

**CITIZENSHIP AS A CONDITION FOR ACCESS  
TO THE PUBLIC SERVICE: HOW FAR IS UKRAINE  
FROM THE EUROPEAN UNION STANDARDS?**

**Rym O. M., Pylypenko P. D.**

**INTRODUCTION**

From the establishment of the European economic communities, workers' freedom of movement has been one of the core principles of EU development. This principle of workers' freedom of movement was enshrined in the EU's founding documents, and the principle still holds today. In the current version of the Treaty on the Functioning of the European Union, section 1 of Chapter 4 is titled 'Free Movement of Persons, Service, and Capital,' and it is dedicated to the issue of free interstate movement of people. Under Article 45 of the Treaty on the Functioning of the European Union, the free movement of workers within the European Union is ensured via the prohibition of discrimination by nationality (citizenship) of workers. These workers must be EU citizens and must also be employed by the EU Member States. But freedom of movement for workers is not absolute, and the Member States are entitled to restrict access to positions in the field of public service for foreigners (part 4, Article 45 of the Treaty on the Functioning of the European Union). This is the most widespread restriction since it allows the Member States to reduce the presence of foreigners in the labour market.

As a rather convenient and legitimate tool, provisions of part 4, Article 45 of the Treaty on the Functioning of the European Union (TFEU), have been used by some Member States for setting the requirement discussing the possibility of citizenship of the employing country for occupying a number of positions. The citizenship availability requirement was developed with no regard for the nature of labour duties or hierarchical subordination to a specific position<sup>1</sup>.

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<sup>1</sup> For instance, in Greece, only citizens of that country could be employed in the following industries:

state, semi-state, or municipal enterprises dealing with distribution of water, gas, and electricity;

operational sectors of the health care service;

as teachers in nurseries, as teachers of primary and secondary schools, lecturers of higher educational institutions subordinated to the Ministry of National Education;

air and marine transport service;

companies or organizations that belong to the Greek National Railroad structure;

state or municipal bodies;

companies and enterprises providing city and intercity transport services;

In this regard, the Court of Justice of the European Union indicated that the restrictions on the free movement of workers in the public service domain could not be treated in an expanded way since that will prevent the effective implementation of such freedom. Therefore, positions that are rather remote from state and power mandates cannot be called public service<sup>2</sup>.

For Ukraine, as the state that has been striving to become a member of the European Union for quite a time already and is a member of the Council of Europe, clarification of what positions can be reserved for its citizens is extremely important. On the one hand, the European standards in respective restrictions should be followed, but, on the other hand, the protection of national interests is also important. Eventually, our European partners call the Ukrainian government to approximate its labour standards to EU rules, including employment<sup>3</sup>. In this regard, we must mention that Ukraine, as a party to the European Social Charter (revised), has been recognized as having failed to fully comply with its international obligations by imposing excessive restrictions on the access of foreign nationals to the civil service, which is discrimination on the grounds of citizenship<sup>4</sup>.

At the European Union level, rules regulating foreigners' access to public service have long been developed and approved. Faced with similar challenges, Ukraine's legislator should take advantage of its strategic partners' positive developments and consider their joint achievements. However, so far in employment and social policy, we have a kind of vicious circle. There is a constant desire to bring domestic labour legislation closer to the relevant norms of EU labour law because there is a clear need to do so. At the same time, the adoption of the Labour Code of Ukraine, a basic act that must take into account all EU labour standards, is permanently postponed. And the attempt to replace it with the draft Law of Ukraine "On Labour" did not give the desired results<sup>5</sup>.

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positions of research and non-research staff of state institutions doing research in non-military fields;

positions in state or semi-state bodies or enterprises providing postal services, telecommunication services and radio-and-TV broadcast services;

musicians in the Opera House of Athens, municipal and local orchestras (CJEU 1996).

<sup>2</sup> CJEU (1996). Judgment of July 02. Commission of the European Communities v Hellenic Republic. Case C-290/94. ECLI:EU:C:1996:265

<sup>3</sup> European Parliament (2021). Resolution of February 11, 2021, on the implementation of the EU Association Agreement with Ukraine (2019/2202(INI)). URL: [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0050\\_EN.pdf?fbclid=IwAR37F\\_U5z6yYLqsR8j\\_ejx7wduhkIj6KS\\_vP\\_abzirlueZyE2eM4RGLjYJ3A](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0050_EN.pdf?fbclid=IwAR37F_U5z6yYLqsR8j_ejx7wduhkIj6KS_vP_abzirlueZyE2eM4RGLjYJ3A)

<sup>4</sup> European committee of social rights (2021) / conclusions on employment, training and equal opportunities regarding Ukraine. URL: <https://rm.coe.int/vysnovky/1680a245ae>

<sup>5</sup> *Верховна Рада України* (2019). Проект Трудового кодексу України № 2410 від 08.11.2019. URL: <https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=67331&pf35401=509026>.

In connection with the above, the purpose of this paper is to analyze the EU legislation and the practice of its application concerning the exercise of freedom of movement of persons for employment in the public service as well as a demonstration of exactly how foreigners are employed in Ukraine today and what the concept of public service is applied. As a result, our task is to set out systematically the European criteria for determining the legitimacy of restrictions on freedom of movement for public service employees, information on restrictions on foreigners' employment, and the requirements for holding public service positions. All this should contribute to the improvement of the legislation on the employment of foreigners in Ukraine in terms of the future introduction in Ukraine of the principle of free movement of all workers. After all, the relevant reform should be carried out because of Ukraine's European integration obligations under the Association Agreement, which emphasizes that the treatment of employees who are citizens of the Parties to the Agreement and who are legally employed in the respective territories should be free from any discrimination based on citizenship regarding working conditions, remuneration or dismissal.

**The paper's sources** are scientific research of foreign and domestic scientists, current labour legislation of Ukraine and legal acts on public service, analytical evaluations of practitioners and representatives of the society, and statistics data.

We can even constitute the existence of separate scientific approaches and legal doctrine, the formation of generally recognized standards that determine the content of public service, and conditions for access to positions within this sphere.

### **Methodology**

This contribution focuses on empirical studies of Ukraine's and EU legislation and its enforcement concerned with citizenship as a condition for access to public service. We consider the EU's restrictions on holding positions in public service and relevant Ukraine's demands in this sphere together in the context of Ukraine's European integration. We also discuss how foreigners' employment in public service could be solved and propose using appropriate EU *acquis* to fulfill Ukraine's international commitments.

The methodological basis of our research is a number of scientific methods. The comparison method is used to examine conditions for access to public service in Ukraine and the European Union. Also, the dialectical method is used to analyze EU labour legislation and its application to employment in the public service to identify and explain relevant regulations in the EU and changes in the European labour market. The technical and legal analysis method is applied to assess the state of normative regulation of foreigners' employment in Ukraine to evaluate the quality and effectiveness

of the legislation on public service. Additionally, the formal-legal method is used to establish the content of law as a norm. Mainly these and other research methods are used in their relationship.

### **1. Public service in Ukraine: what needs to be changed and why**

Non-systemic reform of the Ukrainian legislation has led to complex and tricky legal regulation of employment in the public service. Let us start with the fact that the term 'public service' was introduced into legal terminology in 2005 by the Code of Administrative Legal Proceedings of Ukraine. This term embraces the activity in state political positions and collegial state bodies, professional activity of judges, prosecutors, military service and alternative (non-military) service, other civil service, patronage service in the state authorities, service in the authorities of the Autonomous Republic of Crimea and local self-government bodies<sup>6</sup>.

Many scholars comment on this definition, note that it can hardly be defined as successful, and offer the author's definitions of this term. For example, N. O. Runova explains that public service is the exercise of power by society (people) through the professional activities of public servants<sup>7</sup>.

O. V. Popova also criticizes the above definition since it combines types of officials combination of which is inexpedient from the point of view of the theory of administrative law<sup>8</sup>. As N. Yaniuk<sup>9</sup> rightfully states, the legislator has united types of service activity, that differ by their content – political, which depends on the positioning of political forces in higher state authorities, and professional activity ensuring the immediate performance of the state tasks, as the result of the activity of the former.

Researchers stress that the notion of public service is derivative from the notion 'public administration'. The latter is manifested via the integrity of state and non-state entities of public authority, of which, first of all, state authorities, and, secondly, local executive self-government authorities are the core structural elements<sup>10</sup>. Since both state authorities and local self-government bodies serve to express the will of the state in the performance of their tasks and functions, and thus, are the representatives of public authority

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<sup>6</sup> *Верховна Рада України* (2005). Кодекс адміністративного судочинства України від 06.07.2002 № 2747-IV. URL: <https://cis-legislation.com/document.fwx?rgn=10720>.

<sup>7</sup> Рунова Н. (2012) Публічна служба в Україні: проблеми дефініції. *Публічне право*. № 3 (7). С. 273.

<sup>8</sup> Попова О. В. (2011) Поняття та ознаки публічної служби в Україні. *Форум права*. № 4. С. 584. URL: <http://www.nbuv.gov.ua/e-journals/FP/2011-4/11povcvu.pdf>.

<sup>9</sup> Янюк Н. (2010) Актуальні проблеми формування публічної служби в Україні. *Вісник Львівськ. ун-ту. Серія «Юридична»*. Вип. 51. С. 165.

<sup>10</sup> Авер'янов В. (2005) Актуальні завдання створення нового законодавства про державну службу в Україні. *Юридичний журнал*. № 8 (38). С. 54.

within the competence set by legislation<sup>11</sup>. Therefore, the two main types of public service are service in public authorities (civil service) and service in local governments (municipal service)<sup>12</sup>. The corresponding understanding of public service is, in fact, a narrow version of its interpretation, which is proposed by the doctrine of administrative law of Ukraine.

At the same time, at the doctrinal level, the approach is also supported by which public service is not simply limited to service in executive authorities but also is in the apparatus of all branches of government, in local self-government bodies, in the bodies and institutions to which the state has delegated the performance of its tasks and functions, etc.<sup>13</sup>. Therefore, it is fair to note that a broad understanding of public service by Ukraine's administrative law science is also perceived. A supporter of a broad sense is O. V. Petryshyn, who classifies the state, municipal service, and service in non-governmental organizations (public organizations, political parties, and even private enterprises) as public<sup>14</sup>. I. V. Nedobor argues that the public service combines the political and professional activities of citizens of Ukraine in public authorities, local governments and their offices, and other non-governmental bodies, which by law are entrusted with the performance of public functions of the state<sup>15</sup>. O. S. Petrenko names political, administrative, specialized, and civil services components of the public service<sup>16</sup>.

So there is a situation when the vague legislative definition "public service" has led to comprehensive discussions on the content of this concept. Now we can point to two scientific camps, the representatives of which interpret the public service either narrowly (as a civil service and a service in local self-government bodies) or widely (in addition, such service includes non-governmental organizations). There are differences in the scope of the category "civil service" and "public service" in the traditions of different

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<sup>11</sup> Янюк Н. (2010) Актуальні проблеми формування публічної служби в Україні. *Вісник Львівськ. ун-ту. Серія «Юридична»*. Вип. 51. С. 163.

<sup>12</sup> Тимків В. (2012). Понятійні аспекти становлення публічної служби в Україні. *Публ. упр.: теорія і практика : зб. наук. Праць*. № 1. С. 73. URL: <http://www.kbuapa.kharkov.ua/e-book>.

<sup>13</sup> Голобутовський Р. (2019) Поняття та ознаки публічної служби в органах судової влади України. *Jurnalul juridic national: teorie și practică*. № 2. Ч. 1. С. 33.

<sup>14</sup> Петришин А. В. (1998) Государственная служба: историко-теоретические предпосылки, сравнительно-правовой и логико-понятийный анализ : монография. Нац. юрид. акад. украины им. Ярослава Мудрого. Харьков : факт. С. 139.

<sup>15</sup> Недобор І. В. (2018) Теоретичні основи становлення публічної служби в Україні. *Вчені записки Таврійського національного університету імені В. І. Вернадського. Серія: Державне управління*. Т. 29(68), № 1. С. 116.

<sup>16</sup> Петренко О. С. (2008) Формування інтегрованого інституту публічної служби в Україні : автореф. дис. ... к. держ. упр. : 25.00.03. Д. : ДРІДУ НАДУ.

states, and the respective categories are also interpreted differently. And, by the way, is not the rule of state and public service ratio as part and whole.

In this context, the Supreme Administrative Court of Ukraine pointed out that the decisive factor in identifying the types of public service for law enforcement is the legal regulation of the relevant types of activity, according to which such types of public activity can be determined. These are activities in government political positions, professional activity of judges, civil service, service in local government bodies<sup>17</sup>.

A generalized definition of the concept of a public servant has also appeared. In particular, the Plan for Modernization of Public Administration: Proposals to Bring Public Administration and Civil Service of Ukraine into Harmony with the Principles and Practices of Democratic Governance introduces the term “public servants” which unites persons authorized to perform state functions (from the President, senior officials, civil servants to the heads of state enterprises, institutions, organizations) and officials of local self-government bodies<sup>18</sup>.

However, even fifteen years after its introduction, the term “public service” and the doctrinal term “public servant” are used in the scientific literature with reservations, in passing and fragments, i.e. in general terms. One of the objective reasons for this is that the modern Ukrainian civil service system is not a public service system but is formed as a civil service to narrower boundaries.

The uncertainty of the terms leads to the impossibility to clearly understand how to implement objectively certain restrictions on foreign nationals’ access to public service positions in Ukraine; as the question arises, what exactly should be improved and how exactly should it be changed? The need for clear answers refers to the positive experience of the EU in this area, where rules on restrictions on employment in the public service have already been formed and interpreted by case law. Therefore, a clear delineation of types of public service at the legislative level is one of the urgent tasks for Ukraine, including in the context of reforming labour legislation to implement the free movement of workers. This will solve the problems related to the status and appointment of foreigners in public service positions since not all

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<sup>17</sup> Вищий адміністративний суд України (2009). Про вивчення та узагальнення практики розгляду адміністративними судами спорів з приводу прийняття громадян на публічну службу, її проходження, звільнення з публічної служби: аналітична довідка. URL: <https://zakon.rada.gov.ua/laws/show/n0006760-09#Text>.

<sup>18</sup> План модернізації державного управління: пропозиції щодо приведення державного управління та державної служби України у відповідність із принципами і практиками демократичного урядування / А. Вишневецький (кер. авт. колективу), В. Афанасьєва, Р. Гекалюк та ін. ; за заг. ред. Т. Мот ренка. Київ : Центр адаптації державної служби до стандартів Європейського Союзу. 2010 : 205

state authorities' employees and local self-government bodies must have a public-legal status. Hence, the notion of public service should be limited to the service of only those individuals who directly perform public administration authority. Thus, the work of hired staff that could be treated as similar work in the same positions in the private sector should not be embraced by the notion of public service.

The above approach has been implemented since 2016 in the field of civil service, which is a component of public service, where, following the approved criteria, the list of positions of the staff of state authorities, performing servicing functions, is determined<sup>19</sup>. In particular, the above criteria include the content and nature of the work performed, which mainly does not presuppose exercising of the authorities directly related to the performance of state tasks and functions and performance of works related to ensuring adequate conditions of the state body functioning. For example, comprehensive maintenance and repairing of buildings, work on maintenance of the adjacent territory, restoration as well as construction and assembly works, documentary provision and records management, computer software provision and implementation of information technologies, the performance of the tasks and functions of an interviewing expert, secretary and stenographer are not considered to be civil service. Hence, the above types of works may be performed by foreigners.

As public, independent professional activity related to the practical performance of the state tasks and functions, the very civil service in Ukraine is regulated by a special law<sup>20</sup>. And the law emphasizes while determining the notion of civil servant the availability of such individual's citizenship of Ukraine. Along with that, the Law of Ukraine *On Civil Service* also contains the list of positions of the staff of state authorities, whose labour relations are not within its effect (part 3, Article 3). However, in most cases, these positions, by their essence, are public service<sup>21</sup>; therefore, specific

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<sup>19</sup> Кабінет Міністрів України (2016). Постанова «Про затвердження критеріїв визначення переліку посад працівників державних органів, які виконують функції з обслуговування» від 06.04.2016 р. № 271. URL: <https://zakon.rada.gov.ua/laws/show/271-2016-%d0%bf#text>.

<sup>20</sup> Верховна рада України (2015). Закон «Про державну службу» від 10.12.2015 № 889-viii. URL: <https://zakon.rada.gov.ua/laws/show/889-19#text>.

<sup>21</sup> The Law of Ukraine *On Civil Service* is not applied to:

- 1) the President of Ukraine;
- 2) the head of the permanent supporting body established by the President of Ukraine, and his deputies, Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea and his deputies;
- 3) members of the Cabinet of Ministers of Ukraine, first deputies and deputy ministers;
- 4) the head and members of the National Board of Ukraine on Television and Radio Broadcasting, the head and members of the Antimonopoly Committee of Ukraine, the head and

requirements exist concerning the citizenship availability for their holding. And these requirements are envisaged by special laws, particularly those that refer to the legal status of public servants employed in the bodies of the public prosecutor's office, courts, customs, diplomacy and tax services, etc.

And it should be noted that positions are differentiated by the functions and tasks performed by their holders within the structure of some of the above state authorities. In particular, we can find information about the division of the staff of the prosecution bodies into civil servants, servants and other staff in the field-specific law<sup>22</sup>.

In the judiciary, there work both judges as public servants, civil servants, the staff of the patronage service, and the staff who have concluded traditional labour contracts<sup>23</sup>. At the same time, many positions in the judiciary which require the citizenship of Ukraine do not have anything to do with the implementation of the state functions. For example, the authorities of an assistant judge as a patronage employee are far from administration and

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members of the Auditing Chamber, the head and members of the Central Election Commission, the heads and members of other state collegial bodies;

5) the Secretary of the National Security and Defense Council of Ukraine and his deputies;

6) the head of the State Committee of Television and Radio Broadcasting of Ukraine and his deputies, head of the State Property Fund of Ukraine and his deputies, head of the National Agency on Corruption Prevention and his deputies;

7) the people's deputies of Ukraine;

8) the Commissioner of the Verkhovna Rada of Ukraine for human rights and his representatives;

9) the officials of the National Bank of Ukraine;

9<sup>-1</sup>) the heads of local state administrations, their first deputies and deputies;

10) the deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, head of the Council of Ministers of the Autonomous Republic of Crimea and his deputies, the ministers of the Autonomous Republic of Crimea;

11) the deputies of local councils, officials of local self-government bodies;

11<sup>-1</sup>) the judges of the Constitutional Court of Ukraine;

11<sup>-2</sup>) the permanent representative of the Cabinet of Ministers of Ukraine in the Constitutional Court of Ukraine;

12) judges;

13) prosecutors;

14) staff of state bodies performing servicing functions;

15) staff of state enterprises, institutions, organizations, other business entities of state ownership, as well as educational institutions established by state authorities;

16) military men of the Armed Forces of Ukraine and other military units established under the law;

17) persons of rank and commandment composition of law-enforcement bodies and staff of other bodies, assigned with special titles, if not otherwise envisaged by the law;

18) staff of patronage services.

<sup>22</sup> *Верховна рада України* (2014). Закон «Про прокуратуру» від 14.10.2014 № 1697-vii. URL: <https://zakon.rada.gov.ua/laws/show/1697-18#text>.

<sup>23</sup> *Верховна рада України* (2016). Закон «Про судоустрій та статус суддів» від 02.06.2016 № 1402-viii. URL: <https://zakon.rada.gov.ua/laws/show/1402-19#text>.



executive authorities. He/she ensures a selection of legislative acts and materials from court practice that are necessary for the consideration of a specific court case; participants in the preliminary preparation of court cases for consideration, in the drawing up of court cases, prepares draft court decisions, inquiries, letters, other materials related to the consideration of a specific case upon the judge's commission; draws up copies of court decisions to be sent to the parties in the case and performs other assignments related to the organization of the court case consideration, given by the judge<sup>24</sup>. Thus, the supportive and organizational nature of the work activity of an assistant judge does not require the performance of such work by the citizens of Ukraine only. On the availability of adequate qualification training and the appropriate level of education, a foreign citizen can also perform those functions.

Also, for a court secretary, it is not necessary to be a citizen of Ukraine since he only performs primary registration of cases and materials consideration of which is envisaged by the procedural legislation; places considered cases in accordance with assigned numbers; makes accounting and ensures the preservation of material evidence; holds inspection of the correspondence of the documents in court cases to the case description; compiles statistical accounts about the results of court case consideration under established forms and performs other activity essential for the organization of the court work that is not related to the implementation of the state authorities.

Finally, it is also unclear why only Ukrainian citizens may be specialists, consultants, chief accountants, and masters of the bench in courts.

In 2019, the Court Guard Service was established in Ukraine. That is a state body in the judiciary designed for guarding and supporting public order in courts. The core tasks of this Service include public order maintenance in court, termination of manifestations of disrespect for the court, guarding of court premises, bodies and institutions of the judiciary, performance of functions relating to state-guaranteed ensuring of personal security of judges and their family members, court staff as well as ensuring the safety of trial participants in court<sup>25</sup>. Ukrainian legislators consider these functions so crucial that they can only trust Ukrainian citizens with these tasks.

There is a similar situation with the staff of the Administration of the State Guard of Ukraine (the state law-enforcement body). In particular, the staff of

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<sup>24</sup> Рада суддів України (2018). Положення про помічника судді, затверджене рішенням від 18.05.2018 року № 21. URL: <https://zakon.rada.gov.ua/rada/show/vr021414-18#top>.

<sup>25</sup> *Верховна Рада України* (2016). Закон «Про судоустрій та статус суддів» від 02.06.2016 № 1402-VIII. URL: <https://zakon.rada.gov.ua/laws/show/1402-19#Text>; Вища рада правосуддя (2019). Положення Про службу судової охорони, затверджене рішенням від 04.04.2019 р. № 1051/0/15-19. URL: <https://zakon.rada.gov.ua/rada/show/v1051910-19#Text>.

this Administration includes military men enrolled for military service in Administration. Under the contract, the army conscripts men as well as the staff who have concluded a labour contract with the Administration. And only citizens of Ukraine can be accepted on a contractual basis for service (work) in the Administration. The requirement concerning the availability of citizenship could be specified more reasonably. It should apply only to positions of employment related to the implementation of state power authorities. There should be more precise guidelines on which positions are explicitly reserved for the citizens of Ukraine.

However, the widest service for employment of the citizens of Ukraine only is the service in local self-government bodies, that is a professional, permanent activity of the citizens of Ukraine holding positions in local self-government bodies, aimed at the implementation of the right to local self-government and some authorities of executive bodies provided by the law by the territorial community<sup>26</sup>. Though this requirement does not apply to technical staff and servicing personnel of local self-government bodies, it still seems to us that the list of positions to be held by the citizens of Ukraine only is unreasonably broad. It should be allowed for other states' citizens to hold advisors, consultants, assistants, accountants, and others positions if they have adequate professional competence.

The list of cases when positions are reserved for the citizens of Ukraine, provided above, is not exhaustive and can be expanded. However, the requirements set for the scope of the paper do not allow for the indication of all positions concerning which there exist respective restrictions. In addition, the above draws attention to a non-systemic approach to setting the requirement concerning the citizenship of Ukraine as an employment condition, leading to ungrounded restriction of the right of foreigners to employment. To our belief, in the context of Ukraine's movement towards the European Union, these issues must be settled, and the process should be launched already now.

All in all, each state is entitled to determine the list of positions that its citizens can hold only due to the nature of work or the field of performance. However, Ukraine should bear it in mind that the advantages of employment for its own citizens cannot be provided as the result of the infringement of the rights of the EU citizens who have the right to treatment free from discrimination by citizenship in relation to employment, if they are legally staying in Ukraine.

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<sup>26</sup> *Верховна рада України* (2001). Закон «Про службу в органах місцевого самоврядування» від 07.06.2001 № 2493-iii. URL: <https://zakon.rada.gov.ua/laws/show/2493-14#text>.

A way out of the situation can be found in a clear delineation of public service positions in the structure of state and local authorities, which may be held by the citizens of Ukraine only. Positions of the staff of such bodies perform functions not related to the implementation of the state functions, which allow for the employment of foreigners in certain positions. That is, in the context of employment in the public service, in fact, necessary to outline two categories of employees: hired employees and public servants. The former mainly perform more technical and supportive nature tasks (consultants, secretaries, drivers, etc.). Their labour rights and duties are not related to public administration. Hence, the requirement concerning the availability of the citizenship of Ukraine concerning those individuals should be canceled. The other type of persons employed in the public service are officials who must have Ukrainian citizenship due to power authorities for the performance of state tasks and functions granted to them and aimed at meeting public interest.

## **2. Employment of foreigners in Ukraine today**

As far as the use of labour of foreigners and persons without citizenship in Ukraine is concerned, certain peculiarities exist. Though subparagraph 1 of Article 43 of the Constitution of Ukraine stresses that '*Everyone* shall have the right to work, including a possibility to earn a living by labour that he freely chooses or to which he freely agrees,' where the word '*everyone*' obviously applies to all persons (including those who are not citizens of Ukraine) staying on legitimate grounds in the territory of the state and willing to exercise their natural right to labour.

However, the next subparagraph of the cited norm of the Constitution slightly neutralizes such optimistic opinion about the interpretation of the word '*everyone*', since it appears that 'the State shall create conditions for *citizens* that will make it possible to: fully realize their right to work; guarantee equal opportunities in the choice of profession and of types of labour activities; and implement programs for vocational education, training, and retraining of personnel according to the needs of society'<sup>27</sup>. That is, based on the subjective "right to work" norm as it set in the International Covenant on Economic, Social and Cultural Rights, approved by the UN General Assembly in December 1966, where this right was recognized as a natural and determining right of every person, Ukrainian legislator reduced it in fact, to the right, the guarantees of which apply only to citizens of Ukraine.

Let us recall that the Constitution of Ukraine was adopted in 1996 when the citizens of Ukraine could only dream about accession to the European

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<sup>27</sup> Конституція України : Закон України від 28.06.1996 № 254к/96-ВР. URL: <http://zakon2.rada.gov.ua/laws/show/254к/96-вр>.

Union. And still, at that time, Ukraine was a full-fledged member of the Council of Europe, and therefore obviously, the formulation of the norm of the right to work in the Fundamental Law of our state should have been performed more diligently, to have it in the spirit of respect for the European social standards and values.

Currently, when Ukraine is gradually covering its thorny path to the European Union, the issue of employment of foreigners must be considered in the context of the prospective implementation of the free movement of workers into the national system of law. Article 17 of the Association Agreement between the European Union's Member States and Ukraine (hereinafter referred to as the Agreement), which concluded in September 2014, stresses that under the laws, conditions and procedures applicable in the Member State and the EU, treatment of employees who are the citizens of Ukraine and who are legally employed in the territory of the Member State must be free from any discrimination on *citizenship* grounds as compared to the citizens of that Member State as far as labour conditions, remuneration or dismissing is concerned. And Ukraine, in accordance with the laws, conditions and procedures applicable in its territory, shall ensure respective treatment of employees who are the citizens of the Member State and who are legally employed in its territory.

The respective wording seemingly prepares us for the fact that citizenship as an employment condition should not be of importance for exercising the right to work by the EU citizens in Ukraine. We sincerely believe that in the future, that will become our reality. But so far, in its May 23, 2017 version, Article 42 of the Law of Ukraine *On Population Employment* presupposes the right of employers to use the labour of foreigners and persons without citizenship if they have the respective permission issued by the territorial executive authorities implementing state policy in the field of employment and labour migration. It is worth noting that the latest version of this norm is already closer to the requirements of the European standards, since, according to the previous rules, employment permission for foreigners was issued only on the condition that there were no workers in Ukraine or in some of its regions, who were capable of performing the respective job, or if there existed sufficient grounds for the expediency of using the labour of foreign experts. Now, the procedure of getting permission is actually narrowed down to the submission of documents identifying the worker and the employer. It is also necessary to submit the draft labour contract that is intended to conclude. The need for substantiating the reason for the employment of a foreigner in Ukraine has been liquidated. Additionally, the list of persons who can be employed without a permission issued by a special authority has been expanded.

Nevertheless, the already mentioned Article 42 of the Law of Ukraine *On Population Employment* in the cited version still presupposes that foreigners and persons without citizenship cannot be appointed to positions or carry out labour activity if, under the *legislation*, appointment to the respective position or carrying out of the respective activity type is related to having the citizenship of Ukraine, if not otherwise envisaged by the international treaties of Ukraine, consent to the binding nature of which has been given by the Verkhovna Rada of Ukraine. Let us note that the employer must submit an application that confirms that the position to be held by the foreigner or person without citizenship is not related to having the citizenship of Ukraine and does not require any access to highly classified information constituting classified state documents.

At first glance, the above norm does not differ specifically from the rules set by some other foreign countries (including the EU Member States) on holding of the positions related to the public service, performance of judicial and some other public duties, when restrictions are set for their holding by the citizens of the respective state only<sup>28</sup>. But the reference in the Law of Ukraine *On Population Employment* to the 'legislation' which may establish respective restrictions concerning the holding of certain positions with due account of the availability of the citizenship of Ukraine seems not to be very apt. According to the definition given by the Constitutional Court of Ukraine, the term 'legislation' embraces a relatively wide range of regulatory legal acts, including by-laws. It includes the acts of executive authorities, acts of the President of Ukraine, and acts of local self-government bodies<sup>29</sup>, and this means that the field of effect of such prohibitions for holding positions in case the candidate does not have the passport of the citizen of Ukraine can be unreasonably wide. And finally, practice here is rather eloquent, since many different by-laws sometimes not quite reasonably point to citizenship as a condition for holding some positions in the respective fields of activity that sometimes are distant from the public service. Here it is enough to mention at least the Regulation on the Departmental Militarized Guard of Enterprises Belonging to the Field of Administration of the State Space Agency of Ukraine, which was approved by the Order of the State Space Agency of

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<sup>28</sup> See comparative table of the characteristics of the civil service in the EU countries and some other countries of the world. URL: [http://radaprogram.org/sites/default/files/infocenter/publications/civil\\_service\\_and\\_servants\\_worldwide\\_comparison\\_table.pdf](http://radaprogram.org/sites/default/files/infocenter/publications/civil_service_and_servants_worldwide_comparison_table.pdf)

<sup>29</sup> Конституційний Суд України (1998). Рішення у справі за конституційним зверненням Київської міської ради професійних спілок щодо офіційного тлумачення частини третьої статті 21 Кодексу законів про працю України (справа про тлумачення терміну «законодавство») від 9 липня 1998 року N 17/81-97. URL: <https://zakon.rada.gov.ua/laws/show/v012p710-98#Text>.

Ukraine as of July 20, 2012 No. 281<sup>30</sup>, Resolution of the Cabinet of Ministers of Ukraine *On Establishment of the National Agency for Higher Education Quality Assurance*<sup>31</sup>, Regulation *On Sea Port Captain*, approved by the Ministry of Infrastructure of Ukraine as of March 27, 2013 No.190<sup>32</sup>, or the Regulation on the competitive selection of candidates for the position of the head of the municipal enterprise of Chernihiv Regional Council, approved by decision of Chernihiv Regional Council as of March 28, 2018 No. 69–12/VII<sup>33</sup>, which belong to by-laws and act as impediments on the way of persons without citizenship and foreigners to filling some positions.

Obviously, such practice is intolerable in the conditions of adjustment of the Ukrainian labour law to the European standards, and, primarily, Directive 2000/78 establishing a general framework for equal treatment in employment and occupation<sup>34</sup>, which stresses, in particular, that occupation and profession constitute key elements in ensuring equal opportunities for everyone and the pre-condition for a full-fledged engagement of citizens in the economic and social life as well as the opportunity to fulfill their capacity. And as it is mentioned in paragraph 2, Article 3, the above Directive does not embrace the differences in relations based on citizenship and does not affect the conditions related to entry and residence of the citizens of the third countries and persons without citizenship in the territory of the Member States, or any treatment that results from the legal status of the citizens of the third countries or persons without citizenship, nevertheless it is included into the list of the EU acts,

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<sup>30</sup> Державне космічне агентство України (2012). Положення про відомчу военізовану охорону підприємств, що належать до сфери управління Державного космічного агентства України, затверджене наказом від 20.07.2012 N 281. URL: <https://ips.ligazakon.net/document/RE21667?an=42>.

<sup>31</sup> Of interest in this act is the fact that it does not fix any direct requirement about availability of the citizenship of Ukraine for holding the position of the member of the national agency for higher education quality assurance. At the same time, termination of the citizenship of Ukraine by a member of the national agency has been mentioned among the grounds for termination of membership in this national agency. Such wording makes one think that only a citizen of Ukraine may become a member of the national agency. (Кабінет міністрів України (2015). постанова «Про утворення національного агентства із забезпечення якості вищої освіти» від 15.04.2015 № 244. URL: <https://zakon.rada.gov.ua/laws/show/244-2015-%d0%bf#text>).

<sup>32</sup> Міністерство інфраструктури України (2013). Положення про капітана морського порту та службу капітана морського порту, затверджене Наказом Міністерства інфраструктури України від 27.03.2013 р. № 190 <https://zakon.rada.gov.ua/laws/show/z0632-13#Text>.

<sup>33</sup> Чернігівська обласна рада (2018). Положення про конкурсний відбір кандидатів для призначення на посаду керівника комунального підприємства Чернігівської обласної ради, затверджене рішенням Чернігівської обласної ради від 28 березня 2018 року № 69-12/VII. URL: <https://chor.gov.ua/component/k2/item/6752-pro-zatverdzhennia-polozhennia-pro-konkursnyi-vidbir-kandydativ-d>.

<sup>34</sup> EU (2000). Council Directive 2000/78/EC of November 27 establishing a general framework for equal treatment in employment and occupation. *OJ L 303*: 16–22.

which, under the already mentioned EU-Ukraine Association Agreement (Annex XL to Chapter 2–1 'Cooperation on Employment, Social Policy and Equal Opportunities') must be implemented in the Ukrainian labour legislation within four years from the date the Agreement comes into effect. Therefore, general approaches to restrictions in access to profession and holding of positions due to citizenship must be unified and meet the requirements accepted in the EU Member States.

In Ukraine, such restrictions should obviously be defined as an exception by the laws that belong to acts of the highest legal effect. In such a way, it is suggested to solve the problem in one of the draft Labour Codes of Ukraine, which has been submitted to the Parliament for consideration and approval. Here, in particular, it is indicated that 'foreigners and persons without citizenship cannot be appointed to some positions or conduct a certain labour activity, if, under the *Laws of Ukraine*, appointment to the positions or such activity is related to having the citizenship of Ukraine'<sup>35</sup>.

In general, as it has already been mentioned, the practice of restricting access to certain positions taking into account citizenship availability, exists in many states. But such restrictions mainly refer to public service that presupposes the performance of certain state functions by an individual. While in Ukraine, the requirement on availability of citizenship for holding certain positions, in our opinion, goes beyond the framework of activity related to the performance of state functions and tasks. For example, only a citizen of Ukraine may be appointed head of either a preschool educational institution or a public secondary educational institution, regardless of their subordination, type, and ownership<sup>36</sup>, head of state or municipal out-of-school educational institution<sup>37</sup>, head of a state-owned or municipal institution of higher education of state<sup>38</sup>. Though Ukrainian legislators rejected the idea to grant the status of civil servants to all teachers, medical staff, as well as scientific and teaching staff in 2010, on failing in the adoption of the respective law<sup>39</sup>, the introduction of the requirement on availability of citizenship of Ukraine for holding positions of heads of educational

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<sup>35</sup> *Верховна Рада України* (2019). Проект Трудового кодексу України № 2410 від 08.11.2019. URL: <https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=67331&pf35401=509026>.

<sup>36</sup> *Верховна рада України* (2017). Закон «Про освіту» від 05.09.2017 № 2145-viii. URL: <https://zakon.rada.gov.ua/laws/show/2145-19#text>.

<sup>37</sup> *Верховна рада України* (2000). Закон «Про позашкільну освіту» від 22.06.2000 № 1841-iii. URL: <https://zakon.rada.gov.ua/laws/show/1841-14#text>.

<sup>38</sup> *Верховна рада України* (2014). Закон «Про вищу освіту» від 01.07.2014 № 1556-vii. URL: <https://zakon.rada.gov.ua/laws/show/1556-18#text>.

<sup>39</sup> The Verkhovna Rada did not support the law on granting the status of civil servants to teachers, medical staff and scientific and teaching staff. Friday, February 19, 2010. URL: <http://pdp.sirko.net.ua/component/content/article/1-latest-news/1860-2010-02-19-11-43-14>.

institutions (sometimes – only state and municipal ones, and sometimes – of all forms of ownership) is a disproportionate measure since this category of workers does not have any relation to exercising of state power authorities. The competence of the head of a state-owned or municipal educational institution is the same as that of the head of a private institution.

Even more doubtful from the point of view of their legitimacy are legal restrictions for position-holding by citizens of Ukraine only for some heads of municipal enterprises, set on the level of local self-government bodies. The requirement for the candidate to be a citizen of Ukraine is often not indicated directly. However, the documents that must be submitted for participation in the competition include a passport of the citizen of Ukraine. The absence of all the necessary documents constitutes the grounds for rejecting the application for participation in the competition<sup>40</sup>. In fact, for respective workers a priori there should be no restrictions related to citizenship availability since they do not perform any state functions in their activity.

In this context, it is worth mentioning that the list of documents for holding the positions of heads of business entities of the state sector of the economy does not include a passport of the citizen of Ukraine<sup>41</sup>. The exception is made only for heads of enterprises-participants of the State Concern *Ukroboronprom* (defense sector) that must have the citizenship of Ukraine<sup>42</sup>.

For some reason, only the citizens of Ukraine may work in the departmental militarized guard of the enterprises belonging to the field of administration of the State Space Agency of Ukraine. The Regulation on this departmental militarized guard service even indicates that foreigners and

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<sup>40</sup> For instance, a copy of the passport of the citizen of Ukraine is required for holding the position of the head of the enterprise or the institution being in municipal ownership of the territorial community of the town of Kamyanske, Dnipropetrovsk region (See for instance Міський голова Кам'янська (2016). Порядок призначення керівників комунальних підприємств і закладів та умови оплати їх праці, затвержене розпорядженням від 08.09.2016 № 361-р. URL: [http://kam.gov.ua/poryadok\\_priznachennya\\_kerivnykiv\\_komunal\\_nikh\\_pidpriemstv\\_i\\_zakladiv\\_ta\\_umovi\\_oplati\\_ikh\\_pratsi](http://kam.gov.ua/poryadok_priznachennya_kerivnykiv_komunal_nikh_pidpriemstv_i_zakladiv_ta_umovi_oplati_ikh_pratsi)), head of municipal enterprises and institutions jointly owned by the territorial communities of the villages, urban villages, towns of Kharkiv region (Харківська обласна рада (2018). Положення про порядок призначення на посаду та звільнення із займаної посади керівників комунальних підприємств, установ, закладів, що є у спільній власності територіальних громад сіл, селищ, міст області. Додаток до рішення Харківської обласної ради від 30 серпня 2018 року № 793-VII (XVII сесія VII скликання). URL: [https://www.ts.lica.com.ua/b\\_text.php?type=3&id=20346&base=77](https://www.ts.lica.com.ua/b_text.php?type=3&id=20346&base=77)), as well as other acts adopted by local authorities within their mandate.

<sup>41</sup> Кабінет міністрів України (2008). Постанова «Про проведення конкурсного відбору керівників суб'єктів господарювання державного сектору економіки» від 03.09.2008 № 777. URL: <https://zakon.rada.gov.ua/laws/show/777-2008-%d0%bf#text>. URL: <https://zakon.rada.gov.ua/laws/show/777-2008-%d0%bf#text>.

<sup>42</sup> The procedure of appointing heads of enterprises-participants of the State Concern *Ukroboronprom* (2017) can be found here. URL: <https://ukroboronprom.com.ua/uk/poryadok-pryznachennya-kerivnykiv-pidpriemstv-uchasnykiv-derzhavnogo-kontsemu-ukroboronprom-2>



persons without citizenship shall not be allowed to be appointed and perform the functions of guarding the respective facilities, which are nine large enterprises of the industry<sup>43</sup>.

The Law of Ukraine *On Security Guard Activity* that determines organizational and legal principles of carrying out economic activity in the field of provision of the services of protection of property and citizens also surprises with its provision according to which only the citizens of Ukraine may be the employees directly performing the functions of protecting property and natural persons<sup>44</sup>.

It is worth paying close attention to the problem of citizenship availability as far as notarial activity in Ukraine is concerned. Under Article 3 of the Law of Ukraine *On Notaryship*<sup>45</sup>, citizenship availability shall be performed by a state-authorized natural person (notary) in the state notary's office, state notary's archive, or carrying out the independent professional notarial activity. That is, notaries in Ukraine are divided into two types: public and private. The former hold respective offices in state notary's offices, while the latter carry out their independent professional activity, which is not considered an entrepreneurial activity in Ukraine. And both in relation to the former (state/public) and the latter (private) notaries, Article 3 of the Law *On Notaryship* sets the requirement for them to have the citizenship of Ukraine.

And while at the beginning, after private notary's practice was introduced in our state in Ukraine on September 2, 1993, public notaries used to be the only ones in the field of notarial activity and still preserved the status of civil servants for some time. The requirement about their citizenship was somewhat logical, but gradually, after they lost their respective status, this requirement became not grounded for them, the same as for private notaries.

Still, in our opinion, the requirement concerning citizenship for carrying out notary activity in Ukraine has got its substantiation. Since, under the law, notaryship in Ukraine constitutes the system of bodies and officials assigned with the duty to certify rights and facts of legal importance and take other notarial actions envisaged by the law for the sake of making them legally credible. This means that individuals (notaries) who perform such activity are the individuals authorized by the state for taking the respective actions on its behalf. They take an oath to the state and shall keep the notary's secret and

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<sup>43</sup> Державне космічне агентство України (2012). Положення про відомчу воєнізовану охорону підприємств, що належать до сфери управління Державного космічного агентства України, затверджене наказом від 20.07.2012 № 281. URL: <https://ips.ligazakon.net/document/RE21667?an=42>.

<sup>44</sup> Верховна рада України (2012). Закон «Про охоронну діяльність» від 22.03.2012 № 4616-ві. URL: <https://zakon.rada.gov.ua/laws/show/4616-17#text>.

<sup>45</sup> Верховна рада України (1993). Закон «Про нотаріат» від 02.09.1993 3425-xii. URL: <https://zakon.rada.gov.ua/laws/show/3425-12#text>.

comply with the respective rules of taking notarial actions that the state has set. And finally, the requirement concerning citizenship as a condition for getting a certificate of the right to carry out notarial activity is enshrined in the Law of Ukraine *On Notaryship*, and that, as it has already been indicated, is almost the key sign of the legitimacy of restrictions for accessing the profession under this condition.

Along with that, all the positives of the Law of Ukraine *On Notaryship* are in this respect somewhat offset by Article 13, which is dedicated to the assistant notary. According to the requirement set here, the latter should also be a citizen of Ukraine. And that already, as it seems, does not fit any of the characteristics usually used by the world practice of introducing restrictions for holding positions related to citizenship availability.

The above proves that currently, there is no uniform approach in Ukraine to apply such requirements for employment as citizenship. The above cases demonstrate that there are many obstacles to the employment of foreigners. Some of them are indicated directly, like the requirement to be a citizen of Ukraine. In contrast, others are latent and come as a request to submit the passport of the citizen of Ukraine as the document necessary for getting employed.

But no attention has so far been paid to minimizing restrictions for employment of foreigners in Ukraine in research since accession to the European Union is rather perceived as simplifying the employment procedure of Ukrainian citizens in the EU vice versa. Ukrainian government officials are not getting ready to open the Ukrainian labour market for EU citizens. They are not developing and implementing provisions that would ensure equal treatment of all workers regardless of their citizenship. Additionally, there is no clear identification of the positions in the public service where the introduction of foreigners' restrictions would be considered justified and legal.

### **3. The criteria of legal restriction of freedom of movement for workers in the public service**

At the level of the European Union, employment in public service is guided by the rules of Article 45 of the Treaty on the Functioning of the European Union, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union<sup>46</sup>, 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

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<sup>46</sup> EU (2011). Regulation No 492/2011 of the European Parliament and the Council of April 05 on freedom of movement for workers within the Union Text with EEA relevance. *OJ L 141: 1–12*.

family members to move and reside freely within the territory of the Member States<sup>47</sup> and Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications<sup>48</sup>. No special legal acts that would specify and detail the possibilities of the Member States to restrict freedom of movement for workers have been adopted in this field. And the notion of public service has not been defined. Therefore, of critical importance are the principles of interpretation of part 4 of Article 45 of the Treaty on the Functioning of the European Union, developed by the Court of Justice of the European Union.

In the context of working possibilities, the Member States have to restrict foreigners' access to public service industries. The Court of Justice of the EU has primarily stated that public service should be interpreted as narrowly as possible, and the Court has also stressed that only the EU authorities have the respective competence<sup>49</sup>. In particular, in the case *Giovanni Maria Sotgiu v Deutsche Bundespost (Case 152-73)*, it was specified that Article 45 (4) should not apply to all employees within the public service, but only to a part of it<sup>50</sup>. Later, in the case *Commission of the European Communities v Kingdom of Belgium (Case 149/79)*, holding of offices that are directly or indirectly linked to exercising of state power under public law, as well as activities related to the performance of duties aimed to protect general interests of the state<sup>51</sup> or state authorities<sup>52</sup>, was called public service. Holding these offices causes the appearance of special relations of loyalty to the state and reciprocity of rights and duties that form the foundation of the bond of nationality<sup>53</sup>. In subsequent case law on Article 45(4) TFEU, the CJEU has always confirmed

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<sup>47</sup> EU (2004). Directive 2004/38/EC of the European Parliament and of the Council of April 29 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) No 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 (Text with EEA relevance). *OJ L 158: 77-123*.

<sup>48</sup> EU (2005). Directive 2005/36/EC of the European Parliament and of the Council of September 07 on the recognition of professional qualifications (Text with EEA relevance). *OJ L 255: 22-142*.

<sup>49</sup> Petkute I. (2014). The legitimacy of the provision of the article 45(4) of the treaty on the functioning of the European Union. master thesis, university of Oslo. URL: <https://www.duo.uio.no/handle/10852/43044>.

<sup>50</sup> CJEU (1974). Judgment of February 12. *Giovanni Maria Sotgiu v Deutsche Bundespost*. Case 152-73. ECLI:EU:C:1974:13

<sup>51</sup> Here, guaranteeing of internal and external security of the state is meant. Thus, the range of interests a Member State is to protect shall determine restrictions in the field of application of Article 45 of the TFEU.

<sup>52</sup> CJEU (1980). Judgment of December 17. *Commission of the European Communities v Kingdom of Belgium*. Case 149/79. ECLI:EU:C:1980:297

<sup>53</sup> CJEU (1986). Judgment of 3 July. *Deborah Lawrie-Blum v Land Baden-Württemberg*. Case 66/85. ECLI:EU:C:1986:284

this first interpretation and made it clear that both criteria are not alternative but cumulative (exercising of powers conferred by public law and safeguarding general interests)<sup>54</sup>.

It should be stressed that at the EU level, no prior official public service recognition is needed. It is important that in case of reservation of such positions exceptionally for the citizens of their own country, this position corresponds to the criteria of the Court of Justice of the European Union concerning the interpretation of part 4, Article 45 of TFEU.

The standpoint of the CJEU concerning the possibility of interpreting part 4 of Article 45 of TFEU only at the EU level ensures uniform application of this norm since the Member States have a different understanding of the notion of public service. Such an approach allows for the prevention of threats posed to the unity and effectiveness of the EU law since it does not allow the Member States to refer to the national legislation to restrict the field of effect of the EU legal norms. Criteria must be assessed on a case-by-case basis with regard to the nature of the tasks and responsibilities involved. This is considered the most functional approach. It is essential to always bear in mind the purpose of the exception, i.e., whether the post requires 'a special relationship of allegiance'<sup>55</sup>. In particular, thanks to the CJEU practice, it was reasoned that a train operator of the Belgian Railway<sup>56</sup>, a nurse of the French state hospital<sup>57</sup>, President of the Italian port<sup>58</sup>, the staff of private guard agencies (private guards) in Spain and Italy<sup>59</sup>, etc. have no relation to the public service.

But as far as captains of commercial vessels and their assistances are concerned, the CJEU has still made an exception. In particular, in the case *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado* (Case C-405/01), the Member States' competencies to establish availability of citizenship of the employing country as an obligatory qualifying requirement for holding those positions were confirmed. Still, freedom of movement shall not be applied to this category of positions if only

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<sup>54</sup> European Commission (2010). staff working document: free movement of workers in the public sector. Brussels. sec (2010) 1609 final. URL: <https://ec.europa.eu/social/blobservelet?docid=6400&langid=en>.

<sup>55</sup> Ibid.

<sup>56</sup> CJEU (1980). Judgment of December 17. Commission of the European Communities v Kingdom of Belgium. Case 149/79. ECLI:EU:C:1980:297

<sup>57</sup> CJEU (1986). Judgment of June 03. Commission of the European Communities v French Republic. Case 307/84. ECLI:EU:C:1986:222

<sup>58</sup> CJEU (2014). Judgment of September 10. Iraklis Haralambidis v Calogero Casilli. Case C-270/13. ECLI:EU:C:2014:2185

<sup>59</sup> CJEU (2001). Judgment of May 31. Commission of the European Communities v Italian Republic. Case C-283/99. ECLI:EU:C:2001:307

their rights and duties are actually performed permanently and do not constitute an insignificant part of their labour activity<sup>60</sup>.

In the case *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado* (Case C-405/01) it is stated that it is logical and reasonable to except the performance of such functions by persons responsible for ensuring public order and safety on board a ship. Higher potential risks in the open sea, as well as the fact that vessels stay there beyond the reach of the state authorities, cause the need for ensuring the presence of the representative of the state there, who has the mandate to pass decisions on its behalf.

Despite the absence of administrative relations, those employees' labour duties partially ensure the implementation of state authorities. Since in most EU Member States captains of commercial vessels and their assistances have to ensure security and have police authorities, particularly in case any danger appears onboard a ship. In particular, these authorities should investigate cases and apply means of legal responsibility to those guilty. In addition to this investigation of cases, the authorities' responsibilities also include taking notary's actions and registering births, marriages, and deaths. Indeed, these authorities do not constitute a standard component of the duties of the ship captain as a hired employee. He is granted these authorities under the legislation to protect the general interests of the state under the flag of which the ship is sailing. And the fact that captains of commercial vessels and their assistances work for the employer who is a private natural person or legal entity is not sufficient for considering them to be rank-and-file workers. Performing state functions delegated to them under the law, these persons act as the representatives of state authorities; therefore, restrictions under part 4 of Article 4 of TFEU apply to them.

With its judgment in the case *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado* (Case C-405/01), the CJEU has provided an additional interpretation of part 4 of Article 45 of the TFEU since by 2003 it was considered that its provisions are incompatible with employment in the private sector. Before this case, the CJEU had numerous stresses that public service is not related to employment with an employer who is a natural citizen or a legal entity, regardless of the worker's authorities<sup>61</sup>.

Elimination of obstacles for access by workers from the other Member States to positions in certain public service domains has become a specific direction of the European Commission's activity. In particular, the EU has stressed many times that, according to the precedent practice of the Court of

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<sup>60</sup> CJEU (2003). Judgment of 30 September. *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado*. Case C-405/01. ECLI:EU:C:2003:515

<sup>61</sup> CJEU (1998). Judgment of October 29. *Commission of the European Communities v Kingdom of Spain*. Case C-114/97. ECLI:EU:C:1998:519

Justice of the EU, discrimination by nationality in accessing public service positions that do not presuppose any activity, which is specific of the public service, cannot be justified<sup>62</sup>. Additionally, the European Commission is convinced that it cannot be the case that only the citizens of the employing country are the staff of postal communication or railway, sanitation engineers, gardeners or electricians, teachers, nurses, and civil researchers. In each specific case, the nature of the assignments of workers as well as the need for being loyal to the state in duty performance must be taken into account as the basic criteria of assessing the position of the public servant<sup>63</sup>.

And still, it is necessary to bear it in mind that freedom of movement for workers is not absolute, and the Member States are entitled to restrict access to positions in public service for foreigners. Certainly, the Member States can limit access for foreigners to offices in:

- judicial authorities, prosecution authorities, the enforcement system;
- police, border guard and fire control;
- the army;
- the tax service;
- the diplomatic service;
- government and local executive administrations (European Commission 1988).

Exercising the authorities granted by public legislation and performance of duties related to the protection of the general interests of the state constitute the core criteria in determining whether the position belongs to the public service. Considering the above, it is thought that currently, from 60 to 90 percent of public positions in the EU Member States are open for all EU Member States citizens. Hence, only from 10 to 40 percent of the overall number of such positions can be held by the citizens of the respective states<sup>64</sup>.

## CONCLUSIONS

Today in Ukraine, there is no single approach to applying such a requirement for employment as citizenship. The demonstration of how foreigners are employed in Ukraine today, which is made in this paper, proves that there are many obstacles to the employment of other countries' nationals.

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<sup>62</sup> European commission (1988). action in respect of the application of Article 48 (4) of the eec treaty. Freedom of movement of workers and access to employment in the public service of the member states. *Oj C 72: 2–4*.

<sup>63</sup> European commission (2010). staff working document: free movement of workers in the public sector. Brussels. sec (2010) 1609 final. URL: <https://ec.europa.eu/social/blobservelet?docid=6400&langid=en>.

<sup>64</sup> Сивий Р. (2018). Детермінанти трансформації концепцій державної служби в країнах Європейського Союзу. *Вісник Київського національного університету імені Тараса Шевченка. Державна служба*. № 1(10). С. 37.

Some of them are explicitly stated, such as the requirement to be a citizen of Ukraine; others are veiled and appear to request a passport of a Ukrainian citizen as a necessary document for employment.

The vagueness of the term public service makes it difficult for foreign nationals to access positions in the relevant field, as it allows for excessive restrictions on access to positions due to a lack of citizenship. In this context, Ukraine should benefit from the positive experience of the EU, where rules on restrictions on employment in the public service have already been formed and interpreted by case law. Therefore it should be envisaged at the law that not all employees within the public service have to be Ukrainian citizens. Only holding of offices directly or indirectly linked to exercising state power under public law and activities related to the performance of duties aimed to protect the general interests of the state or state authorities could justify the demand to be a Ukrainian citizen. Exercising the authorities granted by public legislation and performance of duties related to the protection of the general interests of the state must constitute the core criteria in determining whether the position belongs to the public service.

Therefore, the analysis of EU legislation and the practice of its application to the exercise of freedom of movement for employment in the public service, conducted by the authors of this publication, should be used in public service reform by moving away from the excessive extension of this concept. In this context, the Ukrainian authorities must update the concept of public service and exclude labour relations that have nothing to do with exercising the powers provided by public law and performance of duties related to protecting the general state interests from it. Only after a narrow understanding of public service is approved nationally, and after respective amendments are made in the legislation, Ukraine will be able to avoid the fate of Greece, Luxemburg, Italy, France, and other EU Member States that have been trying to unsuccessfully prove their right to reserve some positions in the public service for their own citizens in the CJEU.

Therefore, it is necessary to clearly distinguish in the structure of public authorities and local self-government the public service positions, which citizens of Ukraine can only occupy, and the positions of employees of such bodies that perform functions that are not related to the functions of the state and which the foreigners can occupy. In the context of employment in the public service, it is necessary to distinguish between two categories: hired employees and public servants, who must have Ukrainian citizenship, taking into account the authority to perform the tasks and functions of the state.

All this should contribute to the improvement of the legislation on the employment of foreigners in Ukraine in terms of the future introduction in Ukraine of the principle of free movement of all workers. In our belief, as far

as the issues of free movement of workers in the public service are concerned, Ukraine must be proactive on its path towards European integration. Ukraine must carry out the necessary reform relating to the liquidation of those national provisions that do not meet European employment standards since these standards disproportionately demand the availability of citizenship as one of the pre-conditions for holding the position.

Though the many EU Member States still keep ignoring the criteria of referring positions to public service, it would be in the interests of Ukraine to independently liquidate as many non-conformities of the national legislation with the EU legislation as possible. This will at least show our European partners the absolute and unchanging striving of Ukraine to become the EU Member State and to accept not just European rules of the game but also to overtake the spirit of legal regulation of the public service following the European sample. And with this in view, we need to have a complete revision of positions in the public service. The scope of such work may be scary; therefore, the sooner Ukrainian legislators start this monitoring and remove ungrounded restrictions, the better the situation will be.

## **SUMMARY**

This paper aims to show Ukraine's and European Union legal rules on employment in the sphere of public service. The analysis focuses on legal acts of the EU that contain such regulations and consider the case-law of the CJEU on their interpretation and application, as well as Ukraine's relevant legislation is researched. The European criteria for stating the legitimacy of restrictions of the freedom of movement for public officials and the data about conditions in the employment of foreigners and the requirements for holding public positions are characterized. The Ukrainian legislation on the employment of foreigners is examined, as is the concept of public service in Ukraine. The article gives some recommendations on what needs to be changed in Ukraine in this context and why. Thus, this article demonstrates the necessity of adapting EU standards of free movement of workers in public service and emphasizes the need to complete revision of positions in the public service.

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#### **Information about the authors:**

##### **Rym Olena Mykhaylivna,**

Doctor of Law, Associate Professor,  
Professor at the Department of Social Law of Law Faculty  
Ivan Franko National University of Lviv  
1, Universytetska str., Lviv, 79000, Ukraine  
<https://orcid.org/0000-0002-3364-2830>

##### **Pylypenko Pylyp Danylovych,**

Doctor of Law, Professor,  
Head of the Department of Social Law of Law Faculty  
Ivan Franko National University of Lviv  
1, Universytetska str., Lviv, 79000, Ukraine  
<https://orcid.org/0000-0002-3382-3033>