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THE FREE MOVEMENT OF PEOPLE

Speaking, at a given moment, about the concept of European identity, a certain author specifies the fact that among the objectives of the European Union, there is a series of desiderata that have to be mentioned, according to the treaty of Lisbon, which classifies them into several levels:
a. promoting peace, its values and the welfare of the member states;
b. offering to its citizens a space of freedom, security and justice without any internal boundaries.

It has to be mentioned that when the Treaty of Rome was drawn up, an especially important treaty for Europe, the free movement of people was not envisaged as a right for the citizens of the member states to travel anywhere within the community and having no matter what purpose.

At first, the freedom of movement was related to the concept of worker – to what the German doctrine calls ***Marktburger,*** when it describes the status of the individual within the communitarian law, namely, the individual that exerts economic cross-border activities. The principle of free circulation has evolved, considering the establishment of an internal market, along with other types of freedom. The development was due both to the jurisprudence of the Court, as well as to the law-making activities of the other communitarian institutions.

The doctrine considers unquestionable the fact that **free circulation and inhabitancy** constitutes one of the fundamentals of the European Community. **Its relation to the European citizenship has an important significance, especially from a symbolic approach** point of view. Currently, it is still a branch falling apart from citizenship, because of the role played in the development of the communitarian integration.

The institution of any EU citizen's right to travel and live freely on the territory of the member states, stipulated by the Treaty of Maastricht, has put an end, to a certain extent, to the controversy and tensions related to the free circulation. The establishment of this right reasserts the consolidation of a freedom system achieved a long time ago and which had lost, even before the Treaty, its exclusively economic character over the European Union. The combination of the intergovernmental cooperation –

established especially by the Schengen agreements – with the communitarian integration, as well as with the persistence of some states' refuse to eliminate the inner border control, make the treaty of Amsterdam almost illegible. This treaty made an attempt to settle the substance, the latter having four significant general objectives:
- to bring forth the employment and the citizens' rights to the attention of the European Union;
- to eliminate the last obstacles for the free movement of people and to consolidate security;
- to allow Europe strengthen its position at the global level;
- to render more efficient the institutional architecture of the Union with a view to a future expansion.

A special case which has made a change in the jurisprudence of the Court in Luxembourg in the field of free movement , was the *Grzelcyzk* case, a student, French citizen, who studied for three years at a Belgian university, paying his studies by taking part-time jobs and by way of obtaining credits. In the fourth year of college, he applied for a Belgian benefit of social security, also known as the minimal sustenance allowance - minimex. The application was turned down under the reason that the relevant Belgian legislation pronounced as eligible the applicant that is not a Belgian citizen only if the Regulation 1612/68 is applicable, with a view to the free movement of workers within the community. As a consequence, the regulation would be applicable only to workers, not to students too. If the French citizen had been Belgian, he would have been entitled to such an allowance. The Belgium Court of Law has concluded that the subject was not a worker and at the same time it questioned the compatibility of the Belgian legislation with the articles 12 and 17 of the Treaty of European Communities Establishment (T.E.C.) and it required a preliminary interpretation to the European Court of Justice (E.C.J.). While analyzing this case, the Court has taken into account the regulation 1612/68 and the Directive 96/93/CEE regarding the residence right of the students, emphasizing the fact that the directive does not contain stipulations for allocating social benefits to the resident students in the host member state, but it does not prohibit this either. It was drawn the conclusion that in this particular case, the discussion was about a discrimination based on citizenship, which virtually is forbidden by the art. 12 of T.E.C.

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The employment and the rights of the workers carrying out a certain activity in other EU member states than the origin country

One of the most important aspects regarding the free circulation of people is related to the free circulation granted to workers.

As per art. 48 of T.E.C., it has been stipulated that the free movement of workers should be carried out within the Community by the end of the transition period at the latest. This right of free circulation of workers has been established by the regulation 1612/68 of the Council and the Directive 68/360 concerning the abolishment of restrictions on movement and residence within the community for the workers of the member states and their families**.**

The high level of unemployment in the European Union is one of the main concerns of the member states and it used to be a priority in all the documents of the Union. Although creating new job opportunities remained in the scope of the governments of the member states, which had the necessary levers, the Treaty of Amsterdam has given a common dimension to this issue, establishing common politics and strategies, as per the political will of the member states. The stipulations mentioned in this Treaty have rebalanced the Union, balancing the economic and currency dispositions contained in the Maastricht Treaty.

The free movement of people is rendered, among other things, also into the free circulation of workers in relation to whom Bernard Teyssie used to state that „it is a fundamental right that the national jurisdictions have to defend".

The free movement of people aims at, first of all from the economic point of view, creating a sole workforce market, and from the political point of view, achieving a higher cohesion of the peoples making up the European Union, by eliminating the barriers to migration and promoting a communitarian citizenship.

According to the European Social Charter – signed at Torino in 1961 - „every person should have the possibility to make a living by freely exercising a profession", and the fundamental Charter of the fundamental social rights of the workers of December 8-9th, 1989 proclaimed the right of every worker to exercise any kind of profession or trade within the Community, a right which is achievable only by way of free movement. Moreover, the free movement of people must allow the countries facing a certain level of unemployment to export their redundancy to the countries experiencing a shortage of workforce. The displacement of independent

workers is indispensable in order to allow the communitarian exertion of commercial or liberal professions. The displacement of physical persons may contribute to the life of societies and the practical exertion of the freedom to establish branch offices. The access to different positions of the social proxy does not fall into free movement of the employees, but within the dispositions regarding the independent workers.

In addition to that, align. 2 of the Adherence Treaty tackles the Regulation C.E.E. 1612/ 68 regarding the free circulation of workers within the community, with a view to establishing a derogation for a two year interval, calculated from the date of adherence (for Romania 01. 01. 2007-12. 31.2008). During this interval, the member states (at that moment) would apply measures of internal law or measures resulting from bilateral agreements regulating the access of the Romanian nationals to the workforce market of each and every of these states.

In the *Politierechtbank te Mechlen* case – *Belgium c. Hans van Lent, October 2nd 2003,* Mr. Van Lent, Belgium citizen, owns a car, registered in Luxembourg, where he worked. The vehicle is lease purchased by a Luxembourgish company. The Belgium legislation imposes to the Belgian residents the obligation of registering the cars in Belgium on the owner's name, which was impossible for Mr. Van Lent to do, considering that the Leasing Company was registered in Luxembourg. Following a traffic control, the Belgian authorities filed a criminal lawsuit to Mr. Van Lent. The Belgian High Court of Justice has intimated the C.J.C.E. in relation to the compatibility between the Belgian legislation and the principle of free movement of workers, consecrated by the T.E.C. The case entailed the interpretation of the articles 10 (regarding the loyalty obligation) and 39 (regarding the free circulation of workers) of the T.E.C. The Court has appreciated the fact that, in absentia of a harmonization in the field, the member states can establish the terms of vehicles registration (on condition that the dispositions of the treaty regarding the free movement are complied with) and that the Belgian legislation in the field may discourage the employment of Belgian citizens in other member states. The Court has also taken into account the fact that, since August 2001, the Belgian law allows a Belgian resident to register a car he/she uses, only in case that the car owner has no residence right on the territory of Belgium. Nevertheless, the Court considers that neither of these dispositions is able to eliminate the confinements to the free circulation of workers.

The solution of the Court reiterates the principle according to which the member states are compelled to eliminate any legal or administrative barrier that might affect the free circulation of people. In addition to that, the solutions of the Court imply that there is an incompatibility with art. 39 T.E C. not only among the measures establishing restrictions to the employment freedom of the communitarian citizens in other member states, but also among those which may discourage the employment of their citizens in other member states or of other states citizens in the member state under focus.

In a different case, *Christine Morgenbesser c. Consiglio dell'Ordine degli Avvocati di Genova, Italia – a prior appeal* , Mrs. Christine Morgenbesser, French citizen, residing in Italy, is the titular holder of a bachelor's degree in law, awarded in France 1996, but without having obtained the competence certificate for the lawyer profession. After a short internship in some French advocacy cabinets, she had worked since 1998 in a cabinet from Genova, Italy. Consequently, she asked to be registered in the probationers register in Italy, in order to carry out validly the internship period with a view to setting in for the competency exam, which is necessary for the legal practice. Her application was rejected by the Geneva Council of the Attorneys Order, as well as by the National Council of Florence, on the grounds that the Italian law regarding the attorney profession requires a law diploma obtained in an Italian University and the fact that Mrs. Christine M. was not qualified as attorney in France. The High Court of Cassation and Justice has asked C.J.C.E to decide on whether the communitarian law accepts that the Italian authorities reject the registration of title holder of a diploma obtained in another member state, on the simple grounds that the diploma was not issued in Italy.

The Court specified firstly that the case of Mrs Christine M., was not applicable neither to the Directive 98/5, regarding the permanent exercise of the attorney profession, nor to the Directive 89/48 regarding the acknowledgement of high education diplomas. The first directive aims obviously only at fully qualified attorneys, whereas the „practitioner" quality, which is limited in time and representing a part of the training necessary to becoming an attorney, cannot be qualified as „regulated profession", as per the directive 89/48.

Assuming the fact that the internship period entails exercising certain *remunerated activities* (by the clients or the attorneys cabinets, as fees or wages), the principles, established in the treaty as regards the freedom of

becoming a resident or aiming at the free movement of the workers, are applicable to probationers as well. Consequently, the Court reiterates the principles established in the prior jurisprudence: if the national rules do not take into account the knowledge and the already acquired qualification of citizen belonging to another member state, apart from the host state, the exercise of free circulation and residence is restricted.

As far as the term "worker" is concerned, this is not defined either by the primary law or by the secondary law, the Regulation no. 1612/68 of October 15th 1968 defining under art. 1 the *labor relations* in the sense of art. 39 of T.E.C. as a *remunerated activity*. Due to the major importance of the free movement of workers, CJCE has specified that the term "worker" has to have a more comprehensive meaning, the workers, in the communitarian law acceptance being those people that exercise a certain non-liberal profession during a definite period of time and that are remunerated for this

This general definition of the term was given by the Court in the case *Lawrie Blum against Land Baden-Württemberg*, when Mrs. Deborah Lawrie Blum, British national, after obtaining from the University of Freibourg the certificate of pedagogic competence for high school, Oberschulamt of Stuttgart turned down her access to the internship stipulated by „zweite Staatsprüfung" (the second state exam), granting the graduates the possibility of having a career as high school teachers. The file and the remarks presented to the Court state that in the Federal German Republic the training of teachers is, in fact, the scope of the lands. This training include university studies, confirmed by a „erste Staatsprüfung" (the first state exam) and an internship, followed by a „zweite Staatsprüfung" (the second state exam), which is an exam of pedagogical skills, according to paragraph 8 of the resolution. As her access to the internship had been turned down due to the fact that she didn't have German citizenship, Mrs. Lawrie-Blum entered an action to Verwaltungsgericht Freiburg (the administrative High Court of Justice of Freiburg) with a view to invalidating the rejection decision, on the grounds that the communitarian norms were being breached, due to her citizenship, for the access to employment. Verwaltungsgericht Freiburg, just like Verwaltungsgerichtshof Baden-Württemberg (the administrative court of appeal), rejected her request, invoking that article 48 align. (4) of the C.E.E. Treaty excludes from the norms regarding the free circulation of workers, the positions within the public administration; the appeal court added the

fact that the public education is excluded from the treaty field of application, as it is not an economic activity. The court considered that since the free movement of workers constitutes one of the fundamental principles of the Community, *the notion "worker", as stipulated by article 48, cannot be interpreted differently, depending on the national law, as it has a field of application at the communitarian level.* According to our specialized literature, a "worker" is „a person entering dependently in a wage system, which is also the case of football players".

In fact, so that article 48 can be applied, it is required that the activity should have the character of a remunerated work, no matter the field it is performed. The economic character of these activities can no longer be denied on the grounds that they are carried out in the field of public law, because, as the Court showed, the nature of juridical relationship between the employee and the employer – be it public law status or private low contract – has no relevance for the application of article 48.

The *free circulation of workers* is different from the *freedom of residence* by the fact that the latter can be used only by the people exercising a liberal profession. The criteria of assessing the liberal character of a profession are participation to profit and losses, the free choice of the working hours and the possibility of choice for collaborators. The freedom of movement entails the removal of any discrimination based on nationality among the workers of member states as far as remuneration, employment and other working terms are concerned. The abolishment, on the part of the member states, of the obstacles to the free movementof people could be compromised if the abolishment of the state barriers could be neutralized by obstacles resulting from their juridical autonomy exercised by certain organizations or associations that are not ruled by the public law.

The banishment of discrimination concerns any form that it may take, whatever its importance or field, ***including the educational field.*** In the case "*Commission against Italy*, it was stated, for instance, that the equality of treatment principle prohibits not only the direct discrimination, but any other disguised form of it by way of applying other differentiating criteria, such as the case of private universities in a member state having not acknowledged the rights obtained by former foreign languages assistant lecturers who have become mother tongue linguistic experts, even if such an acknowledgement is granted to national workers.

A similar case that brought to discussion a discriminating principle is the *Delay case* reiterating the issue of exchange lecturers who were not acknowledged by the Italian administration. They have to benefit from equality of treatment with the Italians hired on similar positions as regards the ceasing of their working contracts or their rights to social services, after Italy was denounced in 2001 (*case C-212/99*) for discrimination on grounds of nationality of the foreign language lecturers, who had become in the mean time „linguistic collaborators" (by way of not acknowledging their rights). After having analyzed art. 39 T.C.E. regarding the discrimination based on nationality grounds and after having drawn a parallel with the other cause, that is the Commission against Italy, the Court came to the conclusion that, in this case however, a particularity stands out, regarding a syncope in the collaboration of Mrs. Delay with the university that she used to teach at. The Court stipulates that in such cases, the continuity of collaboration should be taken into consideration. It was considered that the temporary stoppage of the work relations was not an element of importance just because „only an analysis focused on the substance, not on the form of juridical regimens, *can allow the probation as to whether their practical application to different types of workers, placed in comparable juridical situations, leads to compatible/non-compatible situations with the communitarian principle of nondiscrimination for nationality reasons".*

Similarly, the generally imposed obligation on all foreign physicians and dentists as regards the practice of their profession in France is, no doubt, restrictive, so much the more that in the case of medical specialization it is required that the specialist should be in permanent contact with the patient after their intervention.

In the decision given in case of *Ian William Cowman against the Public Finances,* the Court has established, by drawing parallels with other two cases - C- 286/82 and C- 26/83 *Luisi and Carbone against the Ministry of Public Finance,* that the liberty of providing services also includes the liberty for the service beneficiaries to travel to other member states with a view to obtaining a certain service, without being deterred by certain restrictions.

According to the provisions of art. 39 align. (4) of the E.C. Treaty, the free movement of workers is not applicable to public administration abidance. To put it differently, it is possible that only the citizens of the host state could have access to this type of jobs. However, this exception was interpreted by the Court of Justice of the European Communities as being extremely restrictive. In the Court's opinion only the employment entailing

the public authority exercise and the defense of general interests of the state may be limited strictly to the citizens of the respective country. These criteria have to be assessed from case to case, according to the nature of tasks and responsibilities that the job engenders. Consequently, if the jobs do not fall into this category, the examinations organized for their occupation should be accessible to every citizen of the European Union.

The Free Circulation Conferred by the Schengen Agreement

The right to the free movement on the territory of the European states is translated into the fact that every European citizen has the right to travel and settle anywhere on the territory of the member states of the European Union. This right should not be mistaken by the Schengen cooperation which is even more comprehensive, eliminating the checking at the border of the states having signed the Schengen agreement. The right to freely circulate means traditionally that no formality is needed in order to travel across the borders of a member state, except for the condition of holding a valid traveling document. This right is extended to the family members who can travel freely on the territory of certain states such as Norway, Liechtenstein, Island (based on A.E.E.A) and on Switzerland territory (based on a bilateral agreement), whereas the communitarian legislative basis as regards the free movement and residence of citizens and their family members is represented by the 38/04/C.E.E Directive.

The freedom of movement and residence within the current Schengen area has taken shape in 1985 when Germany, France and the component members of Benelux signed an intergovernmental agreement with a view to gradual elimination of the document control at the borders of these states, in a border town of Luxembourg, Schengen. The Schengen Agreement was followed in 1990 by the Convention bearing the same name which acquired juridical force in 1995. The role of the Schengen agreement was the elimination of the document control at the borders of these internal states signing the document and it introduced a common policy named the *short stay visa* and other measures as well, such as the judiciary cooperation among police and judiciary authorities. The representatives signing the Schengen agreement specified the fact that these states can reintroduce the control at the borders only for a short stay and especially under specific and clearly determined circumstances. A protocol annexed to the Amsterdam Treaty has included the development achieved subsequently to in intergovernmental cooperation within the judiciary and legal

cooperation among certain states (acqu-is Schengen) which has become thus, a part of the E.U. legislation, being divided between the first and the third community pillar, whereas the visa and border policy are included under the first pillar.

Starting with December 2007, 22 member states of the EU are situated within the Schengen area, eliminating thus their border control. Thers states are: The Czech Republic, Belgium, Denmark, Estonia, Germany, Greece, Spain, France, Hungary, Italy, Lithuania, Luxemburg, Malta, Holland, Austria, Poland, Portugal, Finland, Slovakia, Slovenia and Sweden. Two of the non-member states of the E.U., namely Norway and Island, fully apply the Schengen agreement based on a *specific agreement*, while Bulgaria, Cyprus and Romania apply it only partially at the moment, because becoming a member of the European Union does not necessarily imply that they are assimilated automatically to the Schengen area and that they can eliminate the internal border control. In resolution dated from 2006, the Council has decided that the member states having joined the European Union in 2004 have the possibility of acknowledging the visas and the residence permits issued by the Schengen states or by those countries that are not Schengen members, as they are considered equivalent to the national visas. This equivalence is valid only for transit, for a period no longer than five days. After the extension of the Schengen area, since December 2007, these rules were about to be applied only to Cyprus.

The Court has decided in a certain case that Spain has infringed the communitarian law by refusing to allow access to two Algerian citizens on the grounds that Germany had issued an alert according to the Schengen Convention of 1990 (named CISA) implementing the Schengen agreement since 1985. In 1999, Mr. Farid, who used to live with his wife (a Spanish citizen), has required to the Spanish consulate of London, a visa in order to enter the Schengen area and his application was rejected in 2000. In this case, the question was if the immediate refusal was compatible with the communitarian law, when the alert concerned the husband of a member state citizen. In this case, the Court has clarified the relation between the Schengen CISA and the communitarian law, indicating that the Schengen Protocol confirmed the fact that the CISA provisions are applicable if and when compatible with the communitarian law.

The Schengen Visas Issue

A sum total of 24 states apply the Regulation CE 539/2001 and have a completely common policy as regards the visas, while the citizens of other states are subjected to visa obligation. A visa issued by one of the countries having signed the above mentioned Schengen Agreement, is valid also for other states joining the same agreement. The visa sticker, which looks the same for all the Schengen states, shows the inscription "valid for Schengen States" and the alphanumeric codes that are marked down, indicate the country where the visa had been issued. The procedures and conditions for the Schengen visas released are stipulated in the Common Consular Instructions, published in the Official Journal C 326 of 22nd of December 2005. The third country nationals having the obligation of holding a visa as per the Regulation CE /539/2001- as Regulation CE/ 453/ 2003 and Regulation 1932/2006/CE have been modified, can travel with one visa on the Schengen territory and are not compelled to require a new national visa from the new member states. The third country nationals, holding a valid residence permit issued by a Schengen member state are able to travel based on this permit to every st ate and are not compelled to apply for another visa,

The freedom of residence

The freedom of residence refers to the right of the physical and legal entities to decide on the place of residence, that is the freedom of choice regarding the place where they are about to carry out their activity. The settlement of a physical or legal person in another member state implies the rolling out of an economic activity for a non-definite time because, if the activity is not carried out this way, it falls under the stipulations of the communitarian law regarding the freedom of providing services.

Art. 43 of the E.C. Treaty as well as art. 31 of the Agreement establishing the E.E.A. (European Economic Area) confers to the nationals of the member states the right to settle with a main or secondary title on other states territory. As a direct effect, art. 43 allows the nationals of a member state to exercise or accede to certain activities, mainly, under the same terms as the nationals of the respective country. The freedom of residence refers to the right of legal persons to participate in a stable and continuous way to the economic life of another member state of the community, other than the origin state.

According to the *case Gebhard,* the freedom of residence has been transformed from a simple interdiction of discrimination into general interdiction of limitation. The limits of the freedom of residence cannot have a discriminative character; they have to be grounded by a general interest, they have to be appropriate and necessary so that the intended objective is reached.

According to art. 43 E.C. "the restrictions regarding the freedom of residence of the nationals of a member state on the territory of another member state are prohibited. This prohibition refers also to the restrictions concerning the establishment of agencies or branches by the nationals of a member state on the territory of another member state". As for the containment of the residence freedom, the Court stipulates that, as results from the jurisprudence, a restriction regarding the freedom for residence, which is applicable with no discrimination based on citizenship or nationality, may be justified on imperative grounds of general interest, on condition that it could guarantee reaching the objective aimed at and does not exceed everything necessary for the objective to be reached. The free circulation right includes, however, both the European Union citizens' right to enter a member state other than the native country, and the right to leave it.

The Court of Luxembourg considers that the guaranteed fundamental liberties based on the E.C. Treaty could be depleted of any substance if the origin member state could, with no valid justification, prohibit its own nationals to leave the respective state territory in order to enter other states territories

As for the freedom of residence, in case of a more than three months stay period, the European citizen has to fulfill one of the following conditions:

- exercise an economic activity as an employee or non-employee;
- dispose of enough financial resources and a health insurance;
- being a student and dispose of enough financial resources and a health insurance;
- being a member of the family of an European Union citizen, falling under one of the above-mentioned categories.

For the citizens of the European Union member states, there is no notion such as the residence permit. Nevertheless, the host state can ask the citizen to record a procedure which is done by the presentation of an

identity card or a valid passport and a proof according to which, the terms regarding the financial incomes are complied with

Another case debating on the freedom of residence and circulation of people is the *Morson* case [1]. Mrs. Elestina Esselina Christina Morson has raised the issue of discriminating her country's own citizens in applying the free circulation of workforce. In this case, E. Morson and S. Jhanjan, Surinamese citizens, have requested for their right to settle in Holland to be acknowledged, as their children resided in Holland having that citizenship. They have founded their request based on art. 10 of the Directive 1612 /68 allowing a worker, traveling in order to fill a position, to bring along his/her family members. The Court stated that these provisions meant to ensure the free circulation of workforce cannot be applied to a situation that has nothing to do with another situation that the communitarian law is applicable to. To put it more simply, it is impossible to apply certain rights which are generated by the right to free circulation of workforce for a person that has never made use of his/her right to the free circulation of workforce

The enunciated case is not singular, as similar aspects regarding the right for residence of family members are represented by the case *European Communities Commission against. F.G R* where the defendant state has been accused that, by introducing and maintaining in its national legislation the dispositions regarding the residence permit (dispositions stating the obligation of "living in normal living conditions, and not only during the accommodation period of the migrant worker, but during their entire stay"), the former F.G.R. did not comply with the dispositions of art. 48 T.C.E.

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