Chapter 13

Grounds for restricting the free movement of workers – Recognition of previous professional experience and loyalty to the employer

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Abstract

This article analyzes and critiques two European Court of Justice (ECJ) judgments concerning the freedom of movement for workers and the justifications for restrictions on this right. The Krah judgment is critically examined for its combination of two distinct provisions to constitute a restriction, while the reasoning in the Land Niedersachsen case, involving a single provision under a Collective Agreement, is supported. The article further explores the ECJ's evolving approach to company loyalty as a justification, noting a significant development in the Land Niedersachsen judgment. The Court's decision to consider functionally independent units within a single employer context as invalidating company loyalty justification represents a progression from the SALK ruling. Lastly, the article assesses the ECJ's treatment of recognizing previous professional experience, particularly in the Krah ruling, where limited recognition was deemed unjustifiable due to the continual accumulation of expertise by academic staff. The case of Land Niedersachsen introduces a nuanced perspective, emphasizing the inconsistency in the employer's recognition of equivalent experience. Together, these cases provide a deeper understanding of the permissible boundaries of justifications in EU law.

Keywords: Freedom of Movement of Workers, Art 45 TFEU, Restriction, Justification, Company Loyalty, Professional Experience

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1. Introduction

The free movement of workers, as laid down in Art 45 TFEU, is considered one of the EU's central cornerstones.[1] The provision aims to ensure free movement for workers within the European Union and entails the abolition of any discrimination based on nationality. However, Art 45 TFEU does not permit Member States to lay down restrictions on freedom of movement within their own territory.

The goal of this article is to explore the boundaries surrounding the notion of a restriction to the free movement of workers. To do so, Chapter 2 will delve into the broader scope of Art 45 TFEU, examining both direct and indirect discrimination concepts before concentrating on the concept of a restriction to the free movement of workers. Furthermore, it will discuss possible justifications for a restriction of free movement. Chapters 3 and 4 will present and analyse two recent judgments of the European Court of Justice to illustrate how these rulings shape our understanding of the above-mentioned concepts. Finally, the findings will be consolidated in a final, concluding Chapter.

2. The scope of Article 45 TFEU

The principle of free movement for workers is laid down in Art 45 TFEU, which has a direct effect. This means that individuals may directly invoke Art 45 TFEU when they wish to challenge State measures.[2] While Art 45 Para 1 generally states that the freedom of movement for workers shall be secured within the Union, Art 45 Para 2 provides that any discrimination based on nationality is prohibited. According to the European Court of Justice,[3] the free movement of workers encompasses import as well as export restrictions, which means that it is equally applied, regardless of whether a worker is prohibited from leaving his or her home state to take up employment in another Member State or vice versa, i.e. when he or she is prohibited from entering a host state.[4]

In terms of material scope, Art 45 Para 2 expressly addresses the abolition of discrimination based on nationality. Para 3 adds that this shall entail the right to accept job offers, to move freely and to stay within the territory of a Member State for that purpose. In addition to Art 45 TFEU, the Workers Regulation Directive[5] offers a negative expression of the equal treatment principle and is therefore often

1 Blanpain, 2014, p. 324.
2 Schütze, 2018, p. 593; Blanpain, 2014, p. 325.
3 See European Court of Justice, 26.1.1999, C-15/95, Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland, ECLI:EU:C:1999:22.
4 Schütze, 2018, p. 614.
5 Regulation 492/2011.

referred to in case law as well. According to the European Court of Justice,[6] Art 7 Para 1 of the Regulation, much like Art 45 TFEU, encompasses direct as well as indirect discrimination.

The term "direct discrimination" is commonly defined as a different and usually less-favourable treatment on the grounds of nationality,[7] or in other words: the national of a Member State and the non-national are treated differently in law. If a Member State allows only for nationals to become lawyers, as Belgium has done in the case of *Reyners*,[8] this constitutes direct discrimination as citizens from other Member States are treated less favourably than Belgian nationals. This national measure has thus been qualified as an infringement of Article 45 TFEU by the European Court of Justice.

Additionally, "indirect discrimination" is also prohibited by Art 45 Para 2 TFEU and Art 7 Para 1 of the Regulation. National measures may be qualified as indirectly discriminatory when they are apparently nationality-neutral on their face, meaning that they apply indistinctly to all workers, but have a greater impact on nationals of other Member States.[9] Typical examples include requirements concerning residence[10] and language[11]. While nationals of a certain Member State almost always satisfy these conditions, migrants usually do not.[12] In contrast to direct discrimination, there is a possibility to salvage a measure that has been qualified as indirectly discriminatory and that is by way of justification. Therefore, if a national measure has been found indirectly discriminatory but pursues an aim compatible with Union law, and the measures adopted to achieve that goal are found to be necessary as well as proportionate,[13] the measure has to be qualified as being in accordance with Art 45 TFEU.

What has just been described is the system expressly set out by Art 45 TFEU. Around the mid-1990s, several cases were brought before the European Court of Justice that concerned national measures which, applying only Art 45 Para 2, were found to be non-discriminatory. However, these measures were also found to effectively hinder market access of the workers concerned,[14] thus impeding the freedom of movement of workers.[15] Jurisdiction therefore decided to broaden the scope of Article 45 TFEU and equally apply it to these kinds of measures – this is what we now describe as the so-called restrictions of or obstacles to the free movement of workers.[16]

6 European Court of Justice, 12.2.1974, case 152/73, Sotgiu v Deutsche Bundespost, ECLI:EU:C:1974:13.
7 Barnard, 2016, p. 218.
8 European Court of Justice, 21.6.1974, case 2/74, Reyners v. Belgian State, ECLI:EU:C:1974:68.
9 Barnard, 2016, p. 219.
10 Cf. European Court of Justice, 16.1.2003, C-388/01, Commission v. Italy, ECLI:EU:C:2003:30.
11 Cf. European Court of Justice, 6.6.2000, C-281/98, Angonese v. Cassa di Risparmio di Bolzano SpA, ECLI:EU:C:1999:583.
12 Barnard, 2016, p. 219.
13 Barnard, 2016, p. 220.
14 Barnard, 2016, p. 222; Riesenhuber, 2012, p. 103.
15 Schütze, 2018, p. 604.
16 Schlachter, 2021, p. 471.

To explore this institution further and also to outline its possible outer limits, I would like to highlight two cases brought before the European Court of Justice, starting with the well-known judgment of the court in the famous *Bosman* ruling.[17]

Jean-Marc Bosman is a Belgian national who was employed by the Belgian first-division football club FC Liège. When his contract expired, he wanted to switch teams and play for a French second-division football club. However, the receiving French club was confronted with transfer fees imposed by the national and international football associations. These transfer fees also applied to players already out of contract. Now, the transfer fee system applied equally to all players moving from one club to another and a player's nationality was entirely irrelevant regarding the application of the transfer fees. The system was therefore found to be neither directly nor indirectly discriminatory. However, Mr. *Bosman* was nonetheless effectively prevented from securing employment with the French football club, as they refused to pay the applicable transfer fee. The European Court of Justice ruled that while the transfer fee system did not constitute direct or indirect discrimination as set out in Article 45 Para 2 TFEU, it nonetheless directly affected players' access to the employment market in other Member States and was thus capable of impeding the freedom of movement for workers.

The European Court of Justice has also already defined when a non-discriminating national measure is not liable to restrict the freedom of movement of workers. The Court ruled in the *Graf*[18] judgement, that an event may be too uncertain and indirect, a possibility for legislation to be capable of being regarded as liable to impede market access. In the case on hand, Mr *Graf* terminated his contract of employment with an Austrian employer to move to Germany and take up new employment there. In Austria, a compensation on termination of employment is paid if the employment relationship has continued for at least three years and the contract of employment is terminated by the employer. However, no compensation is being paid if employees terminate the employment contract themselves. The European Court of Justice found that the entitlement to compensation was not dependent on the worker choosing whether to stay with their current employer. It was rather dependent on a future and hypothetical event, namely the subsequent termination of the contract without this being at the worker's initiative. The event was therefore found to be "too uncertain and indirect"[19] to be regarded as a breach of Article 45. This reasoning is still being employed today to determine whether a certain non-discriminatory national measure constitutes an obstacle to the free movement of workers.[20]

It is worth noting that a restriction of the free movement of workers, if identified, may be justified using the same possible grounds as with indirect discrimination.[21]

17 European Court of Justice, C-415/93, Bosman/Royal Club Liégois SA, ECLI:EU:C:1995:463.
18 European Court of Justice, 27.1.2000, Graf/Filzmoser Maschinenbau GmbH, ECLI:EU:C:2000:49.
19 European Court of Justice, 27.1.2000, Graf/Filzmoser Maschinenbau GmbH, ECLI:EU:C:2000:49.
20 Riesenhuber, 2012, p. 104.
21 Schlachter, 2018, p. 471.

Consequently, a restriction to the free movement of workers can be deemed lawful when it pursues one of the legitimate objectives listed in the Treaty or if it is justified by overriding reasons in the public interest and when the measure is necessary to achieve that aim as well as proportionate.

Two possible justifications for restricting the free movement of workers, frequently cited in the case law of the European Court of Justice, shall be highlighted:

(1) We talk about "company loyalty" whenever a national measure applies certain legal consequences to the loyalty of an employee to a certain employer.[22] A longer period of employment with the same employer is considered desirable for the worker, but also holds concrete (including economic) benefits for the employer. Employees who have been with the company for a longer time are familiar with the internal processes, have experience in their specific field, and do not require time-consuming training and induction. The stability factor that employees provide with increasing seniority should also be taken into account. This is particularly important for customers who regularly value continuity in consulting.[23] The European Court of Justice itself has already stated in several judgments that company loyalty may potentially justify a measure that has been qualified as an obstacle to the free movement of workers. However, up until now, there is not a single case in which this justification has been effectively applied.

One of the judgments that explicitly addressed company loyalty is the so-called SALK ruling.[24] SALK is an abbreviation for a holding company for the clinics and hospitals of the Federal State of Salzburg (Land Salzburg), in Austria. In this case, a national measure provided that to determine the reference date for the advancement of an employee of Land Salzburg to the next pay step in his/her respective pay grade, account is to be taken of all uninterrupted periods of service completed with Land Salzburg. Experience with employers outside of the Land was only recognised with a period equal to 60%. Therefore, if an employee had spent ten years working at a hospital in Munich, Germany, and then sought to take up employment at a clinic in Salzburg, only 6 out of these 10 years would be taken into account in determining the reference date.

The European Court of Justice concluded that the justification of company loyalty did not apply because of the high number of potential employers (as each clinic and hospital is a legally distinct entity) coming under the authority of Land Salzburg. Instead, this pay scheme is intended to allow mobility within a group of distinct employers and not to reward the loyalty of an employee to one particular employer. Therefore, we can conclude that as far as a group of legally distinct employers is concerned, the justification of company loyalty is not accepted by the European Court of Justice.

22 Brameshuber, 2018, p. 16; Schlachter, 2018, p. 471.

23 Brameshuber, 2018, p. 16.

24 European Court of Justice, 5.12.2013, Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH/Land Salzburg, ECLI:EU:C:2013:799.

(2) Secondly, the "recognition of previous professional experience" may also constitute a justification for a restriction of the free movement of workers. It is usually argued that previous experience enables an employee to perform his/her duties better.[25] The European Court of Justice has already found that rewarding experience acquired in a particular field may constitute a legitimate objective of pay policy, if the measure is also necessary and proportionate.

In summary, the principle of equal treatment alone was deemed inadequate to effectively reinforce the principle of free movement of workers within the European Union. There's a notable emphasis on ensuring that individuals encounter no barriers upon accessing a specific Member State's labour market and do not suffer impediments upon engaging in that market.[26] Having introduced the concept of restrictions to free movement of workers and their possible justifications, the focus transitions toward two recent judgments of the European Court of Justice. Commencing with the case Adelheid Krah v the University of Vienna these judgements will be examined in further detail.[27]

3. Case C-703/17 –Krah v University of Vienna[28]

Dr. Adelheid Krah holds a doctorate in history and is a senior lecturer/postdoc at the University of Vienna. Due to an internal regulation of the University, previous professional experience of three years was credited to her within the scope of a retroactive classification into the pay grade of the Collective Agreement for university employees. However, all other previous professional experience, including another 4 1/2 years at the University of Vienna as well as 5 years at the University of Munich, were not taken into account.

Dr. Krah therefore filed an action with the Labour and Social Court of Vienna for all previous professional experience to be credited in order to be placed in a higher pay step of the Collective Agreement. The Labour and Social Court turned down her request, and Dr. Krah then appealed to the Higher Regional Court, Vienna. The court stayed the proceedings and referred two questions to the European Court of Justice for a preliminary ruling.

25 Schlachter, 2018, p. 471.

26 Barnard, 2016, pp. 287–288.

27 Please note that the judgment contains more legal aspects than the one featured in the article at hand. However, this particular aspect has not yet been widely discussed and was therefore specifically chosen. For more information regarding the topic of discrimination against (domestic) nationals in the Krah judgment, please refer to Burger-Ehrnhofer, 2019, p. 442; Friedrich, 2021, p. 31; Posch, 2021, pp. 149; and Potz, 2020, p. 99.

28 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850.

1) Must EU law, in particular Article 45 TFEU be interpreted as precluding a provision under which previous periods of relevant professional service of a member of the teaching staff of the University of Vienna can be recognised only up to a total period of three years, irrespective of whether these are periods of service with the University of Vienna or with other national or international universities or similar institutions?
2) Is a system of pay that does not provide for full recognition of previous professionally-relevant periods of service, but at the same time links a higher rate of pay to the duration of employment with the same employer, at variance with the freedom of movement for workers in accordance with Article 45 (2)?

When delving into the legal framework, it becomes evident that this case revolves around the regulations governing the remuneration of university staff. These regulations are established at two levels: firstly, at the national level through the applicable Collective Agreement, and secondly, by the University of Vienna itself through its internal guidelines and regulations.

In Austria, Collective Agreements are a result of a negotiation between the social partners. They set the minimum rules that must be applied by Austrian universities.[29] However, they do not prevent those universities from internally adopting more favourable rules.

The applicable Collective Agreement contains rules regarding the evolution of the remuneration of academic staff. Those rules take seniority into account. Once in office, remuneration increases at regular intervals, with the time spent within the same university. Academic staff is divided into several subcategories corresponding to specific pay grades. Each pay grade is itself subdivided into pay steps, to which a certain salary corresponds. The university employees move from one pay step to the next within the specific pay grade.

The internal regulations of the University of Vienna provide for a period of up to four years of previous professional experience to be taken into account to decide the initial pay step upon recruitment. This amounts to a more favourable treatment offered by the University of Vienna in comparison to the national provisions and to other universities that merely apply the rules laid down by the Collective Agreements. The internal rules therefore act as an incentive for scientific staff to take up occupation at the University of Vienna. Dr. *Krah* was allocated to the third of five possible pay steps. However, she argued that a full recognition of her previous professional experience would have led to an even higher classification.

The European Court of Justice found that the internal regulation of the University of Vienna did not constitute a direct discrimination as the measure applies to all employees of the university regardless of their nationality.[30]

29 Risak, 2010, p. 41.
30 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850, m.n. 28.

The European Court of Justice ruled that the regulation could not be classified as indirect discrimination either.[31] The Court highlighted that the practice of recognising previous relevant professional experience – limited to a specific number of years – could potentially detriment certain employees. Specifically, individuals with over four years of previous professional experience at universities other than the University of Vienna might face a setback compared to senior lecturers with an equal duration of service exclusively at the University of Vienna. However, this disparity impacts both Austrian employees and those from other Member States equally. According to the European Court of Justice, this provision did not inherently impact employees from other Member States more than it affectsed domestic employees, thus negating its classification as indirect discrimination.

The final consideration for the European Court of Justice was to determine if the provisions created a restriction to the free movement of workers. The Court observed that granting complete credit for previous professional experience would result in a new employee being placed in the same pay step as senior lecturers who have worked for an equivalent duration, albeit exclusively at the University of Vienna. In contrast, only recognising a set number of professional experience would result in senior lecturers who spent all their professional experience at the University of Vienna being placed in a higher pay step than new employees that accumulated the same amount of professional experience at another institution. Consequently, the European Court of Justice concluded that this measure indeed constitutes a restriction of the free movement for workers.[32]

The European Court of Justice did not find the restriction justifiable. The University of Vienna submitted, by way of justificationed, that the limited acknowledgment of previous professional experience served the purpose of only recognising experience that is associated with enhanced work quality. Conversely, the University of Vienna argued that acknowledging experience beyond four years would not necessarily enhance performance. However, the European Court of Justice promptly dismissed this argument. Among other reasons, it highlighted that senior lecturers are often tasked not only with teaching but also with conducting research activities and handling administrative duties, negating the notion that experience beyond the specified duration would cease to contribute to their performance.

The interpretation of the European Court of Justice largely aligns with the evaluations made in the previous Chapter. The limited recognition of previous professional experience, while not qualifying as direct or indirect discrimination, indeed restricts the free movement of workers. The only concrete indication that we can employ to decide whether a national measure constitutes an obstacle to the free movement is the formula developed in the judgment *Graf*,[33] namely that the event must neither be too uncertain nor indirect to affect a worker's decision to take up occupation in

31 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850, m.n. 38.
32 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850, m.n. 49.
33 European Court of Justice, 27.1.2000, Graf/Filzmoser Maschinenbau GmbH, ECLI:EU:C:2000:49.

another Member State. Limiting the recognition of previous professional experience has a direct effect on the employees' right at the beginning of the employment relationship with the University of Vienna as the amount of time credited directly affects the remuneration received. This immediate consequence, without reliance on hypothetical future events, is likely to significantly impact employees' decisions regarding employment at the University of Vienna.[34]

The fact that the European Court of Justice rejected the submissions of the University of Vienna is fundamentally plausible. As the Court has pointed out, the submissions only take into account one of a number of tasks owed by the potential employee. Furthermore, I cannot understand why only the first four years of professional experience should be relevant. Rather, the learning curve that a senior lecturer goes through is a progressively rising one. The gain in experience might be highest in the first years of one's activity, but it also increases after those first four years. For this reason alone, the submissions of the University of Vienna cannot be followed.

I also believe that the internal regulation is a measure that is expressly intended to act as an incentive for potential employees to take up employment at the University of Vienna. The Collective Agreement does not provide any possibility of crediting previous professional experience. The internal regulation therefore puts all employees with professional experience in a better position than the existing system at national level and should therefore primarily serve to increase the competitiveness of the University of Vienna. It is not clear why such an "incentive" cannot be suitable to justify a restriction.

Furthermore, the judgment is inaccurate in one other central point of its reasoning: The European Court of Justice concludes in paragraph 49 of the judgement that a full recognition of previous professional experience would cause employees who are nationals of other Member States and who have performed for more than four years the duties of a senior lecturer at a University in their home country to receive the same conditions of remuneration as employees who have worked as senior lecturers at the University of Vienna for the same amount of time.

Upon examining the legal framework, it becomes apparent that there are two different measures that are being applied to scientific staff: (a) The first rule, the one contained in the internal regulations of the University, is that up to four years of previous relevant professional experience are taken into account by the University of Vienna upon hiring senior lecturers, to determine their initial pay step within a specific pay grade. This has been accurately named "the past experience rule" by Adovate General *Bobek*.[35] (b) The second rule is that, once in office, during the contract concluded with the University of Vienna, seniority accrued within that job

34 Vinzenz and Burger, 2020, p. 528; Posch, 2021, pp. 148, 152. Also note Friedrich, 2021, p. 30, and Potz, 2020, p. 99, who argue that the present regulation does not even constitute a restriction to the free movement of workers, as mobile and immobile workers are treated the same.

35 Opinion of Advocate General Bobek, 23.5.2019, ECLI:EU:C:2019:450.

determines subsequent moves from one pay step to another. This is the provision laid down by the Collective Agreement and has been referred to as the "the seniority rule" by the Advocate General.

Both provisions can of course be subject to an examination about their compatibility with the freedom of movement of workers, but such an assessment should be made separately.

On the one hand, while it has previously been noted that the "past experience" rule included in the internal regulations of the University of Vienna may likely constitute a restriction to the free movement of workers,[36] it seems plausible, at least in assessment, that it may very well be justified.

On the other hand, the examination must also consider the "seniority rule". As per the Collective Agreement, an employee is categorised into a particular pay grade and progresses through pay steps as the employment duration increases. If a worker who has accrued the same periods with a different employer begins a new employment relationship, they will be classified into the first of a certain number of pay steps within the same pay grade. This measure constitutes a restriction, as it might be seen as a potential deterrent for workers considering opportunities in the Austrian employment market. However, such a provision could conceivably be justified by the above-mentioned company loyalty aspect, as the Collective Agreement exclusively values durations spent with the same employer. Should an employee of the University of Vienna decide to take up employment as a senior lecturer elsewhere in Austria, he/she would similarly begin at the initial pay step within the specific pay grade.

Should the Court integrate these two criteria, as indicated by the wording of Paragraph 49, it would seemingly necessitate the automatic recognition of all previous professional experience upon placement into the remuneration structure. Consequently, the justification based on company loyalty would be rendered absurd since recognising only durations with the same employer would be impossible without also acknowledging past experiences with other employers. I hold the belief that the European Court of Justice did not intend its judgment to lead to problems of this sort.[37]

Interestingly, the European Court of Justice was approached in a strikingly similar case shortly afterward. Consequently, the judgment WN v Land Niedersachsen shall now be examined and contrasted with the Krah judgment.

36 Compare also Posch, 2021, pp. 148, 152. Different views expressed by Friedrich, 2021, p. 30, and Potz, 2020, p. 99, who argue that the present regulation does not even constitute a restriction to the free movement of workers, as mobile and immobile workers are treated the same.

37 Vinzenz and Burger, 2020, p. 531.

4. WN v Land of Land Niedersachsen[38]

The facts of the judgment are surprisingly similar to those in the judgment of Krah. W.N., a German national, carried out teaching activities in France. In 2014, she was recruited as a teacher by the Land of Lower Saxony. Her employment contract is governed by the Collective Agreement for the public sector of the *Länder*, which determines her pay step allocation in the remuneration table.

The Land of Lower Saxony recognised W.N.'s professional experience acquired in France as equivalent to determine her classification in that table. The previous professional experience completed in France was taken into account only in part, as only 3 out of 17 years of WN's professional activity in France were taken into consideration. Once again, it was up to the European Court of Justice to decide whether the partial recognition of previous professional experience poses an obstacle to the free movement of workers.

Paragraph 16(2) of the Collective Agreement provides that the relevant professional experience acquired with employers other than the local authority is taken into account only in part. Previous professional experience with the Land of Lower Saxony on the other hand, is recognised in full. The European Court of Justice stated that such a provision is likely to render the freedom of movement for workers less attractive, in breach of Article 45(1) TFEU, and, accordingly, constitutes an obstacle to that freedom.[39]

In a next step, the European Court of Justice turned to examine the possible justifications submitted by the Land of Lower Saxony and the German Government.

The first argument submitted is that experience acquired with the same employer enables the workers concerned to perform their duties better. That advantage may be rewarded with a higher remuneration. The Court dismissed this argument by stating that the Land of Lower Saxony had already recognised *WN*'s previous professional experience as equivalent to that which she is to perform in the context of her work relationship with the Land of Lower Saxony. Therefore, it is not possible to argue that an experience that has already been considered as equivalent by the employer itself is then deemed as insufficient for the sake of granting a certain rate of remuneration.

The Land of Lower Saxony and the German Government also argued that the measure is justified by the objective of rewarding employees for their loyalty to their employer. According to their argument, the conditions of work, such as the teaching content, are similar in all state schools within the Land of Lower Saxony.

The European Court of Justice found that while state school teachers are employees of one single employer, they are assigned to different schools within that Land. The measure at issue does nothing to promote the loyalty of a teacher to a single school as the remuneration is payable even if that person changes schools

38 European Court of Justice, 23.4.2020, WN/Land Niedersachsen, ECLI:EU:C:2020:299.
39 European Court of Justice, 23.4.2020, WN/Land Niedersachsen, ECLI:EU:C:2020:299, m.n. 33.

within that Land. The measure therefore leads to a partitioning of the employment market for school teachers – on the one hand those teachers within the Land of Lower Saxony and on the other hand all teachers outside the territory of the Land and it therefore runs counter to the principle of freedom of movement of workers.

The European Court of Justice decided that the obstacle to the free movement of workers could not be justified and that the national legislation in question is therefore not compatible with Article 45 TFEU.[40]

5. Conclusion

I would like to conclude with a swift comparison of the two rulings. As has been shown above, I believe that the European Court of Justice made a mistake in the Krah judgment when they combined the effect of two different provisions to constitute a restriction to the freedom of movement for workers. In the case of Land Niedersachsen, the limited recognition of previous professional experience and the advancement in remuneration based on seniority are contained in the same provision, namely the applicable Collective Agreement. It is therefore impossible to separate them in effect and therefore, I do agree with the European Court of Justice's reasoning in that particular case.

Secondly, I would also like to assess the considerations of the European Court of Justice regarding the justifications submitted. In both judgments, company loyalty and recognition of previous professional experience were referred to explicitly. I believe that both cases may be further employed to develop our understanding of these two justifications and their possible outer limits.

If we first turn toward company loyalty, I would like to bring to mind once again the judgment of the European Court of Justice in the SALK judgment.[41] The Court stated that company loyalty cannot be employed if there are several legally distinct employers present and a certain provision simply allows mobility within this group of employers. In the case Land Niedersachsen, the European Court of Justice went one step further. While all state school teachers are the employees of one single employer, namely the Land of Lower Saxony, they are assigned to different schools within the *Land*. The European Court of Justice concluded that the deciding unit is the single state school, even if they are not legally independent entities. I believe that this step can be considered a development of the SALK ruling. If there is only one employer, but workers are assigned to functionally independent entities, even if they result to be legally dependent from that one employer, the justification of company

40 European Court of Justice, 23.4.2020, WN/Land Niedersachsen, ECLI:EU:C:2020:299, m.n. 55.

41 European Court of Justice, 5.12.2013, Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH/Land Salzburg, ECLI:EU:C:2013:799.

loyalty cannot be employed. In the case *Land of Lower Saxony*, the Court found that the single schools had identical teaching content and terms of remuneration. However, they differ in other aspects, for example school reputation or teaching priorities and they compete against each other in the employment market. That is enough to consider them functionally independent from one another.

Finally, I would like to assess the statements of the European Court of Justice regarding the recognition of previous professional experience. In the *Krah* ruling, the Court explained that a limited recognition of previous professional experience as a senior lecturer could not be justified as senior lecturers are assigned more tasks than simply teaching, as they participate in administration and carry out research activities. I believe this is a smart move as the European Court of Justice did not have to go into more detail as to why the justification could not be employed. I believe that the deciding factor is that a member of the academic staff does not stop to accumulate experience, put in other words, there can be no cap to the knowledge acquired.[42] To me, this is a reasoning that might be employed in the future if arguments of that sort are being submitted. Lastly, I would like to conclude by saying that the case *Land of Lower Saxony* contains one more interesting aspect that should be suitable for developing our understanding of the justification. Apart from the plain fact that a different weighting of previous professional experience will always be difficult to justify if the employer itself has already recognised the previous experience of a single employer as equivalent at one stage, so it will not be able to deem that experience as insufficient for another purpose such as the allocation into a remuneration table.

42 Also compare Friedrich, 2022, p. 31; Potz, 2020, p. 100.

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