CONSIDERATIONS ON THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN AREA

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Abstract:

As part of the free movement of individuals, the principle of free movement of workers is enshrined in Article 45 (previously Article 39 EC) of the Treaty on the Functioning of the European Union and its significance and content have been further developed through secondary legislation and the jurisprudence of the European Union Court of Justice. The principle provides to any national of a Member State of the European Union the right of access to employment and the right to conduct such an activity on the territory of another Member State, subject to limitations justified on grounds of public policy, public security and public health.

The outcome pursued by the theoretical and practical approach of this issue consists in analyzing the principle from a triple perspective, namely from the point of view of regulations evolution, of highlighting the role of jurisprudence of the European Union Court of Justice in the process of normative framing and completion and of the level of its application.

***Key words** : free movment of workers, fundamental rights, Europen Union, Case-law of the Court of Justice*

***JEL classification :** K31, K33*

1. The concept of worker.

One of the fundamental freedoms that comes with being a citizen of the European Union is the free movement of workers, an institution with important economic, political and legal implications. This implies the right of workers to move and reside freely within the territory of any Member State, the rights of entry and residence provided to the members of their families and the right to work in another Member State and the right to receive non-discriminatory treatment equal to that granted to the citizens of the state concerned. The right of free movement of workers, as an essential element for the development of a genuine EU labor market, is completed on the European level by a system for coordinating social security schemes and by a system likely to ensure mutual recognition of diplomas and qualifications.

The legal foundation is represented by the provisions of Article 45 of the Treaty on the Functioning of the European Union[2] (previously known as art. 39 of the EC Treaty) which states that free movement of workers is guaranteed within the Union, while it involves the abolition of any discrimination based on nationality between the workers of the Member States in terms of employment, remuneration and other conditions of work and employment. The provisions of the treaties were gradually developed and

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[2] Art. 45 TFUE: 1. ,, 1.. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service ".

supplemented by secondary law of the Union, namely the Directive 2004/38 / EC on the right to move and reside freely within the Member States for Union citizens and their family members; Regulation (EU) no. 492/2011 on the free movement of workers within the Union; Directive 2014/54 / EU on measures to facilitate the exercise of rights provided to workers in the context of free movement of workers, Regulation (EC) no. 883/2004 on the coordination of social security systems and Regulation (EC) no. 987/2009 on its enforcement.

The concept of worker does not overlap with that of the European citizen, it is not defined either in the Treaty, where art. 45 stipulates the concept of worker, or in the secondary law of the Union. In this context, an important role is held by the Court of Justice of the European Union, which through its case law has determined the meaning and the constituent elements of that concept. The term has, according to the case law of the Court of Justice, a broad scope, encompassing both the employees who work under an individual labor contract, and the individuals coming from another Member State in search of a job.

Through extensive case law in this matter, the court in Luxembourg stressed the need to ensure the effectiveness of European regulations imposed in order to ensure the principle of free movement and equal treatment in employment of migrant workers. To determine its significance, the Court applied to the generally recognized principles of interpretation, from the ordinary meaning given to the terms in the light of the principles of Community law (EU:C:1964:19).

Consequently, the fundamental idea that emerges from the Court jurisprudence is that the concept of worker represents a European concept that does not depend on the meaning defined by Member States into their national laws. Thus, recently, by the Decision dated as of February 21, 2013 LN against *Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* pt. 39 and 40, quoting previously given decisions,[1] the the Court holds that the ″term 'worker' within the meaning of Article 45 TFEU has its own independent meaning for the EU law that must not be interpreted restrictively, but it must be defined according to some objective criteria which characterize the employment relationship, taking into account the rights and obligations of the persons involved".

In Lawrie Blum case, the Court gave a general definition of the worker applicable throughout the entire Union, stating that the "concept of worker involves anyone who performs an activity that was not established by himself/herself, for and under the direction of another person, for remuneration, whatever the legal nature of the employment relationship ".

So, in the acceptance of the european judge, what prevails for determining the quality of a "worker", is conducting a performance, that is carrying on an actual and genuine activity (EU:C:1982:105) for and under the authority of another person (EU:C:2001:616, para.37) for remuneration (EU:C:1986:284 para16,17; EU:C:2004:172 para.26; EU:C:2004:488, para 15), the area where benefits are provided and the nature of the legal relationship linking the worker and the employer not showing interest in applying Article 45 of the Treaty.

Starting from the need for a uniform application of the Union law in all Member States, the Court pointed to two rules of interpretation of the concept of worker (Teyssie, 2013 p.109,110):

1 See in this regard, especially the Decision as of July 3, 1986, Lawrie Blum, 66/85, Rec., P. 2121, paragraph 16, Decision as of 21 June 1988, Brown, 197/86, Rec., P. 3205 paragraph 21, Decision as of 26 February 1992 Bernini, C 3/90, Rec., p. 1071 I, paragraph 14, and Decision as of 6 November 2003, Ninni Orasche, C 413/01, Rec., p. 13187 I, paragraph 23).

a) The European meaning of the concept of worker is not limited by the definition of the regulation manner in each Member State. The concept of worker has a European content, which means that its meaning should not be determined according to criteria defined by national legislation (Paragraph 41 of the recitals of the Decision dated as of 21 June 1988 in Lair, 39/86)[1]. The Court pointed out that "in the Community law, there is no single definition of a worker, but it varies depending on the scope envisaged"”[2]. Also the content of the concept of worker may vary by different provisions of the EC Treaty (now the TFEU) or secondary law. Applying this rule, the Court of Justice found, for instance, that some national rules (in the Netherlands, Denmark, France, Germany, Italy) are contrary to the meaning of the concept of worker in the sense of the EU law on the freedom of movement and the right to social security (Tinca O, 2015, p 9).

Given that labor mobility within the Union must be one of the means by which workers are guaranteed the opportunity to improve living and working conditions and promote on the social level, while helping to satisfy the needs of the economy of Member States in order to achieve the objectives of the Union, and to grant equal protection, the term of worker has a community meaning (European) imposed by the need for uniform interpretation and application in all Member States (EU:C:1964:19).

b) The concept of worker involves a proper interpretation of objectives pursued by the treaties establishing the European Union in order to ensure completely the principle of free movement of workers, so that in some cases it goes beyond the existence of an employment relationship. At the termination of the employment relationship, the person concerned loses, in principle, the quality of worker, but in some circumstances, the quality of worker in the sense of community (European) meaning may take effect after termination of the employment relationship, particularly in relation to the person seeking a job in another Member State (the migrant worker)[3].

In the Court jurisprudence they also included in the category of worker ' within the meaning of Art. 45 TFEU the person who is looking for a job in another Member State[4], the one pursuing studies in another Member State and who also provides a activity that comprises the essential elements of the employment relationship (EU:C:2004:172; EU:C:2002:432; EU:C:2013:97), the person who after graduation in another Member State seeks a job (EU:C:1992:84, EU:C:2004:172).

In a recent decision (EU:C:2014:2007, para. 47), the Court of Justice ruled that a woman who terminates employment or ceases to look for a job because of physical constraints that occur in the latter stages of pregnancy and following the birth retains the status of "worker" for the purposes of this Article, on condition to resume work or find another job within a reasonable period after childbirth

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1 The same effect, the Decisions as of 19 March 1964, Case Unger, 75/63, and 28 March 1982 in Case Levin, 53/84

2 Paragraph 31 of the recitals of the Decision dated as of 12 May 1998, in the case Maria Martinez Sala C-85/96 ´It must also be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied. For instance, the definition of worker used in the context of Article 48 of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article 51 of the EC Treaty and Regulation No 1408/71 .

3 Paragraph 32 of the recitals of the Decision Martinez Sala ´there must be considered as a worker a person who performs, for a certain period of time in favor of another person and under the latter’s direction, certain services, for which he receives remuneration. At the termination of the working relationship, the person concerned loses, in principle, the quality of worker, although on the one hand, this quality can produce certain effects after the termination of employment relationship and, on the other hand, a person who seeks real employment must also be regarded as a worker (see, to that effect, the decision as of 3 July 1986 Lawrie - Blum Case 66/85, Cul., p. 2121, paragraph 17; Case 21 June 1988, Lair, Case 39/86, Cul. p. 3161, paragraphs 31-36, and the decisions as of 26 February 1991 Antonissen, Case C-292/89 Cul. p. I-745, paragraphs 12 and 13) , Caves Krier Frères Case C 379/11, EU: C: 2012: 798, paragraph 26

4 Among the decisions in this regard we can mention the decisions dated as of 4 June 2009, in case Vatsouras, C-22/08 and 23/08, the Decisions as of 23 March 2004 Colins, c138/03

Extensive case law of the Court constituted the engine of codification at the level of secondary legislation, made by Directive 2004/38 / EC on the right to move and reside freely within the Member States for Union citizens and their family members[1], Regulation (EU) no. 492/2011 on free movement of workers within the Union and Directive 2014/54 / EU on measures to facilitate the exercise of rights conferred to workers in the context of free movement of workers, acts under which fragmented and sectoral measures measures applicable in this field so far were merged.

2. The rights granted to European workers

2.1. The current European context.

The provisions of Article 45 TFEU are directly applicable in the national law of the Member States within the limits outlined by the jurisprudence of the Court of Justice of the European Union (CJEU) and in compliance with the legal framework established in secondary legislation. They provide to the EU citizens, without discrimination, the right to move freely within the territory of any Member State in professional interest, the right to seek employment, accept real job offers, to work in a Member State without needing a work permit, to reside in a Member State of the European Union for the exercise of their duties and remain in that Member State even after termination of employment agreement.

Currently, the rules and specific conditions to exercise these rights are provided for in Directive 2004/38 / EC. By Regulation (EU) no. 492/2011 on free movement of workers within the Union there was completed the legislative framework aiming at setting up an overall common regulatory framework across Member States. Regulation regulates in detail the rights arising from the freedom of movement for workers and defines the areas which prohibit all discrimination based on nationality between workers of the Member States in the labor market. Rights deriving from free movement concern the access to jobs, working conditions, social and tax advantages, access to training, membership of trade unions, housing, access to education for children.

Art. 7 of the Regulation provides that workers who are nationals of a Member State may not be treated differently from national workers on the territory of other Member States on grounds of nationality, as regards the conditions of employment and work, especially in terms of remuneration, dismissal and, if left without a job, reinstatement or re-employment with the same social and tax advantages. It takes into account both direct and indirect discrimination, and CJ held that even if certain criteria are applicable irrespective of nationality, they must be considered as indirectly discriminatory if there is a risk of discriminating against migrant workers in particular (EU:C:1996:206).

According to article 7 para. (2) of the Regulation, migrant workers enjoy social advantages as the national workers do since their first day of work in the host Member State, which must be interpreted in the sense that obtaining such advantage cannot be subject to completion of a specified period of occupation. Social advantages have been defined by the CJ in Case C-85/96 ´as representing all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or due to the simple fact of their stay in the national territory and whose extension to workers who are nationals of other Member States appear to facilitate their mobility.´

Revealing a serious concern for ensuring the effective exercise of freedom of movement for workers, for the a more accurate and uniform implementation and enforcement of the rights conferred under the TFEU and Regulation (EU) no. 492/2011,

[1] Published in JOCE no.L158 as of 30 April 2004, details the specific rules and conditions regulating the free movement and residence in the Union teritory

Directive 2014/54 / EU was adopted. It applies to all workers and their families as well as to people in search of a job, covering in compliance with the provisions of Art. 2 the following issues related to the free movement of workers: (a) access to employment; (b) conditions of employment and work, in particular as regards remuneration, dismissal, health and safety at work, and, if Union workers become unemployed, reinstatement or re-employment; (c) access to social and tax advantages; (d) membership of trade unions and eligibility for workers' representative bodies; (e) access to training; (f) access to housing; (g) access to education, apprenticeship and vocational training for the children of Union workers; (h) assistance afforded by the employment offices.

The Directive also introduces a number of binding obligations to all Member States to facilitate the mobility of workers by reducing the obstacles created by certain European or national rules, aiming at improving the mechanisms of effective implementation of the principle of equal treatment for workers within the Union and the members of their families exercising their right of free movement and a better knowledge of their rights.

According to the provisions of Article 3 there is established the obligation for Member States to ensure EU mobile workers, who travel for work purposes within the European Union, an appropriate means of appeal at the national level, meaning that every worker in the European Union who has suffered or suffers from restrictions and unjustified obstacles to their right to free movement or who considers to have been discriminated against on grounds of nationality, should be able to apply to apropriate administrative and / or legal means to challenge discriminatory behavior. In the same context, the states should grant social partners, associations, organizations or other legal entities which have a legitimate interest in promoting the rights of free movement of workers the opportunity to engage in administrative or judicial proceedings on behalf of or in favor of mobile workers within the Union European whose rights have been violated.

Workers knowledge of the rights they enjoy is one of the objectives at European level, so that Member States are obliged to establish or designate structures or bodies at national level to promote the exercise of free movement by providing information, support and assistance to mobile workers in the European Union who face discrimination on grounds of nationality. These national structures will cooperate, will exchange information which will be further made avaliable to stakeholders.

According to art. 5 and 6, Member States shall take measures to promote the dialogue with social partners and relevant non-governmental organizations and ensure easy access of all interested parties to clear, free, accessible, comprehensive and updated information.

2.2. The right of residence.

Nationals of Member States of the Union may enjoy the right of access to the territory of a Member State and the right of residence in its three manners, regulated distinctly by the European rules mainly in relation to the duration: legal residence for a period of up to three months, residence for more than three months and permanent residence. Currently this right derives from the status of European citizen and it does not depend entirely on the quality of independent worker or employee.

Thus, pursuant to art. 6 of Directive 2004/38, citizens of the Union have the right to reside in another Member State for a period of maximum three months if they hold a valid identity card or passport, without having to fulfill other conditions and formalities These provisions also apply to family members[1] who hold a valid passport or who are not nationals of a Member State and they accompany or join the citizen of the Union.

[1] According to art. 2 paragraph 2 of Directive 2004/38/CE 'family member' means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the

Corroborating these provisions with those contained in art. 14 para. (1) of the Directive 2004/38 under which it is permitted the removal of Union citizens and their family members from the host country for economic reasons, it appears possible in certain cases to consider the conditions and formalities stipulated by art. 14 para. (3) pt. (16), art. 30 and 31 or art. 14 para. (4) b) of the directive.

It should also be noted in this context the fact that the individuals mentioned in art. 6 are not required to declare their presence to the local authorities in the host Member State.

The right of residence for more than three months is subject to certain conditions, depending on the person's status in the host Member State[1]. Art. 7 of Directive 2004/38 states that all EU citizens have the right to reside in another Member State for more than three months provided they comply with one of the following situations:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

If the period of stay exceeds three months, the host Member State may require the Union citizens, in accordance with art. 8 of the Directive. 2004/38, to register with the competent authorities, in which case they shall be issued a registration certificate (Deleanu, 2013).

If the planned period of residence exceeds three months, family members of a European citizen who are not nationals of a Member State have to apply for a residence permit, according to the provisions of art. 10 para. (2) indicating the exhaustive documentation to be submitted by the applicant for the issuance of a residence permit.

The right of permanent residence is not subject to any condition, it can be acquired by any European citizen and family members who have legally resided together with the Union citizen in the host Member State, regardless of citizenship[2] after five years of continuous and legal residence on the territory of the receiving State. This right can be acquired, notwithstanding the above provisions, and in a shorter period of time under certain strictly defined circumstances. The continuity of residence is not affected by the

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legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

[1] 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

[2] It is not any period of time to be taken into account for establishing the right to stay. According to the European Court jurisprudence the periods of detention in the host Member State of a third-country national, family member of a Union citizen who has acquired during those periods the right of permanent residence in that Member State cannot be taken into account in order to acquire by the third country national the right of permanent residence.

temporary absence which does not exceed a total of six months a year or by absences of longer periods of time, determined by performing the compulsory military service or by an absence of twelve months in a row due to important reasons, such as pregnancy and childbirth, serious illness, study or vocational training, or a detachment in another Member State or in a third country.

After acquiring it, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years (art. 16 para. 4).

Under Art. 19 of the Directive, EU citizens who have the right of permanent residence shall be issued a document certifying the permanent residence. Furthermore, Member States shall issue a permanent residence permit with a validity of 10 years, to family members who are not nationals of a Member State and have the right of permanent residence, according to art. 20 para. (1) of the Directive.

3. The restrictions applied to the free movement right

The right of free movement and right of residence on the territory of Member States do not have an absolute character but they are subject to limitations and conditions laid down both in the Treaty and in the secondary law. Analysis of regulations on the field have proven the conclusion that we can envisage three categories of restrictions, respectively:

a) restrictions on grounds of public policy, public security or public health;

b) restrictions on grounds of employment in certain positions or exercising certain activities, involving prerogatives of public authority;

c) restrictions arising from the transitional arrangements agreed by the Member States and the European Union, on the occasion of signing the Treaties of Accession.

Member States may restrict the freedom of movement and residence of Union workers and their family members, irrespective of nationality, on grounds of public policy, public security or public health under the provisions of the introductory paragraph. 3 of art. 45 TFEU, paragraph 1 of article 52 TFUE and Article 62 TFEU. These reasons cannot be relied on to contribute to the achievement of economic goals (Blumann, C. 2006, p.67).

The acceptation recognized to the notions of "overriding reasons of public order" and "imperative grounds of public security" is established both depending on how these notions are defined by Member States but also on the definition under the provisions of the European law and the Court of Justice of the Union.

The measures taken if they considered grounds of public policy or public security must observe the principle of proportionality and be based entirely on the actual and individual behavior of the individual in question, previous criminal penalties being unable to represent by themselves reasons for taking such measures.

Considering the public health reasons cited for restricting the right to free movement, it is provided for in art. 29 that the only diseases justifying measures that restrict the freedom of movement are diseases with epidemic potential as defined by the relevant bodies of the World Health Organisation and other contagious infectious or parasite diseases to the extent that they are subject to, in the receiving state, some protective provisions which apply to nationals of the host Member State.

Diseases occurring after a period of three months from the date of arrival cannot be grounds for expulsion from the territory.

Expulsion from the territory of the host state shall be achieved under the conditions imposed by European rules, those persons benefiting from material and procedural guarantees, provided for by art. 31 of Directive 2004/38.

Under the primary provisions of the EU law, Member States may limit the employees' access to employment of in the public administration or at performing certain

activities involving the exercise of public authority, while retaining them for their own nationals. This exemption has been interpreted narrowly by the Court (Case Lawrie Blum, 1986) and found compatible with EU law only to the extent that the vacant positions in the administration "involve direct or indirect participation in the exercise of public powers and functions which aim at protecting the general interests of the State or of other public colectivities and which involve, therefore, as far as the holders are concerned, the existence of a special solidarity report with the State, as well as the reciprocity of rights and obligations representing the foundation of the citizenship relationship. Excluded positions are only those which, considering their respective duties and responsibilities, may take the specific characteristics of government activities in the areas described above. "

Upon a country's accession to the European Union there was created the possibility for Member States to impose a series of transitional arrangements on the free movement of workers, aimed at temporarily restricting the access of workers coming from the new Member State on the labor markets in their countries. These transitional measures allow Member States to establish the access policy to employment regarding the situation of the local labor market so that there should not be serious disturbances, while they can be established for a period of 7 years. Currently such restrictive measures apply to workers from Croatia Provence, the measures will expire in July 2020

4. Conclusions

Art. 3 of the Treaty on the European Union states that "the Union shall offer its citizens an area of freedom, security and justice without internal frontiers in which there shall be provided the free movement of persons, in conjunction with appropriate measures on external border controls, the right to asylum, immigration and the prevention and fight against crime". An important component of this freedom is the freedom of movement of workers within the Union.

Although it has been more than 50 years after the recognition of the freedom of movement of people, the effective exercise of freedom of movement for workers as part of it still remains a major challenge for Member States and, very often, workers in the Union unaware of their rights faced with unjustified restrictions.

At European level there has been a constant concern to improve the mechanisms for effective implementation of the principle of equal treatment for workers in the Union and their family members exercising their right to free movement. The actions were conducted on multiple levels: on the one hand they aimed to synthesize and improve the existing legal framework, including the solutions offered by the jurisprudence of the CJEU, on the other hand efforts were targeted towards the establishment of mechanisms to enable a correct application and unitary European standards coupled with an efficient and coherent cooperation between Member States and to provide information to the beneficiaries of this right.

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