BENEFICIARIES OF THE FREEDOM OF MOVEMENT WITHIN THE EU

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Abstract

One of the consequences producing direct effects, on short, medium and long term, generated by the quality of member state of the European Union, is that of valuing the fundamental freedoms of movement existing at the level of the European Union. The emphasis in matters of freedoms must fall on the rule of law, knowledge, understanding and, above all, on compliance and enforcement. Why? Because, in the European space as well, freedom is seen as representing what philosophers call „understood necessity", not chaos, not chance, not disorder. This is the reason why, we shall briefly analyse in our approach, the beneficiaries of the freedom of movement, starting from the reality according to which freedom belongs to everyone, not just to some people, under conditions of equal chances, but also of involvement in valuing the legal rules of the European Union, the recipients of which are the individuals.

Keywords: *freedom of movement at EU level, direct beneficiaries, indirect beneficiaries, primary law, secondary law.*

1. General aspects

Regardless of the field to which we refer when we discuss the application of the principle of freedom of movement within the European Union (goods, persons, services, capital and payments), their beneficiaries remain constantly the same, namely the subjects of domestic law (natural persons and legal persons) or the subjects of international law, here speaking, equally, about member states[1], third countries and, to a relative extent, about international organisations[2].

An important place among the beneficiaries of this principle is, naturally, the EU itself, as subject of international law, especially after acquiring legal personality, under art. 47[3] TEU, after the entry into force, on December 1, 2009, of the Treaty of Lisbon.

The evolution of the freedoms of movement has been characterised by continuity, judging the frequent emergence of primary and secondary regulations, adopted at the community/union level, but also according to the jurisprudence of the jurisdictional courts of the European Union. An increasingly obvious characteristic over time was, is and we believe, will be, that giving a systemic component to this principle, including from the beneficiaries' perspective. The permanent interference of these fields in which the man/person is at the centre of attention, is an indisputable reality. Not by chance, at the beginning, but also nowadays, the free movement of services, for example, was and still is viewed/analysed/regulated together with the free movement of people. In the final analysis, the man is equally the creator of these freedoms, but also their beneficiary, from the multiple perspectives acquired by the concrete forms of manifestation. Basically, the free movement of goods, capital, payments or services is inconceivable without human intervention, at least in this historical stage that humanity is still going through.

That is precisely why, whenever we tried to highlight the number of freedoms of movement enshrined in EU law, we did not succeed. Why? Because four of these freedoms are grouped two by two (persons with services, respectively capital with payments), only one being analysed individually (the free movement of goods).

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„The state is the main subject of public international law, being the holder of rights and obligations at international level" (according to R.M. Popescu, *Drept internațional public. Noțiuni introductive*, Universul Juridic Publishing House, Bucharest, 2023, p. 83).

[2] «International organization represents „an association of states, established by treaty, endowed with a common constitution and bodies and with legal personality, distinct from that of the member states". The Vienna Convention on the Law of Treaties (1969) stipulates, in art. 2, that international organizations are „intergovernmental organizations" (...). Considering that international organizations are constituted by a treaty - which expresses the will of the states -, they are qualified as derivative subjects of international law» (according to R.-M. Popescu, *op. cit*., p. 109.

[3] „The Union has legal personality".

2. Natural and legal persons - main beneficiaries of the application of the principle of freedom of movement

From the point of view of the distribution of competences, according to the art. 4 TFEU, the freedoms of movement fall under the incidence of their sharing between the Union and the member states, in the field of „freedom, security and justice", together with others that have as direct or indirect beneficiaries, the individuals, as natural persons and legal persons, such as: consumer protection; social policy (for those aspects defined by the treaty); economic and social cohesion; the environment (from the perspective of third-generation human rights „the right to a healthy environment"[4]) combined, from the same perspective, with the fields of energy and transport; internal market and agriculture, respectively fishing[5].

The field of public health security [art. 4 para. (2) letter k) TFEU], last stated at the level of shared competences, is closely related to natural persons, as main beneficiaries of the freedom of movement. In a natural logic, this last field from the second level of competences is corroborated with the first field from the third level (of actions to support, coordinate and complement the action of the member states, under art. 6 TFEU).

The first field highlighted at the third level is in complete correlation with the last one at the second level, aiming at „the protection and improvement of human health" [art. 6 letter a) TFEU].

2.1. The seat of the matter

Lato sensu, „the right to free movement is guaranteed by the international legal instruments regarding the protection of human rights[6], by the supreme rules of the states, as well as by the constitutive acts of the European Communities and the European Union"[7].

The analysis of the main regulations regarding persons as main beneficiaries of the freedom of movement highlights the existence of both a primary seat of the matter (treaties) and a secondary seat (regulations, directives).

The primary seat of the matter is the TEU, which, in art. 6 para. (1), states that „The Union recognizes the rights, freedoms and principles provided for in the Charter of Fundamental Rights of the EU (...) which has the same legal value as the treaties".

The same treaty, in art. 3 para. (2), addressing objectives and values, lists, among other things, the fact that „The Union offers to its citizens a space of freedom, security and justice, without internal borders, within which the free movement of people is ensured". It joins the provisions of the TEU and those of the TFEU. Thus, from the corroboration of the provisions of art. 45 TFEU with those of art. 48 para. (1) TFEU, it unequivocally follows that a first category of beneficiaries of the free movement of persons is that of *salaried employees*. In the same sense, there are also the provisions of art. 48 para. (1) TFEU and art. 49 para. (1) TFEU according to which *migrant workers performing an independent activity* are included in the category of beneficiaries of the freedom of movement of persons. Art. 49 para. (2) regulates another category of beneficiaries, namely *companies* „constituted in accordance with the provisions of civil or commercial legislation, including cooperative societies and other legal entities under public or private law, except for non-profit ones"[8]. A last category of beneficiaries is given *by the dependents of salaried migrant workers or who carry out an independent activity*[9]. The exception

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[4] „Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations" (quotation from E.E. Ștefan, *Climate Change - An Administrative Law Perspective, Athens Journal of Law,* vol. 9, issue 4, October 2023, p. 577).

[5] For details on European policies and the Union's competences, see A.M. Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 11-21.

[6] *E.g.*: „the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter „ECHR") designed to protect, in the first place, civil and political rights of human being, democracy and the rule of law. The human rights protection mechanism enshrined in the Convention (*i.e.*, ECHR) is considered the most advanced in the world, its effectiveness being due to the right of individual applications (art. 34 ECHR) as a consequence of the acceptance of the binding force and execution of the ECtHR judgments (art. 46 ECHR)" – according to M.-C. Cliza, L.-C. Spătaru-Negură, *Environmental Protection Derived from the European Convention for Human Rights and from the European Social Charte*r, LESIJ NO. XXVII, vol. 2/2020, p. 123.

[7] M.A. Niță, O.M. Salomia, *Dreptul Uniunii Europene II*, 2nd ed., revised and added, Universul Juridic Publishing House, Bucharest, 2023, p. 231.

[8] Art. 54 para. (2) TFEU.

[9] Art. 48 para. (1) TFEU.

are those people who want to work in the public administration or to exercise activities that are associated in the residing state, even on an occasional basis, with the exercise of public authority[10].

For companies, as beneficiaries of free movement, the seat of the matter is represented by art. 54 TFEU, according to which „Companies established in accordance with the legislation of a member state and having their registered office, central administration or principal place of business within the Union are assimilated, in the application of this chapter, to natural persons who are nationals of the member states".

The provisions of primary sources are supplemented by the provisions of Regulation (EU) no. 492/2011 on the free movement of workers within the Union[11] and Directive 2004/38/EC on the right to free movement and residence on the territory of the member states for citizens of the Union and their family members[12], as sources of secondary EU law. Directive 2006/123/EC on the free movement of services[13] joins the EU secondary law regulations.

2.2. Salaried workers and self-employed workers - the main beneficiaries of freedom of movement

From the interpretation of the provisions of TFEU, the free movement of persons is conditioned by the fulfilment of requirements related, on the one hand, to the citizenship of the person, who must be of a member state of the European Union, and, on the other hand, to the exercise of a professional or economic activity. Regarding citizenship, each member state determines, in a sovereign way, the conditions under which it is granted. For example, Romanian citizenship is granted under the conditions of Law no. 21/1991[14], republished, with subsequent amendments and additions. Regarding the exercise of a professional or economic activity, „The Court considered (…) that all the provisions of the Treaty on the free movement of persons aimed at facilitating to the nationals of (…) [the European Union], the exercise of professional activities of any nature on the territory (…) [of the Union] European] and opposed measures that could disadvantage them when they wanted to exercise an economic activity on the territory of another member state"[15]. In the specialised literature[16], it is specified that «a *professional activity* can consist of the performance of a salaried activity, while the *economic activity* refers to the productive, income-generating activity. (...) Over time, the phrase „economic activity" has acquired a wider meaning, including members of professions such as doctors, veterinarians, lawyers, architects, subject to the equivalence of their studies»[17]. Moreover, it should be noted that the notion of „professional activity" is understood, by the Luxembourg Court of Justice, in a broad sense, if we consider the fact that, accordingly, the requirement is met in the case of professional sports activities, the Court deciding whether professional football players may be subject to either the legal provisions for salaried workers or to the provisions relating to the free provision of services[18].

It should be noted that the Treaty uses the concept of "worker" without defining it. Moreover, the secondary legislation, adopted to implement the provisions of the Treaty, does not provide any definition of this

[10] Pursuant to art. 51 para. (1) TFEU.

[11] Regulation (EU) no. 492/2011 of the European Parliament and of the Council of 05.04.2011 regarding the free movement of workers within the Union, published in OJ L 141/27.05.2011.

[12] Directive 2004/38/EC of the European Parliament and of the Council of 29.04.2004 regarding the right to free movement and residence on the territory of member states, for Union citizens and their family members, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE, published in OJ L 158/30.04.2004. The directive was transposed into Romanian legislation by GEO no. 102/2005 regarding the free movement on the territory of Romania, of citizens of the member states of the European Union, the European Economic Area and of citizens of the Swiss Confederation, republished in the Official Gazette of Romania, Part I, no. 774/02.11.2011, with subsequent amendments and additions.

[13] Directive 2006/123/EC of the European Parliament and of the Council of 12.12.2006 on services within the internal market, published in OJ L 376/27.12.2006. The directive was transposed into Romanian legislation by GEO no. 49/2009 regarding the freedom of establishment of service providers and the freedom to provide services in Romania, with subsequent amendments and additions, published in the Official Gazette of Romania, Part I, no. 366/01.06.2009.

[14] Published in the Official Gazette of Romania, Part I, no. 576/13.08.2010.

[15] Judgment of December 15, 1995, *Union royale belge des sociétés de football association ASBL v. Jean Marc Bosman, Royal club liégeois SA v. Jean Marc Bosman et al. and Union des associations européennes de football (UEFA) v./ Jean Marc Bosman*, case C 415/93, EU:C:1995:463, point 94.

[16] M. Dony, *Droit de la Communaute et de l'Union Europeenne*, Editions de L'Universite de Bruxelles, 2001, p. 161.

[17] I. Moroianu Zlătescu, *Dreptul la liberă circulaţie a persoanelor în statele membre ale Uniunii Europene – cu referire specială la România*, in Human Rights Magazine no. 3/2003, p. 48.

[18] In this regard, the CJEU judgment of December 15, 1995, *Union royale belge des sociétés de football association ASBL v. Jean Marc Bosman, Royal club liégeois SA v. Jean Marc Bosman et al. and Union des associations européennes de football (UEFA) v./ Jean Marc Bosman,* (EU:C:1995:463): „(...) practising a sporting activity is related to Community law insofar as it constitutes an economic activity in the sense " of the Treaty (…). This rule also applies to the activity of professional or semi-professional football players when they exercise a salaried activity or when they provide remunerated services" - point 73.

notion. That is why, as in many other fields, it was the Court that, over time, defined the „worker". The Court assumed the role of defining that concept, considering that «if the definition of that term were within the competence of national law, each member state could, consequently, modify the meaning of the notion of „migrant worker" and eliminate whenever it pleased, the protection granted by the Treaty in the case of certain persons. (…) articles (…) [of the Treaty referring to workers] would therefore be effectless and the objectives (…) of the Treaty thwarted, if the meaning of such a notion were to be unilaterally fixed and changed by national law»[19]. Therefore, the notion of *„worker"* is autonomous and established by jurisprudence. From the interpretations offered by the Court of Justice to the notion of worker, we note the following:

– any citizen of a member state of the European Union has the right to work in another member state and

– the notion of „worker" has a certain meaning in EU law and can't be subject to national definitions. It refers to any person who performs real and actual work under the direction of someone else, for which they are paid.

The doctrine of the field shows that „a professional activity can consist of the performance of a paid activity, but it can also take the form of an independent activity"[20]. The latter can be exercised by the independent person, „either by getting settled, in a sustainable manner on the territory of another member state, or by offering services in another member state, by performing isolated professional acts"[21].

The right of establishment of self-employed persons from the point of view of recognition was and still is an important source for the enrichment of the Luxembourg court jurisprudence. In its jurisprudence, the Court came up with additional details, according to which Member States could not „simply deny a person's access to a profession or to the practice of a profession, on grounds that they lacked internal qualification, even though an internal recognition of the equivalence of foreign qualifications does not exist yet"[22].

2.3. Family members of employed or self-employed migrant workers

The secondary seat of the matter is represented by art. 2 para. (2) of Directive 2004/38, according to which „family members" and, implicitly, beneficiaries, under certain conditions, of the right to free movement and residence on the territory of the European Union are:

„a) the husband;

b) the partner with whom the Union citizen has contracted a registered partnership, under the legislation of a Member State, if, according to the legislation of the host Member State, registered partnerships are considered equivalent to marriage and in accordance with the conditions provided by the relevant legislation of the host Member State;

c) direct descendants not older than 21 or who are dependent on them, as well as direct descendants of the spouse or partner, according to the definition in letter b) and

d) the dependent direct ascendants and those of the spouse or partner, according to the definition from letter b)".

Pursuant to art. 7 para. (4) of Directive 2004/38/EC, „(...) only the spouse, the registered partner within the meaning of art. 2 para. (2) letter (b) and the dependent children also enjoy the right of residence, as family members of a citizen of the Union who meets the conditions set out in para. (1) letter (c). Article 3 para. (1) applies in the case of direct relatives in ascending line dependent on the citizen of the Union, as well as those of the spouse or registered partner".

The recipients of the provision of a service (*e.g.*: medical or legal assistance) constitute, likewise, an important category of beneficiaries of the freedom of movement.

Particular attention is paid to the doctrine and jurisprudence of fictitious or disguised marriages/partnerships.

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[19] The judgment of *M.K.H. Unger, married R. Hoekstra v./ Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten à Utrecht*, case 75/63, EU:C:1964:19, text taken from P. Craig, G. de Búrca, *European Union Law. Commentaries, Jurisprudence and Doctrine*, 4th ed., Hamangiu Publishing House, Bucharest, 2009, p. 929.

[20] M. Dony, *Droit de la Communauté et de l'Union Européenne,* Editions de L'Université de Bruxelles, 2001, p. 161.

[21] *Ibidem*.

[22] P. Craig, G. de Búrca, *op. cit*., p. 993.

2.4. Companies – important beneficiaries of freedom of movement

The primary seat of the matter is represented by art. 54 TFEU which provides that „companies established in accordance with the legislation of a member state and having their registered office, central administration or principal place of business within the Union are assimilated, (...) [in application of the provisions relating to the right of establishment] by the natural persons, nationals of the member states". In other words, the Treaty requires that companies are treated in the same way as natural persons, citizens of EU member states. „This is not strictly possible, given the differences between the natural persons and the legal entities"[23].

In the meaning of the Treaty, companies are those entities „constituted in accordance with the provisions of civil or commercial legislation, including cooperative companies and other legal entities of public or private law, except for the non-profit ones"[24]. In this way, non-profit companies are excluded, although the Court, in the *Sodemare*[25] case, considered as follows: „the condition of the absence of a profit-making purpose can't be considered contrary"[26] to the provisions of the Treaty.

The conditions for a company to benefit from the provisions of art. 54 TFEU, cover several aspects, such as: compliance with the legislation of a member state, *i.e.*, „to have its registered office on its territory and its principal place of business somewhere in the Union"[27], even if the Luxembourg court considered that „it is not possible for the competent national authorities of a member state to refuse (…) the benefit of the national health insurance regime for the simple reason that the company was established according to the legislation of another member state in which it had its registered office, even if it did not exercise commercial activities in that state"[28].

For fiscal reasons, but also for the fact that companies can exist only under the national legislation that can determine the conditions of their reporting to the legislation of a state and the ways of transferring their registered office, companies can't benefit from any Union rule that would provide the effective right to transfer the registered office from one member state to another. The freedom of establishment "with main title" is cancelled. Companies can't invoke any legal act of the European Union to remove the national provisions related to the affiliation of a company to a certain legislation and to the methods of transfer of registered offices.

It is not possible, except for the situation where art. 49 TFEU is breached, to prevent a company from leaving economically, a member state, and giving up being regulated by its law. Specifically, the national law to which the company originally belonged, will determine the ways of transfer. Most laws prohibit transfers of registered offices or submit them to certain legal and fiscal conditions[29]. This is legitimate and it is just the consequence of the diversity of national laws. Cross-border mergers are considered possible. Some national legal systems are more flexible than others. This fact makes legislative or conventional harmonisation necessary. From a fiscal point of view, the relocation of the registered office could only be carried out after such harmonisation.

The choice of the secondary seat is the only way of establishment within the European Union. This can be achieved, pending fiscal harmonisation. According to the „General Program for the elimination of restrictions on the freedom to provide services"[30], a company claiming the right to establish a secondary establishment (subsidiary, agency, branch) must have „an effective and continuous link with the economy of a Member State". The formula is characterised by imprecision, which may mean more than incorporation and less than the actual registered office. It is enough to have a flow of real and serious business (even if this flow is a minority in the activity of the company). The turnover, its permanence and investments must be taken into account, but it is not, in any case, about control or the citizenship of the associates or of those who run the company.

Pursuant to art. 54 TFEU, the free provision of services can be offered to any company which was established within the Union. Art. 54 TFEU does not distinguish between the main and the secondary establishment. Any location can be the starting point for the free provision of services. Of course, a service providing activity within the registered office will develop an effective and continuous connection of the registered office with the economy of a member state.

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[23] P. Craig, G. de Búrca, *op. cit*., p. 1002.

[24] Art. 54 TFEU.

[25] Judgment of *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia*, C 70/95, EU:C:1997:301.

[26] *Idem*, point 34.

[27] P. Craig, G. de Búrca, *op. cit*., p. 1003.

[28] Judgment of July 10, 1986, *D. H. M. Segers v./ Bestuur van de Bedrijfsvereniging voor Bank en Verzekeringswezen, Groothandel en Vrije Beroepen*, case 79/85, EU:C:1986:308, operative part.

[29] Dissolution, assignment of the activity with immediate charge, etc.

[30] Adopted by the Council on December 18, 1961, published in OJ 36/15.01.1962.

Also, art. 50 para. (2) letter g) TFEU stipulates that the European Parliament, the Council and the Commission exercise their functions, especially „coordinating the guarantees requested by the member states for companies, to the extent necessary and aiming at their equalisation, within the meaning of art. 54 second paragraph[31], to equally protect the interests of associates and third parties". The article is placed within the provisions on freedom of establishment. This comes naturally because the rules for the establishment and operation of companies concern, first of all, their bodies which are found, in principle, in the registered offices. However, it does not mean that, as far as coordination is concerned, it has nothing to do with the free provision of services. The borderless space of the EU contributes to the solution according to which companies deal with their customers across borders. The security of customers within the free provision of services is all the better ensured, as the guarantees offered by all companies record a certain degree of equivalence.

All this is reflected, correlatively and inevitably in everything that concerns the free movement of capital and payments, but also of goods.

3. Conclusions

The Schengen area with its three components (land, air and water) constitutes the legal framework by removing internal border controls and moving checks to external borders, at the level of the European Union, which allows the beneficiaries of freedom of movement to use with maximum efficiency, all the opportunities offered. This is highlighted by EU member states or non-member states that are also parties to the Schengen Agreement, from the perspective of the three components. Currently, Romania finds itself in the situation of relating to only two of these components (air and water?), with justifiably increased (real) chances to also have access to the land component, generating unprecedented advantages for all categories of beneficiaries from the point of view of the freedom of movement of persons, goods, services, capital and, implicitly, of correlative payments.

Exceptions and safeguard clauses in the matter of freedom of movement should not be ignored, given the developments that result from unforeseen events, at national, European and international level.

The current context is likely to determine a less predictable evolution from the point of view of the legislation that will govern it. When we make such a statement, we have inevitably in mind, a series of arguments related, above all, to: a) the pandemic/post-pandemic/epidemic period that gave rise to profound paradigm changes, including from the perspective of freedom of movement; b) the energy crisis, global warming and the concern regarding the transition of mankind to the use of alternative sources of energy (its renewable nature), directly influencing the freedom of movement, including from the perspective of the means of transport used; c) the conflict situations on the world map, even if the state of war is still undeclared, but hidden under the phrase „special operations", right in the proximity of our country borders and d) the unprecedented developments of digitization combined with those related to artificial intelligence, which are already influencing all areas of social life, including from the perspective of the beneficiaries of freedom of movement.

The constraints related to ensuring the safety of these freedoms of movement are additional to the economic and social constraints that affect free movement of the imminent beneficiaries, in a more and more accentuated manner, including at the EU level, the causes being among the most diverse and complex.

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[31] Art. 54 para. 2 TFEU: „Companies are entities established in accordance with the provisions of civil or commercial legislation, including cooperative societies and other legal persons under public or private law, except for non-profit ones".

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