

Free movement of workers: the role of Directive 2014/54/EU in tackling current and future challenges

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Paris, 8 December 2015

Overview

- EU legal landscape
- Added value of Directive 2014/54
- Main current and future legal issues

EU legal landscape on the freedom of movement for workers: Treaty provisions

- Article 45 TFEU
 - Abolition of any discrimination on grounds of nationality as regards employment, remuneration and other conditions of work and employment
 - The right to look for a job in another Member State (MS), to accept it, to stay and remain in that MS
 - Includes the prohibition of non-discriminatory obstacles to free movement: case law of the ECJ
 - Exceptions
 - Public policy, public security and public health
 - Employment in the public service
 - Only applies to EU citizens (and members of their family, even third-country nationals)

EU legal landscape on the freedom of movement for workers: Treaty provisions

- Article 56 TFEU
 - Freedom to provide services
 - Including with the service providers' own workers
 - 'Posted workers' are not 'migrant workers': Art. 45 TFEU does not apply (*Finalarte*, C-49/98)
 - However: *Hudzinski/Wawrzyniak*, C-611/10 - C-612/10
- Article 21 TFEU
 - General right for EU citizens to move and reside freely within the MSs
 - Also applicable to economically inactive EU citizens
- Article 18 TFEU
 - General clause on the prohibition of discrimination on grounds of nationality

EU legal landscape: Charter of Fundamental Rights

- Article 45
 - Freedom of movement and of residence for EU citizens
- Article 20
 - ‘Everyone is equal before the law’
- Article 21(2)
 - Prohibition of discrimination on grounds of nationality within the scope of the Treaties
- Article 51
 - Charter only applies when EU and MSs are implementing EU law

Secondary law

- Regulation 492/2011
 - Replaced Regulation 1612/68
 - Articles 1-6: eligibility for employment
 - Article 7-9: employment and equal treatment
 - Article 10: workers' families
- Directive 2004/38 ('citizenship'-directive)
 - Right to reside in another MS for EU citizens and the members of their family
 - Article 24: a right to equal treatment for all matters coming under the scope of the Treaty

Secondary law

- Regulation 883/2004 and Regulation 987/2009
 - EU coordination of the national social security systems in order to prevent loss of rights in cross-border situation
 - Confirms the prohibition of discrimination on grounds of nationality
- Directive 98/49 and Directive 2014/50
 - Occupational pensions
- Directive 96/71: posting of workers
 - ‘Posted workers’ are not ‘migrant workers’
 - Limited employment rights in host State: no full equal treatment
 - Social security only after 24 months (Reg. 883/2004)

Role of the Court of Justice

- Abundant case law
- Crucial role in matters such as:
 - Access to public employment
 - ‘functional’ vs. ‘institutional’ approach
 - Development of criteria to assess ‘indirect’ or ‘covert’ discrimination on grounds of nationality
 - Development of the concept of ‘non-discriminatory obstacles to the free movement’

Added value of Directive 2014/54

- Personal scope: art. 1:
 - ‘Union workers and members of their family’
 - Reference to Article 45 TFEU and Reg. 492/2011
- Material scope: art. 2
 - ‘identical to that of Regulation 492/2011’
- No added value: confirmation of existing instruments
- But: explicit reference to discrimination on grounds of nationality as well as to unjustified restrictions or obstacles to the right to free movement
 - Articles 3(1), 4(1) and 5
 - No definition of what is direct and indirect discrimination, as in other equality instruments

Added value of Directive 2014/54: What is not covered?

- The right to reside (Directive 2004/38), except:
 - equal treatment for social advantages:
 - *Reed* (95/85) and the right to reside for the unmarried partner of a migrant worker
 - Access to education for children of migrant workers
 - Entails also the right to continue education and residence in the host State, even if the migrant worker (parent) returned home
 - Including for the primary carer of these children
 - Including equal treatment for social advantages
 - *Ibrahim* C-310/08, *Teixeira* C-480/08, *Alarape* C-519/11

Added value of Directive 2014/54: What is not covered?

- Social security coordination
 - Social security benefits fall under ‘social advantages’
 - But implementation of Reg. 883/2004, not mentioned in Dir. 2014/54
 - Complex and intricate system of coordination
 - Yet, tax matters would fall under the scope of Dir. 2014/54, since there is no specific other EU instrument
- Recognition of professional qualifications
 - See Directive 2006/36
 - But outside its scope: implementation of general rules on non-discrimination and obstacles
 - Ex.: *Brouillard*, C-298/14 (5.10.2015)

Added value of Directive 2014/54: What is not covered?

- Economically inactive EU citizens
 - Students, pensioners, ...
 - Covered by Dir. 2004/38
 - However: jobseekers are covered by Article 45 TFEU
 - Article 7(2) Dir. 2014/54: possible extension of the mandate of the 'bodies'
- Posted workers
 - Recital 3 Dir. 2014/54: not covered
 - However: *Hudzinski/Wawrzyniak*

Added value of Directive 2014/54

- The only new rights: Art. 3: Defence of rights
 - MSs shall ensure that judicial procedures are available
 - MSs shall ensure that associations/organizations may engage in any judicial or administrative procedure
 - MSs shall introduce protection against adverse treatment or consequences as a reaction to a complaint or proceeding
 - ! Nothing on shift of burden of proof !
 - See other equality directives

Added value of Directive 2014/54

- Article 4: the role of the ‘bodies’
 - See other presentations
- Article 5: promotion of dialogue
- Article 6: access to and dissemination of information
- Article 7
 - Non-regression clause
 - ! Possibility to extend mandate of the ‘bodies’ to economically inactive EU citizens and the members of their family !

Current and future legal issues

- Who is a migrant worker?
- Jobseekers
- Frontier workers
- Concept of discrimination
- Language requirements
- Social and tax advantages
- Access to public employment
- Discrimination by private parties

Who is a migrant worker?

- Autonomous EU meaning
- Broad concept in ECJ's case law
 - An employment relationship
 - Real and genuine activities which are not purely marginal and ancillary
 - Level of payment or duration not relevant
 - Grey zones:
 - How many hours a week? (*Genc*, C-14/09: 5.5 hours a week)
 - What about work in the context of social integration or rehabilitation? (*Fenoll*, C-316/13)
 - Trainees, apprentices; au pairs, ...
 - Growth of non-standard forms of work

Who is a migrant worker?

- Retention of the status of a worker
 - Article 7(3) Directive 2004/38
 - Temporarily unable to work as a result of an illness or accident
 - Involuntarily unemployed after a working period of at least one year
 - Involuntarily unemployed after a working period of less than one year
 - Retention of status for at least six months
 - Afterwards: jobseekers status (*Alimanovic*, C-67/14)
 - Enrolment in vocational training
 - List is not limitative: *Saint-Prix*, C-507/12

Jobseekers

- The right to look for a job in another MS and to receive the same assistance from the national employment offices (Article 5 Reg. 492/2011)
 - As long as they are continuing to seek employment and have a genuine chance of being engaged (Article 14(4)(b) Dir. 2004/38)
 - Grey zone
 - *Antonissen*, C-292/89: 6 months
 - Also applies to those who lost the status of worker (*Alimanovic*)

Jobseekers

- The right to equal treatment with regard to access to benefits of a financial nature intended to facilitate access to employment (*Collins, C-138/02; Vatsouras and Koupatantze, C-22/08-23/08*)
 - Requirement of a genuine link with the employment market of the MS
 - Discussion on the grey zones between benefits intended to facilitate access to employment and mere 'social assistance' (*Dano, C-333/13; Alimanovic*)

Frontier workers

- May become regular 'clients'
- Problems mostly linked to social security and taxes
 - Social security Regulations 883/2004 and 987/2004
 - Multitude of bilateral tax agreements
 - Residence clauses
 - Recognition of income obtained and facts occurred in another MS
- What about assistance by the employment offices, including participation in activation measures while residing in home State and benefitting from unemployment benefits there?
 - Residence requirement; duration of previous employment; ...
- Study grants for children of migrant workers
- Eures-advisers

Direct discrimination

- Nationality clauses as such are rather rare
 - Access to some social advantages, including social housing
 - Access to jobs in the public sector (Article 45(4) TFEU)
 - Recruitment quotas
- Difficult to justify
 - In principle only for reasons of public policy, public security and public health (Article 45(3) TFEU)
 - Selection for national sport teams
- Substandard working conditions

Indirect discrimination

- Conditions more easily to be fulfilled by nationals of the host MS
- Examples:
 - Residence requirements (factual residence or duration of residence)
 - Language requirements
 - Recognition of only 'national' professional experience
 - Calculation of seniority only on the basis of periods of employment in the host MS
 - Recognition of previous professional experience only if acquired in the host MS

Indirect discrimination

- Need to be justified
 - By an objective aim compatible with EU law
 - Measure can ensure achievement of the aim pursued
 - Does not go beyond what is necessary for that purpose
- Budgetary reasons not accepted
- See *Com. v. Netherlands*, C-542/09 (study grants)
- See recently also *Giersch*, C-20/12
 - Previous working period of 5 years for entitlement to study grants for the children of migrant workers: accepted for Luxembourg (taking into account the special need to keep highly educated youngsters in the country)

Non-discriminatory obstacles to the free movement

- Conditions that hinder or make it less attractive to take up a job in another MS
 - *Kranemann*, C-109/04; *ITC*, C-208/05; ...
 - Transfer fees in football (*Bosman* C-415/93; *Olympique Lyonnais*, C-325/08)
- Mostly a problem for the nationals of the Member State involved

Language requirements

- Allowed by Article 3(1) Reg. 492/2011
- Indirect discrimination on grounds of nationality
 - Must be reasonable and necessary for the job in question
 - Evidence may not be limited to a specific certificate (*Com. v. Belgium*, C-317/14)
 - Requirement to be mother-tongue speaker is not acceptable
- *Groener*, C-379/87, *Angonese*, C-281/98
- *Las* (C-202/11)
 - Mandatory language (Dutch) for a legally valid employment contract
- See new Dutch legislation on language test for access to social assistance

Social advantages

- Broad concept, such as:
 - reduced public transport fares; social assistance; funeral allowances; pre-retirement benefits; the tide-over allowance for young people seeking their first employment; housing benefits; ...
 - social security benefits in general
 - would it make Directive 2014/54 also applicable to social security?
 - advantages granted directly to family members supported by the migrating worker, such as financial support for students or housing assistance, even if the 'worker' him/herself has left the host State
 - *Ibrahim, Teixeira, Alarape*

Tax advantages

- No EU coordination
- A large number of bilateral double tax conventions
- Problems with residence conditions for tax advantages, such as deductions/exemptions/reductions for family reasons or for other costs or expenses

Access to posts in the public sector

- Article 45(4) TFEU: may be limited to nationals of the MS
- ECJ: exception to be interpreted restrictively
- Only posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State
 - If exercised on a regular basis and not representing a very minor part of the activities
 - See recently *Haralambidis*, C-270/13

Discrimination by private parties

- By employers, colleagues, house-owners,
 - Problems when applying for a job, inferior working conditions, harassment, ...
- Article 7(4) Reg. 492/2011:
 - *'Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States'*
- Regulations are directly applicable as such

Discrimination by private parties

- ECJ: the principle of non-discrimination on grounds of nationality as well as the prohibition to create obstacles to the free movement for workers also applies to private parties:
 - *Bosman; Angonese (C-281/98); Raccanelli (C-94/07)*
 - Liability for any resulting loss or damage
 - Limited to collective or individual regulations?
 - What about individual conduct?

Discrimination by private parties

- Breaches of Union law by private parties may be attributed to MSs when these parties are carrying out special public functions under the decisive control of MSs
- or when systematic breaches of Union law by private entities may be indicative that a MS has failed in its obligations to implement or enforce Union law effectively

To conclude

- Directive 2014/54 itself does not create the prohibition of discrimination or obstacles
- Scope identical to Article 45 TFEU and Reg. 492/2011
- Not:
 - The right to reside (exceptions)
 - Social security coordination
- Very broad scope and thus very broad tasks and responsibilities of the designated (or to be designated) bodies

Thank you for your attention

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