

## IMPORTANCE AND EFFECTS ON THE LIBERALIZATION OF THE RIGHT TO WORK IN THE EUROPEAN AREA

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**Abstract:** One of the fundamental freedoms of European law is the free movement of people and labour. The right to work in the European area involves different areas of social life, starting from the economy and living standards and ending by the formation of the citizen in moral and professional terms. The free movement of labour allows countries whose populations are facing social problems: the lack of jobs, low pay, poor working conditions, to emigrate in search of jobs and better livelihoods than in the home country.

**Keywords:** labour force, European area, European citizens, right to work, free movement.

The right to work in the European area is one of the fundamental rights that European citizens have. The free movement of workers, that we will focus our analysis on, is presented from the constitutive treaties of the European Economic Community (*Treaty of Rome*) and ending by the new regulations and guidelines embodied in the already existing legislation.

The role of the labour law within the European Union social policy was outlined and structured over time, particularly after the 70s of last century, once with accelerated incorporation of the social policy in the Community policies. The national labour law was no longer able to meet EU requirements. Thus, the Community employment law was born gradually, by adopting some Community instruments (mainly directives, and some regulations).

### **Definitions, directives and principles of the labour law in the European area**

The right to work in the European area is defined by the right to respond to offers on jobs, to move for this purpose in the Member States to conduct an activity

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and to remain on the territory of one of them after a person conducted any activity (article 48 par. 3, Article 39 in the consolidated version of *Directive No. 2004/38/EC* regarding the right of citizens of the union and their family members to move and reside freely within the territory of the EU and EEA member states)<sup>1</sup>.

The free movement of the labour force supposes from the beginning that the worker moving responds to an offer effectively made on a job. Therefore, it is not about the right to freely move on the territory of member States in search for a job<sup>2</sup>. Principally, only workers of the member states have the freedom to move within the Community, but each member state establishes according to its own legislation, its citizens, as well as the methods to lose and acquire the citizenship.

The European labour market uses the term of “worker”. Within the meaning of the Community law, the term “worker” includes persons employed in the host country, those who are looking for a job, unemployed able to work and who previously were employed, people unable to work due to illness or an injury encountered during employment in the host country [Art. 7(1) of *Directive No. 68/360*], persons under the normal age of retirement while conducting the activity in the host country. Worker, within the meaning of Community law, is one that provides only occasional or part-time activity. It’s enough for the work to be effective, not simply a voluntary one<sup>3</sup>.

It is also used the term of “labour migration”. The labour migration is: movement for the purpose of changing their place of residence and work determined by social, political, economic or natural factors, so migration is leaving a basic territory for another one suitable for economic activities, leaving which involves also relocation. In this context it is necessary to distinguish between the concepts of immigrant and emigrant. According to the Explanatory Dictionary of the Romanian Language, we talk about emigration when you leave the home country and settle down, either permanently or temporarily in another country. In this case the verb to emigrate is synonymous with the verb to expatriate.

Regarding the term “immigration”, it can be used when changing the perspective and look from the “adoption” country of a migrant. That means, once we arrive in a foreign country where we left, we become immigrants. Similarly, those who come from other states and settle in Romania, immigrate when they get here, but emigrate when they leave their home country. More easier to remember: a migrant is emigrant at departure and immigrant at destination.

The first and main directives and regulations adopted with reference in the labour law of the European area are<sup>4</sup>:

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<sup>1</sup> Nicolae Voiculescu, *Community labour law*, Wolters Kluwer Publishing House, 2009, p. 152.

<sup>2</sup> *Ibidem*, p. 153.

<sup>3</sup> *Ibidem*, pp. 155-156.

<sup>4</sup> *Directive 68/360/EEC*, *64/221/EEC* and *Regulation EEC no.1612/68* were abrogated by *Directive 2004/38/EC of April 28th, 2004*, have historical and informative character.

a) *Directive no. 68/360/EEC* on entry and residence rights<sup>5</sup>;  
b) *Regulation no. 1612/68/EEC* on the access to the employment conditions<sup>6</sup>;  
c) *Regulation no. 1251/70/EEC* on the right of workers to remain on the territory of a Member state after having been employed in that State<sup>7</sup>;  
d) *Directive no. 64/221/EEC* on the right of member states to derogate from the provisions of free movement on ground of public order, public security of public health<sup>8</sup>;

e) *Directive no. 2004/38/EC* on the right of free movement and residence on the territory of member states for the EU citizens and their family members<sup>9</sup>;

*Directive no. 68/360/EEC* was the first community document suppressing the restrictions on the movement and residence of the European Union citizens and their family members (art. 1).

Thus, it provided the migrant worker with the right:

a) To leave the home country in order to conduct an activity as an employee in other member state (art. 2);

b) To enter the territory of other member state only based on an identity card or passport [art. 3 (1)].

The entry visas (or their equivalent) have not been required any longer, save for the family members who are not the citizens of any member state. These states were requested to grant facilities for obtaining the necessary visas [art. 3 par. (2)].

To obtain a residence permit, based on:

– the document whereby he/she entered the territory;

– employment confirmation from the employment or an employment certificate [art. 3 par. (3) letters a) and b)].

*Directive no. 2004/38/EC* codified and reviewed the existing Community instruments dealing separately with employees, self-employed persons, as well as students and other inactive persons. Unlike the previous Community act, *Directive no. 2004/38/EEC* retains not only the entry right but also the exit right that all European Union citizens have.

EU citizens have the right of residence in the host member state for a period not exceeding three months, without being subject to any conditions or formalities

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<sup>5</sup> *Directive no. 68/360/EEC* on the entry and residence rights, published in the European Union Official Gazette, Legislation (referred to hereunder as OG L) 257 of October 19<sup>th</sup>, 1968.

<sup>6</sup> *Regulation no. 1612/68/EEC* on the access to the employment conditions, published in the OG L 257 of October 19<sup>th</sup>, 1968, pp. 2-12.

<sup>7</sup> *Regulation no. 1251/70/EEC* on the right of workers to remain on the territory of a Member state after having been employed in that State, published in the OG L 142 of June 30<sup>th</sup> 1970, pp. 24-26.

<sup>8</sup> *Directive no. 64/221/EEC* on the right of member states to derogate from the provisions of free movement on ground of public order, public security of public health, published in OG L 56 of April 04<sup>th</sup>, 1964, pp. 850-857.

<sup>9</sup> *Directive no. 2004/38/EC* on the right of free movement and residence on the territory of member states for the EU citizens and their family members, published in JO L 158 of April 30<sup>th</sup> 2004, pp. 77-123.

other than the requirement to hold a valid identity card or passport, without prejudicing a more favourable treatment applicable to persons seeking work, according to the Court of Justice (art. 6).

Instead, the right of residence for more than three months is granted, according to art. 7 par. (1) of *Directive no. 2004/38/EC* if the EU citizens rendering it valuable:

- a) Are employees or self-employed in the host member state;
- b) Have enough resources for them and their family members, so as they do not become a burden for the social work system of the host member state during the residence period and hold an appropriate medical insurance, valid in the host member state;
- c) Are registered with a private or public institution accredited or financed by the host member state under its legislation or administrative practices, for the main purpose of attending studies, including professional training;
- d) Hold an appropriate insurance in the host member state and ensure the competent national authority, by a statement or any other equivalent procedure at their discretion, that they hold enough resources for themselves and for their family members so as they do not become a burden for the social work system of the host member state during the residence period;
- e) Are family members accompanying or joining an European Union citizen fulfilling the conditions mentioned at letters a), b) or c).

The principles of Community law represent regulatory rules common to the laws of the Member States, with or without elements of fairness and impartiality; they originate near their legal systems, produced over the years also in their level of economic, social and cultural development (it is in fact a condition of acquiring the European Union membership).

The most important *principles regulating the right to work in the European area* are:

➤ *Principle of equal treatment between men and women* in terms of access to employment, vocational training and promotion, as well as working conditions and occupational social security schemes;

The equality between men and women is a fundamental principle of Community law. The equality between men and women is a “task” and a Community objective and it has the positive obligation to promote it in all its actions. The scope of the principle of equal treatment between men and women can not be confined only to discrimination based on the affiliation to either sex. Given the subject or the nature of the rights which it seeks to defend, this principle applies equally to discriminations arising from the gender reassignment of a person<sup>10</sup>.

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<sup>10</sup> Costel Gilcă, *Community labour law. Transposition in the Romanian labour law*, Rosetti Internațional Publishing House, 2012, pp. 92-93.

➤ *Principle of equal pay for equal work;*

Art. 119 of the EEC Treaty on the establishment of the European Community (Art. 141 of the consolidated version) establishes the principle of equal pay for equal work between men and women. For the purposes of this article, pay means the minimum or ordinary wage, either in cash or in kind, which the worker receives, directly or indirectly, for his/her work, from his/her employer. Applying the principle of equal work, equal pay does not prevent the employer from establishing a difference in salary between employees who provide the same work or work of equal value if the difference is justified by objective and relevant elements that may be proven (responsibilities, a remote work place). In the absence of an objective justification, that can be proven, the employer commits an act of discrimination against the employee who is under a less favourable position<sup>11</sup>.

➤ *Principle of equal treatment irrespective of racial or ethnic origin;*

Among the concerns of European Union in the consecration of free access and the equal opportunities and treatment for EU citizens, it should be mentioned *the Council Directive 2004/43/EC of June 29th 2000* on the implementation of the principle on equal treatment between persons, irrespective of their racial or ethnic origin. Any employee who performs work, benefits of working conditions appropriate to the conducted activity, social protection and also respect of his/her dignity and consciousness, without any discrimination<sup>12</sup>.

➤ *Principle of non-discrimination between full-time employed workers and those part-time employed;*

The non-discrimination principle requires, regarding the employment conditions, that part-time workers should not be less favourable than full-time workers, unless the difference in treatment is justified by objective reasons<sup>13</sup>.

➤ *Principle of working week of 40 working hours and principle of annual paid leave of 4 weeks.*

The freedom of movement and residence of persons in the European Union is the cornerstone of Union citizenship and was established by the *Maastricht Treaty* in 1992. In addition to other three fundamental freedoms: free movement of goods, services and capital. They gradually removed first internal borders according to *Schengen Agreement*, initially only in some Member States. Currently, the free movement of persons is governed by *Directive no. 2004/38/EC*<sup>14</sup> on the right to free movement and residence within the Member States for the Union citizens and their family members. The legal ground for this freedom is Article 3 paragraph (2) of *the Treaty on European Union (TEU)*; Article 21 of *the Treaty on the functioning of the European Union (TFEU)*; Titles IV and V of the TFEU.

<sup>11</sup> Nicolae Voiculescu, *op. cit.*, p. 209.

<sup>12</sup> Costel Gîlcă, *op. cit.*, p. 228.

<sup>13</sup> *Ibidem*, p. 190.

<sup>14</sup> *Directive 2004/38/CEE* of the European Parliament and Council of April 28<sup>th</sup>, 2004 on the right to free movement and residence on the territory of the member states for the Union citizens and their family members, published in the OG L 30. 04. 2004.

The original meaning of the concept of *free movement of persons* has changed over time, once with the expansion of the right to free movement. The first provisions date back to 1957, included in the *Treaty establishing the European Economic Community*<sup>15</sup>. *The Maastricht Treaty*<sup>16</sup> introduced the concept of EU citizenship<sup>17</sup>, that every citizen of a Member State benefits of automatically. This EU citizenship is the basis of individuals' right to move and reside freely within the territory of the Member States. The Lisbon Treaty confirmed this right which is also included in the general provisions relating to the area of freedom, security and justice.

An internal market without obstacles to the free movement of persons has been the objective of concluding the two Schengen agreements, namely *the Schengen Agreement itself on June 14<sup>th</sup>, 1985* and *the Convention implementing the agreement signed on June 19<sup>th</sup>, 1990* and which became effective on March 26<sup>th</sup>, 1995. The Convention implementing the Schengen Agreement (signed only by Belgium, France, Germany, Luxembourg and Netherlands) was based on the intergovernmental cooperation on justice and home affairs. Since the vast majority of the provisions in the Schengen agreements are nowadays part of the EU acquis, since the UE enlargement of May 1, 2004, countries under accession have no longer the option of non-participation (Article 8 of the *Schengen Protocol*).

Currently, there are 26 members with full rights of the Schengen area: 22 EU Member States plus Norway, Iceland, Switzerland and Liechtenstein (which have associate status). Ireland and the United Kingdom are not parties to the *Convention* but they have the possibility to adhere to the application of certain provisions of the Schengen acquis; Denmark, although it is part of the *Schengen Agreement*, benefits of the option of not participating in any new measures, including related to Schengen, but it is still bound to observe some provisions of the common visa policy. Bulgaria, Romania and Cyprus will join, even if there are delays for various reasons. On July 1, 2015, Croatia began the process by requesting the accession to Schengen area.

Due to the common Schengen area, presently it is possible for the member states:

- a) removal of controls at internal borders for all persons;
- b) measures to strengthen and harmonize controls at external borders: to enter the Schengen area<sup>18</sup>, all EU citizens must present only their identity card or passport;
- c) a common policy on visas for short-term stays: citizens of third countries included on the joint list of non-member countries whose citizens need an entry visa (see Annex II of *Regulation 539/2001 of the Council*<sup>19</sup>) may obtain a single visa valid for the entire Schengen area;

<sup>15</sup> For details, see [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU\\_1.1.1.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_1.1.1.html), accessed in March, 2016.

<sup>16</sup> *Treaty on the European Union*, which became effective on November 01<sup>st</sup>, 1993.

<sup>17</sup> See the second part of TFUE entitled "Non-discrimination and Union citizenship".

<sup>18</sup> For details, see [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU\\_5.12.4.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_5.12.4.html), accessed in March, 2016.

<sup>19</sup> For details, see <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32001R0539>, accessed in March, 2016.

d) police and judicial cooperation: police forces assist each other in detecting and preventing crimes and are entitled to pursue fugitive criminals into the territory of a neighbouring Schengen state; there is also a faster mechanism for extradition and mutual recognition of criminal judgments<sup>20</sup>;

e) establishment and development of the Schengen Information System (SIS).

Although the Schengen area is generally considered as one of the main achievements of the European Union, it is currently subject to considerable pressures as a result of unprecedented flow of refugees and migrants in the EU. The extremely high number of new arrivals determined several Member States to temporarily reintroduce checks at the internal borders of the Schengen area the recent months, in accordance with the Schengen Borders Code<sup>21</sup>. An additional challenge to the passport-free movement in the Schengen area appears as an increased terrorist threat, the attacks of November 2015 in Paris and of March 2016 in Brussels demonstrating the ease by which persons suspected or even accused of terrorism could enter and travel within the Schengen area.

***The free movement of citizens within the European area offers both rights and obligations:***

- For stays less than three months: the only requirement is that EU citizens hold a valid identity card or passport. The host Member State may require the concerned persons to register their presence in the country, in a reasonable and non-discriminatory time period;

- For stays of more than three months: the right of residence is subject to certain conditions: if not working, EU citizens and their family members must have sufficient resources and a health insurance to ensure that they do not become a burden for the social services of the host Member State during their stay. EU citizens do not need residence permits, but Member States may require them to follow a procedure of registration with the competent authorities. Those family members of EU citizens who are not nationals of a Member State must apply for a residence permit valid for the duration of their stay or for a period of five years;

- Right of permanent residence: *the Directive* gives to EU citizens the right to permanent residence in the host Member State after a period of five years of continuous legal residence, if no expulsion decision against them was applied. The right of permanent residence is no longer subject to any conditions. The same rule applies also to family members who are not nationals of a Member State and who have cohabited with a Union citizen for five years. The right of permanent residence can be lost only in case of an absence for more than two consecutive years in the host Member State;

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<sup>20</sup> For details, see [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU\\_5.12.6.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_5.12.6.html), accessed in March, 2016.

<sup>21</sup> See (EC) Regulation no. 562/2006 of the European Parliament and Council of March 15<sup>th</sup>, 2006 instituting a Community Code on the regime governing the movement of persons across borders (Schengen Borders Code).

- Restricting the right of entry and right of residence on grounds of public order, public security or public health: EU citizens or their family members may be expelled from the host Member State on grounds of public order, public security or public health. The expulsion decision may not be taken in any circumstance for economic reasons. The measures affecting the freedom of movement and residence must comply with the principle of proportionality and be based exclusively on the personal conduct of the concerned individual. Such conduct must represent a real and sufficiently serious threat to the fundamental interests of the state. Previous criminal convictions do not automatically justify expulsion. The mere fact that the entry documents used by the concerned individual have expired does not constitute a ground for expulsion. Only in exceptional circumstances, where there are imperative reasons of public security, decisions of expulsion may be taken against a Union citizen who lived in the host country for ten years or is under age.

There may be issued under no circumstances acts of expulsion valid during the entire lifetime of the concerned person and the persons making the subject of an expulsion decision may request a review after three years. Moreover, the concerned persons have access to a method of judicial control and, if applicable, a method of administrative control on decisions in the host Member State.

Even if the free movement is a fundamental right, it laid down in EU legislation, there were various difficulties and controversies and there is evidence on serious shortcomings in the implementation and the persistence of some obstacles to free movement. *The Directive 2004/38/EC* must be transposed into the national law and implemented by all Member States.

For new joining states, there is a so-called *transition period*. *The Accession Treaty signed April 16<sup>th</sup>, 2003* allows the 15 “old” EU member states to apply the “transitional regulations” on nationals of the Member States that joined the EU in 2004. This meant that for the citizens of the *new* Member States some restrictions on the freedom of movement could be maintained for a transitional period of up to seven years from the date of their accession. For Bulgaria and Romania, the period lasted from January 1<sup>st</sup>, 2007 to January 1, 2014 and for Croatia, it has applied since July 1<sup>st</sup>, 2013.

Regarding the pressure exercised on Schengen flow of refugees and migrants in 2015, the Parliament, in its resolution of September 17<sup>th</sup>, 2015 on migration and refugees, reiterated its “commitment to open borders within the Schengen area, providing whilst the effective management of external borders” and stressed that “*the free movement of persons within the Schengen area is one of the greatest achievements of the European integration*”.

The right to work in the European area is a fundamental right, guaranteed by the EU legislation. Currently, about 56 million Europeans live and work in a country other than their home country.

The migration of the labour force in the European area should not be approached as a negative phenomenon that influences in decreasing manner the demography of countries where people leave in search for new perspectives. The migration of the labour force for the home country decreases the unemployment rate, which leads to higher wages, an economic growth is recorded by transferring the migrant revenues, many of migrant citizens tend to get back home and invest the earned money and implement their improved qualifications. For the destination country, migration also has a positive effect by the increasing human resources, a developed country will always need foreign labour force. Therefore, besides the negative aspects, the migration of the labour force has a positive aspect for both parties.

