Analysis of the free movement of labour under Article 45 TFEU based on ECJ Decisions

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Abstract

The free movement of labour benefits the individuals who choose to work elsewhere in the EU as well as the societies which receive them. It enables the former to exercise their right to free movement and to improve their personal and professional situation, and the latter to fill job vacancies and skills shortages.[1] Article 45 of TFEU guarantees the free movement of workers within the common market. This includes (according to paragraph 2) the abolition of any discrimination of nationality, based on different treatment in terms of employment, remuneration and other employment conditions (prohibition of discrimination). Article 45 (3) of TFEU entails the right to workers to:

- to accept offers of employment actually made;
- to move freely within the territory of Member States for this purpose;
- 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;
- 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;

Main objective of this article is the analysis of this article based on the latest ECJ Decisions.

Keywords: freedom of movement, Labour, ECJ, Decisions, EU.

Introduction

Freedom of movement stipulated in Article 45 TFEU was regulated in detail by Regulation (EEC) No. 1612/68 on the content of the free movement of workers within member states, concretized and supplemented in secondary legislation. This regulation sets out detailed rules for admission to employment, the exercise of employment and equal rights as well as about the status of family members. It was later amended by Directive 2004/38 on the right of EU citizens and their family members to move and stay within the territory of member states.

It codifies in its Article 2, the jurisprudence of the ECJ and also regulates the fundamental freedoms of the EU for EU citizens and their families residing in another Member State.

The free movement of persons of EU citizens, pursuant to Article 18 of the TFEU,

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al23013a

is independent of any economic activity, the protector should not be an employee, jobseeker, trainee or a person involved in these activities category. In contrast to the foregoing, only employees and entrepreneurs (and their families) enjoy fundamental freedoms under Articles 45 and 49 of TFEU (free movement of workers, freedom of establishment in a Member State). In this sense, we will analyze the following ECJ Decisions.

Decision No. 39 from 7.9.2004[2]

Michel Trojani, a French citizen, stayed briefly in Belgium, where he allegedly pursued an independent activity in the distribution sector. In 2000, he returned to Belgium. There he lived unregistered at a Blankenberge Square and since December 2001 in Brussels. Following a stay at a Hostel "Jacques Brel," in early 2002, he was given accommodation in a Salvation Army hostel from 8 January 2002, where in return for board and lodging and some pocket money he does various jobs for about 30 hours a week as part of a personal socio-occupational reintegration programme. Since he was in a difficult economic situation, he applied to the "Center publique d'aide" (CPAS) in Brussels to provide him with the minimum subsistence and argued this request at a value of 400 Euros per month, for the Dormitory to pay and also with the ability to live independently. The negative decision of CPAS was argued on the one hand that the plaintiff did not have Belgian nationality and secondly that Regulation No 1612/68 was not applicable to him and was not accepted by the Brussels Labor Court. According to the ECJ decision in the Trojani case, the concept of employee is interpreted strictly within the meaning of Article 45 TFEU. Employee is anyone who carries out genuine and true activities, while activity is considered not as a job when there is a marginal and insignificant degree. The main feature of the work report under this law lies in the fact that someone within a certain time offers services for which he receives a reward. Exceptions to the employee definition, however, make those persons who are employed as part of reintegration projects (such as: addiction to drugs). Otherwise, in those cases, if a social institution (such as the Salvation Army) agrees with the person of an individual integration project, where the labor market will receive an ordinary remuneration for such services (which may also include payments in kind as such). It remains to be verified by the national court whether the case in question, depending on the law, is really the case.
If there is no classification as an employee, it remains to consider the free movement of Community citizens, on the basis of Article 18 EU treaty. This is provided solely on the basis of the restrictions of Directive 90/364, where Member States may be required for a residence permit of EU foreign nationals, to require the certification of health insurance and sufficient financial resources for which they need during their stay in the territory of that country so that they do not take into account the social assistance of the host member state. In addition, discrimination on the basis of citizenship under Article 12 TFEU remains to be considered: If an EU citizen already has a residence permit (because he was not denied for the above reasons), as in the case of Mr. Trojani, he cannot be treated differently from the locals in need. This means that Mr. Trojani

[2] Case C-456/02, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS).

should have the same rights to social assistance as a Belgian citizen.
The use of social benefits by an EU citizen cannot cause his or her right to withdraw (not to be extended) because it would be discriminatory.

ECJ Decisions Köbler[3] and Schöning-Kougebetopoulou[4]

Freedom of movement of workers in Article 45 TFEU, does not apply to employment in the public service. Under this exception, according to the jurisprudence of the ECJ, only important public activities, in the strict sense, fall, such as justice, police, army, tax administration and certain public order positions. Not allowed are, however, health transportation and transport services (Railroads) and teaching in public schools and universities, as evidenced by the decisions of Köbler and Schöning-Kougebelopoulou.

ECJ Decision No. 234, Köbler from 30.9.2003

Gerhard Köbler is from 01.03.1986, a professor at the University of Innsbruck. In 1996, Mr. Köbler sought special administrative status for university professors who worked for a 15-year term as a professor at the Austrian universities. He argued that although he had not done such a service in Austria, he could show this, in the light of his activities as a professor at universities of other member states, and his professorship over the course of 15 years. The process ended at the Austrian Administrative Court, which rejected the claim by arguing that seniority compensation in the service was a loyalty bonus and could be justified as a reason which did not affect the provisions of the Community on the free movement of workers. Mr Köbler then indicted the Austrian government for damages for breaches of the Community's primary law (EU) (based on state responsibility)[5] in the civil court. The Vienna-based Court of Appeal raised the issue of the compatibility of Austrian law with Article 45 of the TFEU of the ECJ, along with the question of whether the actions of the courts of last instance and the higher courts (administrative court) include state responsibility.
Firstly, the ECJ makes it clear that member states are obliged to pay compensation for the harm caused to individuals by their own in respect of infringements of Community law, even if the alleged violation arises from a court decision of the last degree. Conditions for state responsibility are provided when violent community norms aim at: granting rights to individuals, the breach is qualified as quite serious and between a violation and loss or damage there is a direct causal link. A violation of EU law by a court of last instance of a member state is considered such when the ECJ jurisprudence has been violated openly.
In its reasoning, the ECJ recognizes in the Austrian rule of 15-year service as a "loyalty bonus", a restriction of the free movement of workers because workers in other member countries are discriminated against and at the same time, this restriction could stop Austrian citizens from working in other member states. An employee's loyalty bonus can be considered as a coercive reason for the general interest, but in the present case

3 Case C 224/01, Köbler v Austria.
4 Case C 15/96, Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg.
5 For more info see: ECJ Decisions Brasserie du Pecheur and Factortame.

the restriction cannot be considered justified because the professors "traitors", who change from one Austrian university to another Austrian university do not lose their right to the "loyalty bonus".The measure acts not only against loyalty to an Austrian university but disassociates the labor market for university professors in Austria and thus it is contrary to the essence of the free movement of workers. The administrative court has failed to apply Austrian legal norms against this fundamental freedom.
Also, the violation of the Austrian administrative court against Article 45 TFEU in this case does not qualify as obvious. The Austrian Administrative Court had withdrawn its preliminary ruling because of the ECJ ruling in the Schöning-Kougebetopoulou case, which it had wrongly interpreted.

ECJ Decision No. 45 from 15.1.1998, Schöning-Kougebetopoulou

Greek physician Schöning-Kougebetopoulou worked in the public service in Greece from 1986 to 1992, and since 1993, she worked in the public service in Hamburg. Her activity in Greece was not taken into account in Germany regarding her status and seniority at work. Again, Germany argued, with the employee's loyalty award to a certain employer, which the ECJ therefore considers unfounded, because the higher qualification is valid for seniority at work for the total public service in Germany and for this reason the exchange between employers is possible. In conclusion, therefore, we are dealing again with a violation of Article 45 TFEU. Employment in Greece should be taken into account in Germany for determining the status and seniority at work.
The Austrian Administrative Court had already made the mistake because the Austrian professor scheme was very well classified as a lawful loyalty bonus, because it was not applied to Schöning-Kougebetopoulou for all public service in that country, but only for national universities. Therefore, the Austrian court tried to call it a justifiable condition, which the ECJ considered wrong, as it rejected the government's responsibility. This, of course, left the obligations of the Austrian State untouched by the violation resulting from Article 45 of the TFEU with the result that Mr. Köbler should get his loyalty bonus based on seniority at work.

Conclusions

This manuscript showed that the freedom of movement of persons, namely the free movement of workers and the freedom of establishment, serve primarily the benefit of the citizens, who exercise an economic activity in the common market.
With the Treaty of Maastricht, the institute of "Union Citizenship" was introduced in TFEU (Articles 17-22), and then the idea of common market citizens expanded with the aim of expanding political and civil components. Apart from political rights (participation), such as active and passive voting rights of EU citizens (Article 19 TFEU) and the rights of diplomatic protection by diplomatic missions of other member states (Article 20 TFEU) , there is a general move, according to Article 18, paragraph 1 of the EU Treaty. This article provides for citizens, regardless of the economic activities they exercise, the right to move to the territory of the free member

states and to reside there. This is argued by the fact that although the individual is a citizen of another member state and as such a citizen of the EU, he has the right to reside under Article 18 TFEU. The above discussed ECJ Decisions clearly show a regulatory power under Article 18 TFEU related to the prohibition of discrimination under Article 12 TFEU.

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