The Access of EU Citizens to the Public Service: A Comparative Analysis

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Abstract

Article 45 of the Treaty of the Functioning of the European Union sets the norm of free movement of workers in EU Member States. However, the same article sets in unequivocal terms in paragraph 4 an exclusion principle concerning the employment in the public service. During the past decades it has been underlined that the exception clause ought to be interpreted in a narrow sense. That is, restrictions on access to the public service should only apply to posts involving the exercise of public authority and the responsibility for safeguarding the general interests of the State or other public bodies. In the paper it is presented the way that a number of EU Member States have implemented the policy of open access to public service posts. The level of implementation of this rule could be used as an indication of the wider phenomenon of administrative convergence in the European level.

Keywords: Free movement, National citizenship, Employment in the public service, Exercise of public authority, Administrative convergence, Europeanisation, State sovereignty, European integration

1. The norm of free movement of workers

"*Wir fassen ein Gesetz begierig an,*
Das unsrer Leidenschaft zur Waffe dient.
Ein andres spricht zu mir, ein älteres,
Mich dir zu widersetzen: das Gebot,
Dem jeder Fremde heilig ist"
Goethe, *Iphigenie auf Tauris*

Article 45 of the Treaty on the Functioning of the European Union (former article 39 of the Treaty establishing the European Community and article 48 of the Treaty establishing the European Economic Community) sets among other things the norm of free movement of workers in European Union Member States. (Note 1) This norm is directly related to the rule of equal treatment of people in the context of the European Union and the prohibition of discrimination. (Note 2) However, article 45 of the Treaty on the Functioning of the European Union sets also in unequivocal terms in paragraph 4 an exclusion principle – which should not be confused with the limitations of paragraph 3 – concerning the employment right in the public service: that is, the access of non-nationals to the national public service is excluded from the general rule of free movement of workers (Note 3) (Handoll, 1995: 235-241, Beenen, 2001, as well as Oppermann, 1999: 642-643, Arnull *et al.*, 2000: 426-428, Cuthbert, 2000: 82, Steiner *et al.*, 2003: 331-332, Deards & Hargreaves, 2004: 226-228, Craig & De Búrca, 2007: 764 ff.).

1.1 The clause of exception: employment in the public service

During the past four decades it has been established through a number of cases which the Court of Justice of the European Communities (Note 4) had dealt with (Handoll, 1988: 226-227), and through the Communications of the European Commission that the exception clause of article 48 paragraph 4 of the Treaty establishing the European Economic Community (now article 45 paragraph 4 of the Treaty on the Functioning of the European Union) ought to be interpreted in a narrow sense (Groenendijk, 1989: 107).

Specifically, the Court of Justice, dealing with the notions of 'worker' and 'equal treatment', held that the exclusion principle refers only to the access to national public service and not to further career prospects. It also explained what "*employment in the public service*" exactly means. As far as this last notion is concerned, it is

true that its somehow vague meaning had led a number of EU Member States to interpret it at first in a wider sense; however, the Court of Justice made clear that it ought to be interpreted according to Community law, not according to norms and principles of national law. Thus, it ought to be interpreted necessarily in a narrow sense. (Note 5) The Court of Justice held that all public service posts should be open to citizens of other Member States of the European Community, whereas restrictions on access should only apply to posts involving the *exercise of public authority* and the *responsibility for safeguarding the general interests of the State or other public bodies* presuming "*on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality*". (Note 6) It should be stressed that these two criteria are required cumulatively (Handoll, 1988: 234-236, Goerlich & Bräth, 1989, Spiliotopoulos, 1997).

Apart from the Court of Justice, the European Commission also maintained that citizenship should not be a precondition for access to the public service. In this framework in 1985 it issued and circulated the White Paper on "Completing the Internal Market" and elaborated the draft of a Directive, by means of which an attempt was made to define the notions of 'public service', 'exercise of public authority', 'participation in exercising public authority' and 'responsibility for safeguarding the general interests of the State'. Nonetheless, this draft did not come to an end. Thereafter, the European Commission promulgated the Communication 88/C 72/02 on "Freedom of movement of workers and access to employment in the public service of the Member States - Commission's action in respect of the application of article 48 paragraph 4 of the EEC Treaty", whereby a number of clarifications were made concerning the kind of public service functions that are covered by the exclusion principle, namely, the armed forces, the police, the judiciary, the tax administration, the diplomatic corps, et.c. It also specified which ones are not covered by it: namely, welfare services, such as public transport, supply of electricity and gas, airlines and shipping lines, posts and telecommunications, radio and television companies, public health care services, State education, research for non-military purposes, et.c. (Note 7) The European Commission did not hesitate to warn the Member States that, in case national law did not manage to comply with the above provisions, the procedure of sanctions of article 169 of the Treaty establishing the European Economic Community (now article 258 of the Treaty on the Functioning of the European Union) (Note 8) would be commenced (Skouris *et al.*, 1994: 19).

According to Communication of 11 December 2002 "Free movement of workers: achieving the full benefits and potential", the European Commission sustained that, in order to forbid citizens of other EU Member States to accede national public service posts, the nature of the duties that these posts include must be reviewed, even if they are considered to be in the core of the State functions.

In the next sections of this paper it will be presented the way that a number of EU Member States implemented the above mentioned policy of open access to public service posts. The analysis will commence with the presentation of the Greek case.

2. The Greek case

National law in Greece – including the Constitution itself – provides that Greek citizenship forms a fundamental formal prerequisite for employment in the public service.

It may be noted that former Greek Constitutions included clauses, which required clearly and explicitly Greek citizenship for employment in all public service posts. Thus, during the period 1822-1864 all public posts were open only to Greeks, whereas during the period 1911-1952 the relevant constitutional provisions allowed some legislative exceptions to the general prohibition of recruiting non-nationals in the public service.

As regards the current Constitution (1975/1986/2001/2008), article 4 sets the rule of equal treatment of all citizens. Simultaneously the same article sets in paragraph 4 an exception concerning the employment in the public service. (Note 9) Based on this clause, which cannot be revised, (Note 10) after Greece's accession to the European Economic Community, a great problem emerged related to the harmonisation of the Greek law with the new obligations of Community legal order. Nevertheless, it can be argued that the problem could be solved if article 4 paragraph 4 of the Greek Constitution is interpreted according to the spirit of Community law.

On the other hand, former Code of Civil Servants (1977) provided that nobody had the right to be appointed to the Greek public service, unless he/she was Greek, whereas the access of non-nationals was allowed in concrete cases and on the basis of specific legal provisions.

Ordinary legislation at the national level was exposed to a kind of conflictual situation: to comply with the constitutional obligation on the one hand and to Community legal order on the other. The Court of Justice had established a policy of narrow interpretation of the exclusion principle of article 48 paragraph 4 of the Treaty

establishing the European Economic Community (now article 45 paragraph 4 of the Treaty on the Functioning of the European Union). The European Commission on its part, following the above policy, had proceeded to remind Member States to give non-nationals the possibility of access to public service posts; especially to those which do not involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

Nonetheless, Greece had not made any serious effort to abolish discriminations based on citizenship. As a result, the European Commission, following the proceedings of article 169 of the Treaty establishing the European Economic Community, (Note 11) brought to the attention of the Greek Government Authorities a number of cases calling for observations, in the areas of water agencies, electricity distribution, et.c. The Greek Government did not submit its observations in time and consequently the European Commission delivered reasoned opinions requesting Greece to take the measures needed to abolish the citizenship condition and asked it to incorporate new rules regarding access to the public service.

However, despite the time given by the European Commission, Greece did not manage to take the adequate measures, in order to comply with the opinion of the European Commission. Thus, the latter brought the matter before the Court of Justice, which held that the Member State concerned had failed to fulfil the obligation under the Treaty establishing the European Economic Community regarding the access of employment in the public service. (Note 12)

In accordance to the above ruling the Greek Parliament approved and enacted a new piece of legislation, Law 2431/1996 on the "Appointment or recruitment of EU citizens in the public service". (Note 13) Pursuant to this law EU citizens are given general access of employment to public service posts. It was foreseen, however, that Presidential Decrees should be published in order to be defined in particular which posts in each ministry or other public agency would be reserved for Greeks. These posts include activities that are related to the exercise of public authority and the responsibility for safeguarding the general interests of the State. On the basis of the above provision it becomes obvious that the Greek legislator has adopted both criteria as regards the implementation of the norm of free movement in relation to the employment in the public service, which had been issued by the Court of Justice. But the European Commission had sustained that the Greek legislator should not have related the implementation of the law to presidential decrees, as in this way the right of citizens of other EU Member States is endangered. Greek Government responded that this right is fully guaranteed by the law and it is not limited by the provision of the publication of these decrees, as they aim just to define in a systematic way the particular public service posts, the access to which is allowed for citizens of other EU Member States, and those ones that are reserved only for Greeks, so that EU citizens are fully informed.

During a period of fourteen years that followed, thirty eight (38) presidential decrees foreseen by this legislation have been adopted in various ministries and departments of State (Pravita, 2009). By means of these legal documents there have been specified the particular sectors in public functions which rightfully impose a Greek citizenship condition and are reserved for employment to Greek citizens. However, it should be emphasised that a remarkable delay has been noticed as far as the implementation of the above mentioned law is concerned. Thus, the first presidential decree was published two years after the enactment of the law (1998). Most decrees were published in 2001, whereas from then on, the number of decrees published was dramatically diminished and from 2005 till now no decree has been published (see Table 1 and Diagramme 1).

As a result, no decree has been issued for a number of ministries or public agencies providing for the access of non-nationals. Moreover, it should be underlined that most presidential decrees concern transportations and communications, whereas there has not been issued the relative decrees regarding public policies of great importance, such as external affairs or public works (see Table 2 and Diagramme 2).

Three years later, namely in 1999, the Code of Civil Servants was also amended, incorporating the clause for providing the access of EU citizens to most public service posts. (Note 14) One may reach, therefore, the conclusion that Greece, despite the delay, did finally manage to comply with the obligations arising under EU law. That claim can be sustained through the enactment of the above mentioned laws, as well as through a number of presidential decrees which nevertheless lack on homogeneity. Namely, to give an example, while a citizen from other EU Member States cannot accede the post of the night guardian in one ministry, the same post is not reserved for Greek citizens, as far as another ministry is concerned.

Moreover, a number of further problems regarding the access of employment of citizens of other EU Member States to public service posts continue to exist, such as, for instance, language barriers, (Note 15) gaps in the recognition of professional, academic and vocational qualifications, (Note 16) differences in the social security systems of civil servants (Note 17) and so on. It should not be overlooked that a lot of effort has been exerted to

deal with them. Nevertheless, in practice the extent that this opportunity has been really taken advantage of by EU citizens continues to remain rather low.

3. A comparative perspective

In the context of the European Union the public service forms an important part of the employment market. During the recent past, all Member States have opened up large areas of their public service for employment to EU citizens. This should be highlighted as an important development for the free movement of workers and the free movement of persons in general.

In this framework a comparative analysis is of great significance, taking into account that the level of implementation of this rule could be used as an indication of the wider phenomenon of administrative convergence in the European level. In this section of the paper there would be analysed the experience from a representative sample of Member States, such as France, Germany, Belgium, Luxembourg, United Kingdom, Italy and Spain. These countries present similarities with the Greek case in some aspects and differences in others. In some of them citizenship as condition sine qua non for access to the public service is provided in the national constitution. In some of them national law was harmonised with the European legislation, as far as free movement of persons is concerned, timely and successfully. Whereas in others, despite the adaptation in the legislative level, the access of non-nationals to the national public service is still prevented in the level of administrative practice. Analysing different cases can be helpful in order to draw out certain conclusions concerning the rightness and the ex post effectiveness of the choices of the Greek legislator in order to deal with the expansion of the right of free movement in the public service too.

3.1 Administrative convergence

The comparison of different administrative systems can be of great interest regarding the study of administrative phenomenon. It must however be taken into account that the national sociopolitical environment affects the organisation and function of a country's administrative mechanism (Chandler, 2003: 15).

The Greek political system is affected by changes which occurred in the respective social context. In order to adapt to these challenges, the system had to transform itself in certain respects. The 'evolutionary universals' are the critical preconditions for the progress of sociopolitical systems, as the American Sociologist Talcott Parsons has maintained (1964). That is, Rule of Law, the representative democratic institutions in the political sphere, market economy in the productive sphere and organised bureaucracy in the public sector form a set of factors facilitating development and overall modernisation. It is exactly the bureaucratic structure of a country which must adapt to the different conditions. In the context of Europeanisation, that is "*the process by which domestic policy areas become increasingly subject to European policy-making*" (Börzel, 1999: 574), administrative systems in Member States are likely to adapt their function to the new factors, preserving on the other hand their historical tradition.

The public service constitutes the basic expression of the sovereignty of the State. However, taking part in a supra-national coalition, as the European Union, can result into gradual and partial transfer of sovereignty rights – more concretely, those rights which can be exercised more effectively by the European Union (Bellamy & Castaglione, 1997: 429). It is to be noted that in Greece this is provided in the national Constitution in article 28 paragraph 3: "*Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity*". The interpretative clause of this article constitutes the fundamental stone of Greece's participation in the European integration process.

This does not mean of course that nation State loses its historical significance. What is aimed at is the coordination of separate national interests in the European context. The convergence of national administrative systems is promoted, so that structures and procedures can be unified and consolidated to the necessary extent. What reflects maybe in the most adequate way the nature and the potential of administrative convergence in Europe is what the German Physicist Gottfried Wilhelm Leibniz said about European legacy: "*We are fond of and we like diversity, but diversity which is conducive to a unity*" (Makridimitris, 2001: 6).

In this context what is compared is not the different administrative mechanisms in general, but the way those mechanisms have harmonised their legislation with the European obligation, as far as acknowledging the right of non-nationals to accede national public service is concerned. As it is shown by the comparative analysis and in the light of the cooperation among EU Member States, despite any differences and particularities of separate national administrative systems, the process of Europeanisation does not move towards the creation of a uniform

model of public administration, but towards the adoption of common rules and norms, such as free movement of persons. The so called European Administrative Space (OECD, 1998) is likely to be the result of convergent tensions of accepting common rules and forming similar practices.

Nevertheless, comparative analysis helps adopting and adapting to good practices that take place elsewhere: "... *the comparative aspects of public administration have largely been ignored; and as long as the study of public administration is not comparative, claims for 'a science of public administration' sound rather hollow. Conceivably there might be a science of American public administration and a science of British public administration and a science of French public administration; but can there be a 'science of public administration' in the sense of a body of generalised principles independent of their peculiar national setting?*" (Heady, 1979: 4-6).

The countries that are examined in this part of the study are comparable, because they all form part of the evolving European structure. They are also representative of different systems of constitutional organisation and administrative traditions. That is, France and Germany, which are two of the founding members of the European Economic Community, are characteristic examples of the continental model of State organisation and administrative configurations, as well as countries with a tradition of positive law. It is to be noted that as far as Greek legal order is concerned, it has adopted many elements of this administrative tradition. Belgium and Luxembourg are also founding members of the European Economic Community, with a population similar to the Greek one. On the other hand, regarding the British administrative system, it reflects the anglosaxon tradition, which is conventionally considered as the best model of effective organisation. Last but not least, Italy and Spain are Mediterranean countries like Greece and comparable as far as the organisation and functioning of the State is concerned.

3.1.1 The case of France and Germany

Article 6 of the Declaration of the Rights of Man and of the Citizen of 26th August 1789 provides that all French citizens are equally eligible to all public service posts, according to their abilities. Moreover, in the legislative level, article 5 of the Law 83-634 of 13th July 1983 "portant droits et obligations des fonctionnaires" set citizenship as a precondition in order to accede the public service. Law 91-715 of 26th July 1991 "portant diverses dispositions relatives à la fonction publique", which followed the conviction of the country for failing to fulfil its obligations under EU law, (Note 18) set out the principle of the progressive opening of all public service posts by way of decrees that would modify each particular statute. (Note 19) However, article 10 of the Law 2005-843 of 26th July 2005 "portant diverses mesures de transposition du droit communautaire à la fonction publique" reformed the till then existing legal order, in order to open more public service posts to EU citizens.

Taking into account a relative judgment of the French State of Council of 31st January 2002, non-nationals have not access to these posts in the Ministry of Defence, Economy, Finance, Justice, the Interior, Public Order and Foreign Affairs that result to duties of regulatory nature. If the two criteria are not fulfiled, it must be acknowledged to non-nationals too the right to accede public service posts (Demmke & Linke, 2003: 4-5). As a conclusion, non-nationals cannot enter either the judicial corps, or the diplomatic corps, or the police force or other armed forces, or the tax administration – unless the posts consist exclusively of duties of clerical or operational nature.

In spite of France's adaptation in the institutional level, it seems that there remain certain problems to be dealt with. That is sustained by the fact that even after so many years the Court of Justice has recently declared that French Republic failed to fulfil its obligations under the article 39 of the Treaty establishing the European Community. (Note 20)

In the German administrative system employees are distinguished in three different categories: public servants whose relation with the public service is regulated by public law and who exercise public authority (Beamte), employees whose relation to the public service is regulated by private law (Angestellte) and workers who are paid with day's wages (Arbeiter).

The lois-cadre for public servants (Rahmengesetz zur Vereinheitlichung des Beamtenrechts – Beamtenrechtsrahmengesetz) is also implemented, as far as the Länder are concerned, to which is acknowledged a high level of administrative autonomy. This Law, amended by article 4 of the Zehntes Gesetz zur Änderung dienstlicher Vorschriften, provides that all EU citizens have a right to become public servants. The exceptions to this assimilation in principle are limited to functions which by their own nature can only be fulfiled by German citizens, that is, those involving the exercise of public authority and the responsibility for safeguarding the general interests of the State or other public bodies. The federal authorities and the Länder have agreed a list of recommended criteria (1996) to specify the posts thus reserved. These include – among others – the posts in

national defence, police, justice, finance and foreign affairs.

3.1.2 The case of Belgium and Luxembourg

Belgian Constitution, just like the Greek one, provides that national citizenship forms a prerequisite for employment in the public service (article 10 clause 2), apart from some exceptions provided by legislation. Concretely, upon the Royal Decree of 2nd October 1937 as amended, Belgian citizenship is required only regarding those public service posts which come under the notion of "*employment in the public service*" as defined by the European Commission and the Court of Justice. Thereafter, a guide entitled Service public fédéral – Personnel et Organisation was published, in order to promote employment in the federal public service. It is then defined that non-nationals can neither enter the diplomatic corps nor exercise the duties of the Inspector of Social Security.

It is to be noted hereupon that the whole discussion about the definition of the notion "*employment in the public service*" started with regard to a number of tenders concerning posts in the Belgian railway and in the Municipality of Brussels which had set national citizenship as a precondition. (Note 21)

Luxembourg's Constitution also provides that national citizenship is required in order to accede national public service posts, unless it is provided otherwise by relative legislation. Based on the Law of 17th May 1999 "concernant l'accès des ressortissants communautaires à la fonction publique luxembourgeoise", posts in the following sectors are open to EU citizens unless they involve the exercise of public authority and the responsibility for safeguarding the general interests of the State: research, teaching, health, land transport, mail and telecommunications, distribution of water, gas and power. Prior to this Law the Court of Justice had declared that Luxembourg had failed to fulfil its obligations under European law. (Note 22)

Furthermore, articles 1 and 2 of the Regulation of 5th March 2004 "déterminant les emplois dans les administrations de l'État et les établissements publics comportant une participataion directe ou indirecte à l'exercice de la puissance publique et aux fonctions qui ont pour objet la sauvegarde des intérêts généraux de l'État ou des autres personnes morales de droit public" define in a concrete manner which posts in the teaching sector, mail and telecommunications sector are excluded from the general rule of free movement of persons, as they fall into the notion of "*employment in the public service*".

By the discussions of the Law of 23rd October 2008 "sur la nationalité luxembourgeoise" it was underlined how important it is to open the national public service to EU non-nationals. Therefore, it would be easier to select the right person for the right post, having a wide spectrum of candidates, especially when it is the case of posts with specific qualifications, where the number of candidates is usually not the expected.

3.1.3 The case of the United Kingdom

As far as the British legal order is concerned, the prerequisite of national citizenship had to do initially with the sector of research. However, The European Communities (Employment in the Civil Service) Order 1991, which amended the former Aliens' Employment Act 1955, provided that "*... an alien may be employed in any civil capacity under the Crown… (c) if he is (i) a national of a Member State of the Communities, ... and he is not employed in employment in the public service within the meaning of Article 48(4) of the EEC Treaty (derogation from freedom of movement of workers)*" (article 2).

On the 21st May 1991 the Office of the Civil Service Commissioners published the Civil Service Nationality Rules, according to which only UK citizens have the right to accede posts in the Cabinet Office, the diplomatic corps and the Department of Defence, the Weather Bureau excluded.

On March 2007 The European Communities (Employment in the Civil Service) Order 2007 was published. According to the explanatory memorandum, the aim was to allow EU non-nationals to accede a greater number of public service posts. Thus, the posts reserved for UK citizens should be limited to the necessary extent, so that the remaining problems regarding the efficiency of the public service, as far as the employment of the adequate and qualified staff is concerned, will be dealt with. This Order was the result of wide consultation in the public service and therefore was easily accepted. Concretely, as reserved posts are considered only those in the security and intelligence services, the posts in Her Majesty's Diplomatic Service, in the Foreign and Commonwealth Office, as well as the posts in the Defence Intelligence Staff.

It is to be underlined that in 2005 public service posts reserved for UK citizens (see The Civil Service Nationality Rules ANNEX C), that is "*... those which, due to the sensitive nature of the work, require special allegiance to the Crown…*", (Note 23) were estimated to 25% of all public service posts, whereas in 2007 to 18% (97,000 posts). The aim is to reduce the number of reserved posts, so that British citizenship will be required only to 5% of the total of public service posts. As a result, EU non-nationals will be acknowledged the right to accede 70 000 posts more.

3.1.4 The case of Italy and Spain

The right of EU non-nationals to accede public service posts in Italy has been acknowledged by the Legislative Decree of 3rd February 1993 "Razionalizzazione dell' organizzazione delle amministrazioni pubbliche e revisione della disciplina in material di pubblico impiego…" (N° 29). Furthermore, taking into account the general rule that Italian citizenship is not required for access to public service posts, except for those which involve the exercise of public authority, the DPCM (Note 24) of 7th February 1994 "Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche" (N° 174) listed formally such posts. These include among others higher posts in the public service, namely in the Cabinet Office, in Ministries of the Interior, External Affairs, Justice and Finance. It has been also clarified the nature of the responsibilities, for the exercise of which national citizenship is obligatory. Those involve the elaboration, decision making and execution of administrative acts as well as duties involving review of legality of administrative performance and maintaining standards of meritocracy.

It is to be underlined that Italy, as well as France and Belgium, although included to the founding members of the European Economic Community, showed a remarkable reluctance to comply with European rules concerning free movement of persons. That proves the significance of national sovereignty for EU Member States. As a result, Italy did not evade conviction by numerous judgments of the Court of Justice. (Note 25)

As far as Spain is concerned only Spanish citizens have the right to accede public service posts. Law 17/1993 of 23rd December "sobre el acceso a determinados sectores de la función pública de los nacionales de los demás Estados miembros de la Comunidad Europea" allows the access of EU non-nationals – among others – to public posts in research, teaching, mail and secondary medical services.

On the other hand, Law 55/1999 of 29th December "de Medidas fiscales, administrativas y del orden social" provided that EU citizens (including spouses and children) can have access on the same conditions as Spanish citizens to all public service posts, excluding those which imply the direct or indirect exercise of public authority and the safeguarding of the general interests of the State. This access has been established for the central public service and regional and local administrations. The government or the corresponding bodies of autonomous communities or the other public agencies determine which corps, cadres, posts or jobs are to be excluded from the opening to other EU Member States' citizens.

In this context, Royal Decree N° 800 of 19th May 1995 "por el que se regula el acceso a determinados sectores de la función pública de los nacionales de los demás Estados miembros de la Unión Europea" defined in a concrete way which public service posts were accessible to EU non-nationals. This was replaced by the posterior Decree N° 543 of 18th May 2001 "sobre acceso al empleo público de la Administración General del Estado y sus Organismos públicos de nacionales de otros Estados a los que es de aplicación el derecho a la libre circulación de trabajadores", which specified the posts that are excluded (such as the armed forces, the grand corps of administration, the Council of State, the Bank of Spain and the Supreme Authority of Defence) whereas all the rest are open to non-nationals.

The opening of national public service posts to other Member States' citizens was also promoted by the Law 7/2007 of 12th April "del Estatudo Básico del Empleado Público" in the context of the administrative modernisation in Spain.

4. Conclusions

From the above exposition it can be concluded that the access of non-nationals to most posts in the national public service forms established practice nowadays. In the administrative systems examined relative policies of convergence have succeeded – sooner or later – to adjust the national legislation with the European legal order regarding the access of non-nationals to the public service. As far as Greece is concerned, it is noted that the country has complied with EU legal order, even if that occured with some delay mainly because of the malfunctioning of the Greek public service.

In most countries it was observed the necessity to acknowledge this right to even more public posts, taking account of the fact that few EU citizens take advantage of this opportunity. The reasons that can explain this phenomenon refer – among others – to the difficulties that still exist on the level of administrative practice, the insufficient information, the language barriers, the differences in the level of administrative traditions and cultural perceptions.

The British Government took an initiative (ante, section 3.1.3), which constitutes the product of social consultation, defines its scopes with a clear and specific way and moves toward the opening of more public service posts to non-nationals. One may assume that this policy initiative that bears the mark of inspiration of a

pro European attitude would be adopted by other EU Member States as well. Thus the criterion of the access to public service posts to non-nationals emerges as a critical index of administrative and institutional convergence among the participant political systems of the emerging European order.

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Notes

Note 1. See also Regulation (EEC) N° 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Council Regulation (EEC) N° 312/76 of 9 February 1976 amending the provisions relating to the trade union rights of workers contained in Regulation (EEC) N° 1612/68 on freedom of movement for workers within the Community, as well as Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) N° 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Note 2. See article 18 of the Treaty on the Functioning of the European Union.

Note 3. "*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 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*".

Note 4. Now, Court of Justice of the European Union.

Note 5. It is worth mentioning that since 17th January 1972 the European Parliament had already published a Resolution concerning the definition of 'public service' and 'exercise of public authority'.

Note 6. See Judgment of the Court of 21 June 1974, Case C-2/74 'Jean Reyners v Belgian State', thought 45, Judgment of the Court of 17 December 1980, Case C-149/79 'Commission of the European Communities v Kingdom of Belgium', thought 10, Judgment of the Court of 13 July 1993, Case C-42/92 'Adrianus Thijssen v Controledienst voor de Verzekeringen', thought 8, Judgment of the Court of 2 July 1996, Case C-290/94 'Commission of the European Communities v Greek Republic', thought 2, Judgment of the Court of 29 October 1998, Case C-114/97 'Commission of the European Communities v Kingdom of Spain', thought 35, Judgment of the Court of 9 March 2000, Case C-355/98 'Commission of the European Communities v Kingdom of Belgium', thought 25, Judgment of the Court of 31 May 2001, Case C-283/99 'Commission of the European Communities v Italian Republic', thought 20, Judgment of the Court of 22 May 2003, Case C-103/01 'Commission of the European Communities v Federal Republic of Germany', thought 44, Judgment of the Court of 30 September 2003, Case C-405/01 'Colegio de Oficiales de la Marina Mercante Española v Administación del Estado', thought 39 and Judgment of the Court of 30 September 2003, Case C-47/02 'Albert Anker, Klaas Ras and Alvertus Snoek v Federal Republic of Germany', thought 58.

Note 7. It has also been stressed, however, that there has never been established a definitive list of duties which are reserved exclusively for citizens and for all the rest. As a result, a case-by-case decision was thought to be more preferable (referred in the answer that the European Commission gave to the written question of Raymonde Dury – 13th March 1991, N° 42/91).

Note 8. "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union*".

Note 9. "*Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws*".

Note 10. See article 110 paragraph 1 of the Greek Constitution: "*1. The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26*".

Note 11. See note 8.

Note 12. See Judgment of the Court of 2 July 1996, Case C-290/94 'Commission of the European Communities v Greek Republic': "... *On those grounds, The Court hereby: 1. Declares that, in not restricting the requirement of Greek nationality to access to 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 or of other public authorities in the public sectors of water, gas and electricity distribution, the operational public health services, in the sectors of public education, transport by sea and air, railways, city and inter-city public transport, research for civil purposes, posts and telecommunications and radio and television broadcasting, and at the Athens Opera and in municipal and local orchestras, the Greek Republic has failed to fulfil its obligations under the Article 48 of the EC Treaty and Article 1 of Regulation (EEC) N° 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. 2. Orders the Greek Republic to pay the costs*".

Note 13. Official Gazette A 175, 30th July 1996.

Note 14. See article 4 paragraphs 1 and 2 of the Code of Civil Servants as it stands: "*1. Only Greek citizens, of both genders, are appointed as civil servants. 2. Citizens of the Member States of the European Union may only be appointed to posts, which do not come under the exception of article 39 paragraph 4 of the EC Treaty, according to the special statute provisions pertaining thereto*".

Note 15. See Judgment of the Court of 28 November 1989, Case C-379/87 'Anita Groener v Minister for Education and The City of Dublin Vocational Educational Committee (CDVEC)' and Judgment of the Court of 6 June 2000, Case C-281/98 'Roman Angonese v Cassa di Risparmio di Bolzano SpA'.

Note 16. See Council Directive 89/48/EEC of 21 December 1988 "on a general system for a recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration", Council Directive 92/51/EEC of 18 June 1992 "on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC", Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 "establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications", Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 "amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor" and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 "on the recognition of professional qualifications".

Note 17. See Regulation (EEC) N° 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, Council Regulation (EC) N° 1606/98 of 29 June 1998 amending Regulation (EEC) N° 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) N° 574/72 laying down the procedure for implementing Regulation (EEC) N° 1408/71 with a view to extending them to cover special schemes for civil servants and Regulation (EC) N° 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Note 18. See Judgment of the Court of 3 June 1986, Case C-307/84 'Commission of the European Communities v French Republic'.

Note 19. Article 2 added a new provision to the former Law 83-634 (article 5bis). Also see Law 93-1420 of 31st December 1993 "portant modification de diverses dispositions pour la mise en œuvre de l'accord sur l'Espace économique européen et du traité sur l'Union européenne" (article 11), Law 96-1093 of 16th December 1996 "relative à l'emploi dans la fonction publique et à diverses mesures d'ordre statuaire" (article 47) and Law 2005-102 of 11th February 2005 "pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées" (article 31).

Note 20. See Judgment of the Court of 11 March 2008, Case C-89/07 'Commission of the European Communities v French Republic'.

Note 21. See (interim) Judgment of the Court of 17 December 1980, Case C-149/79 'Commission of the European Communities v Kingdom of Belgium' and Judgment of the Court of 26 May 1982, Case C-149/79 'Commission of the European Communities v Kingdom of Belgium'.

Note 22. See Judgment of the Court of 2 July 1996, Case C-473/93 'Commission of the European Communities v Grand Duchy of Luxembourg'.

Note 23. The Civil Service Nationality Rules: Guidance on Checking Eligibility, version November 2007, Section 3 – 3.1).

Note 24. Decreto del Presidente del Consiglio dei Ministri.

Note 25. See Judgment of the Court of 16 June 1987, Case C-225/85 'Commission of the European Communities v Italian Republic', Judgment of the Court of 30 May 1989, Case C-33/88 'Pilar Allué and Carmel Mary Coonan v Università degli Studi di Venezia', Judgment of the Court of 23 February 1994, Case C-419/92 'Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda', Judgment of the Court of 31 May 2001, Case C-283/99 'Commission of the European Communities v Italian Republic', Judgment of the Court of 12 May 2003, Case C-278/03 'Commission of the European Communities v Italian Republic', Judgment of the Court of 26 October 2006, Case C-371/04 'Commission of the European Communities v Italian Republic' and Judgment of the Court of 11 September 2008, Case C-447/07 'Commission of the European Communities v Italian Republic'.

Table 1. Presidential decrees per year

1996	0	2004	1
1997	0	2005	0
1998	7	2006	0
1999	6	2007	0
2000	2	2008	0
2001	12	2009	0
2002	6	2010	0
2003	4		

Table 2. Presidential decrees per public policy sector

AGRICULTURE – FOOD	2
ATHLETICS	0
CULTURE	1
DEFENCE	0
ECONOMY – MONETARY POLICY – DEVELOPMENT – COMMERCE – INDUSTRY	9
EDUCATION	3
ENVIRONMENT – NATURAL RESOURCES	1
EXTERNAL AFFAIRS	0
HEALTH	2
INTERIOR	6
JUSTICE	2
LABOUR – EMPLOYMENT	1
MEDIA	1
PUBLIC ORDER – SECURITY	1
PUBLIC WORKS – INFRASTRUCTURE	0
SOCIAL SECURITY	1
TRANSPORTATIONS – COMMUNICATIONS	8

Diagramme 1

PRESIDENTIAL DECREES PER YEAR

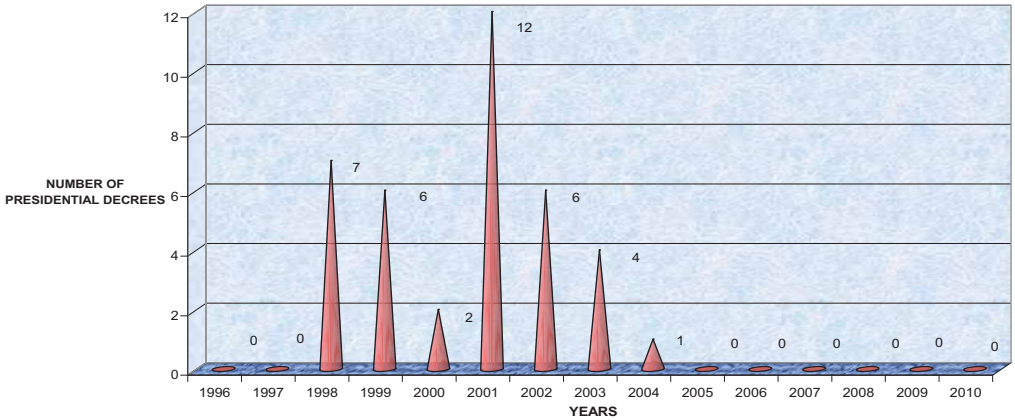
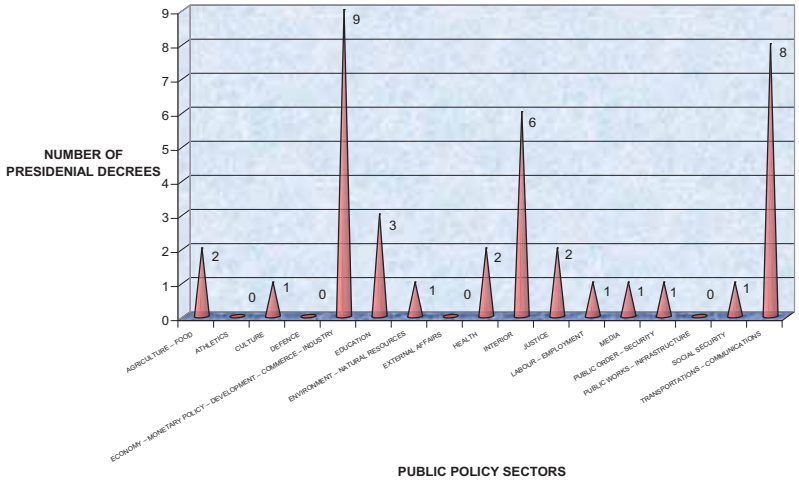


Diagramme 2

PRESIDENTIAL DECREES PER PUBLIC POLICY SECTOR



The Civil Service Nationality Rules ANNEX C: Flowchart for checking eligibility Citizenship and access to the British public service