

Ioana Nely Militaru

# The internal market of the European Union. Fundamental freedoms



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### **Activity**

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**ADJURIS**   
International Academic Publisher

Bucharest 2018

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ISBN 978-606-94312-7-6 (E-Book)

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Editing format .pdf Acrobat Reader  
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# **Chapter I**

## **Evolution of the internal market of the European Union**

The internal market must be seen in its evolution as a process, starting from the common market established by the Treaty establishing the European Coal and Steel Community (since 1952 establishing the coal and steel market), then the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community (since 1958, which has established a common European market for the whole of the economy and for atomic energy). Each Treaty subsequent to the institutional treaties of the European Communities contributed to the elimination of trade barriers between Member States in order to increase economic prosperity and to contribute to "ever closer union among the peoples of Europe".

### **1. Treaty establishing the European Coal and Steel Community (ECSC Treaty)**

The concept of "**common market**" was stated by Robert Schuman in his statement of 9 May 1950, which led to the creation of the ECSC in 1952<sup>1</sup>.

The ECSC Treaty<sup>2</sup> establishes the first international organization - based on supranational principles - and the common coal and steel market for the purpose of developing and expanding the economy, increasing the labor force and raising the standard of living within the Community (ECSC). The market

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<sup>1</sup> The ECSC Treaty was signed on 18 April 1951 and entered into force in 1952.

<sup>2</sup> In article 100.

was designed to rationalize the distribution of high-level production to ensure stability and employment.

The common coal and steel market was opened on 10 February 1953 and, for steel, on 1 May 1953.

At the meeting in Messina of the six foreign ministers from 1-3 June 1955, the Benelux proposes in a memorandum the creation of a **Common Market** with a broader economic field than coal and steel production, focusing on nuclear energy, transport, finance, etc.<sup>3</sup>

In 1956 (April), a Preparatory Committee was held in Brussels under the chairmanship of P. H. Spaak, Belgian Foreign Minister at the time, presenting two main projects, one on a **General Common Market** and the other on a community of atomic energy<sup>4</sup>.

## 2. Treaty establishing the European Economic Community (TEEC)

The two projects were materialized in the Treaties which they established in 1957 - by signing - with the entry into force on 1 January 1958 of the European Economic Community and the Economic Community of Atomic Energy<sup>5</sup> (also called the Treaties of Rome, after signing).

Article 2 of the TEEC provides for both the mission of the Community and the means by which it can be achieved as follows:

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<sup>3</sup> See B. Ștefănescu, *Curtea de Justiție a Comunităților Europene*, Scientific and Encyclopedic Publishing House, Bucharest, 1979, p. 23.

<sup>4</sup> These projects were approved by the May 1959 intergovernmental conference in Venice.

<sup>5</sup> See Dr. Marian, I. Rădulescu, *Uniunea Europeană de la tradiții la drepturi fundamentale. Afirmarea dreptului fundamental al omului la un mediu sănătos*, Pro Universitaria Publishing House, Bucharest, 2012, p. 39 et seq.

- the mission is to promote the harmonious development of economic activities throughout the Community, a sustainable and balanced growth, increased stability, an accelerated increase in living standards and closer relations between the States it brings together,

- the means of achieving these objectives are: **the establishment of a common market and the gradual approximation of Member States' economic policies.**

Article 3 of the TEEC (the author's note - now repealed) further provides that the Community's actions to achieve the objectives set out in Art. 2 concern mainly the two means.

Thus, in order to establish **a common market**, Community action is directed towards:

- the elimination, between Member States, of customs duties and quantitative restrictions on the entry and exit of **goods** and any other measures having equivalent effect [Art. 3 letter a)];

- the establishment of a common customs tariff and a common commercial policy in relation to third countries [Art. 3 letter b)];

- the elimination, between Member States, of obstacles to **the free movement of persons, services and capital** [Art. 3 letter c)];

- the introduction of a regime to prevent distortions of competition in the common market [Art. 3 letter f)];

- approximation of domestic legislation to the extent necessary for the functioning of the common market [Art. 3 letter h)].

**The common market** designed according to TEEC is a geographic space based on:

**A. Free movement of goods, persons (employees, self-employed persons and legal persons), services, capital.**

The common market was foreseen to be established (under Article 8 of the TEEC) during a 12-year<sup>6</sup> transition period,

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<sup>6</sup> The transition period of 12 years between 1958 and 1970.

divided into three stages, each of four years each. For each stage, the Treaty established a set of actions to be undertaken and carried out simultaneously. Each stage was assigned a number of actions to be undertaken and pursued. Subject to the exceptions and derogations provided for in the TEC, the expiry of the transitional period is the deadline for the entry into force of all the rules laid down and for the implementation of all the achievements of the common market [Article 8 (7) TEEC];

### **B. Customs union.**

The customs union comprises all trade in goods and involves the prohibition, in relations between Member States, of customs duties on imports and exports and any charges having equivalent effect, and the adoption of a common customs tariff in relations with third countries (Article 9 TEEC).

The objective of the deadline for establishing the common market was not achieved, while the objective of **customs union** was fulfilled on 1 July 1968 (18 years before the end of the transitional period proposed by the TEEC) as follows:

- customs duties within the Community have been eliminated;
- a common customs tariff applicable to goods from non-EEC countries has been established;
- quantitative (contingents) restrictions on trade between Member States of the Community have been eliminated.

Overseas countries and territories are associated with the common market and the customs union in order to intensify exchanges and continue joint economic and social development efforts;

### **C. Free competition.**

The common market is based on the principle of free competition. The TEEC provides that any agreements between undertakings, any decisions by associations of undertakings and any concerted practice which may affect trade between Member States and which have as their object or effect the prevention,

restriction or distortion of competition within the internal market (Article 85 TEEC).

**For the gradual approximation of the economic policies of the Member States**, Community action is also geared towards **developing common policies**:

- the establishment of a common commercial policy vis-à-vis third countries [art. 3 letter b)];
- adoption of a common agricultural policy [art. 3 letter d)];
- the adoption of a common transport policy [art. 3 letter e)];
- applying procedures to coordinate the economic policies of the Member States and to prevent imbalances in their balances of payments [art. 3 letter g)].

### **3. The White Paper on the „Internal Market” of 1985**

#### **The Single European Act (SEA)**

The concept of "**internal market**" was mentioned for the first time by the European Commission, which published the "**White Paper on the Internal Market**"<sup>7</sup> on June 14, 1985. On the same date, the **agreement on the "Schengen area"** by EC Member States (France, Germany, Belgium, the Netherlands and Luxembourg) **was also signed on the gradual abolition of checks at their common borders.**

**The „White Paper”** stated in its letter that the goal of completing the internal market was to be achieved by December

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<sup>7</sup> At the initiative of the acting president, Jacques Delors. For details on the 1970-1985 period (the year of publication of the White Paper on the Internal Market), see: Project "Fit for the Internal Market" - Preparing Entrepreneurs for EU Accession, Internal Market of the European Union, <http://www.piatainterna.ccina.ro/Does/PiataInterna/GhidPiataInterna.pdf>, p. 7, consulted on 1.10.2018. The White Paper was adopted on 14 June 1985.

31, 1992 by bringing together national markets in a single, borderless market<sup>8</sup>.

The **Single European Act**, signed in Luxembourg in 1986, entered into force on 1 July 1987<sup>9</sup>, was adopted on the basis of the "White Paper" on the completion of the Internal Market. In line with the "White Paper", the SEA in Art. 13, provides for the gradual introduction of the internal market over a period of seven years ending on 31 December 1992<sup>10</sup>. The aim of the SEA was to complete the "internal market" through the 310 directives adopted to approximate the laws of the Member States, this market comprising an inland frontier area where the free movement of goods, persons, services and capital is ensured in accordance with the provisions Treaty.

The SEA contains the three categories of measures related to the removal of physical, technical and fiscal frontiers, as set out in the "White Paper on the completion of the Internal Market"<sup>11</sup>.

#### 4. The Treaty of Maastricht (TEU)

On 1 January 1993, in the White Paper program for the completion of the Internal Market of the European Commission,

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<sup>8</sup> The White Paper identified some 300 obstacles to the completion of the Single Market and for each of them a legislative measure to remove it; *ibidem*, p. 9.

<sup>9</sup> Signed in Luxembourg on 17 February 1986 by nine Member States and on 28 February 1986 by Denmark, Italy and Greece, is the first important amendment to the Treaty establishing the European Economic Community (EEC). It entered into force on 1 July 1987.

<sup>10</sup> Between 1986 and 1992, the European Communities numbered 12 Member States.

<sup>11</sup> *Idem*.

it was appreciated that the work of the Communities was carried out focusing on its development<sup>12</sup>.

In this respect, the Maastricht Treaty (which entered into force on 1 November 1993) included provisions on the **free movement of goods, persons, services and capital**, which were the subject of the second part of the TEEC, entitled "Community Fundamentals" **have been included in Part III - on Community Policies** in the ECT (so called TMs) respectively: agricultural policy (Title II), visa policy, asylum, immigration and other policies related to the free movement of persons (Title IV), transport policy (Title V), competition policy (Title VI), economic and monetary policy (Title VII), common trade policy (Title IX); social policy, education, vocational training and youth (Title XI), cultural policy (Title XII), health policy (Title XIII), consumer policy (Title XIII), industry policy (Title XVI), economic and social cohesion (Title XVII), policy on research and development), environmental policy (Title XIX), development cooperation (Title XX).

The objectives of the Community, referred to in art. 2 TEC, is achieved both by **establishing a common market and an economic and monetary union**<sup>13</sup>, as well as by **common policies and activities**.

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<sup>12</sup> See *Manualul Afacerilor Europene*, European Institute of Romania, 2005, p. 65.

<sup>13</sup> The Community's mission is to promote a harmonious, balanced and sustainable development of economic activities throughout the Community, a high level of employment and social protection, gender equality, sustainable non-inflationary growth, a high degree of convergence of performance economic, high level of protection and improvement of the quality of the environment, raising the standard of living and quality of life, economic and social cohesion and solidarity between Member States (Article 2 TEC).

**The common market is not defined**<sup>14</sup>, but, according to the EC Treaty, respectively Art. 3, which sets out the means of achieving those objectives, it follows that the common market is carried out by Cornunitate by including in its area of activity both the internal market and **common policies**<sup>15</sup>.

**The common market** is therefore wider than the **domestic market**, the latter being only a further stage of integration into a **single market** designed to operate as a **national market**. In this respect, the Community's activity<sup>16</sup> is aimed at ensuring:

- the prohibition between Member States of customs duties and quantitative restrictions on imports and exports of goods and all other measures having equivalent effect [Art. 3 letter a) TEC];

- the establishment of the internal market characterized by the elimination of obstacles to the free movement of goods, persons, services and capital between Member States [Art. 3 letter c) TEC];

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<sup>14</sup> The notion of a common market has been defined in the doctrine as a unique geographical area, substituted for the diversity of the national geographical areas where it merges and where the rules of the market economy (see J. Boulouis, *Droit institutionnel des Communautés européennes*, 4 ed, avec références au Traité sur L'Union européenne, Paris, Montchrestien, 1993, p. 56, cited by R. Munteanu, *Drept european*, Oscar Print Publishing House, Bucharest, 1996, p. 44); A.S. Popescu-Cruceru, *Economic-juridic în economia concurențială*, Economica Publishing House, Bucharest, 2006, p. 10 et seq; C.-S. Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 9, 10.

<sup>15</sup> The policies provided in art. 3 TEC are the common commercial policy, the common agricultural and fisheries policy, a transport policy, a social policy including a European Social Fund, an environmental policy, etc.

<sup>16</sup> Article 3 TEC.



- measures concerning the entry and movement of persons in accordance with the provisions of Title IV of the TEC, on "Visas, asylum, immigration and other policies related to the free movement of persons" [Art. 3 letter d) TEC];

- a system ensuring non-distortion of competition in the **internal market**<sup>17</sup> [art. 3 letter g) TEC];

- the approximation of national laws to the extent required by the operation of a **common market** [Art. 3 letter h) TEC].

The internal market, according to TMs, is characterized by the TEC as a geographical area without frontiers, which includes the Member States "where the free movement of goods, persons, services and capital is ensured", eliminating any border control between Member States. The internal market must operate under the same conditions as a national market.

\*

"Europe without borders", however, was not born on 1 January 1993, but is the result of a lengthy process<sup>18</sup> that began with the Institutional Treaties of the Communities, a process which, in the context of the concerns of the development of the internal market, continues.

In this respect, it is the primary task for the EC institutions, subsequently the EU, to adopt legislation in the field of the already established market.

Thus, by Decision no. 93/72, an Internal Market Coordination Advisory Committee has been set up. It can be consulted

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<sup>17</sup> See O.H. Maican, *Concurența în dreptul românească și în dreptul comunitar*, Paralela 45 Publishing House, Pitești, 2008, p. 20 et seq.

<sup>18</sup> See J. Echkenazi, *Ghidul Uniunii Europene*, Niculescu Publishing House, 2008, Bucharest, p. 80 et seq.

on all practical issues relating to the functioning of the internal market<sup>19</sup>.

The Council also adopted Regulation no. 2679/1998 on the functioning of the internal market through which rules have been laid down on the free movement of goods in the Member States<sup>20</sup>.

According to the Regulation, the internal market comprises an area without frontiers in which the free movement of goods is guaranteed. Within this framework, Member States must refrain from any measures or behavior which may constitute an obstacle to trade and, on the other hand, take all necessary and proportionate measures to facilitate the free movement of goods within their territory<sup>21</sup>.

Article 1 (1) of the Regulation expressly states that the "obstacle" to the free movement of goods between Member States and which is imputable to a Member State implies an action or inaction on its part which could constitute a violation of Articles 30-36 TEC, currently art. 36-42 TFEU and which:

a) result in a serious disturbance in the free movement of goods by preventing, delaying or otherwise physically or otherwise diverting their importation into a Member State, exporting from a Member State or transporting through a Member State;

b) causes serious loss to the injured persons;

(c) require immediate action to prevent the continuation, extension or intensification of the disruption or damage in question; the term "failure to act" includes the case where the competent authorities of a Member State, in the presence of an obstacle

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<sup>19</sup> See Official Journal of the European Communities no. 26/93 of 3 February 1993.

<sup>20</sup> Council Regulation (EC) no. 2679/1998 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods between Member States, JOCE L. 337/8 of 13 December 1998.

<sup>21</sup> See Popescu-Cruceru, A.S., *Economia concurențială în Uniunea europeană*, Artifex Publishing House, Bucharest, 2008, p. 5 et seq.

caused by action taken by private persons, do not take all necessary and proportionate measures in their power to remove the obstacle and guarantee freedom of movement of goods within their territory (Article 1 (2) of the Regulation).

## **5. The Treaty on the Functioning of the European Union (TFEU)**

The internal market is governed by the TFEU in Title I of Part III - "Internal policies and actions of the Union", in Art. 26, which provides: "The internal market shall comprise an area without frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

In order to achieve the objectives stipulated in art. 26 TFEU, the Commission may propose appropriate provisions, given that there are gaps in their level of development for the establishment of the internal market between Member States' economies. The Commission's provisions may take the form of derogations, but they must be of a temporary nature and disturb the operation of the common market as little as possible [Art. 27 par. (2) TFEU].

The components of the internal market, according to the Treaties, **are the free movement of goods, services, persons and capital.**

At present, the issue of the internal market has been relaunched by the European Union institutions with the Communication of Cornisia, entitled "Single Market Act", on **the Europe 2020 strategy**. The Commission report includes "a new strategy for the single market for the benefit of the European economy and society". An area of internal market progress is now the single, digital market. This creates conditions to boost the economy through e-commerce. The Single Digital Market puts new oppor-

tunities for current business practices that are in line with the opportunities created by information and communication technologies.

## Chapter II

### Free movement of goods in the European Union

#### 1. Regulation

Art. 26 and Art. 28-38 TFEU is the legal basis for the free movement of goods in the European Union.

According to art. 28 par. (1) TFEU, the Union is made up of a customs union which regulates **all goods exchanges** and involves **the prohibition between Member States of customs duties on imports and exports of any charges having equivalent effect and the adoption of a common tariff in relation to third countries.**

The gradual approximation of national customs tariffs led to the common customs tariff, namely the customs union, which allowed the promotion of a **common commercial policy in the Community (initially) and the development of its own customs legislation, represented by the Community Customs Code.**

**The Customs Union**, that all trade in goods in the EU (Art. 28 TFEU) and fundamental principle, namely **the free movement of goods led to the creation of the single market** and the EU's economic expansion. Consequently, conditions have been created for the intensification of trade in goods both between EU Member States and with other third countries, the latter being governed by specific agreements and not by the provisions of the TFEU<sup>22</sup>.

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<sup>22</sup> For example, products from Iceland, Liechtenstein and Norway benefit from the free movement of goods under the European Economic Area Agreement.

Understanding Art. 28 TFEU paragraph (1) requires a series of clarifications regarding the concept of commodity and the place where the commodity is exchanged.

## **2. The notion of goods**

The Court defines goods as products of economic value and may be the object of commercial transactions<sup>23</sup>. According to the case law of the EU Court of Justice, there are commodities and works of artistic, historical, archeological or ethnographic value, waste of no economic value (but involving costs for businesses), audiovisual materials (except for broadcasts or advertising messages falling within the scope of rules on the free movement of services)<sup>24</sup>. Coins are not considered commodities because their transfer is governed by the provisions on capital movements, according to art. 63 TFEU. Conversely, currencies, as from the date when they are no longer in circulation in a Member State, are considered to be goods<sup>25</sup>.

## **3. Origin of goods. Regime of goods in free circulation**

Goods can be obtained:

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<sup>23</sup> The Case "Italian Art", 7/68, *Comisia c. Italia*, (1968), Rec. 617.

<sup>24</sup> <https://dreptmd.wordpress.com/cursuri-universitare/dreptul-comunitar-al-afacerilor/libera-circulatie-a-marfurilor/>, consulted on 1.10.2018.

<sup>25</sup> Old gold coins constitute goods because they are not ordinary means of payment; see the Case 7/78, *Regina c. Ernesi George Thompson, Brian Albert, Brian Albert Johnson and Colin Alex Norman Woodiwiss*, (1978), ECR, 2247; see also T. Ștefan, B.A. Grigoriu, *Drept comunitar*, C.H. Beck Publishing House, Bucharest, 2007, p. 324.

- either exclusively in one country or territory. In this case, the goods are deemed to originate in that country or territory [Art. 60 par. (1) of the Customs Code of the European Union<sup>26</sup>].

- or through the intervention of several countries or territories in their production. In this case, the goods shall be considered as originating in the country or territory in which they underwent the last substantial transformation or substantial workmanship, economically justified, carried out in an undertaking equipped for that purpose and resulting in a new product or stage of manufacture important manufacturing [art. 60 par. (2) of the Customs Code of the European Union]<sup>27</sup>.

According to art. 5 point 23 of the **Customs Code of the European Union** (CCU)<sup>28</sup>, the principle of the free movement of goods applies to the following categories of goods, called "**union goods**":

a) goods wholly obtained in the customs territory of the Union<sup>29</sup> and not containing goods imported from countries or territories located outside the customs territory of the Union;

b) goods entering the customs territory of the Union from countries or territories which are not part of that territory and which have been released for free circulation; according to art.

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<sup>26</sup> We will use the abbreviation C.C.U. for the Customs Code of the Union.

<sup>27</sup> JOUE, L 269/1, 10 October 2013, Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Customs Code of the European Union, <http://codfiscal.net/media/2013/10/Codul-Vamal-UE-Regulament-952-2013.pdf>., consulted on 1.10.2018.

<sup>28</sup> It was adopted by Regulation no. 952/2013 of the European Parliament and of the Council of the EU began to apply from 1 June 2016, with the exception of organizational provisions that entered into force on 30 October 2013. See Art. 5 Customs Code of the Union.

<sup>29</sup> The customs territory of the Union comprises the territories corresponding to the EU Member States (author's note), including their territorial and inland waters, respectively their airspace [art. 4 para. (1) C.C.U.].

29 TFEU, products coming from third countries for which import formalities have been completed and for which they have been collected in the Member State, namely customs duties and charges having equivalent effect, shall be considered to be in free circulation in a Member State have not benefited from a full or partial refund of these taxes and charges (Article 29 TFEU);

c) goods obtained or produced in the customs territory of the Union, either solely from the goods referred to in (b) or from the goods referred to in a) and b).

"Non-Union Goods" are goods other than those mentioned above or which have lost their customs status as union goods [Article 5 (23) CCU].

For non-unional goods, their origin may be:

**a) preferential.** For the goods to benefit from some rules on the common customs tariff [contained in the measures under art. 56 para. (2) letter d) or e) CCU<sup>30</sup>] or non-tariff preferential measures, they must comply with the preferential origin rules according to the CCU, that is to say:

- goods outside the customs territory originating in countries, territories or groups of countries or territories with which the EU has **agreements** establishing rules on preferential origin [Art. 64 par. (2)];

- goods originating in countries or territories or groups of countries or territories outside the customs territory of the EU other than those referred to above for which **the Union unilaterally adopts preferential measures** [Art. 64 par. (3)].

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<sup>30</sup> Account shall be taken of: (d) preferential tariff measures contained in agreements concluded by the Union with certain countries, territories or groups of countries or territories outside the customs territory of the Union; (e) preferential tariff measures adopted unilaterally by the Union towards certain countries or territories or groups of countries or territories outside the customs territory of the Union.



These rules shall be based either on the criterion of the full value of the goods or on the basis of sufficient processing or conversion.

For goods benefiting from preferential measures applicable in trade between the customs territory of the Union and Ceuta and Melilla contained in Protocol 2 to the 1985 Act of Accession, rules on preferential origin shall be adopted in accordance with Article. 9 of that protocol [Art. 64 par. (4)].

- the goods come from overseas countries and territories associated with the EU. The preferential measures in their case are contained in **preferential commitments** in favor of these countries or territories [Art. 64 par. (5)]. The rules on the preferential origin of these goods are adopted according to Art. 203 TFUE.

**b) non-preferential**, as a general rule. Goods which do not fall into any of the categories of goods mentioned above are considered.

Goods moving within the Union are presumed to be Union goods, with the authorities concerned being required to prove the non-national nature of the goods.

#### **4. The exchange of goods within the European Union**

Freight exchange takes place within the Union, namely between Member States or between Member States and third countries.

In the space of Union, according to art. 28 par. (1), art. 34 and art. 35 TFEU, the free movement of goods involves two categories of prohibitions.

The first category concerns the prohibition between Member States:

1. **customs duties on imports and exports;**
2. **any charges having equivalent effect.**

In addition to these prohibitions, the provisions of Art. 110, all fiscal provisions relating to domestic taxes applicable by

a Member State to similar domestic products coming from another Member State which do not have to be higher, as follows:

3. No Member State shall apply, directly or indirectly, to the products of other Member States any **internal taxation** of any kind greater than that applied directly or indirectly to similar domestic products.

4. No Member State shall apply to products of other **Member States internal taxes which indirectly protect other sectors of production.**

The four bans concerned tax obstacles and their non-compliance is likely to hinder intra-Community trade.

The second category of prohibitions is regulated by art. 34 and art. 35 TFEU and concerns quantitative restrictions.

**"Member States shall be prohibited:**

- **quantitative restrictions on imports and any measures having equivalent effect;**
- **quantitative restrictions on exports and any measures having equivalent effect".**

The EU Court of Justice, referring to these measures, calls them "non-fiscal" or "non-tariff" obstacles<sup>31</sup>.

Although customs duties on imports and exports (provided for in Articles 28 and 30 TFEU) and quantitative restrictions were abolished on 1 July 1968, even one year earlier than foreseen, for the prohibition of measures having equivalent effect and in order to harmonize the relevant national legislation, the term has not been respected, which has led to a constant effort on the part of the Member States to complete the free movement of goods.

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<sup>31</sup> "Obstacles of a fiscal nature or having an equivalent effect (...) are not subject to Art. 28 TFEU "; see Case 74/76, *Iannelli Volpi SpA c. Ditta Paollo Meroni*, 1977, ECR, 557; see also T. Ştefan, B.A. Grigoriu, *op. cit.*, p. 326.

It could be invoked that there are no definitions in the treaty on them, the EU Court of Justice having to provide them with its case law.

#### **4.1. Prohibition of charges having equivalent effect to customs duties: art. 28 par. (1) and art. 30 TFUE**

According to the case-law of the Court of Justice of the European Union, any tax, regardless of its name or its manner of application, which "imposed on a product imported from a Member State but not on a similar domestic product, has effect on the free movement of goods as a customs duty may be regarded as a charge having equivalent effect, whatever its nature or form"<sup>32</sup>.

The Court of Justice has also held that "all taxes, irrespective of their manner of application, which are unilaterally imposed on goods crossing frontiers without strictly having the customs duty, are charges having equivalent effect"<sup>33</sup>. Any pecuniary charge, irrespective of the size, destination and method of application unilaterally imposed on domestic or foreign goods crossing a frontier, without a customs duty, is a charge having equivalent effect<sup>34</sup>.

The case-law of the Court of Justice in question highlights the following features, specific to customs duties having equivalent effect:

- a. are pecuniary duties/charges;
- b. are unilaterally imposed by the authorities of the Member States;
- c. are imposed on goods (native or foreign) crossing a border.

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<sup>32</sup> Cases 2/62 and 3/62 of 14 December 1962 and Case 232/78 of 25 September 1979.

<sup>33</sup> See F.C. Stoica, *Dreptul Uniunii Europene. Libertățile fundamentate*, Universitara Publishing House, Bucharest, 2009, p. 15; Case 82/1969.

<sup>34</sup> *Idem*.

Taxes having equivalent effect to customs duties are prohibited even if they do not produce a discriminatory effect<sup>35</sup>. Although it has a lower value than the duty, a tax with equivalent effect is considered to be the pecuniary obligation which increases the cost of the commodity, thereby constituting an obstacle to the free movement of goods.

They shall not be considered as having equivalent effect to customs duties:

- taxes forming part of the internal tax system of a State of munitions, if applied indiscriminately to all domestic or national goods (Article 110, Article 111 TFEU)<sup>36</sup>;

- the fees charged for services rendered to economic agents, where the amount of the tax is proportionate to the service in question;

- taxes claimed under a Community legislative provision for certain services provided that the following conditions are met:

- a. the respective fees did not exceed the value of the services;

- b. the verification and taxation measures are uniform and binding throughout the Community/ Union territory;

- c. duties are set in the general interest of the Community/Union;

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<sup>35</sup> See <https://dreptmd.wordpress.com/cursuri-universitare/dreptul-comunitar-al-afaeerilor/libera-circulatie-a-marfurilor/>, consulted on 1.10.2018.

<sup>36</sup> No Member State shall apply directly or indirectly to the products of other Member States any internal taxation of any kind greater than that which applies directly or indirectly to similar domestic products. No Member State shall apply to products of other Member States inherent taxes which indirectly protect other production sectors (Article 110 TFEU). Products exported to the territory of one of the Member States can not benefit from any reimbursement of internal taxes higher than taxes directly or indirectly (Article 111 TFEU).

d. the insured service is in the mood to stimulate the free movement of goods.

#### **4.2. Prohibition of measures having equivalent effect to quantitative restrictions on imports and exports, according to art. 34 and art. 35 TFEU**

In Member States it is prohibited, according to art. 34 and art. 35 TFEU, quantitative restrictions on imports and exports, and any measures having equivalent effect.

Measures of equivalent nature produce effects similar to quantitative restrictions.

Quantitative restrictions and measures with equivalent effect have been defined by the Court of Justice in its case law as follows:

- quantitative restrictions are those measures which result in a total or partial restriction of imports, exports or the transit of goods;

- measures having equivalent effect to quantitative restrictions are any commercial regulations ordered by Member States which are liable to hinder, directly or indirectly, intra-Community trade in real or potential trade<sup>37</sup>. This definition was subsequently developed by the Court of Justice in another judgment, taking the form of a principle<sup>38</sup> that "any product lawfully manufactured and marketed in a Member State in accordance with its fair and traditional rules and the manufacturing processes existing in that country must be authorized on the market of any other Member State". **This case-law has been and is the main argument on which the definition of the principle of mutual**

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<sup>37</sup> Decision "Dassonville", Cases 8/74 of 11 July 1974 and points 63-67 in Case C-320/03 of 15 November 2005.

<sup>38</sup> Decision „Cassis de Dijon", Case 120/78 of 20 February 1979; M. Maciejewski, *Fișe tehnice privind Uniunea Europeană, Libera circulație a mărfurilor*, March 2017, [http://www.europarl.europa.eu/ftu/pdf/ro/FTU\\_3.1.2.pdf](http://www.europarl.europa.eu/ftu/pdf/ro/FTU_3.1.2.pdf), consulted on 1.10.2018.

**recognition, which applies in the absence of harmonization, is based. As a result, even in the absence of European harmonization provisions (secondary EU legislation), Member States are obliged to allow the movement and marketing of products traded and legally marketed in another Member State on their markets<sup>39</sup>.**

Measures of an equivalent nature may not only be legal provisions (laws, regulations, administrative provisions) but also administrative practices of public authorities, ie all instruments originating from a public authority, including non-binding recommendations<sup>40</sup>, affecting trade (for example, the lengthy examination of requests made to obtain authorizations for the use of imported appliances, the passivity and tolerance of administrative authorities vis-à-vis the deeds of individuals which have the effect of hindering the free movement of goods)<sup>41</sup>. Administrative practice means, as provided for in Commission Directive 70/50 on the abolition of measures having equivalent effect to quantitative restrictions in trade between Member States, "any standard or procedure normally used by a public authority which, although not binding legally the people they are addressing, leads them to have a certain course of action".

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<sup>39</sup> *Idem*.

<sup>40</sup> See O. Manolache, *Tratat de Drept comunitar*, 5<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2006, p. 245. They are also qualified as measures having equivalent effect and acts by which public authorities recommend a certain attitude, such as the campaign to promote national products; to be seen <https://dreptmd.wordpress.com/cursuri-universitare/dreptul-comunitar-al-afacerilor/libera-circulatie-a-marfurilor/>, consulted on 1.10.2018.

<sup>41</sup> See F.C. Stoica., *op. cit.*, p. 19; in the same sense, and <https://dreptmd.wordpress.com/cursuri-universitare/dreptul-comunitar-al-afacerilor/libera-circulatie-a-marfurilor/>, consulted on 1.10.2018.

They are considered to be among the most important provisions, actions or administrative practices<sup>42</sup>:

- restrictions on production and investment, if they lead to a reduction in export possibilities;
- setting maximum or minimum prices, even temporarily;
- legislation on origin or designation of goods or composition of packaging;
- national purchase measures;
- double inspections and inspections;
- administrative practices disadvantaging import and / or export;
- "grandfather clauses"<sup>43</sup> (administrative practices at the disadvantage of import or export);
- legislation on certain goods: margarine, alcoholic products;
- practices concerning inventions, trade marks, indications of provenance or designation of origin,
- national agricultural and fisheries legislation and environmental legislation affecting some commodities.

To avoid the scope of art. 34 TFEU, these rules must be non-discriminatory both as regards the economic operators to which they apply and as to the effects which those rules may have, in law or in fact, on the marketing of national products and those originating from other Member States<sup>44</sup>.

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<sup>42</sup> See P. J. Kapteyn, P. ver Loren van Themaat, *Introduction to the law of the European Communities*, Ed. by L. W. Gormley, Kluwer-Deventer, 1990, pp. 383-387 (and court cases cited therein); J. Megret s.a., *Le droit de la Communauté économique européenne*, Presses Universitaires de Bruxelles, 1970, vol. I, p. 104.

<sup>43</sup> This name, promoted by American practice, refers to the protection or privilege of a group of people or products; see, for details, O. Manolache, *op. cit.*, p. 246, footnote no. 2.

<sup>44</sup> C 267-268/91, *Keck et Mithouard*, judgment of 14 November 1993, in Bull. CE, no. 12/1993, pp. 165-166; C.401 and 402/1992 (joined).

"Where such conditions are met, the application of such provisions to sales of products originating in another Member State which fulfill the requirements laid down by that State shall not be such as to prevent their access to the market or to impede more than it (than the market itself, the author's note) access indigenous products"<sup>45</sup>.

Also, the obstacles to the free movement of goods can also be generated by the differences between the national laws of the Member States on the production and marketing of goods<sup>46</sup>. These "obstacles" introduced by national laws must be understood and accepted to meet mandatory requirements that meet the following requirements:

- fiscal surveillance measures;
- measures to ensure fairness in trade relations;
- measures to ensure consumer protection;
- measures that ensure the protection of local or national social and cultural values. These measures can not be adopted to represent arbitrary means of discrimination in the commercial activity of the Community/Union<sup>47</sup>.

#### **4.2.1. Types of measures with equivalent effect**

Directive 70/50/EEC<sup>48</sup> on the abolition of measures having an equivalent effect to quantitative restrictions on imports lists in Art. 2, but without limiting the enumeration, a series of measures that can be encountered in various situations. However, practice has provided the Court of Justice with a multitude of

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<sup>45</sup> *Idem*; see O. Manolache, *op. cit.*, pp. 241-242 (and court cases cited therein).

<sup>46</sup> See F.C. Stoica, *op. cit.*, pp. 18-19.

<sup>47</sup> *Idem*.

<sup>48</sup> JOUE L 013/29, of 22 December 1969.



cases, identifying the following measures having equivalent effect to quantitative restrictions<sup>49</sup>:

1. licenses or authorizations for import or export<sup>50</sup>;
2. automatically granted licenses, these being, in principle, liable to lead to delays and abuses by the State which granted them;
3. the obligation to present certificates for products which are the subject of intra-Community trade (e.g. veterinary certificate, certificate of origin)<sup>51</sup>;
4. the obligation to make a declaration of origin. If there is a risk of misleading the consumer due to the packaging, label, etc., the obligation does not fall under the category of "measures having equivalent effect"<sup>52</sup>;
5. sanitary, veterinary and phytosanitary inspections and controls, as well as customs controls<sup>53</sup>;
6. those fines or sanctions that are likely to violate the restrictions imposed by art. 34 and art. 35 TFEU or, through them, discriminate against imports (for example by imposing smaller fines, easier sanctions for domestic products)<sup>54</sup>;
7. subordinate access of imported products to the national market by observing the condition of having a representative in the territory of the importing state<sup>55</sup>;
8. the obligation to have storage facilities in the territory of the importing Member State<sup>56</sup>;

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<sup>49</sup> See F.C. Stoica, *op. cit.*, pp. 24-30 (and court cases cited therein).

<sup>50</sup> C.51-54/71, *International Fruit Company c. Produktschap voor Groenten en Fruit*; C-189/95, *Franzen*.

<sup>51</sup> C.-251/78, *Denkavit Futtermittel c. Minister für Ernährung*.

<sup>52</sup> C.-113/80, *Comisia c. Irlanda*.

<sup>53</sup> C.-4/75, *Rewe-Zentralfinanz e GmbH c. Landwirtschaftskammer*.

<sup>54</sup> C.-367/89, *Aimee Richardt*; C.-23/99, *Comisia c. Franța*.

<sup>55</sup> C.-155/82, *Comisia c. Belgia*.

<sup>56</sup> C.-267 - 268/91, *Keck et Mithouard*, judgment of 44 November 1993, in Bull. CE, no. 12/1993, pp. 165-166.

9. national price regulations. It is a 'measure of equivalent effect' if, by national rules, prices are set at a level, the sale of imported products becomes more difficult than domestic products or even impossible<sup>57</sup>. Avoiding this "measure" has prompted, for example, the European Commission to adopt a Communication on the compatibility of Article 30 TEC (now Article 36 TFEU) of the measures taken by the Member States to control and reimburse the prices of medicines<sup>58</sup>;

10. measures through which it is encouraged to purchase domestic products<sup>59</sup>;

11. the obligation to use the national language. To this end, the Commission has published a Communication on the use of languages in the marketing of foodstuffs in the light of a judgment given by the Court of Justice (in the *Peeters* case)<sup>60</sup>;

12. national provisions through which only national products which are not indications of origin or provenance are reserved<sup>61</sup>; for example, the use of the "mountain" islands without the authorization of the state in which the product is marketed is forbidden<sup>62</sup>;

13. technical regulations concerning the presentation of products relating to, for example, weight, shape, composition, labeling, size, presentation, identification, packing are prohibited if applied indiscriminately to national products and those of Member States<sup>63</sup>;

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<sup>57</sup> C.-65/75, *Tasca*; C.-88-90/75, *Sadam*; C.- 181/82, *Roussel*; C.-16-20/79, *Denis*.

<sup>58</sup> JOCE C 310 of 4 December 1986.

<sup>59</sup> C.-222/82, *Apple and Pear Development Council c. Lewis*.

<sup>60</sup> JOCE C 345 of 23 December 1993; see to that effect C.-366/98, *Geffroy c. Cavino France*; C. *Piageme c. Peeters*, C.-369/89 and C.-85/94.

<sup>61</sup> C.-321/94, *Pistre*.

<sup>62</sup> See F.C. Stoica, *op. cit.*, p. 28.

<sup>63</sup> C.-261-81, *Rau c. De Smedt*.

14. any measure taken by public authorities in public procurement procedures whereby differential treatment is applied, thereby hindering imported products;

15. those situations in which art. 34 and art. 35 TFEU applies to State aid; one can exemplify the situation where a Member State promotes the sale and purchase of national products through a campaign funded by public authorities. If the funding campaign makes an unjustified differentiation between national products and those originating in other Member States, its action falls within the scope of Art. 34 TFEU.

#### **4.2.2. Exceptions to the prohibition of measures having equivalent effect to quantitative restrictions**

According to art. 36 TFEU, Member States are entitled to take measures having equivalent effect to quantitative restrictions on the importation, exportation or transit of goods between themselves only if they are justified on the basis of general economic considerations, namely:

- public morality<sup>64</sup>;
- public order<sup>65</sup>;
- public safety<sup>66</sup>;
- to protect the health and life of humans and animals;
- plant conservation;
- protection of national heritage assets of artistic, historical or archeological value;
- protection of industrial and commercial property.

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<sup>64</sup> Neither the Treaties (TFEU, TEU) nor the CJEU case law provide a definition of "public morality". Each Member State has its own moral norms; to be seen F.C. Stoica, *op. cit.*, p. 31.

<sup>65</sup> C.-7/78, *Regina c. Thompson*.

<sup>66</sup> The Jurisprudence of the CJEU has shown that "road safety" is circumscribed to "public security" to which the TFEU refers in Art. 36; see, to that effect, C. 241/86, *Bodin*.

However, those prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (Article 36 TFEU).

These exceptions to the general principle must be interpreted and applied strictly, and may be extended by interpretation to other situations.

However, those exceptions are not justified if a Union legislative act prohibiting such exceptions has entered into force in that area<sup>67</sup>.

Measures must also have a direct effect on the public interests to be protected and must not go beyond what is necessary (according to the principle of proportionality)<sup>68</sup>.

In the doctrine it is considered that the analysis of observing the proportionality must have into view several elements, and that is: the actual situation which will determine the decision, the purpose which is focused on by solving this situation, the decision which will be taken in order to solve the actual situation, on the other hand not being ignored, but to a less extent, not even the reasons which determined the positive appreciation of the solution undertaking and the action for this<sup>69</sup>.

To that end, the Court of Justice has recognized in its case-law<sup>70</sup> that Member States may make exceptions from the prohibition of measures having an effect equivalent to quantitative restrictions on the basis of mandatory requirements relating to the effectiveness of fiscal control, the protection of public health, the fairness of commercial transactions and consumer protection.

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<sup>67</sup> See M. Maciejewski, March 2017, *op. cit.*

<sup>68</sup> *Idem.*

<sup>69</sup> See O. Şaramet, G.-B. Spîrchez, *Limits of the discretionary power established through enforcing the European principle of proportionality*, „Perspectives of Law and Public Administration”, Volume 7, Issue 2, December 2018, p. 262.

<sup>70</sup> Case *Cassis de Dijon*, C-120/78 of 20 February 1979.

Member States are required to notify the Commission of national measures derogating from the restrictions imposed by art. 36 TFEU. In this respect, procedures for information exchange and a monitoring mechanism have been introduced to facilitate the supervision of such national derogations. These are provided at: 114 and art. 117 TFEU, in its Decision no. 3052/95/EC of the European Parliament and of the Council of 13 December 1995 and Regulation (EC) Council Regulation (EC) No. 2679/98 of 7 December 1998.

The principle was also formalized in Regulation (EC) no. 764/2008 on mutual recognition, adopted in 2008 as part of the so-called new legislative framework<sup>71</sup>.

### **4.3. Adaptation of national monopolies of commercial character**

Under national rules, a Member State may grant to a State enterprise or state institution exclusive rights<sup>72</sup> in respect of imports and exports, thus constituting, in certain areas of activity, national monopolies of a commercial character<sup>73</sup>. Similarly, such national regulations may also grant these rights to a private undertaking by way of concession of important business, such as the production and sale of alcohol and tobacco<sup>74</sup>.

State monopolies can only be commercial or mixed, production or commercial<sup>75</sup>.

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<sup>71</sup> See M. Maciejewski, March 2017, *op. cit.*

<sup>72</sup> By such "rights", trade between Member States will be appreciably supervised or determined, see O. Manolache, *op. cit.*, p. 263 (and the causes cited there).

<sup>73</sup> See N. Diaconu, *Dreptul Uniunii Europene. Tratat*, 2<sup>nd</sup> ed. revised, Lumina Lex Publishing House, Bucharest, 2011, pp. 373-374.

<sup>74</sup> They are considered delegated monopolies; see O. Manolache, *op. cit.*, pp. 262-263 (and the works cited there).

<sup>75</sup> *Idem.*

In order to qualify as a "monopoly", it is not necessary to exercise the full market control of certain goods, it being sufficient for them to engage in transactions in a commercial product which is likely to be in competition and marketed between Member States, with an effective role in such trade<sup>76</sup>.

These monopolies can introduce restrictions and discriminations that affect the free movement of goods.

In order to avoid the adoption of such measures at this level, which imminently may affect the free movement of goods, art. 37 TFEU obliges Member States "to adapt their monopolies (...) in such a way as to ensure that all nationals of Member States are not discriminated against in terms of supply and marketing conditions".

Recipients of art. 37 TFEU are:

- any body through which a Member State, directly or indirectly, directly or indirectly controls, directs or influences significantly imports or exports from Member States;

- concessional state monopolies. Measures that can be pursued for adoption by the Member States through monopolies and from which they are obliged to abstain, according to art. 37 paragraph (2) are:

- those likely to create discrimination between nationals of the Member States with regard to supply and marketing conditions [principle introduced by art. 37 paragraph (2) TFEU];

- those which restrict the scope of the provisions concerning the prohibition of customs duties and quantitative restrictions between Member States.

In the case of commercial monopolies involving a regulation aimed at facilitating the marketing and marketing of agricultural products, Member States (the author's note) must ensure,

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<sup>76</sup> C. 6/64, *Costa/Enel*; see O. Manolache, *op. cit.*, pp. 262-263 and the works cited there.

in accordance with art. 37 paragraph (3) TFEU, equivalent guarantees for employment and the standard of living of the producers concerned.

#### **4.4. Harmonizing national laws on the free movement of goods<sup>77</sup>**

Efforts by Member States to harmonize national laws since the late 1970s have made it impossible to hinder the obstacles created by national provisions in order not to hinder the free movement of goods within the Community. Gradually there was a phenomenon of interpenetration of the legislation of the Communities in the national systems underlined in the doctrine<sup>78</sup>.

Harmonization has been continued and facilitated by the introduction of the qualified majority rule - which is required for most of the directives on the completion of the single market<sup>79</sup> - and by the Commission in 1985 (June) adopting a White Paper in which it made a proposal avoids the too costly and detailed process of harmonization in this area. The proposal has as its starting point the Council Resolution of 7 May 1985 (as confirmed by the Council Resolution of 21 December 1989 and Council Decision 93/465/EEC), in which **the basic principle is**

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<sup>77</sup> See M. Maciejewski, March 2017, *op. cit.*

<sup>78</sup> See C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 790, 791; C.-S. Săraru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, Bucharest, 2017, p. 19, 20.

<sup>79</sup> It's about art. 95 The EC Treaty, as amended by the Maastricht Treaty, provides: "(...) The Council shall adopt measures aimed at approximating the laws, regulations and administrative provisions of the Member States concerning the establishment and functioning of the internal market, acting in accordance with the procedure laid down in art. 251 TEC, according to which (...) the Council shall act by a qualified majority after obtaining the opinion of the European Parliament (...). Article 95 TCE (modified by TMs) is Art. 114 TFEU (currently).

**the mutual recognition of national rules.** Harmonization should only concern essential requirements and is justified only when national rules can not be considered equivalent and creates restrictions.

The directives adopted in line with the Commission's proposal have proposed:

- to ensure the free movement of goods through the technical harmonization of certain sectors of activity;
- ensure a high level of protection of public interest objectives. To this end, "the European Parliament and the Council (...) shall adopt measures concerning the approximation of the laws, regulations and administrative provisions of the Member States concerning the establishment and functioning of the internal market" [Art. 114 par. (1) TFEU]. The Commission in the drafting of the proposals foreseen [in art. 114 par. (1) TFEU] in the field of health, safety, environmental protection and consumer protection is based on the assumption of a high level of protection, taking account, in particular, of any new developments based on scientific facts [Art. 114 par. (3) TFEU]. Examples are: toys, building materials, machinery, base, gas and telecommunication terminal equipment.

#### **4.5. Contribution of the European Parliament to the completion of the internal market in the free movement of goods<sup>80</sup>**

The European Parliament, **advocating the completion of the internal market by providing additional support to the Commission in its adoption of the White Paper on the free movement of goods, has also made a significant legislative contribution to the Harmonization Directives.** This contribution was reflected, in particular, in the package of measures on

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<sup>80</sup> See M. Maciejewski, March 2017, *op. cit.*



the new legislative framework adopted in 2008. In the negotiations with the Council, the Parliament had as an outfit to create an agreement, a guarantee, "through which all the economic agents involved are responsible, to a greater extent, to ensure compliance with the rules and safety of the products they place on the market and to further strengthen the CE marking by increasing consumer awareness"<sup>81</sup>.

In this respect, in **its resolution of 8 March 2011**<sup>82</sup>, Parliament called on the Commission to set up a **single market surveillance system** for all products (whether harmonized or not) on the basis of a single piece of legislation covering both the General Product Safety Directive, and Regulation (EC) no. 765/2008 on market surveillance to achieve a high level of product safety and market surveillance and to clarify the legal basis. After two years, **the Commission, at Parliament's request, presented on 13 February 2013 the "Product Safety and Market Surveillance Package"**. The package of measures aims to improve market surveillance systems in the Member States. The package of measures is new implementing rules for the internal market for goods, with national authorities having the right to supervise the market, enforce the law and provide more comprehensive means of consumer protection. National authorities will be equipped with the necessary means to identify dangerous products. Furthermore, consumer product safety rules will be simplified and unified in a single piece of legislation. The three most important parts of the package are:

1. a proposal for a new Consumer Product Safety Regulation (RSPC);

2. a proposal for a single regulation on product market surveillance, unifying and simplifying existing fragmented legislation;

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<sup>81</sup> Parliament is continuing its work in this area with the alignment package, which includes nine directives covering various products, including lifts, pyrotechnic articles and explosives; *Idem*

<sup>82</sup> JO C 199 E, 7 July 2012, p. 1.

3. a multiannual market surveillance plan containing 20 individual measures that the Commission will adopt over the next three years"<sup>83</sup>.

In addition to **the principle of mutual recognition**, a key role in the functioning of the internal market, contributing significantly to ensuring the free movement of goods within the internal market, fulfills its **standardization**. By enabling EU businesses to become more competitive, these standards help protect the health and safety of European consumers as well as the environment.

On this line of concern, as early as 2010 (21 October), Parliament adopted a resolution<sup>84</sup> calling for the maintenance and improvement of the many success stories of the standardization system, as well as a balance between the national, European and international dimension. In addition, Parliament considered that adding **the principle of "proper representation"** is a vital element, given that it is very important to take due account of the positions of all stakeholders whenever the public interest is at stake, in particular in developing standards to support EU policies and legislation<sup>85</sup>.

On 25 October 2012, Parliament and the Council adopted **Regulation (EU) 1025/2012 on European standardization**, modernizing and improving the mechanism for establishing European standards<sup>86</sup>. Parliament has finalized the **eCall**

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<sup>83</sup> See M. Maciejewski, March 2017, [http://www.europarl.europa.eu/ftu/pdf/ro/FTU\\_3.1.2.pdf](http://www.europarl.europa.eu/ftu/pdf/ro/FTU_3.1.2.pdf), consulted on 1.10.2018.

<sup>84</sup> JOCE 70 E, 8 March 2012, p. 56.

<sup>85</sup> See M. Maciejewski, March 2017, *op. cit.*

<sup>86</sup> The legislative review continued with the new directive in the alignment package in areas such as low voltage equipment, electromagnetic compatibility, non-automatic weighing instruments, measuring instruments, civilian explosives, equipment and protective systems for use in the atmosphere potentially explosive atmospheres, pyrotechnic articles and simple pressure vessels, as well as the Pressure Equipment and Radio Equipment Directives. As part of the package of

**Regulations**<sup>87</sup> and the Decision on interoperability solutions for European public administrations, businesses and citizens (ISA2)<sup>88</sup>. As part of the Circular Economy Package, Parliament is currently drafting legislation to make available CE marketed fertilizer products on the single market<sup>89</sup>. Parliament supports the need for closer cooperation between EU and national authorities

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measures, Parliament adopted the Regulation laying down harmonized conditions for the marketing of construction products, labeling and marking of fiber composition of textile products, safety and environmental performance of two- and three-wheel vehicles and quadricycles, and the Marine Craft and Nautical Vehicle Directive (improving safety through better classification of craft). Parliament has completed its legislative work on: the Regulation laying down harmonized conditions for the marketing of construction products, the labeling and marking of fiber composition of textile products, the safety and environmental performance of two- and three-wheel vehicles and quadricycles, and the Marine Craft and Nautical Vehicle Directive (improving safety through better classification of craft). Parliament is continuing its legislative work with regard to regulations on cable installations, gaseous fuel consuming appliances, medical devices and personal protective equipment; *Idem*.

<sup>87</sup> Regulation of the European Parliament and of the Council concerning type-approval requirements for the installation of an eCall in-vehicle and roaming system of Directive 2007/46/EC, (COM/2013/0316), <http://eurlex.europa.eu/legalcontent/RO/TXT/?uri=CELEX%3A52013PCO316>, consulted on 1.10.2018.

<sup>88</sup> Decision of the European Parliament and of the Council establishing a Program on interoperability solutions for European public administrations, businesses and citizens (ISA2). Interoperability as a means of modernizing the public sector (Text with EEA relevance) - [COM(2014)0367], <http://eur-lex.europa.eu/legal-content/RO/TXT/H TML/?uri=CELEX:52014PCO367&from=EN>, consulted on 1.10.2018.

<sup>89</sup> Proposal for a Regulation of the European Parliament and of the Council laying down rules for the making available on the market of CE marked fertilizer products and amending Regulations (EC) 1069/2009 and (EC) no. 1107/2009 [COM(2016)0157].

with a view to improving the quality of EU legislation and identifying legislative acts requiring simplification or codification, in line with the objective of furthering better lawmaking, prompt transposition and correct implementation. Parliament also asks the other institutions to support, whenever possible, co-regulation and voluntary agreements, in line with the same principle of better lawmaking<sup>90</sup>.

According to recent analyzes, **the ongoing Brexit process will generate considerable uncertainties and will have a negative impact on the single market**, European companies (SE - *Societas Europaea*)<sup>91</sup> and the rights of European citizens<sup>92</sup>. Parliament will have to play a significant role in ensuring democratic legitimacy and respect for citizens' rights in this process<sup>93</sup>.

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<sup>90</sup> For more detailed information, please refer to the study prepared by the Committee on the Internal Market and Consumer Protection (IMCO) of the Parliament, entitled „EU Mapping: Overview of IMCO-re [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536317/IPOL\\_STU\(2015\)536317\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536317/IPOL_STU(2015)536317_EN.pdf), consulted on 1.10.2018.

<sup>91</sup> See O. I. Dumitru, *The European company, perspectives after Brexit*, „Juridical Tribune - Tribuna Juridica”, Volume 7, Issue 2, December 2017, p. 143-145.

<sup>92</sup> P. Eeckhout, *The Consequences of Brexit for the Customs Union and the Internal Market Acquis for Goods* (The consequences of Brexit on the Customs Union and the Internal Market acquis for goods), 2017, [http://www.europarleuropa.eu/RegData/etudes/BRIE/2017/602053/IPOL\\_BRI\(2017\)602053\\_EN.pdf](http://www.europarleuropa.eu/RegData/etudes/BRIE/2017/602053/IPOL_BRI(2017)602053_EN.pdf), consulted on 1.10.2018.

<sup>93</sup> See P.T. Stoll, *The Role and Powers of the European Parliament in the Brexit Process*, 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL\\_IDA\(2017\)602054\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL_IDA(2017)602054_EN.pdf), consulted on 1.10.2018.

## 5. Exchange of goods between Member States and third countries

The Union is made up of a **customs union** governing **the whole commodity trade**:

- **between Member States**, with the prohibition of customs duties on imports and exports, and of any charges having equivalent effect;

- **in relations with third countries**, between which a common customs tariff is adopted [Article 28 par. (1) TFEU].

Goods originating in third countries<sup>94</sup> for which import formalities have been carried out and for which customs duties and charges having equivalent effect which are chargeable and which have not benefited from the import formalities shall be considered to be in free circulation in a Member State a total or partial refund of these taxes or charges [article 28 par. (2) TFEU].

Neither export of goods to third countries nor imports from third countries<sup>95</sup> should suffer from any quantitative restrictions; exceptions to this rule may be made only for the purpose of protecting public morals, public order, public security, the protection of the health and life of citizens, animals and plants, national protection and cultural heritage, industrial property, the commercial one<sup>96</sup>.

In the case of *dumping* practices of the third countries, the *anti-dumping* measures may be imposed by Regulations for products imported from these countries. These measures (in the

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<sup>94</sup> See Council Regulation no. 2603/69 on the establishment of a common regime for exports, as amended, J. Of. L. 324, 1969.

<sup>95</sup> See Council Regulation no. 3285/94 on common rules for imports and repealing Regulation no. 518/94, as amended, J. Of. L 349, 1994, pp. 53-70.

<sup>96</sup> See T. Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 328.

present case, regulations<sup>97</sup>) can only be applied when the EU institutions find that the products in question are marketed within the EU at a lower price than the one practiced in the exporting country<sup>98</sup>. The case law of the CJEU and the Court of First Instance (EU) have stated that the EU institutions have the right to appreciate the economic policy issues involved in the imposition of anti-dumping measures<sup>99</sup>; the Court also stated that anti-dumping measures may be challenged by natural persons or by companies directly affected by them<sup>100</sup>.

► The free movement of goods between Member States and third countries implies **the adoption of a common customs tariff**.

The introduction of the common customs tariff was carried out in two stages. In the first stage, the national tariffs were gradually approximated in order to subsequently establish the common customs tariff.

The Customs Union has allowed the European Community/the European Union to promote a common trade policy and to draw up its own customs legislation, represented by the Community Customs Code, respectively the Customs Code of the Union.

The Common Customs Tariff - as defined in art. 56 of the Customs Code of the European Union - is based on import and export duties due. The Common Customs Tariff includes (all) the following elements:

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<sup>97</sup> See Council Regulation (EC) no 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, as amended, J. Of. L. 56, 1996, pp. 1-20.

<sup>98</sup> See T. Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 328.

<sup>99</sup> C-69/89, *Nakajima All Precision Co. Ltd c. Consiliul*, (1991) ECR, 1-2069; T' - 161/94, *Sinochem Heilongjiang c. Consiliul*, (1996), ECR II-695, cited by T. Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 328.

<sup>100</sup> C-239 and 275/82, *Allied Corporation ș.a. c. Comisia*, (1984), ECR 1005; T. Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 328.

a) the Combined Nomenclature of Goods, as defined in Council Regulation (EEC) 2658/87;

b) any other nomenclature which is wholly or partly based on the Combined Nomenclature or which adds further subdivisions to it and which is established by Union provisions governing specific fields for the application of tariff measures relating to trade in goods;

c) conventional or autonomous normal customs duties applicable to goods covered by the Combined Nomenclature;

d) preferential tariff measures contained in agreements concluded by the Union with certain countries, territories or groups of countries or territories outside the customs territory of the Union;

e) preferential tariff measures adopted unilaterally by the Union towards certain countries or territories or groups of countries or territories outside the customs territory of the Union;

f) autonomous measures providing for a reduction or exemption from customs duties on certain goods;

g) the favorable tariff treatment defined for certain goods by reason of their nature or their final destination under the measures referred to in point c) -f) or h);

h) other tariff measures provided for by agricultural or commercial legislation or by other Union provisions.

► **The European Union's external trade includes the Common Commercial Policy (CCP) and the Customs Union**, where the Treaty distinguishes trade in goods **in relations with third countries, between which a common customs tariff is adopted** [art. 28 par. (1) TFEU]. The EU Court of Justice interprets the issue of external trade in the European Union, which "must be solved in an open perspective and not only for the management of limited systems such as customs and quantitative restrictions"<sup>101</sup>.

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<sup>101</sup> See Opinion no. 1/78 of the Court of 4 October 1979 on the International Agreement on Natural Rubber; to be seen T. Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 327.

Without the existence of a customs union and without the fundamental principle of free movement of goods, it would not have been possible to create the single market or the EU's economic expansion.



## **Chapter III**

### **Free movement of persons in the European Union**

#### **1. Regulation**

**The free movement of persons in the EU is based on the following provisions:**

- art. 3 par. (2) TEU;**
- art. 21 TFEU, Titles IV and V, Part III of the TFEU;**
- art. 45 of the Charter of Fundamental Rights of the EU;**
- the Schengen Agreement on the gradual abolition of checks at the common borders of 14 June 1985;**
- Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders, signed on 19 June 1990 and which entered into force on 26 March 1995.**

The legal basis for this freedom begins with one of **the objectives of the Union**, which in its content is **a guarantee given to its citizens in the area of freedom, security and justice without internal frontiers**, in conjunction with appropriate measures on external border control, with the right to asylum, immigration, as well as the prevention of crime and combating this phenomenon [under art. 3 par. (2) TEU].

In the order of presentation, the following provision, art. 21 TFEU<sup>102</sup> refers to **"any EU citizen who has the right to move and reside freely within the territory of the Member States"** as a result of the introduction by the Treaty of Maastricht of the notion of EU citizenship. This freedom of movement therefore

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<sup>102</sup> The former art. 18 TCE.

benefits every citizen of a Member State "subject to the limitations and conditions laid down in the Treaties by the provisions adopted for their application" (Article 21 TFEU).

The concept of free movement of people has changed over time.

The first provisions in the field, which also meant the original meaning of the concept, were included in the Treaty of the European Economic Community (1957), referring to the free movement of workers and the freedom of establishment, understood as rights of employees or service providers.

Currently, these provisions are contained in Titles IV and V, Part III of the TFEU, as follows:

- Title IV contains regulations on "Workers" (Chapter I), "Right of establishment" (Chapter 2) and "Services" (Chapter 3);

- Title V, entitled "Area of freedom, security and justice", begins with the Union's guarantee of the absence of controls at internal borders, while at the same time developing a common policy on asylum, immigration and asylum of external border control - guarantee based on solidarity between the Member States in a fair manner vis-à-vis third-country nationals [Art. 67 paragraph (2)].

Article 45 of the Charter of Fundamental Rights of the EU only reinforces the provisions of article 21 TFEU, namely, "any citizen of the Union has the right to move and reside freely within the territory of the Member States". This freedom may be accorded, in accordance with the Treaties (TFEU, TEU, the author's note), and to third-country nationals legally residing in the territory of a Member State.

The provisions of the Treaties in this area are "complemented" by a series of directives, which will be presented as far as the references to which they refer are concerned.

## 2. Workers

In the beginning, through the ECT, the freedom of movement of persons was not provided for as a right of the citizens of the Member States to move to the Community for whatever purpose, but was linked to the concept of **workers**<sup>103</sup>, thus having a **pure connotation economic**. This is why it can be said that "the freedom of movement of persons"<sup>104</sup> has made the most important development by moving from the free movement of workers to the community space, to the free movement of **citizens** of the Member States (on the basis of this quality gaining European citizenship).

TFEU guarantees the free movement of workers in the European Union by prohibiting any discrimination on grounds of

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<sup>103</sup> The free movement of workers was achieved through Regulation no. 1612/68 of the Council of 5 October 1968 on freedom of movement for workers within the Community. It was amended by Council Regulation (EEC) no. 2434/92 of 27 July 1992 - J. Of. L. 245/1 of 26 August. 1992 and by Directive no. 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families. The last amendment to the Regulation was made by Regulation (EU) no. 492/2011 of 5 April 2011 on the free movement of workers within the Union.

<sup>104</sup> The principle of the freedom of movement of persons was developed by the Agreement on the European Economic Area (EEA), which entered into force on 1 January 1994. The agreement governs the right of free movement of persons provided in the TEC to nationals of the EFTA States, with the exception of Switzerland. The agreement was signed on May 2, 1992, between the countries participating in the European Free Trade Association and the EU Member States. This agreement establishes a single market governed by the same basic rules aimed at enabling commodities, services, capital and individuals (their citizens and their families) to move freely within the EEA and the EU in an open and competitive environment.

nationality between workers of the Member States as regards employment, remuneration and other conditions of work [Art. 45 par. (1) and (2)].

The concept of worker is defined by Community law (the Union), independent of the law of the Member States<sup>105</sup>, the CJEU, by its jurisprudence, providing the criteria for defining the concept, namely:

- existence of a work relationship;
- a person, in the context of this employment relationship, must perform real and effective work for a certain period of time, for and under the direction of another person;
- the person concerned receives a remuneration in exchange for the work he has done<sup>106</sup>; in other words, the work the person is doing must not be voluntary.

"Freedom of movement" benefits "workers" so defined and their family members. There is also wage activity even if the activity is only occasional and the remuneration is lower than the statutory minimum<sup>107</sup>.

Practice has established that the rule of equal treatment in the context of free movement of workers, provided by art. 45 TFEU, concerns not only workers but also the employer in order to employ in a Member State where workers who are nationals of another Member State are established<sup>108</sup>.

Freedom of movement for workers is subject to restrictions justified on grounds of public policy, social security or public health [Art. 45 par. (3) TFEU]. Also, subject to the above limitations, the free movement of workers implies the right:

- a) to accept actual employment offers;

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<sup>105</sup> See T. Ştefan, B. Andreşan-Grigoiu, *op. cit.*, p. 385.

<sup>106</sup> C-66/85, *Deborah Lawrie-Blum c. Land Baden-Württemberg*, (1986), ECR, 2121.

<sup>107</sup> See O. Manolache, *op. cit.*, p. 253.

<sup>108</sup> *Ibidem*, p. 248.

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

c) to reside in a Member State in order to carry on paid employment in accordance with the laws, regulations and administrative provisions governing the employment of the worker of that State;

d) to remain in the territory of a State after having been employed in that State, under the conditions which will be the subject of regulations adopted by the Commission [Art. 45 par. (3) TFEU]. The provisions of the Treaty relating to workers do not apply to employment in the public administration [according to art. 45 par. (4) TFEU].

### **3. Free movement of EU citizens and their family members**

For the territory of the European Communities to become an area of freedom and mobility for all citizens of their Member States, in 1990 a number of directives were adopted to offer residence rights to persons other than workers<sup>109</sup>. These directives, however, had sectoral and fragmented approaches to both the right to free movement and residence and the exercise of this right, which made it necessary to adopt a single piece of legislation<sup>110</sup>, namely **Directive 2004/38/EC of the European**

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<sup>109</sup> Council Directive 90/365/EEC on the right of residence for employed or self-employed persons who have ceased their occupational activity, Council Directive 90/366/EEC on the right of residence of persons in education, Council Directive 90/364/EEC on the right of residence (for nationals of Member States who do not enjoy this right under other provisions of Community law and for members of their families).

<sup>110</sup> These Directives have therefore been repealed, while amending Regulation (EEC) no. 1612/68 of 15 October 1968 on freedom of movement for workers within the Community. The following acts were repealed: Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community

**Parliament and the Council of 29 April 2004<sup>111</sup> on the free movement and residence within the territory of the Member States of citizens of the Union and members of their families<sup>112</sup>.**

The adoption of the said Directive took into account the repealed legislative texts and the extensive case-law on this freedom.

Directive 2004/38/EC was designed to encourage citizens of the Union to exercise their right to move and reside freely within the territory of the Member States in order to reduce administrative formalities, to provide a new definition of the status of family members and to limit the scope of application of refusal to enter or terminate the right of residence<sup>113</sup>.

According to Directive 2004/38/EC [art. 2 par. (2)], by family member means:

- a) husband;
- b) the partner with whom the Union citizen has contracted a registered partnership under the legislation of a Member

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for workers of Member States and their families, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of the Member States with regard to establishment and the provision of services.

<sup>111</sup> The Directive has been fully transposed into national law; see, in this respect, Law no. 248/2005 on the regime of free movement of Romanian citizens abroad, published in the Official Gazette no. 682 of 29 July 2005, as subsequently amended and supplemented, respectively Government Emergency Ordinance no. 96/2006, amending and supplementing Law no. 248/2005, published in the Official Gazette no. 981 of 8 December 2006.

<sup>112</sup> Published in OJ L 158, 30 April 2004.

<sup>113</sup> See O. Marzocchi, *Fișe tehnice privind Uniunea Europeană. Libera circulație a persoanelor*, June 2017, [www.europarleuropa.eu/atyourservice/ro/displayFtu.html?ftuld=FTU\\_2.1.3.html02/2017](http://www.europarleuropa.eu/atyourservice/ro/displayFtu.html?ftuld=FTU_2.1.3.html02/2017), consulted on 1.10.2018.

State if, under the law of the host Member State, registered partnerships are treated as equivalent to marriage<sup>114</sup> and under the conditions laid down by the relevant legislation of the host Member State;

c) direct descendants aged 21 or under or under their care, as well as direct descendants of the spouse or partner, as defined to the letter b);

d) the dependent ascendants who are dependent and those of the spouse or partner, as defined to the letter b).

The host Member State is the Member State in which a citizen of the Union is moving in order to exercise his right to move and reside freely.

According to Articles 6-7 of Directive 2004/38/EC, EU citizens:

1. have the right to stay for up to three months, provided they have an identity card or a valid passport. This requirement also applies to family members who do not have the nationality of a Member State and who accompany or join the citizen of the Union (Article 6). The host State has the right to require the persons concerned to register their presence in the country;

2. have the right to stay for more than three months (Article 7) if:

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

b) have sufficient resources for them and their family members to ensure that they do not become a burden on the host Member State's social assistance system during the stay and have full medical insurance in the host Member State;

c) are enrolled in a private or public institution, accredited or funded by the host Member State on the basis of its legislation or administrative practices, for the primary purpose of pursuing studies, including training;

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<sup>114</sup> Most Member States apply the directive to guarantee the right to free movement of same-sex spouses, registered partners, partners in a sustainable relationship; to be seen O. Marzocchi, *op. cit.*

- have full medical insurance in the host Member State and ensure that the competent national authority, through a declaration or other equivalent procedure of its own choice, has sufficient resources for themselves and for family members so that they do not become a burden on the system assistance of the host Member State during the period of stay;

d) are family members who accompany or join a Union citizen who himself fulfills the conditions referred to in letters a), b) or c).

According to art. 10 of the Directive for family members of an EU citizen who is not a national of a Member State, the right of residence is confirmed by the issue of a "**Residence permit for a Union citizen**" within 6 months from the date of submission of the application. The residence permit is valid for 5 years from the date of issue or the period of residence of the EU citizen if the period is less than 5 years.

Citizens of the Union acquire a right of permanent residence after a period of 5 years of uninterrupted legal residence if no decision of expulsion has been applied to them (Article 16). This rule also applies to family members who are not nationals of a Member State and who have resided legally with the citizen of the Union in the host Member State for an uninterrupted period of five years. Permanent residence may be lost only if he/she is absent for more than two consecutive years in the host Member State.

Member States may restrict the freedom of movement and residence of citizens of the Union and their family members, irrespective of their nationality, on grounds of public policy, public security or public health. These reasons can not be invoked for economic purposes. Guarantees are provided to ensure that these decisions are not taken for economic reasons, that they respect the principle of proportionality and are based on personal conduct, *inter alia*<sup>115</sup>.

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<sup>115</sup> See O. Marzocchi, *op. cit.*



Member States are, according to the Directive, able to take the necessary measures to refuse, cancel or withdraw any right conferred by it in the event of abuse of rights or fraud, such as marriages of convenience<sup>116</sup>.

#### **4. Free movement of workers in the European Union<sup>117</sup>**

**Regulation no. 492/2011 of the EP and the Council is the normative act currently governing the free movement of workers within the Union<sup>118</sup>**; it develops art. 45 TFUE.

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<sup>116</sup> The implementation of this directive has been characterized by problems due to the shortcomings in its transposition, the remaining obstacles to free movement. These shortcomings were highlighted by the Commission's reports and European Parliament studies on the application of the Directive (its transposition), on actions for failure to fulfill obligations by Member States through incorrect or incomplete transposition of the Directive, the large volume of petitions to the European Parliament and the numerous cases brought before the Court of Justice of the European Union. It has also been found that the general perception is that citizens are abusing their normative provisions by practicing the so-called "social tourism". See O. Marzocchi, *op. cit.*

<sup>117</sup> See Regulation (EU) no. 492/2011 of 5 April 2011 on the free movement of workers within the Union.

<sup>118</sup> Regulation (U.E.) no. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union has substantially amended several of the following acts: Council Regulation (EEC) no. 1612/68 (JO L no. 257, 19. 10. 1968, p. 2), Council Regulation (EEC) no. 312/76 (JO L no. 39, 14. 2. 1976, p. 2), Council Regulation no. 2434/92 (OJ L 245, 26.8.1992, p. 1). With regard to Directive 2004/38/EC of the European Parliament and of the Council (JO L 158, 30.4.2004, p. 77), has been modified only article 38 para. (1).

Freedom of movement for workers must be ensured within the Union<sup>119</sup>. Ensuring this freedom is an objective that involves<sup>120</sup>:

- the elimination of all discrimination between workers of the Member States on the basis of nationality with regard to employment;
- remuneration and other working conditions, as well as:
- the right of such workers to move freely within the Union to engage in wage activity, subject to restrictions justified on grounds of public policy, public security and public health.

Free movement is a fundamental right of workers and their families. This right must be recognized, without discrimination, by permanent, seasonal and frontier workers and those engaged in service activities.

#### **4.1. Access to employment**

*Access to employment benefits any national of a Member State irrespective of his or her place of residence.*

*The right of access to a wage and the right to perform this wage activity can be exercised according to the legislation in force (labor law<sup>121</sup>) governing the employment of the citizens of that state. Moreover, the national concerned benefits from the same priority as the nationals of that State as regards access to available employment.*

*Direct discrimination based on a legislative or administrative act which is likely to restrict or condition a national of a Member State or an employer pursuing an activity in the territory*

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<sup>119</sup> Article 45 (1) and recital no. 1 of Regulation (EU) no. 492/2011.

<sup>120</sup> Recital no. 2 of Regulation (EU) no. 492/2011.

<sup>121</sup> The Regulation refers to the laws, regulations and administrative provisions.

*of a Member State in respect of the right to exchange offers employment, as well as the right to conclude and execute employment contracts.*

Legislative and administrative acts, as well as administrative practices that restrict or condition a foreign citizen but a citizen of a Member State, such as:

- demand and supply of jobs;
- access to employment;
- the right of aliens to carry out an activity which is exercised irrespective of their nationality;
- their exclusive or principal purpose or effect is to prevent nationals of another Member State from gaining access to the jobs offered.

The conditions regarding the linguistic knowledge required by the nature of the job to be occupied are not forbidden.

#### **4.2. Equal treatment and social and tax benefits**

A worker who is a national of a Member State can not be treated differently on the territory of the other Member States in relation to national workers on grounds of nationality.

It shall also enjoy equal treatment in the territory of the other Member States with their nationals in respect of:

- conditions of employment and employment,
- remuneration;
- dismissal;
- reintegration, if left without a job;
- restarting.

The laws, regulations and administrative provisions of the Member States providing for special provisions for foreign nationals (relating to employment, number, percentage, by company, branch of activity, region) do not apply to nationals of Member States. Similarly, nationals of the other Member States are considered to be national workers, even with regard to the granting of benefits of any kind to undertakings subject to the

employment of a minimum percentage of national workers (subject, however, to the provisions of Directive 2005/36/EC of the European Parliament and the Council on the recognition of qualifications<sup>122</sup>).

They benefit from:

- the same social and fiscal advantages as national workers, having access under the same conditions to training in vocational schools and retraining centers;
- equal treatment with regard to affiliation to trade unions and the exercise of trade union rights<sup>123</sup>;
- all the rights and benefits granted to national workers with regard to housing, including the right to ownership of the dwelling they need.

Their children are admitted to the general education, apprenticeship and training courses under the same conditions as nationals of that State if they reside in the territory of that State.

The Member States and the Commission shall cooperate with regard to the contacting and matching of job vacancies at the level of the European Union. Together, the Member States and the Commission shall initiate or conduct any study on employment or unemployment, a study it considers necessary for the free movement of workers within the Union.

Member States shall also provide the Commission with information on problems and data relating to the free movement and employment of workers, as well as information on the employment situation and developments<sup>124</sup>.

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<sup>122</sup> From 7 September 2005, OJ L, 255, 30 September 2005, p. 22, [http://eur-lex.europa.eu/legal-content/HTML/AUTO/?uri=uriserv:OJ.L\\_.2005.255.01.0022.ROM.HTML](http://eur-lex.europa.eu/legal-content/HTML/AUTO/?uri=uriserv:OJ.L_.2005.255.01.0022.ROM.HTML), consulted on 1.10.2018.

<sup>123</sup> Including the right to vote and to the administrative or management posts of a trade union organization (for details, see Article 8 of EU Regulation no. 492/2011 on the free movement of workers within the Union).

<sup>124</sup> For details, see Regulation (EU) no. 492/2011 on the free movement of workers within the Union.

## **5. Regulation no. 492/2011 of the European Parliament and of the Council. The principle of non-discrimination**

Regulation no. 492/2011 of the European Parliament and the Council on the free movement of workers within the Union is intended to ensure the practical observance of art. 45 TFEU (which regulates this freedom at Union level) and to prohibit all forms of discrimination (based on citizenship) among Member States' employees at Union level.

They are forbidden to do so:

- separate recruitment procedures for foreigners;
- any limitations on the dissemination of job offers or the imposition of specific conditions, including registration with employment offices for people coming from another EU country;
- discriminatory practices between national workers and those coming from other EU countries regarding employment and work conditions, with regard to:
  - access to employment (including the assistance provided by employment offices to people who want to work);
  - working conditions (remuneration, dismissal, reintegration, social and fiscal benefits);
  - access to training.

Article 45 (4) The TFEU provides for an exception to the principle of non-discrimination, meaning that access to posts involving the exercise of public authority, including tasks designed to protect the general interests of the State, is reserved for the citizens of the State concerned, namely that "the provisions of this Article shall not apply to public administration".

In order to facilitate the uniform application and enforcement of the right of workers to move freely within the Union (covered by Article 45 TFEU and Articles 1-10 of Regulation no. 492/2011), the European Parliament and the Council adopted **Directive 2014/54/EU on measures to facilitate the exercise of**

**the rights conferred on employees in the context of the free movement of workers<sup>125</sup>.**

In 2016, Regulation (EU) no. 492/2011 was amended by **Regulation no. 2016/589 on employment services (EURES) by introducing regulations on the exchange of information on vacancies, applications for employment and CVs at the level of all EU countries.**

**6. Restrictions on the right of free movement of persons in the European Union**

The right of free movement of persons is restricted, according to art. 45 par. (3) TFEU on grounds justified by public policy, public security and public health.

These reasons can not be invoked to serve economic purposes<sup>126</sup>.

Measures restricting the right of free movement are based solely on the personal conduct of the national concerned, although previous convictions do not constitute grounds justifying such measures. Personal conduct must be a real, present and sufficiently serious threat to a fundamental interest of society<sup>127</sup>. The definition of "personal conduct" was debated by the EU Court of Justice, stressing that "Member States should not exercise their competence in the matter on the basis of an assessment of conduct in such a way as to arbitrarily distinguish between their citizens and those of the other Member States"<sup>128</sup>, they "must refrain from discriminating against migrant workers". The host Member State may, if it deems it necessary, require the State of origin or other Member States, where appropriate, to provide

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<sup>125</sup> JO L 128, 30 April 2014, pp. 8-14, of 16 April 2014.

<sup>126</sup> See T. Ştefan, B. Andreşan Grigoriu, *op. cit.*, p. 408.

<sup>127</sup> *Idem.*

<sup>128</sup> *Idem*; Joined Cases 115 and 116/81, *Rezguia Adoui c. Belgia and City of Liege, Dominique Cornuaille c. Belgia*, (1982), ECR, 1665.

information on the judicial history of the person whose "personal conduct is called into question"<sup>129</sup>.

Reasons for public policy or public safety may also be invoked in the taking of a decision to expel, but the host Member State must take into account the duration of the person's stay on its territory, his state of health, his family and economic situation, integration its social status in the host Member State and so on<sup>130</sup>.

In this respect, a decision to expel a citizen of the Union can not be taken, except for the overriding reasons of public security defined by the Member States, if he is in one of the following situations:

- resided in the host Member State during the previous 10 years,
- is minor, unless expulsion is in the best interest of the child, in accordance with the United Nations Convention on the Rights of the Child of 20 November 1989<sup>131</sup>.

In one of its judgments<sup>132</sup>, the Court has held that public policy or public security measures the effect of which is to restrict the right of residence of a national of another Member State must be based exclusively on the conduct of that person and can not be the consequence of a conviction criminal.

As regards public health, as a measure to restrict the free movement of persons, diseases with epidemic potential as defined in the relevant World Health Organization (WHO) documents and other contagious infectious or parasitic diseases are considered, they are regulated in the host Member State and are addressed to the nationals of that State. Member States may require the person concerned, within three months from the date of arrival, to undergo a free medical examination stating that he or

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<sup>129</sup> See T. Ştefan, B. Andreşan-Grigoriu, *op. cit.*, p. 409.

<sup>130</sup> *Idem.*

<sup>131</sup> *Idem.*

<sup>132</sup> The Court has answered the questions referred by the national court in accordance with Directive 64/221/EC of 25 February 1964 in Case C-348/96, *Donatella Calfa*, 1999, ECR I-11.

she does not suffer from one of the diseases listed in the national host nomenclature.

Another restriction of the right to free movement of persons is provided by art. 45 par. 4 TFEU, which prohibits employment in public administration posts. With regard to this restriction, the Court of Justice of the European Union has stated that "such posts (from the public administration, the author's note), as in fact from their occupants, prove both the existence of a special loyalty relation to the state, and the reciprocity of the rights and duties underlying the obligation of nationality"<sup>133</sup>.

## 7. The Schengen Area

### 7.1. Regulation

Together with the provisions of the TFEU, the free movement of persons is also based on:

- the Schengen Agreement on the gradual abolition of checks at the common borders of 14 June 1985<sup>134</sup>;

- Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders, signed on 19 June 1990, which entered into force on 26 March 1995.

Initially, the Convention - only signed by **Belgium, France, Germany, Luxembourg and the Netherlands**<sup>135</sup> - was based on intergovernmental cooperation in the field of Justice and Home Affairs (JHA), after which a protocol to the Treaty of Amsterdam<sup>136</sup> secured the transfer of the "*acquis* Schengen" in

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<sup>133</sup> Court of Justice of the European Communities, Judgment of 17 December 1980.

<sup>134</sup> The free movement agreement was signed in the Schengen city of Luxembourg.

<sup>135</sup> These states opened their borders between them on March 26, 1995.

<sup>136</sup> The Treaty of Amsterdam was adopted by the Heads of State and Government of the European Union (EU) on 16-17 July 1997 and signed on 2 October 1997. It entered into force on 1 May 1999.



the treaties. Thus, the Treaty of Amsterdam established the so-called "Area of Freedom, Security and Justice"<sup>137</sup>. In this context, the Schengen Treaty has been integrated into Community acts. **Great Britain and Ireland have not joined this treaty.** Member States also agreed on closer cooperation on visa, asylum and immigration.

"Schengen Area" is based on art. 67 and art. 77 TFEU (Treaty of Lisbon), therefore:

a) the Union constitutes an area of freedom, security and justice, respecting the fundamental rights and the different legal systems and legal traditions of the Member States.

The Union ensures the absence of controls on persons at internal borders and develops a common policy on asylum, immigration and external border control based on solidarity between Member States and which is fair to third country nationals. Stateless persons are assimilated to third-country nationals [Art. 67 paragraph (1) and (2) TFEU]<sup>138</sup>;

b) the Union is developing a policy that aims to:

- ensure that there is no control over persons crossing the border, irrespective of their nationality;
- ensure people control and effective surveillance when crossing frontiers;
- gradually introduce an integrated border management system (article 77 TFEU).

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<sup>137</sup> The Treaty of Amsterdam extended the rights of the European Police Office (EUROPOL).

<sup>138</sup> According to art. 68 TFEU: "The European Council defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

## 7.2. Participating countries

Currently, the Schengen Area comprises 26 states<sup>139</sup>, including 22 EU Member States and 4 non-EU countries (Norway, Iceland, Switzerland and Liechtenstein).

Ireland and the United Kingdom are not parties to the Convention but have the possibility to accede to the application of certain provisions of the Schengen *acquis*.

Denmark, although part of the Schengen Agreement, has the option not to participate in any of the new measures in the field of justice and home affairs, but has the obligation to comply with some provisions in the field of the common visa policy.

Romania, Bulgaria and Cyprus are to join, even if there are delays for different reasons. On July 1, 2015, Croatia began the process of joining the Schengen area.

## 7.3. The objective of the "Schengen Area". Evolutions and achievements

The objective of the Schengen Area is to create a single area without internal border controls. This objective requires a

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<sup>139</sup> They are members of the Schengen area: Austria, Belgium, the Czech Republic, Denmark (excluding Greenland and the Faroe Islands), Switzerland, Estonia, Finland, France (Overseas Departments and Territories are excluded, called Dom-Tom abbreviated), Germany, Greece, Iceland, Latvia, Lithuania, Luxembourg, Malta, Netherlands (excluding Aruba, Curacao, Saint Maarten, Caribbean Netherlands), Norway (Svalbard is excluded), Poland, Portugal, Slovakia, Spain (Ceuta and Melilla cities excluded), Sweden, Hungary. Of these, Switzerland, Iceland, Norway, Liechtenstein are not members of the European Union.

common policy for the management of external borders<sup>140</sup>. To this end, the Union is determined to establish common standards on controls at its external borders and to gradually put in place an integrated system for the management of these borders<sup>141</sup>.

Achievements of the objective pursued by the "Schengen Area" can be found in:

**1. Schengen *acquis* on external borders.**

The *acquis* is made up of the rules governing the external borders, based on the original *acquis* integrated into the EU's legal order by the Treaty of Amsterdam<sup>142</sup>.

Achievements are as follows<sup>143</sup>:

- the Schengen Information System (SIS), which provides the necessary information management infrastructure to support border controls and security related tasks in judicial and police cooperation;

- the Visa Information System (VIS), which aims to improve the implementation of the Common Visa Policy, consular cooperation and consultations between the central visa authorities;

- the European Border Police and Coast Guard Agency, which came from the former Frontex Agency with extensive tasks under the Border and Coast Guard Regulation (EBCG)<sup>144</sup>.

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<sup>140</sup> See K. Milt, March 2017, [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU\\_5.12.4.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU_5.12.4.html), consulted on 1.10.2018.

<sup>141</sup> *Idem.*

<sup>142</sup> See Council Directive 2002/90/EC and Council Framework Directive 2002/946/JHA.

<sup>143</sup> For details on each achievement, K. Milt, March 2017, [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU\\_5.12.4.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU_5.12.4.html), consulted on 1.10.2018.

<sup>144</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on Border Police and Coast Guard at European level and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) no.

The main role of the EBCG is to help ensure integrated management of the external borders.

## **2. Developments in the EU's management of its external borders.**

Since the creation of Frontex, practical steps have been taken to improve the integrated management of the external borders, namely: a series of significant technical infrastructure updates; a series of joint border management operations; developing a rapid response capability (initially, with the help of the Rapid Border Intervention Teams - RABIT - and, as of 2011, also through the European Border Guard Teams).

In spite of all developments, in recent years, the Schengen area has been subject to challenges that could put pressure on the reconsideration of the provisions governing this area, namely:

- the unprecedented flow of refugees and migrants to the EU. Thus, the extremely high number of refugees and migrants, starting in September 2015, has led several Member States to reintroduce temporary controls at the internal borders of the Schengen area (however, temporary border controls have complied with the rules of the Schengen Borders Code);

- terrorist threats; they have shown the difficulty in detecting terrorists entering and moving into the Schengen area. All this has highlighted the extremely complex links between the firm management of the external borders and the free movement within them. New measures have also been imposed, both to increase security controls applied to persons entering the Schengen area and to improve the management of external borders.

#### 7.4. Achievements of the "Schengen Area"

The achievements of the "Schengen Area" according to its objectives are<sup>145</sup>:

**a.** the abolition of internal border controls for all persons; EU citizens have the right to free movement when traveling within the EU, whether or not the country is part of the Schengen area. When entering the territory of an EU Member State that does not belong to the Schengen area, EU citizens are in principle subject only to a minimum identity check based on travel documents (passport or identity card)<sup>146</sup>.

**b.** adopting measures to strengthen and harmonize controls at the external borders, consisting in the fact that all EU citizens can enter the Schengen area only by presenting their identity card or passport;

**c.** a common policy on short-stay visas: third-country nationals included in the common list of non-Member States whose nationals require an entry visa (see Annex II to Council Regulation no. 539/2001) may obtain a single visa, valid for the whole Schengen area. The Visa Information System (VIS) is an information system linking the consulates of third-country Schengen

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<sup>145</sup> See O. Marzocchi, March 2017, *op. cit.*

<sup>146</sup> The EU is currently working on a program for the external borders, called "Intelligent Frontiers". It includes an entry/exit system that will improve border controls and combat irregular migration, while facilitating border crossings for frequent travelers and subject to prior checking. The EU is also working on modifying the visa procedure to create better links with other policy areas, such as tourism, and to further simplify the procedures for frequent travelers. It also examines the establishment of a new type of visa, a "circuit visa", which would allow a stay in the territory of two or more Schengen States with a duration of more than 90 days, but not more than one-year extension for another year). To be seen [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/elibrary/docs/schengen\\_brochure/schengen\\_brochure\\_dr3111126\\_ro.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/elibrary/docs/schengen_brochure/schengen_brochure_dr3111126_ro.pdf), consulted on 1.10.2018.

States, competent national authorities and all border crossing points of the Schengen States<sup>147</sup>;

d. police and judicial cooperation: police forces help each other in the detection and prevention of crime and have the right to pursue fugitive criminals on the territory of a neighboring Schengen state; there is also a faster mechanism for extradition and mutual recognition of criminal judgments;

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

### **7.5. The contribution of the European Parliament in supporting the right to free movement of persons in the European Union<sup>148</sup>**

In its **resolution of 16 January 2014** on respect for the fundamental right to free movement in the EU, Parliament calls on the Member States to comply with the Treaty provisions on EU rules governing freedom of movement and to ensure that the principle of equality and the fundamental right to free movement is respected in all Member States, including access to employment, working conditions, remuneration, dismissal and social and fiscal benefits. In the above-mentioned resolution, the European Parliament states that Member States have a responsibility to combat the misuse of social security systems, regardless of whether they are guilty of their own citizens or other EU citizens.

**The European Parliament's resolution of 12 April 2016** refers to the pressure exerted on the Schengen area by the 2015 refugee, migrant flows (including the situation in the Mediterranean), stating that a global approach to migration by the EU is needed, recalling that the Schengen area is "one of the greatest

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<sup>147</sup> See [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen\\_brochure/schengen\\_brochure\\_dr3111126\\_ro.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_ro.pdf), consulted on 1.10.2018.

<sup>148</sup> See O. Marzocchi, March 2017, *op. cit.*

achievements of European integration". Against this background, the European Parliament has expressed concern that some Member States have responded to the pressure of migration through "the need to close their internal borders or to introduce temporary border controls, thus calling into question the proper functioning of the Schengen area".

## **Chapter IV**

### **Right of establishment and freedom to provide services in the European Union<sup>149</sup>**

#### **1. Regulation**

**Freedom of establishment and freedom to provide services in the European Union are governed by the following provisions:**

- **art. 49-55 TFEU (right of establishment);**
- **art. 56-62 TFEU (services).**

**The provisions of the TFEU on the two freedoms complement the directives and case-law of the EU Court of Justice in the matter.**

According to art. 54 par. (1) TFEU, freedom of establishment and freedom to provide services guarantee mobility:

- companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union;
- natural persons who are nationals of Member States.

#### **2. Right/freedom of establishment**

The right of establishment and all related rights is the ability of individuals and legal persons to start and carry on an economic activity in the territory of the Member States, irrespective of their nationality or nationality<sup>150</sup>.

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<sup>149</sup>[http://www.europarleuropa.eu/alyourservice/ro/displayFtu.html?ftuId=FTU\\_3.1.4.html](http://www.europarleuropa.eu/alyourservice/ro/displayFtu.html?ftuId=FTU_3.1.4.html), consulted on 1.10.2018.

<sup>150</sup> C-115/78, *Knooks*, (1979) ECR, 399, par. 16; T. Ştefan, B. Andreşan Grigoriu, *op. cit.*, p. 436.



The right of establishment concerns, on the one hand, **the persons** and, on the other hand, **the work they carry out as a result of that freedom.**

### **2.1. Persons who are beneficiaries of the right of establishment**

Individuals who are beneficiaries of the right of establishment must be nationals of the Member States. A national is the person to whom a State (in our case, a Member State), under international law, grants its protection.

Freedom of establishment for individuals implies their access to independent activities and their exercise [art. 49 para. (2) TFEU].

Therefore, individuals have the right to start an economic activity and exercise it on their own responsibility.

They may also establish and administer undertakings, in particular companies<sup>151</sup>, under the conditions laid down for their own nationals under the law of the country of establishment.

As a result of the right of establishment, as defined in art. 49 para. (2) TFEU individuals have the right to free initiative and can acquire:

- the quality of individual entrepreneurs by their access to independent activities, performing economic activities on their own responsibility<sup>152</sup>. *For example*, a Romanian individual has

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<sup>151</sup> See C. Ene, *Complexity of the Effects of Cross Border Merger on Internal Market under the Both Company Law and Competition Law*, „Knowledge Horizons”, vol. 8, no. 2, 2016, pp. 39-42.

<sup>152</sup> In the same sense, art. 3 of the Government Emergency Ordinance no. 44/2008 of 16 April 2008 on the carrying out of economic activities by authorized natural persons, individual enterprises and family businesses provides: "Under the right of free enterprise, the right to freedom of association and the right of establishment, any natural person, Romanian citizen or a citizen of another Member State of the European

the right to organize his economic activity in the territory of a Member State of the Union, based on the defined right of establishment and the conditions imposed by the Government Emergency Ordinance no. 44/2008 on the carrying out of economic activities by authorized natural persons, individual enterprises and family enterprises, according to art. 2 letter c), so "the right of establishment is the prerogative of a citizen of a Member State of the European Union or of the European Economic Area to carry out economic activities in the territory of another Member State through a permanent establishment on an equal basis with citizens the host State";

- the quality of self-employed, also carrying out activities on their own responsibility;

- the quality of founding members by setting up/establishing companies (acquiring the capacity of associates/shareholders);

- the quality of managers or managers of an enterprise or company [within the meaning of art. 54 par. (1) TFEU].

By establishing or managing companies, the above mentioned persons have the right to carry out activities in the most diverse fields: industrial, commercial, agricultural.

> As we have seen, individuals can be organized as legal entities. They may be public or private law, namely companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place

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Union or of the European Economic Area, may carry out economic activities on the territory of Romania, under the conditions provided by the law (paragraph 1). Economic activities can be carried out in all areas, occupations, or professions that the law does not expressly prohibit for free initiative (paragraph 2)". Further Art. 4 specifies: "The natural persons referred to in art. 3 par. (1) may carry out economic activities as follows: a) individually and independently, as authorized natural persons; b) as entrepreneurs holding an individual enterprise; c) as members of a family enterprise".

of business within the Union, with the exception of non-profit legal persons [according to art. 54 par. (1) TFEU].

Companies which meet the conditions set out above for the establishment at headquarters at the central administration, at the principal place of business within the Union, are assimilated, as regards the right of establishment, to natural persons who are nationals of Member States.

Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. The prohibition also covers restrictions on the establishment of agencies, branches or subsidiaries (dismantling of companies, etc.) by nationals of a Member State established in the territory of another Member State [art. 49 para. (1) TFEU].

Art. 49 para. (1), referring to a national, shall take into account:

- both a legal person and a company, which is entitled to set up agencies, branches and subsidiaries, in the territory of a Member State other than where the parent company has its registered office,

- and a natural person whose economic activity is organized according to Government Emergency Ordinance no. 44/2008; we believe that it can open a working place in a Member State of the Union if it has its permanent<sup>153</sup> (professional) residence on the territory of that Member State on equal terms with the host State's nationals.

As such, the agencies are not defined in Union law, so we consider that they take the form of representatives of companies established in Member States other than the parent company, the agency acting on behalf of the parent company.

Branches and subsidiaries are governed by EU law, respectively directives, as follows:

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<sup>153</sup> See C. Cojocaru, *Sole trader under Romanian legislation*, 4<sup>th</sup> International Multidisciplinary Scientific Conference on Social Sciences & Arts SGEM Vienna 2017, pp. 449 et seq.

- branches may have the legal form of a department or office established outside their head office<sup>154</sup> (the branches of a limited liability company must be registered under the XI<sup>th</sup> Company Directive<sup>155</sup>);

- subsidiaries were defined in Council Directive 2003/123/EC<sup>156</sup> on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States<sup>157</sup>, it has been amended several times.

**Council Directive 2011/96/EU of 30 November 2011** amending Directive 2003/123/EC provides in Article 3(1) that the status of parent company is granted:

(i) at least one company in a Member State fulfilling the conditions set out in Art. 2 and holding at least 10% of the capital of a company in another Member State which fulfills the same conditions;

(ii) under the same conditions, to a company of a Member State which holds at least 10% of the capital of a company of the same Member State, a wholly or partly held shareholding in the first place of business of the first company located in another Member State;

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<sup>154</sup> Branches are entities without legal personality (according to Romanian law, respectively Article 43 of the Companies Act, no. 31/1990).

<sup>155</sup> See Ștefan, B. Andreșan-Grigoriu, *op. cit.*, p. 442.

<sup>156</sup> J. Of. L 7, 2004, pp. 41-44.

<sup>157</sup> Council Directive 2003/123/EC of 22 December 2003 (which amended Directive 90/435/EEC) was also amended by Directive 2011/96/EU, which was amended by Directive 2013/13/EU of 13 May 2013 adapting certain Directives in the field of taxation, having regard to the accession of the Republic of Croatia. The latter was also amended by Council Directive 2014/86/EU of 8 July 2014 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

"Subsidiary" means a company whose capital includes the holding referred to in point (a)<sup>158</sup>.

Through these directives the harmonization of company law is achieved, a process aimed at **promoting the realization of freedom of establishment, the implementation of the fundamental right provided by art. 16 of the Charter of Fundamental Rights of the European Union and the freedom to conduct a commercial activity (within the limits set out in Article 17 of the Charter - the right to property)**<sup>159</sup>.

Member States shall accord to nationals of other Member States the same treatment as their own nationals with regard to participation in the formation of company capital (article 55 TFEU). By doing so, as we have shown, individuals acquire the status of founding member, associate/ shareholder, by participating in the constitution of the capital of a company, under the same conditions as the nationals of the state in which the company is founded.

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<sup>158</sup> About subsidiaries see the 11<sup>th</sup> Company Law Directive (89/666/EEC) - establishes the obligation to communicate information to foreign subsidiaries of banks. This refers to EU companies setting up subsidiaries in another Member State or third country companies that set up subsidiaries in the EU. Also, Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States introduces, for groups of companies in Member States different, tax rules that are neutral from the point of view of competition. Double taxation of dividends distributed by a subsidiary in a Member State to a parent company situated in another Member State does not apply (see also Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxation of the capital increase). To be seen U. Bux, *Fișe tehnice privind Uniunea Europeană, Dreptul societăților*, aprilie 2017, [http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?fluId=FTU\\_3.2.3.html](http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?fluId=FTU_3.2.3.html), consulted on 1.10.2018.

<sup>159</sup> *Idem*.

The right of establishment requires the national treatment of nationals of a Member State in the territory of another Member State<sup>160</sup>.

The national provisions governing the establishment and the activities to be carried out as a result of the right of establishment must apply equally to nationals of all Member States and must not create a disadvantage for a Union citizen or a legal person when they wish to - and extends economic activities beyond the territory of a Member State<sup>161</sup>.

A Member State may have more restrictive provisions for its own citizens<sup>162</sup>, but they should not prevent them from enjoying the right of establishment in another Member State<sup>163</sup>.

## **2.2. The nature of the work carried out by the beneficiaries of the right of establishment**

As regards the work to be carried out, the right of establishment refers only to **economic activities which take place outside a subordination relationship**, the conditions of em-

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<sup>160</sup> C-11/77, *Richard Hugh Patrick c. Ministre des affaires culturelle*, (1977), ECR 1199, par. 15.

<sup>161</sup> C-143/87, *Christopher Stanton and SA belge d'assurances „L'Etoile 1905” c. Institut national d'assurances sociale pour travailleurs independantes (Inasti)*, 1988, ECR, 3877, par. 13-16.

<sup>162</sup> C-159/78, *Comisia c. Italia*, (1979), ECR, 3247; *Opinia AG Mancini*, C270/83, *Comisia c. Franța* (1986), ECR, 273; T. Ștefan, B. Andreșan Grigoriu, *op. cit.*, p. 438.

<sup>163</sup> C-264/96, *Imperial Chemical Industries, plc (ICI) c. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*, (1998), ECR 1-4695, par. 21.

ployment and remuneration being personally assumed by the person applying for and benefiting from it right<sup>164</sup>. Therefore, activities falling within the category of employment relationships are excluded.

**It also refers to the pursuit of economic activities on a permanent and stable, continuous basis, without a predetermined time limit**, under the same conditions as those laid down by the law of the Member State of establishment for its own nationals<sup>165</sup>.

The right or freedom of establishment includes, with reference to natural persons, the right to start (continue) and continue as non-salaried, independent, liberal persons as professionals.

The right of establishment entails access to self-employed activities and the pursuit of such activities, as well as to the formation and administration of undertakings and in particular of companies, under the conditions laid down for their own nationals by the law of the country of establishment, subject to the provisions of the chapter on capital [art. 49 para. (2) TFEU]. It is necessary to comply with the provisions on free movement of capital, since establishment in another Member State of the European Union implies in most cases also a capital transfer.

The rules on the movement of capital prohibit the parallel application of other freedoms if the provision in question

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<sup>164</sup> C-268/99, *Aldona Malgorzata Jany and Others c. Staatssecretaris van Justitie*, (2001), ECR I-8615.

<sup>165</sup> C-196/87, *Steymann*, (1988), ECR 6159, par. 16; C-53/95, *Inasti*, (1996) ECR I-703, par. 8; T. Ștefan, B. Andresan-Grigoriu, *op. cit.*, p. 443; see Technical sheets on the European Union, M. Maciejewski, K. Pengelly, *Libertatea de stabilire și libera prestare a serviciilor*, April 2017, [http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftuld=FTU\\_3.1.5.html](http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftuld=FTU_3.1.5.html), consulted on 1.10.2018.

(with regard to that freedom) regulates the capital flow. For example, both the right of establishment and the free movement of capital in the case of land purchase apply<sup>166</sup>.

In order to achieve freedom of establishment in respect of a particular activity, the European Parliament and the Council, acting on a proposal from the Commission, shall decide, by means of directives, according to art. 50 TFEU, as follows:

- to give priority, as a rule, to activities where freedom of establishment makes a particularly useful contribution to the development of production and trade;

- ensure close cooperation between the competent national authorities in order to know the special aspects of the different activities within the Union;

- eliminate those administrative procedures and practices arising either from national law or from agreements previously concluded between Member States, the maintenance of which would constitute an obstacle to freedom of establishment;

- provide workers in a Member State who are employed in its territory for self-employment if they fulfill the conditions which they would have to meet if they entered the territory of that State at the time they intend to do so to initiate this activity;

- provide the national of a Member State with the possibility to acquire and use land and buildings situated in the territory of another Member State, provided that this does not affect the principles set out in the objectives of the common agricultural policy set out in Article 39 TFEU;

- gradually abolish the restrictions on freedom of establishment in each branch of activity envisaged, as regards, on the one hand, the conditions for the establishment of agencies, branches or subsidiaries in the territory of a Member State and,

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<sup>166</sup> C-302/97, *Konle*, (1997) ECIZ 1-3099, par. 22; Opinion Ag Alber in C-251/98, *Baars*, (2000), ECR I-2787, par. 30; T. Ştefan, B. Andreşan-Grigoriu, *op. cit.*, p. 439.



on the other, the conditions the access of staff employed at headquarters to the management or supervisory functions of such agencies, branches or subsidiaries;

- to coordinate, to the extent necessary and with a view to their equivalence, the safeguards required by Member States for companies in order to protect the interests of members and third parties;

- ensure that aid granted to Member States does not distort the conditions of establishment.

### **2.2.1. Access to independent activities, conditions. Mutual recognition of diplomas in the European Union<sup>167</sup>**

#### **A. Harmonization of legislation on the recognition of diplomas**

Since there have been and are differences in the exercise of certain activities/professions between Member States, it has been necessary to harmonize divergent national legislations<sup>168</sup>.

Thus, access to certain activities/professions/occupations requires the acquisition of diplomas or the fulfillment of specific conditions, and the obtaining or fulfillment of such qualifications is different in the Member States, leading to restrictions on freedom of establishment<sup>169</sup>.

Moreover, even the right of establishment and the freedom to provide services - the basis of the internal market and, implicitly, the mobility of businesses and professionals in the EU

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<sup>167</sup> See M. Maciejewski, *Fișe tehnice privind Uniunea Europeană, Recunoașterea reciprocă a diplomelor*, June 2017, [www.europarl.europa.eu/atyourservice/ro/displayFtu.html?Iluld=FTU\\_3.1.5.html](http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?Iluld=FTU_3.1.5.html), consulted on 1.10.2018.

<sup>168</sup> See O. Manolache, *op. cit.*, p. 304.

<sup>169</sup> C-71/76, *J. Thieffrz cc. Conseil de l'ordre des Avocats à la Cour de Paris*, Judgment of 28 April 1977, paragraph 27, ECR, 1977, 765; See O. Manolache, *op. cit.*, p. 304.

- have led to the need for recognition throughout the Union of diplomas and qualifications issued at national level.

In order to facilitate access to and the exercise of self-employed activities, the European Parliament and the Council shall adopt directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications and on the coordination of the laws, regulations and administrative provisions of the Member States concerning access to self-employed activities and their exercise [Art. 53 par. (1) TFEU]. This provision required that diplomas, certificates and other evidence of professional qualifications issued in the various Member States be mutually recognized and that the national provisions governing access to various professions must be coordinated and harmonized<sup>170</sup>. This provision also refers to the need to coordinate national legislation on starting up and pursuing independent activities<sup>171</sup>. For certain activities, medical, paramedical and pharmaceutical professions, mutual recognition, respectively the gradual abolition of restrictions, is subordinated, in cases where such harmonization is a difficult process, the coordination of the conditions governing their exercise in different Member States [according to art. 53 par. (2) TFEU]. Since the 1970s, the process of harmonization has evolved through the adoption of directives.

Harmonization of legislation requires a sectoral approach - depending on the profession - on the one hand and the general one on the other<sup>172</sup>.

## **B. Harmonization of legislation by profession**

One can speak of a sectoral approach to harmonization in the health sector, which has been more rapid. because the training courses in this sector were not very different from one state

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<sup>170</sup> See M. Maciejewski, *op. cit.*

<sup>171</sup> *Idem.*

<sup>172</sup> *Idem.*

to another. Between the mid-1970s and mid-1980s a number of directives have been adopted covering a large number of professions (for example: doctors, nurses, veterinary surgeons, midwives and self-employed commercial agents).

In 2005, Directive 2005/36/EC<sup>173</sup> on the recognition of professional qualifications was adopted, which aimed at simplifying existing directives and bringing together rules for various regulated professions (physician, dentist, nurse, veterinary surgeon, midwife, pharmacist and architect).

Directive 2005/36/EC regulates how the host Member State should recognize professional qualifications obtained in another Member State ("home"). Recognition of professionals includes both a general recognition system and specific systems for each of the professions mentioned in the earlier directives, which it has repealed and replaced since 20 October 2007. The directive has been concerned with regulating, among others, the level of qualification, training and professional experience (both general and specialized). The Directive also applies to professional qualifications in the transport sector, as well as to insurance intermediaries and statutory auditors<sup>174</sup>.

In 2011, on 22 June, the Commission adopted a **Green Paper entitled "Modernizing the Professional Qualifications Directive"**<sup>175</sup>, proposing a legislative initiative on the reform of systems for the recognition of professional qualifications to facilitate workers' mobility and to adapt training to current market requirements work.

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<sup>173</sup> Directive of the European Parliament and of the Council of 7 September 2005 (OJ L 255/22 of 30 September 2005).

<sup>174</sup> These professions have previously been regulated by separate directives.

<sup>175</sup> COM(2011)0367.

In the same year<sup>176</sup>, the Commission published a proposal for a revision of the Directive on the recognition of professional qualifications<sup>177</sup>.

Of the most important proposals, we exemplify: the introduction of a European professional card; harmonizing minimum training requirements; automatic recognition of seven professions, namely architect, dentist, doctor, nurse, midwife, pharmacist and veterinary surgeon, as well as the introduction of the Internal Market Information System, which allowed for enhanced cooperation in the field of recognition of diplomas.

The main objectives of the proposal are:

- to facilitate and enhance the mobility of professionals throughout the EU;
- to help alleviate labor shortages in some Member States<sup>178</sup>.

**Directive 2005/36/EC** on the recognition of professional qualifications was amended by Directive 2013/55/EU<sup>179</sup>.

A decisive role in the adoption of Directive 2013/55/EU has the European Parliament, by adopting the resolution<sup>180</sup> implementing Directive 2005/36/EC on professional qualifications, which called for the upgrading and improvement of that Directive and the introduction of appropriate technology, **such as the introduction of a European Professional Card** (on a pro-

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<sup>176</sup> On December 29, 2011.

<sup>177</sup> COM (2011)0883.

<sup>178</sup> See M. Maciejewski, June 2017, *op. cit.*

<sup>179</sup> Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System ("IMI Regulation"), OJ L 354 of 28 December 2013, p. 132.

<sup>180</sup> On November 15, 2011.

posal from the Commission mentioned above), which is an official document recognized by all competent authorities to facilitate the recognition process.

The Commission responded to Parliament's resolution by presenting on 19 December 2011 a proposal for a revision of the Professional Qualifications Directive. Parliament has obtained the changes it has requested, including the introduction of a voluntary professional card, the creation of an alert mechanism, clarification of the rules on partial access to a regulated profession, rules on language skills, and the establishment of a mutual evaluation mechanism regulated professions to ensure greater transparency. The resolution, namely Parliament's requests to the Commission, led to the adoption of Directive 2013/55/EU (20 November 2013) of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications<sup>181</sup>.

### **C. Mutual recognition of diplomas without harmonization**

The diversity of the legal systems of the Member States for certain professions has prevented the full mutual recognition of diplomas and qualifications which would have ensured immediate freedom of establishment on the basis of a diploma obtained in the country of origin. Council Directive 77/249/EEC of 22 March 1977 granted lawyers the freedom to provide occasional services; thus, a diploma in the host country is required for the free establishment. A significant step in this sector was Directive 98/5/EC of 16 February 1998, stating that lawyers holding a di-

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<sup>181</sup> For details see the study prepared for the IMCO Commission, entitled „EU Mapping: Overview” of [http://www.europarl.europa.eu/at\\_yourservice/ro/displayFtu.html?ftuld=FTU\\_3.1.5.html](http://www.europarl.europa.eu/at_yourservice/ro/displayFtu.html?ftuld=FTU_3.1.5.html), consulted on 1.10.2018, IMCO-related legislation – see M. Maciejewski, June 2017, *op. cit.*

ploma obtained in any Member State may be established in another Member State in order to pursue their profession, provided that the host country may ask to be assisted by a local lawyer when representing or defending his clients in court. Under this system, after three years of practicing the profession, I obtain the right to pursue my full profession after passing an aptitude test established by the host country without the need for a qualification examination. These principles were also applied by other directives in professions such as road haulage, freight, insurance agent and broker, hairdresser and architect.

#### **D. Harmonization of legislation, general approach**

The new general approach on the approximation of legislation on the recognition of diplomas involves a general system for the recognition of equivalence of diplomas valid for all regulated professions which have not been the subject of specific legislation within the Union.

If "recognition" was originally conditional on the existence of European "harmonization" rules for the profession or regulated activity in question, then "mutual recognition" became almost automatic, according to the legislation in force, for all the regulated professions concerned without being specific sectoral secondary legislation is needed. Thus, since then, methods of "harmonization" and "mutual recognition" have been used according to a parallel system. There have been situations in which both methods have been used according to a complementary system, using both a regulation and a directive<sup>182</sup>. The host Member State may not refuse applicants access to the profession concerned if they have the necessary qualifications in their home country. However, if the training they have received has taken

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<sup>182</sup> See the Council Resolutions of 3 December 1992 and 15 July 1996 on the transparency of qualifications and vocational training certificates.

place for a shorter period than in the host state, it may require some professional experience and, in some cases, if the training differs substantially, a period of accommodation or an aptitude test at the discretion of the applicant, unless the profession requires knowledge of national legislation<sup>183</sup>.

### **3. Freedom to provide services in the European Union**

#### **3.1. The notion of services**

Freedom of movement of services in the Union is closely linked, it can be said to be conditional, the freedom of establishment of persons, the first being impossible to achieve without the second. Reasons lie even in the Treaties<sup>184</sup> economy by regulating, to a great extent, the procedures for eliminating restrictions on these two freedoms.

Currently, the article 56 TFEU (former article 49 TCE) provides: „(...) restrictions on the freedom to provide services within the Union shall be prohibited in respect of nationals of Member States established in a Member State other than that of the recipients of services”.

Are services normally provided for remuneration, in so far as they are not covered by the provisions on the free movement of goods, capital and persons [article 57 paragraph (2) TFEU].

It also falls under the provisions on freedom to provide services and the service provider providing services in a Member State other than that in which it is established irrespective of the

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<sup>183</sup> See M. Maciejewski, June 2017, *op. cit.*

<sup>184</sup> See article 59 of the Treaty of Amsterdam, article 49 TCE; see O. Manolache, *Tratat de drept comunitar*, 5<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2006, p. 308.

Member State where the service recipient is established and whether it pays the supplier<sup>185</sup>.

The services include, according to art. 57 par. (2) TFEU, in particular:

- a) industrial activities;
- b) commercial activities;
- c) craft activities
- d) activities performed in the liberal professions.

They are included in the scope of the notion of services:

- transmission of television signals, including those of an advertising nature;

- leasing, which, even if it involves the handing over of the goods by the lender of the lender, is a remittance related to their use by the user, and the goods remain the property of the lender<sup>186</sup>;

- the activity relating to the operation of gaming machines, whether or not it is separable from activities relating to the manufacture, importation or distribution of such apparatus<sup>187</sup>.

It does not fall within the scope of the notion of services, within the meaning of article 57 paragraph (2) TFEU:

- services provided under the national education system<sup>188</sup>;

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<sup>185</sup> *Idem*.

<sup>186</sup> C451/99, *Cura Anlagen GmbH v ASL*, CJCE (preliminary ruling) of 21 March 2002 in ECR, 2002, 3 (B) I, 3225.

<sup>187</sup> Case C-6/01, *Anomar and Others*, CJCE (judgment of 11 September 2003), recitals 48, 56, 59-61 in ECR, 2003, 8/9 (A) I, 8666, 8668-8669; see, for details, O. Manolache, *op. cit.*, pp. 310-311.

<sup>188</sup> C-286/82 and 26/83, *Graziana Luisi and Giuseppe Carbone*, (CJCE), of 27 September 1988), in L. Cartou, *L'Union européenne, Traités de Paris-Rome-Maastricht*, Dalloz, Paris, 2006, p. 244; see O. Manolache, *op. cit.*, p. 310.



- trade in materials used for broadcasting TV signals, sound recordings, films, devices and other products used for broadcasting; they fall under the provisions on the free movement of goods<sup>189</sup>.

Also, three categories of services are not covered by the chapter on "Services", but in separate chapters on the areas of activity in question, namely:

- the free movement of services in the field of transport, which is governed by the provisions of the title on transport [article 58 paragraph (1) TFEU];

- liberalization of banking and insurance services associated with capital movements must be achieved in parallel with liberalization of capital movements [article 58 paragraph (2) TFEU].

### **3.2. Free movement of services, jurisprudential assumptions<sup>190</sup>**

**a) The first of these assumptions is closely related to the freedom of establishment of persons**, that is to say, the person who intends to provide the service intends to travel to that country in a Member State of the Union. This hypothesis falls under the provisions of article 49 TFEU, „restrictions on freedom to provide services within the Union are prohibited for nationals of Member States established in a Member State other than that of the beneficiary” - in the sense that a person can not be restricted from the right to provide services in a Member State for which it has been established in that Member State, the latter being other than that of the beneficiary. The Court of Justice has stated in this respect that such a requirement that the person providing the service must be the habitual resident of the State where the service is to be provided may, according to

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<sup>189</sup> C-155/73, Giuseppe Sacchi (1974) ECR, 409; see O. Manolache, *op. cit.*, p. 310.

<sup>190</sup> O. Manolache, *op. cit.*, pp.311-318.

circumstances, article 49 TFEU by its useful effects since the precise purpose of that article was to remove the restrictions on the freedom to provide services imposed on persons not established in the State in which the service was to be provided. The Court went on to state that, „in view of the particular nature of the services to be provided, the special requirements imposed on the person providing the service can not be considered incompatible with the Treaty when they seek to apply professional rules justified by the general good, organization, qualifications, professional ethics, supervision and accountability which are binding on any person established in the State where the service is provided when the person providing the service would avoid those rules that are established in another Member State”<sup>191</sup>.

**b) The second hypothesis implies that the beneficiaries of the services go to another state where the services are provided**, although article 57 paragraph (3) TFEU expressly provides that a "person" who performs a "service" is entitled, in the performance of his service, to work temporarily in the Member State in which he performs the service under the same conditions as are imposed by the Member State or its own nationals. The Court stated, referring to the beneficiary's right to move to the State where the service provider is established, as a necessary corollary to the regulation provided by article 57 paragraph (3) of the Treaty by realizing this second hypothesis (the author's note): "the objective of liberalizing all the lucrative activity not covered by the free movement of goods, persons and

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<sup>191</sup> C-33/74, Johannes Henricus Maria van Binsbergen c. Bestuur van Bedriff Vereniging voor Metalnijverheid, preliminary ruling of 3 December 1974, recitals 11-12, in ECR, 1974, 1299. See also the Commission's interpretative communication on the freedom to provide services in the insurance sector, quoted by O. Manolache, *op. cit.*, p. 312.

capital"<sup>192</sup>. *For example*, persons moving to a Member State to receive medical treatment or for business purposes or for education purposes<sup>193</sup> (the "education activity" envisaged by that example is a service if it is funded by a private body - on a commercial basis<sup>194</sup>).

**c) The third hypothesis relates to the fact that neither the service provider nor the recipient of the services goes to another Member State, services provided by post, telephone, telegram, telex, fax, computer terminals, advertising transmission** (information consultation, transmission of copies, instructions for sale or purchase, etc.)<sup>195</sup>.

### **3.3. Services Directive in the Internal Market - Directive 2006/123/EC. Contribution of the European Parliament**

In order to achieve the liberalization of a new service, the European Parliament and the Council shall act by means of directives<sup>196</sup>. The directives adopted in this area generally concern services which directly affect production costs or whose liberalization contributes to facilitating trade in goods [article 59 paragraph (2) TFEU].

One of these directives is the Directive no. 2006/123/EC<sup>197</sup>.

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<sup>192</sup> See O. Manolache, *op. cit.*, p. 316 (and the causes quoted at p. 317).

<sup>193</sup> *Idem*; see in this regard also T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H, Beck Publishing House, Bucharest, 2007, p. 472.

<sup>194</sup> C-286/82 și 26/83, *Graziana Luisi and Giuseppe Carbone*, (CJCE, of 27 September 1988), in L. Cartou, *op. cit.*, p. 244.

<sup>195</sup> See O. Manolache, *op. cit.*, pp. 317-318 (and the causes cited there).

<sup>196</sup> They shall act in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee, under article 59 paragraph (1) TFEU.

<sup>197</sup> The directive was adopted on 12 December 2006 with a deadline for implementation by 28 December 2009. Full implementation of the

Its aim is to create a single open market for services within the Union while ensuring the quality of services provided to Union consumers. The Directive contributes to simplifying and modernizing administrative and regulatory procedures, not only by harmonizing existing legislation and adopting and amending relevant legislation, but also through long-term projects (by setting up one-stop shops and ensuring administrative co-operation). Implementation of the Directive has been significantly delayed in a number of Member States over the original deadline.

Also, the liberalization of services is achieved not only by directives but also by the Member States to an even greater extent than that required by the directives adopted in this field if their general economic situation and the situation in the sector concerned allow this. To this end, the Commission addresses recommendations to the Member States concerned (article 60 TFEU).

### **Contribution of the European Parliament.**

The European Parliament has contributed to the liberalization of the work of independent workers and professionals respectively<sup>198</sup>. It has ensured a strict delimitation of the activities reserved for its own nationals, *for example*, those relating to the exercise of public power prerogatives. The Parliament, having an active procedural legitimacy, has brought the matter to the Court of Justice for the Council's "failure" to take no action on transport policy. The Council has been convicted of failing to ensure the freedom to provide

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Services Directive could increase trade in commercial services by 45% and 25% in foreign direct investment, generating GDP growth between 0.5% and 1.5% (Commission Communication "Europe 2020"); see details on the content of the directive, M. Maciejewski, Kendra Pengelly, *Libertatea de stabilire și libera prestare a serviciilor*, April 2017, [www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftul=FTU\\_3.1.5.html](http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftul=FTU_3.1.5.html), consulted on 1.10.2018.

<sup>198</sup> See M. Maciejewski, Kendra Pengelly, *op. cit.*

international transport services, ie failing to provide conditions allowing non-resident carriers to transport services in a Member State<sup>199</sup>, and to adopt the necessary legislation. Parliament's role has increased with the application of the ordinary legislative procedure for most aspects of freedom of establishment and freedom to provide services.

Among the actions that put pressure on Member States to properly implement the Services Directive, we mention the adoption by Parliament of the following resolutions:

- a resolution on the alignment of the Services Directive, respectively of Directive No. 2006/123/EC - **on 15 February 2011**<sup>200</sup>; following the Commission's Communication of 8 June 2012 on the implementation of the Services Directive, the Committee on Internal Market and Consumer Protection (IMCO) in Parliament has prepared a report entitled "The Internal Market for Services: the current state and the next steps" was adopted in plenary on 11 September 2013<sup>201</sup>;

- a resolution on the mutual evaluation process of the Services Directive – **on 25 October 2011**<sup>202</sup>;

- a resolution containing recommendations to the Commission on the governance of the single market<sup>203</sup>, highlighting: the importance of the service sector as a key area for growth, the fundamental nature of the freedom to provide services and the benefits of the full implementation of the Services Directive **on 7 February 2013**.

The legislative proposals to which Parliament has given priority have led to the following legislative acts:

- a regulation on electronic identification and trust services for electronic transactions in the internal market - **European Union Regulation no. 910/2014**;

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<sup>199</sup> C-13/83 of 22 May 1985.

<sup>200</sup> JO C 188E, 28 June 2012, p. 1.

<sup>201</sup> Texts Adopted, P7\_TA (2013)0366.

<sup>202</sup> JO C 131E, 8 May 2013, p. 46.

<sup>203</sup> Texts Adopted, P7\_TA(2013)0054.

- a regulation laying down measures for a single European electronic communications market and a connected continent<sup>204</sup>. This regulation has led to a similar legislative act, establishing measures for open access to the Internet - **Regulation of the European Union no. 2015/2120 of 25 November 2015** (it amended Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EC) No 531/2012 of the European Union on roaming on public mobile communications networks within the Union).

Concerned by financial services in the area of access to basic payment services<sup>205</sup> and mortgages, the European Parliament has adopted the following directives:

- **Mortgage Credit Directive 2014/17/EU**; it will increase consumer protection by imposing minimum regulatory requirements that Member States are required to meet in order to protect individuals who have secured residential property contracts. This directive needs to be transposed by Member States by March 2016. It was designed to enable consumers to be informed and have the financial means to pay for the mortgage loan.

- **Directive 2014/65/EU on Markets in Financial Instruments**; it seeks to ensure better regulation and transparency of financial markets at the level of the European Union.

The list of priorities of the European Parliament<sup>206</sup> is also:

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<sup>204</sup> COM (2013)0627.

<sup>205</sup> Texts Adopted, P7\_TA(2012)0293.

<sup>206</sup> For more detailed information, please refer to the study prepared by IMCO, entitled "EU Mapping: Overview of IMCO-related legislation": [www.europarl.europa.eu/RegData/etudes/STUD/2015/536317/IPOL\\_STU\(2015\)53631\\_7\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536317/IPOL_STU(2015)53631_7_EN.pdf), consulted on 1.10.2018.

- the package travel and assisted travel arrangements package<sup>207</sup>;
- the legalization of innovative services, such as the integrated eCall emergency service in vehicles<sup>208</sup>. The European Parliament has already voted in favor of the eCall technology for all new vehicles manufactured after April 2018;
- verify the implementation of the Universal Service Directive and the emergency number 112<sup>209</sup>.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions on "Services" of the TFEU to service providers who are nationals of a third State and are established in the Union's carriage [article 56 paragraph (2) TFEU].

### 3.4. Exceptions

According to article 51 TFEU, activities related to the exercise of public authority are excluded from the freedom of establishment and the freedom to provide services. Exclusion is however limited by an exclusive interpretation: exclusions can only cover those specific activities and functions that involve the exercise of public power prerogatives; a profession may be wholly excluded only if its entire activity is devoted to the exercise of public powers or if the part which is devoted to the exercise of public power prerogatives can not be separated from the rest<sup>210</sup>.

The European Parliament and the Council may exempt certain activities from the application of the provisions on the right of establishment [article 51 paragraph (2) TFEU].

In this respect, the Treaty provides for exceptions allowing states to exclude the production or sale of war material

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<sup>207</sup> COM(2013)0512.

<sup>208</sup> COM(2013)0316.

<sup>209</sup> JO C 33E, 5 February 2013, p. 1.

<sup>210</sup> See M. Maciejewski, Kendra Pengelly, *op. cit.*

[article 346 paragraph (1) letter b) TFEU] and to maintain the rules applicable to non-nationals with regard to public policy, public security or public health [article 52 paragraph (1) TFEU]<sup>211</sup>. In order to rely on these reasons for non-nationals, there must be a real and sufficiently serious threat to these interests, including the need to combat possible abuses and the need to ensure correct implementation of national social security provisions<sup>212</sup>.

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<sup>211</sup> *Idem.*

<sup>212</sup> C-30/77, *Regina c. Boucherreau*, (1977), ECR 199, par. 35; C-114/97, *Comisia c Spania*, (1998) ECR, I-6717, par. 46.



## **Chapter V**

### **Free movement of capital and payments<sup>213</sup>**

#### **1. The evolution of the regulation of the freedom of movement of capital**

The EEC Treaty<sup>214</sup> did not provide for the liberalization of capital movements as a formal obligation, but it had to intervene progressively but the Member States "were forced to" eliminate the restrictions "to the extent necessary for the proper functioning of the Communal Market" (Article 67 EEC Treaty). The economic and political situation in Europe has evolved, causing the European Council to confirm the progressive achievement of the economic and monetary union (EMU) in 1988<sup>215</sup>, amid greater coordination of economic and monetary policy. This has created a favorable context for regulating the freedom of movement of capital.

Full liberty of capital transactions was established in the first stage of the Economic and Monetary Union and originally introduced by a Council directive to be subsequently enshrined in the Maastricht Treaty. From this date, the Treaty (EC), by art. 56 para. (1) and (2), and now by the TFEU, in art. 63 paragraphs

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<sup>213</sup> See A. Moțatu, *Free movement of capital and payments in the European Union, the result of successive regulations*, in Kristine Strada-Rozenberga, Maria do Rosário Anjos (editors), *Current Issues in Business Law*, ADJURIS – International Academic Publisher, Bucharest, 2018, p. 85-92.

<sup>214</sup> The Treaty of Rome.

<sup>215</sup> See D. Kolassa, *Fișe tehnice privind Uniunea Europeană. Libera circulație a capitalurilor*, December 2016, [http://www.europarl.europa.eu/ftu/pdf/ro/FTU\\_3.1.6.pdf](http://www.europarl.europa.eu/ftu/pdf/ro/FTU_3.1.6.pdf) and [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU\\_3.1.6.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuld=FTU_3.1.6.html), consulted on 1.10.2018.

1) and 2), any restrictions on the movement of capital and payments between Member States and between Member States and third countries shall be prohibited.

The principle of free movement of capital and payments does not require the adoption of additional regulations at national level and is therefore directly applicable in the member countries.

## **2. Regulation of the principle of free movement of capital and payments. Objectives**

**The free movement of capital and payments is based on a legal basis:**

- **art. 63-66 TFEU (capital and payments);**
- **art. 75 and art. 215 TFEU (on sanctions);**
- **the directives and case-law of the Court of Justice of the European Union on capital and payments.**

The legal basis for this freedom<sup>216</sup> also includes its objective, namely all restrictions on the movement of capital and payments between Member States and between Member States and third countries should be removed (under article 63 TFEU).

However, as regards the movement of capital between Member States and third countries, the Council may:

- adopt safeguard measures with regard to third countries for a period of up to six months where such measures are strictly necessary if the movement of capital from or to third countries causes or threatens to cause serious difficulties for the functioning of the economic union, and monetary policy<sup>217</sup>;

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<sup>216</sup> The legal literature has expressed the view that "freedom of payments may be considered as the fifth freedom in the community space, which is, however, derived from the other four freedoms, and it can not have a stand-alone existence. Only if all four freedoms are carried out may also be the achievement of the free movement of payments "; to be seen O. Manolache, *op. cit.*, p. 288.

<sup>217</sup> On a proposal from the Commission and after consulting the European Central Bank; see art. 66 TFEU.

- adopt a decision requiring that restrictive fiscal measures adopted by a Member State vis-à-vis one or more third countries be considered as complying with the Treaties provided that they are justified in relation to one of the Union's objectives and compatible with the proper functioning of the internal market. The Council shall act unanimously at the request of a Member State [Art. 65 par. (4) TFEU];

- adopt the introduction of such restrictions only in very specific circumstances.

The single market can only be achieved by completing the other freedoms - relating to the movement of persons, goods and services - by liberalizing the movement of capital. Moreover, "even these freedoms can not be considered fully secured if goods and services can be paid only with restrictions or prohibitions or there is no possibility of transferring sums acquired in another country through an activity carried out under Community law"<sup>218</sup> - with reference to the free movement of payments.

The objectives proposed by the free movement of capital and payments, the indispensable freedom for the development of the economic and monetary union and the introduction of the euro, are:

- encouraging economic progress;
- effective investment of capital;
- promoting the euro as an international currency<sup>219</sup>.

### **3. The concepts of "capital movements" and "payments"**

**a)** The movement of capital is not defined in the Treaty, it only regulates the obligation to remove restrictions on freedom of movement.

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<sup>218</sup> See O. Manolache, *op. cit.*, p. 288.

<sup>219</sup> See D. Kolassa, *op. cit.*

The Court of Justice of the EU has defined capital movements "through those financial transactions that essentially reflect the placement or investment of money, not the remuneration for a benefit"<sup>220</sup>.

"Circulation of capital" is the operation of an autonomous nature, ie: direct investment, share issue, credit, private financing, etc. A purchase of immovable property in a Member State by a non-resident, irrespective of its reasons, is an investment in immovable property that falls within the category of capital movements between Member States<sup>221</sup>.

In practice, the payment of insurance premiums for material damage or civil liability insurance was regarded as a current payment whereas the payment of life insurance premiums was qualified as capital movement.

In this context, **Council Directive 88/361/EEC** for the application of article 67 of the Treaty<sup>222</sup> (Treaty of the European Economic Community) includes the "Nomenclature of the capital movements referred to in Art. 1 of the Directive". Areas of capital movement are classified in the nomenclature according to the economic nature of the assets and liabilities to which they refer, expressed either in national currency or in foreign currency<sup>223</sup>. However, according to the EU Court of Justice, the nomenclature has an indicative value, further specifying that "the movement of capital is only a capital movement that is carried

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<sup>220</sup> See N. Diaconu, *Dreptul Uniunii Europene. Tratat*, 2<sup>nd</sup> revised edition, Lumina Lex Publishing House, Bucharest, 2011, p. 401.

<sup>221</sup> See O. Manolache, *Tratat de drept comunitar*, 5<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2006, p. 289; Silvia Cristea, *Aspecte internaționale ale recuperării creanțelor fiscale între statele membre ale U.E.*, „Curierul fiscal” no.10/2007, pp.14.

<sup>222</sup> Article 67 TEEC has been abrogated through the TEC.

<sup>223</sup> See, to that effect, Annex I to Council Directive 88/361/EEC of 24 June 1988.

out as a distinct financial operation and essentially linked to the investment of the funds, it is not a remuneration for a service"<sup>224</sup>.

**b)** "Payments" means those money transfers that constitute<sup>225</sup>:

- a counterpart in a transaction, namely the exchange of goods and services;

- a remuneration for a given benefit, namely wages for the work carried out by the beneficiary of the right of establishment in a Member State, as a person who has gone to that State by virtue of that right;

- the distribution of the profit or the payment of interest to the creditor or the beneficiary;

- capital transfers as a result of their free movement.

Circulation of payments involves a transfer of values (ancillary) that is carried out as a result of a principal operation. The EU Court of Justice has stated that "physical banknote transfers can not be regarded as a capital move when they are the result of a payment obligation resulting from a transaction in the movement of goods and services"<sup>226</sup>. Payments, not capital movements, transfers in connection with tourism or travel for purposes of commerce, education or medical treatment are considered, even if they are carried out by means of the physical transfer of banknotes.

They are considered to be "payments" and not movements of capital, the transfers in connection with tourism or travel for trade, education or medical treatment, even if they are carried out by means of the physical transfer of banknotes.

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<sup>224</sup> C-358/1995 of 23 February 1995.

<sup>225</sup> See N. Diaconu, *op. cit.*, p. 401; O. Manolache, *op. cit.*, p. 294.

<sup>226</sup> C-358/1995 of 23 February 1995; See N. Diaconu, *op. cit.*, p. 401; O. Manolache, *op. cit.*, p. 294.

#### 4. The directives which led to the free movement of capital<sup>227</sup>

The first directive, which was adopted in 1960 (11 May)<sup>228</sup> - before the creation of the Single Market<sup>229</sup>, and which was amended in 1962<sup>230</sup> - unconditionally liberalized direct investment, short- or medium-term loans for commercial transactions and the purchase of traded securities on the scholarship. Without waiting for Community intervention, other Member States have removed all restrictions on the movement of capital by unilateral national measures<sup>231</sup>.

In 1972, **the Directive 72/156/EEC** was adopted, regulating the international capital flow and neutralizing unwanted effects on domestic liquidity. In order to complete the single market, more precisely with the launch of the single market, a series of directives have been adopted which only "questioned" the progress of the period 1960-1962. The following directives were adopted:

- **in the years 1985 and 1986**<sup>232</sup>; are two directives that have extended the unconditional liberalization of long-term loans

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<sup>227</sup> See N. Diaconu, *op. cit.*, p. 401; Ioana Nely Militaru, *Directiva - principalul instrument legislativ de implementare a dreptului Uniunii*, „Revista de Drept comercial”, no. 7/8/2010, p. 22-29.

<sup>228</sup> JOCE, L 43, 12 April 1960.

<sup>229</sup> Ioana Nely Militaru, *Development Issues on the EU Internal Market*, "Octav Onicescu" National Seminar organized by the Romanian Society of Statistics, „Revista Română de Statistică” - Supplement no. 1/2014.

<sup>230</sup> JOCE, L 49, January 22, 1963.

<sup>231</sup> For example, Germany in 1961, the United Kingdom in 1979 and the Benelux countries (among them) in 1980. See N. Diaconu, *op. cit.*, p. 402.

<sup>232</sup> Following a Commission Communication of 1986 [COM (86) 292 final of 23 May 1986].

for commercial transactions and the purchase of non-tradable securities;

- in 1988, **the Council Directive 88/361/EEC**<sup>233</sup> (of 24 June) abolishing with effect from 1 July 1990 all remaining restrictions on the movement of capital between residents of Member States. A transitional regime was foreseen for Spain, Portugal, Greece and Ireland, which had the right to maintain restrictions until 31 December 1992. This directive aimed at completing the single market (until 1993), moving from the European Monetary System to the Union economic and monetary policy and the introduction of the euro.

By Directive no. 88/361/EEC completely liberalized capital movements<sup>234</sup>, which involved the suppression of all transfer authorizations, even those granted automatically. This has resulted in a unit of exchange markets: capital movements must be possible under the same conditions as current payments<sup>235</sup>. The directive also allowed administrative control measures to prevent tax fraud and to comply with prudential rules in banking or static purposes<sup>236</sup>.

The directive also provided for a **safeguard clause** by which Member States had protective measures when short-term

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<sup>233</sup> JOCE, L 178, 8 July 1985, the Single European Act determined the adoption of the said Directives. This was the repeal of the Directive of 11 May 1960 and the Directive no. 72/156/EEC.

<sup>234</sup> With this directive, liberalization was extended to monetary or quasi-monetary transactions that could have the greatest impact on national monetary policies, such as loans, foreign currency deposits and securities transactions; to be seen D. Kolassa, *Fișe tehnice privind Uniunea Europeană, Libera circulație a capitalurilor*, December 2016, [http://www.europarl.europa.eu/ftu/pdf/ro/FTU\\_3.1.6.pdf](http://www.europarl.europa.eu/ftu/pdf/ro/FTU_3.1.6.pdf) and [http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU\\_3.1.6.html](http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_3.1.6.html), consulted on 1.10.2018. For details, see also O. Manolache, *op. cit.*, pp. 290-291.

<sup>235</sup> See F.C. Stoica, *op. cit.*, p. 187.

<sup>236</sup> *Idem.*

capital movements of an exceptional magnitude caused serious disturbances in the conduct of monetary policy<sup>237</sup>.

The Directive allowed certain countries to maintain **temporary restrictions**, especially in the case of short-term capital movements, but only for a certain period of time.

## **5. The Treaties of the European Union and the free movement of capital**

The Treaty of Maastricht (TMs) introduced the free movement of capital as a freedom enshrined in the Treaty, and the TFEU introduces a general ban, in art. 63 - about any restrictions on capital movements and payments between Member States and between Member States and third countries - prohibition goes beyond mere elimination of unequal treatment based on nationality<sup>238</sup>.

Art. 65 par. (1) TFEU allows differential tax treatment of foreign investment and non-residents. Thus, the general prohibition provided in art. 63 TFEU does not preclude "*the right of Member States to apply the provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their residence or place where their capital is invested; (...)*"

*These measures must not constitute a means of arbitrary discrimination and no disguised restriction on the free movement of capital and payments"* [Art. 65 par. (3) TFEU].

Even in relations with third countries, the principle of free movement of capital prevails over reciprocity and the maintenance by the Member States of a bargaining leverage in relation to third countries<sup>239</sup>.

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<sup>237</sup> However, no State has resorted to such a safeguard clause.

<sup>238</sup> C-367/98, *Comisia c. Portugalia*, pct. 44.

<sup>239</sup> C-101/05, *Skatteverket c. A*, cited by D. Kolassa, *op. cit.*



Also, the right to free movement of capital is **not** affected by **the notification obligation**, *for example*, reporting cross-border transactions (made for payments electronic movement of funds and securities that exceed certain thresholds) for the development of economic statistics externally used for drawing up the balance of payments for the Member States and the European Monetary Union<sup>240</sup>.

## 6. Exceptions and justified restrictions

The exceptions provided by the Treaty **refer only to capital movements concerning third countries**, namely **the prohibition of restrictions on the free movement of capital and payments** provided for in Art. 63 TFEU shall be without prejudice to the application **"in respect of third countries of the restrictions in force on 31 December 1993 under national or Union law adopted on the movement of capital to or from third countries in third countries in which they involve direct investment, including real estate investment, the establishment, provision of financial services or the admission of securities to capital markets"** (Article 64 TFEU). For Bulgaria, Estonia and Hungary, the restrictions in force under the national laws of 31 December 1999 remain in force.

The Council and the European Parliament may adopt legislative measures<sup>241</sup> relating to the movement of capital between Member States and third countries involving the making of direct investments, the provision of financial services or the admission of securities to capital markets [according to art. 64 par. (2) TFEU]. *We are exemplifying this:* the proposal for a regulation laying down transitional provisions for bilateral investment agreements between Member States and third

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<sup>240</sup> *Idem.*

<sup>241</sup> They may decide in accordance with the ordinary legislative procedure.

countries<sup>242</sup> and the European Parliament's legislative resolution of 10 May 2011<sup>243</sup>.

The Council, after consulting Parliament and acting unanimously, may adopt<sup>244</sup> measures constituting a regression, a step backwards in Union law as regards the liberalization of capital movements between Member States and third countries [according to Art. 64 par. (3) TFEU].

Article 66 TFEU refers to emergency measures which may be adopted in relation to third countries but which are limited to a period of six months, namely: the Council (...) may adopt, in relation to third countries, safeguard measures for a third country for up to six months if such measures are strictly necessary.

The only justifiable restrictions that Member States may decide to apply to capital movements in general, including within the Union<sup>245</sup>, are laid down in art. 65 TFEU. Therefore, Member States are entitled:

- a) to take all necessary measures to combat the violation of their laws and regulations, in particular in the field of taxation or prudential supervision of financial institutions;
- b) establish procedures for declaring capital movements for administrative and statistical purposes;
- c) to adopt measures justified on grounds of public policy or public security.

Article 75 TFEU complements the above mentioned restrictions, from art. 65 TFEU, with a restriction which may be imposed not by the Member States but by the European Parliament and the Council which, by means of regulations<sup>246</sup>, define the framework of administrative measures on capital

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<sup>242</sup> COM(2010)0344.

<sup>243</sup> P7\_TA(2011)0206.

<sup>244</sup> Only the Council under a special legislative procedure.

<sup>245</sup> See D. Kolassa, *op. cit.*

<sup>246</sup> Adopted in ordinary legislative procedure.

movements and payments, that is, they have the right to apply financial penalties to natural or legal persons, groups or non-State entities, such as the freezing of funds, financial assets or economic benefits owned or held by them.

TFEU provides in art. 215 and the possibility of applying sanctions:

- one or more third countries by interrupting or restricting, in whole or in part, economic and financial relations;
- against natural or legal persons, groups or non-State entities, in the form of restrictive measures, on the basis of decisions taken in the framework of the common foreign and security policy.

In the event of unjustified restriction of the free movement of capital and payments, the procedure for establishing the non-fulfillment of the obligations under art. 258-260 TFEU. For example, in 2010, in an action against Portugal<sup>247</sup>, the Court confirmed previous case law<sup>248</sup> on special rights and stressed that the free movement of capital includes both direct and portfolio investment; important proceedings include a case involving a third country<sup>249</sup>.

## 7. Safeguard clause

The safeguard clause is provided in art. 144 in conjunction with art. 143 TFEU. Thus, in the event of an unforeseen balance of payments crisis and unless a decision is taken immediately<sup>250</sup>, a Member State with a derogation may provisionally

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<sup>247</sup> C-171/08, *Comisia c. Portugalia*, see Doris Kolassa, *op. cit.*

<sup>248</sup> The special rights of public authorities in private enterprises/private sector, for example, C-112/05, *Volkswagen*, *Comisia c. Germania*; see Doris Kolassa, *op. cit.*

<sup>249</sup> C-452/04, *Fidium Finanz*, Doris Kolassa, *op. cit.*

<sup>250</sup> (...) The Commission recommends to the Council, after consulting the Economic and Financial Committee, to provide mutual assistance and appropriate rules. The Commission shall periodically inform the

adopt the necessary safeguard measures. These measures for the protection of the balance of payments "must cause minimum disturbances in the functioning of the common market and must not exceed the absolute limit necessary to remedy the unforeseen difficulties which have arisen" [Art. 144 par. (1) TFEU]. From 1 January 1999, the beginning of the third phase of the EMU, the safeguard clause aimed at remedying crises in the balance of payments is only applicable to Member States that have not (yet) adopted the euro<sup>251</sup>.

## 8. Payments

According to art. 63 par. (2) TFEU, "any restrictions on payments between Member States and between Member States and third countries shall be prohibited". However, any restriction on the circulation of payments is prohibited, even with the first Community regulation, by art. 106 of the Treaty of the European Economic Community, "the movement of unrestricted payments" was made only if the other freedoms were insured. According to art. 106 TEEC:

"(1) Each Member State undertakes to authorize payments in respect of the exchange of goods, services and capital, as well as capital and wage transfers, in the currency of the Member State in which the creditor or the beneficial owner is established, to the extent that which the movement of goods, services, capital and

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Council of the situation and its evolution. Mutual assistance by the Council takes the form of directives or decisions establishing the conditions and rules of assistance as follows: a) concerted action with other international organizations to which Member States with derogations may address; b) measures necessary to avoid trade deviations where the Member State with a derogation in difficulty maintains or restores quantitative restrictions vis-à-vis third countries; c) Limited loans from other Member States, subject to their agreement (Article 143 TFEU).

<sup>251</sup> See D. Kolassa, *op. cit.*

persons is liberalized between Member States in the application of this Treaty. Member States are willing to proceed with the liberalization of their payments beyond what is foreseen in the previous paragraph, insofar as their economic situation in general and their balance of payments situation in particular allow.

(2) In so far as the trade in goods and services and the movement of capital are restricted by restrictions on related payments, the provisions of the chapters on the abolition of quantitative restrictions, liberalization services and the free movement of capital".

"Liberalization of payments" is therefore achieved insofar as the movement of goods, services, persons and capital is liberalized, meaning that the evolution of the first freedom is conditioned by the evolution of the others.

Moreover, the liberalization of payments remains at the disposal of States, "insofar as their economic situation in general and their balance of payments situation in particular allow them".

According to the same art. 106 TEEC "(3) Member States undertake not to introduce in their relations new restrictions on the transfers of invisible transactions (listed in Annex III to this Treaty). The phasing out of existing restrictions shall be carried out in accordance with the provisions of Articles 63 to 65"<sup>252</sup>(...).

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<sup>252</sup> Article 63: "(1) Before the end of the first stage, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall lay down a general programme for the abolition of restrictions existing within the Community on the free supply of services. The Commission shall submit such proposal to the Council in the course of the first two years of the first stage. The programme shall, for each category of services, fix the general conditions and the stages of such liberalisation. (2) In order to implement the general programme or, if no such programme exists, to complete one stage in the liberalisation of a specific service, the Council, on a proposal of the Commission and after the Economic and Social Committee and the Assembly have been consulted, shall, before the end of the first stage by means of a unanimous vote and subsequently by means of a qualified

Consequently, restrictions on the freedom of movement of payments have been phased out, "according to a general program for the elimination of restrictions"<sup>253</sup>, for now, art. 63 TFEU to specifically state "prohibition of any restrictions".

If, principally, the free movement of capital is closely linked to the freedom of establishment - although the right of establishment is not always accompanied by a capital transfer, the latter being able, *for example*, to apply for credit in that country<sup>254</sup> - free movement of payments is necessary to complete the free movement of goods, workers, services and capital<sup>255</sup>.

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majority vote, act by issuing directives. (3) The proposals and decisions referred to in paragraphs 1 and 2 shall, as a general rule, accord priority to services which directly affect production costs or the liberalisation of which contributes to facilitating the exchange of goods".

Article 64: "Member States hereby declare their willingness to undertake the liberalisation of services beyond the extent required by the directives issued in application of Article 63, paragraph 2, if their general economic situation and the situation of the sector concerned so permit. The Commission shall make recommendations to thus effect to the Member States concerned".

Article 65: "As long as the abolition of restrictions on the free supply of services has not been effected, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons within the meaning of Article 59, first paragraph, who supply services".

<sup>253</sup> *Idem*.

<sup>254</sup> See O. Manolache, *op. cit.*, p. 288.

<sup>255</sup> See P. Mathijsen, *Compediu de drept european*, 7<sup>th</sup> edition, Club Europa Publishing House, Bucharest, 2002, p. 266.

### 8.1. Legislative framework for "free movement of payments" in the European Union<sup>256</sup>

**Union legislative acts on the costs of national and cross-border payments within the euro area<sup>257</sup>** have the following succession:

- **Council Regulation (EC) no. 2560/2001** of 19 December 2001 harmonized the costs of national and cross-border payments within the euro area;

- Council Regulation (EC) Regulation (EC) no. 2560/2001 was repealed and replaced by the **Regulation (EC) no. 924/2009** of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community;

- **Regulation (EU) no 260/2012** of the European Parliament and of the Council of 14 March 2012 laying down the technical and trade requirements for credit transfer and direct debit transactions in euro.

**The new legal framework for payments includes<sup>258</sup>:**

- **Payment Services Directive 2007/64/EC** is the legal basis for creating a single EU payment market by 2010.

The Directive contains rules applicable to all payment services in the EU; it aims at:

- that cross-border payments become as simple, efficient and secure as "national" payments made within a Member State;

- Promote efficiency and reduce the costs of payments through greater competition, opening up the payment markets to new entrants.

- provide the necessary legal framework for a European banking sector initiative, called the "Single Euro Payments Area" (SEPA).

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<sup>256</sup> D. Kolassa, December 2016, *op. cit.*

<sup>257</sup> *Idem.*

<sup>258</sup> *Idem.*

At the end of 2010, SEPA instruments were available but were not widely used. For this reason, the Commission (in December 2010) presented a proposal for a Regulation<sup>259</sup> laying down EU-wide deadlines for the migration of old national credit transfer and direct debit systems to SEPA instruments, thereby phasing out national transfer systems credit and direct debits at 12 months and 24 months respectively after the entry into force of the Regulation.

- **Regulation (EU) no. 260/2012** of the European Parliament and of the Council of 14 March 2012 laying down the technical and trade requirements for direct credit operations and direct debit transactions in euro and amending Regulation (EC) no. 924/2009, adopted in 2012, is the result of the Commission's December 2010 proposal.

The Commission's efforts to encourage the liberalization of capital movements were supported by the European Parliament, which considered that liberalization should be more advanced within the Union than between the Union and the rest of the countries to ensure that European economies prioritize European investment.

The European Parliament also specified that liberalization of capital movements should be supported by full liberalization of financial services and harmonization of tax legislation to create a unified European financial market, which is why the Commission, under the political pressure exerted by the European Parliament, has initiated legislation on the harmonization of national and cross-border payments (Parliament's Resolution of 17 June 1988).

Parliament has supported the creation of an efficient, integrated and secure market for securities clearing and settlement in the European Union and has organized a workshop on issues related to securities legislation. By its **Resolution non-legislative of 7 July 2005 on clearing and settlement in the European**

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<sup>259</sup> COM(2010)0775.



**Union, Parliament has supported the creation of an efficient market**<sup>260</sup>. Parliament is also open to other legislative initiatives in the field of clearing and settlement to be discussed under the ordinary legislative procedure.

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<sup>260</sup> 2004/2185(INI).

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