

FUNDAMENTAL RIGHTS OF RESEARCHERS IN EUROPEAN UNION

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ABSTRACT

In the paper the current state, especially possibilities of and barriers to the free movement of researchers and their freedom to enjoy fundamental rights within European Union (hereinafter: EU) are discussed. In the first part of the paper, relevant terms such as “researcher” and “mobility” are explained in detail. Then, an overview of instruments adopted at EU level aimed at ensuring conditions for free movement of knowledge is presented. In the second part of the paper the jurisprudence of the CJEU is examined, in order to detect the current position and potential improvements in the conditions under which researchers are involved in mobility in comparison to (all other EU) workers. Emphasis is given to questions of status of researcher, social benefits, financial security and conditions of work.

KEYWORDS

Researcher. Mobility. European Union. Barriers. Knowledge.

INTRODUCTION

This paper discusses the current state, that is, the possibilities and barriers to the free movement of researchers and their freedom to enjoy fundamental rights within European Union (hereinafter: EU). As a starting point, it is necessary to address the question of who falls under the definition of a researcher. Obviously it does not suffice to acknowledge researchers as bearers of academic knowledge. Hence, the paper will first introduce the definition of a researcher. It will then give an overview of instruments adopted at EU level aimed at ensuring conditions for free movement of knowledge. The second part of the paper examines the jurisprudence of the CJEU in order to detect the current position and potential improvements in the conditions under which researchers are involved in mobility in comparison to (all other EU) workers. Emphasis will be given to questions of status of researcher, social benefits, financial security and conditions of work.

The term “researcher” is not defined in the International Standard Classification of Occupations (ISCO). The lack of a definition can be attributed to the fact that research is treated as an activity potentially carried out by many categories of personnel. However, a definition of a researcher can be derived from FRASCATI MANUAL (2015: 44) as “a person who undertakes creative and systematic work in order to increase the stock of knowledge - including knowledge of humankind, culture and society - and to devise new applications of available knowledge”². Activities of a researcher may be aimed at achieving either specific or general objectives. A researcher's activity is always

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² This definition of a “researcher” provided in Frascati Manual is also accepted in relevant reports on the topic of researcher mobility, see DOHERTY & CHALSÈGE (2014) [hereinafter: RESEARCHER'S REPORT (2014)].

aimed at new findings, based on original concepts (and their interpretation) or hypotheses. In his/her research, a researcher is largely uncertain about its final outcome (or at least about the quantity of time and resources needed to achieve it), it is planned for and budgeted (even when carried out by individuals), and it is aimed at producing results that could be either freely transferred or traded in a marketplace. When a researcher conducts his/her research, it has to satisfy five core criteria. The activity must be: novel, creative, uncertain, systematic and transferable and/or reproducible (FRASCATI MANUAL, 2015: 45).

A researcher's need to acquire scientific knowledge and understanding often results in a search which may lead beyond the borders of a Member State of researcher's origin. In this sense, it could be argued that mobility is in the very core of researcher's career. This need was recognized and acknowledged by European Commission and it was included in the "free movement" policy which is aimed at fostering the growth and prosperity of the Internal Market and more recently, recovering from the economic crisis (RESEARCHER'S REPORT, 2014: 12)³.

In regard to mobility of research, several categories have been recognized. Physical mobility, as the most common form of mobility includes inward mobility (attracting researchers from abroad), outward mobility (researchers going abroad) and intersectoral mobility (between academia and industry). Also, long-term mobility (to another country for the duration of several months or years) is differentiated from short-term mobility (visits or project-related activities). Moving to another country to change jobs or being mobile with the same employer for short - or long-term is also considered as mobility. Finally, there are new forms of mobility such as combined part-time positions, interdisciplinary mobility and virtual mobility (RESEARCHER'S REPORT, 2014: 88).

LEGAL FRAMEWORK RELEVANT FOR MOBILITY OF RESEARCHERS

The European Commission is of the view that developing knowledge and competence which is promoted by researchers can be a significant generator of growth in the EU. This is reflected in a number of EU documents which have been introduced in the last two decades in order to promote measures and activities which will optimise the field of science and research, one of the most important being the establishment of European Research Area (ERA).

A Communication "A Mobility Strategy for the European Research Area"⁴ from 2001 was aimed at enhancing the living and working environment of researchers in Europe in order to attract and maintain a high level of Human Resources in researches both quantitatively and qualitatively. The crucial aspects which were identified as those which needed to be considered are legal improvements (concerning particularly admission conditions, access to employment, social security and taxation), improvements regarding information on mobility, improvements in the provision of practical assistance to researchers (such as the creation of a Network of Mobility Centres) and improvements of a qualitative nature (the exchange of best practice; the developments of benchmarking practices)⁵. In Communication "Researchers in the

³ Also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Research and innovation as sources of renewed growth", COM(2014)339/F1.

⁴ Communication from the Commission to the Council and the European Parliament of 20 June 2001: A mobility strategy for the European Research Area, COM (2001) 331 final.

⁵ Communication "A Mobility Strategy for the European Research Area", pp. 3-4.

European Research Area: One Profession, Multiple Careers”⁶ from 2003 the process of development of a “European Researcher’s Charter” and the “Code of conduct for the recruitment of researchers” was announced. The necessary steps were finalized through the Council Resolution of 10 November 2003 (2003/C 282/01) on the profession and the career of researchers within the European Research Area⁷. Since the idea that researcher mobility is vital for the functioning of ERA was acknowledged at EU level, in order to promote mobility, two important documents were adopted in 2005, the European Charter for Researchers⁸ and the Code of Conduct for the Recruitment of Researchers⁹. The Charter and the Code (CC) enable researchers to enjoy the same level of rights and obligations in all Member States. At the moment, the Charter and the Code have been endorsed by 892 organisations. However, given that the Charter and the Code consist of non-binding measures, the level of their implementation is still not satisfactory. Moreover, even if the Charter and the Code are implemented by institutions and organisations in Member States, there is still a low level of knowledge and awareness among researchers of their existence (CHOU & REAL-DATO, 2014). Further steps have been made in 2008 with the European Commission’s communication “Better careers and more mobility: a European partnership for researchers”¹⁰ which emphasized the need to address the new forms of mobility which usually include short-term contracts in different Member States as well as atypical forms of remuneration. This type of remuneration leads to insecurity in terms of social security assistance and pension benefits.

Obviously, at EU level enhancing free movement of researchers is gaining momentum. Hence, analysis of jurisprudence of CJEU will provide a relevant basis for concluding if the current position of researchers involved in mobility is improved due to the undertaken actions.

⁶ Communication from the Commission to the Council and the European Parliament of 18 July 2003: Researchers in the European research area: one profession, multiple careers, COM (2003) 436 final.

⁷ Council Resolution of 10 November 2003 (2003/C 282/01) on the profession and the career of researchers within the European Research Area), JO C 282, pp. 1-2, of 25.11.2003.

⁸ A set of 40 general principles and requirements which specifies the roles, responsibilities and entitlements of researchers as well as of employers and/or funders of researchers. The aim of the Charter is to ensure that the nature of the relationship between researchers and employers or funders is conducive to successful performance in generating, transferring, sharing and disseminating knowledge and technological development, and to the career development of researchers. The Charter also recognizes the value of all forms of mobility as a means for enhancing the professional development of researchers. In this sense, the Charter constitutes a framework for researchers, employers and funders who invite them to act responsibly and as professionals within their working environment, and to recognize each other as such. Among these principles are research freedom, ethical principles, professional responsibility, professional attitude, contractual and legal obligations, accountability, good practice in research, dissemination, exploitation of results, public engagement, relation with supervisors, supervision and managerial duties, continuing professional development. Retrieved from: <https://euraxess.ec.europa.eu/jobs/charter/european-charter> (13.09.2017).

⁹ The code of conduct for the recruitment of researchers consists of a set of general principles and requirements that should be followed by employers and/or funders when appointing or recruiting researchers. These principles and requirements should ensure observance of values such as transparency of the recruitment process and equal treatment of all applicants, in particular with regard to the development of an attractive, open and sustainable European labour market for researchers, and are complementary to those outlined in the European Charter for Researchers. Institutions and employers adhering to the Code of Conduct will openly demonstrate their commitment to act in a responsible and respectable way and to provide fair framework conditions to researchers, with a clear intention to contribute to the advancement of the European Research Area. Retrieved from <https://euraxess.ec.europa.eu/jobs/charter/code> (13.09.2017).

¹⁰ Communication from the Commission to the Council and the European Parliament - Better careers and more mobility: a European partnership for researchers, COM/2008/0317 final.

Namely, already in 2005 the European Commission acknowledged that mobile researchers moving to another country often face difficulties when it comes to their social security and pension rights. There are basic problems deriving from the lack of awareness of social security rights, the absence of supplementary pension schemes for their retirement, problems with the portability of their pension rights when moving from the public to the private sector (as well as from one country to another), sometimes resulting in significant losses of their acquired social security rights¹¹.

Given that references for preliminary ruling procedure submitted to CJEU all concerned guarantee of freedom of movement of researchers and other related fundamental rights under the framework which guarantees workers in the EU freedom of movement, in order to explore conditions of mobility of researchers in the EU, first a differentiation between mobility of workers at EU market and mobility of researchers, as partial migration of the highly skilled should be made. In this context, a critical assessment of the general legal framework which regulates mobility of workers in the EU will be made, in order to check how it corresponds to the requirements of mobility relating to “knowledge economy”¹².

MOBILITY OF RESEARCHERS IN THE CJEU JURISPRUDENCE

Traditionally, mobility is considered as immanent to the concept of European citizenship. Hence, the basis for examining the position of a researcher is Article 20 TFEU, according to which “every person holding the nationality of a Member State shall be a citizen of the Union”. As one of the fundamental rights and freedoms guaranteed in the Founding contracts, over time, the mobility of European workers and their families started to be observed through its social component. Since the guarantee of freedom of movement contained in Article 20 TFEU does not include social rights and entitlement (ACKERS, 2013: 8-9), these aspects needed to be observed through other sources (Article 3/2 TEU; 4/2a, 20, 26, 45-48 TFEU). Other related EU document regulating aspects relevant for mobility of workers is Directive 2004/38/EC on the right of citizens of the Union to move and reside freely within the territory of the Member States. It acknowledges three categories of residence, and each is approved under different conditions. For each of the categories, a separate set of social rights and entitlements is provided. Also, common rules for protection of social security in case of mobility within EU is regulated in Regulation (EC) 883/2004 on the coordination of social security systems and its implementing Regulation (EC) 987/2009¹³.

Since the specific kind of mobility at issue concerns highly educated individuals whose mobility is connected with acquiring or transferring new findings and knowledge, conditions under which they experience mobility are different from the mobility of workers in the EU. Researchers usually go to research institutes or universities in another Member State in order to do their doctoral or post-doctoral research there, to be included in a project or to participate in mobility as teacher staff. Their stay at the institute or university is of limited duration and dependant of the conditions of a research grant, usually there is no remuneration for the work done during the stay, often a researcher’s stay is funded from a grant. There is even a recent

¹¹ The European Charter for Researchers and The Code of Conduct for the Recruitment of Researchers”, EUR 21620.; Also RESEARCHER'S REPORT (2014: 79).

¹² Pojam “knowledge economy” is a term used in legal literature which discusses the issues of mobility of researchers. ACKERS (2013: 7).

¹³ Regulation (EC) 883/2004 on the coordination of social security systems and its implementing Regulation (EC) 987/2009, Official Journal L 116/1, 30.04.2004.

trend of researchers, who are a part of a scientific project, being only occasionally summoned at the institute or university in charge of a scientific project he is participating in, while the largest part of research and coordination of results is conducted over communication technologies (virtual mobility). Hence, the question arises whether regardless of specificities of the position of a researcher, the same employment and social status as well as access to sick leave, healthcare and pension and other related rights are provided under the relevant framework for mobility of workers in the EU.

The jurisprudence of CJEU has on several occasions offered interpretation on certain aspects relevant for understanding conditions of mobility of researchers.

One of the first cases concerning this issue is case C-66/85 *Lawrie-Blum v Land Baden-Württemberg*¹⁴ which along with the review of the term “worker” also gave an interpretation of the “employment relationship”, relevant for the context of the position of researchers. The concept of a worker... “must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”. On the basis of the definition of a worker and its interpretation of a employment relationship, the CJEU judgment in *Lawrie-Blum v Land Baden-Württemberg* confirmed that providing services of economic value for and under the direction of another person for remuneration, including part-time work and regardless of the low level of remuneration, even in-kind payments constitute an employment relationship. If we try to apply this definitions to the situation of early-career researchers, conducting their doctoral or post-doctoral research, it is obvious that they do not correspond to it. For example, the question of remuneration or, in case of researchers, the lack of it, shows that the position of researchers very often is more alike to that of students than workers.

In the next case, C-3/90 *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen*¹⁵ CJEU additionally widened the term worker, in order to include “a national of a Member State who has worked in another Member State in the context of occupational training, if he has performed services in return for remuneration, provided that his activities are genuine and effective”. Again, even though certain forms of occupational training can be categorized as work, the emphasis is on remuneration. Hence, a position of a researcher is once more problematic, since remuneration is again a requirement for a person obtaining occupational training to being considered a worker.

In case C-94/07 *Raccanelli v Max Planck-Gesellschaft*¹⁶ CJEU directly interpreted the position of a researcher conducting a doctoral research at an institution of another Member State. Mr Raccanelli claimed that, during his research stay at the MPG, he was expected to do the same amount of work as German doctoral students employed under BAT IIa half-time contracts, for whom such contracts (according to Mr Raccanelli) - involving, in particular, the benefit of social-security affiliation - were reserved. In the judgment, CJEU confirmed that a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC if he is called upon to perform as much work as a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract with MPG. So,

¹⁴ C-66/85, *Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284.

¹⁵ C-3/90, *M.J.E. Bernini v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:89.

¹⁶ C-94/07, *Raccanelli v Max Planck-Gesellschaft*, ECLI:EU:C:2008:425.

regardless of his formal position, the factual situation in which the researcher has actually performed work for the institution was given priority. There are some signals that after the Raccanelli case a shift in the practice of research institutions has been made. Contribution of researchers conducting doctoral research and performing work at the same time is no longer possible to negate or conceal and their position as workers with all pertaining rights has to be recognized to them.

Although the judgment resulted in positive changes in practice of research institutions, another issue was discussed in the legal literature. Namely, it was criticized that doctoral or post-doctoral research conducted by early-career researchers enables sharing and exploiting knowledge acquired through the research. Given that sharing and exploiting knowledge can generate profit, researchers should be acknowledged the status of workers which are entitled to remuneration for their work (ACKERS, 2013: 12).

There is another problematic aspect of the position of early career researchers. They often take up unpaid positions at research institutions, in hope of a possibility to retain relationships that may facilitate future mobility and perhaps even be given a full-time position in the future. Since this is a reoccurring situation at many research institutions where researchers from other Member States conduct their research, it should be given more attention (ACKERS, 2013: 12).

The case C-224/01 *Köbler v Austria*¹⁷ addressed directly the question of freedom of movement of university professors (who are also researchers). It concerned discrimination in terms of rewarding only university professors with 15 years service at Universities in Austria. Namely, Mr Köbler claimed that due to the fact that instead of continuing service for 15 years at a University in Austria, he spent some time as a professor at Universities in Member States, he was not rewarded with length-of-service increment. The reward is a financial benefit in addition to basic salary the amount of which is already dependent on length of service. According to Austrian law (Article 50a GG), a university professor receives that increment if he has carried on that profession for at least 15 years with an Austrian university and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment. At the same time, Austrian law precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed by a university professor in a Member State other than the Republic of Austria.

The CJEU found that such a regime is clearly likely to impede freedom of movement for workers in two respects. The regime operates to the detriment of migrant workers who are nationals of Member States other than the Republic of Austria where those workers are refused recognition of periods of service completed by them in those States in the capacity of university professor on the sole ground that those periods were not completed in an Austrian university¹⁸. According to CJEU, the absolute refusal to recognise periods served as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom. In fact, on their return to Austria, their years of experience in the capacity of university professor in another Member State, that is to say, in the pursuit of

¹⁷ C-224/01, *Köbler v Austria*, ECLI:EU:C:2003:513.

¹⁸ See, in that connection, with regard to a comparable Greek provision, Case C-187/96 *Commission v Greece* [1998] ECRI-1095.

comparable activities, are not taken into account for the purposes of the special length-of-service increment provided for in Article 50a of the GG.

CONCLUSION

In the paper, the position of researchers moving within the EU is explored, emphasize being on “labour migrants”, who are involved in long-term unilateral stay requiring relocation of residence and employment¹⁹. Having in mind the significance given to the contribution of researchers in generating new knowledge as an originator of growth and a guarantee of overcoming the economical crisis at EU level, the analysis revealed several open issues relating to the position of a researcher in mobility. Some issues have already been discussed by legal theorists and over time, CJEU also considered them in the course of a preliminary ruling procedure. Certain issues are relatively new and they are related to the recent social development, in terms of communication technologies, new trends in connecting researchers in cross-border projects and cooperation in border territories.

However, all issues have their source in the fact that, although the term “EU citizen” includes the right to mobility, it does not directly involve a guarantee of social rights and entitlement. Instead, this set of rights pertains to the status of “workers”, which is not afforded to researchers, even though their role as “knowledge workers” is acknowledged as fundamental at EU level.

The specific legal framework which relates to the position and rights of researchers in mobility is developing at EU level, bringing programmes, strategies and measures, which are in most part non-binding in nature. Hence, researchers still cannot rely on it, in order to realize all rights and responsibilities which should be derived from a status of a researcher involved in mobility.

It seems that, for now, the protection of fundamental rights of researchers should be sought within the framework which guarantees mobility of workers at EU level. However, the research revealed:

- The successful implementation of measures brought within a specific legal framework will depend to a large extent on the level of development of national legal framework as well as the level of readiness of the national legal system to support the adherence to non-binding instruments. At the moment, disparities and imbalance among the practice in Member States results in uncertainty and causes significant difficulties for researchers, in terms of accessing research funding, mobility, lifelong training, salary and social security.
- Many barriers for researchers, especially for early-career researchers, conducting their doctoral or even post-doctoral research persist, which can influence their decision to choose or continue a research career.
- Research conducted at an institute or university of another Member State as a prerequisite for further development of researcher's career seems especially problematic. Namely, for early-career researchers mobility is not a desirable but a necessary aspect of their career. It is important for collecting legal literature, court practice and conducting experimental research. Also, it is among necessary conditions for obtaining a permanent position at universities. Finally, due to the lack of open positions at universities, very often it is a chance for early-career

¹⁹ Excellence, Equality and Entrepreneurialism Building Sustainable Research Careers in the European Research Area, pp. 26-27.

researchers to work, even without pay, in the hope that they will be considered for the position. In this sense, “forced mobility” that is, researchers moving for work, instead of moving with work (ACKERS, 2013: 15) is increasingly becoming a reality.

Having in mind all the issues revealed, conditions under which researchers are currently involved in mobility at EU level does not seem satisfactory. Not recognizing research as work, due to the rigid interpretation of the terms “worker” and “work” is a significant barrier which is not going to be easy to overcome. Relevance is still given to the formal conditions of an employment relationship, including remuneration, under which researchers included in part-time work, being payed below subsistence level or in-kind are not afforded the status of a worker at EU level.

Changes in national practice would be welcome, especially if they would include a review of possibilities to substitute fixed-term with open-ended contracts for researchers. This would ensure adequate social security systems, especially in terms of family care and support. It would also be a step closer to assimilating the position of researcher to all other workers moving within the EU.

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