

**Paul Minderhoud**  
**Centre for Migration Law**

**COMBATING NATIONALITY-BASED  
DISCRIMINATION IN THE MEMBER STATES  
AND THE IMPLICATIONS OF THE  
PROPOSED DIRECTIVE**

Radboud University Nijmegen





## Network on Free Movement of Workers

- The Centre for Migration Law of the Radboud University Nijmegen, The Netherlands, has coordinated under the supervision of the European Commission a European Network on Free Movement of Workers within the European Union until 1 January 2014. See for our activities:
- <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>
- One of the activities of this Network was the annual production of a European report on the implementation of EU free movement law in the Member States.
- Now new Network: FreSsco, Network on Free Movement of Workers and Social Security Coordination



## Legal Framework: Article 45 TFEU

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, subject 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.



## Legal Framework: Regulation 492/2011

Regulation 492/2011 has replaced Regulation 1612/68

Discrimination of EU workers on grounds of nationality is prohibited, in particular:

- access to employment
- working conditions
- social and tax advantages
- access to training
- membership of trade unions
- housing
- access to education for children.



## Proposed new Directive

Requires Member States to:

- create national contact points providing information, assistance and advice so that EU migrant workers, and employers, are better informed about their rights
- provide appropriate means of redress at national level
- allow trade unions, NGOs and other organisations to launch administrative or judicial procedures on behalf of individual workers in cases of discrimination
- give better information for EU migrant workers and employers in general.



## What are still the main obstacles?

Main obstacles from the reports of our Network:

- Tension free movement law and national immigration law
- Equality of treatment
- Access to employment in the public service
- Language requirements and recognition of diploma's and qualifications
- Access to study grants: response to case C-542/09  
*Commission v. the Netherlands*
- Frontier workers



## Impact and added value proposed Directive 1

- Underlines the importance of the issue of free movement of workers and recognizes that there are still problems to tackle despite the fact that there is formally an equality of rights

But 3 problems:

- -same weaknesses as other Equality Directives
- -depends highly on the willingness of Member States to take this Directive serious
- -not applicable to posted workers, where some of the most structural problems occur



## Impact and added value proposed Directive 2

- The structure and text of the provisions of the proposed Directive are highly similar to that of the Race Directive (Directive 2000/43).
- But no article similar to Article 8 Race Directive on Burden of proof
- No article similar to Article 15 Race Directive on Sanctions
- Same problems as mentioned in Implementation Report on Directives 2000/43 and 2000/78 of 17 January 2014





## Impact and added value proposed Directive 3

General problem of mobilizing rights:

- **Naming** = Become conscious of being the victim of discrimination, and defining the acts as such.
  - Knowledge of equal treatment rules
  - Knowledge of the facts, the context, the comparability
- **Blaming** = Hold the respondent responsible for the discrimination.
  - Knowledge of who is responsible
  - Not everybody can be held responsible
- **Claiming** = Start the procedure, either internally or externally.
  - Fear for retaliation, worsening the relation



## Impact and added value proposed Directive 4

Not applicable to posted workers

- A worker is "a posted worker" when he is employed in one EU Member State but sent by his employer on a temporary basis to carry out his work in another Member State. There is an employment relation between the undertaking making the posting and the worker during the period of the posting
- Fall under the scope on of article 56 TFEU (freedom of services) and Directive 96/71 concerning the posting of workers
- Lower set of rights than under article 45 TFEU and Regulation 492/2011



## Good Practices

- Interferences of Dutch trade union defending the rights of EU migrant workers facing discrimination based on nationality. Support in legal procedures
- Publication Dutch government of a leaflet with information on the rights of workers (like labour conditions and working hours rules), but also on membership of a trade union, education, learning the Dutch language and on the possibilities of housing, translated in all EU languages: [www.newinthenetherlands.nl](http://www.newinthenetherlands.nl)  
Special website Dutch Immigration authorities providing information in English for new migrants from other countries (including EU Member States) on education, employment, permits and visa, social security, taxes and vehicles: [www.newtoholland.nl](http://www.newtoholland.nl)
- Report Netherlands Institute for Human Rights (the Dutch Equality Body), entitled *Polish labour migrants in a human rights perspective*



## Conclusion

- Free movement of workers is a valuable principle
- Formal equality is not material equality
- Legislation alone is not enough to ensure full equality, so it needs to be combined with appropriate policy action. See Implementation Report on Directives 2000/43 and 2000/78 of 17 January 2014 (COM (2014) 2 p. 16
- Challenge for governments, trade unions and NGO's
- Challenge for Equality Bodies to play an active or even a pro-active role