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Is there a real problem for European Union servants of British nationality after Brexit?

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TABLE OF CONTENTS: 1. Introduction. - 2. The Staff Regulations and the requirement of nationality to be appointed as official. - 3. The Conditions of employment of other servants of the European Union. - 4. The interpretation of the rules. - 5. The Commission commitments. - 6. Conclusions.

ABSTRACT: The present paper aims to briefly analyze the Union's legislation to understand if and to what extent the exit of United Kingdom from European Union could be an obstacle to the permanence of British civil servants in the European Institutions.

KEYWORDS: Brexit – British employees in the European Institutions – Staff Regulations of Officials - Conditions of employment of other servants of the European Union.

1. Introduction

Citizens of all the 28 countries of the European Union work, in various capacities, in the European Institutions.

As indicated in the "*Draft General Budget Of The European Union for the financial year 2018 - Working Document Part II Commission Human Resources COM(2017) 400 - June 2017*"¹, in 2017 "*the total authorised staff of the Institutions has reached 59.668 Full-Time Equivalent*"².

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¹ http://ec.europa.eu/budget/library/biblio/documents/2018/DB2018_WD02_en.pdf.

² The total number for each authority is summarized below:

European Parliament: 14.322 of which 7.579 external personnel (external personnel means contract agents, seconded national experts etc.);

European Council & Council: 3.273 of which 246 external personnel;

European Commission (Executive Agencies included) 34.043 of which 9.697 external personnel;

Court of Justice: 2.239 of which 176 external personnel;

With particular reference to the European Commission, it is estimated that as of 1st January 2018 less than 1000 British workers are employed in the European Commission³.

Following the well-known events related to the British referendum⁴ and the consequential trigger of the exit procedure outlined by Article 50 of the Treaty on European Union, one of the many questions that this choice

Court of Auditors: 933 of which 80 external personnel;

European Economic and Social Committee: 718 of which 53 external personnel;

Committee of the Regions: 552 of which 63 external personnel;

European Ombudsman: 80 of which 15 external personnel;

European Data-Protection Supervisor: 72 of which 16 external personnel;

European External Action Service: 3.437 of which 1.826 external personnel.

(http://ec.europa.eu/budget/library/biblio/documents/2018/DB2018_WD02_en.pdf p. 8, 9 and 10).

The authorised establishment plan definitively approved is included in the European Union's general budget for the financial year 2018 – EU Euratom 2018/251, OJEU 28 February 2018 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2018:057:FULL&from=EN>).

³ 917 persons representing 2.8% of the Commission staff as reported by https://ec.europa.eu/info/sites/info/files/european-commission-hr-key-figures_2018_en.pdf.

This number includes officials, temporary staff, contract staff, special advisers, local staff and staff under national law, part of the 32.196 persons in total on 1st January 2018 in the European Commission. If we consider officials, temporary agents and contract agents ordered on the basis of "First Nationality", the number of British employees as of 1st April 2018 is 873 (https://ec.europa.eu/info/about-european-commission/organisational-structure/commission-staff_en). The number of British staff has decreased compared to that of the previous year, 1046 persons representing 3.2% of the Commission staff as reported by https://ec.europa.eu/info/sites/info/files/european-commission-hr-key-figures_2017_en.pdf.

⁴ On 23rd June 2016 citizens of the United Kingdom voted to leave the European Union. As reported by the following site - <https://www.electoralcommission.org.uk/i-am-a-journalist/electoral-commission-media-centre/news-releases-referendums/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester> - the Electoral Commission in Manchester declared that the "total number of ballot papers counted was 33,577,342. The declaration has confirmed that 48.1% of votes (16,141,241) were cast in favour of REMAIN and 51.9% of votes (17,410,742) were cast in favour of LEAVE. This means that the UK has voted to LEAVE the European Union".

On 29th March 2017 the United Kingdom notified the European Council of its intention to leave the European Union, in accordance with Article 50 of the Treaty on European Union. On 29th April 2017 the European Council adopted a set of political guidelines, which define the framework for the negotiations and set out the EU's overall positions and principles. On 3rd May 2017, the European Commission adopted and published its recommendation to open the Article 50 negotiations with the UK. On 22nd May 2017, the Council adopted the Commission's recommendation. The negotiations, therefore, will be conducted in the light of the European Council guidelines and in line with the Council's negotiating directives and with due regard to the European Parliament's resolution of 5th April 2017. Negotiations began on 19th June 2017. According to the Council's directives "for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union" the Agreement "should set a withdrawal date which is at the latest 30 March 2019 at 00:00 (Brussels time), unless the European Council, in agreement with the United Kingdom, unanimously decides to extend this period in accordance with Article 50(3) of the Treaty on European Union. The United Kingdom will become a third country from the withdrawal date". The Commission recently published a draft legal text of the withdrawal agreement in February 2018 and an updated draft on 15th March. On 19th March a third text was published which showed - through different colours - there is full agreement between the EU and the UK, where there is agreement in principle and where there is no agreement (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf).

Once a legal text has been agreed between the UK Government and the European Commission, it will then need to be approved by the EU institutions. Article 50 TEU also requires the European Parliament to approve the final text of the withdrawal agreement. If the EP approves the agreement by a simple majority, for it to be concluded, it must be passed by the European Council acting by qualified majority (20 of the other 27 Member States).

involves is about the permanence of British employees in the European Institutions since *"UK citizens will lose their EU citizenship when the UK ceases to be a Member State under the conditions of Article 50 TEU in the context of Brexit"*⁵.

2. The Staff Regulations and the requirement of nationality to be appointed as official

The legal framework that makes it possible to understand the problem is essentially made up of some rules from *"Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community"*⁶, better known as *"Staff Regulations"*.

Regarding the appointment of officials, Article 28(a)⁷ of the Staff Regulations provides, among the various requirements, that an official may be appointed *"only on condition that: he is a national of one of the Member States of the Union, unless an exception is authorized by the appointing authority, and enjoys his full rights as a citizen"*⁸.

For the time being, the United Kingdom remains a full member of the EU and rights and obligations continue to fully apply in and to the UK. For further information see <http://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/>; <http://www.europarl.europa.eu/news/en/headlines/priorities/20160701TST34439>; https://ec.europa.eu/commission/brexit-negotiations_en

⁵ Herwig C.H. HOFMANN, "The impact of Brexit on the legal status of European Union officials and other servants of British nationality" p. 10 [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596837/IPOL_STU\(2017\)596837_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596837/IPOL_STU(2017)596837_EN.pdf)

⁶ Regulation n. 31 (EEC), 11 (EAEC) - OJ 45, 14.6.1962, p. 1385 - as subsequently amended.

⁷ The full text of Article 28 is shown below:

"An official may be appointed only on condition that:

(a) he is a national of one of the Member States of the Union, unless an exception is authorized by the appointing authority, and enjoys his full rights as a citizen;

(b) he has fulfilled any obligations imposed on him by the laws concerning military service;

(c) he produces the appropriate character references as to his suitability for the performance of his duties;

(d) he has, subject to Article 29 (2), passed a competition based on either qualifications or tests, or both qualifications and tests, as provided in Annex III;

(e) he is physically fit to perform his duties; and

(f) he produces evidence of a thorough knowledge of one of the languages of the Union and of a satisfactory knowledge of another language of the Union to the extent necessary for the performance of his duties."

⁸ *"Accordingly, once Brexit is effective, UK nationals can be appointed officials only on the basis of a special authorization by the appointing authority, unless they also possess the citizenship of another Member State"*, Bert Theeuwes and Frédéric Dopagne (Kelley

On the other side, Article 49⁹ of the Staff Regulations provides that "*An official may be required to resign only where he ceases to fulfil the conditions laid down in Article 28 (a)...*"¹⁰.

Despite the fact that the appointment can't disregard the requirements listed in Article 28 ("*only on condition that*"), it should be noted that Article 28 contains a derogation clause that would allow the appointment of citizens not belonging to member countries¹¹ ("*unless an exception is authorized by the appointing authority*" in the English version, "*salvo deroga concessa dall'autorità che ha il potere di nomina di deroga*" in the Italian version, "*sauf dérogation accordée par l'autorité investie du pouvoir de nomination*" in the French version). Article 49, furthermore, seems formulated in the sense of leaving wide discretion to the appointing authority in requesting an official to resign ("*may*", in the English version, "*può*" in the Italian version, "*peut*" in the French version) in case the staff member is no longer a citizen of a Member State.¹²

Drye & Warren LLP) "The Impact of Brexit on UK Staff Working for the EU Institutions" in <https://www.lexology.com/library/detail.aspx?g=f776944b-9e1a-452e-aa87-1d4ffdfcd4b0>.

⁹The full text of Article 49 is shown below:

"Section 2 Compulsory Resignation

Article 49

An official may be required to resign only where he ceases to fulfil the conditions laid down in Article 28 (a), in the cases provided for in Articles 39, 40 and 41 (4) and (5) and in the second paragraph of Article 14 of Annex VIII.

Reasoned decisions requiring officials to resign shall be taken by the appointing authority after consulting the Joint Committee and hearing the official concerned."

¹⁰ This Article provides "*a legal basis for compulsory resignation of officials who, as a result of the withdrawal of the Member State of their nationality, and failing any simultaneous nationality of another Member State, would no longer be 'a national of one of the Member States' within the meaning of Article 28(a).*" Bert Theeuwes and Frédéric Dopagne (Kelley Drye & Warren LLP) "*The Impact of Brexit on UK Staff Working for the EU Institutions*".

¹¹ See, for example, the case of the recruitment of officials of Norwegian nationality in the past: "*Invero, secondo l'art. 28, lett. a) ,dello Statuto dei funzionari UE (...) il possesso della cittadinanza di uno degli Stati membri è requisito per l'assunzione, salvo deroga decisa dall'autorità investita del potere di nomina. A tale deroga si è fatto ricorso in passato con riguardo ad un piccolo gruppo di funzionari di nazionalità norvegese, in specie traduttori, che erano stati reclutati, all'inizio degli anni '70 e degli anni '90, in previsione dell'adesione che poi non ebbe luogo.*" Carlo Curti Gialdino, "*Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea*", p. 27, 29 giugno 2016, Federalismi.it

<http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=32126&dpath=document&dfile=29062016165126.pdf&content=Oltre+la+Brexit:+brevi+note+sulle+implicazioni+giuridiche+e+politiche+per+il+futuro+prossimo+dell%27Unione+europea+-+stato+-+dottrina+-+>

¹² In fact, the compulsory resignation is "*not automatic: it needs to be decided on a case-by-case basis, by a reasoned decision of the appointing authority. Whether the appointing authorities will effectively make use of this power remains to be seen. Arguably, there should at the very least be a common approach among the various EU institutions and bodies. Furthermore, the general principles of EU civil service law would, in any event, govern the exercise of the above power to require resignation (inter alia the principle of good*

In short, therefore, at the time when the employment relationship is established, the citizenship of a Member State is normally necessary; in a phase following the establishment of the work relationship, instead, compulsory resignation only depends on the will of the appointing authority. So, while in the process of establishing the employment relationship not being a national of one of the Member States of the Union can never lead to the appointment (unless an exception is authorized by the appointing authority), in case the nationality of a Member State is subsequently lost the employment relationship can continue without authorization but without prejudice to the possibility of intervention by the authority that *may* order compulsory resignation on the basis of a reasoned decision.

3. The Conditions of employment of other servants of the European Union

With reference to the other work contract types, the regulatory provisions, according to a literal interpretation, would seem more rigid. Article 12(2)(a) of the "*Conditions Of Employment Of Other Servants Of The European Union*" (CEOS) , like Article 28 discussed above, provides that "*A member of the temporary staff may be engaged only on condition that: (a) he is a national of one of the Member States of the Union, unless an exception is authorised by the authority*" who has the power to conclude the contract. However, Article 47 CEOS peremptorily establishes that:

"Apart from cessation on death, the employment of temporary staff shall cease:

...omissis...

" (iii) where the servant no longer satisfies the conditions laid down in point (a) of Article 12(2), subject to the possibility of authorising an exception under that provision."

Unlike Article 49, therefore, there would be no continuation of the employment relationship, so the reasoning would be reversed: the employment relationship ceases (*"the employment of temporary staff shall cease"* in the English version, *"Il contratto dell'agente temporaneo si risolve"*, in the Italian version, *"l'engagement de ce dernier prend fin"*, in the French version), unless a prior derogation is authorized by the authority.

Nationality of a member State is also required to be hired as contract staff unless, also in this case, *"an exception is authorised by the authority"* (Art. 82(3)(a)). According to Article 119 CEOS, the rules on termination of employment of temporary staff shall apply by analogy to contract staff. Consequently, the aforementioned Article 47 applies also to contract staff.¹³

4. The interpretation of the rules

Based on the described regulatory framework, the following considerations can be made.

First of all *"there should be no changes until the UK exit of the EU effectively takes place. According to Article 50 of the Treaty on European Union, the withdrawal becomes effective upon entry into force of the withdrawal agreement to be concluded between the Member State concerned and the Union, or, failing that, two years after the notification, by the Member State concerned, of its intention to withdraw, unless the EU and the Member State concerned decide to extend this period. Therefore, in the meantime, current UK staff cannot be forced to leave their employment on account of their nationality, and should even be treated on an equal footing with other officials as far as their career is concerned (promotion, mobility, etc.); similarly, UK citizens*

¹³ *"Therefore, by contrast to officials, the contracts of UK temporary staff, contract staff as well as parliamentary assistants will be terminated once the UK has effectively left the Union, unless an exception is granted by the competent authority."* Bert Theeuwes and Frédéric Dopagne (Kelley Drye & Warren LLP) *"The Impact of Brexit on UK Staff Working for the EU Institutions"*.

should in principle not be barred from regular recruitment, provided that they fulfill the necessary conditions to that effect. Until Brexit is effective, any other conclusion would amount to a discrimination based on nationality."¹⁴

Then, it must be noted that the Staff Regulations establish also *"a set of mutually applicable rights and obligations between the Union and its officials and agents. These include compliance with the principles of loyalty to the Union, carrying out the duties assigned with objectivity and impartiality and acting "solely with the interests of the Union in mind" (Article 11 Staff Regulations). The EU is in turn obliged to act vis-à-vis its officials and agents with solicitude taking into account the principle of care. These obligations are the counterparts but also the interpretative framework for understanding the relations between officials and other servants of the Union, on the one hand, and the Union as a legal person, on the other"*¹⁵.

Furthermore, the use of Article 49, even if it is discretionary, requires a *"reasoned decision"* that provides the reasons that led to such a choice. It must be based on an assessment of the Union's interest, but also on respect for the most relevant general principles and fundamental rights of EU law as the principle of *"non-discrimination, the duty of care and good administration, requirements of legal certainty, the protection of legitimate expectations, proportionality..."*¹⁶.

¹⁴ Bert Theeuwes and Frédéric Dopagne (Kelley Drye & Warren LLP) "The Impact of Brexit on UK Staff Working for the EU Institutions"

¹⁵ Herwig C.H. HOFMANN, "The impact of Brexit on the legal status of European Union officials and other servants of British nationality" p. 8-9.

¹⁶ Herwig C.H. HOFMANN, "The impact of Brexit on the legal status of European Union officials and other servants of British nationality" p. 15. Obviously, the principle of non-discrimination can hardly be invoked on the basis of nationality with respect to the nationalities of the Member States. Furthermore, some authors have raised a further problem related to the position of the official (senior officials) that could lead to the application of Article 50 of Staff Regulation ("Retirement in the interests of the service"): *"C'è poi un ulteriore problema che concerne i funzionari che occupano posizioni sensibili nei gradi apicali (direttore, direttore generale aggiunto, direttore generale). A taluni di questi funzionari, già durante la procedura di recesso, potrebbe essere applicato l'art. 50 dello Statuto, che prevede la cessazione dall'impiego per ragioni di servizio"* Carlo Curti Gialdino, *"Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea"*, p. 28, 29 giugno 2016, Federalismi.it <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=32126&dpath=document&dfile=29062016165126.pdf&conten t=Oltre+la+Brexit:+brevi+note+sulle+implicazioni+giuridiche+e+politiche+per+il+futuro+prossimo+dell%27Unione+eur opea+-+stato+-+dottrina+-+>

5. The Commission commitments

Up to this point rules have been considered; now it is also necessary to mention some recent relevant commitments, first of all the Message from President Jean-Claude Juncker to the staff of the European Institutions following the British referendum. In this message the President of the European Commission seems to emphasize the fact that the notion of nationality loses much of its weight when the citizens of the Union come to work for Europe, for a common European project. On the basis of this spirit of reciprocal loyalty between European Institutions and European civil servants the President suggests that the "European spirit" should be the interpretative key through which the Staff Regulations must be read and applied¹⁷.

In order of time it is important to report the recent "Information Meeting for UK Staff" of January 29th, 2018 with Commissioners Gunther H. Oettinger and Julian King. The Commissioner Oettinger has specified that *"he would propose to the College that the Commission (as appointing authority) would not use its discretionary power (under Article 49 of the Staff Regulations) asking UK officials to resign, unless justified under specific cases of conflict of interest or international commitments. He could not guarantee the result but was hopeful that the College would support his proposal which had the support of the President and*

¹⁷ Message to British staff from President J-C. Juncker (24 June 2016):

"Dear colleagues,

Yesterday, the citizens of the United Kingdom voted to leave the European Union. This result makes me personally very sad – but I respect their choice.

I know that many of you are concerned about your future after this vote. I fully understand that. So I want to send a clear message to you, colleagues, and especially to colleagues of British nationality.

According to our Staff Regulations, you are "Union officials". You work for Europe. You left your national 'hats' at the door when you joined this institution and that door is not closing on you now. As European civil servants you have always been loyal to our Union, contributing tremendously to our common European project. And so it will be in this spirit of reciprocal loyalty that I will work together with the Presidents of the other European institutions to ensure that we can all continue counting on your outstanding talent, experience and commitment. I know you all have legitimate expectations about your rights and duties, your families who might have followed you to Brussels and your children who might be enrolled in schools here.

Let me assure you that I will do everything in my power as President of the Commission, to support and help you in this difficult process. Our Staff Regulations will be read and applied in a European spirit.

In the coming days and weeks, you will all have the opportunity to show the European Commission at its best. The eyes of the world will be upon us, expecting us to provide stability, act decisively and uphold Europe's values. I have every confidence in you. Together we will rise to that task".

<https://witness.theguardian.com/assignment/576b2a62e4b030d83eb4992a/2085483>

*Commissioner King.*¹⁸ Instead, the Commissioner could not provide the same assurances “to temporary and contract agents as the rules governing their employment (Article 47 of the conditions of employment) oblige the employer to terminate if staff cease to be citizens of an EU Member State. The Commissioner indicated that he would ask the College to treat temporary and contract agents with the greatest fairness that the rules allow, with case-by-case analysis of derogations in the interests of the service carried out in an objective and transparent manner.”¹⁹

On this basis and after the arrangement of the first drafts of withdrawal agreement, the Commission took the two following different commitments:

- in the case of permanent officials of British nationality who no longer fulfill the condition of being a national of one of the Member States of the Union following the withdrawal of the United Kingdom from the European Union, the Appointing Authority will not exercise its discretion under Article 49 of the Staff Regulations, except where duly justified in specific cases such as conflicts of interest or international obligations;
- in the case of temporary or contractual agents of British nationality who no longer fulfill the condition of being a national of one of the Member States of the Union following the withdrawal of the United Kingdom from the European Union, the Commission shall legally require to conduct a case-by-case analysis in order to allow duly justified exceptions to the nationality requirement based on the interest of the service. In this case, however, the Commission recommends that the authority empowered to conclude contracts should make generous and transparent use of this derogation possibility²⁰.

¹⁸ Draft minutes of the meeting reported by Union for Unity - L'Union pour l'Unité (U4U) Regroupement syndical in http://www.u4unity.eu/document3/Brexit_20180129_Oettinger.pdf.

¹⁹ Draft minutes of the meeting reported by Union for Unity - L'Union pour l'Unité (U4U) Regroupement syndical.

²⁰ “EXTRACT DE « DECISIONS ADMINISTRATIVES ET BUDGETAIRES PRISES PAR LA COMMISSION LORS DE SA 2249EME REUNION DU MERCREDI 28 MARS 2018 » HR – APPLICATION DE LA CONDITION STATUTAIRE D’ETRE RESSORTISSANT DE L’UN DES ETATS MEMBRES DE L’UNION AUX MEMBRES DU PERSONNEL QUI NE REMPLIRONT PLUS CETTE CONDITION EN RAISON DU RETRAIT DU ROYAUME - UNI DE L’UNION EUROPEENNE

La Commission a décidé de prendre les engagements suivants : – dans le cas des fonctionnaires de nationalité britannique qui ne rempliront plus la condition d’être ressortissant d’un des Etats membres de l’Union à la suite du retrait du Royaume-Uni de l’Union européenne, l’autorité investie du pouvoir de nomination n’usera pas de son pouvoir discrétionnaire au titre de l’article 49 du statut des fonctionnaires, excepté lorsque cela est dûment justifié dans des cas spécifiques tels que des conflits d’intérêts ou en vertu

6. Conclusions

In the light of the described regulatory framework, of the abovementioned interpretative principles and of the commitments taken by the Commission, it can be concluded that, although on a differentiated legal basis - permanent officials on one side, temporary and contractual agents on the other - the discretion of the European institutions, allowed by Article 50 of the Staff Regulation and Article 47 of the CEOS, should be founded, as for all “duration relationships”, on the principles of legal certainty and of the protection of legitimate expectations, as well as, in particular, on the principle of loyalty to the Union. Therefore, except for duly motivated specific cases, it seems legally correct that all the employment relationships established before the withdrawal agreement become effective (and in any case before the beginning of the transition period) ²¹ should be protected.

d’obligations internationales ; – dans le cas des agents temporaires ou contractuels de nationalité britannique qui ne rempliront plus la condition d’être ressortissant d’un des Etats membres de l’Union à la suite du retrait du Royaume-Uni de l’Union européenne, la Commission est légalement tenue d’effectuer une analyse au cas par cas afin d’autoriser des exceptions dûment justifiées à l’exigence de nationalité prévue par le régime applicable aux autres agents ; la Commission s’engage toutefois à ce que l’autorité habilitée à conclure des contrats fasse un usage généreux et transparent de cette possibilité de dérogation ; son appréciation sera fondée sur l’intérêt du service.” http://u4unity.eu/document3/Brexit_decadmcom.pdf

²¹ See below Articles 121 and 122 of “Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018”, 19 March 2018, TF50 (2018) 35 – Commission to EU27 https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

“PART FOUR

TRANSITION

Article 121 Transition period

There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.

Article 122 Scope of the transition

1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.

...Omissis...

6. Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.

7. By way of derogation from paragraph 6:

a)...Omissis...

b)...Omissis...

ApertaContrada

RIFLESSIONI SU SOCIETÀ, DIRITTO, ECONOMIA

di **Alessandro Palmaccio**

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c) for the purposes of the recruitment of officials and other servants of the institutions, bodies, offices or agencies of the Union, any references to Member States in Articles 27 and 28(a) of the Staff Regulations and in Article 1 of Annex X thereto and in Articles 12, 82 and 128 of the Conditions of Employment of Other Servants of the European Union, or in the relevant provisions of other staff rules applicable to those institutions, bodies, offices or agencies, shall be understood as not including the United Kingdom.”