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FREE MOVEMENT OF PERSONS

WORKERS

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Welcome back to Internal Market Law. This is the first handout for this term. It is on the free movement of workers.

I hope you will continue to enjoy this module.

Suggested reading:

Generally, I recommend that you look at Barnard, *Substantive Law of the EU*, OUP, 2022, especially chapters 6, 7 and 12 (as far as workers are concerned). The book is also available online on Oxford Trove. You can also use an equivalent textbook which deals with the free movement of workers.

FREE MOVEMENT OF WORKERS

Article 45 TFEU (ex 39 EC)

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

1. THE PERSONAL SCOPE OF ARTICLE 45 TFEU – THE DEFINITION OF WORKER

NB Remember that economically active people have more extensive rights in Union law.

- **Union meaning:** The definition of *worker* depends upon Union and not national law: otherwise it would be easy for MSs to give a very narrow definition, so as to exclude Union nationals from the domestic employment market → Case 75/63 *Hoekstra* [1964] ECR 1771; and the scope of application of Article 45 TFEU would differ from one MS to the other → Case 53/81 *Levin* [1982] ECR 1035. Further, since the rights granted by Article 45 TFEU are amongst the fundamental rights that the Treaty grants to individuals, the concept of worker cannot be given a restrictive interpretation.

- **Definition of worker:** Case 66/85 *Lawrie-Blum* [1986] ECR 2121: "The essential feature of an employment relationship (…) is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". If the services are not provided in the context of a subordinate relationship, then the relevant provisions are those on self-employed (Article 49 TFEU or Article 56 TFEU).

- **Status of worker retained in certain circumstances:** See Article 7(3) Directive 2004/38 → unable to work for illness or accident; involuntary unemployment after having been in employment for at least 1 year and registered as work-seeker; if employment has lasted less that one year (also in fixed term contract) then status of worker is retained for at least 6 months; worker embarks in vocational training which must be related to the previous employment unless the worker is involuntarily unemployed. Retention of status is crucial for right to reside; equal treatment and entitlement to social advantages. Case C‑507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* [2015] ECR I-0000 → woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker',

within the meaning of Article 45 TFEU, provided she returns to work or finds another job within a reasonable period after the birth of her child.

NB Retention of status of worker is very important as it means citizen does not have to satisfy comprehensive health insurance / sufficient resources requirements + has full access to equal treatment.

- **Part-time work falls within the scope of Art 45 TFEU:** Part-timers are to be considered workers → one of the purposes of the free movement provisions is to promote a harmonious development of economic activities and raising of the standard of living. "Since part-time employment, although it may provide an income lower that what is to be considered to be the minimum required for subsistence, constitutes for a large number of persons an effective means to improve their living conditions, the effectiveness of Union law would be impaired and the achievement of the objectives of the Treaty would be jeopardised if the enjoyment of rights conferred by the principle of freedom of movement of workers were reserved solely to persons engaged in full time employment earning, as a result, a wage at least equivalent to the guaranteed minimum wage in the sector under consideration". This provided the activity is "effective and genuine" and not on such a small scale to be purely marginal and ancillary" (Case 53/81 *Levin* [1982] ECR 1035; case C-413/01 *Ninni-Orasche* [2003] ECR I-13187). If these conditions are satisfied, it is immaterial whether the worker draws on public funds to supplement her income → Case 139/85 *Kempf* [1986] ECR 1741; or whether only few hours worked → Case C-357/89 *Raulin* [1992] ECR I-1027. However, work is considered '**effective and genuine**' only if the activity in question is "capable of being regarded as forming part of the **normal labour market**. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services." See Case *Case C-456/02 *Trojani* [2004] ECR I-7573

NB Including part-timers, even on low wages below minimum subsistence level, in the scope of the Treaty has real implications, since it opens up national welfare states to claims by EU nationals.

- **Worker → substantive assessment:** The amount earned and the form the compensation takes is immaterial → e.g. trainee teachers (Case 66/85 *Lawrie-Blum* [1986] ECR 2121); e.g. a person working in a religious Union which would provide for his material needs is to be considered a worker; remuneration needs not to be in the form of monetary compensation but can also be in the form of a *quid pro quo* → Case 196/87 *Steymann* [1988] ECR 6159, provided however the activities are genuine and effective and not marginal and ancillary.

  NB Not much guidance on these Union law concepts and Member States do not seem very compliant.

- **Purpose of work:** this might be relevant in establishing whether activity is marginal and ancillary → e.g. Case 344/87 *Bettray* [1989] ECR 1621; or to establish entitlement to social advantages, e.g. Case 197/86 *Brown* [1988] ECR 3205 (how does *Förster* fit in this?) .

- **Work-seekers:** Article 45 TFEU also applies to those who move to another MS to there seek work (otherwise the rights granted by the Treaty would be of limited use) → Case 48/75 *Royer* [1976] ECR 497; thus Article 45(3) TFEU must be interpreted as a *non-exhaustive* list of the rights of Union nationals, and MSs must give Union nationals a reasonable period to find work → Case C-292/89 ex parte *Antonissen* [1991] ECR I-745; and even after the expiry of a reasonable period MSs cannot be required to leave if they can prove that they are continuing to look for work and have genuine chances of becoming engaged → Case C-344/95 *Commission v Belgium* [1997] ECR I-1035 and **now codified by Article 14(4) Directive 2004/38**. However, if a work-seeker cannot prove that she is looking for employment and has genuine chances of becoming engaged, she may be expelled without the need for the Member State to rely on one of the Treaty derogations (i.e. public policy /security).

  - Work-seekers have a **semi-status** in Union law: their rights are not as extensive as those enjoyed by workers → e.g. work-seekers do not have a right to reside as such, they have a right to 'stay' to look for a job; before the introduction of Union citizenship the Court had excluded work-seekers from the scope of Article 7(2)

Regulation 1612/68 (which is now Reg. 492/11), so that they could not claim equal treatment in relation to social advantages (case 316/85 *Lebon* [1987] ECR 2811). However in *Case C-138/02 *Collins* [2004] ECR I-2703, the Court updated its interpretation of its own case law and held that in view of the establishment of EU citizenship, one could no longer exclude from the scope of Article 45(2) TFEU benefits of a 'financial nature intended to facilitate access to employment', but subject to the 'real link' justification. However, and as we have seen last term, A**rticle 24(2) Directive 2004/38 excludes** work-seekers from equal treatment in respect to social assistance. In Case **C-22/08 *Vatsouras* [2009] ECR I-4585, the Court held that social assistance is to be interpreted narrowly in this context so that a benefit aimed at facilitating access to the employment market was not caught by the exclusion contained in Article 24(2). However, in **C-67/14 *Alimanovic and Others*, the Court de facto appears to have narrowed the significance of *Vatsouras* and *Collins*¸ and held that benefits intended to guarantee basic needs of an applicant are 'social assistance' and are therefore excluded from equal treatment for work-seekers. This could cover most, if not all, cash benefits for workseekers.

- **Employers:** the employer can also rely on Article 45 TFEU to challenge rules which limit her ability to employ a worker (otherwise it would be easy for the MSs to draft rules which by binding the employer would have the effect of excluding other Union nationals from the labour market) → C-350/96 *Clean Car* [1998] ECR I-2521.

- **Frontier-workers:** Article 45 TFEU also applies to frontier workers, i.e. those who work in a Member State, but reside in a different Member State (whether their State of origin or another State).

- **Returning workers:** The free movement provisions also apply to own citizens who return to their own country after having exercised a Treaty right; in particular returning workers have a right to be accompanied by their family members much as Union migrant would have (cf Case C-370/90 *Singh* [1992] ECR I-4265).

2. MATERIAL SCOPE – WHICH ARE THE RIGHTS GRANTED BY ARTICLE 45 TFEU?

Article 45 TFEU grants a right to leave one's own country, to enter and stay in another country to take up or seek employment, and to move within the territory of another country (2.1.). It grants a right not to be discriminated against on grounds of nationality or of movement (2.2.), and a right to access the employment market (2.3.)

2.1. RIGHT TO LEAVE, RIGHT TO ENTER AND RIGHT TO STAY AND MOVE

- Those are the ones we have seen when looking at Directive 2004/38. Remember that the **right to reside in the host Member State** is conditional only upon proof of employment.

- Right **to permanent residence** might be gained even before 5 years by worker (or eco. active) in the cases listed by *Article 17 Directive 2004/38.

2.2. RIGHT NOT TO BE DISCRIMINATED AGAINST

Article 45(2) TFEU; Article 18 TFEU; Article 24(1) Directive 2004/38; Article 7(2) Regulation 492/2011

A. Direct discrimination

Direct discrimination is discrimination in law → the rule distinguishes according to the workers' nationality → e.g. only Italians can teach Italian literature → always forbidden unless it falls within one of the express derogations or within the public service exception.

- **Treaty derogations** (see also Dir. 2004/38) → public policy, public security (public health, but subject to greater restrictions) → narrowly construed (see above) and unlikely to succeed (*see* Case C-114/97 *Commission v Spain* [1998]

ECR I-6717). In any case MSs must respect fundamental rights as general principles of Union law when derogating from a Treaty provision. NB Treaty derogations **cannot be invoked to serve economic aims** (whilst imperative requirements can be invoked when the rule pursues also an economic aim, provided it is not the only aim pursued).

- **Public service exception :** Article 45 (4) TFEU – Public service is a Union not national concept and it does not depend upon the designation MSs give to a post, or merely on the fact that it is regulated by public law → ECJ adopted functional rather than institutional approach → e.g. Case 149/79 *Commission v Belgium* [1980] ECR 3881 – posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard general interests of the State or other public authorities – those presume the existence of a **special relationship of allegiance** to the State and reciprocity of rights and duties which form the foundation of the bond of nationality. For examples see Case 149/79 *Commission v Belgium 2* [1982] ECR 1845.

B. Indirect discrimination

Indirect discrimination is discrimination in fact → the rule does not discriminate on its face but it affects foreigners (and/or migrants) more than nationals (or non-migrants) → e.g. in order to teach Italian literature you must have hold an Italian degree → whilst the rule does not openly distinguish on grounds of nationality, it affects foreigners more than nationals since nationals are more likely to have obtained their degree in their home country. A rule which is capable of affecting foreigners more than nationals is compatible with EU Law only insofar as it is objectively justified, i.e. it pursues an **imperative requirement of public interest and is necessary** (lest restrictive means) **and proportionate** to achieve that aim (e.g. in order to teach in an Italian institution you must be fluent in Italian – Italians automatically fulfil that condition, whilst foreigners do not. However, since the teaching is to be done in Italian that is a necessary and proportionate condition).

The concept of indirect discrimination has been given a broad interpretation → Case C-237/94 *O'Flynn* [1996] ECR I-2617 → "(…) conditions imposed by national law

must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (…) or the great majority of those affected are migrant workers (…), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (…) or where there is a risk that they may operate to the particular detriment of migrant workers (…)."

2.2.1. EXAMPLES OF INDIRECT DISCRIMINATION

- **Rules which are in any way connected with nationality**: e.g. advantages granted to those who have done their military service in the host country → Case 15/69 *Ugliola* [1970] ECR 363.

- **Rules which contain a "territorial" element**: e.g. a residence requirement (e.g. Case 152/73 *Sotgiu* [1974] ECR 153); a requirement that a benefit is used within the territory (e.g. Case C-237/94 *O'Flynn* [1996] ECR I-2617); qualification requirements – those can be interpreted either as indirectly discriminatory or as imposing a double burden; but they need in any case to be justified (e.g. Case 340/89 *Vlassopoulou* [1991] I-2357); taking into account periods of work performed in the *domestic* civil service but not in the civil service of another MS (e.g. Case C-15/96 *Schöning* [1998] ECR I-47).

- **Language requirements**: e.g. 379/87 *Groener* [1989] ECR 3967, and *cf* Article 3 Regulation 492/11.

2.2.2. SCOPE OF THE PRINCIPLE OF NON-DISCRIMINATION

The principle of non-discrimination applies to all that is connected, even remotely, to the exercise of the economic activity. In particular, Regulation 492/2011 provides that the principle of non-discrimination on grounds of nationality applies to all matters relating to employment including:

- access to employment (Arts 3; 4 and 6);
- assistance of employment offices as granted to nationals (Art 5);
- conditions of employment (Art 7(1));

- social and tax advantages (Art 7(2));
- vocational training (Art 7(3));
- membership of trade unions (Art 8);
- housing (Art 9).

- **Social advantages:** Article 7(2) Regulation 492/2011 → The ECJ has interpreted the concept of social advantage to cover also advantages which are not attached to the contract of employment, if they are generally granted to national workers primarily because of their objective status as workers, or by virtue of the mere fact that they reside in the national territory, or if they encourage mobility; e.g. interest-free child birth loan → Case 65/81 *Reina* [1982] ECR 33. **Case C-181/19 *Jobcenter Krefeld - Widerspruchsstelle v JD* ECLI:EU:C:2020:794 → the Court examined, inter alia, how Art 7(2) interacts with Dir. 2004/38 (and Art 24(2)) in the context of someone who benefits of a right of residence based on Art 10 of Reg 492/11 (= right of education - see below for details)

- **Social advantages which indirectly benefit the worker**: Social advantages of which family members (but only those listed in Article 3 Directive 2004/38 → Case 316/85 *Lebon* [1987] ECR 2811) are direct beneficiaries but which indirectly benefit the worker, such as a rail discount for large families (Case 32/75 *Cristini* [1975] ECR 1085), or a disability allowance for the worker's son (Case 63/76 *Inzirillo* [1976] ECR 2057) are also covered by Article 7(2). The ECJ went further and found that if MS grants own nationals' (unmarried) stable partners right to residence, then the same right is to be enjoyed by Union worker since that constitutes a social advantage → Case 59/85 *Reed* [1986] ECR 1283.

- **Benefits awarded because of the special link of nationality**: Those are **not** included in the term social advantages; e.g. benefits awarded to Belgian war veterans were linked to the service they rendered to own country and therefore were not to be considered social advantages → Case 207/78 *Even* [1979] ECR 2019; and obligation placed upon the employer to continue paying insurance and pension contributions for workers during their military service is not a social advantage → Case C-315/94 *de Vos* [1996] ECR I-1417.

- **Work-seekers cannot rely on Article 7(2)** and thus cannot invoke equal treatment for social advantages → Case 316/85 *Lebon* [1987] ECR 2811. Following the ruling in *Alimanovic* they also cannot rely on Article 24 Directive 2004/38 for all benefits that constitute social assistance (now broadly construed), so there are very few benefits that would be available to jobseekers.

2.3. NON-DISCRIMINATORY BARRIERS

- **Rules which discourage/hinder movement or affect access to the employment market:** rules which are neither directly nor indirectly discriminatory, but which affect access to the employment market, or affect the workers' ability to move, are also considered barriers caught by Article 45 TFEU **unless** justified by an imperative requirement of public interest. Eg a rule requiring the payment of a transfer fee in order to engage a footballer previously engaged in another football team (Case C-413/93 *Bosman* [1995] ECR I-4921); a rule establishing a deadline to field players for the championship (Case C-176/96 *Lehtonen* [2000] ECR I-2681).

- **But not if the rule is inherent to the organisation of the economic activity**: e.g. selection rules to be able to take part in sporting competition (Joined cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549).

- **Or if the effect of the rule is too remote and indirect** to affect access to the labour market (Case C-190/98 *Graf* [2000] ECR I-493).

3. AGAINST WHOM CAN ARTICLE 45 TFEU BE RELIED UPON?

- **Vertically:** against the Member State where the worker moves in all cases (direct, indirect and non-discriminatory barriers); against the Member State of origin both to challenge restriction on exit, and restrictions on returning. In this case the ECJ equates the situation of a national returning to her Member State after having exercised her right to free movement to that of a national of another Member State → e.g. Case C-370/90 *Singh* [1992] ECR I-4265. **BUT** Treaty free movement provisions cannot be relied upon in purely internal situations, i.e. when the national has not exercised her right to movement → e.g. Joined Cases 35 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.

- **Semi-horizontally:** rules regulating employment in a collective manner in all cases (direct, indirect and non-discr. barriers) e.g. rules provided for in collective agreements; or rules imposed by professional organisations → e.g. 36/74 *Walrave and Koch* [1974] ECR 1405; Case C-413/93 *Bosman* [1995] ECR I-4921 (*cf* Article 7(4) Regulation 492/11).

- **Horizontally:** private parties cannot impose (directly or indirectly) discriminatory conditions → Case C-281/98 *Angonese* [2000] ECR I-4139 (and *cf* Article 7(4) Regulation 492/11).

4. THE WORKER'S FAMILY

- As we have seen in relation to Directive 2004/38, Union citizens (whether eco. active or not) have a right to bring their family with them and this regardless of whether the family members are Union or Third Country Nationals (TCNs). Children of economically active people also derive a:

  - **Right to education:** Article 10 Regulation 492/2011 → resident children of a worker have a right to be admitted to general education, vocational courses, and apprenticeship under the same conditions as nationals → generous interpretation, it extends to non-dependant children over 21 (Case C-7/94 *Gaal* [1996] ECR I-1031); it covers broad range of courses (e.g. Case 76/72 *Michel S* [1973] ECR

457) and funding and conditions of education (Case 9/74 *Casagrande* [1974] ECR 773. And, the right to education (and residence) continues when worker has left (Joined Cases 389 and 390/87 *Echternach and Moritz* [1989] ECR 723), or terminated employment, or family has broken down. In the latter case, parent-guardian derives right to stay from children's right to education → Case C-413/99 *R v Home Secretary* [2002] ECR I-7091. See also the recent case of **Case C-181/19 *Jobcenter Krefeld - Widerspruchsstelle v JD* ECLI:EU:C:2020:794. This is an important recent case that we will discuss in the lecture.

5. CONCLUSIONS

- Teleological and broad interpretation of Article 45 TFEU → concept of worker interpreted broadly, to include part-timers and work-seekers. NB part-timers have full rights, whilst work-seekers have a semi-status, and denial of social advantages might be justified.

- Restrictions on entry and expulsion must always be justified by a Treaty derogation because they are the very negation of Article 45 TFEU. MSs have to respect procedural guarantees and fundamental rights when denying entrance or when deporting. Treaty derogations cannot be invoked to pursue economic aims.

- Directly discriminatory rules are in principle not admissible **unless** (i) justified by Treaty derogation (unlikely); or (ii) the nature of the post falls within the public service exception.

- Indirectly discriminatory rules are admissible only if they are justified by an imperative requirement of public interest, and if they are necessary (the least restrictive means) and proportionate to the aim they pursue.

- Non-discriminatory barriers are caught by Article 45 TFEU when they hinder movement, or prevent/affect market access.

- Rules which are inherent to the organisation of the economic activity are not barriers falling within Article 45 TFEU and need not be justified.

- Rules the effect of which is too remote and indirect to affect movement/access are not barriers falling within Article 45 TFEU and need not be justified.

- Article 45 TFEU can be relied upon to challenge rules enacted by Member States and rules regulating employment in a collective manner, if they discriminate or impose a barrier to movement/access. It can be relied upon in purely horizontal situation, i.e. against private parties outside the framework of a collective agreement, if they are directly or indirectly discriminatory.

- The worker has a right to bring her family with her. Spouse and children who are under 21 or dependant have a right to reside and to work. Children also have a right to education. The other family members have only a right to reside.

- Article 45 TFEU does not apply in purely internal situations, but it applies to own national when she is returning to own Member State after having exercised Article 45 TFEU rights.