

Employment Status developments in the national public services and the role of EU Law – a subject of growing importance for EUPAN

The Polish Presidency paper

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In accordance with the Medium Term Priorities, approved by Directors General during their 56th Meeting in Gödöllő on 23-24 June 2011, a discussion within Human Resources Working Group (during the first meeting held in Warsaw on 12-13 September) on The future of the employment status in the national public services took place. The debate was based on national cases from three Member States (France, Germany and Spain). The presentations were followed by a panel discussion facilitated by Dr. Christoph Demmke, Professor of Comparative Public Administration at the European Institute of Public Administration in Maastricht.

The short paper presented below, prepared by Dr. Christoph Demmke in cooperation with and on the request of the Polish Presidency, should be regarded as a paper of the Polish Presidency on the future of the employment status in the national public services rather than a summary of the HRWG work in this scope. This paper has not been discussed within HRWG in details and agreed, however during the discussion on that issue, elaboration of such a document for the Directors General was requested by HRWG members.

The aim of this document is also to inspire further discussion on important aspects of this issue showing the main questions and dilemmas.

The early 21st century has seen the introduction of new popular concepts such as governance, change management, knowledge management, life-long learning and new public management. In addition, in many national public services, decentralisation trends have been introduced, organisational structures and recruitment procedures have been changed, budgets reduced, working time patterns have been modified, performance

management systems adopted, pay and pension systems have been reformed and – more generally – alignment trends between the public and private sector have been pursued.

In addition, public policies are now administered through increasingly complex networks, decentralised governance structures, public-private partnerships and cooperative ventures between NGOs, consultants and government. As a consequence, the traditional concept of the public service as a single, unified employer is slowly disappearing. Instead, the introduction of individual performance schemes and the decentralisation of responsibilities in Human Resources Management (HRM) make the public service a somewhat heterogeneous body.

Whereas for a long time, public organisations were very different from private companies, this is much less clear in the 21st century. Today, a distinction between the public service and business is more difficult to make because of many new forms of outsourcing, public-private partnerships, alignments of status, etc.

Thus, central government employment is increasingly complex and is most likely to become more complicated and probably more contradictory all the time. While expectations of government are increasing, the resources available to meet these expectations are diminishing.

Today, national public services no longer have a single, coherent paradigm or conceptual framework. “Disaggregation promotes decomposition of the civil service. Two concepts central to traditional management are now disappearing. One is that any particular government, whether federal, state, or local, should act as a single, unified employer. The other is the concomitant idea of a unified civil service”¹. Whereas once perhaps 80 to 90% of national public employees were subject to the same statutes and working conditions, today the number is declining².

The classical perception is still that the public services are seen as a “haven” of job security. The last decades, however, have seen an erosion of this “standard employment model” through the introduction of part-time work, fixed-term contracts, temporary-agency work and self-employment. Whereas many welcomed this development as a development towards more flexible labour markets, others were highly critical and pointed to the negative side-effects such as low income, flexible jobs, high job insecurity, and poverty in old-age. At the beginning of this century, the European Commission stepped in as a kind of broker by recommending to direct the European Employment Strategy towards a proper balance of flexibility and security, the so-called ‘flexicurity’ agenda.

On the other hand, the pace of change and growing uncertainties about the reform results in the field of public employment features and status developments generates more discussions on the need to preserve traditional structures, to keep the identity of civil servants and to maintain some specific (public law?) features that are different to the private sector and other public sectors. Especially harsh criticism of civil servants’ status at least in financial terms is not always justified. In a number of Member States the so-called “privileges” are also seen as a kind of compensation for excessive limitations on rights and freedoms they are subjected to. Civil servants

1 Rosenbloom/Kravchuk/Clerkin, Public Administration , p. 545.

2 Rosenbloom/Kravchuk/Clerkin, Public Administration, p. 546.

in some Member States cannot freely undertake additional employment or income-generating activities (even after dissolution of employment relationship), there are some restrictions regarding membership in political parties and/or trade unions. Moreover, disciplinary liability applied in the civil service does not exist in labour law. These aspects should also be taken into account in order to avoid a widespread misunderstanding concerning civil servants' legal and financial position.

The traditional question of which tasks and which functions should be performed solely by civil servants has never been answered definitively. In addition, the question as to the differences between public employees and civil servants is handled differently not only throughout the European Union, but also worldwide. At the national level, in some Member States, such as Denmark, Germany, Spain and Greece, either the constitution and/or constitutional courts' jurisprudence or the civil service act (or a combination) require the establishment of a statutory system of official employment. These requirements do not exclude the possibility of concluding normal employment contracts in the national civil services. However, public employment should normally consist of civil servants subject to public law and the employment of employees subject to labour law should be an exception. However, in reality, the possibility of employing staff in terms of employment contracts is NOT any more treated as an exception. Even more, it seems that the current reform trend is leading to a "pluralisation" of employment statuses, the decline of the classical civil service status and an increase of fixed-term employment.

Another development concerns the national inconsistencies as regards the employment of public employees in civil service employment positions (although many national civil service laws do not allow for the employment of public employees in civil service tasks). Several Member States apply different employment relationships in the same sectors and – sometimes – for the same professions. Furthermore, as mobility has increased and careers are in the process of being reformed (or even abolished), there is less reason to treat different groups of public employees differently. Therefore, some countries provide for derogation and exception clauses in their national civil service laws.

When considering the situation in all Member States, the following conclusion can be drawn: although most Member States apply a distinction between civil servants and other public employees and between public employees and private sector employees, this distinction as such is no longer decisive for deciding which tasks are carried out by whom. The conviction is growing that public employees can exercise important state tasks just as well or badly as civil servants under public law. Moreover, more Member States are of the opinion that specific legal and ethical requirements in the national civil services can also be adopted under labour law: the need to act impartially, specific ethical requirements, fairness, rule of law and standardised treatment, etc.

On the other hand, it is worth mentioning that many of the so called "new democracies" in the first phase of political transformation introduced a special status of the civil servant based on public law. The rationale behind this tendency is the belief that such a solution serves as a kind of a guarantee strengthening the implementation of the civil service core principles. During transformation period these values might be quite new for the previous organizational culture and need some reinforcement on a long run to become after some time more acceptable or even obvious.

On the other hand, the trend towards the employment of public employees with limited or fixed term contract risks to be in conflict with Art. 4 of Directive 1999/70/EC ("In respect of employment conditions, fixed-term

workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds”).

Here, pressures for alignment come from EU obligations. The case law of the European Court of Justice is also relevant. In cases like *Adeneler* (C-212/04) and *Del Cerro Alonso* (C-307/05) the ECJ ruled that employees with flexible contracts should not be discriminated against in comparison with permanent employees as regards aspects such as pay and the length-of-service allowance. In the future the case law on the interpretation of Directive 1999/70/EC may further blur the distinction between civil servants and other public employees.

As regards the latter, the Directive 1999/70/EC requires that employees in the public and private sectors should, as a principle, not be offered an unlimited number of limited contracts (provided that the objective reasons cannot be proved to be necessary). In fact, employees should be offered an unlimited contract after a certain period of employment. It is clear that the transposition of this Directive has led to a difficult alignment process in some Member States. The reason for this is rather simple: the Member States are to some extent forced to align of working conditions between civil servants and other public employees.

Despite the growing importance of EU law, each Member State still follows a specific, not always rational, national logic. As regards public employment and the employment of civil servants and other public employees, different national models have developed and brought their own paradoxes and complexities. On the other hand, EU case law (esp. case 268/06, C-307/05, C-444/09 and C-456-09 and C-273/10) puts more pressure on the Member States as regards the limited possibilities to use and apply fixed-term employment features.

Given the (growing) importance of this topic, we believe that this topic merits further examination amongst the DG's and within the EUPAN network.