *Decree n. 487 of 2 May 1994* which indicates the posts which may be reserved to Italian nationals.

*Second*, Art. 5 of Law 2008 n° 101 *Emergency provisions for the implementation of community obligations and the execution of judgements of the ECJ*, mentioned under 4.1.1., is intended to ensure compliance with EU law when taking into account professional experience or seniority

acquired in other EU Member States. However the legislative technique which has been adopted does not guarantee clarity and precision in its application. It would need to be publicized and illustrated at least by ways of an explanatory circular, and by all means it would be better to adopt the necessary amendments to legislation and regulations.

**5.2.** More generally, the absence of monitoring systems for access to public administration and recognition of professional experience and seniority, as well the lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service make it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

A number of reforms of the public service are presently undertaken on the basis of parliamentary authorisations for delegated legislation, e.g. in the public administration as a whole, and in the school and universities sector.

By law of 4 March 2009, Parliament has given power to the Government to adopt delegated legislation in order to reform public employment. Legislative decree n° 150 of 27 October 2009, adopted on the basis of the cited law, has introduced a series of innovations and amendments to the existing general staff regulations, i.e. to *Legislative Decree n° 165*

*of 2001*. No changes have been introduced, which might directly impact upon free movement of workers. According to the new text of *Legislative Decree n° 165 of 2001*, collective agreements may only include derogations if this is expressly foreseen in the law. This will make it more easy to ascertain that there are no rules on working conditions that might impede free movement of workers in the public sector.

The new legislation also requires professional experience in other EU Member States' administrations or in EU institutions in order to access higher executive posts.

\* \* \*

ΚΥΠΡΟΣ/KIBRIS  
**CYPRUS**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Cyprus became a member of the EU on 1 May 2004.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004, as there are no transitional arrangements for Cyprus in the Accession Treaty of 2003.

### 1.2. State form and levels of government

Cyprus is a unitary State with two levels of government, the State and 68 municipalities (*demoi*) and communities or villages (*koinotes*).

### 1.3. Official languages

There are two official languages in Cyprus: Greek and Turkish.

Greek is in practice the language of the southern part of Cyprus, while Turkish is the

language in the northern part, which is not under control of the Government of Cyprus.

### 1.4. Statistical data

Cyprus has a total population of 778 700 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	67 100	17,6 %
Public enterprises	10 000	2,6 %
Total government	57 100	15 %

Government employment in 2006 (*Based on ILO Laborsta*)

State	52 600	92,3 %
Local	4 400	7,7 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Part VII of the Constitution is dedicated to the public service, with provisions to ensure representation of Greeks and Turks in the permanent public service and especially in the Public Service Commission.

The *Public service Law 1990-2005* regulates the status of public servants. It is complemented by more specific laws, e.g. the *Evaluation of Candidates for Appointment in the Public Service Law 1998-2008* and ministerial decrees.

The *Public service law* is also complemented with Regulations for specific aspects of employment in the public service, which apply to all public service employees such as: medical examinations and medical treatment, employee assessment/ appraisal, emoluments, allowances, and other economic benefits, leaves in general, working hours.

## 2.2. Public sector employers

The State Ministries, Departments, Services and independent authorities and the 68 municipalities and communities or villages are public employers. There are also a number of State and local agencies and offices.

Under the *Public Service Law*, “*Public Service*” means any service under the Republic other than the judicial service, the Armed or Security Forces, the offices of the Attorney-General, of the Auditor-General or their Deputies, of the Accountant-General or his Deputies.

The Public Service Commission is responsible for recruitment and for important aspects of career management of public servants. It is an independent body, according to the Cyprus Constitution, and its decisions can be challenged only by the Supreme Court of Laws.

## 2.3 Public sector workers

The legal status of Servants of the State is laid down in the *Public Servants Law*. Specific laws and regulations apply to the categories mentioned under 2.2. and to the educational services. A special mention can be made of workers or of persons whose remuneration is calculated on a daily basis in accordance with

the *Employment of Casual Officers (Public and Educational Service) Laws, 1985-1991* and the *Procedure for Appointment of Casual Officers in the Public and Educational Service Laws, 1995-2004*.

According to government information provided to the European Commission, in 2009 public servants and other government employees (59 590) represent about 23 % of the total workforce (379 900); the number of local government employees is not available. The total number of public servants is about 18 490 (31 % of the total of public sector employees).

## 2.4. Appeals and remedies

The *Supreme Court* may rule on appeals against any ill giving to ones rights/privileges. This includes appeals against any decision made by the *Public Service Commission*.

The Ombudsman (*Commissioner for Administration*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions. The *Cyprus Equality Body*, under the *Commissioner for Administration* is playing an important role in reviewing decisions that encroach upon equal treatment of EU citizens.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

According to Art. 31(a) of the *Public Servants Law* “*No person shall be appointed to the Public Service unless he is a citizen of the Republic, or -provided that the post is not one that involves the exercise of public authority and the responsibility for the safeguarding of the general interests of the State- a citizen of a Member State*”.

Other specific laws, are applicable to the Judiciary, Police, Armed Forces and Fire Service.

## 3.2. Definition of posts

Posts reserved to Cypriot nationals are defined by decree adopted by the Council of Ministers, upon recommendation of a special

committee; this committee is assigned with the task of carefully examining each post in the public service so as to determine which posts fall under the exception based on the criteria of public authority.

Since 2004, four Ministerial Decrees have been issued, covering the vast majority of public posts, but the procedure is ongoing, in order to include new posts that may be created each year.

Posts reserved to nationals include posts in the Customs Department, Inland Revenue Department, VAT Service, Ministry of Foreign Affairs, director posts in various ministries etc.; posts in the Police, Armed Forces and Fire Service are also reserved for nation-

als, as well as Court Registrars, the President of the Supreme Court and the Judges.

According to the legislation of the Educational Service, the Local Authorities and the Semi – governmental Organizations, the practice for the latter is the same as for the public service.

The Council of Ministers decides for the posts that may be reserved to nationals based on the recommendations of a special technical committee. According to the current situation, all the posts of the Educational Service are open to EU citizens as well as the majority of the posts of Local Authorities and Semi – governmental Organizations. The exception applies for posts at the very high hierarchical levels, which involve the exercise of public authority.

There are no legislation or regulations reserving access to posts of captains of vessels under Cyprus flag to nationals.

### **3.3 Practice and monitoring**

The appropriate authorities have to submit a proposal with the posts they wish to entail nationality conditions. Proposals have to be supported reasonably. Each proposal is assessed by the *Public Administration and Personnel Department*. The evaluated proposals are then submitted by the Ministry of Finance to the Council of Ministers which, after studying the proposals submitted decides on which posts to impose nationality conditions.

A list of posts reserved to national in the public service is available with the *Public Service Commission*.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

The competent authority responsible for the appointment of public servants is the *Public Service Commission*. All vacant posts advertised in the Official Gazette after the issuing of the aforementioned decrees explicitly state whether they are open to other EU citizens as well as to nationals.

The *Public Service Commission*, being responsible for the appointment of public servants, is able to monitor the relevant aspects of free movement of workers for public servants.

The Public Administration and Personnel Department assesses the number of public sector posts with access reserved to nationals to 3 300, i.e. 18% of public servants and government employees (about 0,9 % of the labour market).

Information on local government practice is not available.

### **3.4. Compliance with EU law**

With the amendments introduced in 2003 to the *Public service Law 1990*, a first step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Estonian nationals.

As far as the public service is concerned, it seems that the criteria for the application of Art. 45(4) TFEU are applied, but further amendments to laws and regulations need to be adopted for the Police, Armed forces and Fire Service.

#### **4.1.2. Practice**

The *Public Service Commission* is responsible for the appointment, confirmation, emplacement on the permanent establishment, promotion, transfer, secondment, retirement and

exercise of disciplinary control, including dismissal or compulsory retirement, of public officers. It is thus able to monitor the free movement of workers for public servants as far as recruitment is concerned. The *Public Administration and Personnel Department* seems also in a position to monitor practice of gov-

ernment departments on, and the *Educational Service Commission* as far as education is concerned.

Detailed information on local government practice is not available.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

Professional experience is usually not a formal condition for access to a recruitment procedure. First entry posts may require relevant experience or consider it as an advantage. It can play a role in the ranking during the procedure for appointment in a first entry post.

Professional experience can be acquired by previous employment either in the public sector or in the private sector or both. There is no specific legislation at the moment as to the treatment of comparable experience of EU nationals, but the competent authority will apply the same principles and equal treatment when assessing qualifications of candidates and in this case, the professional experience.

The competent authority responsible for the appointment of public servants is the *Public Service Commission*, which determines whether the experience acquired in the national public or private sector or those of another Member State meets the requirements stated in the relevant Job Description.

Recognition of professional experience does not have effects on salaries and grading. However, in the case of a person serving in a position in the national public service who is appointed to another post of the same salary scale, he/she will maintain their current salary advantages and will be placed on a higher incremental point than the normal starting pay for the post in question, in recognition of work experience gained during the previous years of public service

The rules and legislation of semi-government organizations and municipalities are usually similar to the corresponding ones in the public service.

### 4.2.2. Seniority

Promotion posts (i.e., positions open only to public officers serving in the immediately lower hierarchic position in the same job structure) call for “service”, which by law, means service in the immediately lower hierarchic position (career system).

According to the *Public Service Law* (Art. 49), there is no recognition of seniority in the Cyprus public service, other than that acquired from service in the immediately lower hierarchic post in the national public service. *Regulation 14 of the Public Service (General) Regulations 1990-2006* defines ‘service’ and specifies the cases which are considered as real service and taken into consideration when calculating seniority. It also specifies those cases that are not considered real service and are not taken into consideration when calculating seniority.

There is no legislation/regulation about the recognition of seniority acquired in other EU Member States’ equivalent public service. The *Public Service Commission* has not yet had the experience of dealing with a claim regarding seniority acquired in another Member State, since the time Cyprus became a full member of the EU.

In the Education service, *Educational Service Commission* examines applications on the basis of the relevant national educational service legislation and if it recognizes this teaching experience, one increment will be added on the basic salary of the employee then for each year recognised, with the exception of an employee appointed to substitute another employee.

### 4.2.3. Language requirements

The knowledge of language and its level are specified in the scheme of services (job vacancy) of the post. These are specified according to the needs and demands of the appropriate authority in relation to the duties of the post.

In practice, most of the schemes of services require a very good to excellent command of the Greek and or Turkish Language and a good to very good command of English or any other language of EU Member States.

If a citizen of an EU Member State wishes to apply for post for which knowledge of Greek is required, he/she has to provide the necessary documentary evidence that they possess the knowledge required, in the same way as a Cypriot national applying for a position in the public sector has to do by law.

A number of complaints against public sector institutions have been decided by the *Cypriot Equality Body* as using language as a barrier to access.

## 5. Issues of compliance with free movement of workers in the public sector

**5.1.** Available information reveals one issue of compliance with EU law.

The definition of seniority as service in the immediately lower hierarchic post in the national public service does not provide for the necessary recognition of seniority acquired in other EU Member States. The *Public Service Commission* has not had to deal with a request for equivalence and it is thus not possible to

say to what extent the absence of relevant legislation is an obstacle to free movement in itself.

**5.2.** Ongoing complaints logged with the *Cypriot Equality Body* indicate problems in the practice of language conditions.

## 6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Cyprus legislation applicable to employment in the public sector took place in 2004, in order to try and meet the requirements of EU law as far as opening posts in the public service is concerned.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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LATVIJA  
**LATVIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Latvia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

Latvia is a unitary State with two levels of government: the State 530 local governments (*pagasts, pilsēta, and novads*).

### 1.3. Official language

There is one official language: Latvian.

Russian is a minority language spoken by a rather important number of residents.

### 1.4. Statistical data

Latvia has a total population of 2 281 300 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	320 100	31,9 %
Public enterprises	72 200	7,2 %
Total government	247 900	24,7 %

Government employment in 2006 (*Based on ILO Laborsta*)

<i>State</i>	107 900	43,5 %
<i>Local</i>	140 000	56,5 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 101 of the Constitution “*Every citizen of Latvia has the right, as provided for by law, to participate in the activities of the State and of local government, and to hold a position in the civil service*”.

The *State civil service Law* of 2000 regulates the status of civil servants.

The *Law on Labour*, and a number of sector specific laws further contain provisions that are relevant to free movement of the public sector.

### 2.2. Public sector employers

The State and the 530 local governments are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, and a number of para-statal authorities and agencies, whose workers are not public servants.

### 2.3 Public sector workers

The legal status of Servants of the State and is laid down in the *State civil service law*. Other public sector employees are covered by a specific status or regulation or by labour law.

According to Latvian government information provided to the European Commission, at the 2nd quarter 2009 public sector employees (310 454) represents 31% of the total workforce (999 300). The total number of civil servants was 14 406 (4,6 % of the public sector).

### 2.4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *State civil service law* is provided for by a possibility of action with ordinary courts.

The Constitutional Court examines the compliance of legislative acts with the Constitution and with the other laws.

The Ombudsman (*Tiesībsargs*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities and file applications to the Constitutional Court.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. Section 7 of the *State civil service law* of 2000, Latvian citizenship is a requirement for access to the civil service.

The *Law on Judicial Power* of 1992, the *Law on Bailiffs* of 2002, the *Law on the Office of the Prosecutor* of 1994, the *Law on the State Revenue service* of 1993, the *Diplomatic and Consular Service Law* of 1995, the *National Armed Forces Law*, the *Border Guard law* and the *Law on the National Guard* of 1993as well as the *Law On the Career Course of Service of Officials with Special Service Ranks Working in Institutions of the System of the Ministry of the Interior and the Prisons Administration* of 2006 contain similar provisions.

### 3.2. Definition of posts

Posts reserved to Latvian nationals are defined by the relevant laws, without mention of specific reasons, criteria or procedures.

Posts reserved for Latvian citizens according to the special laws are those of judges, bailiffs, notaries, prosecutors, policemen, State security officers, firemen, boarder-guard, national guard, civil employment in military service, employees of the *State Revenue Office* and employees in the diplomatic and consular service, as well as all civil servants posts.

According to Art. 3 of the *State Civil Servants law*, civil servants are in charge of performing “sectorial policy or development strategy, coordination of sectorial activities, distribution or

*control of financial resources, development of draft legislation or control over its implementation, issuance of administrative acts or preparation or adoption of the important decisions related to the rights of the individuals.”*

Secretarial services as well as assistants’ and public relation services to Ministers are not performed by civil servants. There are no civil servants in municipalities. According to the definition above, it seems thus that civil servants are employed in posts which correspond to the criteria for application of Art. 45 (4) TFEU.

There is no legislation or regulations reserving access to posts of captains of vessels under Latvian flag to nationals.

### 3.3 Practice and monitoring

The legal provision reserving posts to Latvian citizens apply to a rather limited amount of workers in the public sector, as mentioned under 2.3.

However there is no information on administrative practice for access to these posts, which would enable to confirm its compliance with the legal criteria.

### 3.4. Compliance with EU law

The definition of civil servants positions in the *State Civil Servants law*, as well as the special

legal provisions requiring Latvian nationality seem to be complying with EU law.

However, monitoring the exact scope of positions reserved to national and, above all,

administrative practices in recruitment would be useful in order to verify compliance.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

Generally professional experience is evaluated as a merit point during the recruitment procedure. Professional experience is a formal condition for access to a recruitment procedure for posts bailiffs, notaries and prosecutors.

Previous professional experience is important with regard to the amount of remuneration.

Recognition of professional experience is carried out on a case by case basis. It mainly requires submission of relevant notice, certification or information from the previous employer. There are no legal provisions on the recognition of previous professional experience, whether in Latvia or abroad.

Career in the State civil service is regulated by the State *Civil Service law*, but these provisions apply only to Latvian nationals, as mentioned earlier. It does not contain provisions as how to handle previous professional experience acquired abroad by Latvian nationals.

There is no information on practice of recognition of professional experience that

would be relevant for free movement of workers.

#### **4.2.2. Seniority**

The comments under 4.2.2. apply to seniority as well as to professional experience.

#### **4.2.3. Language requirements**

Language requirements for access to the public sector are provided by *Official Language Law* and Regulation of Cabinet of Ministers Regulation No 296 *On the level of knowledge of the State language necessary for performance of professional duties and duties of position and procedure for verification of State language proficiency*.

Employees of State and local government institutions, courts and institutions constituting the judicial system, State and local government undertakings, as well as employees of companies in which the greatest share of capital is owned by the State or a local government, have to be fluent in and use the official language to the extent necessary for performance of their professional duties and duties of office.

There are three levels of knowledge which are divided in two sublevels A and B. No

information on practice is available.

## **5. Issues of compliance with free movement of workers in the public sector**

**5.1.** Available information reveals two issues of compliance with EU law.

*First*, the absence of explicit reference to professional experience and seniority acquired abroad might induce practices which would not comply to the requirements EU law, as well for Latvian citizens who would have made use of their right to free movement, as for other EU citizens.

*Second*, the positions reserved to nationals seem to correspond to the criteria for the application of Art. 45 (4) TFEU, but no explicit reference to EU law is being made. This does not help in raising consciousness about the limited character of derogations to the principle of free movement allowed by EU law.

These issues need not necessarily to be faced by the adoption of specific laws or regulation. However, as special proactive effort in making known how the right to free move-

ment of workers applies in the Latvian public sector would be necessary in order to ensure full compliance.

**5.2.** There seems to be no monitoring system of practice in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

The absence of monitoring system also makes it difficult to assess whether the principle of proportionality is being correctly applied when it comes to language requirements.

## **6. Reforms and Coming Trends**

No need for reform of public sector work regulations has resulted from accession to the EU.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

\* \* \*

LIETUVA  
**LITHUANIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Lithuania became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

Lithuania is a unitary State with two levels of government: the State 60 municipalities (*savivaldybės*).

### 1.3. Official language

There is one official language: Lithuanian.

Russian is a minority language spoken by a rather important number of residents.

### 1.4. Statistical data

Lithuania has a total population of 3 384 900 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total public sector	430 800	33,3 %
Public enterprises	83 800	6,5 %
Total government	347 000	26,9 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Art. 33 of the Constitution provides for equal access of Latvian citizens to the public service. Chapter 10 (Art. 119 to 124) of the Constitution deals with public administration and local government.

Employment in the public sector is regulated by the *Law on the Public Service* N° VIII-1316 of 8 July 1999, (new version adopted on 1 July 2002, last amended 1 may 2009). Resolutions of the Parliament and of the Government are complementing legislation. There are also other relevant general laws, such as the *Law on Recognition of the Regulated Professional*

*Qualifications*, and sectorial laws, such as the *Law on Health Care Institutions* and the *Law on Education of the Republic of Lithuania*.

Labour law applies to an important number of workers of the public sector.

### 2.2. Public sector employers

The State and the 60 municipalities are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, as well as para-statal authorities and

agencies, whose workers are not public servants.

On the whole there are about 800 public employers.

According to *EUPAN – Structure of the civil and public services*, in 2005 out of a total of 47 648 public servants, 5 017 (10,5 %) were employed by local government.

### 2.3 Public sector workers

Persons in the public service are divided into two groups: civil (public) servants, and public employees. The legal status of Servants of the State and of Municipalities is laid down in the *Law on the Public Service*. Other public sector employees are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

The main differences between public servants and persons employed under labour contracts in the public service are that salaries of public servants are higher by virtue of qualification grade (the latter is not granted to persons working under labour contracts) and length of service. Public servants are entitled to additions to their salaries, additional holiday days and to receive supplements for perform-

ing additional functions for a period of one year.

According to information provided by the Lithuanian government to the European Commission for 2009 the *Law on Public Service* applied to some 54 500 public servants (13 % of all public sector employees), of which half are statutory public servants. The total number of public sector employees (418 300) represented 27,5 % of the total workforce (1 520 000).

### 2.4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the law on the Public Service is provided for by a possibility of action with administrative courts. Labour disputes are of the competence of courts of general jurisdiction.

The Constitutional court exercises judicial review on the conformity of laws with the Constitution.

The Ombudsmen (*Seimas - Ombudsmen's Office*) may handle complaints with regard to public administration. They may make recommendations to the relevant public authorities but has no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. 33 of the Constitution “*All citizens shall have the right to take part in the conduct of public affairs, both directly and through democratically elected representatives, and the right to seek employment, on general terms of equality, in the public service of the Republic of Lithuania*”.

The *Law on the Public Service* (or *Law on the Officials of the Republic of Lithuania*), Art. 9 (1) provides that Lithuanian citizenship is a requirement for admission to the public service.

According to Art. 2(1) “*Public service means a sum total of legal relations arising after the acquisition of the status of a public servant, the change or loss thereof, as well as those resulting from the public administrative activities of a public servant in a State or municipal institution or agency when implementing the*

*policy of a particular sphere of State governance or ensuring the co-ordination of the implementation thereof, co-ordinating the activities of institutions of a particular sphere of State governance, managing and allocating financial resources and controlling their use, carrying out audits, adopting and implementing legal acts, decisions of State and municipal institutions or agencies in the sphere of public administration, preparing or co-ordinating draft legal acts, agreements or programmes and giving opinions on them, managing personnel, or having public administrative powers with respect to persons, who are not subordinate*”.

Posts reserved to Lithuanian nationals are defined by Parliament and Government Resolutions establishing lists of positions.

A *Resolution of the Parliament of the Republic of Lithuania N° 1X-992 of 27 June 2002* estab-

lishes a list of positions of public servants in the Parliament, Chancery of the Parliament, institutions accountable to the Parliament, the President's Office and institutions accountable to the President, National Court Administration, courts, Prosecutor's Office and municipal institutions.

A *Resolution of the Government N° 684 of 20 May 2002* establishes a similar list of positions of public servants in the prime Minister's Office, Chancery of the Government, ministries, government institutions and institutions at the ministries.

### **3.2. Definition of posts**

Posts reserved to Lithuanian nationals are defined by Parliament and Government establishing lists of positions, as mentioned under 3.1. These resolutions are complemented by government and municipal institutions.

According to the Parliament resolution, employment is reserved to nationals for the following positions (amongst others): head of Parliament Chairman's Secretariat and chief advisor; advisor, consultant and secretary to the president of the Republic; representative of the President for special assignments, public relations officers of the Parliament and of the President; secretary of the municipal council, advisor and assistant to the mayor, director and deputy director of department or section, director of commission or council administration, deputy inspector of municipality; chancellor of the Ombudsmen institution, chief State auditor, chief internal auditor and chief specialist, assistant to the prosecutor of Prosecutor's General Office or regional or county prosecutor, advisor and assistant to the chairman of the courts, assistant to the judge, court consultant, secretary of court sessions, secretary of the administration, chief and junior investigator or specialist.

According to the Government resolution, employment is reserved to nationals for the following positions (amongst others): chief advisor, advisor and assistant of the Prime Minister, head of the Prime Minister's Secretariat, spokesperson for the Prime Minister and ministers; vice-minister, advisor and assistant to the minister; chief and deputy chief of

the county; head and deputy head of government institution, State secretary, undersecretary; Government agent in the European Court of Human Rights, director and deputy director of department, commission, council administration or section, head of section, chief auditor of government institution; advisor in the Chancery of the Government; special attaché and his deputy, chief specialist and specialist in the government institution; ambassadors, consul general and consul, vice-consul, advisor of the department/section, first/second/ third secretary, attaché; chief of headquarters, chief commissioner - deputy commissioner general of the police, head and deputy head of battalion/ squadron/ company/ platoon; investigator of particularly important cases and chief investigator; master of the ship, pilot, chief bodyguard, deputy chief of cordon, chief instructor, head of fire-prevention post, chief border guard, police officer, fireman.

The adoption on 19 June 08 of the law n° X-1628 amending Art. 11 of the Lithuanian Merchant Shipping Law has opened access to the posts of captain and first officer on ships under Lithuanian flags to EU and EEA citizens

### **3.3 Practice and monitoring**

The resolutions mentioned under 3.2 are complemented by government and municipal institutions. The resulting lists, approved by the head of the relevant body are internal and thus not open to the public. The criteria for approving the lists are functional, taking into account the nature of the tasks and responsibilities inherent in the posts.

Usually, advertisements for posts in government and municipal bodies explicitly mention whether the post advertised is for public servant or for public employee.

There seems not to be specific monitoring which would enable to have an overview of compliance with EU law.

### **3.4. Compliance with EU law**

The definition of civil servants positions in the law on the public service seems to be complying with EU law. The lists established

by the Government and Parliament resolutions in 2002 seem at first sight to be complying with criteria for the application of Art. 45(4) TFEU in most cases. There might be doubts about e.g. master of the ship, pilot, chief bodyguard, deputy chief of cordon, chief instructor, head of fire-prevention post, chief border guard, police officer, fireman.

The fact that the lists of government and municipal institutions are not open to the public is a problem as regards compliance with EU law.

Lithuanian authorities would gain from monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment, in order to avoid non compliance with EU law.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

Professional experience is not a condition for access to the public service, but generally a candidate's previous professional experience has an important influence on the assessment of his/her suitability and qualification for the individual post. Previous professional experience plays a role with regard to the amount of remuneration.

Apart from the provisions on length of service mentioned under 4.2.3. there are no legal provisions on the recognition of previous professional experience for the public service.

#### **4.2.2. Seniority**

Seniority plays an important role for salary purposes in the public service.

According to Art. 42 of the *Law on Public Service*, the length of service shall consist of the number of years served for the State of Lithuania as from 11 March 1990 in the civil service. The length of service shall be calculated from the beginning of the service (work) of a civil servant in State and municipal institutions and agencies or from the day of appointment (election) to a civil service post in accordance with the procedure laid by law laws.

Only service in Lithuanian public authorities is taken into account in the law. Even if the posts restricted to Lithuanian nationals were all complying with the criteria for the application of Art. 45 (4) TFEU, Lithuanian citizens having made use of their right to free movement would therefore be discriminated against.

### 4.2.3. Language requirements

According to Art. 50 of the *Law on Recognition of diplomas and qualifications* “Persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the Republic of Lithuania”. Linguistic knowledge is to be assessed, if need be, after the recognition is granted. It is not to be

used to check, in any way, the substantial qualifications of the migrating professional.

Art. 9(1) of the *Law on Public Service* mentions “a good command of State language” amongst requirements for admission to the public service.

No information on practice and monitoring is available.

## 5. Issues of compliance with free movement of workers in the public sector

**5.1.** Available information reveals two issues of compliance with EU law.

*First*, as the *Law on Public service* takes only into account seniority acquired in Lithuanian institutions there is a clear source of discrimination for Lithuanian citizens who would have made use of their right to free movement – as for other EU citizens if they could apply to posts reserved to public servants.

*Second*, the positions reserved to nationals, i.e. public service positions, seem to correspond to the criteria for the application of Art. 45 (4) TFEU, but no explicit reference to EU law is being made. This does not help in raising consciousness about the limited character of derogations to the principle of free movement allowed by EU law. Furthermore, there are doubts about some posts which are included in the general lists established by Parliament and Government. Last but not least, the specific lists established by government and municipal offices are not accessible to the public.

These issues need not necessarily to be faced by the adoption of specific laws or regulations. However a special proactive effort in making known how the right to free movement of workers applies in the Lithuanian public sector would be necessary in order to ensure full compliance.

**5.2.** There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

There is no information on practice as far as languages requirement are concerned, and therefore it is not possible to assess whether the principle of proportionality is being observed.

## 6. Reforms and Coming Trends

No need for reform of public sector work regulations has resulted from accession to the EU.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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# LUXEMBOURG

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Luxembourg is a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

Luxembourg is a unitary State with two levels of government: the State 117 and municipalities (*communes, Gemeinden*).

### 1.3. Official languages

There are three official languages in Luxembourg: French, German and *Lëtzebuergesch*.

French is the language of written law. French and German are the languages of justice.

*Lëtzebuergesch* is very close to the German dialects spoken in the neighbouring regions of Belgium, France and Germany.

### 1.4. Statistical data

Luxembourg has a total population of 476 200 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	37500	12 %
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Government employment in 2008 (*Based on ILO Laborsta*)

<i>State</i>	26 800	71,5 %
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<i>Local</i>	10 700	28,5 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. Art. 11 (2), according to which “*Luxembourgers are equal before the law; they alone are eligible for civil and military service, save as the law may in particular cases*

*otherwise provide.*” Art. 107 on local authorities deals with municipalities.

Employment in the public sector is regulated by the law on the *General status of State civil servants (statut général des fonctionnaires de l’Etat)* of 1976, the *Law on the regime of State employees (loi fixant le régime des employés de l’Etat)*

of 1972 and by the law on the *General status of municipal civil servants (statut général des fonctionnaires communaux)* of 1985, the *Law on the organisation of the National Institute of Public Administration* of 1999, recently modified by a Law of 18 December 2009,

## 2. 2. Public sector employers

The State and the 117 municipalities are public employers. There are also a number of State and local agencies and offices. The State employs more than 70 % of public sector workers; local government less than 30 %.

The public sector furthermore includes State provided medical and educational services, as well as para-statal authorities and agencies.

## 2.3 Public sector workers

Persons in the public service are divided into two groups: civil servants (*fonctionnaires – Beamte*) and employees (*employés – Angestellte*). The legal status of civil servants is laid down in the relevant status for the State and for the Municipalities State employees are covered by a specific law, as mentioned under 2.1.

Whereas functions relating to the exercise of public authority may not be performed by employees, the civil servants' status is not limited to posts relating to that exercise.

No statistics on employment as civil servants as opposed to employees were available to the author of this report.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – is provided for by a possibility of action in annulment with administrative court. Matters relating to contract are submitted to civil courts.

The Constitutional Court may review the constitutionality of Laws.

The federal Ombudsman (*Médiateur*) may handle complaints with regard to public administration, but not for litigation between a civil servant and his/her employer. He may make recommendations to the relevant public authorities but have no power to make binding decisions.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

Art. 11 (2), according to which “*Luxembourgers are equal before the law; they alone are eligible for civil and military service, save as the law may in particular cases otherwise provide.*”

For civil servants Art. 2 (1) a) of the *General status of State civil servants* provides that in order to access to the civil service, one has to be “*a national of a Member State of the European Union*”. This is the result of an amendment introduced by a Law of 18 December 2009. However, Art. 2 (1) 2 provides that Luxembourg citizenship may still be required for “*posts which involve direct or indirect participation to the exercise of public authority and for the functions which have as purpose safeguarding the general interests of the State or other public persons.*”

The posts to be reserved to Luxembourg nationals will be established by Grand-Ducal Regulation.

Similar provisions are also inserted in the *Law on the regime of State employees (loi fixant le régime des employés de l'Etat)* of 1972, and in the *Status of municipal employees* of 1985 stills require Luxembourg citizenship as a condition for access.

Before 1 January 2010, access to the civil service was restricted to Luxembourg nationals, with the exception of the sectors of education, research, health, trans, telecommunications and post as well as water, electricity and gas supply.

### 3.2. Definition of posts

As indicated under 3.1., the government has chosen to establish a full an exhaustive list, in application of the above criteria – i.e. after thorough examination of the relevant functions to be exercised.

It has already been indicated that posts which involve only a very occasional exercise of public authority, like for instance those medical doctors of the National Health Laboratory will not be included in the list of posts reserved to nationals.

No special procedure, nor body, is foreseen in order to implement the definition of posts, as the *Regulation* will be exhaustive and precise as to which posts are reserved to Luxembourg nationals.

### 3.3 Practice and monitoring

As the amendments described earlier entered into force on 1 January 2010, it is too early to know about practice.

Reports of the *Network of Free Movement of Workers* indicate that in the sectors that were already open to non nationals, newspaper ads recruiting for public sector positions were still very often indicating Luxembourg citizenship as a requirement. The *Civil service trade Union (Confédération générale de la fonction publique)* was opposing opening to non Luxembourg citizens until the first months of 2009, when a compromise was finally found with government, which opened the way to the legislative amendment.

As indicated under 3.2. no specific monitoring procedure or body is foreseen.

Although having no access to open sea, Hungary indeed has a fleet of merchant ships under its flag. The new wording of Art. 34 (3) of Act XLII 2000 on water transport opens up post of masters and chief mates of vessels flying the Hungarian flag in international shipping on inland waterways and coastal traffic to EU and EEA citizens.

### 3.4. Compliance with EU law

Complying with the criteria set by the ECJ for the interpretation of Art. 45 (4) TFEU has been the goal of the amendments to relevant State regulations adopted in 2009. The new wording of the *General status of State civil servants*, of the *Law on the regime of State employees and of the General status of municipal civil servants* complies with EU law.

The necessary implementing Regulation needs to be adopted in order to have the necessary rules set down for State public sector.

The first draft regulation set up in order to implement the Law of 18 December 2009 has been strongly criticised by the State Council as not being in line with the requirements of Luxembourg law and of EU law.

Monitoring the application of the new rules will be important for Luxembourg authorities, especially in consideration of the important number of non Luxembourg EU citizens established in the country and of the previous hostility of the trade union to opening recruitment in the public sector.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

The *Law setting the general regime of State civil servants' remuneration (loi fixant le régime général des*

*traitements des fonctionnaires de l'Etat)* contains clauses which are relevant to free movement of workers.

Similar provisions are applicable to State employees, as well as to municipal civil servants and employees.

Furthermore,, a law on change of administration *Loi modifiée du 27 mars 1986 fixant les conditions et les modalités selon lesquelles le fonctionnaire de l'Etat peut se faire changer l'administration* – contains the provisions applicable if a civil servant changes employer in the framework of state administration.

#### 4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

There is no general condition of professional experience for access to public sector employment.

According to a specific provision of the *General status of State civil servants* (Art. 2 (4)), the Government may decide in Council of Ministers that persons having an extended experience in the private sector or showing specific qualifications required for a vacant position may be admitted to the Civil service. There is no limitation to experience in Luxembourg for the application of this provision.

considered in the same way as Luxembourg State service.

For civil servants already appointed, law on change of administration mentioned under 4.2.1. establishes a special body and procedure for change from one state administration to another. No mention is made of changes between communal and state administration; no mention is made either of change between the administration of another Member State and Luxembourg State administration.

### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes.

According to the *Law setting the general regime of State civil servants' remuneration*, Art. 7, previous working periods are taken into account in order to establish seniority at the time of permanent appointment. A difference is made between time passed in State service which is entirely taken into account, and other working time, which is only taken into account for half of the relevant period. At any rate there is a general limit of 12 years for taking into account professional seniority

### 4.2.3. Language requirements

According to the *General status of State civil servants* (Art. 2 (1)), one of the requirements for admission to the State service is to show a knowledge “*adapted to the career level*” of the three languages of Luxembourg.

The mention of a knowledge “*adapted to the career level*” has been introduced by the Law of 18 December 2009. Language requirements should be checked before the participation in selection for access to the civil service. Special language training will be organised for access to the civil service.

For the implementation of this provision, time passed at the service of or at the service of the Crown, of municipal government and of autonomous public bodies as well as time passed in an institution of an EU Member State which is identical or similar to these is

An important issue will be for the Luxembourg authorities that language requirements do not become a way to exclude foreign applicants. Special attention will have to be given to the way in which language will be tested, and to the observance of the proportionality principle.

## 5. Issues for free movement of workers in the public sector

**5.1.** Available information reveals two issues of compliance with EU law.

*First*, concerning posts reserved to nationals, the amendments to the legislation relevant to work in the public sector are in line with the requirements of EU law, but they still need to be enacted by Grand-Ducal Regulation, and practice has to implement the legal changes.

The first draft regulation set up in order to implement the Law of 18 December 2009 has been strongly criticised by the State Council as not being in line with the requirements of Luxembourg law and of EU law.

Monitoring the application of the new rules will be important for Luxembourg authorities, especially in consideration of the important number of non Luxembourg EU citizens established in the country and of the previous hostility of the trade union to opening recruitment in the public sector.

*Second*, the legislation on civil service seems to recognise professional experience and working periods only in access to the civil

service, not for civil servants already in service. Although the legislation does not directly discriminate against non Luxembourg citizens, it might have a greater impact on EU citizens (whether Luxembourg citizens or not) having exercised their right to free movement of workers.

**5.2.** An important issue will be for the Luxembourg authorities that language requirements do not become a way to exclude foreign applicants. Special attention will have to be given to the way in which language will be tested, and to the observance of the proportionality principle.

**5.3.** The lack of statistics on the number of posts reserved to nationals and of the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Luxembourg legislation applicable to employment in the public sector entered into force on 1 January 2010, in order to meet the requirements of EU law, and especially the criteria for the application of Art. 45 (4) TFEU to the recruitment of civil servants.

It was the second legislative reform triggered by the application of Art. 45(4) TFEU

after a first modification of rules in 1999. The 2009 reform was the consequence of an infringement action that had been started by the Commission.

At the beginning of 2010, the main issue is not any more legislative reform but the correct implementation of the new law.

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MAGYARORSZÁG  
HUNGARY

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Hungary became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 1 May 2009.

### 1.2. State form and levels of government

Hungary is a unitary State with two levels of government: 19 counties (*megyék*) and 3 169 municipalities (*városok* and *falu* or *község*)

### 1.3. Official language

There is one official language: Hungarian.

German, which is spoken by about 10% of the population, is officially considered as a minority language.

### 1.4. Statistical data

Hungary has a total population of 10 066 200 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total government	822 300	29,2 %
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Government employment in 2008 (*Based on ILO Laborsta*)

State	255 600	31 %
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County	89 900	11 %
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Local	477 600	58 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Art. 70 of the Constitution guarantees equal access of Hungarian citizens to public offices. Art. 37, 40 and 44B deal with State administration.

Hungarian legislation does not contain any general set of framework regulations for public authorities, the relevant regulations are included in the legislative acts pertaining to the employment and labour relations in question. Of particular relevance are *Act XXIII of 1992 on the legal status of civil servants* and *Act*

*XXXIII of 1992 on the legal status of public employees*. Sectorial laws are applicable to public prosecutors, judges and judiciary employees, law enforcement bodies and civil national security services and the army, as well as the act on higher education.

### 2.2. Public sector employers

The State, the 19 counties and the 3,169 municipalities are public employers. There are

also a number of State and local agencies and offices.

The State employs about 31 %, the counties about 11 % and municipalities about 58 % of the total of public workers.

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies, whose workers are not public servants.

### 2.3 Public sector workers

Workers in the public service are divided into two groups: civil servants and public employees, each of those two main categories is submitted to different legal provisions,, as mentioned under 2.1.

According to Hungarian government information provided to the European Commission, on 31 December 2008 about 500 000

are public employees, i.e. 2/3 of the 750 000 public employees, and thus the civil servants and assimilated may be estimated to 250 000, 1/3 of the total.

### 2.4 Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the Public Servants law is provided for by a possibility of action with ordinary courts.

The Constitutional courts exercises judicial review on the conformity of laws with the constitution.

The Ombudsman may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

Art. 70 of the Constitution guarantees equal access of Hungarian citizens to public offices; this does necessarily entail a limitation of access to employment in the public sector.

According to Art. 7(1) of the *Act on the legal status of civil servants*, Hungarian nationality is, as a rule a requirement to be a civil servant. Art. 7 (8) c) provides for an exception: persons with the right of free movement and residence may also become civil servants if in charge of administrative tasks; non nationals may not be hired in important and confidential administrative positions, or managerial positions as defined in the given legal regulation.

There are also limitations on the basis of nationality for “state leaders” (top positions in central administrative bodies), public prosecutors, judges, law enforcement bodies and civil national security services and the army,

### 3.2. Definition of posts

Posts reserved to Hungarian nationals are defined by law and ministerial decrees on the basis of the notion that administrative tasks may be accomplished by foreigners, except for important and confidential positions, to which some categories of positions are added, such as mentioned under 3.1.

There is no standard legal definition of important and confidential positions. These positions are specified in the relevant sectorial regulations, as well as the organizational and operating rules of the individual institutions.

Numerous ministerial decrees foresee the requirement of Hungarian nationality. Some were recently amended (in 2008) in order to suppress the nationality condition. Usually high level leaders (e.g. director of public financed institutions under the supervision of minister, director of an institution appointed by the local municipal) and heading position of public servants in the field are to be Hungarian nationals.

The following positions are also restricted to Hungarian nationals: positions of security

or asset-guard of archives and public collections (museum); in public institutions, organs under the supervision of the minister of the interior positions where “public order, investigation of crime, border control, catastrophe-management, protection of data and migration interests requires it” (e.g. administrators, security-technician, night watchman, captain and member in security guard with gun, receptionist, gatekeeper, preparation in duty, communication and telephone-technician at National Catastrophe-Management Directorate and all its units including the Training Centre; unless the minister of justice allows exception, prison-guards, and service-men in the prison system; positions at Defence Security Service.

### **3.3 Practice and monitoring**

There seems to be no specific monitoring of the posts reserved to Hungarian nationals and information on the relevant recruitment practice is not available.

### **3.4. Compliance with EU law**

The criteria indicated by the *Act on the Status of civil servants* do not coincide with the criteria for the application of Art. 45(4) TFEU. This is not as such a cause of non-compliance, but the vagueness of the criteria in the relevant legislation does not facilitate analysis, as there is no official comprehensive list of positions reserved to Hungarian nationals.

At first sight, the list indicated under 3.2. seems to include functions for which it would be difficult to find a justification complying with the criteria for the application of Art. 45 (4) TFEU; for instance positions of security or asset-guard of archives and public collections (museum) as well as receptionist, gatekeeper, preparation in duty, communication and telephone-technician at National Catastrophe-Management Directorate and all its units including the Training Centre.

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment would be necessary.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Information on practice is not available. There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

Both for public employees and civil servants, professional experience and seniority may be set as conditions for the occupation of

any given position in calls for applications to positions in public authorities.

The recognition of professional experience is regulated in a general way *Act C of 2001 on the recognition of foreign certificates and diplomas*.

Hungary has transposed directive 2005/36. According to Art. 36 (1) d), if the given activity is deemed to be regulated in Hungary, the applicant is entitled to pursue the professional activity concerned provided that he/she has pursued the given activities for three consecutive years in any Member State, and can prove that prior to the commencement of the activity the applicant did attend such education for the preparation of the performance of the activity that was recognized by the Member State concerned or accepted by any professional organization.

According to *Act XXIII of 1992 on the legal status of civil servants* and *Act XXXIII of 1992 on the legal status of public employees*, service time and professional experience acquired in a foreign country should be recognized.

Institutions of higher education are to evaluate within their own scope of competence whether an employee originating from any Member State of the European Union has adequate professional experience.

Public employees are grouped into so-called salary classes, and within these classes into salary categories which are made on the basis of school qualifications as well as professional qualifications. In principle, professional qualifications acquired abroad should be taken into account for the establishment of the salary category.

#### **4.2.2. Seniority**

As indicated under 4.2.1., seniority may be set as conditions for the occupation of any given position in calls for applications to positions in public authorities. It seems that there are no special conditions for taking seniority acquired abroad into account for the purpose of recruitment.

The duration of services abroad should be taken into for the purpose of establishing the remuneration category. Time periods spent in public employee legal relations by public em-

ployees or in public service legal relations by civil servants are taken into account as one of the elements of the establishment of remuneration. There is no legal provision excluding periods in public service spent abroad. There is no time limitation for taking the service time spent in any public employee or public service legal relation into account.

As a consequence of the legal definition of the relevant time periods, seniority acquired abroad cannot be taken into account as time periods spent in public employee legal relations for the establishment of periods of notice, severance pay, and amount of jubilee bonus.

There is no specific relevant information on practice.

#### **4.2.3. Language requirements**

According to *Act XXIII of 1992 on the legal status of civil servants* and *Act XXXIII of 1992 on the legal status of public employees*, the proper command of Hungarian language is a condition for the occupation of civil servant and judiciary employee positions.

The same applies to education services, with the exception of native-speaker teacher positions in special bilingual institutions, as well as institutions offering minority education and training.

For health services, only public employees who are performing healthcare activities at the armed forces under the control of the minister in charge of judicial and law enforcement bodies, as well as public employees working in the healthcare institutions of the Ministry of Defence and the Hungarian Army are required by law to demonstrate proper command of Hungarian.

There is no specific relevant information on practice. Therefore it is not possible to assess whether the principle of proportionality is duly observed when applying language requirements.

## 5. Issues of compliance with free movement of workers in the public sector

**5.1.** Available information reveals two general issue of compliance with EU law.

*First*, the legal criteria for the definition of posts reserved to Hungarian nationals, e.g. “*important and confidential positions*” allows for far more discretion than the criteria for application Art. 45 (4) TFEU. The absence of reference to EU law may lead to regulations and decisions which would not comply with EU law. Furthermore, at first sight, there are posts reserved to Hungarian citizens which do not seem to comply with the criteria for application Art. 45 (4) TFEU.

*Second*, where professional experience and/or seniority is or may be taken into account for recruitment and salaries, there is no express provision to ensure recognition of

equivalent professional experience and seniority in similar positions in other EU Member States. Here again the absence of reference to EU law, which is not as such an infringement, may lead to regulations and decisions which would not comply with EU law.

**5.2.** There seems to be no monitoring system of practices in recruitment and personnel management in the public sector, in order to detect possible non-compliance which would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## 6. Reforms and Coming Trends

There has not been until now any general legislative reform of public sector employment legislation as a consequence of accession to the EU, but only some recent amendments to the ministerial decrees requiring Hungarian nationality for some positions.

Public sector and administration reform is underway since 2006, and might have consequences on the laws and regulations relevant to free movement of workers in the public sector. For instance, competitive examinations have been introduced for recruitment in public administration as of the beginning of 2010.

\* \* \*



# MALTA

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Malta became a member of the EU on 1 May 2004. There are no transitional arrangements for Malta in the Accession Treaty of 2003 with regard to free movement of workers.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

Malta is a unitary State with two levels of government: the State and 68 municipalities (local councils).

### 1.3. Official language

According to Art. 5 (1) of the Constitution, the national language of Malta is the Maltese. Maltese and English are the official languages of Malta and the languages of administration of justice.

### 1.4. Statistical data

Malta has a total population of 407 800 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	46 900	30,7 %
Public enterprises	4 600	3 %
Total government	42 300	27,7 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Chapter X of the Constitution contains the provisions on the public service, i.e. on the *Public Service Commission* and powers of the Prime minister, and Chapter XA on local councils. There is no provision with respect to Maltese nationality as a condition of access.

The *Public Service Management Code* regulates the status of public servants. It is not a legally binding instrument in itself, but many of its provisions are now embedded in the *Public Administration Act, 2009*.

Labour law applies to employees who are not public servants (see 2.3.)

### 2.2. Public sector employers

The State Ministries and Departments are public employees and are subject to a common framework of rules and regulations.

The wider public sector includes local councils as well as many public corporations, statutory authorities and other entities which are not part of the Public Service.

No statistics on the relative distribution of public workers between State and local government are available. However, as local councils have been introduced only very recently in Malta, it may be assumed that most

of the public sector employees are indeed employed by the State sector.

### 2.3 Public sector workers

The Public Service consists of staff recruited under the authority of the *Public Service Commission* who serve in Ministries and Departments and are subject to a common framework of rules and regulations, assembled in the *Public Service Management Code*.

Teachers in State schools, for instance, are public officers; university lecturers are not. Police officers are also members of the Public Service, but soldiers are not.

According to information provided by the Maltese government to the European Commission, public servants were 28 795 in 2009. This means that they represent about 68 % of the total public sector employees.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. 49 (4) of the *Public Administration Act, 2009*: “The Prime Minister may make regulations to give effect to any of the provisions of this Act and the enforcement thereof, and without prejudice to the generality of the foregoing such regulations may provide for: [...] (f) the recruitment in public administration of nationals of Member States of the European Union other than Malta and nationals of other countries enjoying similar rights in relation to the free movement of workers: Provided that posts involving the exercise of public authority and the safeguarding of the general interests of the State, and particularly those listed herein, may be reserved for Maltese nationals [list of posts, see 3.2.]”

These provisions are in line with paragraph 1.2.3. of the non legally binding *Public Service Management Code*.

For employees in the public sector who are not public servants, there are no conditions of nationality.

### 3.2. Definition of posts

Art. 49 (f) of the *Public Administration Act* is giving a non-binding, non-exhaustive list of posts which “*may be reserved for Maltese nationals*.”

### 2.4. Appeals and remedies

The *Public Service Management Code* provides the possibility to petition the *Public Service Commission*, a Constitutional organ autonomous from the Administration, for applicants for Public Service posts / positions, if they feel that they have been unjustly treated.

In the case of employees of public corporations and authorities beyond the Public Service, recourse exists through the Industrial Tribunal which has jurisdiction to consider cases of discrimination.

Public sector employees may also initiate judicial proceedings if they feel that their fundamental Human Rights have been breached.

In addition, all public sector employees can refer to the Office of the Ombudsman if they feel that they have been treated unfairly.

(i) posts in the Office of the President, the House of Representatives, the Prime Minister’s and Ministers’ Secretariats, the Cabinet Office, and the offices of the Principal Permanent Secretary and of Permanent Secretaries;

(ii) the Judiciary, posts involving the preparation of expert advice in the field of prosecution of offences or lawmaking, and posts entailing responsibility for advisory constitutional bodies;

(iii) posts involving the sovereignty of the State, including diplomatic and foreign representation;

(iv) posts in the Office of the Prime Minister and the Ministries of Finance, Justice, Home Affairs and Foreign Affairs;

(v) posts within departments charged with the protection of the economic interests of the State, including tax authorities;

(vi) positions in the Senior Executive Service;

(vii) posts in the disciplined forces and offices responsible for defence matters; and

(viii) posts in the security services and in the field of civil protection and defence.”

The approach taken by the Public Service of Malta is to apply a Maltese nationality restriction to posts on a case-by-case basis in the

light of Art. 49(f) of the Public Administration Act cited above. Nationality restrictions are adopted by exception, and a number of EU citizens as well as third country nationals are already in the employ of the Public Service.

There is no legislation or regulation reserving access to posts of captains of vessels under Maltese flag to nationals.

### **3.3 Practice and monitoring**

The application of a nationality requirement to positions in the Public Service is determined by the Principal Permanent Secretary (head of the Public Service), possibly following representations by the Permanent Secretary of the ministry in which a particular post is located. Decisions are based within the

framework indicated under 3.2.. No additional special procedures are in place or envisaged.

The number of public service posts reserved to Maltese nationals is assessed by the Ministry of Social Policy as 2 800, i.e. about 10% of the Public Service positions, 1,7 % of the total labour force in Malta. About 4 200 non Maltese EU citizens (2, 35 % of the total labour force) are working in Malta.

### **3.4. Compliance with EU law**

The wording of the *Public Administration Act*, 2009, which consolidate the administrative practice embedded in the *Public Service Management Code*, seem to be complying with EU law, and so does apparently the practice, on the basis of information provided for this report.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and the non-legally binding *Public Service Management Code* mentioned under 2.1 are applicable for access and employment conditions.

#### **4.1.2. Practice**

The *Public Service Commission*, is responsible for the appointment, confirmation, emplace-

ment on the permanent establishment, promotion, transfer, secondment, retirement and exercise of disciplinary control, including dismissal or compulsory retirement, of public officers. It is thus able to monitor the free movement of workers for public servants as far as recruitment is concerned.

Detailed information on employment in the public sector outside of the Public Service and in local councils practice is not available.

### **4.2. Special requirements for access to employment and working condition**

#### **4.2.1. Professional experience**

In the Maltese Public Service it is normal practice to distinguish between professional experience and service in the grade. Professional experience is a core eligibility requirement and/or selection criterion which is assessed by the selection board at the stage of interview. In either case, according to the *Public Service Commission*, credit is given for

relevant professional experience regardless of the country in which it has been obtained.

The selection criteria are determined in consultation with the *Public Service Commission* before the calls are issued. Such a system is meant to ensure that selection criteria are not tweaked to favour or disadvantage any of the applicants. This system has been in place for over 40 years.

The relevance of professional experience is not tied to experience gained with a specific employer.

#### 4.2.2. Seniority

Seniority (length of service) determines progression to higher points within the same salary scale and may also govern eligibility for promotion to higher grades.

In various career streams, promotion to a higher grade may be dependent upon accumulating a certain number of years of service in a particular grade.

Salary scales and working conditions are clearly established in a collective agreement signed with all the unions representing Public service employees. Service in the grade usually also determines progression to a higher point within the salary scale applying to each grade.

Seniority only applies in the case of serving public officers. It is only an eligibility criterion in the case of automatic progressions and/or eligibility criteria as determined in the particular sectorial agreements. This only applies internally and no time limit is factored in when evaluating experience claimed.

In the case of external recruitment, seniority is taken into account without differentiating eligible applicants, regardless of the nature of the previous employment. There are no requirements for professional experience or

length of service to be continuous. On the contrary, for serving public officers, a career break of up to one year in the four year period immediately preceding promotion to a higher grade or progression to a higher salary scale is automatically reckoned as active service. The private sector is also taken into account. No difference is made between professional experience in Malta and professional experience abroad.

These practices, as codified in the *Public Service Management Code* should enable to avoid that computing length of service becomes an obstacle to free movement in the EU.

#### 4.2.3. Language requirements

According to paragraph 1.2.3.4 (ii) of the *Public Service Management Code*: “*applicants have to be conversant in both official languages, namely Maltese and English, unless exceptional circumstances warrant that either of the official languages is waived to the satisfaction of MPO [the Management and Personnel Office within the Office of the Prime Minister]*”.

A good working knowledge of Maltese is required to communicate with and serve the public. There is no specific information on practice that enables to assess to what extent the principle of proportionality is applied with respect to the knowledge of languages.

## 5. Issues of compliance with free movement of workers in the public sector

**5.1.** On the basis of information available to the author of this report, no issue of compliance with EU law seems to appear.

The question of proportionality in the application of the requirement to know official languages needs some attention on behalf of the relevant authorities.

**5.2.** The *Public Service Commission*, which is an independent authority, has the necessary powers and means to apply the relevant rules and principles of EU law and monitor its application in the Public Service.

Practice in the rest of the public sector – outside of the Public service, would also need to be monitored by Maltese authorities.

## 6. Reforms and Coming Trends

There has not been until now any specific legislative reform of public sector employ-

ment legislation as a consequence of accession to the EU.

The recent adoption (2009) of a *Public Administration Act* brings greater clarity on the binding character of rules that were already

applied and set down in the non legally binding *Public Service Management Code*.

\* \* \*



NEDERLAND  
**THE NETHERLANDS**

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## 1. General data

### 1.1. Date of applicability of EU law

The Netherlands are a founding Member State of the European Communities.

EU law provisions on free movement of workers therefore apply since the entry into force of the relevant legislation and the direct applicability of the relevant treaty provisions, i.e. since the end of the 1960s-beginning of 1970s.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

The Netherlands are a unitary State with three levels of government: the Kingdom, 12 provinces (*provincies*) and 467 municipalities (*Gemeenten*).

Furthermore the Caribbean Aruba, Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten are part of the Kingdom of the

Netherlands, but not integrated in the EU internal market.

### 1.3. Official language

The official language of the Netherlands is Dutch. Furthermore, Frisian is an administrative language in the province of Friesland,

### 1.4. Statistical data

The Netherlands have a total population of 16 358 000 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	1 821 600	27 %
Public enterprises	751 700	1,1 %
Total government	1 069 900	15,8 %

Government employment in 2006 (*Based on ILO Laborsta*)

<i>State</i>	269 700	25,2 %
<i>Local</i>	800 200	74,8 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Art. 3 of the Constitution (*Basic law - Grondwet*) provides that “*All Dutch nationals shall be equally eligible for appointment to public service*”. According to Art. 109, the legal status

of civil servants as well as rules regarding employment protection and co-determination for civil servants have to be laid down by Act of Parliament. *Chapter 6* of the Constitution is

dedicated to Provinces, Municipalities and other public bodies.

The *Law on Civil Servants (Ambtenarenwet)*, 1929 and the *General regulation of Kingdom civil servants (Algemeen Rijksambtenarenreglement)*, 1931, which have been amended several times, lay down the general rules applicable to civil servants. They are complemented by a number of sector specific laws and regulations, as well as by collective agreements for civil servants of the provinces and municipalities.

## 2.2. Public sector employers

The Kingdom, the 12 provinces and 467 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers. The relative proportion of civil servants is of about 25 % for the State and 75 % for provinces and municipalities.

Public schools and hospitals are also public employers.

## 2.3 Public sector workers

State (Kingdom) employees have as a rule the status of civil servant. Those, of Provinces and Municipalities, as well as of autonomous public bodies are submitted to similar rules. Employees of public enterprises are submitted to general labour law. Although the legal sources are different, there are no substantial differences in content between civil service rules and general labour law.

The Dutch civil service is based upon appointment under the civil service regulations, but it is typically a post based system, not a career system.

## 2.4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative courts. Matters relating to contract under labour law are submitted to civil courts.

There is no constitutional court, and other courts may not review the constitutionality of laws.

The Ombudsman may handle complaints with regard to public administration. Ombudsmen of the Regions and Communities may handle complaints with regard to federal administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions. Since its institution in 1982, the Ombudsman has been dealing with complaints about recruitment in the civil service, which at that time did not come under judicial review.

The *General Equal Treatment Law (Algemene wet gelijke behandeling)* provides that anyone who faces discrimination on the basis of a.o. nationality can submit a complaint to the *Commission for Equal Treatment (Commissie Gelijke Behandeling)*.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

Art. 3 of the Constitution provides that “*All Dutch nationals shall be equally eligible for appointment to public service*”. However, this is not interpreted as an impediment for access of foreigners to the civil service.

Since a law of 1988, the principle is that access to the civil service is not subject to nationality conditions, unless explicitly stated otherwise by law.

For some functions, Dutch nationality is required on the basis of a specific sectorial legal provision, mentioning the relevant posts.

## 3.2. Definition of posts

The definition of posts reserved to Dutch nationals is made by the legislator without a general indication of the criteria used. This system was presented in 1988 as linked to the achievement of the European Community's internal market, but the opening went beyond

citizens of other EEC Member States, making no difference between categories of foreigners. There is no reference to the criteria of application of Art. 45(4) TFEU.

Dutch nationality is required for the following categories of posts: posts in the judiciary; functions with the police; military posts with the exception of temporary appointments for posts which cannot be fulfilled by already appointed military personnel, e.g. translators abroad; functions in diplomatic service; some high State offices, such as the National Ombudsman and members of the State Council.

As a general rule for civil servants, according to Art. 125e *Civil Service Act*, only Dutch citizens may be appointed in “*functions of confidence*”, unless the interest of the service necessitates that a foreigner be appointed.

There is no legislation or regulation reserving access to posts of captains of vessels under Netherlands flag to nationals.

### **3.3 Practice and monitoring**

The Dutch system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system).

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are no general rules on e.g. professional experience and seniority.

There is no specific system of monitoring of practices with regard to recruitment of civil servants. So far there have been no procedures regarding EU-nationals with the *Commission for Equal Treatment* for employment in the public sector. Generally speaking, there are only very few appeals on recruitment in the civil service.

### **3.4. Compliance with EU law**

The criteria indicated by the *Civil Service Act*, i.e. “*functions of confidence*”, do not coincide with the criteria for the application of Art. 45(4) TFEU. This is not as such a cause of non-compliance, especially as exceptions in the interest of the service are possible. However the vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of “*functions of confidence*”.

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment would be necessary in order to permit a precise assessment of practice.

#### **4.1.2. Practice**

Government departments and public bodies have their own complementary rules or practices.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

## 4.2. Conditions for employment and access to advantages and benefits linked to employment

### 4.2.1. Professional experience

The Dutch system of public employment is based upon open recruitment on a post by post basis. Employment is, as a rule, based on public notice of a vacant position (open recruitment system). Professional experience may play a role, especially as candidates have usually to present recommendations from previous employers. There are no rules or general practices. No information was available to the author of the report in order to know whether experience abroad is treated in the same way as experience in the Netherlands.

### 4.2.2. Seniority

As mentioned under 4.2.2., the Dutch system of public employment is based upon open recruitment on a post by post basis. Promotion depends upon the individual employee who has always an option to decide to give notice in the current job and apply for another post in the public sector.

Seniority is taken into account for remuneration purposes, including salary increments.

No information was available to the author of the report as to whether and how service time with different employers, and especially with employers fulfilling functions equivalent to the Dutch State public service are taken into account for establishing the salary level or salary increments.

### 4.2.3. Language requirements

There are no explicit regulations concerning the knowledge of the Dutch language for posts in the public sector.

In practice, a good knowledge of the Dutch language will be required for most posts in the public sector.

No information is available in order to assess whether the principle of proportionality is correctly applied to language requirements.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

*First*, the criteria indicated by the *Civil Service Act* in order to reserve posts to nationals, i.e. “*functions of confidence*”, does not coincide with the criteria for the application of Art. 45(4) TFEU. Vagueness of the criteria used in the legislation reserving posts to Dutch nationals does not facilitate analysis, especially as there is no official comprehensive list of the relevant positions involving the exercise of “*functions of confidence*”.

*Second*, the absence of legal provisions on the recognition of seniority acquired in other EU Member States may generate obstacles to the free movement of EU citizens, including

Dutch nationals who make use of their right to free movement.

5.2. A further point to mention is the absence of a central point for the monitoring of practice relevant to the free movement of workers in the public sector.

5.3. More generally, the lack of statistics on the number of posts reserved to nationals and on the number of applications of non nationals to posts in the public service makes it difficult to assess whether there are in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

As indicated under 3.4, an important reform of Dutch regulations applicable to employment in the public sector took place in 1988, in order to open up the civil service to foreigners. This was made possible from a legal point of view by the wording of Art 1

and 5 of the new constitutional text adopted in 1982.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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ÖSTERREICH  
**AUSTRIA**

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## 1. General data

### 1.1. Date of applicability of EU law

Austria joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

### 1.2. State form and levels of government

Austria is a federal State with three levels of government: the Federation, the 9 *Länder* and 2 358 municipalities (*Gemeinden*). The capital city Vienna is a *Land* which also exercises the usual competences of a municipality.

### 1.3 Language

The official language of Austria is German. Furthermore, Croatian, Hungarian and Slovene are minority languages and administrative languages in the relevant areas.

### 1.4. Statistical data

Austria has a total population of 8 298 900 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	476 900	11,8 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The Constitution contains provisions applicable to public employment. There is no clause on Austrian citizenship as a condition for access to public employment.

The *Law on civil service (Beamtendienstrechtsgesetz)*, 1979 and the law on contractual employees (*Vertragsbedienstetengesetz*) 1948 contain the provisions applicable to respectively civil servants and public employees. They are supplemented by specific laws e.g. on recruitment *Act on the Advertisement of Vacancies (Aus-schreibungsgesetz)* 1989 as well as sectorial laws, i.e. the *Law on teachers of the Länder (Landeslehrer-Dienstrechtsgesetz)* 1984 and of teachers of agri-

cultural and forestry *Land- und forstwirtschaftliches Landeslehrer-Dienstrechtsgesetz* 1985. These are all federal laws, applicable at all levels of government.

### 2.2. Public sector employers

The Federation, the 9 *Länder* and 2 358 municipalities are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers. Public schools and hospitals are also public employers.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a

majority of public capital or which are otherwise controlled by government.

According to information provided by the Austrian government to the European Commission, in 2009 public sector employment represents 470 000, i.e. 12,5 % of the total labour force (4,09 million). The Federation employed approximately 132 700 (28 %), the *Länder* about 141 000 (30 %), municipalities about 74 000 (15,8 %).

### 2.3 Public sector workers

Persons in the public service are divided into two groups: civil servants (*Beamte*) and contractual employees (*Vertragsbediensteten*).

Whereas in theory functions relating to the exercise of public authority should not be performed by contractual employees, there is no systematic rationale in practice for the division of functions and posts between civil servants and contractual employees.

The main difference in status between civil servants and contractual employees is that civil servants are employed on career terms.

According to information provided by the Austrian government civil servants represent about 61,2 % of the total, contractual staff 38,8 %.

### 2.4 Appeals and remedies

Judicial review on decisions of public authorities – including those relating to the employment of civil servants – is provided for by actions administrative courts. Matters relating to contract are submitted to labour courts.

Infringement to fundamental rights (including professional freedom) by public authorities and the legislator may be appealed to the *Constitutional Court (Verfassungsgerichtshof Österreichs)*.

The Austrian Ombudsman Board (*Volksanwaltschaft*) may handle complaints with regard public administration. The *Länder* of Vorarlberg and Tirol have their own Ombudsman boards. Ombudsman boards may make recommendations to the relevant public authorities but have no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. 4 of the *Civil servants law* 1979, Austrian nationality or the nationality of a country whose nationals Austria has to grant the same rights due to a treaty in the context of the European integration, is required to access posts in the civil service, with the exception of posts defined under Art. 42. The latter are defined as “*positions requiring a special loyalty link to Austria that can only be expected from Austrian nationals*” which are “*in particular, those which 1. involve a direct or indirect participation in the exercise of public authority and 2. the protection of the general interests of the State*”.

Similar provisions are included in the *Law on teachers of the Länder* (and of teachers of agricultural and forestry. Those provisions also apply to contractual teachers.

### 3.2. Definition of posts

Posts reserved for Austrian nationals are directly or indirectly linked to official representation or the defence of the general interests of the State: the police force, the military, the diplomatic service, justice, official representation.

The final decision is made on a case by case basis. Decisions on the posts that are to be reserved to Austrian nationals is made on a case by case basis. There is neither an exhaustive, nor an exemplary list of public sector posts reserved for nationals.

The notice of competition for the post which is published in the Official Journal or the “*Wiener Zeitung*” and additionally on the website of the Federal Chancellery indicates whether Austrian nationality is a condition for access.

Examples of posts for which Austrian nationality would be required are: Director Gen-

eral in the Federal Chancellery-Constitutional Service; Head of Law Office of the Republic of Austria; Director in Federal Chancellery responsible for staff regulations and general legislative affairs; Government Tax Auditor in the Federal Ministry of Finance; Legal Expert in the Federal Ministry of Transport, Innovation and Technology (participation in formulation of draft laws); Posts in the Parliamentary Directorate.

Although having no access to open sea, Austria indeed has a fleet of merchant ships under its flag. Art. 27 par. 4, of the Law on maritime transport (*Seeschiffahrtsgesetz*) which permitted to require Austrian nationality for the crew has been abolished in 2005.

### 3.3 Practice and monitoring

There are no special procedures or bodies assessing the nationality conditions. Due to the structure of the public service and the principle of “ministerial sovereignty”, the proper application of the rules governing the nationality condition and the exemptions

thereto lie within the final responsibility of each minister.

There are no statistics on employment of non nationals in public administrations, which could give indications about the effects of administrative practice.

### 3.4. Compliance with EU law

Art. 42 of the *Civil servants law 1979* has clearly been worded in order to comply with the criteria for the application of Art. 45 (4) TFEU: the criteria are worded in the same way as the case law of the ECJ. Interestingly the law also mentions that “*positions requiring a special loyalty link to Austria that can only be expected from Austrian nationals*”, as was indicated by the ECJ in *Case 149/79 Commission v Belgium*.

The absence of a comprehensive list of posts reserved to Austrian nationals makes it difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions.

There are also regulations on remuneration and pensions, as well as for specific sectors.

#### 4.1.2. Practice

As mentioned under 3.3 there are no special procedures or bodies assessing the nationality conditions. The proper application of the rules governing the nationality condition and the exemptions thereto lies within the final responsibility of each minister.

### 4.2. Special requirements for access to employment and working conditions

#### 4.2.1. Professional experience

A distinction is made between seniority and professional experience: recognition of both seniority and professional experience has financial (remuneration) but no grading effects; there is no recognition of seniority and

only exceptional recognition of professional experience of previous services in the private sector (as regards determining salaries).

Professional experience can play a role in the recruitment procedure: for example as an additional merit point it can place the candi-

date in a higher position on the shortlist in the recruitment procedure of teachers. In other cases it may influence the candidate's suitability and qualification based on the requirements for the individual post.

Recognition of professional experience is carried out by the human resources department of the relevant authority.

#### **4.2.2. Seniority**

As indicated under 4.2.2, a distinction is made between seniority and professional experience.

When workers move within the public service, prior periods of employment in the public service in Austria are taken into account fully and automatically when determining salaries ('seniority'); the content of the prior post(s) or a distinction between full-time/part-time does not matter, nor does the status as a civil servant or an employee.

Since the accession of Austria to the European Union the same rules have applied to the recognition of seniority acquired by EU-EEA nationals in comparable institutions in the public sector of EU- or EEA Member States as well as Switzerland.

In the federal administration prior professional experience outside the public service is taken into account for up to 2, 3 or 5 years depending on the level of post only if certain conditions are fulfilled: the recognition must

be in the public interest and the prior professional experience must be of significant relevance for the post concerned. Otherwise the professional experience is taken into account only partly (50% up to a maximum of 3 years, later on 1,5 years).

Recognition of professional experience is carried out by the human resources department of the relevant authority.

As a consequence of the judgement of the ECJ in the *Köbler case* C-224/01, seniority acquired by a university professor at institutions of another Member State comparable to Austrian universities to determine the grant of a special length-of-service increment has been recognized in 2003 through an amendment to Art. 50a of the Law on remunerations (*Gehaltsgesetz 1956*). In December 2008, the Austrian Administrative Court started a new preliminary procedure as regards the benefits for university professors ECJ (C-542/08); here the issue at stake was the impact of a procedural rule which impeded the application of the *Köbler* jurisprudence prior to the judgement of the ECJ in 2003.

#### **4.2.3. Language requirements**

Candidates to employment in the public service have to prove a certain level of knowledge of the German language depending on the level and the content of the post applied for.

## **5. Issues for free movement of workers in the public sector**

**5.1.** On the basis of information available to the author of this report, no specific potential issues of compliance with EU law on free movement of workers in the public sector emerge.

**5.2.** A point to mention however is the fact that reliance on the principle of "ministerial sovereignty" seems to impede a general monitoring of recruitment and management practices in public authorities.

The absence of a comprehensive list of posts reserved to Austrian nationals makes it

difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

**5.3.** More generally, the lack of statistics on the number of posts reserved to nationals, and of the number of applications of non-nationals to posts in the public service, makes it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

The Austrian legislation had been adapted prior to Austria's accession to the EU to the requirement of EU law as far as posts reserved to nationals are concerned. Indeed, those rules already applied in the framework

of the association agreement of the European Community with EFTA Countries.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

\* \* \*



POLSKA  
**POLAND**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Poland became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 1 May 2007.

### 1.2. State form and levels of government

Poland is a unitary State with four levels of government: the State, 16 regions (*voivodships*), 373 districts (*powiaty*) and 2 500 municipalities (*gmina*).

### 1.3. Official language

The official language of Poland is Polish.

### 1.4. Statistical data

Poland has a total population of 38 125 500 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total public sector	3 619 800	26,3 %
Public enterprises	1 977 100	14,3 %
Total government	1 642 700	11,9 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 60 of the Constitution “*Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.*” Art. 153 further provides that “*a corps (korpus) of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations*”; it also provides that “*the Prime Minister shall be the superior*” of this corps.

*Act of 21 November 2008 on the Civil Service* (Dz. U. nr 227 pos. 1505) regulates the status of civil servants. A series of other laws are

relevant for the definition of posts which require Polish nationality.

The Polish Labour Code and the laws on the Polish education system (i.e. the *Teachers' Charter and the Act on the Education System*) apply to teachers.

### 2.2. Public sector employers

The State, the 16 regions (*voivodships*), 373 districts (*powiaty*) and 2 500 municipalities (*gmina*) are all public employers. There are also a number of State and local agencies and offices.

According to EUPAN – *Structure of the civil and public services*, in 2004, total employment in the public administration was 358 205, which included 162 279 for State administration (45,4 %) and 194 941 for local self-government administration (54,6 %).

The public sector furthermore includes State provided medical and educational services, national and communication services, nor para-statal authorities and agencies.

### 2.3 Public sector workers

As indicated under Art. 2.1. the legal status of Civil Servants is laid down in the *Law of 21 November 2008 on the Civil Service*, which applies both to civil servants i.e. a “*person employed on the basis of an appointment*” and to “*civil service employee*, i.e. “*any person employed under an employment contract*”.

According to Art. 2 of the *Law on the Civil Service*, the civil service is defined as covering the positions in the offices of the central government; of regional government administration which are subordinate to ministers or to central government bodies; inspectorates and other organisational units of the heads of “*consolidated services*” and district (*powiat*) services”; the *Office for the Registration of Medicinal Products, Medical Devices and Biocidal Products* and the *Seed Production Office (BNL)*; Border and District Veterinary Officers and their Deputies. According to Art. 2.2.4, specific rules apply to the foreign service.

According to EUPAN – *Structure of the civil and public services*, in 2005 there were some 106 479 members of the Civil Service Corps, divided into two categories: civil service employees (102 880 –96,62%) and civil servants *strict sensu* (3 599 – 3,38%).

Local government employees are submitted to *Act of 21 Nov. 2008 on self-government workers* (Journal of Laws 2008, N° 223, poz.1458)

Other public employees, including teachers are submitted to labour law.

No recent statistics indicating the number of civil servants and of public sector employees were available to the author of this report.

### 2.4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action with administrative courts, but litigation between civil servants or civil service employees and their employers are of the competence of labour courts.

The Constitutional court exercises judicial review of legislation.

The Ombudsman (*Rzecznik Praw Obywatelskich*) may handle complaints with regard to public administration. He / she may make recommendations to the relevant public authorities but has no power to make binding decisions.

## 3. Posts reserved to nationals

### 3.1. Relevant laws and regulations

According to Art. 60 of the Constitution “*Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.*” This does not necessarily mean that foreigners cannot access the public service.

According to Art. 4 of the *Law on the Civil Service* “*A person may be employed in the civil service if that person is a Polish citizen, subject to Art. 5*”. Art. 5.2., which has been introduced in 2008 and entered into force on 24 March 2009

provides that “*A person without Polish citizenship may be appointed to a position which does not entail direct or indirect participation in the exercise of public authority or functions protecting the general interests of the State if that person has a knowledge of the Polish language as attested by one of the documents referred to in provisions issued pursuant to paragraph 3*”

Similar provisions are contained in the *Act of 21 Nov. 2008 on self-government workers*. Heads of self-government offices indicate the vacancies for which, beside Polish citizens, citizens of the European Union and citizens of the other countries may apply.

### **3.2. Definition of posts**

Posts reserved to Polish nationals are to be determined, according to Art. 5.1. of the *Law on the Civil Service*, by the Director general of the relevant office, who “*when publishing job vacancies in his office, [...] shall, in agreement with the Head of the Civil Service, indicate those vacancies for which not only Polish citizens but also citizens of the European Union and of other countries who, on the basis of international agreements and the provisions of law, are entitled to take up employment in the Republic of Poland, may apply*”.

Polish nationality is required to take up posts – not necessarily employment – of the supreme authorities of the State, ombudsmen, heads of centralised government agencies, regional and local representatives of the central government, regional and local self-governments officials, judges, prosecutors, inspectors of public control bodies, public servants, uniformed services staff and some posts in other bodies.

There is no legislation or regulation reserving access to posts of captains of vessels under Netherlands flag to nationals.

### **3.3 Practice and monitoring**

As the new rules concerning employment in the civil service came into force on 24 March 2009, there is not yet information available on administrative practice.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Updated information on practice for the civil service is not available when it comes to employment of non nationals, as the relevant

The Head of Civil Service may apply to the Prime Minister for the exercise of control. The Civil Service Council is entitled to evaluate qualification procedures in the Civil Service. If infringements in the course of qualification procedures are disclosed, the Council can approach the Head of Civil Service with a motion to hold another qualification procedure.

### **3.4. Compliance with EU law**

With the amendments introduced on 21 November 2008 to the *Law on the Civil Service*, a first step has been accomplished in order to comply with the requirement of EU law on free movement of workers: as a principle, employment in the public service is not any more reserved to Polish nationals, and the law refers to the criteria for the application of Art. 45(4) TFEU.

The procedure laid down in the law, which provides for a decision at the moment of publishing job vacancies, should result in a post by post analysis of the functions which have to be exercised. Practice has yet to be established and monitored before one can assess its compliance with EU law.

Furthermore, monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment will be necessary.

legislation is only applicable since 24 March 2009. Information on practice with teachers is available. There is no information either on practice for Polish nationals who would have made use of their right to free movement of workers.

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting infor-

mation about the implementation of free

movement of workers in the public sector.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

There are no general obligatory conditions of professional experience and seniority to be employed in the Civil Service.

Requirements in general are set for the certain position on the basis of job description. Senior positions in the Civil Service may be held by a person who has at least six years of professional experience, including a specific number years of experience on a managerial position in the public finance sector units for a number of specific positions.

Professional experience in the private sector is also taken into account for certain positions (e.g. senior positions in the Civil Service).

For certain employee's rights and benefits professional experience in the civil service, public administration or public finance sector is also required.

The decision on the professional experience required for a given position is estimated by the Director General of the relevant service.

There are no specific rules for the recognition of professional experience acquired out of Poland, and especially for the recognition of experience in institutions equivalent of the relevant Polish institutions.

However, Art. 86 of the *Act on promotion of employment and labour institutions* provides that it is possible to document previous employment abroad in order to gain special employment rights (such as a full time leave, additional remuneration, etc...). The regulation allows demonstrating periods of employment with various documents, not only by employment certificate. Therefore any certificates issued by the former employer or any other documents proving periods of employment abroad shall be deemed acceptable.

Art. 38 (5) of the *Act on self-government employees* states that in order to gain employment

benefits such as remuneration for a long employment, jubilee awards, one-time severance pay as a result of retirement or pension, all periods of employment shall be taken into account and that these rules shall apply to both Polish and EU citizens.

In the education service, the procedure of recognition of professional qualifications acquired in one of the Member States of the European Union is detailed in the *Act of 18th March 2008 on the Rules of Recognition of Professional Qualifications acquired in the EU Member States*. The recognition procedure is initiated on a motion by the applicant.

### 4.2.2. Seniority

Seniority is taken into account for remuneration and career purposes in the same way as professional experience (see 4.2.2)

### 4.2.3. Language requirements

According to Art. 5 of to the *Act of 21 November 2008 on Civil Service*, a non-Polish national may be employed on the positions mentioned under 3.1 and 3.2 provided that his/her command of the Polish language is certified with a document specified in regulations issued by the Prime Minister. According to the law the regulation has to take into consideration the type of work performed by the Civil Service Corps members and the need to ensure an appropriate level of performance of their tasks.

A regulation on documents certifying command of Polish language was to be published in April 2009, but was not accessible to the author of this report. There is no specific information that may enable to assess whether the principle of proportionality is fully taken into account when applying language requirements.

## **5. Issues of compliance with free movement of workers in the public sector**

**5.1.** Available information reveals one possible issue of compliance with EU law.

Where professional experience and/or seniority is or may be taken into account for recruitment, promotion and salaries in the public service there is no specific provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States. This is not as such a breach of EU law, but the absence of legislative or regulatory provisions should be compensated by appropriate information of the heads of public offices who are in charge of recruitment and management of human resources. It should be pointed out that mutual recognition not only applies to non nationals,

but also to Polish citizens who have made use of their right to free movement.

**5.2.** There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which might help Polish authorities in detecting possible non-compliance that would be due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## **6. Reforms and Coming Trends**

As indicated under 3.4, an important reform of Polish legislation applicable to employment in the public sector took place in 2008, in order to try and meet the requirements of EU law as far as opening posts in the public service are concerned.

At the beginning of 2010 there seems to be no other reform on the agenda that might impact on the free movement of workers in the public sector.

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# PORTUGAL

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Portugal joined the European Communities on 1 January 1986. A transition period of seven years was foreseen for free movement of workers, which was then reduced to six years.

EU law provisions on free movement of workers and the ECJ case law on the public sector fully apply since 1 January 1992.

### 1.2. State form and levels of government

Portugal is a unitary State with three levels of government: the State, 18 districts (*distritos*) and 308 municipalities (*municípios*).

The Azores and Madeira archipelagos are autonomous regions with legislative powers.

### 1.3. Official language

The official language of Portugal is Portuguese.

### 1.4. Statistical data

Portugal has a total population of 10 599 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	677 900	13,1 %
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Government employment in 2006 (*Based on ILO Laborsta*)

State	532 500	78,5 %
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Regions	8 000	1,2 %
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Municipalities	137 400	20,3 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Art. 15 of the Constitution is devoted to “*Foreigners, stateless persons, and European Citizens*”; Art. 47 to the “*freedom to chose a profession and to join public administration*”. Art. 199 contains provisions on “*administrative responsibilities*” of government. Title IX is devoted to public administration – including Art. 269 on the rules governing public administration staff –, whereas title VIII is devoted to local government and title VII to the two autonomous regions.

Civil service legislation and regulations include several acts dealing with specific subject

matters. Especially relevant to the issues of free movement of workers in the public sector are e.g. *Law 12-A/2008, of 27 February 2008*, which establishes the general regime of access to positions in the public sector, *Law 23/2004, of 22 June 2004*, establishing the legal regime of the individual labour contract of the Public Service, which are complemented by enacting regulations, as well as sector specific or post specific laws and regulations.

## 2. 2. Public sector employers

The State, the 18 districts and 308 municipalities as well as the two Autonomous regions of the Azores and Madeira are all public employers. All these governments also have created autonomous public bodies, which in turn are public employers in the strict sense.

According to *EUPAN – Structure of the civil and public services*, the total number of public administration workers was of 360 067 for direct State administration and 200 756 for indirect State administration (thus 78,3 % of the whole of public administration workers for State administration), 15 166 for the autonomous regional administration of the Azores and 18 638 (thus 4,7 % for regional administration) and 116 066 for local government (16,2 %).

Recruitment for the general State administration is centralised with a *Standing Selection Committee (Comisión Permanente de Selección)*. For posts in other administration groups or categories a special temporary selection board is created for this purpose.

The public sector in a broad sense also includes public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

## 2.3 Public sector workers

Civil servants and agents of the State, of Autonomous Regions, districts and municipalities are submitted to the same legal rules, with some minor adaptations for regional and local government officers.

In accordance with the new system of employment relationships, which entered into force in January 2009, careers and salaries of public sector workers relating to the armed forces, State representation abroad, security services, criminal investigation, the police force and inspection is carried out by agents

employed by appointment (as opposed to public sector employment contract).

Other positions should be submitted to public sector contract.

According to information provided by the Portuguese government to the European Commission, for 2008 the number of Civil servants and agents of central government was of 465 122 as opposed to 57 539 with a work contract and 5 590 with a contract for provision of services. Numbers including local government are only available for 2005: 150 008 civil servants and agents, 15 848 work contracts and 3 617 contracts for the provision of services. These figures are not any more relevant as, since January 2009, the majority of public sector workers in Portugal are employed under contract.

Employees of public enterprises are submitted to general labour law.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities is provided for by a possibility of action in annulment with administrative courts. Matters relating to contract are submitted to ordinary courts.

The Constitutional Court may also be appealed to in order to solve conflicts of competence between the State and Autonomous Communities, as well as verifying compliance of State and Autonomous legislation with the Constitution.

The Ombudsman (*Provedor de Justiça*) protects fundamental rights and civil liberties against encroachments by public administration. He ensures that Administration decides in time and form to requests and appeals it may have received. He may appeal to the Constitutional court on cases submitted to him.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

According to Art. 15(1) of the Constitution, foreigners and stateless persons who are

staying or residing in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens. Art. 15(2) however pro-

vides that equal rights for foreigners do not apply to “*the performance of activities in the public sector that are not predominantly technical in nature*”. This provision has been interpreted not according to how technical the activities are performed, but according to the prevalence of the authoritative or technical aspects of the post.

*Law 12-A/2008, of 27 February 2008*, establishes the general regime of access to positions in the public sector. According to its Art. 8, a general requirement for admission to open competitions and recruitment to public sector posts is Portuguese nationality, except when exempted by the Constitution, specific legislation or international convention.

The nationality requirement must be interpreted therefore in the sense that applies exclusively to public posts implying the exercise of authority or sovereignty powers.

There is no reference in legislation or regulations to the specific criteria for the application of Art. 45 (4) TFEU.

*Law 23/2004, of 22 June 2004*, establishing the legal regime of the individual labour contract of the Public Service prohibits “*activities that involve the direct exercise of authority powers or the exercise of sovereignty powers*” from being the subject of a labour contract in the ambit of the direct Administration of the State.

### 3.2. Definition of posts

On the basis of sector specific laws and regulations the following posts are considered to be reserved to Portuguese citizens: Judges and Public Prosecutors, the Diplomatic Corps (Art. 10 of Decree-Law 40-A/98), Police, Armed Forces and Tax Administration.

For other posts, each public authority acting as an employer has to apply the interpretation of the law on access to the public sector in the light of Art. 15 (2) of the Constitution as mentioned under 3.2. It therefore may be deduced that the definition of posts is the consequence of a post by post analysis based on emerging issues, not on a systematic screening.

Posts of captains on ships under Portuguese flag used to be reserved to Portuguese nationals, but Art. 61.2 of *Legislative decree n°*

*280/2001* on professional activity of maritime agents and ships crews has been amended in order to open them up to EU citizens.

### 3.3 Practice and monitoring

Acts governing access to certain public sector careers or announcements of open competitions frequently mention that applicants may be nationals of a Member State of the EU. This is the case, for example, of Art. 22(1)(a) of Decree-Law 139-A/90 (*Career Statutes for nursery school, teachers for primary and secondary school levels*), which expressly foresees EU citizens’ access to the teaching profession in State schools.

In cases where Portuguese legislation foreseeing specific public competitions does not mention the requirement of nationality of the applicants, it should be interpreted as opening the competition to both Portuguese and EU citizens.

Each public service or body has to apply the existing legislation to the cases submitted internally for its consideration in exactly the same way as for Portuguese nationals. In situations where there are doubts as to the correct interpretation/application of the law, however, the Portuguese *Solvit* centre asks for assistance from the *Directorate-General for Public Administration and Public Sector Employment*.

There is no information available about the practice used in assessing what are activities involving the direct exercised of authority powers or the exercise of sovereignty powers.

### 3.4. Compliance with EU law

The Constitutional and legislative criteria for reserving posts in public administration do not coincide with the criteria for the application of Art. 45(4) TFEU. According to the interpretation given by Portuguese authorities, their interpretation however seems rather close to these criteria. The question of their correspondence with the EU law criteria is therefore a question of practice, for which there is little information available.

Monitoring the exact scope of positions reserved to national and, above all, administra-

tive practices in recruitment would be necessary.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and regulations mentioned under 2.1 are applicable for access and employment conditions. There is no specific legislation or administrative rules in place on the recognition of professional experience, except in the case of recruitment for middle management posts (*Art. 20 of Law No 2/2004*) and for career progression in education services (Decree N° 12/2004 of 3rd March).

There are also regulations on remuneration and pensions, as well as for specific sectors.

For public enterprises, general labour law is applicable.

#### **4.1.2. Practice**

Each public service or body has to apply the existing legislation.

The *Directorate-General for Public Administration and Public Sector Employment* does not seem to monitor specifically the aspects related to free movement of workers other than the application of Art. 45 (4) TFEU.

### **4.2. Special requirements for access to employment and working condition**

#### **4.2.1. Professional experience**

Law No 12-A/2008 allows for applications to posts in the public service to be made by persons who do not have the required qualifications but who have the necessary and sufficient training and/or professional experience to make up for this lack of qualifications. It is for the competition board to decide whether this training and experience is appropriate for the career, category and area of activity in question.

As a rule, professional experience and/or length of service do not constitute formal requirements in the recruitment process. The publication notice for a competition cannot stipulate that previous experience is necessary when it is not a legal requirement for the job description of the category of post to be filled. It is not a basis for excluding a candidate in the applications evaluation stage.

During the selection process the assessment of candidates' CVs covers, inter alia, their career history and the relevance of their professional experience, with an emphasis on the performance of tasks related to the posi-

tion for which they have applied and the type of duties carried out. Professional experience in a specific area of activity is considered to be an advantage, and it is important in relation to the previously defined skills profile.

In accordance with the new system of employment relationships, careers and salaries, which entered into force on 1 January 2009, working conditions, as well as salaries and pay grades, are not determined on the basis of professional experience and/or length of service. Changes to pay grades are linked more to the assessment of employees' performance.

Under this new system, employees with a public sector employment contract may apply for competitions for any pay grade, provided that they meet the stipulated requirements, since the salary may be negotiated with the public sector employer (*Art. 55 of Law 12-A/2008*).

According to Portuguese authorities, these arrangements make it easier for migrants to gain access to the public sector, as career development is no longer determined by length

of service in the category occupied by the jobholder.

Recognition of professional experience is taken into account during recruitment in certain selection methods.

Professional experience acquired in the private sector may be relevant for competitions for middle-management posts.

There is no reference in the applicable legislation and regulations to professional experience acquired abroad. It is therefore a question of administrative practice whether it is taken into account in the same way as professional experience acquired in Portugal.

#### 4.2.2. Seniority

The indications given under 4.2.2. apply as well to professional experience as to seniority, i.e. seniority does not apply anymore since 1

January 2009 to the determination of working conditions, salaries and pay grades.

#### 4.2.3. Language requirements

Applicants to public sector employment are required to prove their command of the Portuguese language only for teaching positions in pre-school, primary and secondary education (*Order No 21 703/2006*). However, as part of the procedure for the recognition of professional qualifications, it is to the competent authority to verify that the applicant possesses the level of Portuguese needed to carry out the work in question (*Art. 48 of Law 9/2009 of 4 March 2009*).

There is no specific information available that would enable to assess whether the principle of proportionality is duly taken into account in applying language requirements.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issues of compliance with EU law.

*First*, although the criteria for reserving posts to Portuguese nationals may correspond to the criteria of application of Art. 45 (4) TFEU, the difference of wording and the lack of reference to EU law leaves room for divergent interpretation. There is thus a risk that posts be reserved to Portuguese nationals, which do not correspond to the criteria set in EU law.

*Second*, the absence of general clauses on the recognition of professional experience in other EU Member States, although not being as such a source of infringement of EU law,

may generate obstacles to free movement, especially as far as Portuguese citizens having made use of their right to free movement are concerned.

5.2 More generally, the lack of statistics on the number of posts reserved to nationals and of the number of applications to posts, benefits or other advantages of non nationals, or of Portuguese citizens having made use of their right to free movement in the EU, make it difficult to assess whether there are still in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

No specific reforms of public sector employment have been undertaken as a direct consequence of Portugal's accession to the EEC in 1986.

As indicated under 4.2.2, an important reform of Portuguese legislation applicable to employment in the public sector came into

force in 2009, which had two significant consequences: the majority of public sector employees should now be employed under contract, not as career civil servants, and the impact of seniority and professional experience and seniority should be dramatically reduced

due to the implementation of a performance based system.

It remains to be seen whether this new system will have positive consequences on the

free movement of workers in the public sector.

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ROMÂNIA  
**ROMANIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Romania became a member of the EU on 1 January 2007. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the relevant ECJ case law on the public sector apply since 1 January 2007.

### 1.2. State form and levels of government

Romania is a unitary State with three levels of government: the State, 44 departments (*Județe*) and 3136 local governments (2 825

*comune*, 208 towns – *orase* – and 103 municipalities – *municipii*).

### 1.3. Official language

There is one official language: Romanian.

Hungarian, Romani, Ukrainian, German, Serbian and Russian are minority languages, without specific official status.

### 1.4. Statistical data

Romania has a total population of 21 565 100 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	1 723 400	18,4 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 16 (3) of the Constitution “Access to a public office or dignity, civil or military, is granted to persons whose citizenship is Romanian and whose domicile is in Romania.” Other provisions relevant to employment in the public sector: *Law No. 303 of 28 June 2004 on the status of judges and prosecutors*, as republished; *Law No. 304 of 28 June 2004 on judicial organization*, as republished; *Law No. 293 of 28 June 2004 on the Statute of civil servants with special status in the National Administration of Penitentiaries*, as republished; *Law No. 144 of 21 May 2007 on the establishment, organization and opera-*

*tion of National Integrity Agency*, as republished; *Law Nr. 1 of 6 January 1998 on the organization and operation of the External Intelligence Service*, as republished..

These laws are complemented by regulations, such as *Order Nr. 2321 / C of 4 September 2008 on Methodology for the admission of candidates in the National School for Agents Training*.

The Labour code applies to a public sector employees under contract.

## 2.2. Public sector employers

The State, the 44 departments (*Județe*) and 3136 local governments are public employers. There are also a number of State agencies and. Education services, social insurance of the public sector, health and social assistance services are also public employers.

## 2.3 Public sector workers

The legal status of public Servants of the State and of Municipalities is laid down in the *Law 188/1999 on the status of a public servant*, which “sets the general regime of juridical reports between the civil servants and government or local public administration, through autonomous administrative authorities or through public authorities and bodies of central and local public administration”.

According to Art. 6, of the cited law it does not apply to: “the contractual personnel from own structure of public authorities and bodies, who perform secretariat, administrative, protocol, management, maintenance – repairs and serving activities, security, as to any other category of personnel that does not exercise prerogatives of public power”. The relevant positions are filled by contract personnel under labour legislation.

National statistics do not provide with a relevant enough breakdown of numbers to be used for the purpose of establishing the relative proportions of public servants and con-

tractual employees or of the total public sector employment in the total workforce. The only indication available to the author of this report is in According to *EUPAN – Structure of the civil and public services*, which indicates for Romania that the latest figures provided by the National Agency of Civil Servants refer to the number of civil servants as being about 110 000 (to compare with the ILO figure for the total public labour force of 1 723 400 for 2008).

## 2.4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Public Servants law* is provided for by a possibility of action with administrative courts.

Matters relating to contract are submitted to civil courts.

The Constitutional court exercises judicial review on laws and may be asked to give a binding interpretation of the Constitution.

The Ombudsman (*People’s advocate – Avocatul Poporului*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

According to Art. 16 (3) of the Constitution “Access to a public office or dignity, civil or military, is granted to persons whose citizenship is Romanian and whose domicile is in Romania.”

*Law 188/1999 on the status of a public servant*, and the other relevant laws repeat the condition of Romanian citizenship and domicile.

As for positions for which have to be filled on the basis of a contract, the application of ordinary labour law which establishes the principle of equal treatment with Romanian citizen means that they are open to nationals of EU Member States.

## 3.2. Definition of posts

The definition of posts reserved to Romanian citizens is based on categories established by law.

As a general principle, it results from Art. 6, of the *Law 188/1999 on the status of a public servant* that the positions of persons “who perform secretariat, administrative, protocol, management, maintenance – repairs and serving activities, security, as [well as] any other category of personnel that does not exercise prerogatives of public power” are open to non nationals, as they are filled by contract. According to Art. 111 (1) “Public authorities and institutions that have provided on the States functions contractual positions, that imply the pursue of a duty

mentioned at art.2(3) are required to establish public positions under the art. 107”.

Furthermore specific sectorial law reserve to Romanian nationals the posts of judges and prosecutors, staff of prison administration, inspectors of national integrity, and staff of the Ministry of defence and of the Intelligence services.

It may be therefore assumed that the definition of posts reserved to nationals is based on a mix of general categories and post by post assessment.

Posts of captains on ships under Romanian flag used to be reserved to Romanian nationals, but there is no nationality condition any more since Art. 52 of the *Government Ordinance n° 42/1997 regarding the naval transport* has been amended by an *Emergency Government Ordinance n° 74/2006*.

### 3.3 Practice and monitoring

Recruitment for entry into the body of civil servants is on the publication of vacancies followed by open competition.

The completion notice is published in the Official Gazette of Romania, and in a newspaper of wide circulation, at least 30 days in advance. Competitions for vacant positions in public authorities and public institutions are organised by the National Agency of Civil

Servants for a number of public leadership positions or by special commissions assisted by the National agency or with the agreement of the National agency, directly by public authorities for other positions.

There does not appear to be a specific system for monitoring practice as far as access to public service is concerned.

### 3.4. Compliance with EU law

The Constitutional and legislative criteria for reserving posts in public administration do not coincide with the criteria for the application of Art. 45(4) TFEU.

They are apparently in contradiction with EU law when requiring candidates to have domicile in Romania, as this might impede Romanian citizens who make use of their right to free movement in the EU to apply.

The criteria of Art. 6 of the *Law 188/1999 on the status of a public servant* might correspond with the criteria for the application of Art. 45(4) TFEU when it comes to posts reserved to Romanian citizens, but it is a question of practice, for which there is little information available.

Monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment should be undertaken by Romanian authorities.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### 4.1.2. Practice

According to *Decree n° 92 from 16th of April, 1976 regarding the labour book*, a labour book has

be filed in and kept by the Territorial Labour Inspectorate for the employees of the most employers, which seem to include public employers. The labour book represents the official document proving seniority, continuous seniority, continuous seniority in the same unit, seniority in the same position, occupation or specialty, length of service at working places with special conditions, tariff retribu-

tion for employment and other rights included in this kind of remuneration.

Educational and professional training has to be proved and will be written down in the labour book by means of original study and qualification documents.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

According to the *Law 188/1999 1999 on the status of a public servant*, professional experience is required for access to the permanent civil service.

Civil servants who don't fulfil the seniority requirements foreseen for the promotion in the superior professional degree are permitted to participate in the organized contest, according to law, for the fast promotion in the public post, i.e. persons who graduated organized programs, within the limits of law, to acquire to status of public manager as well as civil servants that have no less than 1 year of experience. For the latter, the law mentions training obtained with specialised bodies "*in this country or abroad, for a minimum period of 1 year*".

Apart from the above-mentioned recognition of vocational and professional training "*in this country or abroad*", it does not seem that a specific system of recognition of professional experience in other EU Member States is taken into account if equivalent to that obtained in Romania.

### 4.2.2. Seniority

Seniority is taken into account for the purpose of establishing rights of workers.

It is relevant: for establishing the period of time the employees are entitled to request the payment of the rights they deserve according to individual labour contracts (i.e. legal holiday); determining the seniority for financial supplement – in case of remuneration systems that apply it; to demonstrate the seniority in a certain trade/profession/specialty. Seniority

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

has a special relevance in the civil service for the purpose of career progression.

Seniority established up to 31 December 2009 is established on the basis of the labour book mentioned under 4.1.2, or in case a person does not own a labour book, at request by the legal instance with competences in solving labour conflicts, on the basis of documents or other proves demonstrating the existence of labour relationships.

It does not appear that a specific system of recognition of seniority acquired in other EU Member States is taken into account if equivalent to that obtained in Romania.

### 4.2.3. Language requirements

According to Art. 54 of the *Law 188/1999 1999 on the status of a public servant*, knowledge of the Romanian language, written and spoken, is a condition to hold a public function. Some other relevant sector laws are also requiring oral and written knowledge of Romanian. In certain territorial units where the percentage of a national minority is above 20 %, knowledge of the minority language is also a requirement.

Language requirements are not regulated on labour law.

Information on how knowledge of Bulgarian is being verified and on what level of knowledge of the language is required in practice was not available to the author of this report. It is therefore not possible to assess to what extent the principle of proportionality is taken into account in applying language requirements.

## 5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals three potential issues of compliance with EU law.

*First*, the requirement to have domicile in Romania in order to become a civil servant might impede Romanian citizens who make use of their right to free movement in the EU to apply. It is not clear whether the constitution and of relevant legislation leaves room for an interpretation according to which the residence condition applies only once appointment to the civil service has been made. If so, it is only an issue of clarification in notices of competition. Otherwise, amendments to existing law would be needed.

*Second*, although the criteria for reserving posts to Romanian nationals might correspond in practice to the criteria of application of Art. 45 (4) TFEU, the difference of wording and the lack of reference to EU law leaves room for divergent interpretation.

*Third*, the absence of specific clauses on the recognition of professional experience and experience acquired in other EU Member States, - with the exception of the above-mentioned recognition of vocational and professional training “*in this country or abroad*”- although not being as such a source of infringement of EU law, may generate obstacles to free movement, especially as far as Romanian citizens having made use of their right to free movement are concerned.

5.2 More generally, lack of information on practice, as well as the lack of statistics on the number of posts reserved to nationals make it difficult to assess whether and to what extent there are in practice obstacles to the free movement of workers in the public sector.

## 6. Reforms and Coming Trends

No reform of the general rules applicable to public sector employment has been made in Romania as a consequence of accession to the EU.

The author of the present report has no information on reforms on the political agenda at the beginning of 2010 that might impact on the free movement of workers in the public sector.

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SLOVENIJA  
**SLOVENIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Slovenia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply for all as of 25 May 2006.

### 1.2. State form and levels of government

Slovenia is a unitary State with two levels of government: the State and 210 municipalities (*obcine*) or urban municipalities (*mestna občina*).

### 1.3. Official language

There is one official language: Slovene.

Hungarian and Italian are a minority language with administrative status in some municipalities, they are also recognized and protected as official languages in their residential municipalities.

### 1.4. Statistical data

Slovenia has a total population of 2 010 400 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	263 400	31,1 %
Public enterprises	82 800	9,8 %
Total government	153 600	18,1 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

Art. 122 of the Constitution, on *Employment in the State Administration*, provides that “*Employment in the State administration is possible only on the basis of open competition, except in cases provided by law*”. Art. 120 further provides that “*The organisation of the State administration, its competence and the manner of appointment of its officers are regulated by law*”, and Art. 121[9] that “*By law or on the basis thereof, legal entities and natural persons may be vested with the public author-*

*ity to perform certain duties of the State administration.*”

The *Civil servants Act of 2002* regulates the status of civil servants. It has been amended four times (last amendment in June 2008)

Other relevant legislation are the *Employment Relationships Act of 2002* (amended in November 2007). It applies only in subsidiary cases when an issue is not dealt with by the *Civil Servants Act*. Employment relationship is entered into by employment contract.

Both Acts have been amended rather recently. Sectorial legislation, such as the *Medical services Act*, or the *Organisation and Financing of Education Act* are also relevant.

## 2. 2. Public sector employers

The State and the 193 municipalities are public employers. There are also a number of State and local agencies and offices.

The public sector furthermore includes State provided medical and educational services, whose workers are not civil servants.

According to Art. 1 (1) of the Civil Servants Act, for the purpose of its application: “*the public sector shall be comprised of: - State bodies and the administrations of self-governing local communities, -public agencies, public funds, public institutions, and public commercial institutions -other entities of public law that indirectly use State or local budgetary funds.*” According to Art. 1 (3) “*Public companies and commercial companies, where the State or local communities are controlling shareholders or have prevailing influence, shall not be a part of the public sector under this Act.*”

According to EUPAN – *Structure of the civil and public services*, state administrations employ 34 924 public servants (90 % of the total); municipalities 3 900 (10 %).

## 2. 3. Public sector workers

There is an important difference between “*officials*” and “*professional-technical civil servants*”. According to Art. 23 of the Civil Servants Act in its original version “*1) Officials shall be civil servants that perform public tasks in the bodies, and civil servants that perform exacting ancillary work requiring the knowledge of the body's public tasks*”, whereas “*3) Civil servants performing other ancillary work in the bodies shall be the professional-technical civil servants.*” Art. 6 gives further precisions:

“*16. "public tasks" means tasks falling within the field of activity of State bodies or local community administrations, or tasks carried out by entities of public law established for such purposes; 17. "ancillary work" means work in the field of personnel and in the field of material and financial management, technical and similar services, and other work required to secure uninterrupted performance of public tasks by bodies or entities of public law.*” The definition in art. Art. 23 of the Civil Servants Act (p.141), has changed with the amendments of 2005.

Other public sector employees are covered by a specific status or regulation (eg. State provided medical services or educational services etc).

No data on the respective proportion of officials and professional-technical civil servants were available for this report.

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Civil Servants Act* is provided for by a possibility of action with labour courts, who are also competent for other public sector employees.

The Constitutional court exercises judicial review on the conformity of laws with the constitution.

The Human Rights Ombudsman (*Varuha človekovih pravic*) may handle complaints with regard to public administration lodged by any person who believes that his/her human rights or fundamental freedoms have been violated by an act or an action of a State body, a body of local self-government or a body entrusted with public authority. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

There is no provision of the Constitution that would reserve access to the public service or to civil servants positions to Slovene nationals.

The *Civil Servants Act*, requires Slovene citizenship for employment as an “official”.

Art. 84 provides that officials “*shall perform public tasks in title*”, and Art. 88 that “*citizenship*”

of the Republic of Slovenia” “shall be set as a condition for appointment to title”.

Since 2003, public tasks are defined as tasks which are directly related to the exercise of public authority as well as to the responsibility for safeguarding the general interest of the State.

Special legislation is applicable to the diplomatic corps, the police, the judiciary and the military.

### **3.2. Definition of posts**

The *Civil Servants Act* requires Slovenian nationality for the officials’ work posts in State bodies and local community administration which are performed in following titles: clerk; senior clerk; counsellor; senior counsellor; undersecretary; secretary and senior secretary. Slovenian nationality is also required for officials’ work posts where authorisations related to management, coordination and the organisation of working process are exercised.

The Civil Servants Act indicates several relevant positions which mainly amount to director-general, secretary-general, directors and heads of organisational unit in State and local administration. It is also indicates posts implying the substitution and direct assistance to the officials just mentioned. The list is not exhaustive, as the Civil Servant Act provides that positions in other State bodies shall be determined by such bodies by their general acts.

There are also nationality requirements for the functions with the courts, the public prosecutors’ office, the attorney generals’

office, the police, the defence and the customs office.

There is no legislation or regulation reserving access to posts of captains of vessels under Slovenian flag to nationals.

### **3.3 Practice and monitoring**

Whether Slovenian nationality is required or not is indicated in the notice for competition for the post which is published on the website of the Ministry of Public Administration and in the official Gazette of the Republic of Slovenia.

No specific body or procedure has been set up for the determination of posts requiring Slovenian nationality, and information on practice is not available.

### **3.4. Compliance with EU law**

With the amendments introduced in 2003 to the *Civil Servants Act* the legal definition of posts reserved to Slovenian nationals seems to be complying with the criteria for the application of Art. 45 (4) TFEU.

In the absence of a comprehensive list of functions reserved to Slovenian nationals, it is not possible to indicate with certainty that all the relevant posts comply indeed with EU law.

The Slovenian authorities should monitor the exact scope of positions reserved to national. Furthermore, monitoring administrative practice in recruitment will be necessary in order to know to what extent compliance is guaranteed.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Especially relevant information on practice is not available. There does not seem to be specific permanent monitoring of practices in personnel management that would be particu-

larly helpful in getting information about the implementation of free movement of workers

in the public sector.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

According to the *Civil Servants Act*, professional experience is relevant both to access and for working conditions in the civil service.

The *Civil Servants Act* defines “*working experience*”, in Art. 6 as “*the years of employment at work posts demanding the same level of education, and the period of apprenticeship demanding the same level of education, regardless of whether a person entered into employment or apprenticeship with the same employer; working experience shall also include the working experience that a civil servant has gained by working at work posts demanding a one-degree lesser level of education in the same line of profession or the same occupation, not including the period of apprenticeship at one-degree lesser level of education.*”

Since 2005 all work (which means all work in the public and private sector) performed at the same level of difficulty as the work of the post for which a person is a candidate, is considered as a professional experience. As evidence of professional experience authentic documents showing the period of performance and the level of education are accepted.

The *Civil Servants Act* provides in the Art. 88 that the Government shall lay down provisions on conditions regarding the required years of working experience for “appointment to title” upon entering into employment in public administration bodies and local administration bodies; for other bodies, such provisions shall be laid down in general acts of the bodies.

Professional experience is one of the conditions for the appointment of officials and is a compulsory element of the open competition notice.

For professional-technical servants, Art. 23 of the *Employment Relationships Act* provides that public advertisement of vacancies must contain conditions for carrying out the work and the deadline for applications.

Professional experience appears therefore in public advertisement of vacancies, except in case of apprenticeship.

Working conditions (e.g. salary, grade) are also determined on the basis of professional experience.

Professional experience does not depend on the legal nature of the previous employment and there is no time-limit determined for taking professional experience into account.

Professional experience and/or seniority acquired in another EU Member State is taken into account not only in case of job vacancy in public administration, public health or in public teaching sectors but also when deciding on certain rights arising out of civil servants’ employment relationship (e.g. annual leave).

### 4.2.2. Seniority

“*Years of employment*” are defined in the *Civil Servants Act*, Art. 6, as “*the years of employment as a civil servant in State bodies or local community administrations*”.

This definition seems to be more limitative than the definition of “*working experience*” indicated under 4.2.1. However, according to the 2008 report of the *Network of experts on free movement of workers*: the Ministry of Public Administration addressed an instruction to all ministries, Government’s services and local administration in which it pointed out that the length of service accomplished in an EU Member State shall always be taken into account for determining certain professional advantages of the employed (e.g. supplement for the years of service, the calculation of the length of the paid annual leave).

### 4.2.3. Language requirements

The *Civil Servants Act* requires active knowledge of Slovenian as one of the compulsory conditions to be fulfilled in order to

be appointed as official. Evidence of active knowledge of Slovenian is required also for doctors but not for teachers according to the Organization and Financing of Education Act.

Detailed information is lacking, that would enable to assess if this criterion is applied in compliance with the principle of proportionality.

## **5. Issues of compliance with free movement of workers in the public sector**

**5.1.** Available information does not reveal specific issues of compliance with EU law in Slovene legislation. However, in the absence of a comprehensive list of functions reserved to Slovenian nationals, it is not possible to indicate with certainty that all the relevant posts comply indeed with EU law.

law due to a wrong application of Slovene legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

**5.2.** There is no monitoring system of practices in recruitment and personnel management in the public sector, which would allow detecting possible non-compliance with EU

## **6. Reforms and Coming Trends**

As indicated under 3.1, an important reform of Slovene legislation applicable to employment in the civil service took place in 2003 in view of accession to the EU, in order to meet the requirements of EU law for the determination of posts reserved to Slovenian nationals.

No information relating to possible reforms on the agenda, which could have an impact on free movement of workers in the public sector was available to the author of this report.

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SLOVENSKO  
**SLOVAKIA**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Slovakia became a member of the EU on 1 May 2004. For EU law provisions on free movement of workers, the Act of accession foresaw a transitional period of 2 years that might be prolonged twice.

EU law provisions on free movement of workers and the ECJ case law on the public sector apply since 1 May 2004.

### 1.2. State form and levels of government

Slovakia is a unitary State with three levels of government: the State, 8 autonomous regions (*samosprávne kraje*) and 2 887 municipalities (*obec*).

### 1.3. Official language

There is one official language: Slovak (or Slovakian).

Hungarian is a minority language spoken by a number of residents.

### 1.4. Statistical data

Slovakia has a total population of 5 393 600 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total public sector	519 200	22,8 %
Public enterprises	232 200	10,2 %
Total government	287 000	12,6 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

According to Art. 86 f) and 122 of the Constitution, State administration and bodies (including local bodies of State administration) are established by law. Chapter IV contains the provisions applicable to territorial self-administration, according to which (Art. 67) “*The community decides independently in matters of local self-administration*”. There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions.

Employment in the area of public administration in the Slovak Republic was until recent governed in particular by *Act N° 312/2001 Coll. on Civil Service and on the amendments of certain laws*, which has been replaced by a new *Civil Service Act*, that entered into force on 1 November 2009. Also applicable are *Act N° 313/2001 Coll. on Public Service*, which applies to employment in local government, and *Act N° 552/2003 Coll. on the Performance of Works in the Public Interest*.

These are complemented by regulations, e.g. Regulation of the Civil Service Office 596/2004.

## 2.2. Public sector employers

The State, the 8 autonomous regions and 2 887 municipalities are public employers. There are also a number of State and regional local agencies and offices.

No statistics on the respective number of employees of the State, regional and municipal levels were available for this report.

The public sector furthermore includes State or regional/local provided medical and educational services.

## 2.3 Public sector workers

The legal status Servants of the State is laid down in the *Act on the Civil Service*. Public administration also employs workers submitted to labour law.

According to *EUPAN – Structure of the civil and public services*, the total number of civil

servants was 41 618 for a total public sector of 473 237. Comparing with ILO statistics it is thus possible to deduct that about 15 % of public administration workers are civil servants, and about 85 % are employed under normal labour law contracts.

## 2.4. Appeals and remedies

Judicial review on decisions of public authorities relating to employment under the *Civil Service Act* is provided for by a possibility of action with ordinary courts, which are also competent for labour law employment.

The Constitutional Court exercises also judicial review on the conformity of laws with the constitution.

The Ombudsman (Public Defender of Rights - *Verejný ochranca práv*) may handle complaints with regard to public administration. He may make recommendations to the relevant public authorities but has no power to make binding decisions.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

There is no article of the Constitution with special relevance to citizenship as a possible requirement for positions in the public sector, apart from the usual clauses regarding some political positions.

According to Art. 3 of the *Civil Service Act*, citizens of the Slovak Republic, citizens of other EU Member States, of the EEA and Switzerland are entitled to apply for admission into the civil service under the conditions stipulated by the Act and a special regulation.

There was a condition of residence in the 2004 legislation, which has been abolished in 2007.

The law is complemented by a regulation establishing civil service sectors, which are based at ministries and other central State administration bodies and at offices subordinate to them, which perform State administration or special State administration.

Special legislation applies to the judiciary, police force, the intelligence service, the national security office, court guards and prison wardens corps, the railway police, the fire and rescue service, the mountain rescue service, customs officers and professional soldiers, which require Slovak nationality for access to the relevant positions.

## 3.2. Definition of posts

The positions that may only be performed by citizens of the Slovak Republic are stipulated by a *Decree of the Ministry of Labour, Social Affairs and Family of the SR of 26 May 2006*, which lays down a list.

The list includes civil service positions in the sectors of justice, defence, industrial property, interior, protection of classified information. The list furthermore includes civil service positions at service offices, i.e. the office of the Government of the Slovak republic, the

Supreme Audit Office, the ministry of Foreign Affairs, the General Prosecutor's office, regional prosecutor's offices, higher military prosecutor's office and district prosecutor's offices. The list further includes civil service positions of special importance, for which authorization is required for becoming familiar with classified information.

Furthermore, Slovak nationality is required for posts in the police force, the intelligence service, the national security office, court guards and prison wardens corps, the railway police, the fire and rescue service, the mountain rescue service, customs officers and professional soldiers, on the basis of the sectorial legislation mentioned under 3.1.

### **3.3 Practice and monitoring**

The implementation of legislative tasks and supervision over the implementation of the *Civil Service Act* is of the responsibility of the *Ministry of Labour, Social Affairs and Family*, more specifically to the *Civil Service Department* in the jurisdiction of the *Labour Section*, while other duties resulting from the law are handled at the level of the service offices of individual departments and other State administration bodies.

Information on practice in establishing the lists mentioned under 3.3 and applying them

to recruitment was not available for this report.

There is no legislation or regulation reserving access to posts of captains of vessels under Slovakian flag to nationals.

### **3.4. Compliance with EU law**

The general clause of Art. 3 of the *Civil Service Act*, complies with EU law when stating in principle that access to the civil service is open to EU citizens.

However, according to information provided by the Slovak administration, the criteria adopted by the relevant legislation and regulations for limiting access to posts to Slovak nationals are those of "*legitimate interests of the Slovak Republic*", which do not coincide with the criteria for application of Art. 45 (4) TFEU. The criteria of "*legitimate interests of the Slovak Republic*" seem to leave too much discretion with respect to the criteria of participation in public authority and safeguard of general interests. Furthermore, there is no indication about the method adopted for the definition of relevant posts, which seems based on a sector approach more than on a post by post approach.

It is not clear whether the monitoring functions of the *Civil Service Department* enables it to be aware of the practice followed in reserving posts to national.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation mentioned under 2.1 is applicable for access and employment conditions.

#### **4.1.2. Practice**

Information on practice was not available for this report.

There seems to be no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

## 4.2. Special requirements for access to employment and working conditions

### 4.2.1. Professional experience

Provisions on professional experience and seniority were repealed from the *Civil Service Act* in 2003. According to the applicable legislation professional experience is not a condition for entry into the civil service. It is not a direct condition for inclusion into a salary class, but it has an impact on the level of salary in the given class.

To the extent to which professional experience or salary is taken into account, no difference is made in regulations between the employers and the country where experience has been acquired. There is no specific provision for the recognition of experience or seniority acquired in other EU Member States.

### 4.2.2. Seniority

Seniority is taken into account in the same way as professional experience (see 4.2.2).

### 4.2.3. Language requirements

Knowledge of the Slovak language is a prerequisite for applying to civil service positions. This also applies to posts in the public services where such knowledge is required for the performance of work, for instance in cases of direct contact with patients, students or citizens and if required by the employer. The requirement is not applied to citizens of the Czech Republic, due to the proximity between Czech and Slovak languages.

In cases where performance of the work does not necessarily require knowledge of the Slovak language and knowledge of a “world language”, e.g. English, is sufficient, such condition is not required and respectively a time period is given for learning the Slovak language.

## 5. Issues of compliance with free movement of workers in the public sector

5.1. Available information reveals two issues of compliance with EU law.

*First*, the definition of positions reserved to nationals is based upon the “*legitimate interests of the Slovak Republic*” and on the sector in which the person is working; it is most probable that a number of posts reserved to Slovak nationals imply functions that do not correspond to the criteria for the application of Art. 45 (4) TFEU.

*Second*, where professional experience and/or seniority is or may be taken into account for working conditions, there is no provision to ensure recognition of equivalent professional experience and seniority in similar positions in other EU Member States.

5.2. There seems to be no monitoring system on practices in recruitment and personnel management in the public sector, which would allow Slovak authorities to detect possible non-compliance due to a wrong application of legislation.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## 6. Reforms and Coming Trends

As indicated under 2.1, Slovak legislation on the Civil Service has undergone a number of reforms in the recent years and amendments were introduced to the *Civil Service Law* in view of accession to the EU on 1 May

2004. The big number of recent amendments to the 2001 legislation has led to the approval of a new *Civil Service Act* which entered into force on 1 November 2009.

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**FINLAND**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

**1. General data****1.1. Date of applicability of EU law**

Finland joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

**1.2. State form and levels of government**

Finland is a unitary State with three levels of government: the State, 19 regions (*maakunnan liitto* - regional council are joint local authorities indirectly elected by the municipalities of the region) and 416 municipalities (*kunta*).

**1.3. Official languages**

There are two official languages in Finland: Finnish (*Suomi*) and Swedish.

Karelian, Romani and Sami are minority languages.

**1.4. Statistical data**

Finland has a total population of 5 277 000 (*Eurostat, Statistics in focus* 81/2008).

Public sector employment in total numbers and in % of total employment for 2008 (*Based on ILO Laborsta*)

Total government	666 000	26,3 %
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Government employment in 2006 (*Based on ILO Laborsta*)

State	157 000	23,6 %
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Regional/ local	509 000	76,4 %
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**2. Employment in the public sector: legal, organisational and economic aspects****2.1. Relevant legal sources**

Chapter 11 of the Constitution (sections 119 to 126) contains the main provisions applicable to public administration. According to section 126: "It may be stated in an Act that only Finnish citizens are eligible for appointment to certain public offices or duties."

The civil service is regulated by *Civil service law of 1994 (281/2000)*. There are also a number of relevant sectorial laws. Employees are employed under labour legislation, i.e. by the

*Employment Contracts Act*. The *Act on Collective Agreements for State Civil Servants* covers collective agreements on terms and conditions of service for civil servants, while the *Collective Agreements Act* does the same for personnel on an ordinary employment contract.

In addition to this, negotiation procedures in respect of civil servants have been agreed in the main collective agreement for civil servants. Under the system of negotiation and collective agreement for central government,

the terms and conditions of employment relationships for civil servants and employees under contract are agreed in the *Collective Agreement for State Civil Servants and Employees Under Contract* at central level and in separate collective agreements for civil servants and employees under contract at agency level.

## 2. 2. Public sector employers

The State, the 19 regions and 416 municipalities are all public employers. These governments also have created autonomous public bodies, which in turn are public employers in the strict sense. The State employs about 23,6 % of public workers, regional and local government about 76,4 %.

Public schools and hospitals and public transport are considered as part of the public sector.

The public sector in a broad sense also include public enterprises, i.e. businesses with a majority of public capital or which are otherwise controlled by government.

## 2.3 Public sector workers

For state administrations, according to information provided by the Finnish government to the European Commission, Civil servants positions represent about 80 % of the total of government employment; about 20 % are employed on ordinary employment contract. No statistical data were available for this report as regards the respective numbers of civil servants and contract employees including local government workers.

## 2. 4. Appeals and remedies

Decisions of public administration may be appealed to administrative courts. Matters relating to contract are dealt with by labour courts.

Finnish courts may not rule on the compatibility of a law with the Constitution.

Review on decisions of public authorities – including those relating to employment – are dealt with by the Chancellor of Justice (*Oikeuskansleri, Justitiekanslern*), an independent government official who supervises public authorities.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

The Constitution, *section 126*, provides that “*It may be stated in an Act that only Finnish citizens are eligible for appointment to certain public offices or duties.*”

The *Civil Service Law*, section 7, gives a comprehensive a list of positions reserved to Finnish nationals.

For positions under labour law, there are no conditions of nationality whatsoever.

## 3.2. Definition of posts

According to the *Civil service law of 1994 section 7 (281/2000)* only a Finnish citizen may be appointed to the following offices, or to posts involving the performance of duties falling within purview of these offices:

1) Chancellor of Justice and Assistant Chancellor of Justice, Secretary General and

Referendary Counsellor in the office of the Chancellor of Justice;

2) State Secretary, Permanent State Secretary, Permanent Secretary, Head of Department and Head of Unit, as well as any similar or higher office;

3) offices in the foreign affairs administration;

4) judges;

5) heads of Government agencies (except for the principal of a university);

6) Provincial Governors, of Heads of Department of Provincial Government, and Provincial Readiness Director;

7) offices involving the duties of public prosecutor or enforcement officer; 8) police officers; 9) members of the board of directors of a prison;

10) offices with the Ministry of Defence, the Defence Forces and the Frontier Guard; 11) offices with the Finnish Security Police (except policemen); 1

2) offices with the Customs Administration, offices involving the authority to make arrests and an office, involving participation in the supervision and the defence of Finland's territorial integrity, or involving criminal investigation and supervision;

13) head of the public authority department of Finnish Civil Aviation Administration; 14) Maritime Security Director with the Finnish Maritime Administration.

No indication about the criteria used by the legislator is given.

Posts of captains on ships under Finnish flag used to be reserved to Finnish nationals. A Law amending Art. 1 of *Chapter 6* of the Sea law 310/2008 has been adopted, and entered into force on 1 June 2008, which opens access to these posts to EU and EEA citizens.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and collective agreements mentioned under 2.1 are applicable to employment conditions.

### **3.3 Practice and monitoring**

When a position becomes vacant or is created, each ministry or agency organises the recruitment of its staff. The applicant with the best profile is awarded the position following an interview; each recruitment body determines its own recruitment methods.

There are no statistics about employment of non nationals.

### **3.4. Compliance with EU law**

The Constitution, laws and regulations seem to comply with EU law in so far as they do not explicitly reserve to Finnish nationals positions that would not correspond to the criteria of application of Art. 45 (4) TFEU.

In the absence of indications about the criteria used to establish the list mentioned under 3.2. it is not possible to say whether all the posts reserved to Finnish nationals indeed comply with EU law.

#### **4.1.2. Practice**

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

There are no specific legal provisions relating to the taking into account of professional experience in the civil service or in the public sector.

Payment is based upon a post specific component and an individual component,

based upon the performance and competence of the employee.

There are no specific legal provisions on taking to account professional experience gained abroad. There is no information on practice, and no relevant court cases are signalled.

#### 4.2.2. Seniority

The Finnish civil service is a post based system. An employee seeking advancement has to change post.

However, some positions of employment form part of career-based system. This is the case for the police, armed forces and foreign affairs. The post based system means that that advancement through seniority is not possible.

#### 4.2.3. Language requirements

The language proficiency requirements for State civil servants are laid down in separate legislation: the *Language Act (Kielilaki 423/2003)* and the *Act on language proficiency required from personnel of public authorities (Laki*

*julkisyhteisöjen henkilöstöltä vaadittavasta kielitaidosta 424/2003)*.

The requirements concerning linguistic competence are bound to the qualification requirement (for example university degree) and not, for example, to the tasks in question. Normally specified level of command of both of the national languages, Finnish and Swedish, is required.

The means by which a person can show that she has reached the required level of language proficiency are national language tests and certificates. The *Board on Language Exams (Kielitutkintolautakunta)* may upon application issue a certificate on excellent command of Finnish or Swedish language.

### 5. Issues for free movement of workers in the public sector

5.1. Available information reveals two potential issue of compliance with EU law.

*First*, in the absence of indications about the criteria used to establish the list of posts reserved to Finnish nationals in *Civil service law of 1994 section 7* it is not possible to say whether all the posts reserved to Finnish nationals indeed comply with EU law.

*Second*, the fact that the requirements concerning linguistic competence are bound to the qualification requirement and not to the tasks in question might lead to situations of

non compliance with the principle of proportionality.

5.2. No specific monitoring of free movement of workers in the civil service and public sector is being undertaken.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

### 6. Reforms and Coming Trends

Accession to the EU has not lead to legislative reform as far as opening up the public sector was concerned. The relevant rules of EU law already applied in the framework of the association agreement of the European Community with EFTA Countries, but this

had not lead to a modification of the relevant Finnish legislation.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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SVERIGE  
**SWEDEN**

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

Sweden joined the European Communities on 1 January 1995. There were no transitory measures for free movement of workers in the Accession Act.

EU law provisions on free movement of workers and the ECJ case law on public sector apply since 1 January 1995.

### 1.2. State form and levels of government

Sweden is a unitary State with three levels of government: the State, 18 counties (*Län*) and two regions (*Skåne et Västra Götaland*), and 290 municipalities (*kommuner*).

### 1.3. Official language

There is formally no official language in Sweden, but Swedish is the national language.

Finnish, Sami, Romani, Yiddish, and Meänkieli (Tornedal Finnish) are minority languages.

### 1.4. Statistical data

Sweden has a total population of 9 113 300 (*Eurostat, Statistics in focus 81/2008*).

Public sector employment in total numbers and in % of total employment for 2007 (*Based on ILO Laborsta*)

Total government	1 267 400	33,9 %
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Government employment in 2007 (*Based on ILO Laborsta*)

State	227 100	17,9 %
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Regional and local	803 300	76,2 %
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Local	237 000	22,4 %
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## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The “*Instrument of Government*”, which is part of Sweden’s constitution, contains provisions relevant to public sector employment. Chapter 11 contains provisions on Administration of Justice and General Administration. Chapter 11 Art. 9, provides that “*Appointments to posts at courts of law or administrative authorities coming under the Government are made by the Government or by a public authority designated by the Government*”; it further provides that Swed-

ish citizenship is required for a number of posts enumerated in the *Instrument*, and that other offices can be restricted to only Swedish citizens.

Chapter 11 Art. 7, of the “*Instrument of Government*”, which is the constitutional basis for the Swedish administration’s organisation in autonomous government agencies, provides that “*No public authority, including the Riksdag and the decision-making bodies of local authorities, may determine how an administrative authority shall decide*

*in a particular case relating to the exercise of public authority vis-à-vis a private subject or a local authority, or relating to the application of law.”*

The basic law regarding employment in the governmental sector is the *Public Employment Act*, 1994, amended in 2005).

Further, some sectorial legislation is relevant, such as *Act on Professional Activity in Health and Medical Services*, the *Code of Judicial Procedure*, the *School Act*, the *Act on the qualifications for the veterinarian profession*, and the *Act on driving schools*.

Legislation is complemented by government regulations, such as for instance the *Ordinance on Professional Activity in Health and Medical Services* and by regulations issued by State authorities (authorities’ statute-books).

In addition to this wages in the public sector are settled in collective agreements.

## 2. 2. Public sector employers

The State, 18 counties and two regions, and the 290 municipalities are all public employers. The Swedish system of government is furthermore characterized since two centuries by the fact that the implementation of public policies and application of law is the task of autonomous public agencies (about 250 at State level).

Public schools and hospitals and public transport are considered as part of the public sector.

According to *EUPAN – Structure of the civil and public services*, the 250 State agencies employ 235 000 permanent public servants (18 % of the total); regions 825000 (63 %); and municipalities 248 000 (19 %).

The public sector in a broad sense also includes public enterprises, i.e. businesses with a

majority of public capital or which are otherwise controlled by government.

The total number of government employees, including all types of national and local public services, as well as public enterprises are of approximately 1,5 million (37% of the labour force).

## 2.3 Public sector workers

On the basis of the *Public Employment Act*, 1994, civil servants are employed with an employment contract, although the decision of employment is formally an administrative decision.

Judges, prosecutors, military officers and police officers have special status and special regulation regarding education, recruitment and job security. They are altogether approximately 30 000 employees, 12,5% of Government employees.

## 2. 4. Appeals and remedies

Decisions of public administration may be appealed to administrative courts; this includes the formal decision to appoint somebody as a civil servant. Matters relating to labour contracts are dealt with by labour courts.

Swedish courts may not rule on the compatibility of a law with the constitution.

Review on decisions of public authorities – including those relating to employment – are dealt with by the Parliamentary Ombudsmen and the Chancellor of Justice (*Justitiekanslern*), an independent government official who supervises public authorities.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

According to *Chapter 11 Art. 9 of the Instrument of Government (Constitution)*, “ *Only a Swedish citizen may hold or exercise the functions of a judicial office, an office coming directly under the Government, an office or appointment as head of an authority coming directly under the Riksdag or the Gov-*

*ernment, or as a member of such an authority or its governing board, an appointment in the Government Offices coming directly under a minister, or an appointment as a Swedish envoy. Also in other cases only a person who is a Swedish citizen may hold an office or appointment if the holder of such an office or appointment is elected by the Riksdag. Swedish national-*

ity may otherwise be stipulated as a condition of qualification to hold an office or appointment under the State or under a local authority only with support in law or in accordance with conditions laid down in law.”

The constitutional provisions are complemented by the *Public Employment Act*, Section 5: “In addition to the requirements for Swedish citizenship prescribed by the Instrument of Government or any other enactment, only Swedish citizens may be employed as a prosecutor or police officer or hold a military post”.

Furthermore, according to Section 6 of the *Public Employment Act*: “The Government may prescribe or for special cases decide that only Swedish citizens may hold 1. posts within the Government Offices or foreign service, 2. public posts that may be combined with exercise of official duties or dealing with issues that affect the relationship with other States or with international organisations, 3. public posts that may involve knowledge about circumstances that are of important for the security of Sweden or for other important, public or private financial interests.” It has to be underlined that in Sweden, “government offices” are a very small administration, supporting the work of ministers, as policy implementation is carried out by autonomous agencies.

### 3.2. Definition of posts

The definition of posts reserved to government is made by law for the posts mentioned under 3.2., and by the government for the posts indicated under section 6 of the *Public Employment Act* (see 3.1.).

The positions for which Swedish citizenship is a requirement are most of the positions in Parliament services (head of offices and accountants in the *Riksdag*), in the judiciary, the police, the military, the enforcement service, as well as some other leading positions (e.g. in the Electricity security board; *Elsäkerhetsverket*). However, Swedish citizenship is not a necessary requirement to become a judge.

Posts of captains on ships under Swedish flag used to be reserved to Swedish nationals. Art. 2 of Chapter 4 of Ordinance 2003:438 on the security of ships has been amended and access to these posts is open to EU and EEA citizens

### 3.3 Practice and monitoring

Each agency acts autonomously for the recruitment of civil servants. When a position becomes vacant or is created, each agency organises the recruitment of its staff. The applicant with the best profile is awarded the position following an interview; each recruitment body determines its own recruitment methods. When posts are restricted to Swedish citizens this is indicated in the vacancy note. If a post is open for candidates of any nationality this is normally not specified.

In the year 2000 an Official report was presented, dealing with the requirements for Swedish citizenship for employment and more in the public sector. According to the investigation committee the guiding principle should be the right to equal rights and liabilities for persons residing in Sweden irrespective of citizenship. However, the committee indicated that Swedish citizenship should be required when the motivation is State security and Sweden’s relations to other countries. The committee also held that public activities that interfere with the citizens’ legal relations should still be reserved for Swedish citizens.

There are no exact figures but it is estimated that approximately 20-25% of State governmental sector is limited to Swedish citizens, i.e. 40 000 -50 000 State employees.

### 3.4. Compliance with EU law

The criteria indicated in Section 6 (3) of the *Public Employment Act*, i.e. “3. public posts that may involve knowledge about circumstances that are of important for the security of Sweden or for other important, public or private financial interests?”, do not coincide with the criteria for application of Art. 45 (4) TFEU, especially as they mention “public or private financial interests”.

This difference in wording is not as such an infringement of EU law, but might be a source of non compliance, as it may lead to reserving posts to Swedish nationals which do not imply the exercise (even indirect) of public authority and the safeguard of general interest.

The absence of a central monitoring system, makes it difficult to understand to what

extent existing regulations, and furthermore, practice, are indeed complying with EU law.

## **4. Potential sources of discrimination and obstacles to free movement of workers in the public sector**

### **4.1. Legislation and general regulation of access and employment conditions**

#### **4.1.1. Legal sources**

The legislation and collective agreements mentioned under 2.1 are applicable to employment conditions.

#### **4.1.2. Practice**

There is no specific permanent monitoring of practices in personnel management that would be particularly helpful in getting information about the implementation of free movement of workers in the public sector.

### **4.2. Special requirements for access to employment and working conditions**

#### **4.2.1. Professional experience**

There are no specific legal provisions relating to the taking into account of professional experience in the civil service or in the public sector.

Payment is based upon a post specific component and an individual component, based upon the performance and competence of the employee.

There are no specific legal provisions on taking to account professional experience gained abroad. There is no information on practice, and no relevant court cases are signalled.

#### **4.2.2. Seniority**

The Swedish civil service is a post based system. An employee seeking advancement has to change post.

However, some positions of employment form part of career-based system. This is the case for judges, prosecutors, military officers and police officers. The post based system means that that advancement through seniority is not possible.

#### **4.2.3. Language requirements**

There are no explicit legal provisions about language requirements in the Swedish civil service.

Considering the *Public Employment Act* § 4, good language skills – and especially in Swedish – could in practice be a very important qualification when the recruitment is made if skills in Swedish language is considered to be important for the performance of the work. A request for language skills should basically be based on the qualifications necessary for the employment.

For access to some posts knowledge of the Swedish language is a formal requirement on the basis of sectorial legislation or regulation. For instance, for a position as a teacher in schools the requirement for a certain proof of competence will be issued only if the applicant has “*the knowledge in Swedish language that is necessary*”. However, the regulation should only apply when the applicant has another mother language than Swedish, Danish, Faeroese, Icelandic or Norwegian.

## 5. Issues for free movement of workers in the public sector

**5.1.** Available information reveals one potential issue of compliance with EU law.

The criteria indicated in *Section 6 (3)* of the *Public Employment Act*, do not coincide with the criteria for application of Art. 45 (4) TFEU. While not being as such an infringement of EU law, this formulation might be a source of non compliance.

**5.2.** No specific monitoring of free movement of workers in the civil service and public sector is being undertaken.

It would be useful to establish precise figures on the number of posts reserved to nationals. Monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service.

## 6. Reforms and Coming Trends

Accession to the EU has not lead to legislative reform as far as opening up the public sector was concerned. The relevant rules of EU law already applied in the framework of the association agreement of the European Community with EFTA Countries, but this

had not lead to a modification of the relevant Swedish legislation.

At the beginning of 2010 there seems to be no reform on the agenda that might impact on the free movement of workers in the public sector.

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# UNITED KINGDOM

*Caution: this country file has been established on the basis of the documents mentioned on p. 5 of this volume, which are limited to 2009 or sometimes earlier. They may not be entirely up to date. Misinterpretations of those documents are of sole the responsibility of the author of this report.*

## 1. General data

### 1.1. Date of applicability of EU law

The United Kingdom joined the European Communities on 1 January 1973.

EU law provisions on free movement of workers apply since 1 January 1973.

The criteria resulting from ECJ case law for the interpretation of Art. 45 (4) TFEU are applicable since they were set in the judgement in *Case 149/79 Commission v Belgium*, in December 1980.

### 1.2. State form and levels of government

The United Kingdom is a unitary State; regionalized as far as Scotland, Wales and Northern Ireland are concerned.

There are two levels of government for England (the Crown and 34 Shire Counties, divided into districts), except for London where there is also a regional authority (Greater London); and three levels for devolved regions: the Crown, Scotland, Wales and Northern Ireland and 70 unitary local authorities or district councils.

### 1.3. Official language(s)

The UK has not formally an official language, but English is the language of law and public administration.

The *Welsh Language Act 1993*, has given Welsh equal status with English in the public sector in Wales.

### 1.4. Statistical data

The UK has a total population of 60 816 700 (*Eurostat, Statistics in focus 81/2008*).

In terms of persons, the public sector employs about 7 200 000, which corresponds to one quarter of the entire labour market.

Public sector employment in total numbers and in % of total employment for 2006 (*Based on ILO Laborsta*)

Total public sector	5 850 000	20,19 %
Public enterprises	348 000	1,2 %
Total government	5 502 000	18,9 %

Government employment in 2006 (*Based on ILO Laborsta*)

Central government	2 560 000	46,5 %
Local government	2 942 000	53,5 %

## 2. Employment in the public sector: legal, organisational and economic aspects

### 2.1. Relevant legal sources

The UK has no written constitution, but there is a fundamental constitutional principle applicable to public employment: under the

*Royal Prerogative*, the Crown (i.e. in practice the Cabinet) has the power to regulate the *Civil Service* without prior legislative authorisation

by Parliament. This applies only to Crown servants (i.e. State servants).

Employment of civil servants is regulated on the basis of government regulations adopted in the form of Orders in Council, and by subject specific legislation for some aspects. There are also important non legally binding documents resulting from answers to Parliamentary committees, Reports and codes of practice.

The most important of these sources are the *Civil Service Order in Council* 1991, the *Civil Service (Management Functions) Act* 1992, the *Civil Service Order in Council* 1995, the *Civil Service Management Code* (which includes the Civil Service Code), the *Carltona Principle*, the *Armstrong Memorandum*, and the *Osmotherly Rules*.

## 2. 2. Public sector employers

The State (*Civil service*) the local government councils, schools and the National Health Service are the main public employers. In some legal contexts, universities are considered private bodies and in others public bodies; sometimes they have a hybrid status, where in the exercise of their public functions they fall under the public body requirements. However, they are legally separate corporations and are not part of the local government.

On the basis of ILO statistics, it is possible to indicate that about 46,5 % of public sector workers are employed by central government, and about 53,5 % by local government.

## 2.3 Public sector workers

The specific rules and regulations for the Civil service do not apply to local government. Local government employees (about 53,5 % of the total) are employed under ordinary labour law, but there are also specific regulations embedded in legislation or adopted by the local authorities

## 2. 4. Appeals and remedies

Judicial review on decisions of public authorities – including those relating to employment – as well as matters relating to contract are dealt with courts and tribunals. The remedy for a breach of equality on grounds of nationality is a claim of nationality discrimination under the *Race Relations Act 1976*.

There is no constitutional court.

The Parliamentary and Health Service Ombudsman may handle complaints with regard to government departments, the National Health Service. The Local Government Ombudsman looks at complaints about councils and some other authorities, including education admissions appeal panels.

# 3. Posts reserved to nationals

## 3.1. Relevant laws and regulations

The *Civil Service Nationality Rules* govern eligibility for employment in the UK Civil Service (also known as Home Civil Service) on the grounds of nationality. These rules must be followed by Government departments and agencies and other bodies within the Home Civil Service and Diplomatic Service in their recruitment and appointment procedures.

The Rules are set in UK legislation, i.e. in the *European Communities (Employment in the Civil Service) Order 2007*, which amended the *Aliens' Employment Act 1955* and the *European Communities (Employment in the Civil Service)*

*Order* 1991 and came into effect on 7 March 2007.

Employment arrangements for the Northern Ireland Civil Service (devolved government in Northern Ireland) are consistent with that in England and Wales, as set out in the *European Communities (Employment in the Civil Service) Order 2007*.

Applicants for posts in local government in England are required to provide documentary evidence of their entitlement to work in the UK in accordance with the *Asylum and Immigration Act 1996*. This is also the position for posts in Wales and Scotland.

### 3.2. Definition of posts

The definition of posts reserved to UK citizens nationals results from the *European Communities (Employment in the Civil Service) Order 2007* sections 2(3) and 3 (3).

According to section 2(3) “a reserved post” means

(a) a post in the security and intelligence services;  
or (b) a post falling within subsection (7) or (8) which the responsible Minister considers needs to be held otherwise than by a relevant European.”

The latter mean:

“(a) a post in Her Majesty’s Diplomatic Service and posts in the Foreign and Commonwealth Office; and (b) posts in the Defence Intelligence Staff;”

According to section 3 (3) of the Order, the “posts whose functions are concerned with—(a) access to intelligence information received directly or indirectly from the security and intelligence services; (b) access to other information which, if disclosed without authority or otherwise misused, might damage the interests of national security; (c) access to other information which, if disclosed without authority or otherwise misused, might be prejudicial to the interests of the United Kingdom or the safety of its citizens; or (d) border control or decisions about immigration.”

Some posts are thus automatically reserved to UK nationals, whereas others are capable of being reserved. No criteria are given for the exercise of the Minister’s decision.

If posts do not fall into the criteria set out in the Order, they cannot be reserved. Currently about 95 % of Civil Service posts are non reserved.

### 3.3 Practice and monitoring

When posts are advertised, it is specified whether they are only open to UK citizens.

There are no indications on the method or specific criteria used in order to decide whether a post should be reserved to nationals. The relevant government authorities do not publish specific information for EU citizens who might like to apply to civil service positions.

There are no available statistics about employment of non nationals in the public sectors.

There is no legislation or regulation reserving access to posts of captains of vessels under UK flag to nationals.

### 3.4. Compliance with EU law

The list of reserved posts indicated in *European Communities (Employment in the Civil Service) Order 2007* seems to comply with the criteria set for the application of Art. 45 (4) TFEU. However, the absence of criteria for the Minister’s decision on posts capable of being reserved might leave room for discrimination amongst EU citizens – as well between British citizens and others as between citizens from different Member States of the EU. The absence of criteria for the Minister’s decision is not as such an infringement of EU law, but requires appropriate mechanisms of appeal and review in order to ensure compliance.

The absence of a central monitoring system, makes it difficult to understand to what extent existing regulations, and furthermore, practice, are indeed complying with EU law.

## 4. Potential sources of discrimination and obstacles to free movement of workers in the public sector

### 4.1. Legislation and general regulation of access and employment conditions

#### 4.1.1. Legal sources

The legislation, regulations and non legally binding documents mentioned under 2.1 are applicable for access and employment condi-

tions for positions in the civil service and with other public employers.

#### 4.1.2. Practice

There is no specific permanent monitoring of practices in personnel management that appears as particularly helpful in getting in-

formation about the implementation of free movement of workers in the public sector.

### 4.2. Special requirements for access to employment and working conditions

#### 4.2.1. Professional experience

There are no general rules on professional experience and seniority for the UK Civil Service.

The *Professional Skills for Government competency framework* is used for jobs and careers in the Civil Service. It sets out the skills that staff in the Civil Service need in order to do their job well, at all levels and no matter where they work.

Recruitment for posts in the public sector varies between organizations. The following is an example from the Department for Business, Innovation and Skills. *“We operate a competence-based recruitment process where applicants are asked to give examples of their skills, knowledge and experience as relevant to the job they are applying for. Seniority is not an issue, except in rare cases, where we might advertise a job as requiring X years experience in e.g. the field of estates management”*.

There are no specific provisions other than those mentioned under 4.2.1. for the recogni-

tion of professional experience acquired outside of the UK. No specific mention of this type of experience appears clearly on the relevant websites for employment in the Civil service.

#### 4.2.2. Seniority

There are no specific provisions on seniority. As far as applicable, the indications given under 4.2.2. for professional experience may be transposed to seniority.

#### 4.2.3. Language requirements

There are no specific legislative or administrative language requirements for teaching posts. However, when recruiting teachers, schools and local authorities must be satisfied that all candidates can communicate effectively with pupils.

## 5. Issues for free movement of workers in the public sector

5.1. Available information reveals one possible issue of compliance with EU law.

The absence of criteria for the Minister’s decision on posts capable of being reserved to UK nationals might leave room for discrimination amongst EU citizens – as well between British citizens and others as between citizens from different Member States of the EU. The absence of criteria for the Minister’s decision is not as such an infringement of EU law, but requires appropriate mechanisms of appeal and review, in order to ensure compliance.

5.2. The lack of published procedures on the recognition of skills needed to access civil

service posts and more generally of monitoring of the practices specifically relevant to free movement of workers in the public sector do not provide for all the necessary transparency in order to promote free movement of workers in the public sector.

The relevant authorities’ monitoring practice should include establishing statistics on the number of applications of non nationals to posts in the public service and on the recognition of professional experience acquired out of the UK.

## 6. Reforms and Coming Trends

Before accession to the EEC, Civil service positions were reserved to UK nationals – and Irish nationals – by the *Act of Settlement of 1700*. The *European Communities (Employment in the Civil Service) Order 1991* amended the *1955 Aliens' Employment Act* so as to allow nationals of other Member States of the European Communities to access the Civil service. The *European Communities (Employment in the Civil Service) Order 2007* is the most recent piece of legislation directly related to employment in the public sector.

In the 1990s the Civil Service was profoundly reformed, without the intervention of Acts of Parliament, as the necessary powers are with the Cabinet under the Royal Prerogative. The career system which was the basis of employment in the civil service since the

1920s was replaced by a post based system, and life-long tenure by fixed term contracts.

The Lord Chancellor announced on 25 March 2008 the introduction of a *Constitutional Renewal* Bil, which would give the Civil Service a legislative basis, by enshrining in an Act of Parliament “its core values of impartiality, integrity, honesty and objectivity, making provision for the appointment of special advisers and establishing an Independent Commission for the Civil Service”. The legislation was carried over to 2009-10, but did not complete its passage through Parliament before the 2010 General Election. At any rate, it is not clear whether and to what extent such an Act would have a major impact on the status of civil servants, with relevance to free movement of workers.

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