

Who's a National and Who's a European? Exercising Public Power and the Legitimacy of Art. 39 4 EC in the 21st Century



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Summary

The European Union has experienced dramatic internal and external changes within the last few decades. These changes have deeply affected and changed the traditional concepts, meaning and importance of the principles of sovereignty and nationality. The discussion about the pros and cons of the exception clause to the free movement of workers principle (Art. 39.4 EC) has to be seen from a national and European point of view. Although we agree that there is no reason to transfer to the EU tasks and functions which could be better dealt with on a national basis (e.g. competence to regulate national civil services), this does not apply to the provisions of Art. 39 EC. Today, the number of civil servants moving throughout the Union is very low – a situation which is unlikely to change in the future. This implies that even if Art. 39.4 were deleted there would be no massive increase in mobility in Europe.

In addition, a number of developments have taken place in the past few decades which have rendered Art. 39.4 EC old fashioned. Today it poses artificial obstacles to the free movement principle and is more and more difficult to justify. We therefore propose that Member States should restrict its provisions to specific areas of the public sector.

A. Introduction

Art. 39 EC states that freedom of movement for workers shall be secured within the Community. The provisions of this Article do not apply to employment in the public service (Art. 39 4 EC) and national administrations therefore have the opportunity to restrict certain posts to nationals. This means that EU nationals can be barred from accessing certain posts in the civil services of the Member States. Art. 39 4 EC is one of the last “dinosaurs” of the Treaties, having not been changed or modified since the Treaties of Rome. Looking at the integration process over the last few decades it is striking that no politician has “touched” upon this Article in 50 years. Also, the negotiations on a future European Constitution will not modify it. In the final report of Working Group V to the Members of the Convention, the following recommendation was made: “The provisions in TEU Article 6 (3) that the Union respects the national identity of the Member States should be made more transparent by clarifying that the essential elements of the national identity include, among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding languages; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces”.¹

Although the national public services are not explicitly mentioned, they too (at least partly) belong to the fundamental structures and essential elements of the national identity and will continue to be regulated solely under national law and not under Community law.

Why will the provisions of Art. 39 not to be applied to employment in the public sector? What do the Member States fear? Why should certain positions in the public sector be restricted to nationals? What is a national nowadays and for who will certain posts be reserved?

This article will discuss all relevant arguments in favor and against Art. 39 4 EC. Our approach is twofold: First we will examine why the public sector should be restricted to EU officials – and why not. Second, we will question the notion of “a national” and “a citizen”.

The authors take the reader into an area of extraordinary complexity and into a discussion which is – from a political point of view – extremely sensitive. At the end, we will discuss how and to what extent the Article should be modified and reformulated.

B. Art. 39 on the free movement of workers

In the chapter of the EC Treaty devoted to the free movements of persons, Article 39 establishes the fundamental principle of the freedom of movement for workers within the European Union.

Freedom of movement is part of the broader concept of the single market and the objective to reach an ever closer union. Ideally, citizens should not be hampered in their movements. The right of free movement is firstly described in Art. 18 of the Treaty, which states:

“Every citizen of the European Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty...”

However, the principle of free movement of persons

still lags behind the other freedoms. Workers, self-employed persons and service providers, for instance, enjoy more rights than students, retired people and civil servants.² The limitations on free movement also illustrate the fact that the EU is still mainly an economic community, and is not yet a Union for citizens.

Article 39 paragraph 1 EC provides that “Freedom of movement for workers shall be secured within the Community.” And 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”. Paragraph 3 provides that freedom of movement “shall entail the right, [...] to accept offers of employment actually made; to move freely [...]; to stay [...]; to remain [...] in the territory of a Member State.”

In the past few years it has become evident that state restrictions on citizens moving freely within the EU and among third-countries are creating increasing economic drawbacks for the country in question. For example, in the Dutch Civil Service Dutch nationality is required for a very limited number of posts. If non-nationals are excluded no distinction is made between citizens from the EU and third-country nationals. This non-distinction is interesting; one reason for it is the fact that there is a real shortage of personnel in some (public) sectors in The Netherlands. Other EU countries face even bigger challenges in attracting a sufficient number of public employees due to the aging of their populations.

Problems in recruiting talented and qualified staff will most likely affect more and more areas, especially the armed forces, the police, the social sector, teachers and the research sector.³ Therefore, Member States open up their civil services to the private sector and introduce measures to increase the mobility between the private and the public sector. Within this logic it is also important to create a European employment market and fill vacant positions with candidates from EU countries and especially from those where recruitment problems do not exist in a given sector. Finally, from an ethical point of view, it is difficult to argue in a consistent way that the public service should be opened up for (national) managers from the private sector (and vice versa), but not for senior officials from other Member States.

C. The scope of Article 39 4 EC and its legal interpretation

Paragraph 4 of Article 39 specifies that “The provisions of this article shall not apply to employment in the public service.” Article 39.4 makes employment in the public service an exception to the free movement of workers within the Community.

Otherwise the Member States could avoid the principle of freedom of movement by “restricted interpretations of the concept of public service which are based on domestic law alone”.⁴ This would obstruct the application of Community rules. The demarcation of the public service exception can not be left to the discretion of the Member States.⁵

The tasks carried out by specific post-holders are decisive. In the case *Commission vs. Belgium*, the European Court of Justice identified two types of posts for which freedom of movement can be excepted: those which involve direct or indirect participation in the exercise of powers conferred by public law, and those in which duties are designed to safeguard the general interest of the state or of other public authorities.

It is obvious that both criteria (the exercise of powers conferred by public law, and the responsibility for safeguarding the general interest of the state or other public bodies) together (meaning “and” instead of “or”⁶) determine whether posts fall within the scope of 39.4 EC.

According to the European Court of Justice the exception laid down in paragraph 4 has to be interpreted “very strictly”.⁷

By case law, the following jobs do not fall within the scope of the public-service exception: postal services: workers;⁸ railways: shunters, loaders, drivers, plate-layers, signalmen, office cleaners, painter’s assistants, assistant furnishers, battery services, coil winders, armature services, night-watchmen, cleaners, canteen staff, workshop hands;⁹ municipal councils: joiners, garden hands, hospital nurses, children’s nurses, electricians, plumbers;¹⁰ state hospitals: male and female nurses;¹¹ state education: trainee teachers,¹² secondary school teachers,¹³ foreign language assistants in universities;¹⁴ civil research: researchers.¹⁵

The Commission decided in 1988 to implement a “strategy” for the elimination of restrictions on the ground of nationality on the basis of Communication 88/C 72/02: Freedom of movement of workers and access to employment in the public service of the Member States.¹⁶

The Commission considered that the derogation of Article 39.4 EC covered specific functions of the state and similar bodies in the following categories: the armed forces, the police and other law enforcement bodies, the judiciary, the tax authorities, and the diplomatic corps. Furthermore, the public service exception covers jobs in state ministries, regional authorities, local authorities, central banks, and other public bodies where the duties of the post in question involve the exercise of state authority (such as the preparation, implementation and monitoring of legal acts, and the

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supervision of subordinate bodies). The position of the Commission as regards the interpretation of Art. 39 4 EC has developed since 1988 and today interpretation is stricter and more precise than it was then.

In the Communication “Free Movement of Workers – achieving the full benefits and potential”, the European Commission also made clear that not all jobs in state ministries, regional authorities, local authorities and central banks fall within the scope of Art.39.4.¹⁷ For example, all technical, administrative and secretarial jobs would fall outside its scope. In addition, it is important to note that not all posts that involve the exercise of public authority and responsibility for safeguarding the general interest shall be restricted to nationals. For example, “the post of an official who helps prepare decisions on granting planning permission should not be restricted to nationals of the host Member State”.¹⁸

Bossaert et al estimate that between 10% to 40 % of public service posts are “restricted posts”.¹⁹ The latter figure especially seems much too high when considering the interpretation of Art. 39 4 by the ECJ. For example, this would amount to more than one million restricted jobs in France alone.

Another reason for the different interpretation of Art. 39 4 ECT can be found in the hugely different numbers and percentages of public law posts which might be considered (from a first point of view) to fall under the public employment restriction. Whereas in France, almost five million employees are considered to be civil servants under public contract (fonctionnaires titulaires), the number of Beamte in Germany is approx. 1,7 million and in the United Kingdom 500.000.²⁰ Contrary to this, in Sweden only a couple of hundred of public employees can be considered civil servants under public contract. However, from a European perspective, the question of whether employees have a public or private contract does not play a role.

Whatever the right figure, the Member States and future Member States apply the provisions of Art. 39. 4 EC very differently. In Poland, the law on the civil service of 18 December 1998 states: “Any person who is a Polish citizen may be employed with the Civil Service...”. In Romania, Art. 16 paragraph 3 of the Constitution stipulates: “the functions and the public dignities can be occupied only by persons who have

Romanian citizenship...”. Also the law on the public service in Lithuania stipulates in Article 9 that only citizens of Lithuania have access to the public service. We will not discuss here whether this broad exclusion of “foreigners” from the public service would be in accordance with the requirements of the ECJ as regards Art. 39 4 ECT. More interesting is the fact that almost all European Countries restrict access to the public service

Public service employment within the scope of article 39.4 EC

<i>European Court of Justice</i>	<i>Jobs which involve:</i> <i>a) the exercise of powers conferred by public law, and</i> <i>b) responsibility for safeguarding the general interests of the state or other public bodies</i>
<i>European Commission</i>	<i>Armed forces</i> <i>Police and other law enforcement bodies</i> <i>Judiciary</i> <i>Tax authorities</i> <i>Diplomatic corps</i> <i>Jobs in the state ministries (restricted)</i> <i>Regional authorities (very restricted)</i> <i>Local authorities (very restricted)</i> <i>Central banks (very restricted)</i> <i>Other public bodies where the duties of the post involve the exercise of state authority</i>

for nationals to certain sectors or positions. For example, the Czech Republic restricts access to the armed forces to persons with Czech nationality. In Germany all posts in the public service are open to EU nationals within the meaning of Art. 116 of the Basic Law. In derogation from this principle, only Germans may become civil servants if the position concerns the exercise of public tasks which, because of their specific content (and in accordance with the jurisprudence of the ECJ on Art. 39 4 ECT) must only be performed by Germans. Other EU Member States have similar legal provisions. For example, on the 31 January 2002 the Conseil d’Etat in

France interpreted Art. 39 4 as follows: “Doivent être regardés comme inséparables de l’exercice de la souveraineté ou comme participant directement ou indirectement à l’exer-

cise de prérogatives de puissance publique de l’ETAT ou d’autres collectivités publiques: a) d’une part, l’exercice de fonctions traditionnellement qualifiées de régaliennes: b) d’autre part, la participation, à titre principal, au sein d’une personne publique, à l’élaboration d’actes juridiques, au contrôle de leur application, à la sanction de leur violation, à l’accomplissement de mesures impliquant un recours possible à l’usage de la contrainte, enfin à l’exercice de la tutelle”. This

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interpretation includes the ministries of defence, budget, economy, finances, justice, interior, police and Ministry of Foreign Affairs. But only posts in these ministries which are in conformity with a) and b) may be restricted to nationals. For all other authorities, access to posts is open as long as a) and b) are not affected.

Most countries apply a different interpretation to that of the Conseil d'Etat, with broad restrictions applied to the (top) political, police, judiciary and diplomatic sectors.

Some Member States have clear guidelines as to which posts Art. 39.4 should apply, whereas other Member States interpret the application of the Article on a case by case basis.

According to EUROSTAT, the number of EU nationals in the Member States varies between 0,5% and 5,5% of the total population (excluding Luxembourg).²¹ Only a few Member States provide figures for the number of EU nationals working in the public services of other Member States. What is known, though, is that the vast majority of those EU nationals working in the public sectors of other countries are teachers or researchers. The number of civil servants moving throughout the Union seems, however, to be very low. This implies that even if Art. 39.4 were deleted there would be no massive increase in mobility in Europe.

D. Between globalisation and national tradition.

The legitimacy of Art. 39 4 EC

How is it possible to justify Art. 39 4 EC if non-nationals in the Member States are allowed to work in nuclear power stations, the weapons industry or military research (as long as they pass security checks), but not in some positions in the public service? This example shows that – in the 21st century – Art. 39 EC faces tremendous difficulties when it comes to the legitimacy of paragraph 4.

So what is the reason for excluding civil servants from the rights of free movement in the 21st century? What do Member States fear? What is the sense of excluding public administrations from the free movement principle if the European Union is based on the principles of democracy, union citizenship, internal market? What do we fear if a French senior official would like to work in a senior position in Berlin? Do we fear that this person will “betray” the Germans? Will this person violate German sovereignty? One has to recall here the change of the notion of sovereignty between 1945 and 2003. For example, the Elysée Treaty between France and Germany promotes the exchange of officials at all levels and even between the Ministries of Foreign Affairs. Questions of “the need to safeguarding the national interest” are not mentioned in this bilateral

treaty. Contrary to this the Elysée Treaty as amended on 22/23 January 2003 illustrates the tremendous progress in administrative, diplomatic and legal cooperation between these two countries. Both have established (or are in the process of establishing) a common bi-lingual television (ARTE), a so-called EUROCORPS (composed of 50000 French, German, Spanish, Belgian and Luxembourgish troops). Both countries regularly exchange staff

of the national police. They envisage the possibility of having dual nationality, promoting the idea of a European Prosecutor and seeking to harmonise – in essential policy sectors – national legislation. They also consult on the preparation of important law projects. Finally, it is proposed to establish common diplomatic missions and embassies. Impressive indeed!

Another argument which is often mentioned is the need to preserve the principle of the rule of law and the principle of democracy. Could it be e.g. that an Italian, Greek or Swedish senior official moving to the British senior civil service would jeopardise or violate these principles simply because of his/her different nationality? This argument was certainly valid for a long time, at least from a theoretical point of view. Today, however, the Treaty of the European Union clearly states that all Member States must be built on the principles of democracy and the rule of law. Art. 6 1 EUT provides that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” These principles apply to all Member States. Moreover, Art. 17 EC provides that “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby” and allows EU citizens to participate in local elections as well as elections to the European Parliament. Thus, the danger that foreign officials do not respect classical principles of the civil service (merely because of the fact that they are foreigners) can be almost excluded.²²

Also, one of the most traditional characteristics of national sovereignty is about to change: the diplomatic sector and the diplomatic representation. Art. 20 EC provides for the diplomatic protection of EU citizens by all other diplomatic missions of the Member States. Scandinavian countries especially are “merging” their embassies into one building – a Scandinavian embassy. It is well known that the embassies of the Benelux countries, The Netherlands and Belgium, also represent

the state of Luxembourg. Moreover, Luxembourg officials are from time to time represented by Dutch or Belgian officials in Council of Ministers working groups. The rules of procedures of Council working groups explicitly provide for the possibility of delegating voting rights to other delegations.

Also, the differences in positions e.g. in the Iraq crisis and the lack of a common foreign and security policy do not lend a strong argument for the need to maintain Art. 39. 4 EC. Contrary to this, politicians of almost all Member States continue to promote the idea of a European Common and Foreign Security Policy and to further “Europeanise” the Justice and Home Affairs portfolio. Especially in the military area, Member States continue to build up common corps, such as the German-French or the German-Dutch corps, and projects are under way to create more common military bodies. On the national level, more and more foreign police officials are employed, especially in bigger cities, since they are much better suited to deal with the increasing number of foreigners (e.g. Turks in Berlin) than national policemen are. Especially in this field, developments have created new practical realities which have surpassed the legal reality. It seems that, as time passes, the classical doctrine of “sovereignty” is becoming blurred.

E. Restricting certain posts to nationals.

Who is a national in the 21st century?

In all Member States and future Member States, the concept of reserving certain positions for nationals is based on the traditional nation-state philosophy. Art. 39. 4 EC, which allows for this restriction, stems from the 1950's when it was apparently relatively easy to define sovereignty, nationality and citizenship. Nowadays, the concepts of sovereignty, nationality and citizenship have drastically changed. For example, in Italy access to the position of a senior employee in the national central bank of Italy is reserved for Italian citizens. This restriction is certainly in accordance with the case law of the Court of Justice and was at the time undisputed since Italy was “sovereign” in monetary affairs. Today, the introduction of the euro and the creation of the European Central Bank have fundamentally changed (not only) the importance of the position of a “central banker”, and within this also the question of whether this position needs to be reserved for a national. Other important developments have taken place since then. Art. 13 EC provides a legal basis against all discrimination because of race, sex, religion or ethnic origin. The introduction of this Article in the Treaty was an important step forward and a measure towards less discrimination of whatever kind in our societies. The question is, of course, what is an ethnic minority? In the case of The Netherlands, this would be, for example, employees of Surinam or the Dutch Antilles (in The Netherlands today approximately 500000 citizens are of origins of Surinam). In 2001, 7,7% of persons working in central government belonged to an ethnic minority²³ (The Netherlands has an ethnic minority employment quota of 8%, which should be met by each employer).

These people have – at least in theory – access to all posts. But why then should EU nationals not be treated in the same way as an ethnic minority?

The fact that almost all European countries restrict access to at least some positions in the public sector raises the question: who is a national and who is a citizen? Currently, there are two levels of EU citizenship – EU nationals who live in their country of origin, and EU nationals who have exercised their right of free movement in the EU. Today, the first category enjoys full civil, economic and political rights (and duties), whereas the second category enjoys restricted rights (and limited duties).

The prevailing interpretation of European citizenship originates from a 19th century philosophy that links implementation of citizenship and free movement to financial status. The rights of free movement are also linked with the nationality of citizens. It is up to the Member States to define the notion of nationality.

Things are more complicated when looking at the millions of people (the so-called German minorities) who migrated into Germany from Russia and Romania. Whereas other countries would define these immigrants possibly as non-nationals, Germany considers them as Germans, although most of them were not born in Germany and have a Russian or Romanian citizenship. Their status thus shifts from “foreigners” to “nationals”. Since these people have become citizens of Germany, they enjoy all the rights and duties of German citizens. At the same time, they are EU citizens and enjoy the same rights as French, Italian or Spanish citizens who are living in their countries. On the other hand, the status of Czechs living in Slovakia has changed from “national” to “foreigner”. Lithuanians living in Latvia have seen their nationality change from “Russian” to Lithuanian. In all these cases, access to certain posts may now be limited because of the change of status in the last 15 years.

If a French national is born in Germany, he might have French nationality and not German nationality, although things might be different in Ireland, where until recently all people born in the country were given Irish nationality. Ireland is an interesting case: there are about 10 times the number of Irish living in the US (people of Irish origin who have US nationality) as there are living in Ireland.

If they wanted to move to Ireland, they would receive Irish nationality relatively easily, as long as they could prove they have Irish ancestors.

The question of who is a national becomes more complicated when looking at the average number of years foreigners spent in their hosts countries and the number of cross-national marriages and inter-ethnic issues. Just like in the United States, where it becomes more and more difficult to define “blacks” and “whites”, it becomes increasingly difficult to clearly identify the “classical national” in the EU. More than 50% of all foreigners in Germany have lived in the country for more than 10 years, with 23% for 30 years and longer²⁴. In addition, in 1960, almost every marriage in Germany

was between two Germans, with only 4% of marriages between different nationalities.²⁵ In 1995, about 15% of all marriages are so-called mixed marriages.²⁶ In 1960, only 1,3% of all children born were of a “foreign” father and mother. In 1995, this figure had risen to 19,2%.²⁷ If these children have two nationalities, new complexities emerge, since the children of – let’s say – a German father and a Spanish mother appear as Spaniards in the Spanish statistics and Germans in the German statistics.²⁸

Today 17% of the population in The Netherlands are either born in a foreign country or have a “foreign” mother or father, but 5% of the Dutch population has no Dutch nationality.²⁹

These figures demonstrate that it is increasingly difficult to define who is a national and what is an ethnic minority. For example: a Portuguese from East Timor or Macao is considered to be a Portuguese,³⁰ but a German Turk who is born in Germany and has never been to Turkey in his life has Turkish Nationality. These cases illustrate that our societies are becoming more and more multinational and multi-cultural. This development raises some interesting questions and reveals some paradoxes:

For example, of the approx. 800000 Algerians living in France, 300.000 also have French Nationality.³¹ Most of them are muslims. Because of their nationality and the principle of non-discrimination they deserve equal treatment with their French compatriots and

can apply for all jobs in the French administration. But why then not Italians, Spaniards or Dutch etc. officials? In a recent judgment, the Court of Justice took a decision in relation to private posts, which involve some exercise of public authority. The judgment concerned private security guards who do not form part of the public service, and the Court therefore ruled that Art. 39 4 EC is not applicable. Although these developments have led to a fairly wide opening of the public sector to EU nationals, it is still not clear whether other private sector posts to which the state assigns public authority (e.g. captains of fishing ships, who exercise police functions) fall under Art. 39 4 EC. On the other hand, all of the above mentioned four groups (French-Algerians, Italians, Spaniards and Dutch) could apply for any senior post in the OECD in Paris. In addition, they would also be allowed to apply for any (senior) position in most international organisations (e.g. the WTO or the UN) worldwide. Although these authorities are international organisations, some of the tasks and functions they carry out are of utmost political, economic or legal importance. Consider, for example, a senior official in the WTO who is responsible for important trade negotiations with the

United States. These examples show the need for a modification of Art. 39 4 EC and not merely for more legal interpretation and case-law by the Court of Justice.

F. The need for Art. 39.4 and the need to reform.

The dilemma.

All of the arguments presented make clear that Art. 39 4 EC does not “fit” in the modern world of the 21st century.³² Modifications are certainly necessary. But how far should they go? What would happen if Art. 39. 4 was entirely deleted? What are the arguments in favour of keeping at least certain restrictions? Before answering these questions it is helpful to recall certain facts: although the public administration network of the EU Member States (Directors-General of Public Administrations) has become more important over the last few years, the competence to deal with public services and HRM has stayed almost entirely in the hands of the Member States. Art. 39 4 EC can thus only be understood when taking into consideration that the EU Treaty does not provide for any competence in the field of national

public services (apart from the impact of Art. 136 EC to Art. 141 EC and some secondary legislation).

The civil service has traditionally been a national matter. Despite all the modernisation and “Europeanisation” trends, the civil services of the Member States remain very different. The emergence of a European model of public administration or even a European Administrative Space is therefore very unlikely to be seen in the near future.³³ Still, every Member State is keen to preserve its own concept of the civil service based on its tradition, culture and history. For example: despite the fact that almost all Member States align the pension systems for civil servants to those in the general labour market, implementation of the measures and policies is remarkably different.

Even in the area of international administrative cooperation, the Member States of the EU have never agreed to change the informal character of the European Public Administration Network (EPAN) and turn it into more formalised structures. Art. 39 4 EC is in this way a logical consequence, since it should serve the autonomy of the Member States.

It seems to be the modern paradox of our societies that people continue to expect – despite all globalisation, internationalisation and modernisation trends – their national governments to stabilise the economy, to protect them against enemies and terrorism, to insure them against unemployment, poverty and illness and to determine the amount of taxes, to improve education and to promote public safety. Despite a growing distrust in “Government” and (on the other hand) the growing

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belief that nation-states lose the capacity to “steer” national societies, it is unlikely that other structures or even international organisations (e.g. the EU) are likely to replace the classical nation state. In addition, the European Court of Justice justifies Article 39.4 with the existence of a special relationship of allegiance to the state and reciprocity of rights and duties from the foundation of the bond of nationality.³⁴ Another argument is the principle of democracy and the rule of law. Since the power of the state comes from the people, the implementation and interpretation of the law should be done by those people who represent the peoples’ nationality. Therefore the laws and their implementation should also come from the people and their nationals. This is even more true since the EU is not yet a fully fledged democratic power and the power of some of its institutions comes only indirectly from the people.

In fact, the nation-state will survive not only because of people’s expectations, but because of people’s needs. The nation-state is perceived not only as an instrument, but also as an entity with two deep human values which find an expression in nationhood: belonging and individuality. As Weiler writes in *The Constitution of Europe*: “At a societal level, nationhood involves the drawing of boundaries by which the nation will be defined and separated from others. The categories of boundary-drawing are myriad: linguistic, ethnic, geographic, religious, etc. The drawing of the boundaries is exactly that: a constitutive act, which decides that certain boundaries are meaningful, both for the sense of belonging and for the original contribution to the nation”.³⁵ As a recent Eurobarometer survey (2003) shows: 90% of the EU population feels attached to their countries, 87% to their town or village, 86% to their region and 45% to the European Union.³⁶ One reason for Art. 39 4 is therefore purely philosophical. People need “boundaries” to build their identities.

It is precisely because of this that new nations have emerged in Europe since 1989. The silent revolutions at the beginning of the nineties have demonstrated that citizens in Europe have preferred the (re-)building of traditional nation-states. Only in a second step did the integration into international structures follow – not the other way round!

The broadening European Union is facing a delicate development since it does not offer enough incentives for the people to identify with. For many, the EU with 25 Members is perceived as a technocratic monster and as an instrument that destroys “boundaries”. It is an instrument of modernity and a mechanism for change, but not one which offers stability and identification.

From this point of view, we get a new understanding of why the free movement of workers principle should not be opened up completely. It may be difficult to argue in favour of Art. 39 4 EC from a political, legal and even

economic point of view, but the cultural and philosophical argument stands!

If Art. 39 4 were abolished, all EU nationals would have access to all jobs in the Member States and also to senior jobs in all sectors and at all levels. Let’s put this to a test: could a French official represent the United Kingdom in a Council of Ministers working group in Brussels? Let’s assume the United Kingdom takes a

different position from France on a highly delicate dossier. What kind of position would this person take?

What would happen if a (former) Irish official negotiating on behalf of the German Government negotiated Art. 3 of the Water

Framework Directive 2000/60/EC? Would he be aware that this Article might be in conflict with the principle of federalism in the German Constitution (Art. 79.3 GG)? What if EU citizens of highly centralised countries move to countries in federal states (e.g. Belgium)? Would they be aware of the need to communicate and co-ordinate with several authorities and parliaments? What if a Finnish official had to negotiate a development programme for South America on behalf of the Spanish Delegation? Or a Dane deal with an Algerian case on behalf of France?

One author of this article is of German nationality, with a Dutch Mother, and could easily acquire Dutch nationality. However, even if the nationality were changed, it would be hard to imagine that a special “feeling” for the Royal Family could be developed. Rather, it seems that the author’s own identity as a Republican would endure.

Identities and values are difficult to change overnight, but these cases show that – if Art. 39 4 were abolished – the emergence of personal dilemmas and even conflicts of loyalty could not be excluded, especially in those cases where senior positions in other countries would be open to everybody.

And what about the army? That also has potential for conflicting loyalties, if one considers for example the Iraq crisis (war). Since positions in Europe are so different it seems difficult to imagine how a Frenchman could command an English corps in Iraq, even if he would agree to do so.

Another argument in favour of Art. 39.4 is the fear of cross-border migration. This argument can be well founded in some cases and especially for very small countries who are scared that the integrity of the state is put into question. What will happen in Luxembourg³⁷ or other small future Member States (Malta, Slovenia) if free movement in the civil service is allowed? Will they lose their identity? Will Luxembourg be governed by French, German, Dutch or Belgian civil servants?

We see from these arguments that, although it may be relatively easy to criticise Art. 39.4, it is also important to justify upholding some restrictions.

In fact, the nation-state will survive not only because of people’s expectations, but because of people’s needs.

G. Where to draw the line? National identity and the free movement of workers

As we have seen, nationality, citizenship, sovereignty and public service are not static concepts.³⁸ They evolve and change over time, although they are very much linked to national structures, power and tradition. We all know this if we have to explain the identity of our country and the people of our country. We know that they are different from other cultures, regions and countries, but when we have to define and explain it, the difficulties become apparent. Because of these problems, there are only a few empirical studies that measure national pride, identity, nationalism and racism.³⁹

It seems natural that everybody develops a solidarity with a group of people with the same (or similar) language, cultural heritage, symbols, religion, literature and attitudes. The importance of this need to belong can be seen if we try to prohibit it. Numerous ethnic conflicts have shown how problematic it is to merge groups (sometimes by force) with different cultural heritages.

Because of this it is important to protect and to respect local, regional and national differences. However, another question arises: are the cultural and ethnic differences in Europe such that it would be important and useful (from an economic and political viewpoint) to concentrate on the existing differences as symbolised by Art. 39 4 EC (e.g. the Dutch are different from the French), rather than on those elements which we have in common (we are all Europeans with a common cultural heritage) and the emergence of new trends and identities (e.g. by the way of a European citizenship)?

A further question concerns how the different European identities change over time and how they overlap. What about a French national and citizen from the city of Strasbourg and a German citizen from the city of Kehl on the other side of the Rhine, who does his/her shopping every day in Strasbourg? Do these citizens from Strasbourg and Kehl have less in common than those from Strasbourg and Toulouse or – on the other side – from Kehl and Hamburg? What about a German-speaking Italian citizen of Bolzano and an Austrian in Innsbruck? Do they have less in common than a citizen of Palermo who is applying for a job in Bolzano? What about a Spaniard from Malaga or a Brit from Gibraltar? Or what about Irish in Dublin and Brits in Belfast?

Obviously, these cases prove nothing and there are no answers to the questions. What they show, however, is that identities are never “pure”. Local, regional, national and even European identities are constantly changing and fluid. Identities are also based on emotions and are dependent on what individuals want and need,

but it is impossible to measure them scientifically. Even if cultural differences must and will to exist, “pure national identities” are unlikely to continue and are changing over time into new identities. At this point one should also not forget that the modern nation state is also a product of modern times.

Although it is unlikely that the European nation-states will soon merge into a new European superstate, the more European countries co-operate and “live together” the more they will also develop new identities. Especially in this small and densely populated Europe, languages, religions and traditions are very much related to each other. The times of cultural homogeneity are over – even in homogenous countries like Finland and Ireland. These thoughts lead us to the following conclusion: Art. 39 4 ECT in its present form does not reflect changes in national identity or in politics, culture, economics etc. It represents a view of nation, sovereignty and identity which belongs to the past.

H. Conclusions and Recommendations

Art. 29 TEU states that “without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice...”. Whereas the Union and the Member States have focused on the issue of security over the past few years, this has not been the case in the area of freedom. It is now time to develop and to enhance the concept of freedom. On the other hand, the implementation of the free movement of workers Article in its present form still meets tremendous difficulties. In the past few years the inter-governmental working group (now called HRM group) of the Directors-General of Public Service were invited to examine the situation and to suggest how it could be improved. During their work, all existing obstacles to

the free movement principle (e.g. language requirements, difficulties in recognising professional experience, the recognition of diplomas, mid-career access etc.) were analysed. In addition, information was provided to the Member States, and national contact points were established to help improve the situation. The work of the group was completed under the Danish Presidency in the year 2002.

However, its mandate did not extend to making suggestions for modifying the Article.

The discussion about the pros and cons of Art. 39.4 EC has to be seen from a national and European point of view. We agree that there is no reason to transfer to the EU tasks and functions which could be better dealt with on a national basis. In addition (and as we have seen) questions of national identity and national tradition

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continue to be of utmost importance for citizens of the EU. We therefore agree with the above-mentioned Working Group V to the Members of the European Convention that some principles should remain under the exclusive responsibility of the Member States.

At the same time a number of developments have taken place in the past decades which have rendered Art. 39.4 EC old fashioned. Today the Article poses artificial obstacles to the free movement principle.

Art. 39.4 EC could therefore be reformulated as follows:

“The principle of freedom of movement of workers applies to public and private employment. However, Member States may restrict the provisions of this article only to those positions in the armed forces, the diplomatic corps, the judiciary and central and regional ministries that are entrusted with the direct preparation and decision-

making of national and international laws and judgments as well as their direct implementation and judicial interpretation”. Within this, it is important to note “that even if management and decision-making posts which involve the exercise of public authority and responsibility of safeguarding the general interest of the State may be restricted to nationals of the host Member State, this is not the case in relation to all jobs in the same field”.⁴⁰ For example, the post of an official who only indirectly *prepares* decisions (e.g. as a member of a national delegation in a Council of Ministers Working group) should not be restricted to nationals.

This new version would still be open to interpretation. However, we do not see convincing arguments which would justify the exclusion of other functions or sectors such as police, tax authorities, jobs in local authorities, central banks etc.

NOTES

¹ The European Convention, The Secretariat, CONV 375/1/02 of 4 November 2002.

² See Case Case Grzelczyk 194/99 and Case Martinez-Salsa C-85/96.

³ See Demmke, C., Die Herausforderungen der demographischen Entwicklung: Einstellungspolitik als Weg zur Bestimmung der Attraktivität der öffentlichen Beschäftigung, unpublished Study, EIPA, Maastricht 2002 (also published in English and French).

⁴ Case 149/79 Commission vs. Belgium, paragraph 19.

⁵ Case 149/79 Commission v Belgium, paragraph 18; Case 152/73 Sotgiu.

⁶ This is our interpretation of the case law of the ECJ and the word “and”. We have seen no case yet where the ECJ has used the word “or”. See for example Case 307/84 Commission vs. France, paragraph 12; Case 66/85 paragraph 27.

⁷ Case 66/85 Lawrie-Blum vs. Land Baden-Wuerttemberg.

⁸ Case 152/73 Sotgiu, paragraph 4.

⁹ Case 149/79 Commission vs. Belgium.

¹⁰ *ibid.*

¹¹ Case 307/84 Commission vs. France.

¹² Case 66/85 Lawrie-Blum.

¹³ Case 4/91 Bleis.

¹⁴ Case 33/88 Allue sv Coonan.

¹⁵ Case 225/85 Commission vs. Italy.

¹⁶ Communication 88/c72/02 Freedom of movement of workers and access to employment in the public service of the Member States. Commission action in respect of the application of article 39.4 of the EC Treaty OJ 1988 C72/2.

¹⁷ European Commission, Communication from the Commission, COM (2002) 694 final, 11.12.2002.

¹⁸ Communication, *op.cit.*, p. 19.

¹⁹ Bossaert et al., Civil Services in the Europe of Fifteen, Trends and Developments, Maastricht, 2001, p.4.

²⁰ see United Kingdom Cabinet Office, Civil Service Statistics 2001.

²¹ Also, these figures do not include France and Greece. Eurostat, European Social Statistics – Population, 2002, Population Structure.

²² Kaemmerer, J.A., “Europaeisierung des oeffentlichen Dienstrechts”, EuR 2001, p.39.

²³ Lanting, B.B.B./Pennings, F.J.L., Status and Mobility of the Public Administration Staff in The Neherlands, Final Report for the Netherlands, unpublished paper 2002, p. 24.

²⁴ Statistisches Bundesamt Deutschland, Ausländische Bevölkerung in Deutschland, 2. April 2003.

²⁵ E. Beck-Gernsheim, was kommt nach der Familie?, München 1998, p. 155.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ Beck-Gernsheim, *op.cit.*, p. 163.

²⁹ www.isoplan.de/aid/2002-2/europa.htm

³⁰ Macau was Chinese territory under Portuguese administration until 1999, when administration was given over to China. East-Timor was Portuguese territory before Indonesia took it over, which Portugal never recognised.

³¹ Le Monde, 3 March 2003, p.3.

³² q.v. Prof. Alber, S., “Das europaeische Recht und seine Auswirkungen auf den oeffentlichen Dienst”, ZBR 2002, pp.229.

³³ Pollitt, C., Convergence: The useful Myth?, in: Public Policy and Administration, Vol. 17, No.2, Summer 2002, pp.933; Ziller, J., European Models of Government: Towards a Patchwork with Missing Pieces, in: Parliamentary Affairs, Vol. 54, 2001, pp. 102; Demmke, C., Undefined Boundaries and Grey Areas: The Evolving Interaction between the EU and the National Public Services, in: EIPASCOPE 2002, No.2, pp.8.

³⁴ Case 149/79 Commission vs. Belgium paragraph 10; Case 66/85 Lawrie-Blum.

³⁵ J.H.H. Weiler, The Constitution of Europe, Cambridge, MA, 1999, p.247.

³⁶ European Commission, Eurobarometer, Report Number 58, March 2003, p. 26.

³⁷ Commission vs. Luxembourg Case 473/93 Schutz nationaler Identitaet kleiner Mitgliedstaaten.

³⁸ Museum für Völkerkunde Hamburg (ed.), Das gemeinsame Haus Europa, Berlin 1999.

³⁹ See especially Domm, R., An Empirical Examination of National Pride, Identity, Nationalism and Racism using ISSP Data, in: EUI Working Papers, No. 7, 2001.

⁴⁰ Communication of the Commission, *op.cit.*, p.19. □