JURISPRUDENTIAL ISSUES CONCERNING THE BENEFICIARIES OF PROVISIONS OF ARTICLE 49 TFEU

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Abstract

From the interpretation of Article 49 paragraph (1) TFEU it results that restrictions on the freedom of establishment are removed for the purpose to pursue independent activities under conditions of equality with nationals of the Member State of establishment. The beneficiaries of Article 49 TFEU are people moving from the territory of the State of origin (nationals of a Member State) on the territory of another Member State in order to pursue an independent activity, but only under the case-law of the Court of Justice of the European Union; beneficiaries of these rights are also the Member State nationals who obtained qualifications or training in another Member State and then go back to their home state to conduct a business on grounds of that qualification or professional training.

Keywords: *Article 49 TFEU; beneficiaries; ECJ case-law; recognition of professional qualifications; recognition of professional training.*

1. General aspects

Under Article 49 of the Treaty on the Functioning of the European Union (TFEU), at the level of the European Union, „restrictions on the freedom of establishment of nationals of a Member State in another Member State are prohibited. This prohibition aims also at restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in another Member State. The freedom of establishment includes access to independent activities and their exercise, as well as the setting up and management of undertakings, and in particular of companies or firms[1] (...) under the conditions laid down for its own nationals, by the law of the country of establishment". Thus, from the interpretation of Article 49 paragraph (1) TFEU it results that, on the one hand, restrictions on the freedom of establishment are eliminated and, on the other hand, the right „to pursue independent activities on equal terms with nationals of the Member State of establishment"[2] is set. After first reading the article, it can be interpreted that the beneficiaries of the rights mentioned above are only those persons moving from the territory of origin (they are nationals of a certain Member State). Furthermore, „its requirements are satisfied if the person exercising the right of establishment is treated the same as citizens"[3] of the host State (the State where the person moved). In reality, after a careful study of the doctrine of specialty, but especially of the case-law of the Court of Justice of the European Union[4], it is clear that Article 49 TFEU „received a broad interpretation on the two issues"[5] within the meaning that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own state"[6].

2. The direct beneficiaries of provisions of Article 49 TFEU

As mentioned before, the main beneficiaries of provisions of Article 49 TFEU are people moving from the country of origin to another Member State of the European Union. Invoking this right, by its beneficiaries, before the national authorities[7], is now possible after the Court of Justice in Luxembourg has given direct effect to Article 49 TFEU since 1974 in his famous judgment ruled in *Reyners*[8] case. In that case, Conseil d'Etat in Belgium addressed the Court two

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[1] Companies covered by those provisions are those referred to in art. 54 second paragraph of the TFEU, namely „companies formed in accordance with provisions of civil or commercial law, including cooperative societies and other legal persons of public or private law, excepting the non-profit companies".

[2] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, edition IV, Hamangiu Publishing House, Bucharest, 2009, p. 992.

[3] Idem.

[4] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

[5] Idem.

[6] Idem.

[7] With regard to the concept of public authority, see Elena Emilia Ștefan, *Disputed matters on the concept of public authority*, LESIJ no. 1/2015, pp. 132-139.

[8] Judgment of the Court dated June 21, 1974, *Jean Reyners v./ Belgian State*, Case 2/74, ECLI:EU:C:1974:68.

questions on the interpretation of Articles 52[9] and 55[10] of the Treaty establishing the European Economic Community (TEEC) concerning the establishment right, related to exercising the profession of lawyer. Those questions were raised in an action brought by a Dutch citizen, „holder of a legal degree under which in Belgium, the access to the profession of lawyer was granted, and who was excluded from that profession on account of his nationality, following the Royal Decree of August 24, 1970 regarding the title and the exercise of the legal profession of lawyer". Regarding the article that is the subject of our study, Conseil d'Etat wanted to know if Article 52 TEEC was, from the end of the transitional period, a „directly applicable provision". It must be mentioned that the question was raised on grounds of the absence, at that time, of certain directives adopted in accordance with the provisions of the Treaty, in order to attain the freedom of establishment as regards to a particular activity, although the transition period for adopting them had expired. In those circumstances, the Court considered that the Treaty had foreseen „that the freedom of establishment should be done at the end of the transitional period", which is why it asserted that Article 52 required such a precise obligation of result, the execution of which had to be facilitated, but not conditional to the implementation of a program of progressive measures"[11]. According to the Court, „the fact that this progressive character has not been complied with, leaves the obligation itself intact, after the deadline stipulated for its fulfillment"[12]. Therefore, „from the end of the transitional period, Article 52 of the Treaty has been a provision directly applicable, even despite the absence in a specific area, of directives set"[13] by the Treaty, though, added the Court", such directives have not lost all interest since they have preserved an important area of application of measures meant to facilitate the effective exercise of the right to the freedom of establishment"[14].

Two years later, in 1976, under the same conditions under which directives to attain the freedom of establishment concerning a particular activity were not adopted, the Court went back on the direct effect of Article 49 TFEU, in *Thieffry*[15] judgment. In that case, Cour d'appel de Paris formulated a question on the interpretation of article 57[16] TCEE on the mutual recognition of professional qualifications for the access to independent activities, especially for the purpose of admission in order to exercise the profession of lawyer. In fact, a Belgian lawyer was not admitted into the *Ordre des lawyers auprès de la Cour de Paris* (the Paris Bar), though he was the holder of a „Belgian degree of doctor of law, the equivalence of which to the university degree in French law was recognized by a French university, and who subsequently obtained „certificat d'aptitude à la profession d'avocat" (certificate of qualification for the legal profession of lawyer), after successfully passing that examination, in accordance with the French law"[17]. The reason to refuse the admission requirement was that „the person concerned did not hold a degree to justify a university degree or a PhD degree in French law"[18]. In *Thierry*, unlike *Reyners*, the reason for rejecting the application for registration in the bar was not that of citizenship, but the rejection was based on the recognition of professional qualifications. In those circumstances, the Court requested to be answered to the following question: „the fact to require a national of a Member State wishing to practice the profession of lawyer in another Member State, the national diploma provided by the law of the country of establishment, while the diploma which he obtained in his home country was the subject of recognition of equivalence by the university authorities of the country of establishment and allowed him to pass in that country the qualification examination for the legal profession of lawyer - examination which he passed - is it, in the absence of the directives set out (...) [by] the Treaty of Rome, an obstacle that goes beyond what is necessary to achieve the objective of Community provisions in question?"[19]. The Luxembourg Court held that „when the freedom of establishment provided in Article 52 [the current Article 49 TFEU] can be attained in a Member State either under the laws, regulations and administrative

[9] The current art. 49 TFEU. See also the comment of Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 202-203.

[10] The current art. 51 TFEU: „Activities that are associated in this state, even occasionally, with the exercise of the official authority are exempted from the provisions of this chapter, as regards to the Member State concerned.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may exempt certain activities from the application of provisions of this chapter".

[11] Pct. 26 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[12] Pct. 27 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[13] Pt. 32 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[14] Pt. 31 of the judgment *Jean Reyners v./ Belgian State*, ECLI:EU:C:1974:68.

[15] Judgment of the Court of April 28, 1977, *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, Case 71/76, ECLI:EU:C:1977:65. See also the comment of Augustin Fuerea, *op. cit.*, p. 203.

[16] The current art. 53 TFEU: „(1) In order to facilitate the access to independent activities and their exercise, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, issues directives for the mutual recognition of diplomas, certificates and other formal qualifications as well and on the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and pursue of independent activities.

(2) With regard to the medical, paramedical and pharmaceutical professions, the progressive abolition of restrictions is dependent upon coordination of the conditions for their exercise in the various Member States ".

[17] Idem.

[18] Pt. 3 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[19] Pt. 6 of the judgment of the Court Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris, ECLI:EU:C:1977:65.

provisions[20] in force or under practices of the Government or of professional bodies, the genuine enjoyment of this freedom should not be denied to a person covered by Community law, just because, for a particular profession, the directives provided in Article 57 of the Treaty have not been adopted yet"[21]. The Court therefore prohibits national authorities of the host State to refuse access to the Bar of nationals of other Member States, on the grounds that they do not hold a French qualification, even if directives in this field have not been adopted yet.

In the same vein, the Court ruled in the case *Patrick v./ Ministre des affaires culturelles*[22]. In that case, a British national, holder of a diploma in architecture issued in the UK by the Architectural Association, requested permission to exercise the profession of architect in France and his permission „was refused on the ground that, under [a] law of (...) 1940, that authorization had (...) exceptional character (...) [because] there was no mutual agreement between France and the applicant's home country and that, in the absence of a specific convention to have that purpose, between the Member States of the EEC and, in particular, between France and the United Kingdom, the Treaty establishing the European Economic Community cannot replace it [and] art. TEEC 52-58, which refer to the freedom of establishment (...) [send] to achieve this freedom, to Council directives which have not been adopted yet". The Court wanted to know whether at the state of Community law on 9 August 1973 [...] a British national had reason to invoke in his favor, the benefit of the right of establishment to practice the profession of architect in a Member State of the Community"[23]. The Court's answer was emphatic in the sense that „a national of a (...) Member State, who holds a title recognized by the competent authorities of the Member State of establishment, equivalent to a degree issued and required in that State, shall enjoy the right of access to the architectural profession and to its exercise, under the same conditions as nationals of the Member State of establishment without having to meet additional conditions"[24].

In the same context, of beneficiaries of provisions of Article 49 TFEU, it is also included the recognition of equivalence of diplomas, aspect that has been the subject of the judgment ruled in the case *Heylens*[25]. „By its question, the referring Court seeks essentially to ascertain whether, when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of degrees obtained abroad, but recognized as its/their equivalent, the principle of free movement of workers enshrined in Article 48 of the Treaty [the EC][26] requires that the decision refusing to a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State of which national he is, to be able to be subject to appeal in Court and to be motivated. The Court held that „since the requirement concerning the qualifications required to practice a certain profession must be reconciled with the imperatives of the free movement of workers, the recognition procedure of the equivalence of degrees should enable national authorities to ensure objectively that the degree obtained abroad attested that the holder had knowledge and qualifications if not identical, at least equivalent to those certified by the national degree. Assessing the equivalence of the degree obtained abroad must be made by taking into account exclusively the level of knowledge and skills that the degree, given the nature and duration of the studies and practical training which it attests as achieved, presumes to be acquired by its holder"[27]. The Court therefore considers that „when in a Member State, the access to a remunerated profession is subject to the holding of a national degree or of a degree obtained abroad recognized as its equivalent, the principle of free movement of workers enshrined in Article 48 of the Treaty requires that the decision refusing a worker, national of another Member State, the recognition of the equivalence of the degree issued by the Member State, the national of which he is, to be able to be subject to an appeal[28] in Court which may check its legality in relation to Community law and enables the party concerned to ascertain the grounds for the decision"[29].

Another important moment in the evolution of the direct effect of Article 49 TFEU is the judgment in the case *Vlassopoulou*[30]. *Vlassopoulou* represents the boundary between the period in which there was no legislation adopted to facilitate access to independent activities and their exercise and the period

[20] With regard to administrativ act, see Elena Emilia Ștefan, *Manual de drept administrativ. Partea II*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp.21-81.

[21] Pt. 17 of the judgment of the Court *Jean Thieffry v./ Conseil de l'ordre des avocats à la Cour de Paris*, ECLI:EU:C:1977:65.

[22] Judgment of the Court of June 28, 1977, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, Case 11/77, ECLI:EU:C:1977:113.

[23] Pt. 7 of the judgment of the Court, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[24] Pt. 18 of the Judgment of the Court, *Richard Hugh Patrick v./ Ministre des affaires culturelles*, ECLI:EU:C:1977:113.

[25] Judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, Case 222/86, ECLI:EU:C:1987:442.

[26] The current art. 45 TFEU on the free movement of workers which is guaranteed in the European Union.

[27] Pt. 13 judgment of the Court of October 15, 1987, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[28] With regard to the object of the legal action, see: Elena Emilia Ștefan, *Drept administrativ. Partea a II-a*, Universul Juridic Publishing House, Bucharest, 2013, pp. 76-77.

[29] Pt. 30 of the Court Judgment, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v./ Georges Heylens and others*, ECLI:EU:C:1987:442.

[30] Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, C-340/89, ECLI:EU:C:1991:193.

characterized by the adoption of directives concerning the mutual recognition of degrees, certificates and other formal qualifications, as well as for the coordination of laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In that case, the Court pointed out that although on December 21, 1989, was adopted Directive 89/48 / EEC on the general system for the recognition of higher education diplomas awarded for professional training lasting at least three years[31], it „did not apply to facts from [that] case"[32] because the transposition deadline was January 4, 1991 and the facts occurred prior to that date. Thus, the Court held that „a Member State notified on an application for authorization to pursue a profession to which the access is conditioned under national law, by the possession of a degree or professional qualification, has the obligation to take into consideration the degrees, certificates and other titles which the person concerned has obtained in order to pursue the same profession in another Member State by comparing the abilities certified by those degrees with the knowledge and qualifications required by the national rules"[33]. „The examination procedure should allow host authorities to ensure, objectively, that the foreign diploma certifies that the holder has knowledge and qualifications if not identical, at least equivalent to those attested by the national diploma. Assessing the equivalency of the degree obtained abroad must be exclusively made by taking into consideration the knowledge and skills that this degree, by taking into account the nature and duration of studies and practical training referred to in the degree, permits to infer that they were acquired by its holder"[34].

The situation did not change even when, the Member States implemented the necessary legislation to facilitate access to independent activities and their exercise, i.e. those Directives on the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for coordination of the laws, regulations and administrative provisions of the Member States relating to the access to and exercise of self-employment. In this regard, we mention *Borrell*[35]judgment where the Court resumed the previous case, as follows: section 11 of the judgment resumed section 16 of *Vlassopoulou* judgment; section 12 resumed section 13 of *Heylens* judgment and section 13 was taken from section 17 of *Vlassopoulou*. The same happened in *Aranitis*[36] judgment, the Court providing the solution by resorting to the jurisprudence already established prior to adopting the legislation to facilitate the access to independent activities and their exercise: pt. 31 of the judgment resumed *Vlassopoulou* (pt. 16) and *Borrell* (pt. 11) jurisprudence.

The analysis of the Court's decisions required Member States, „despite the diversity of national educational systems and training, and in the absence of coordination legislation at EU level, Article 49 TFEU imposes a clear obligation on the national authorities, to examine thoroughly the qualifications held by an EU national, to inform the person concerned of the reasons for which its qualification was not considered equivalent and to comply with his/her rights during the procedure"[37]. Under the Court's case-law, Member States cannot refuse the access of a citizen of an EU Member State, on the territory of another Member State, the access to a profession, because he does not have a qualification obtained in the host country or because, in the host state, a national recognition of the equivalence of foreign qualifications does not exist yet.

3. Expanding the provisions of Article 49 TFEU to the citizens of their home state

As mentioned before, Article 49 TFEU „received a broad interpretation on the two issues"[38] in the sense that „citizens can, under certain conditions, capitalize the provisions of Article 49 against their own state"[39]. An important role went to the Court of Justice of the European Union, which, in the judgment ruled in the case *Knoors*[40] argued that the fundamental freedoms of the European Union „would not be fully achieved if Member States could refuse the benefit of provisions of Community law to those of their nationals who have used the existing facilities of free movement and establishment and who acquired, by their virtue, their professional qualifications, specified by the directive, in a Member State other than the one whose nationality they already hold"[41]. The Court added that while „it is true that the Treaty provisions relating to the establishment and provision of services cannot be applied to situations which are purely internal to a Member State, it is no less true that the reference in

[31] Published in OJ L 19, 24.1.1989.

[32] Pt. 12 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

[33] Pct. 16 of the Judgment of the Court, *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, ECLI:EU:C:1991:193.

[34] Pt. 17 of the Judgment of the Court of May 7, 1991 *Irène Vlassopoulou v./ Ministerium für Justiz, Bundes - und Europaangelegenheiten Baden-Württemberg*, Case C-340/89, ECLI:ECLI:EU:C:1991:193.

[35] Judgment of the Court of May 7, 1992, Colegio *Oficial de Agentes de la Propriedad Inmobiliaria v./ José Luis Aguirre Borrell and others*, C-104/91, ECLI:EU:C:1992:202.

[36] Judgment of the Court of February 1, 1996 *Georgios Aranitis v./ Land Berlin*, C-164/94, ECLI:EU:C:1996:23.

[37] Paul Craig, Grainne de Burca, *op. cit*., p. 995.

[38] Ibid, *op. cit*., p. 992.

[39] Idem.

[40] Judgment of the Court dated February 7, 1979, *J. Knoors v./ Staatssecretaris van Economische Zaken*, Case 115/78, ECLI:EU:C:1979:31.

[41] Pt. 20 of the Court judgment, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

Article 52 [now Article 49 TFEU] to „nationals of a Member State" who wish to establish themselves „in another Member State" cannot be interpreted so as to exclude from the benefit of Community law, the own nationals of a Member State, when they, by virtue of the fact that they resided legally in a Member State and gained a professional qualification recognized by the provisions of Community law are, in terms of their state of origin, in a situation that can be assimilated to that of all other subjects enjoying rights and freedoms guaranteed by the Treaty"[42].

4. Conclusions

Recognizing the right of establishment of persons practicing an independent activity was and still is an inexhaustible source for the Court in Luxembourg to enrich its case-law. Under the case-law[43] of the CJEU, Article 49 TFEU can be invoked by any citizen of a Member State of the European Union in another Member State, regardless of the country where the person concerned obtained a qualification or vocational training, as well as of citizens of a Member State who completed a qualification or professional training in another Member State and then returned to their home state to conduct a business under that qualification or professional training.

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[42] Pt. 24 of the judgment of the Court, *J. Knoors v./ Staatssecretaris van Economische Zaken*, ECLI:EU:C:1979:31.

[43] With regard to the role of jurisprudence, see Elena Anghel, *The reconfiguration of the judge`s role in the romano-germanic law system*, in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72.