
# Analytical Report 2014

## The notions of obstacle and discrimination under EU law on free movement of workers

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**Written by Dr Filip Van Overmeiren (ed), Dr Charlotte O'Brien, Prof Dr Eleanor Spaventa, Prof Dr Yves Jorens, Dr Bernd Schulte**

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Authors:

Dr Filip Van Overmeiren, researcher, Ghent University.

Dr Charlotte O'Brien, lecturer at the University of York, York Law School.

Prof Dr Eleanor Spaventa, Professor of European union law, Durham University.

Prof Dr Yves Jorens, professor of social security law and European social law, Ghent University.

Dr Bernd Schulte, researcher, formerly Max Planck Institute of social foreign and international social law.

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# Executive summary

The free movement of workers enshrined in Article 45 TFEU is one of the fundamental principles of the European Union. Although Article 45 TFEU contains clear references to specific rights for workers, which have been implemented in several pieces of secondary legislation (e.g. Directive 2004/38, Regulation (EU) No 492/2011 as well as Regulations (EC) No 883/2004 and (EC) No 987/2009), the key concepts regarding the scope of application of the free movement of workers derive from case law.

Article 45 TFEU applies to migrant workers, i.e. persons performing services for and under the direction of another person in return for which they receive remuneration, provided their activity is not marginal and ancillary. This includes full-time workers, part-time workers (no matter how many hours worked), seasonal workers, frontier workers, working students and jobseekers. Article 45 TFEU does not apply to non-remunerated work including voluntary work and care work within the family unit. It is open to debate whether it should apply to internships and other forms of non-remunerated work which are aimed at facilitating access to the paid labour market.

Migration exists whenever the worker has moved between EU Member States: this includes migration to another Member State to work there; returning to the home State after having worked abroad; and living in one Member State and working in a different one. Article 45 TFEU can be invoked also by employers to challenge restrictions on the possibility to hire workers. The family of the worker is also protected by both primary and secondary provisions of EU law.

In order to be protected by the Treaty free movement of workers provisions a claimant must fall within the personal scope of the Treaty, i.e. he or she must fall within the definition of worker. Even though the concept of worker has been interpreted broadly, there are some grey areas, in particular in relation to employment which pursues an ulterior aim, such as social reintegration schemes. For the claimant, being classified as a worker is of paramount importance since the status carries a wealth of rights (non-discrimination, access to benefits, the unconditional right to reside in the host State).

Work also needs to be remunerated, but the concept of remuneration is flexible so that a quid pro quo (such as board and lodging) might count as remuneration. However, certain work (internships, apprenticeships etc) is often of economic value for the employer, and of value to the person performing it; and yet, the fact that such activity attracts no remuneration might leave a vulnerable section of workers devoid of protection in European law. Next to that, Member States may police the definition of worker rather rigidly, so that those who work are in fact treated as economically inactive, and so subject to indirectly discriminatory rules that would not be justified if applied to workers. The Commission should be ready to challenge any restrictive practices in defining migrant work, which may result in significant detriment to part-time workers. The same should be said in relation to atypical work contracts, such as zero-hours contracts, and there are also problems with the status of compulsory work placements in order to receive benefits. Therefore, given the changed landscape of the labour market, in order to determine whether there is an employment relationship the focus should be on whether the worker is able to refuse work offered (useful guidelines could be provided by national laws on the application of minimum terms and wages and similar), rather than on the remuneration.

The Commission should also be alive to measures that discriminate against migrant workers once they have become unemployed, challenging restrictive approaches to the retention of worker status which can result in sudden loss of social protection, and arguing that such restrictions defy the broad approach to be taken to defining workers under Article 45 TFEU. Where possible, it would be advisable to characterise migrants as workers in order to trigger the strongest obligations with regard to both indirect discrimination and obstacles to movement. Measures that appear to be directed at the economically inactive can have significant effects upon migrant workers, increasing the disadvantages of becoming unemployed, even though many migrant workers move between jobs, and so making their work more precarious. The use of Article 45 TFEU in the context of access to the labour market, and an empirically evidenced, broad approach to benefits necessary to subsist, and so make access to the labour market possible, could help to avoid a situation in which the biggest obstacles to the free movement of workers are obstacles that prevent migrants from becoming migrant workers in the first place, or from regaining worker status having become unemployed. This could be combined with contesting indirect discrimination, wherever the measures in question can be framed as restricting access to benefits that facilitate access to the labour market. Measures that make it more difficult for own state nationals to seek work having worked elsewhere in the EU should be identified and challenged. Finally, the Commission has a role to play, both through case work, and through awareness-raising activities, in stressing to national legislatures and judiciaries the importance of the prohibition of obstacles to movement. This is especially important in the light of the new Enforcement Directive; Member States need to appreciate and implement the principles contained therein if they are to effectively enforce them.

Article 45 TFEU prevents national rules that discriminate directly on grounds of nationality, e.g. only Italians can work for the Ministry of Defence. These rules can be justified by relying on the Treaty derogations. It is also directed towards measures that discriminate indirectly on grounds of nationality, e.g. in order to be employed in a school the worker needs to be fluent in Italian. These rules can be justified on imperative grounds of public interest provided they are necessary and proportionate. Finally, Article 45 precludes obstacles/barriers/restrictions to the worker's ability or desirability to move or access the market, e.g. a worker returning to Italy after having worked abroad will not be eligible for certain benefits; or a worker cannot be employed by more than one employer, or in more than one Member State. These rules can also be justified on imperative grounds of public interest as above.

Although there are numerous studies and doctrinal contributions on the development from a discrimination approach toward an obstacle approach and all the consequences this has, it should be stressed that most free movement of persons cases could be treated using a discrimination approach, albeit 'discrimination based on migration' rather than pure nationality discrimination. The language of obstacles is in itself perhaps a bit misleading, since the cases predominantly deal with obstacles to *movement* rather than mere obstacles to market access experienced after movement. The construct of discrimination on grounds of movement might also help with making 'obstacle' arguments more accessible in national courts, by framing them as a familiar, hard legal concept (discrimination), and accepting inherent limits hinted at by the *Bosman* case law, that only measures penalising the exercise of free movement rights be caught. Discrimination on grounds of migration has the advantage of creating clearer boundaries (therefore making it easier to apply law) to the free movement of persons, whilst at the same time being less intrusive to national regulatory autonomy.

The classification as 'discrimination' or 'obstacles/restrictions/barriers' in the case law should not be considered excessively rigid. What really matters is whether the rule has

an effect on intra-Union migration. If such an effect is found through either discrimination or a barrier to movement or an obstacle, then the rule will have to be justified. In order to claim indirect discrimination it is sufficient that the rule might affect more foreigners or migrants than nationals and no particular evidence is required. In order to claim an obstacle it is sufficient to show that the rule might deter or discourage the free movement of workers, or that it might constitute a barrier to market access. Again no particular evidence is required. For this reason, it is advisable to claim both discrimination and obstacle in litigation.

There are nonetheless some manifest differences between the discrimination and the obstacle approach. If a finding of discrimination can be supported by statistical data, then it will be very difficult for the Member State to defend such discrimination. A finding of discrimination is then again politically less problematic. This is so because if the CJEU finds discrimination the Member State might amend the rules simply to remove that discrimination, whilst if the CJEU finds that the rule is an unjustified obstacle to free movement the Member State will have to remove the rule for all economic operators. This might be very important should governments seek to introduce new restrictions on, for instance, the possibility to claim benefits or social advantages. Once discrimination is established the *Graf* doctrine (effect of rule too remote and indirect) cannot be invoked: no matter how minimal the discrimination is, it always needs to be justified. On the other hand, the Member State might attempt to reverse a claim of discrimination with statistical data (albeit this would not be conclusive). There are also inherent limits to the definition of 'obstacle', as a rule is not to be considered an obstacle if it is inherent in the organisation of the employment concerned or if the effect of the rule is too uncertain and indirect to be qualified as a barrier to movement.

Finally, it can be observed that the justification of indirect discrimination and obstacles runs along similar lines. In several cases the CJEU does not carry out a separate assessment of necessity and proportionality, so that it would simply look at whether the measure is 'appropriate' and necessary to achieve the purported aim. In more recent times, the scrutiny as to the necessity of measures has also focused on issues such as the coherence of the rule within the legal system. Case law suggests that where both are established, indirect discrimination may be more readily justified by a Member State than obstacles to movement, where the former typically affect non-nationals and the latter own nationals.

The more traditional proportionality assessment, on the other hand, focuses very much on whether the restriction on the person's freedom is out of proportion with the policy aim pursued. 'Proportionality proper' is a very useful tool in the armoury of private claimants, especially in those cases where the rule itself might be legitimate but the application of the rule to that particular claimant is disproportionate because of the hardship it would cause. 'Proportionality proper' is less useful in relation to the abstract review of legislation (as it is carried out in Commission proceedings) where rules can only be declared either compatible or incompatible with Union law without there been any possibility for an individual assessment. In those cases, the analysis would focus on whether the measure is appropriate and necessary as detailed above.

# 1 Introduction

This report is the result of the analysis of a FreSsco Think Tank group mandated by the European Commission to provide clarification on the usage and meaning of the crucial free movement of workers' concepts of direct and indirect discrimination as well as obstacles to free movement.

The right to free movement of workers, enshrined in Article 45 TFEU and Regulation (EU) No 492/2011, requires inter alia the elimination of any discrimination based on nationality (Article 45(2) TFEU, and Articles 2 to 10 of Regulation (EU) No 492/2011). Article 46(b) refers to abolishing procedures and practices that form an obstacle to the exercise of this right (Article 46(b) TFEU). However, neither Article 45 TFEU nor Regulation (EU) No 492/2011 contain any definition of discrimination or obstacle, although for access to employment Regulation (EU) No 492/2011 in its Article 3(1)(b) gives a description of a situation of indirect discrimination. The case law of the Court of Justice of the European Union (CJEU) gives some definitional guidance on these issues.

Article 45 TFEU clearly covers direct discrimination: this consists of treating like situations in a different way, or unlike situations similarly. According to EU law on the free movement of workers, nationality in relation to access to employment, working conditions including salary, access to tax and social advantages and housing, as well as membership of trade unions, is not a difference which justifies a different treatment. Direct discrimination is easy to identify (e.g. the publication of a vacancy of a private employer which provides that only nationals can apply for the post or that non-nationals cannot have access to a social advantage). It can only be justified pursuant to a limited number of Treaty derogations.

Indirect discrimination is more difficult and sometimes more complex to identify: it occurs when measures are neutral in their formulation (do not expressly discriminate on the basis of nationality) but in practice have a disproportionate impact upon a protected group. The CJEU defined indirect discrimination very widely in the case *O'Flynn* as any provision of national law "*intrinsically liable to affect migrant workers more than national workers and if there is a risk that it will place the former at a particular disadvantage*". Unlike direct discrimination, indirect discrimination can be justified on several grounds, provided the Member State can show a legitimate aim and that the measures it has taken are objectively justified and proportionate to the aim pursued.

The CJEU also provided a definition of an obstacle to the free movement of workers in the famous *Bosman* case: "*Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*". The CJEU has also held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Union citizens of occupational activities of all kinds throughout the Union, and to preclude measures which might place Union citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. However, according to CJEU case law, and similarly to instances of indirect discrimination, an obstacle can be justified when the rules creating the obstacle pursue a legitimate aim compatible with the Treaty and are

justified by pressing reasons of public interest, are necessary and proportionate (i.e. they do not go beyond what is necessary for that purpose).

In the light of the case law of the CJEU, the European Commission has mandated FreSsco to:

- analyse and better define the notion of obstacle/restriction and of indirect discrimination;
- make a clear distinction between an obstacle and indirect discrimination;
- describe whether the CJEU's requirements for establishing the existence of an obstacle are more or less demanding than those for establishing the existence of an indirect discrimination;
- describe whether the qualification of a measure as an obstacle or as an indirect discrimination has any consequences as to the examination of that measure's compatibility with EU law;
- illustrate the analysis with examples on the basis of CJEU case law as well as on the basis of national experiences.

Following this mandate, the FreSsco Think Tank group has engaged in an overview of the legal framework of the free movement of workers and has taken this as a starting point to assess the broader analytical framework concerning the implementation and enforcement of the right to freedom of movement as a worker.

In this regard, the group has first studied the overall legal framework and the (personal/material) scope of Article 45 TFEU. Specific attention was dedicated to the conceptual distinction between the discrimination approach and the obstacle approach in the CJEU case law. Based on this, the report further explores the particular impact of the delineation of the personal and material scope of the free movement of workers, but also the problems stemming from this delineation. More concretely, it explores how the qualification of the claimant as a worker can influence a case and how the classification of a national measure as a discrimination or an obstacle can affect the outcome of a case. The main question here is: why is it important to be regarded as a worker, and how can you make a strong case against a barrier to movement? The report also assesses how similar measures can be classified as discrimination, an obstacle, or both, and the consequences for justification. The main question here is: which measures can still be justified by the Member States and how?

# 2 The general framework of the free movement of workers

## 2.1 Objectives and legal framework

Article 39 EEC (then 48 EC, now 45 TFEU) introduced the fundamental right for all citizens of the Member States to freely exercise their profession Community-wide after a transitional period (which ended in 1969).

The free movement of workers is now described in Article 45 TFEU, which provides the following:

"*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."*

The free movement of workers has been a central element of the European Union ever since the very beginning in 1957,[1] but was given effect only in 1968 when two acts concerning secondary legislation were passed: Regulation (EEC) No 1612/68[2] on the freedom of movement of workers and Directive 68/360[3] on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, which set the conditions for the effective exercise of free movement for workers.

The term 'workers of the Member States' in Article 45(1) TFEU only covers workers who are nationals of a Member State. Workers who are nationals of a non-Member State, but reside and work permanently in a Member State are not included. In accordance thereto, Regulation (EEC) No 1612/68 refers expressly to 'nationals of a Member State'.

[1] The free movement of workers thus forms part of the foundations of the Union, just as do Article 49 TFEU providing the right of establishment, Article 56 TFEU stipulating the freedom to provide services and Article 28 TFEU on the free movement of goods. In terms of economic constitutionalism, these fundamental freedoms are, in accordance with Article 26(2) TFEU, components of the internal market. 'Fundamental freedoms' as a generic term for the free movement of capital, goods, services and persons cannot be found in the Treaty, but is used by the CJEU. See case C-203/80, Casati, ECLI:EU:C:1981:261; case C-205/84, Commission v Germany, ECLI:EU:C:1986:463.

[2] Regulation (EEC) No 1612/68 on free movement of workers, OJ 1968 L 257/2.

[3] Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ 1968 L 257/13.

The rights of workers under the free movement provisions of the Treaty are not unlimited. Limitations are provided for in the Treaty itself, notably on grounds of public policy, public security, public health and for employment in the public service (Articles 45(3) and (4) TFEU). These limitations have been interpreted narrowly by the CJEU in accordance with the fundamental principle that exceptions to fundamental rights are to be narrowly construed.[4] According to the relevant case law on Article 45(4) TFEU, for example, posts of railway workers, nurses, teachers, civil researchers etc are not covered by this exception, which only applies to employment in public service that involves participation in the safeguarding of the State's general interests.[5]

With respect to enlargements of the European Union, transitional provisions allowed 'old' Member States to restrict access to their labour markets for 'new' acceding States (for up to seven years in specific circumstances[6]).

From its earliest judgements in the 1970s, the CJEU confirmed that the right to free movement and non-discrimination on grounds of nationality was directly applicable[7] and thus took precedence over conflicting national law. The details of the rights of migrant workers have been further developed in several secondary instruments, in particular in Regulation (EU) No 492/2011 (formerly Regulation (EEC) No 1612/68) on the free movement of workers,[8] Citizens' Rights Directive 2004/38[9] and Regulations (EC) No 883/2004 and (EC) No 987/2009 regarding the coordination of social security systems.

Regulation (EU) No 492/2011 further implements the principle of equal treatment for migrant workers.[10] A key, and possibly the most cited, provision of this instrument is Article 7(2), which provides that a migrant worker[11] and the members of his or her family enjoy "the same social and tax advantages" as a national worker. 'Social advantages' are all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, where the extension of such advantages to EU national migrant workers seems likely to facilitate the mobility of such workers within the Union.[12] Migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship.[13] The extension of the concept of 'social advantage' in the case law of the CJEU, which may include advantages as diverse as the right of a person to request that proceedings take place in a language other than the language normally used,[14] or the right of residence for the unmarried partner of a migrant worker,[15] has been central to the development of migrant workers' rights.[16]

[4] Case C-30/77, Bouchereau, ECLI:EU:C:1977:172; case C-152/73, Sotgiu, ECLI:EU:C:1974:13; case C-149/79, Commission v Belgium, ECLI:EU:C:1980:297; case C-66/85, Lawrie-Blum, ECLI:EU:C:1986:284.
[5] Case C-149/79, Commission v Belgium, ECLI:EU:C:1980:297.
[6] See e.g. Accession Treaty (2003), Annexes V to XV of 2003, OJ 236/807 et seq.
[7] Case 167/73, Commission v France, ECLI:EU:C:1974:35; case C-41/74, van Duyn, ECLI:EU:C:1974:133; case C-48/75, Royer, ECLI:EU:C:1976:57.
[8] Previously known as Regulation (EEC) No 1612/68.
[9] Directive 2004/38 replaces former Directive 68/360 on the rights of entry and residence and Directive 1251/70 on the right to remain.
[10] The rules of equal treatment in respect of social advantages in now Regulation (EU) No 492/2011 apply to dependent workers only. However, the self-employed may invoke comparable rights by virtue of Article 49 TFEU despite the absence of secondary legislation.
[11] The fourth recital of the preamble of Regulation (EEC) No 1612/68 states that the right of free movement must be enjoyed without discrimination by permanent, seasonal and frontier workers as well as by those who pursue their activities for the purpose of providing services.
[12] Case C-310/91, Schmid, ECLI:EU:C:1993:221; Case C-57/96, Meints, ECLI:EU:C:1997:564.
[13] Case C-39/86, Lair, ECLI:EU:C:1988:322.
[14] Case C-137/84, Mutsch, ECLI:EU:C:1985:335.
[15] Case C-59/85, Reed, ECLI:EU:C:1986:157.
[16] The interpretation of social advantages has been established in respect of such benefits as railway discount cards for large families; case C-32/75, Cristini, ECLI:EU:C:1975:120 (childbirth loans); case C-

The freedom of movement of workers is therefore more than just an instrument for achieving an economic objective, but must be seen as an instrument by which the worker is guaranteed the possibility of improving his or her living and working conditions and promoting his or her social advancement, although these social objectives might be seen as the necessary corollary of promoting free economic movement.[17]

Article 21 TFEU, which sets out generally the right of every Union citizen to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU in relation to freedom of movement for workers. This means that in such a case Article 45 TFEU takes precedence over Article 21 TFEU and is solely applicable.[18]

In its *Martínez Sala*[19] judgement the CJEU first checked if the claimant, who had worked in Germany and after losing her job had received social assistance benefits, could base her claim to the German child-raising allowance on Regulation (EEC) No 1408/71 or Regulation (EEC) No 1612/68. As her status as an employed person for Regulation (EEC) No 1408/71 or of a worker for Regulation (EEC) No 1612/68 could not be clarified, the CJEU based its decision on Articles 18 and 21 TFEU, as Mrs Martínez Sala, as a Spanish national, was a Union citizen lawfully residing in another Member State.

Social protection of persons moving from one country to another is a crucial aspect of the freedom of movement, as workers would be reluctant to move to another Member State to take up employment if they ran the risk of losing social security rights acquired or in the process of being acquired. Furthermore, the rules on equal

65/81, Reina, ECLI:EU:C:1982:6 (invalidity benefits); case C-63/76, Inzirillo, ECLI:EU:C:1976:192, and case C-310/91, Schmid, ECLI:EU:C:1993:221 (minimum means or subsistence); case C-261/83, Castelli, ECLI:EU:C:1984:280; case C-249/83, Hoeckx, ECLI:EU:C:1985:139; case C-122/84, Scrivner, ECLI:EU:C:1985:145; case C-139/85, Kempf, ECLI:EU:C:1986:223 (financial support for students); case C-235/87, Matteucci, ECLI:EU:C:1988:460; case C-308/89, di Leo, ECLI:EU:C:1990:400; case C-3/90, Bernini, ECLI:EU:C:1992:89 (maternity benefits); case C-111/91, Commission of the European Communities v Grand-Dutchy of Luxembourg, ECLI:EU:C:1993:92 (family benefits); case C-185/96, Commission of the European Communities v Hellenic Republic, ECLI:EU:C:1998:516 (guaranteed social minimum for elderly persons); case C-157/84, Frascogna, ECLI:EU:C:1985:243; case C-261/83, Castelli, ECLI:EU:C:1984:280. From this case law it appears that the principal function of Regulations (EEC) No 1612/68 and now (EU) No 492/2011 is to provide for a general prohibition of non-discrimination with respect to benefits which do not qualify as 'social security' in the sense of the social security Coordination Regulations. Furthermore, the material scope of legal arrangements covered by the Regulation on free movement of workers is not restricted to legislation as in Article 1(l) of Regulation (EC) No 883/2004.

[17] This case law presaged the creation of citizenship of the Union by the Maastricht Treaty. This concept of Union citizenship marks a process of emancipation of Union rights from the economic paradigm insofar as they are no longer bestowed upon citizens solely when they make use of the economic freedoms and assume a corresponding status as a worker or provider of services, but directly by virtue of their legal status as a citizen of the Union. Union citizenship attributes central significance to the right to move and to reside freely within the territory of the Member States (Article 21 TFEU), since this is the precondition for exercising most fundamental freedoms and basic rights. Union citizenship aims therefore at a general freedom of movement, independent from economic freedoms. With the introduction of Union citizenship the link between economic activity and entitlement to social benefits has been severed, as Article 18 EC (now 21 TFEU) has opened new possibilities for persons who were previously excluded from the personal scope of Community law because they neither engaged in work nor provided or received services by attributing central significance to the right to move and to reside freely within the territory of Member States as the precondition for exercising most fundamental freedoms and basic rights. Union citizenship thus aims at a general freedom of movement, independent from economic activities. The fact that Union citizenship confers the right of free movement on every citizen of the EU Member States is reflected by the fact that there is now one simple legal instrument – Directive 2004/38 – dealing with the right to move and reside freely within the European Union. At the same time a paradigm shift has to be detected from a selective, category-based model of market solidarity to the recognition, to a certain degree, i.e. limited recognition of a transnational personal status of all citizens of the Union which establishes a general claim of social integration in the host Member State.

[18] Case C-287/05, Hendrix, ECLI:EU:C:2007:196.

[19] Case 85/96, Martínez Sala, ECLI:EU:C:1998:217.

treatment and access to social security are instrumental to facilitating social integration into the host State. The fundamental principle underlying the social security coordination system envisaged by Article 48 TFEU and implemented by Regulations (EC) No 883/2004 and (EC) No 987/2009 is the equality of treatment between nationals and EU non-nationals.[20] The Regulations also guarantee the aggregation of periods, the assimilation of facts and the exportation of benefits, to minimise the disadvantages incurred when migrating.

Thus, the rights of workers and their family members to enter a Member State, to take up residence therein, and to engage in economic activity on the same basis as nationals of that Member State are set out in detail in secondary legislation. However, such law reflects only partially the CJEU case law on the impact of the Treaty provisions on free movement, the CJEU often basing its decisions not on the respective Regulations, but directly on the Treaty provisions.[21] Accordingly, the fact that secondary legislation does not provide for solutions to certain problems faced by persons when moving from one Member State to another does not necessarily mean that these persons are without any protection under European law, since the free movement of workers provisions can be invoked directly.

National law must comply with the requirements of both primary law and secondary legislation. These are two independent yardsticks which must be applied concurrently, and the CJEU has accordingly held that the compatibility of a provision of national law with secondary EU law does not render the examination of primary law unnecessary.[22]

The interpretation of the Treaty free movement provisions is of paramount constitutional importance, since the broader the interpretation, the greater the potential intrusion in the Member States' regulatory autonomy. Because of the broad definition of the concept of worker and the fact that almost every field of national policy can come within the radius of action of EU free movement law,[23] the question of which types of measure, requirement or conduct fall within the scope of the Treaty (and therefore within the jurisdiction of the CJEU) becomes all the more important.

The recently enacted Directive 2014/54/EU on measures facilitating the exercise of rights conferred to workers in the context of freedom of movement for workers (the 'Enforcement Directive'),[24] which must be implemented by 21 May 2016 is aimed, amongst others, at providing and ensuring the provision of independent legal and other assistance to Union workers, conducting independent surveys, publishing independent reports and information on application at national level of the EU rules on the free movement of workers. The Member States are to designate national structures or special bodies intended to promote equal treatment and non-discrimination on grounds of nationality as well as to remove unjustified restrictions on or obstacles to the right of free movement. These bodies should act as 'contact points' vis-à-vis equivalent bodies in other Member States and cooperate with existing information and assistant services and other entities. Information about rights conferred by the Directive that is independent, up-to-date, comprehensive, accessible,

[20] EU migrant workers must be subject to the same conditions of affiliation to social security schemes as national workers (case C-33/88, Allué and Coonan, ECLI:EU:C:1989:222) and must be entitled to receive the same range and level of benefits which may entail the 'export' of benefits to another Member State. The result should be parity, in social security terms, between nationals and EU non-nationals subject to the same social security system insofar as both contribute to the system and receive benefits on the same terms.
[21] Case C-379/11, Caves Krier, ECLI:EU:C:2012:798; case C-233/12, Gardella, ECLI:EU:C:2013:449.
[22] Case C-158/96, Kohll, ECLI:EU:C:1998:171.
[23] See e.g. the broad interpretation of social advantages in case C-207/78, Even, ECLI:EU:C:1979:144, and the overall tendency of free movement law to tackle almost any issue as long as there is some connection with freedom of movement of the Union citizen. See case C-60/00, Carpenter, ECLI:EU:C:2002:434; case C-192/05, Tas-Hagen, ECLI:EU:C:2006:676; Case C-499/06, Nerkowska, ECLI:EU:C:2008:300.
[24] OJ of 30 April 2014.

free of charge and in more than one EU official language should be provided. Associations and organisations with a legitimate interest, e.g. the social partners, must be given entitlement to enforce rights on behalf of Union workers. Providing migrant workers with adequate and accurate information is not only of crucial importance to ensure access to the labour market and social protection in the host Member State, but is also apt to facilitate the work of the institutions concerned.

## 2.2 Definition of key concepts

Before entering into a deeper analysis, it is necessary to clarify the exact meaning of the key concepts in the framework of the free movement of workers, as defined by the CJEU.

'Worker' in the context of the free movement of workers of Article 45 TFEU is defined in the *Lawrie-Blum*[25] case as a person performing services for and under the direction of another person in return for which she or he receives remuneration.

It is commonly known that *discrimination* occurs when the same situations are treated differently or when different situations are treated the same; such treatment is unlawful unless objectively justified.[26] Unlawful discrimination occurs when criteria which are not relevant, like nationality, are relied upon as grounds for different treatment. It will always be necessary, therefore, to ascertain first which criteria are relevant to the choice of treatment and which are not.[27] The prohibition of discrimination based on nationality encompasses both direct and indirect discrimination.[28]

*Direct discrimination* occurs when national rules expressly distinguish on grounds of nationality. It entails that nationals and non-nationals are treated differently in law.

*Indirect discrimination* is broadly construed in the CJEU case law.[29] It occurs when rules, although neutral in their formulation, are likely to bear more heavily on a protected group. The CJEU gave the most comprehensive definition of indirect discrimination in the *O'Flynn* case. It held that "*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*"[30].

[25] Case C-66/85, Lawrie-Blum, ECLI:EU:C:1986:284.
[26] Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, ABNA and Others, ECLI:EU:C:2005:741, paragraph 63, and case C-344/04, IATA and ELFAA, ECLI:EU:C:2006:10, paragraph 95; case C-300/04, Eman and Sevinger, ECLI:EU:C:2006:545, paragraph 57. In case C-43/95, Data-Delecta, ECLI:EU:C:1996:357, the Court said that the principle of non-discrimination requires "*perfect equality of treatment in Member States of persons in a situation governed by EU law and nationals of the Member States in question*". See also case C-122/96, Saldanha, ECLI:EU:C:1997:458; case C-411/98, Ferlini, ECLI:EU:C:2000:530.
[27] Opinion of Advocate General Sharpston, delivered on 30 November 2006 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CC0227%2801%29&rid=2#Footnote1), case C-227/04, P Maria-Luise Lindorfer v Council of the European Union, ECLI:EU:C:2007:490.
[28] In legal doctrine, one also finds the distinction between formal and substantive discrimination. Formal discrimination is when a rule explicitly divides by an illegitimate factor. Substantive discrimination is determined largely by effect and may be direct or indirect. Davies, 15.
[29] First case: case C-15/69, Ugliola, ECLI:EU:C:1969:46; case C-152/73, Sotgiu v Deutsche Bundespost, ECLI:EU:C:1974:13. Other cases: case C-111/91, Commission v Luxembourg, ECLI:EU:C:1993:92, paragraph 9; case C-419/92, Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda, ECLI:EU:C:1994:62, paragraph 7; case C-278/94, Commission v Belgium, ECLI:EU:C:1996:321, paragraph 27.
[30] Case C-237/94, O'Flynn, ECLI:EU:C:1996:206; see also case C-152/73, Sotgiu, ECLI:EU:C:1974:13.

To detect indirect discrimination, neither the form nor the intention matter, but the effect of the rule is relevant for the assessment. Typical 'neutral' but often indirectly discriminatory conditions are residence conditions,[31] conditions regarding professional qualification[32] or language requirements.[33]

The concept of *obstacles* to free movement, also known as *restrictions*, *impediments* or *barriers*,[34] was introduced in the free movement of workers case law in the mid-1990s. In the *Bosman* case, the CJEU held that "*provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*"[35] and that, although the rules indistinctly applied to national and cross-border situations, "*they still directly affect […] access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers*"[36]. The distinction between direct discrimination, indirect discrimination and obstacles to free movement is connected to the potential justification of the rule.

*Justification* prevents a rule that on the face of it is discriminatory or an obstacle to free movement from breaching EU law. Direct discrimination can only be justified based on one of the grounds expressly provided for in the Treaty: public policy, public security and public health (Article 45(3) and (4)). Indirect discrimination and obstacles to free movement can be justified pursuant to the Treaty derogations, but also by relying on other public policy grounds, the imperative requirements of public interest.[37] In order to be compatible with EU law an indirectly discriminatory or restrictive national measure must pursue an aim compatible with EU law and the restriction imposed must be necessary to achieve that aim, as well as proportionate.

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[31] Case C-350/96, Clean car, ECLI:EU:C:1998:205; case C-388/01, Commission v Italy, ECLI:EU:C:2003:30; case C-288/89, Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media, ECLI:EU:C:1991:323. In direct taxation cases, the assessment of indirect discrimination is rather different as tax systems are inherently territorial and therefore different treatment between nationals and non-nationals can more easily be explained as they are not in a comparable situation. However, this does not exclude that tax law is considered to be indirectly discriminatory. See case C-87/99, Zurstrassen, ECLI:EU:C:2000:251.

[32] Case C-340/89, Vlassopoulou v Ministerium für Justiz, ECLI:EU:C:1991:193; case C-11/77, Patrick v Ministre des affaires culturelles, ECLI:EU:C:1977:113; case C-71/76, Thieffry v Conseil de l'ordre des avocats de la Cour de Paris, ECLI:EU:C:1977:65. See also Directive 2005/36 on the recognition of professional qualification in this regard.

[33] Case C-379/87, Groener v Minister for Education and City of Dublin Vocational Education Committee, ECLI:EU:C:1989:599. However, in case C-424/97, Haim I, ECLI:EU:C:2000:357, a language requirement was treated as an obstacle rather than as an indirectly discriminating measure.

[34] The CJEU has ruled in many decisions that free movement may not be "prohibited", "obstructed", "hindered", "hampered", "discouraged", "placed at a disadvantage", "deterred" or "made less attractive" – English terms which are often used cumulatively. It is an open question if and when the terms used indicate sometimes different degrees of restrictive effects. In any case, the terms used in the other languages, in particular in the language of the case and the working language of the CJEU, i.e. French, would have to be taken into consideration as well.

[35] Case C-352/06, Bosman, ECLI:EU:C:2008:290, paragraph 96.

[36] Case C-352/06, Bosman, ECLI:EU:C:2008:290, paragraph 103.
Since its Dassonville judgement (case C-8/74; ECLI:EU:C:1974:82) the CJEU has interpreted national trade rules which "*are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade*". The same applies to the freedom to provide services, to the freedom of establishment and also to the free movement of workers (case C-415/93, Bosman, ECLI:EU:C:1995:463). The so-called *Dassonville* formula does not only limit the scope of application to particular forms or means of hindrances, i.e. does not only protect against discrimination, but also against all other forms of constraints. However, a restriction which falls within the scope of a fundamental freedom does not automatically represent a violation of this freedom as it may be permissible under certain conditions, i.e. may be justified.

[37] It should however be noted that the case law is not always consistent in that regard.

The CJEU explained the rule of reason as a common test[38] for all fundamental freedoms in the *Gebhard*[39] case:

"*It follows, however, from the Court's case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:*

- *they must be applied in a non-discriminatory manner;*
- *they must be justified by imperative requirements in the general interest;*
- *they must be suitable for securing the attainment of the objective which they pursue;*
- *and they must not go beyond what is necessary in order to attain it."*

Next to this, the measure must, where appropriate, also respect fundamental rights as general principles of Union law.

## 2.3 The scope of application

### 2.3.1 The personal scope

#### 2.3.1.1 The definition of worker

Workers have the greatest package of equal treatment rights, but the term 'worker' was not defined in European legislation, other than to make clear that the term does not include persons who are nationals of third countries residing and working in a Member State but covers only Member State nationals. The worker concept has been defined by the CJEU in the light of principles derived from the European legal order, and to prevent it from being determined by the national legislations of the Member States as otherwise the Member States would be able to unilaterally alter the scope of the Treaty provisions.

The EU concept of 'worker' has three basic elements, namely the provision of labour, remuneration and subordination: "*The essential feature of an employment relationship is that a person* ***performs services*** *of some economic value for and* ***under the direction of another perso****n in return for which he receives* ***remuneration****."*[40] Someone who is genuinely seeking employment can also be classified as a worker. However, and as we will see in more detail below, the residence and equal treatment rights of jobseekers are limited and conditional.

The CJEU has interpreted the notion of worker broadly, highlighting that it defines the scope of one of the fundamental freedoms granted by the Treaty. Accordingly, the notion of 'worker' must not be interpreted restrictively,[41] and includes permanent, part-time,[42] seasonal and frontier workers. Workers might earn below the minimum required for subsistence and have full access to welfare and tax benefits.[43]

[38] A common approach applying to all free movement of persons provisions was already propagated in case C-48/75, Royer, ECLI:EU:C:1976:57.
[39] Case C-55/94, Gebhard, ECLI:EU:C:1995:411, paragraph 37, referring to case C-19/92, Kraus, ECLI:EU:C:1993:125, paragraph 32.
[40] Case 66/85, Lawrie-Blum, ECLI:EU:C:1986:284.
[41] Case 53/81, Levin, ECLI:EU:C:1982:105; joined cases C-389/87 and C-390/87, Echternach, ECLI:EU:C:1989:130.
[42] Furthermore, since in most industries women form most of the part-time workforce, to exclude part-timers from the scope of Article 45 TFEU would have had sex discrimination implications.
[43] Case C-139/85, Kempf, ECLI:EU:C:1986:223.

In order to qualify as an EU migrant worker, the key is that work is 'genuine and effective' as distinct from 'ancillary and marginal'. Work can still be genuine and effective when productivity is low, activities are performed for a small number of hours per week and remuneration is limited.[44] This loose formula has remained unchanged for decades, with the CJEU repeatedly holding that the notion of worker should be interpreted broadly.[45] The CJEU has never accepted a *de minimis* rule regarding remuneration and working time, instead favouring a case-by-case approach.

The fact that a worker has worked only for a short period of time under a fixed-term contract does not exclude him or her from the scope of Article 45 TFEU, provided that the activity was not purely marginal and ancillary. In *Ninni-Orasche*,[46] the claimant had worked for just two and a half months. The CJEU instructed the national court to have sole regard to the nature of the activity, i.e. whether it was genuine and not purely ancillary, in order to determine the status of Ms Ninni-Orasche, and to disregard any other consideration, including the facts that she had taken up the job years after having first entered the host territory; that soon after taking up the job she obtained a qualification which made her eligible for enrolment in a university; and the fact that she was looking for a job in between finishing her short fixed-term employment and enrolling at university.[47] The reason why an individual moves to seek work in another Member State is immaterial to her or his qualification as a worker. Thus, it is irrelevant that a person has moved for the sole purpose of triggering the Treaty and therefore benefit of rights granted by EU law, provided that he or she pursues or wishes to pursue an effective and genuine activity.[48]

The personal scope of the free movement of workers also extends to contractual counterparties with the result that an employer can rely on the Treaty free movement of workers provisions to challenge rules that limit the freedom of his or her employees.[49] Posted workers, in contrast to migrant workers, do not enter the labour market of the host Member State, but work in that State on a temporary basis, within the context of the provision of services of their employer, and they remain part of the labour force of their home State.[50] Accordingly, the standards concerning the free movement of workers are not applicable, whereas those concerning the free movement of services are.[51]

#### 2.3.1.2 Retention of the worker status

First, workers might retain their status as workers if they are temporarily unable to work as a result of an accident or illness. Second, they also retain this status if they are involuntarily unemployed, provided that they have worked for at least a year in the host State and they have registered as a jobseeker. Furthermore, if this second group has worked for less than a year the status of worker is also retained for at least six months. Finally, the status is retained if they enrol in vocational training related to

[44] Case C-66/85, Lawrie-Blum, ECLI:EU:C:1986:284, paragraphs 19-21; case C-344/87, Bettray, ECLI:EU:C:1989:226, paragraph 15; case C-3/90, Bernini, ECLI:EU:C:1990:164, paragraphs 15 and 16.
[45] Case C-444/93, Megner and Scheffel, ECLI:EU:C:1995:442.
[46] Case C-413/01, Ninni-Orasche, ECLI:EU:C:2003:600, paragraph 32.
[47] See also case C-46/12, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, ECLI:EU:C:2013:97.
[48] Case C-53/81, Levin, ECLI:EU:C:1982:105; case C-109/01, Akrich, ECLI:EU:C:2003:491; see also case C-46/12, L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, ECLI:EU:C:2013:97.
[49] Case C-350/96, Clean car, ECLI:EU:C:1998:205; case C-379/11, Caves Krier, ECLI:EU:C:2012:798.
[50] As far as employment and working conditions are concerned, Directive 96/71 envisages laying down a nucleus of mandatory rules for minimum protection to be observed in the host countries by employers who post workers to perform temporary work in the territory of a Member State where the services are provided.
[51] Joined cases C-49/98, Finalarte and Others, ECLI:EU:C:2001:564; case C-113/89, Rush Portuguesa, ECLI:EU:C:1990:142; case C-43/93, Vander Elst, ECLI:EU:C:1994:310.

their employment, unless the worker is involuntarily unemployed, in which case the vocational training can be in any area.[52]

#### 2.3.1.3 Genuine and effective activity

Even though the concept of worker is generously construed, it still covers only the pursuit of ***effective*** and ***genuine*** activities, and not activities on such a small scale as to be regarded as 'marginal and ancillary'.[53] In *Bettray* the CJEU held that work cannot be regarded as an effective and genuine economic activity if it merely constitutes a means of rehabilitation or reintegration for the persons concerned and if the purpose of the paid employment, which is adapted to the physical and mental capabilities of each person, is to enable those persons sooner or later to recover their capacity to take ordinary employment or to lead as normal as possible a life.[54] In the *Trojani* case,[55] a French citizen living in Belgium worked about 30 hours a week for the Salvation Army as part of a personal socio-occupational reintegration scheme. In return for his work he received board, lodging and some pocket money. When he claimed subsistence benefits, these were denied on the grounds that he was not a worker within the meaning of Article 45 TFEU and was therefore not entitled to social assistance. The CJEU held that in deciding whether work is to be regarded as an 'effective and genuine' economic activity the national court:

"*must in particular ascertain whether the services actually performed by Mr Trojani are 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*".[56]

#### 2.3.1.4 Jobseekers

Those looking for a job are also protected by Article 45 TFEU (and by Directive 2004/38). In the first three months, like any other category of citizens, they can enter any Member State without limitations. After that, the Member State might require them to show that they have a genuine chance of finding employment.[57] However, the full implications of this are unclear, so we cannot say when,[58] and to what extent,[59] Member States might test for such a chance. It is doubtful that the new test introduced by the UK according to which, after three months,[60] jobseekers have to

[52] Article 7(3) of Directive 2004/38.
[53] Case C-53/81, Levin, ECLI:EU:C:1982:105; case C-413/01, Ninni-Orasche, ECLI:EU:C:2003:600.
[54] Case C-344/87, Bettray, ECLI:EU:C:1989:226.
[55] Case C-456/02, Trojani, ECLI:EU:C:2004:488.
[56] Paragraph 24.
[57] Article 14(4)b of Directive 2004/38.
[58] *Antonissen* suggests that Member States may impose evidential requirements after six months of (unsuccessful) jobseeking, though the Directive seems to permit such requirements earlier. In case C-344/95, Commission v Belgium, paragraph 17, the legislation under scrutiny allowed jobseekers to be in Belgium for three months and then face automatic expulsion. The latter requirement was deemed incompatible with EC law, and it is in this context that the CJEU provided for the possibility for the jobseeker to demonstrate that she had 'genuine' chance of finding employment. The three months time limit was not explicitly addressed by the CJEU.
[59] Given the paramount importance of the free movement of workers (which includes those looking for a job) for the EU, restrictions upon an EU citizen's ability to look for a job must be interpreted in a restrictive way.
[60] The Immigration (European Economic Area) (Amendment) (No 3) Regulations 2014, (SI 2014 No 2761) in combination with the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013 (SI 2013 No 3032) and the Immigration (European Economic Area) (Amendment) Regulations 2014 (SI 2014 No 1451).

provide 'compelling evidence' of their chance to find a job – or lose their right to reside – is compatible with the provisions of Directive 2004/38.[61]

Jobseekers have the right to equal treatment, at least in relation to access to employment and benefits that support access to the employment market.[62] They do not have a general right to social assistance (Article 24(2) of Directive 2004/38).

However, the line between general social assistance and those benefits which are necessary to exercise a right to reside in a host State in order to seek work can be difficult to draw. The extent to which jobseekers are protected in EU law, and the extent to which Member States are actually willing to accept jobseekers, is becoming more contentious, so it is to be expected that this will be one area where effective implementation of EU law will need more careful scrutiny.

#### 2.3.1.5 Family members

The worker has the right to be accompanied by his or her family. For the purposes of Union law protected family members are the spouse; the registered partner when registered partnerships are recognised in the host State; and children under the age of 21 or children who are dependent upon the worker/spouse,[63] as well as dependent relatives in the ascending line.[64] They have a right to enter and install themselves with the worker, as well as a right to take up an economic activity and a right not to be discriminated against on grounds of nationality in respect of all matters, including welfare benefits.[65]

#### 2.3.1.6 Summary

Article 45 TFEU applies to migrant workers (subordinate and remunerated activity). This includes:

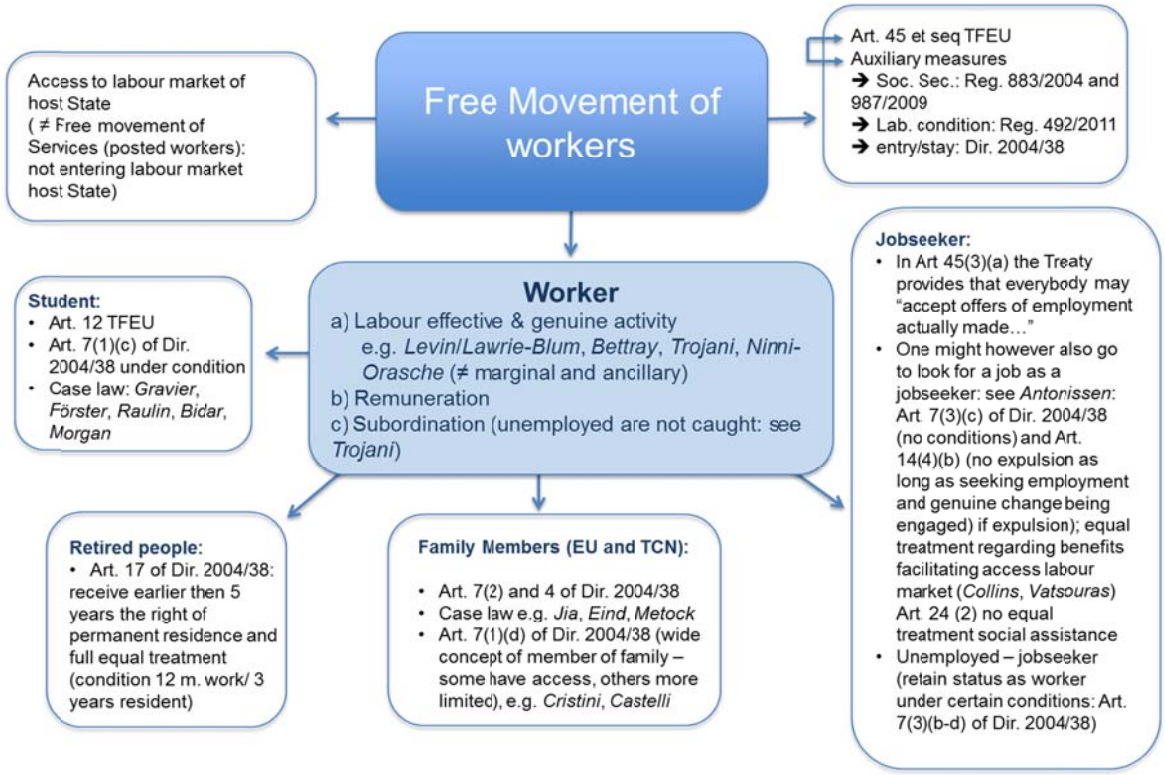
- Full-time workers (subordinate and remunerated relationship).
- Part-time workers, no matter how many hours worked provided the activity is not marginal and ancillary.
- Frontier workers.
- Seasonal workers.
- Working students.
- Jobseekers. Although the latter are protected by Article 45 TFEU, Article 24(2) of Directive 2004/38 excludes them from equal treatment in relation to social

[61] This is especially so as the nature of 'compelling evidence' is very narrowly construed, and speaks to a strong likelihood, or even certainty, of imminent employment rather than a 'genuine chance' of it – see Department of Work and Pensions MEMO DMG 15/14.
[62] Joined cases C-22/08 and C-23/03, Vatsouras and Koupatantze, ECLI:EU:C:2009:344.
[63] The status of dependency is a result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to such support, see case 316/85 *Lebon* [1987] ECR 2811.
[64] Article 3 of Directive 2004/38 further provides that the Member State must facilitate admission of, and justify any denial of entry for, other members of the family who are dependent on the worker or, even though not dependent, require for serious health grounds the personal care of the worker (Union citizen); or who were living under his or her roof in the country whence he or she came; or the partner with whom the Union citizen has a stable and duly attested relationship
[65] Case C-32/75 Cristini v SNCF, ECLI:EU:C:1975:120, p. 1095; case C-63/76, Inzirillo, ECLI:EU:C:1976:192; case C-261/83, Castelli, ECLI:EU:C:1984:280; case C-157/84, Frascogna, ECLI:EU:C:1985:243. In this respect see also Article 24 Directive 2004/38, which extends the equal treatment right to family members of Union citizen, provided they have the right of residence or of permanent residence.
Case C-3/90, Bernini, ECLI:EU:C:1992:89, paragraphs 25 and 26.

assistance. This has been interpreted narrowly so that jobseekers can access benefits intended to facilitate access to the labour market.

- Article 45 TFEU does not apply to non-remunerated work, including voluntary work; and care work within the family unit. It is open to debate whether it should apply to internships and other forms of non-remunerated work which are aimed at facilitating access to the paid labour market. See below, section 2.3.1, on issues arising from the definition of worker and the choice of migrant worker categories in which to pursue a challenge.
- Migration exists whenever the worker has moved 'cross-border': this includes migration to another Member State to work there; returning to the home State after having worked abroad; and living in one Member State and working in a different one.
- Article 45 TFEU can be invoked by employers to challenge restrictions on the possibility to hire workers.
- The family of the worker is also protected in EU law.

#### 2.3.1.7 Schematic overview




### 2.3.2 Material scope

Article 45(1) TFEU provides that free movement of workers "*shall be secured within the Union*", whilst Article 45(2) TFEU provides that free movement must "entail" the abolition of all discrimination based on nationality. Article 45(3) TFEU gives a non-exhaustive list of rights protected by Article 45 TFEU. The text of the Treaty is therefore open-ended and this has allowed the CJEU to develop a dynamic case law that has progressively broadened the scope of Article 45 TFEU. Thus, Article 45 TFEU prohibits (subject to justification):

- direct and indirect discrimination on grounds of nationality;
- rules which penalise or hinder movement;
- rules that affect the ability of workers (and employers) to access the labour market.

However, for this prohibition to apply, the situation must contain a cross-border element.

#### 2.3.2.1 Cross-border element

The fundamental freedoms protect specific activities with a cross-border connection, i.e. they are not applicable to activities that are confined in all respects within a single Member State or have no factor linking them with any of the situations governed by European law. In the context of the free movement of workers, this cross-border element depends on the person benefiting from this freedom.

A worker will fall within the scope of Article 45 TFEU if he or she has migrated to another Member State in order to look for a job or in order to take up employment; if he or she is returning to his or her own Member State after having exercised his or her free movement rights (i.e. having been abroad for work); or when he or she is residing in one Member State and working in another one (frontier workers).

#### 2.3.2.2 Direct discrimination

Direct discrimination on grounds of nationality occurs when a Member State (or an employer) distinguishes in law (or explicitly) on grounds of nationality: e.g. only Italians can be employed by the Italian civil service. Early case law focused on directly discriminating rules and requirements which expressly discriminate on grounds of nationality.

***Examples***

Case C-44/72, *Marsman*,[66] concerned a Dutch national living in the Netherlands but employed in Germany, who was dismissed after becoming incapacitated. German legislation provided that seriously disabled workers could not be dismissed. However, this protection was only available for German nationals. This clear direct discrimination on grounds of nationality was evidently contrary to EU law.

Case C-225/85, *Commission v Italian Republic*,[67] concerned Italian legislation providing that private security work could only be carried out by Italian companies employing Italian nationals.

Case C-167/73, *Commission v French Republic*,[68] concerned a provision of the French Maritime Code requiring a certain proportion of the crew of a ship to be of French nationality. Article 4(1) of Regulation (EU) No 492/11 states that national provisions that restrict, by number or percentage, the employment of foreign nationals in any undertaking do not apply to nationals of other Member States. Article 4(2) provides that if there is a requirement that an undertaking is subject to a minimum percentage of national workers being employed, nationals of the other Member States are counted as national workers.

Only rules which expressly distinguish on grounds of nationality are considered directly discriminatory. Such rules can only be justified by invoking one of the Treaty derogations of public policy, public security, public health; or the public service exception. These derogations have been construed narrowly: the CJEU has not allowed Member States to invoke such exceptions in relation to all jobs in the public sector or in the civil service,[69] but only for jobs which require the exercise of public law powers and a special allegiance to the Member State.[70] Cases involving direct discrimination on grounds of nationality are becoming less and less common, but do continue to arise every now and then.[71]

[66] Case C-44/72, Marsman, ECLI:EU:C:1972:120.
[67] Case C-225/85, Commission v Italian Republic, ECLI:EU:C:1987:284.
[68] Case C-167/73, Commission v French Republic, ECLI:EU:C:1974:35.
[69] Case C-225/85, Commission of the European Communities v Italian Republic, ECLI:EU:C:1987:284.
[70] Case C-173/94, Commission of the European Communities v Kingdom of Belgium, ECLI:EU:C:1996:264.
[71] In the field of sports, nationality restrictions have been a vexed issue for quite some time; see e.g. case C-415/93, Union Royale Belge des Sociétés de Football Association and others v Bosman, ECLI:EU:C:1995:463, or case C-265/03, Simutenkov v Ministerio de Educación y Cultura, ECLI:EU:C:2005:213.

#### 2.3.2.3 Indirect discrimination

Indirect discrimination occurs when an apparently neutral rule affects non-nationals more heavily than nationals, e.g. a residence requirement is indirectly discriminatory since nationals are more likely to be resident in the national territory than non-nationals.[72]

Discrimination can occur as a result of the operation of any rule; the application of a different contract to a certain category of people might in itself be problematic. For instance, in *Delay*,[73] exchange assistants (who were more likely to be non-nationals) were treated differently from foreign language assistants. As a result, the applicant had not benefited from the recognition of rights accrued in earlier employment, which detrimentally affected her pay. The CJEU directed the national court to examine whether the situations were comparable – given that the rules invoked regarding nationals required 'continuity' of an employment relationship, and the applicant's employment had been interrupted for two months.

In the *Hartmann* case, the Austrian spouse of a German national working in Germany who resided in Austria was excluded from receiving German child-raising allowance, because she was neither permanently nor ordinarily resident in Germany. According to the CJEU such a provision must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.[74]

In other words, as soon as a requirement is shown to be liable to disadvantage migrating workers, it is considered indirect discrimination unless justified – there is no need for evidence that the detrimental effect has been realised in practice. Potential harm to migrating workers is enough. Several requirements might be considered indirectly discriminatory, such as residence, place-of-origin or place-of-education requirements that can be more easily satisfied by nationals.

***Examples***

In case C-152/73, *Sotgiu*,[75] the German Post Office paid an increased separation allowance to workers who were employed away from their place of residence in Germany, but did not do so for workers with a place of residence outside of Germany, regardless of their nationality.

In case C-138/02, *Collins*,[76] the fact that British law made the entitlement to a jobseeker's allowance conditional upon habitual residency in the UK was considered to be indirectly discriminatory.

In case C-149/79, *Commission v Belgium*,[77] the CJEU held that a system of retirement pension points that could more easily be satisfied by Belgian nationals than by migrant workers was indirectly discriminatory.

Language requirements for certain posts are also potentially discriminatory as they are much more likely to be satisfied by nationals. However, the nature of the post to be

[72] See generally case C-237/94, O'Flynn, ECLI:EU:C:1996:206. See also case C-246/80, Broekmeulen, ECLI:EU:C:1981:218..
[73] Case C-276/07, Delay, ECLI:EU:C:2008:282; see also case C-94/07, Raccanelli, ECLI:EU:C:2008:425 (see below in section 2.3.1.).
[74] Case C-212/05, Hartmann, ECLI:EU:C:2007:437.
[75] Case C-152/73, Sotgiu, ECLI:EU:C:1974:13.
[76] Case C-138/02, Collins, ECLI:EU:C:2004:172.
[77] Case C-149/79, Commission v Belgium, ECLI:EU:C:1982:195.

filled might satisfy the imposition of such conditions. Such requirements were considered extensively by the CJEU in the *Groener* Case, concerning a Dutch national working as a part-time art teacher in Ireland, who was rejected for the full-time art teaching post after having failed an oral exam in Gaelic.[78] The CJEU concluded that, although the teaching would most likely take place exclusively in English, the government's language requirement could be justified by the government's policy to promote the use of the Irish language. In any case, the requirement could not be imposed in a disproportionate way.

Language requirements cannot specify that the language must have been learned, or qualifications acquired, in a specific territory. The CJEU clarified this in *Angonese*, which concerned an Italian national living in the Bolzano province whose first language was German and who was not permitted to compete for a post with a private banking undertaking because he did not present the required certificate of bilingualism, only issued by the public authorities of Bolzano.[79] Overall, the CJEU's broad interpretation of indirectly discriminatory measures, with its focus on the measures' potential effect on workers' free movement, has significantly increased the number of national rules liable to be caught by the Treaty.

#### 2.3.2.4 Obstacles

Article 45 TFEU as construed by the CJEU also prohibits unjustified barriers to movement and barriers to market access. In *Kraus*[80] the CJEU was faced with a German national who went to the United Kingdom, where he took an LLM course at Edinburgh University. After returning to Germany, he objected to a German legal requirement for authorisation from the competent authority in order to be able to use his Scottish academic title. The CJEU noted that the possession of such a title constituted, for the person entitled to make use of it, an advantage for the purpose both of gaining entry to such a profession and of prospering in it.[81] The CJEU held the following (paragraph 35):

"*Consequently, Articles 48 and 52 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest (…). It would however also be necessary in such a case for application of the national rules in question to be appropriate for ensuring attainment of the objective they pursue and not to go beyond what is necessary for that purpose (…).*"

As the claimant had been a migrant student, rather than a migrant worker, the case shows that the temporal relationship between an obstacle to free movement and economic activity is fairly fluid. In the context of discrimination on the grounds of nationality, the protection afforded to *migrant workers* is significantly greater than that afforded to those exercising other free movement rights.[82] *Obstacles* on the other hand may be challenged by those exercising other Treaty rights of free movement, as in *Kraus*, on the grounds that those obstacles might, on returning to the home State, interfere with their re-integration into the home State's labour market. So post-

[78] Case C-379/87, Groener v Minister for Education, ECLI:EU:C:1989:599.
[79] Case C-281/98, Angonese v Cassa di Risparmio di Bolzano SpA, ECLI:EU:C:2000:296.
[80] Case C-19/92, Kraus, ECLI:EU:C:1993:125.
[81] Ibid, paragraph 18.
[82] Case C-158/07, Förster, ECLI:EU:C:2008:630.

migration economic activity is enough to trigger protection from obstacles to movement. Obstacles may also be challenged by those who move their Member State of residence, without actually moving their State of work, i.e. who continue to work in their home State.[83]

A few years later the CJEU had the chance to further clarify its case law in the *Bosman* case.[84] Here, the CJEU considered whether rules laid down by sporting associations were in accordance with Article 45 TFEU. These rules stipulated that a professional footballer who is a national of one Member State could not, on the expiry of his contract with a club, be employed by another club unless the latter club had paid to the former a transfer, training or development fee. The rules applied to all transfers regardless of whether the footballer moved clubs within the same Member State or between different Member States. The CJEU held (paragraph 95) that: "*Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned*".

The CJEU's reasoning was straightforward. It noted that nationals of Member States have in particular the right, which they derived directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.[85] It added that provisions which preclude or deter a national of a Member State from leaving her or his country of origin in order to exercise her or his freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.[86] This was the effect of the rules at issue in the national proceedings in the cases in point, even if similar rules also governed transfers between clubs within a single Member State. The CJEU then stated:

"*It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers.*"[87]

The CJEU concluded that the transfer rules constituted an obstacle to freedom of movement for workers prohibited in principle by Article 45 TFEU. This was so because of the transfer fee "*hindering access to the market*" for Mr Bosman.[88] Indeed, the requirement of paying a transfer fee blocked Mr Bosman from being able to obtain employment in another Member State.[89] The CJEU followed similar lines of argumentation in two other sports cases, i.e. *Lehtonen*[90] and *Olympique Lyonnais.*[91]

[83] Case C-287/05, Hendrix, ECLI:EU:C:2007:494.
[84] Case C-415/93, Bosman, ECLI:EU:C:1995:463; see also case C-208/05, ITC, ECLI:EU:C:2007:16, in relation to national legislation which provided that the fees due to private sector employment agencies would be reimbursed by the State only if the employment was subject to compulsory social security contributions in that State; and case C-325/08, Olympique Lyonnais SASP v Bernard, ECLI:EU:C:2010:143, with annotation by J. Lindholm (2010) 47 Common Market Law Review 1187.
[85] Case C-415/93, Bosman, ECLI:EU:C:1995:463, paragraph 95.
[86] Case C-415/93, Bosman, ECLI:EU:C:1995:463, paragraph 96.
[87] Ibid, paragraph 103 *(emphasis added)*; the CJEU thus distinguishes the 'selling arrangements' referred to in the context of the free movement of goods in joined cases C-267/91 and C-268/91, Keck and Mithouard, ECLI:EU:C:1993:905.
[88] A similar line was followed in the services case; case C-384/93, Alpine Investments, ECLI:EU:C:1995:126, paragraph 38.
[89] The CJEU also clarified that the transfer fee could not be equated to 'certain selling arrangements' excluded by the *Keck* ruling from the scope of application of the free movement of goods provisions.
[90] Case C-176/96, Lehtonen, ECLI:EU:C:2000:201.
[91] C-325/08, Olympique Lyonnais, ECLI:EU:C:2010:143.

This so-called 'sporting exemption' means that the non-economic aspects of sport as well as those economic aspects which are motivated by purely sporting interests fall outside the scope of the prohibition rules as long as the respective rules are not disproportionate. The maintenance of the proper functioning of competitions and of the integrity and ethical values of sport, as well as the upkeep of the competitive balance and the recruitment of new, in particular young, personnel are justifications which have been developed by the CJEU in its case law on sports. These may set an example for exceptions in other fields which fall outside the range of the Treaty provisions on freedom of movement.

Obstacles to movement are usually experienced and challenged retrospectively, as penalties exacted after the movement – it is not necessary to show that an obstacle has affected the decision of whether to exercise free movement in the first place.

An example of a penalty for exercising free movement once having returned to the home State was evident in *Terhoeve.*[92] The Netherlands subjected Mr Terhoeve, a Dutch national, to rules which overall created a heavier social security burden than would have been the case if he, in otherwise identical circumstances, had not been a migrant worker in the UK for part of the year. The CJEU, taking a very similar approach to that in *Bosman*, held that a national of a Member State could be deterred from leaving the Member State in which he or she resides in order to pursue an activity as an employed person in the territory of another Member State if he or she were required to pay greater social security contributions than if he or she had not moved, without thereby being entitled to additional social benefits such as to compensate for that increase.[93] It followed, in the view of the CJEU, that national legislation of the kind at issue in the main proceedings constituted an obstacle to freedom of movement for workers, in principle prohibited by Article 45 TFEU, and it was therefore unnecessary to consider whether there was indirect discrimination on grounds of nationality, prohibited by the Treaty or by Article 7(2) of Regulation (EEC) No 1612/68.[94]

The temporal connection with work can be at the point of claim, on return to the home Member State, or else prior to the return. Someone who returns to their home State and is not at that point a worker, but experiences a welfare penalty for having worked in another Member State can invoke that the application of the rules at issue constitutes an obstacle (as well as discrimination on grounds of migration).

In *Swaddling*[95] a UK national had worked in France but returned to the UK, the home State, as a jobseeker. There, the UK required all applicants for income support (the means-tested jobseeker's benefit at the time) to be resident for eight weeks before they could be considered habitually resident. The CJEU found that "*the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence*", and that someone in the applicants' position ought to be able to be considered habitually resident "*at the time of applying*" for the benefit, if he or she "*intends to remain in his State of origin, where his close relatives live*".

### *Examples*

[92] Case C-18/95, F.C. Terhoeve, ECLI:EU:C:1999:22. For another example of an 'exit' restriction see case C-109/04, Kranemann, ECLI:EU:C:2005:187; see also case C-352/06, Bosmann, ECLI:EU:C:2008:290.
[93] Ibid, paragraph 40.
[94] Ibid, paragraph 41.
[95] Case C-90/97, Swaddling, ECLI:EU:C:1999:96.

In case C-464/02, *Commission v Denmark*,[96] and case C-232/01, *Van Lent*,[97] national rules prohibiting workers domiciled in one Member State from using a vehicle registered in another Member State were condemned as they might preclude the workers from exercising their free movement rights or might impede labour market access in another Member State.

In case C-285/01, *Burbaud*,[98] a French condition of employment in the hospital public service was passing a competition such as the National School of Public Health (ENSP) entrance examination. The CJEU considered that such a requirement was clearly an obstacle affecting access to the employment concerned, since passing the examination was a precondition for being admitted to the ENSP's training course, which is, in turn, a precondition for access to the employment concerned.

Case C-40/05, *Lyyski v Umeå universitet*,[99] concerned a Swedish rule that required an individual wanting to follow a special teacher training course at a designated university in Sweden to be employed at a Swedish school to complete the practical component of the training. The CJEU held that the requirement was an obstacle to the freedom of movement that could place persons such as Mr Lyyski, who was employed at a Swedish-speaking school in Finland, at a disadvantage. The CJEU however went on to state that the measure was justified on the grounds of preserving or improving the education system, and that it was proportionate.

The 'liable to hamper or render less attractive' formula is very broad. It is not surprising then that in subsequent case law the CJEU also attempted to curb the potential breadth of the *Bosman* formula.

In *Graf*,[100] for instance, Mr Graf quit his employment in Austria to take up a position in Germany. The Austrian legislation provided for compensation for termination of employment when such termination resulted from a decision not attributable to the employee. Since Mr Graf had voluntarily quit his occupation, he was not entitled to any compensation. Relying on a literal interpretation of the *Bosman* ruling, Mr Graf argued that the rule constituted an obstacle to his right to move to take up employment in another Member State, since the prospect of losing the right to be compensated discouraged him from moving. The CJEU was not impressed by the submission, as in order to be considered an obstacle to movement, the rule has to affect "*access of the worker to the labour market*".[101] In the case at issue, that was not so:

"*Legislation of the kind at issue in the main proceedings is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker's choosing whether or not to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him*".

In *Graf*, therefore, the CJEU more precisely defined the boundaries of Article 45 TFEU: not every rule which might potentially discourage movement is an obstacle caught by that Article. Rather, the rule needs to affect access to the employment market in a way that is not too uncertain and indirect.

[96] Case C-464/02, Commission v Denmark, ECLI:EU:C:2005:546.
[97] Case C-232/01, Van Lent, ECLI:EU:C:2003:535.
[98] Case C-285/01, Burbaud, ECLI:EU:C:2003:432.
[99] Case C-40/05, Lyyski v Umeå universitet, ECLI:EU:C:2007:10.
[100] Case C-190/98, Graf, ECLI:EU:C:2000:49.
[101] Paragraph 23 *(emphasis added)*.

In *Deliège*,[102] the CJEU was once again seized with the question of the compatibility with Community law of rules regulating sporting activity. Even though the case related to the free movement of services, the rationale of the case could be easily transposed to the scope of Article 45 TFEU. Here, the claimant attacked the selection process to be able to take part in an international judo championship. If the *Bosman* ruling were to be applied mechanically, it could be argued that such rules constituted an obstacle to movement, since the fact that Ms Deliège had not been selected meant that she could not go to another Member State to take part in the championship. The CJEU, however, wisely avoided such interpretation. It held that even though the rules at issue inevitably limited the number of participants in sporting competitions, they "*were inherent in the conduct of an international high-level sports event*"[103] and so could not be a restriction on the freedom to provide services.

So not *all* non-discriminatory rules are to be considered as an obstacle to the free movement of workers, as otherwise all rules regulating any aspect of employment activity would have to be justified. Rather, in order to be considered a barrier to the free movement rights a non-discriminatory rule must:

- apply to the entry and residence of migrants; or
- affect access to the employment market; or
- apply in any other way specifically to the transfer of the migrant from one Member State to another for the purposes of exercising Treaty rights.

The argument against drawing a distinction between national rules which might hinder free movement, and those which do not, is that such a distinction is difficult to draw in practice, since rules which relate to, say, the terms and conditions of employment, or to the tax treatment of residents, might, if unduly burdensome, be said to deter workers of other Member States from entering the employment market of the host State. Moreover, it cannot be said that all the CJEU's case law is consistent with the proposition that non-discriminatory rules need only be justified if they hinder *access* to the employment market – it is possible that detrimental effects on the *conditions* of work/providing services are capable of being obstacles.

For instance, recently in the case *S* and *G* the Grand Chamber examined the case of two Dutch nationals who were claiming family rights in the Netherlands on the basis of the fact that they travelled to another Member State for work: Mr S only once a week; Mr G every day.[104] The CJEU clarified that whilst the intra-Union element is established by frontier workers, in order to obtain residency rights for the family on the basis of the Treaty, the claimant had to show that refusal of such rights would entail an interference with his right to move.[105] The CJEU also acknowledged that the fact that the family member was taking care of the Union citizen's children might be a relevant consideration, but only insofar as the children are looked after by the spouse. The mere desirability of children being cared for by their grandparents is not in itself sufficient to have a dissuasive effect on the right to move.

[102] Joined cases C-51/96 and 191/97, Deliège, ECLI:EU:C:2000:199.
[103] Paragraph 64.
[104] Case C-457/12, S and G, ECLI:EU:C:2014:136; see also case C-60/00, Carpenter, ECLI:EU:C:2002:434.
[105] As mentioned in footnote 34, in *O and B* the CJEU held that if the migrant has resided in another Member State satisfying the conditions set out in Article 7(1) of Directive 2004/38, then an obstacle to movement will be presumed.

## 2.4 Justification of national measures

Indirect discrimination can be justified by imperative requirements of public interest as well as by the Treaty derogations (public policy and public security[106]). In order to be justified by an imperative requirement:

a) the rule must pursue an aim compatible with Union law;

b) the restriction it imposes on the right must be necessary and proportionate;

c) the national rule must also comply with fundamental rights as protected by the Charter.

### 2.4.1 The aim compatible with EU law

The CJEU very rarely challenges the aim invoked by the Member States; in order to be compatible with Union law the rule must simply pursue a public interest; and must not be protectionist. An economic aim can be taken into account by the rules, but it cannot be the only reason to impose the measure that has discriminatory effects. For instance, in *SETTG*,[107] a case concerning the free movement of services, Greek law provided that tourist guides should be employed under an employment contract (so that they could not provide services as self-employed persons). In order to justify the rule the Greek government relied on the 'need to maintain industrial peace', since this legislation was passed in order to bring labour disputes to an end. The CJEU held the following:

"*However, maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and consequently on the economy of the State, must be regarded as an economic aim which cannot constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty.*"

### 2.4.2 Necessary and proportionate

In order to be legitimate, a rule which has discriminatory effects must be necessary to achieve the stated aim, i.e. it must be the least restrictive means to do so, as well as proportionate, i.e. the interference on the free movement right must not be out of proportion with the interest pursued (e.g. if the interest pursued is purely marginal, and the interference very great then the rule will be disproportionate). Whilst, as said above, the CJEU is quite ready to accept the policy interests put forward by the Member States, it carefully scrutinises the necessity and proportionality of the rules.

One example is the above-mentioned case of *O'Flynn*, which related to a grant to help with funeral costs of relatives. This grant was confined to burials to take place in the UK. The CJEU accepted that the UK might legitimately want to avoid 'prohibitive costs and practical difficulties' when administering the benefit. However, the CJEU focused on the effect of the measures, and found that they were simply not appropriate – costs of transport were irrelevant since they were not reimbursed, while the cost paid for the funeral could be kept down by other measures, such as fixing a lump sum or

[106] Public health is not particularly relevant, as it has never been tested and unlike security and policy cannot be used to expel citizens after the initial three months. It cannot be regarded as an adequate justification for discrimination and for indirect discrimination.
[107] Case C-398/95, Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias, ECLI:EU:C:1997:282, paragraph 23.

limiting the amount of the reimbursement to a given amount having regard to the normal cost of burial in the United Kingdom.[108]

In *Groener*,[109] discussed above, the CJEU found that a potentially discriminatory rule requiring a degree of competence in the Irish language for posts of Assistant Lecturer and Lecturer in Ireland, could be justified, notwithstanding the fact that for the post in question the candidate would be working "*essentially, or indeed exclusively in English*".[110] The Treaty, it was found, "*does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language*"[111] and centres of education would be particularly important for such a policy.[112] However, this policy must not be administered in a discriminatory way – e.g. by requiring the language to be learned in a given territory,[113] or requiring a level of knowledge disproportionate to the objective pursued.[114]

### 2.4.3 Respecting fundamental rights

Finally, in order to be compatible with Union law a rule which limits a free movement provision must also be compatible with fundamental rights as protected by the Charter of Fundamental Rights. This principle originates in case law (*Rutili*)[115] and is based on the assumption that a limitation to a Treaty right falls within the scope of the Treaty. as such it must respect the constitutional principles of the Union including fundamental rights protection. It has now been codified in Article 51(1) of the Charter, which provides that the latter applies to the act of the Member States when they implement Union law. For instance, in *Carpenter*, a case relating to the free movement of services but the principles of which apply to all migrants, the CJEU held that a rule which denied a residence permit to the spouse of a service provider falling within the scope of Union law could only be compatible with EU law if its application did not have the effect of impinging unduly on the applicant's right to family life, as guaranteed by the (then) general principles of Union law.

## 2.5 Summary

Article 45 TFEU applies to rules that:

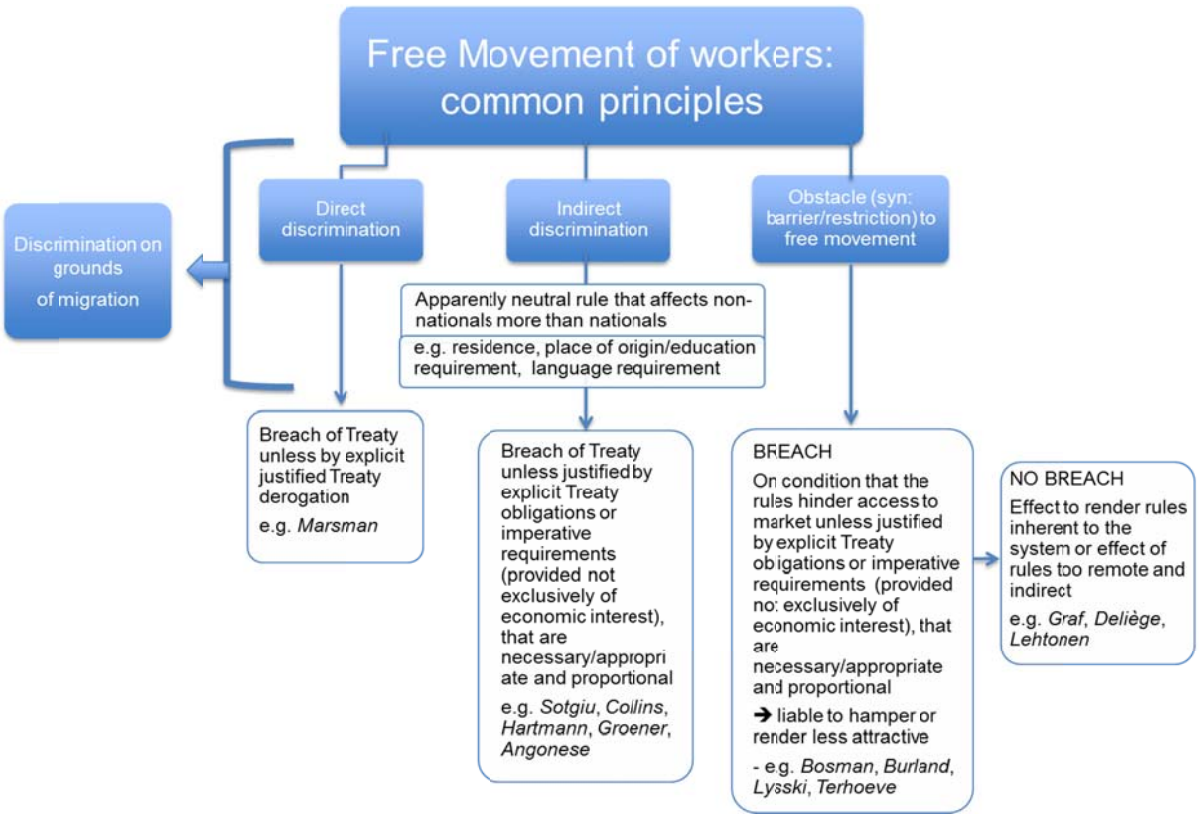
- discriminate directly on grounds of nationality, e.g. only Italians can work for the Ministry of Defence; those rules can be justified by relying on the public service derogations (e.g. only Italians can be appointed in the higher ranks of the Italian army);
- discriminate indirectly on grounds of nationality, e.g. in order to be employed in a school a worker needs to be fluent in Italian; those rules can be justified on imperative grounds of public interest provided they are necessary and proportionate (e.g. fluency requirement would be justified for a teacher but not for a cleaner);
- impose a barrier to the ability or desirability of the worker to move, or impose a barrier to market access, e.g. a worker returning to Italy after having worked

[108] Case C-237/94, O'Flynn, ECLI:EU:C:1996:206, paragraph 27-29.
[109] Case C-379/87, Groener v Minister for Education, ECLI:EU:C:1989:599.
[110] Ibid, 15.
[111] Ibid, 19.
[112] Ibid, 20.
[113] Ibid, 23.
[114] Ibid, 21.
[115] Case C-36/75, Rutili, ECLI:EU:C:1975:137.

abroad will not be eligible for certain benefits, or a worker cannot be employed by more than one employer, or in more than one Member State; these rules can be justified on imperative grounds of public interest as above.

We suggest it would be easier to just refer to discrimination on grounds of migration and nationality (see below).

## 2.6 Schematic overview



# 3 Analysis of free movement of workers case law: problematic areas and case strategy

## 3.1 General: discrimination on ground of migration

Even before the introduction of the obstacle approach, the CJEU did not restrict itself to a pure discrimination approach. It did not hesitate to tackle both cases based on nationality discrimination and cases rather dealing with discrimination based on migration, regardless of the claimant's nationality.[116] The comparison was thus not always between the national and the non-national, but often also between the migrant and the static worker.[117] This is logical, as the exercise of free movement rights should of course not be penalised in national legislation.

Initially the obstacle approach appeared a radically different route of challenge. It was considered to be the potential start of an era in which all regulation could be attacked, whether or not discriminatory. However, given the broad notion of discrimination already used in earlier case law, the immediate restrictive interpretation of the *Bosman* case law (no hindrance to market access, too remote effect on free movement) and the rather modest line of true non-discrimination cases, the difference is marginal in practice. If there is no substantial hindrance to market access or if the connection with free movement is too remote, the non-discriminatory rules concerned will not breach the Treaty (and therefore will not have to be justified). All in all, most of the free movement of persons cases could be treated using a discrimination approach, albeit discrimination based on migration rather than nationality discrimination.

The language of obstacles is in itself perhaps a bit misleading, since the cases predominantly deal with obstacles to *movement* rather than mere obstacles to market access experienced after movement. Moreover, the obstacle definitions point to measures likely to preclude or deter a national from exercising free movement, but no evidence is required of that likelihood. Nor in the context of the subsequent penalty do claimants need to show the numbers of people affected, or even to show that migrants are disproportionately affected – the cases are decided on whether an individual has suffered a migration penalty.

In spite of the differences in approach outlined above, the two concepts of obstacle and discrimination do seem to be converging: in fact, if one were to go back to the *O'Flynn* definition of indirect discrimination to include any discrimination on grounds of movement or migration, most if not all cases described above (and many more) would be easily explained.

Thus, for instance, Mr Bosman was penalised because he wanted to *move* from one club to another; Mr *Terhoeve* was disadvantaged because he had resided and worked in *another* Member State; Mr *Kraus* was discriminated because he had studied in *another* Member State etc.

The construct of discrimination on grounds of movement might help making 'obstacle' arguments more accessible in national courts by framing them as a familiar, hard legal concept (discrimination), and accepting the inherent limits hinted at by the *Bosman* case law, that only measures penalising the exercise of free movement rights be caught, naturally excluding national sports team selection processes, or compensation

[116] Cf case C-370/90, Singh, ECLI:EU:C:1992:296, and case C-224/98, D'Hoop, ECLI:EU:C:2002:432.
[117] E.g. see the discrimination test in case C-237/94, O'Flynn, ECLI:EU:C:1996:206.

reserved for involuntary unemployment. Thus, discrimination on grounds of migration has the advantage of creating clearer boundaries (therefore making it easier to apply law) to the free movement of persons, whilst at the same time being less intrusive to national regulatory autonomy.

National measures which discriminate, not on grounds of nationality, but by placing at a disadvantage those who have exercised their right of free movement as compared to those who have not, are already regarded as impeding the exercise of freedom of movement.[118] Yet, once a migrant worker has secured entry and residence in a Member State, gained access to the employment market of a Member State, and is pursuing employed activities in that State, it will not be possible to object to national rules concerning, for example, the terms and conditions of employment, or the tax treatment of residents, solely on the ground that they might be described as excessively burdensome to those subject to them. Once integrated into the economic and social life of the host State, the migrant worker's fundamental right derived from Article 45 TFEU is the right to equality of treatment, in law and in fact.[119]

The language of discrimination on the grounds of migration appears to surface in a number of cases, in which the CJEU has criticised unfavourable treatment on the sole ground of having exercised a free movement right.[120] Similarly, the CJEU invoked the concept of an obstacle to movement in *R v Baumbast*[121] in order to find that Regulation (EEC) No 1612/68 – providing for the *equal treatment* of migrant workers – which created a right to access education for children under the best possible conditions, meant that the child of a migrant worker was entitled to be accompanied by its primary carer during its studies.

"*[T]o prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty.*"

This principle was further aligned with the concept of non-discrimination/equal treatment in *Teixeira*[122] and *Ibrahim*,[123] where it was found that a *Baumbast* carer's right of residence was not contingent upon sufficient resources – i.e. entitling them to equal access to social assistance, based on the migrant work of the child's parent.

It might aid clarity were the prohibition of discrimination on the ground of migration to be made explicit, and its limits clearly outlined. It would seem to apply to non-workers exercising other free movement rights.

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[118] The CJEU has held that the provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Union citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Union citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. See case C-143/87, Christopher Stanton and SA belge d'assurances 'L'Etoile 1905' v Inasti (Institut national d'assurances sociales pour travailleurs indépendants), paragraph 13.

[119] If a restriction on access to the market is imposed on a migrant after his or her integration into the economic and social life of the host State, this does not of course preclude it being regarded as a restriction on access to the market, and it will be required to be justified even if non-discriminatory. Thus, if a restriction such as the one at issue in case C-19/92, Kraus, ECLI:EU:C:1993:125, is of its nature a restriction on access to the market, and it is immaterial whether it is invoked as against a new market entrant, or as against a person already pursuing the relevant economic activity.

[120] See the obstacles cases (not all dealing with workers): case C-224/98, D'Hoop, ECLI:EU:C:2002:432; case C-224/02, Pusa, ECLI:EU:C:2004:273; case C-619/11, Chassart, ECLI:EU:C:2013:92; joined cases C-523/11 and C-585/11, Prinz and Seeberger, ECLI:EU:C:2013:524; case C-192/05, Tas Hagen & Tas, ECLI:EU:C:2006:676; case C-406/04, De Cuyper, ECLI:EU:C:2006:491.

[121] Case C-413/99, Baumbast and R, ECLI:EU:C:2002:493.

[122] Case C-480/08, Texiera, ECLI:EU:C:2010:83, with annotation by C. O'Brien (2011) 48 Common Market Law Review 203; M J Elsmore (2010) 35 European Law Review 571.

[123] Case C-310/08, Ibrahim, ECLI:EU:C:2010:80.

## 3.2 The impact of the worker status

### 3.2.1 The persons affected are workers

In order to receive maximum protection from indirect discrimination, a migrant should be classified as a worker. The definition provided by the CJEU is set out above, but there are a number of 'fringes' to the definition and many people performing work[124] may be deprived of equal treatment rights if they are found to be non-workers. Key issues are set out below:

*1. Bettray, rehabilitative work and disability*

It is unclear whether the *Bettray-Trojani* approach would apply beyond work schemes which aim at reintegrating people who suffer from addiction. In *Birden*,[125] in the context of the Turkish Association Agreement, the CJEU held that the ruling in *Bettray* was confined to the facts of the particular case and could therefore not be extended to a State-sponsored working scheme aimed at (re-)introducing those in receipt of social assistance into the employment market. It remains to be seen whether special schemes aimed at ensuring the employment of people with disabilities, where the work is tailored to the person rather than the person tailored to the work, would fall within the scope of Article 45 TFEU. Given, however, that disabled people might find it difficult to exercise their free movement rights at best of times;[126] that work in those cases allows the worker to significantly improve his or her 'living conditions'; that the Treaty free movement provisions should be given a broad interpretation; and that such interpretation should be consistent with fundamental rights including the need to respect human dignity, it is to be hoped that special schemes aimed at encouraging the participation of disabled and vulnerable people to the labour market would fall within the scope of Article 45 TFEU.

Where possible, migrants performing work should be classified as workers, in order to maximise their protection from indirect discrimination and their protection from obstacles to movement. The limits of *Bettray* can be challenged where a migrant is performing re-integrating or rehabilitative work, with reference to disability equality duties, including Article 26 of the Charter of Fundamental Rights of the European Union, (regarding the social and occupational integration of persons with disabilities), and the UN Convention on the Rights of Persons with Disabilities, to which the EU is a signatory.

*2. Remuneration, apprenticeships, and benefit conditional work programmes*

[124] The varying labour market developments in the Member States during the last two decades were accompanied by an altered composition of employment. In particular, there is a greater spread of work arrangements and a growth in non-standard work such as part-time employment, fixed-term contracts, agency work and zero-hours contracts ('standard work' usually being considered as working full-time in a permanent job, which implies a clear link to a certain employer and offers in addition, as a rule, full access to the social security system). Non-standard work is often, but not always, treated as precarious work associated with poor pay, low working hours and limited access to social security, whereas, for instance, part-time work may in certain periods of the life course, such as education and vocational training or family and care work be, however, of interest for individuals because it offers an opportunity to reconcile different activities.

[125] Case C-1/97, Birden, ECLI:EU:C:1998:568.

[126] Consider that the comprehensive health insurance requirement makes it prohibitively expensive for those with serious health conditions to reside in a State different from the State of nationality unless they are employed or self-employed.

Work needs to be remunerated, but the concept of remuneration is flexible, so that a quid pro quo such as board and lodging might count as remuneration.[127] The stress on remuneration, rather than on the 'economic value' of the work performed, leaves open some loopholes, especially during economic downturns. Here, consider that it is not unusual for young people looking to enter the labour market to engage in unpaid work in order to better their chances of finding a job.[128] This work (internships, apprenticeships etc) is often of economic value for the employer and yet the fact that it attracts no remuneration might leave a vulnerable section of workers devoid of protection in European law.[129] Furthermore, this gap in protection might have discriminatory effects since those 'internships' are often seen (or promised to be) the first step towards remunerated employment – they are themselves measures that facilitate access to the labour market. A similar situation is faced by those performing compulsory work activity as a condition of receipt of benefits – government work programmes that might require substantial services without remuneration beyond the benefit in question.

Member States may police the definition of worker rather rigidly, so that those who work are in fact treated as economically inactive, and so subject to indirectly discriminatory rules that would not be justified if applied to workers. This can result in those taking part in the activities above being excluded from rights, and can also result in an over-emphasis upon remuneration to the detriment of part-time workers.

An example from the UK includes the new Minimum Earnings Threshold, which is only applied to EU nationals. If EU migrants earn less than £153 per week, they are subject to a 'genuine and effective test' to ascertain whether they are nevertheless a worker.[130] The decision maker guidance accompanying the test gives cause to think that the 'genuine and effective' test may be more narrowly applied than CJEU case law suggests, potentially excluding part-time workers from automatic equal treatment rights. For example, the guidance states that 'part-time work is not necessarily always marginal and ancillary'.[131] As a statement of probability, this suggests that part-time work is usually marginal and ancillary.

If faced with discriminatory/obstacle internship or work programme cases, the Commission should push for the situations to be viewed as interferences with Article 45 TFEU, requesting that the CJEU look at those cases much as a national court would do, focussing on the 'subordinate' nature of the relationship; the extent to which the subject has the freedom to fail to turn up for work and so on. The same should be said in relation to atypical work contracts, such as zero-hours contracts, where the employee is required to be at the disposal of the employer even though the employer might not be obliged to provide work (immediately or on a regular basis) to the employee. It is the limitation upon the workers' freedom to refuse work that should determine whether they are in employment or not.

Any definitional limitations upon migrant work should be monitored, and where they impact significantly upon part-time workers, can be challenged.

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[127] Case C-196/87, Steymann, ECLI:EU:C:1988:475; in the context of the Turkey Association Agreement but of broader relevance; case C-294/06, Payir and others, ECLI:EU:C:2008:36.

[128] Low or even unpaid work can be combined with other activities such as education or vocational training. For instance, a marginal, low-paid or even unpaid work arrangement with a well-known undertaking as employer might be recognised as a stepping stone for a successful professional career.

[129] For some examples of unpaid 'internships' see e.g. http://www.internshipinlondon.com/search-results.php; for the purposes of UK law, see the guidance from the Department for work and pensions, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197222/11-1216-national-minimum-wage-worker-checklist.pdf.

[130] Department of Work and Pensions Press Release: 'Minimum earnings threshold for EEA migrants introduced', 21 February 2014, available at https://www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced.

[131] DMG 1/14 JSA(IB) – Right to reside – establishing whether an EEA national is/was a "worker" or a "self-employed person", DMA Leeds, February 2014.

### *3. Problems retaining worker status*

The provisions for retaining worker status in Article 7(3) of Directive 2004/38 include significant gaps. These provisions have recently been found to be non-exhaustive, in *St Prix*.[132] In this case, it was found that a worker who temporarily ceases work during later stages of pregnancy, or during a maternity period, can retain worker status. In the light of this, further gaps could usefully be challenged, for example if employment is temporarily interrupted due to caring obligations,[133] which can result in a punctuated work record.

Migrant workers seeking to rely on Article 7(3) (b) or (c), as persons who have become unemployed and subsequently seek work, might fall foul of the technical requirements Member States impose drawing upon those provisions. The unemployment must be 'duly recorded'. This means that a recently unemployed migrant worker who does not register with the public employment agency, because he or she does not want to claim benefits, and instead seeks work using his or her own resources, will not retain worker status during the intervening period.[134] If he or she subsequently registers with the public employment agency, he or she may be found to have done so with 'undue delay' (the test in the UK) and so not retain worker status and not be entitled to benefits.

There is also a risk, given the growth of zero-hour contracts, that a worker will cease to be considered a worker (he or she will have done his or her last shift) before he or she even knows that his or her employment has come to an end, if he or she is waiting to hear about further shifts. By the time it is clear no further shifts are coming, he or she will have been considered to have lost and not retained worker status.[135]

The Commission should be alive to measures that discriminate against migrant workers once they have become unemployed, challenging narrow definitions of retained worker status, and arguing that such restrictions defy the broad approach to be taken to defining workers under Article 45 TFEU. Measures that automatically penalise migrants for not immediately registering with employment agencies, by stripping them of worker status and of associated protections, can be challenged. Such measures, and any ensuing discriminatory benefit eligibility policy (such as the loss of Housing Benefit in the UK) could constitute ex ante obstacles to movement, because they mean that migrant work entails a significant social risk.

### *4. Reflecting modern labour market patterns*

In recent years the pattern of transnational migration has changed drastically. In the past one striking feature of labour migration was the interest of host countries in low-skilled workers. Today, technological change deeply influences the demand for skills in the labour market, insofar as the percentage of workers with tertiary education has increased considerably, and better cognitive and non-cognitive competences are needed even for low-skilled tasks. Accordingly, there is a growing demand for high-skilled jobs and a decrease in demand for medium-skilled and low-qualified jobs. Education and vocational training is necessary in order to access the labour market.

[132] Case C-507/12, Jessy Saint Prix v Secretary of State for Work and Pensions, ECLI:EU:C:2014:2007.
[133] Which are not covered in Article 7(3) of Directive 2004/38.
[134] UK case law requires there not to be 'undue delay' in registering with Jobcentre Plus following unemployment. Secretary of State for Work and Pensions v MK, CIS/2423/2009.
[135] A risk evident in the UK, Upper Tribunal case VP v Secretary for Works and Pensions (JSA) [2014] UKUT 32 (AAC); judge Ward found that even where a claimant was "*reasonably in my view, hanging on in the hope of further work from [his employer]*" this nevertheless resulted in undue delay in registering for JSA.

Furthermore, there are new kinds of atypical employment which blur the borderline between work and non-work. An allocation of rights according to the traditional concept of worker is therefore just as anachronistic as the traditional '9 to 5' work organisation. EU law concerning the freedom of movement of workers must take account of these changes. From a wider perspective, Europe as a whole has to adapt to new political, economic and social circumstances, which require a new approach to the free movement of workers. The high rate of unemployment in many Member States also reflects a need for a more effective European employment strategy as well as a broader concept of European citizenship. It is against the background of all the European policies relevant in this context that free movement of workers has to be seen. Measures should focus on a clearer, more up-to-date and efficient legal framework on free movement for European workers as well as a more transparent and efficient labour market in Europe which will allow free movement under optimum conditions.

### 3.2.2 Different routes to coverage

*1. Applying the broader personal scope of 'obstacles' to non-nationals*

Protection from indirect discrimination is considerably stronger for workers than for other categories of migrants. Prima facie indirect discrimination is more readily justified in the context of non-workers, including students,[136] on the grounds of requiring some degree of social integration, through e.g. residence requirements. The prohibition of obstacles to movement has a potentially broader personal scope, with strong presumptions against obstacles not only for workers, but for students and citizens too.

In *D'Hoop*,[137] a Belgian national had completed her secondary education in France. She returned to Belgium, studied at a Belgian university, and after graduation claimed the Belgian tide-over allowance, a benefit granted to 'young people who have just completed their studies and are seeking their first employment'. This was refused, as a condition of entitlement was completing secondary education in Belgium, or in another Member State if she was the dependent child of migrant workers (she was not – her parents were resident in Belgium throughout). The CJEU found that an own State national should not be treated less favourably because he or she has "*availed [him or herself] of the opportunities offered by the Treaty in relation to freedom of movement*".[138] Those opportunities "*could not be fully effective if a national of a Member State could be deterred from availing himself of them by obstacles raised on his return to his country of origin by legislation penalising the fact that he has used them.*"[139] The opportunities go beyond work – the issue being "*particularly important in the field of education*" given the Union's aims of "*encouraging mobility of students*".[140]

In *Morgan and Bucher*[141] the CJEU similarly readily engaged with the question of whether a measure that allocated student grants for study abroad only to those whose studies had started in Germany was an obstacle to movement. It found that it was "*liable, on account of the personal inconvenience, additional costs and possible delays which it entails, to discourage citizens of the Union from leaving the Federal Republic*

[136] Case C-158/07, Förster, ECLI:EU:C:2008:630.
[137] Case C-224/98, D'Hoop, ECLI:EU:C:2002:432.
[138] Ibid, 30.
[139] Ibid, 31.
[140] Ibid, 32.
[141] Joined cases C-11/06 and C-12/06, Morgan and Bucher, ECLI:EU:C:2007:626.

*of Germany in order to pursue studies in another Member State and thus from availing themselves of their freedom to move and reside in that Member State*". It then turned to questions of justification, and found that the many arguments put forward by the German authorities were not sufficiently commensurate, appropriate, proportionate, or well-evidenced in order to create justification.

While obstacle arguments have typically only been raised in the context of own-State returning EU migrants, the convergence of obstacles and discrimination logic around the concept of migration discrimination means that obstacle arguments can logically be deployed in the context of non-national EU migrants as well. However, this might mean that the force of the argument gets watered down, since the case law is especially disapproving of Member States who penalise their own nationals for moving, and may be less stringent when it comes to non-nationals, reflecting the approach taken in indirect discrimination case law.

Where possible, it would be advisable to characterise migrants as workers in order to trigger the strongest obligations under both indirect discrimination and obstacles to movement. In this context, the logic of the obstacles case law could be extended to cover non-nationals, and with it the strong presumption against obstacles, and the presumed heavy burden of proof (and difficulty of justification) placed on Member States. When dealing with non-workers who are non-nationals, connections to work, such as jobseeking, or former work should be stressed. Once the obstacle logic has become more firmly established in the case law on non-nationals, in the context of work, it could be possible to explore reliance purely on a person's EU citizenship status.

### *2. Getting agreement that the affected migrants are workers*

It can be difficult in some cases to establish 'work', especially in the light of some national divergence. In some cases, the CJEU may not make a finding as to whether a migrant is a worker, but devolve that question back to national courts.

For instance in *Raccanelli*,[142] the provisions for creating two routes of doctoral study – one under a grant system, and the other recognising the students as employees, was challenged by an Italian student with a grant. He claimed he was performing the same duties as the German students recognised as workers. The CJEU re-stated the key features of an employment relationship, and said it was for the referring court to find the facts to establish whether such a relationship existed. It then added rather briefly that the institute in question was bound by the principle of non-discrimination, and that it was for the referring court to find out whether domestic and foreign workers had been treated differently.

If the Commission were to take action that hinged upon accepting that those affected are workers, it should include factual evidence that speaks to the components of the working relationship (services performed under the supervision of another in return for remuneration). It would also be advisable to outline grounds that include the prohibition of obstacles to movement for students/citizens as appropriate to help to provide an argument 'in the alternative'.

### *3. Emphasising that the free movement of workers requires access to host State labour markets*

[142] Case C-94/07, Raccanelli, ECLI:EU:C:2008:425.

The protection of jobseekers under Article 45 TFEU, and their alignment with workers, could be better emphasised by recognising the (limited) protection from equal treatment to which they are entitled, and stressing that any obstacle-to-movement case arises primarily out of Article 45 TFEU rather than Article 18 TFEU, which can be raised secondarily and in the alternative.

Obstacles to the labour market that obstruct a migrant's ability to become a worker in another Member State may be clear infringements of the fundamental freedom of movement for 'workers', even though they primarily affect jobseekers, since they affect the overall patterns of movement and employment. It should be noted here that by classifying jobseekers as simply economically inactive citizens, Member States may be erecting significant obstacles to the labour market by making it difficult to reside and seek work in the territory.

Examples of such obstacles in the UK include the residence requirement of three months before Jobseeker's Allowance can be claimed[143] – which goes further than is necessary to establish that someone is genuinely jobseeking, as over half of all jobseekers find work within three months in the UK.[144] Moreover, the measure creates an obstacle to movement for own nationals who cannot, contrary to the CJEU ruling in *Swaddling*,[145] be considered habitually resident at the point of claim. Another example is the withdrawal of Housing Benefit from jobseekers,[146] as the low level of Jobseekers' Allowance in the UK means that migrants face a substantial rent shortfall,[147] and so cannot maintain a residence, calling the meaning of a right 'to reside' as a jobseeker into question, and highlighting the problematic classification of benefits as social assistance where they are necessary for jobseeking to be possible. The exclusion applies to all EU national jobseekers, not just newly arrived ones. As there are several obstacles to retaining worker status, discussed at 3.2.1 (3) above, this will affect former workers. These measures reflect the UK government's contentious desire to reduce immigration from the EU.[148]

The use of Article 45 TFEU in the context of access to the labour market could help to avoid a situation in which the biggest obstacles to the free movement of workers are obstacles that prevent migrants from becoming migrant workers in the first place, or from regaining migrant worker status. This could be combined with contesting indirect discrimination, whenever the measures in question can be framed as restricting access to benefits that facilitate access to the labour market. Measures that make it more difficult for own State nationals to seek work having worked elsewhere in the EU should be identified and challenged.

The Commission may also contribute to the task of distinguishing benefits that facilitate access to the labour market from social assistance lawfully withheld from jobseekers according to Article 24(2) of Directive 2004/38. It would be useful to set out some clear benchmarks for subsistence without which a migrant cannot meaningfully seek work and therefore cannot get access to the labour market.

[143] The Social Security (Jobseeker's Allowance: Habitual Residence) Amendment Regulations 2013 SI 2013 No 3196.
[144] DWP 'The Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013' *Impact assessment* 16/12/2013 http://www.legislation.gov.uk/ukia/2013/230/pdfs/ukia_20130230_en.pdf, last accessed 13 August 2013, 5.
[145] Case C-90/97, Swaddling, ECLI:EU:C:1999:96.
[146] The Housing Benefit (Habitual Residence) Amendment Regulations 2014, Regulation 2 amending Regulation 19(3)(b) of the Housing Benefit Regulations 2006.
[147] The local housing allowance figures give an indication of acceptable rent levels for benefit recipients. The levels are usually well above the rate of Jobseeker's Allowance leaving a big rent shortfall.
[148] To reduce immigration to the target of 'tens of thousands' would mean reducing immigration of EU workers.

*4. Making it possible to rely on 'obstacle' case law in domestic courts*

While obstacles imposed by Member States on their own nationals seem harder to justify than indirect discrimination against non-nationals, especially in the context of jobseeking, that does not necessarily help the vast majority of potential claimants whose cases are dealt with solely by domestic courts. The concept of obstacles is arguably a little too nebulous and potentially limitless, without clear boundaries that national courts can get to grips with. There are no implementing pieces of legislation addressing obstacles to movement in domestic law in the UK, for example, whereas non-discrimination provisions find expression in domestic law as well as in directly effective EU law.

There is a risk that the concept of an obstacle to movement is treated as a construct of soft rather than hard law, or as a 'general principle' difficult to rely on in court. National litigators are sometimes wary of challenging something as an obstacle where another challenge is possible, and courts are less comfortable with tackling obstacles than they are with tackling discrimination. It is not just the courts that struggle – legislatures are more likely to create measures that constitute obstacles, without necessarily considering whether they are justified, than they are to create measures that discriminate on the grounds of nationality, without first subjecting the measure to an equality impact assessment and providing grounds for objective justification at the time of enactment.

An example here is the UK measure mentioned above, which has reinstated the pre-*Swaddling* requirement for an appreciable period of residence for all claimants of Jobseeker's Allowance – except this time it is longer, i.e. three months, instead of the old eight-week rule.[149] This applies to UK nationals returning from the EU, having exercised their Treaty rights. The measure is symptomatic of the degree to which the concept of obstacles is rather neglected in the mind of the legislature.

The Commission has a role to play, both by means of case work and by means of awareness-raising activities, in stressing to national legislatures and judiciaries the importance of the prohibition of obstacles to movement. This is especially important in the light of the new Enforcement Directive; Member States need to appreciate and implement the principles contained therein if they are to effectively enforce them.

### 3.2.3 The distinction discrimination / obstacle impacting workers and non-workers

As noted above in the section on jobseekers, measures that are framed as impacting only on the 'economically inactive' can have significant effects upon the free movement of *workers*, constituting indirect discrimination and/or obstacles to that movement.

The legitimate aim of requiring benefit claimants deemed not to be workers to have a degree of integration into society is unlikely to justify an obstacle to movement imposed on an own national. Instead, it is highly likely to permit a differentiated system of benefit entitlement as between non-nationals and EU nationals (so that the latter must be currently in work, or have permanent residence). This differentiation can and does impact upon workers in the following ways:

(a) They create extra administrative hurdles that all EU migrants, workers or not, have to go through (whereas home State nationals do not) to demonstrate entitlement. These extra hurdles create more potential for delay, create additional evidential

[149] The Social Security (Jobseeker's Allowance: Habitual Residence) Amendment Regulations 2013 SI 2013 No 3196.

burdens for claimants, and more administrative complexity. Examples in the UK include the 'more robust' habitual residence test; the minimum earnings threshold and genuine and effective work test; the rules affecting retention of worker status, including the 'compelling evidence of a genuine prospect of work test' after six months.

(b) They create a culture of distrust in which EU migrants, including workers, are perceived as potentially dishonest threats to the benefits system. The UK Treasury recently announced that all EU migrants, including workers, would be subjected to HMRC 'Compliance checks', which are otherwise undergone when there is a reason for suspecting that a claimant is not entitled to a benefit.[150] This is direct discrimination and arguably contravenes Article 14(2) of Directive 2004/38, which states that Member States 'may verify' that the residence conditions are fulfilled "*in specific cases where there is a reasonable doubt*". There must be some ground for reasonable doubt – not just the fact that someone is an EU national. The provision then adds that "*this verification shall not be carried out systematically*".

(c) Measures that provide for unequal access to benefits for those who become unemployed place EU migrant workers in a precarious situation whereby loss of worker status can mean the sudden loss of support. This precariousness impacts upon the lives and health of workers,[151] and also makes them more vulnerable to exploitative employment, for fear of loss of worker status. Fear of entering into such a situation of precariousness – with the threat of homelessness – could create obstacles to the free movement of workers.

(d) Persons performing migrant work may nevertheless be defined by national law as economically inactive, in the light of the potentially stringent approach outlined in the UK decision maker guidance on the Minimum Earnings Threshold and the status of part-time work. Those persons will then be subject to the benefit restrictions imposed on the economically inactive.

Measures ostensibly targeting the economically inactive impact significantly upon workers in various ways, and constitute potentially ex ante obstacles to movement. Moreover, in the context of frontier *workers*, it seems that some degree of nationality discrimination akin to that applied to the economically inactive, is considered legitimate, as in *Geven*.[152] There, a German child-raising allowance was limited to those resident in the territory, or else to those working full-time (more than 'minor' work). The CJEU gave the green light to the justificatory aim of awarding the benefit to those who "*have established a real link with German society*".[153] The fact that residence was not the only criterion, but frontier workers could get the benefit through "*a substantial contribution to the national labour market*"[154] was sufficient to render the justification legitimate. The rule – performing more than minor work if not resident – was likely to disproportionately impact upon non-nationals, and in particular upon part-time workers, who are more likely to be women. This was, however, not explored by the CJEU.

[150] HM Government, *Budget 2014: Policy costings* (March 2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295067/PU1638_policy_costings_bud_2014_with_correction_slip.pdf, p. 49.
[151] See, for example, Bambra (2014); Bambra, Lunau et al (2014); Benach, Vives et al (2014).
[152] Case C-213/05, Geven, ECLI:EU:C:2007:438.
[153] Ibid, 22.
[154] Ibid, 25.

## 3.3 The impact of the distinction between discrimination and obstacles

As we have seen above both the notion of discrimination and the notion of obstacle have been broadly construed and in many ways the notion of obstacle also encompasses the notion of discrimination. Consequently, if there is no sufficient evidence to argue discrimination, a rule might be challenged also as an obstacle.

Furthermore, and because the notion of obstacle is broader than that of indirect discrimination, the CJEU does not always apply rigid differentiations. For instance in *Haim I*, the CJEU treated a language requirement as an obstacle,[155] whilst under the *Groener* case law, as then confirmed in *Angonese*,[156] the CJEU held language requirements to be indirectly discriminatory since own nationals are more likely to speak the official language than foreigners. Moreover, as said above in *Terhoeve* the CJEU found that since the rule is in any case an obstacle to movement, it was unnecessary to assess whether the rule was also discriminatory.[157]

Whether a rule will be looked at under the lens of discrimination or obstacle will also depend on how the case has developed in the national court and what was claimed in that forum. In preliminary references the CJEU replies to the questions formulated by the national court. Hence, if the national court has used the notion of obstacle rather than the notion of discrimination, the CJEU might well maintain that choice. For this reason, the classification in the case law should not be considered excessively rigid: what matters at the end of the day is whether the rule has an effect on intra-Community migration. If such an effect is found through either discrimination or a barrier to movement or an obstacle then the rule will have to be justified.

As said above, the distinction between discriminatory and non-discriminatory obstacles is more fluid than what doctrinal writings might suggest. When considering whether a rule is compatible with Union law, the following should be taken into account:

It is important to remember that the concept of discrimination in free movement law is radically different from the cognate concept in sex discrimination law. In particular in the latter, discrimination must be proven using statistical data as to the specific effects of the rule or practice on one of the sexes; or of the over/underrepresentation of one sex over the other in the area challenged. In the area of nationality discrimination that is not necessary – rather, and illustrated above, it is sufficient to show that the rule *might* affect more foreigners/migrants than nationals. The reason behind this discrepancy is that the very existence of rules might have prevented or discouraged foreigners from entering the employment market in the first place. Thus, it is sufficient to establish a *narrative* of discrimination (which is relatively easy for all those rules which contain a territorial element).

Again, it should be remembered that in order to claim an obstacle it is sufficient to show that the rule might deter/discourage the free movement of workers; or might constitute a barrier to market access; again there is no particular evidence required. For this reason it is always advisable to claim both discrimination and obstacle (e.g. a rule that provides for a language requirement to be able to treat patients in the NHS is clearly discriminatory on grounds of nationality because it affects more foreigners than nationals; and in any event it is an obstacle in that it directly restricts access to the employment market).

This said, some differences should be taken into account when deciding on litigation.

[155] C-424/97, Haim I, ECLI:EU:C:2000:357.
[156] Case C-281/98, Angonese v Cassa di Risparmio di Bolzano SpA, ECLI:EU:C:2000:296.
[157] Ibid, paragraph 41.

If a finding of discrimination can be supported by statistical data, then it will be very difficult for the Member State to defend such discrimination. A finding of discrimination is politically less problematic. This is so because if the CJEU finds discrimination, the Member State might amend the rules simply to remove that discrimination; whilst if the CJEU finds that the rule is an unjustified obstacle to movement the Member State will have to remove the rule for all economic operators. An example might illustrate the difference: a qualification requirement is indirectly discriminatory because nationals are more likely to have qualified in the Member State; in order to make the national rule compatible with EU law it will be sufficient for the Member State to avoid applying *that* particular rule to those who hold a qualification or equivalent experience from another Member State. If, however, the rule is found to be an obstacle to access to the employment market it will need to be lifted for all economic operators because it is not realistic for a Member State to accept that **no** qualification/experience is required if the worker is a foreigner or is returning upon migration, but qualification is required for own citizens.

Thus, a qualification requirement will be an obstacle to access to the market justified, say, for the protection of the consumer (e.g. an architect), but in imposing that qualification the Member State cannot impose indirectly discriminatory criteria and therefore needs to recognise experience or qualifications obtained in another Member State.

Once discrimination is established the *Graf* doctrine (effect of rule too remote and indirect) cannot be invoked: no matter how minimal the discrimination is, it always needs to be justified.

On the other hand, the Member State might attempt to reverse a claim of discrimination with statistical data (albeit this would not be conclusive). One such attempt was made in the *Gourmet* case in relation to the free movement of goods. The case related to the prohibition of advertising alcoholic beverages in Sweden. The Swedish government claimed that the consumption of wine and whisky (both imported) had increased despite the advertising ban, whilst that of vodka (home-produced) had decreased. The CJEU held that that fact was immaterial also because had the rule not been there the increase in consumption of imported beverages might have been greater.[158]

As mentioned above there are inherent limits to the definition of 'obstacle' (those do not apply to discrimination). Therefore, a rule is **not to be considered an obstacle:**

- If the rule is inherent in the organisation of the employment concerned (*Lehthonen*). This basically ensures that the free movement provisions cannot be used as a means to dispose of things such as selection criteria (in the case at issue for sporting activity, but this would apply to any selection). Thus, a selection criterion inherently limits participation in the labour market, and yet it does not need to be justified (unless discriminatory) as otherwise we would find ourselves in an impossible situation. Similarly, it may be argued that detention is inherent in the administration of justice and therefore cannot be challenged under the free movement provisions.

- If the effect of the rule is too uncertain and indirect to be qualified as a barrier to movement (e.g. in *Graf* the claimant argued that the effect on free movement of a rule that provided for compensation for mandatory redundancy but not for voluntarily resignation was too remote and indirect to be qualified as a barrier) then the rule does not need to be justified.

[158] Case C-405/98, Konsumentombudsmannen v Gourmet International, ECLI:EU:C:2001:135, paragraph 22.

## 3.4 Justification of discrimination and obstacles

As mentioned above, the fact that a rule is found to be indirectly discriminatory or an obstacle does not exhaust the examination of the CJEU since the rule might be justified. In order to be justified the rule must:

- pursue a legitimate aim, i.e. an aim compatible with Union law;
- be necessary/appropriate to pursue that aim;
- be proportionate, i.e. the restriction imposed on the free movement right;
- and be commensurate to the importance of the policy pursue by the Member State.

*Legitimate aims*

As stated above, with the exception of protectionist aims, the CJEU tends to avoid challenging the legitimacy of the aims pursued by Member States, since it does not want to adjudicate on national policy priorities.[159] Aims that pursue also an economic interest are not necessarily incompatible with European law: it is sufficient in this respect to recall the health care cases where the CJEU accepted that cost containing measures are compatible with Union law since their ultimate aim is to ensure welfare or health provision.

*Necessity/appropriateness and proportionality*

In several cases the CJEU does not carry out a separate assessment of necessity and proportionality, so that it would simply look at whether the measure is 'appropriate' and necessary to achieve the purported aim. For instance in *Bosman*, in relation to the transfer fee, after having found that the purported aim (ensuring some equality between clubs and the training of young players) was compatible with Union law, the CJEU went on to analyse whether the measures (imposition of transfer fees) were 'appropriate'. To that end the CJEU found that the rules at issue did not prevent the richest clubs from securing the best players, or the richest club from being able to spend more money. In relation to the second aim (training of young players), the CJEU found that whilst in theory the prospect of receiving a transfer fee would be likely to encourage football clubs to foster new talent, in practice the transfer fee was too speculative an event not commensurate with the actual cost of the training and therefore could not be a decisive factor in the decision to train young footballers or an adequate means to finance such training.

So in many cases the assessment of the appropriateness/necessity of the measure is also used to assess whether the purported aim is in fact the real aim of the measure: if the measure is neither appropriate nor necessary then either the measure pursues no actual aim (e.g. that might be the case with measures that used to satisfy a policy need which is simply no longer there), or in fact pursues other (non-stated) aims.

For instance in *Lehtonen*[160] a rule which would have been justified otherwise, was found not justified because it was not overall consistent. In this case sporting rules imposed a deadline in order to field players for the basketball championship. Such a deadline was an obstacle falling within the scope of Article 45 TFEU, since it restricted the possibility of engaging players from other Member States where they had been

[159] Similarly in the context of goods see case C-231/83, Cullet, ECLI:EU:C:1985:29.
[160] Case C-176/96, Lehtonen, ECLI:EU:C:2000:201.

engaged after the specified date. The CJEU accepted that justificatory objectives of ensuring the proper functioning of sport competition, and considered that a measure preventing late transfers could speak to that objective by ensuring that the strength of the teams did not change substantially just before the end of the championship. However, players from a federation outside the Eurozone benefited from a later deadline. Thus, if non-EU players could be engaged at a later date without affecting the proper functioning of the championship, then there was no reason why players from the Eurozone could not also benefit from the extended deadline, so the rule went beyond what was necessary and was disproportionate.

In more recent times, the scrutiny as to the necessity of measures has also focused on issues such as the coherence of the rule within the legal system (e.g. there is no point invoking the protection of workers in a small industry if workers in other industries are wholly unprotected); as well as an extensive analysis of the regulatory alternatives available to the Member States to minimise the obstacles to movement; and the manner in which the rule had been adopted.

This is best illustrated by a series of cases decided within the context of the free movement of goods. In *Commission v Austria (Brenner I)*,[161] Austria had adopted restrictive measures for lorry traffic in part of the Brenner Motorway (one of the main transport arteries between the south and north of Europe). The CJEU found that whilst the aim invoked was of paramount importance to the EU (environmental protection), it had not been demonstrated in this case that the Austrian authorities had sufficiently studied whether reduction in carbon emissions could be achieved through means less restrictive of intra-EU transport. Furthermore, the CJEU also found that the speed at which the legislation had been implemented, leaving just two months between the adoption and entry into force of the restrictions, left insufficient time to economic operators to adapt. It is clear then that, insofar as new legislation is concerned, and especially when the effects on free movement are considerable, the Member States might be required to demonstrate to have taken all possible alternatives into account; to have based their decision on objective data; and to have given sufficient time to economic operators to adapt. This might be very important should governments seek to introduce new restrictions on e.g. the possibility to claim benefits or social advantages.

In *Commission v Austria (Brenner II)*,[162] Austria again attempted to reduce traffic on the Brenner motorway by introducing a partial ban on transport on wheels of given goods, which were instead to be transported by rail. The CJEU considered very carefully whether the rules were necessary and it was eventually persuaded by the Commission's contention that a permanent reduction in the speed limit would attain a similar effect in relation to the reduction of carbon emissions.

In this respect, unpacking a piece of legislation to determine whether the restriction imposed on free movement is really necessary and proportionate might well highlight some inconsistencies in the policy framework of the Member State which might then determine the incompatibility of the rules with EU law. For the Member States this is a particular challenge not least since legal systems and policy initiatives within a State are hardly ever wholly coherent.

The more traditional *proportionality* assessment, on the other hand, focuses very much on whether the restriction on the person's freedom is out of proportion with the policy aim pursued. Proportionality proper is a very useful tool in the armoury of private claimants, and was of paramount importance in developing Union citizenship, especially in those cases, such as those concerning family reunification, where the rule itself might be legitimate but the application of the rule to that particular claimant is

[161] Case C-320/03, Commission v Austria (Brenner I), ECLI:EU:C:2005:684.
[162] Case C-28/09, Commission v Austria (Brenner II), ECLI:EU:C:2011:854.

disproportionate because of the hardship it would cause him or her. For instance in the above-mentioned case of *Carpenter*, it was the application of the British migration rules to those particular claimants that was inconsistent with their right of family life as protected by Union law. Proportionality proper is less useful in relation to the abstract review of legislation (as it is carried out in Commission proceedings) where rules can only be declared either compatible or incompatible with Union law without there been any possibility for an individual assessment. In those cases, the analysis would focus on whether the measure is appropriate and necessary as detailed above.

# 4 Conclusion

The analysis of the legislative framework and of the case law of the Court of Justice of the European Union (CJEU) shows that the personal and material scope of Article 45 TFEU on the free movement of workers has been interpreted broadly. Under the protected EU nationals, it includes full-time, part-time, seasonal and frontier workers, working students and jobseekers. In combatting free movement breaches, the CJEU has also stretched the interpretation so as to incorporate as many obstructive rules as possible within its range of action. Consequently, at first glance, the functioning of the free movement of workers appears to be rather straightforward.

However, deeper analysis reveals that there are still many grey zones and unclarities in delineating this fundamental freedom, all the more in the light of its importance for the implementation and effective realisation of the internal market and for the EU-wide post-crisis efforts. The reported ambiguities surrounding the scope of this freedom call for further reflection and action.

In this regard, the classification as a worker as well as the retention of the worker status are manifest problem areas. Although the CJEU has provided a workable definition of the former and the EU legislature has explicitly clarified the conditions and requirements for the latter, a substantial number of categories of persons remain in a precarious situation, threatened to 'fall between stools' (e.g. persons learning on the job, apprentices, persons in a low-paid or unpaid internship). In this respect, a gender perspective should be taken into account as well. Furthermore, these problems must be viewed against the background of the difficult labour market situation in many Member States as well as in view of the endeavours both of the European institutions and the Member States to tackle these challenges. In view of this, several EU nationals who are prima facie 'worthy of protection' lose the full protection they seem to be entitled to, taking into account the aims, the spirit and the 'philosophy' of the principle of free movement, in particular of workers. This state of affairs undoubtedly calls for a more detailed analysis of the limits of the free movement of workers. In such further clarification, the different aspects of the relationship between Article 45 TFEU and the other areas of the free movement of persons, more specifically the free movement of Union citizens, is of particular interest.

With regard to the types of measures that are contrary to Article 45 TFEU, the current legal framework also seems to complicate the exercise the Member States and the European Commission have to take up in order to trace measures having an adverse effect on intra-EU migration. A clearer conceptual framework based on discrimination on grounds of migration could be proposed as a possible solution. As a familiar concept on both national and EU level, such a new approach to discrimination may provide a clearer scenario for more and better compliance and may also be a catalyst to further define a list of key areas of action to counter remaining EU-incompatible national measures and practices. Crucial questions in this regard are if such a concept should be introduced and how it could be introduced into the legal framework of free movement.

Anticipating a further case-to-case approach by the CJEU, the problematic areas tackled in the report should be proactively included in the strategy of the European Commission for the promotion of the free movement of workers, after further analysis and detection of the key fields of action. It fits well in the strategy of enforcing the freedom of movement of workers as devised in Directive 2014/54/EU of April 2014 which must be implemented by the Member States in the next two years. It is self-evident that all relevant stakeholders should be included in this exercise.

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