MASTER THESIS

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„The Freedom of Movement of Persons in the EU and its Present Major Obstacles“

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Contents

LIST OF ABBREVIATIONS

AG	Advocate General
Art	Article
CJEU	Court of Justice of the European Union
CLJ	Cambridge Law Journal
CMLRev	Common Market Law Review
COM	Communication
CSIH	Court of Session Inner House
CSOH	Court of Session Outer House
EC	European Commission
ECJ	European Court of Justice
EU	European Union
EEC	European Economic Community
EDC	European Defence Community
EDPS	European Data Protection Supervisor
EFTA	European Free Trade Association
EP	European Parliament
EPC	European Policy Centre
FAC	Foreign Affairs Council
GATT	General Agreement on Trade and Tarrifs
IPPR	Institute of Public Policy Research
IR	International Relations
LCE	Labour Committee for Europe
LCMC	Labour Common Market Committee
LCMSC	Labour Common Market Safeguards Committee
LESC	Labour Euro-Safeguards Campaign
LME	Labour Movement in/for Europe
MP	Member of Parliament
MNC	Multinational Corporation
SEA	Single European Act
TASC	Trade Unionists Against the Single Currency

TASS Transport and Salaried Staff

TEAM The European Alliance of Euro-sceptic Movements and Organisations

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

TGWU Transport and General Workers' Union (then T&G and now part of UNITE)

TNC Transnational corporation

VIS Visa Information System

WTD Working Time Directive

WTO World Trade Organization

INTRODUCTION

Free movement of persons next to the free movement of goods, services and capital, is one of the four main economic freedoms of the EU. The first appearance of the right to free movement dates back to 1957 and the Treaty of Rome, which considered this right only from the economic point of view. Therefore, at that time, free movement right was intended to be granted only to workers who could contribute to creating common market. However, since the Treaty of Maastricht, free movement became an essential element of European citizenship and is extended to every citizen of the Union, independent of the fact whether they are economically active or not.

Today, the right of free movement for EU citizens is a supranational right guaranteed by European law and is linked to both market integration and rights of EU workers and EU citizenship granted to all citizens of EU Member States. Freedom of movement for workers guarantees the right for EU nationals to move to another Member State to take up employment and to establish themselves in the host country with their family members on the same terms as nationals. The legal framework protects EU workers from direct or indirect discrimination against them on the basis of their nationality. EU migrant workers and their families are also entitled to equal treatment not only in work-related matters, but also in regard to, tax advantages and social benefits.

Nevertheless the contribution of my Thesis is presenting certain barriers to mobility.

Therefore, the main **problem** of this Thesis is a questions: is a so called “free movement” of persons really free, or it still has barriers and restrictions?

Object of the work: legal regulation on free movement of persons in the EU.

The **aim of this final thesis** is to analyze how free and under what conditions a free movement of persons in the European Union is.

Objectives of the work:

1. To present a theoretical concept of free movement, in particular, the historical background of the single market, establishing the free movement of goods, services, capital and persons;

2. To identify and evaluate EU legal acts, regulating the free movement of persons and describe the main form of free movement of persons such as workers and economically inactive persons;
3. To analyze the legal judgments of the European Court of Justice in order to crystallize the main obstacles and barriers to persons mobility within the EU;
4. To conclude the research provided in the Thesis.

Research methods of the work:

- descriptive method,
- theory review,
- analysis of documents, international legal acts and legal cases.

Structure of the work: This final thesis consists of three main parts. The first chapter provides an overview of theoretical concept of free movement. This part consists of two sections and three subsections, describing free movement of goods, services and capital. The section one discusses the history of a single market, defines the differences between internal, single and common market, explains the nature of four freedoms of the EU, while section two discusses four freedoms of the EU. Chapter one provides background to detailed analysis of free movement of persons.

The legal acts, regulating the free movement of persons in the EU, are analyzed in the second chapter of the Thesis. It is divided into two sections, where the first includes evaluation of the right of free movement and residence within the territory of the Member States, and second identifies exceptions to the free movement of persons. Moreover, section one of the second chapter gives the detailed analysis of free movement of workers as well as free movement of non-economically active persons.

The last part – chapter three is built to provide an analysis of legal cases of the European Court of Justice and the present critique of the implementation of the free movement of persons, as is manifested by the European Parliament. This analysis helps to identify barriers and exceptions to the free movement of persons and to answer the raised problematic question of the Thesis.

1. THEORETICAL CONCEPT OF FREE MOVEMENT

1.1. The establishment of a single market

Two of the original core objectives of the European Economic Community (EEC) was the development of a generic market supply free movement of goods, service, people and capital. Free movement of goods was established in principle through the customs union between its then-six member states. Those founding members, or simply called "The Six" were Belgium, France, West Germany, Italy, Luxembourg, and Netherlands[1]. Based on the results achieved on the field of the establishment and development of the Single Market, it can be said that the Single Market is one of the greatest achievement of the EU. Although, its determination was not a simple issue, it ensures significant privileges of both for EU citizens and enterprises.

Although, March 25 , 1957 can be considered as the official starting date of the Common Market, when the Treaty of Rome was signed, its establishment started far earlier, directly after the second world war. After the war it became evident that the international political climate is defined by the relationship between the USA and the Soviet Union. For this reason, the geographical region located between the two superpowers strategically became a very important area. USA elaborated West-Europe as a region that can play a important role during its forthcoming against the Soviet Union. For this reason USA strongly maintained West European countries in reinforcing their economies. Irrespectively of the American support, West European countries have also endeavored to strengthen their relationships in order to establish a Europe which is independent both from USA and the Soviet Union[2].

As the result of these processes the European Economic Community (EEC) was established the in 1957. The common aim of the casting states was to produce a Common Market based on a common economic cooperation. The coinage of a solitary European economic area based on a common market was the radical objective of the Treaty of Rome. Article 2 of that Treaty (also called Treaty establishing the European Economic Community) set out that objective as follows: "The Community shall have as

[1]'The history of the European Union' (n.d.) <http://europa.eu/about-eu/eu-history/index_en.htm > accessed 31 March, 2017

[2]Soltesz B., 'Past, present and future of the Single Market of the EU, University of Economics, Prague' (2009) <http://uni-obuda.hu/users/vecseya/RePEc/pkk/wpaper/0907.pdf> accessed 2 April, 2017

its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it"[3]. Cited article shows that EEC was more than a simple economic cooperation.

Actually, the Treaty install the European Economic Community can also be elaborate as an ambitious long-term project, of which purpose was to establish a common Market able to create the basis for a balanced, long-term sustainable economic development. As it was mentioned before, the member states signing the Treaty intended to install a common market based on a customs union and on the free movement of goods, persons, services and capital in the course of a transitional period of twelve years. However the customs union was not equal to the common market. The EEC member states had to do a lot yet, first of all concerning "the four freedoms". Namely, the free movement of goods, services, persons and capital has not fully materialized. A few significant steps have been made, but much obstacle stick to be overcome. For example, EEC member states used some national regulations which had the same result like quantitative restrictions.

To give a new pulse for the integration process of the EEC member states, the Commission prepared and perform the Single Market Program (SMP) on the completing the Internal Market in 1985. The SMP paid special attention to the executing and the timing. The timing of actions proposed by the SMP based on an exact time schedule grouping them under the following three objectives: the removal of physical barriers, the removal of technical barriers, the removal of fiscal barriers[4].After publication of the Single Market Program, the special idea of the Internal Market has been also included in the Single European Act, which was considered as a revision of Treaty of Rome, and which, as was said, completed the Internal Market in 1992.

It is evident that the common market was not an end in itself, but a means to reach economic and political goals. It is useful to define here the concepts of "common

[3]'Treaty of Rome' (25 March, 1957) <http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf> accessed 2 April, 2017

[4]Soltesz B. , 'Past, present and future of the Single Market of the EU, University of Economics, Prague ' (2009) <http://uni-obuda.hu/users/vecseya/RePEc/pkk/wpaper/0907.pdf> accessed 4 April, 2017

market", "single market" and "internal market" which are used almost synonymously but which have significant nuances of meaning.

The common market is a stage in the multinational integration process, which, in the words of a Court of Justice ruling, aims to disposal all the barriers to intra-Community trade with a view to the confluence of national markets into a single market giving rise to conditions as close as possible to a genuine internal market[5].

Others may argue that the distinction between the internal market and the common market is that the internal market is based on the rules of the four freedoms and competition law, while the common market encomoasses not only these matters but many more areas, such as: environmental policy, which has been, to a great extent, co-ordinated by the EU; all common policies, that is, a common commercial policy, a common agricultural policy, a common fisheries policy and a common transport policy; development policies, which through structural funds and cohesion funds provide financial assistance to disadvantaged regions of the EU; the funding of research; the common VAT system of indirect taxation as well as common customs duties and excises on products from third countries; the common commercial policy, including the participation of the EC in the arrangements and work of the WTO, funding for programmes in candidate countries, and providing development aid.

It is worth noting that the Treaty of Lisbon ignores the concepts of the "single market" and of the "common market". It replaced the words "common market"' (of the treaty of Nice) by the end result of this stage of the integration process, the "internal market", which according to Article 26 of the Treaty on the functioning of the EU comprises "an area without inner border in which the free movement of goods, persons, services and capital is ensured in conformity with the provisions of the Treaties"[6].

The establishment of the common market first required the elimination of all import and export duties existing between Member States before the foundation of the European Economic Community (EEC). The creation of a common market resembling an internal market implies not only the liberalization of trade among the

[5] 'The EU common market' (n.d.) <. http://www.europedia.moussis.eu/books/Book_2/3/6/index.tkl?all > accessed 4 April, 2017

[6]Treaty on the functioning of the EU, Article 26 (ex Article 13 TEU) (n.d) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2008:115:FULL&from=EN> accessed 4 April, 2017

participating member states but also necessitates the free movement of production factors: labor, capital and services. It further entails the free establishment of persons and companies in all the territory of the member states, in order to exercise their professional or business activities. In order to speak about a common market, we need to have between the compound member states the essence of four fundamental freedoms: freedom of movement of goods, thanks to the elimination of all trade barriers; freedom of movement of salaried and non salaried workers, thanks to the elimination of all restrictions to their entrance and residence in other Member States; freedom of establishment of persons and companies in the territory of any Member State and of the provision of services by them in the host country; and freedom of capital movements for business or personal purposes[7]. It shows up that the keyword of the common market is freedom.

Whether we accept the distinction between the common market and the internal market, or whether we argue that both terms have the same meaning, in reality the internal market encompasses much more than the rules of the four freedoms and competition law, given that for its proper functioning it must be underpinned by many supporting policies. Consequently, it is submitted that the terms common, single and internal market are synonymous. In this Thesis those three terms are used synonymously as well.

So, the internal market of the European Union is a single market in which the free movement of goods, services, capital and persons is ensured and in which European citizens are free of charge free to live, work, study and do business. Since it was created in 1993, the single market has opened more to competition, created new jobs, defined more affordable prices for consumers and enabled businesses and citizens to gratuity from a wide choice of goods and services. The European Union is working towards further simplification of the regulations which still preclude citizens and businesses from making the most of the privilege of the single market[8]. It should be noted that the single market is all about bringing down barriers and simplifying existing rules to enable everyone in the EU – individuals, consumers and businesses – to make the most

[7]The EU common market (n.d) <http://www.europedia.moussis.eu/books/Book_2/3/6/index.tkl?all> accessed 4 April, 2017

[8]The internal market of the European Union (n.d.) <http://europa.eu/legislation_summaries/internal_market/index_en.htm> accessed 4 April, 2017

of the possibility offered to them by having direct access to 28 countries and 503 million people[9]. The cornerstones of the single market are often said to be the "four freedoms" – the free movement of people, goods, services and capital. These freedoms are enshrined in the EC Treaty and form the basis of the single market framework. These four "freedoms" are analyzed in the next section of this thesis.

1.2. Four freedoms of the EU

For most of the history of the Union, its central policy has been the creation of the internal market (or single market, or common market, as it has been called in the various times). These are four of the EU's fundamental founding principles. Under the 1957 Treaty of Rome, goods, services, capital and people are assumed to be able to move freely across the Union's internal limits. The free movement of people and services allows EU nationals to work as employees or self-employed persons anywhere in the EU. There are still some obstacles to the exercise of the right to free movement of workers, the right of establishment and the provision of services, especially in relation to recognition of professional qualifications. The Schengen Agreement, which removed internal borders between participating Member States and harmonised rules on external border controls, greatly facilities the free movement of persons inside the Schengen Area. Nowadays the Schengen Area is the area inclusive 26 European countries that have abolished passport and any other type of border control at their common borders, also reflected to as internal borders. Twenty two of the twenty eight European Union (EU) member states take a part in the Schengen Area. Of the six EU members that do not form part of the Schengen Area, four – Bulgaria, Croatia, Cyprus and Romania – are legally indebted and wish to join the area, while the other two – Ireland and the United Kingdom – maintain opt-outs. All four European Free Trade Association (EFTA) member states – Iceland, Liechtenstein, Norway, and Switzerland – have signed the Schengen Agreement, even though they are outside the EU. In addition three European microstates – Monaco, San Marino, and the Vatican – can be considered as *de facto* within the Schengen Area as they do not have border controls with the Schengen

[9]The EU single market. (n.d.) >http://ec.europa.eu/internal_market/top_layer/index_en.htm< accesed 5 April,2017

countries that surround them[10]; but they have not officially signed documents that make them part of Schengen.

Under the freedom of establishment and the freedom to give services self-emloyed persons enjoy rights parallel to those of workers[11]. The right of establishment means that any EC national is entitled to set up in whichever Member State he wishes and to spend business under the conditions laid down for nationals of that Member State. Exercise of the right of establishment and the right to provide services is also granted to companies and firms established in Member States of the EU. The free movement of services is hindered by the fact that the service sector is difficult to deregulate, but the adoption of Directive 2006/123/EC on Services in the International Market will certainly contribute to the removal of obstacles to both the freedom of establishment and the freedom to provide services[12].

The ability for capital to move freely has been successfully accomplished. Directive 88/361 eliminated all restrictions on movement of capital and ensured access to the financial systems and products of all Member States[13]. Common competition rules ensure that neither companies (through anti-competitive conduct or unlawful merger) nor the Member State (through the granting of aid and subsidies) distort competition within the internal market. The EU has, to a great extent, harmonised rules on intellectual property rights, which are vital for the creation of the internal market given their impact on the free movement of goods and the maintenance of undisorted competition.

A single currency, which at the time of writing has been adopted by 19 Member States and six non-Member States (Andora, San Marino, Monaco and the Vatican City on the basis of formal arrangements with the EU, Montenegro and Kosovo as de facto national currencym without any arrangements being made with the EU) facilitates trade

[10]Schengen Area (n.d.) >http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm< accessed 5 April, 2017

[11]Kaczorowska A. , *European Union Law, Routledge Cavendish* (, London) p. 476

[12] 'The European Parliament and the Council services in the internal market' (Directive 2006/123/EC December 2006) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN> accessed 5 April, 2017

[13]"The implementation of Article 67 of the Treaty, 88/361/ECC ' (Council Directive 24 June 1988) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31988L0361&from=EN> accessed 5 April, 2017

between Member States and constitutes a powerful symbol of European integration[14]. All „new“ Member States are required to adopt the euro once they fulfil the convergence criteria. „Old“ Member States – the UK and Denmark – on the basis of derogations, decided not to join the Eurozone[15]. Sweden, as a result of a national referendum, although no specific opt-out is provided for it, has voluntarily excluded itself from the EMU and does not participate in ERM II.

By the end of this section it should be noted that the rules of the four freedoms are extended to three out of the four European Free Trade Association countries (Iceland, Norway and Lichtenstein) through the creation of the European Economic Area. Now each of those freedoms will be presented separately in the next three subsections, after which main attention will be paid to the regulation of the free movement of persons in the European Union.

1.2.1. Free movement of goods

The free movement of goods is one of the freedoms of the single market of the European Union. Since January 1993, after the EU states abolished a series of reforms in their legal system, controls on the movement of goods within the internal market have been abolished and the European Union is a economical single territory without internal borders . It has helped to build the internal market from which European citizens and businesses are now benefiting and which is at the heart of EU policies.

The free movement of goods is a hugely successful program which has integrated the economies of Europe. It enables any trader or manufacturer in any part of the EU. to export their goods unhindered to any other Member State in the EU . Today’s internal market makes it easy to buy and sell products in all Member States. For example, German sausage-makers in Bavaria can export their products to any other EU Member State without trade being impeded by national tariffs.

It gives consumers large choice of products and allows them to shop around for the best available offer. At the same time the free movement of goods is perfect for business. Around 75 % of intra-EU trade is in goods. The single European marketplace,

[14] 'Economic and Financial Affairs: The euro. ' (n.d.) <http://ec.europa.eu/economy_finance/euro/index_en.htm > accessed 5 April.2017

[15]Lilico A. , 'After 2020, all EU members will have to adopt the euro, ' (1 July 2014) <http://www.telegraph.co.uk/finance/economics/10935617/After-2020-all-EU-members-will-have-to-adopt-the-euro.html > accessed 5 April, 2017

that was created in past, helps EU businesses to build a strong platform in an open, diverse and competitive environment. This internal strength fosters growth and job creation in the European Union and gives EU businesses the resources they need in order to be successful in other world markets. A properly functioning internal market for goods is thus a critical element for the current and future prosperity of the EU in a globalised economy.

From a legal perspective the principle of the free movement of goods has been a key element in creating and developing the internal market. It is one of the economic freedoms established by the EC Treaty. Articles 28–30 of the EC Treaty defined the scope and content of the principle by prohibiting unjustified restrictions on intra-EU trade[16]. Nowadays the internal market goes beyond these three Treaty articles. The main Treaty provisions governing the free movement of goods are:

- Article 34 TFEU, which relates to intra-EU imports and prohibits "quantitative restrictions and all measures having equivalent effect" between Member States;
- Article 35 TFEU, which relates to exports from one Member State to another and similarly prohibits 'quantitative restrictions and all measures having equivalent effect'; and
- Article 36 TFEU, which provides for derogations to the internal market freedoms of Articles 34 and 35 TFEU that are justified on certain specific grounds.

The Treaty chapter on the prohibition of quantitative restrictions between Member States contains, also in Article 37 TFEU, rules on the adjustment of state monopolies of a commercial character.

Harmonized legislation in many areas has specified the meaning of the internal market and has thereby framed the principle of the free movement of goods in concrete terms for specific products. Nevertheless, the fundamental function of the Treaty principle as a key anchor and safety net for the internal market remains unaltered[17].

[16]Johan Adriaensen, National Administrations in EU Trade Policy: Maintaining the Capacity to Control (Palgrave Macmillan UK, 2016,) 20-25

[17]European Commission, Free movement of goods: guide to the application of Treaty provisions governing the free movements of goods. p. 8. (n.d.) <http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf> accessed 7 April,2017

However, the free movement of goods is not an absolute value. In specific circumstances certain overriding political aims may necessitate restrictions or even prohibitions which, while hampering free trade, serve important purposes such as protection of the environment or human health. Against a background of major global developments it comes as no surprise that a "greening" of the free movement of goods has taken place in recent years, underlining the fact that certain grounds for justification may be viewed differently over time. It is thus a constant task, when applying EU law, to reconcile different, sometimes competing, goals and to ensure that a balanced, proportionate approach is taken.

Today's free movement of goods incorporates many policies and fits smoothly into a responsible internal market which guarantees easy access to high-quality products, combined with a high degree of protection of other public interests.

1.2.2. Free movement of services

The internal market for goods seems to function well, after the implementation of the Single Market program in 1988. That is however not the case for the internal market in services. Service providers often experience obstacles if they want to export their services to other EU member states, or when they want to start a subsidiary company in other EU member states. Services are crucial to the European Internal Market. They are everywhere, accounting for over 70% of economic activity in the European Union of, and a similar (and rising) proportion of overall employment[18].Creating a single market for services is difficult. Service providers are people, or companies, and when they are active in host states they interact with a wide range of regulations. These may be to do with the actual service, but many also be to do with the nature of the provider: their qualifications, or legal form, or financial position. A comparison with goods may be helpful: imagine if sale of goods were to be made conditional not just on aspects of the product, but on aspects of the company producing it, their factory and work methods. The creation of free movement would become even more of a challenge.

[18]A single market for services. European Commission, (n.d.)
<http://ec.europa.eu/internal_market/top_layer/services/index_en.htm> accessed 7 April, 2017

The free movement of services raises several issues of definition. What is service? The distinction between goods and services is relatively simple. Goods are things that one can feel. Hence, electricity is treated by the Court as goods. The sale of e-books, however, would fall within the provision of services, since there is no tactile object being traded. If the book were on a CD, by contrast, then this CD would be a good[19].

Sometimes the provision of a service is attached to the provision of a physical thing. Most notably, in Schindler, the Court found that buying a lottery ticket fell within the free movement of services, not goods, because the physical ticket was purely ancillary to the real substance of the transaction, which was the chance of winning a prize. The customer paid in order to participate in the lottery – a service – not in order to own a piece of paper.

The distinction between services and establishment is less precise. If a person or company has a number of customers in another Member State to which they provide services, this will fall within Article 56. However, if their position in that MemberState reaches a sufficient level of permanence and solidity that one might speak of them being 'established' there, then any restrictions on their activities will be seen as restrictions on freedom of establishment, not of services.

The principles of freedom of establishment and free movement of services have been clarified and developed over the years through the case law of the European Court of Justice. In addition, important developments and progress in the field of services have been brought about through specific legislation in fields such as financial services, transport, telecommunications, broadcasting and the recognition of professional qualifications[20].The EC (2002) has concluded that these impediments are to a considerable degree caused by national regulations for service exporters, foreign investors in services, and for the service product itself. Such regulations are mostly made for domestic purposes without much regard for the interests of foreign service providers[21].

[19]Chalmers D., Davies G., Monti G. , *European Union Law* (Second edition New York: Cambridge University Press) 2010,p. 786
[20]A single market for services. European Commission, (n.d.) <http://ec.europa.eu/internal_market/top_layer/services/index_en.htm> accessed 7 April,2017
[21]Kox H., Lejour A., Montizaan R. , 'The free movement of services within the EU, Netherlands' (No 69. – p. 13 October 2004) <www.cpb.nl/.../free-movement-services-within-eu.pdf> accessed 8 April, 2017

It is, of course, natural for a state to apply their laws to all on their territory. The EU law rejection of this is counter-intuitive from a national perspective. Yet, it is equally natural for a service provider to find it deeply frustrating when she is forced to demonstrate compliance with all kinds of professional and technical regulation which essentially duplicates similar demands in her state of establishment. Nor is such duplication the only problem. Other local rules may impose costs and make it harder for her to do business in the way she is used to – according to her business model, as the Court of Justice has recently put it. Examples might be a prohibition on a particular marketing method, such as cold-calling, or a tax on the equipment necessary for the service, advertising rules, or rules about the legal form of the service provider. These rules might not discriminate, nor has any protectionist intent, but they might nevertheless have the effect that some service providers decide it is just not worth entering that market or that market entry should be on a smaller scale. Trade is inhibited.

This makes Article 56 TFEU[22] constitutionally dangerous. If all law affecting a service provider imposes costs on her somehow, then all law deters her activities to some extent, and Article 56 might just become a tool for a general review of national legislative proportionality. One of the central issues of the free movement of services is, as with the other freedoms, how to define its limits in a way reflecting the right balance between purposive market-creation, and practical, attribution-respecting, limits to EU law. The Court has not yet created a Keck for services, a case which is accepted to draw such lines, perhaps partly because the types of restrictions which impact on services are less easy to categorize than is the case for goods.

The free movement of services is regulated by Article 56 TFEU, which provides in its first paragraph: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than of the person for whom the services are intended".

Article 57 TFEU then provides that: "Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for

[22]' Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union' (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=en> accessed 8 April, 2017

remuneration (…).” Subsequent Articles address aspects of certain specific services (transport, banking and insurance services) and aspects of the process of harmonization and liberalization.

A number of derogations are also provided. The free movement of services may be restricted on grounds of public policy, public security or public health, and it does not apple at all to the exercise of official authority[23]. These derogations are found in the Treaty Chapter on freedom of establishment, and are applied to the services Chapter by Article 61 TFEU: “As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56”[24].

1.2.3. Free movement of capital

Free movement of capital is also one of “four freedoms”. The free movement of capital is not only the youngest of all Treaty freedoms, but — because of its unique third-country dimension — also the broadest[25]. It enables integrated, open, competitive and efficient European financial markets and services - which bring many advantages to all citizens. For citizens it means the ability to do many operations abroad, such as opening bank accounts, buying shares in non-domestic companies, investing where the best return is, and purchasing real estate. For companies it principally means being able to invest in and own other European companies and take an active part in their management[26].

According to European Commission, capital movements mean any one of the following when carried out on a cross-border basis (i.e. between an investor in one Member State and a financial institution in another):

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[23]Chalmers D., Davies G., Monti G. , *European Union Law* (2ndedn, Cambridge University Press, New York) 2010, p. 787

[24]'Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, Article 61' (Official Journal of the European Union 2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=en> accessed 8 April, 2017

[25]Fact sheet on the European Union: The free movement of capital (n.d) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.6.html> accessed 10 April, 2017

[26]Banking and finance: free movement of capital. (n.d) <http://ec.europa.eu/finance/capital/overview_en.htm#what> accessed 10 April, 2017

- Foreign direct investment (FDI), including investments which establish or maintain lasting links between a provider of capital (investor) and an enterprise (in effect setting up, taking-over, or acquiring an important stake in a company or institution);
- Real estate investments or purchases;
- Securities investments (e.g. in shares, bonds, bills, unit trusts);
- Granting of loans and credits; and
- Other operations with financial institutions, including personal capital operations such as dowries, legacies, endowments, etc[27].

The basic requirement set out in Article 67(1) of the original Treaty Establishing the European Economic Community was that during the transitional period, Member States should progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested, but only "to the extent necessary to ensure the proper functioning of the common market[28]". With regard to transitional and standstill arrangements, it was required Member States to be "as liberal as possible" in granting such exchange authorizations as were still necessary after the entry into force of the Treaty. Additionally, the Treaty required Member States to "Endeavour to avoid introducing within the Community any new exchange restrictions on the movement of capital and current payments connected with such movements, and to Endeavour not to make existing rules more restrictive"[29]. It means that in order for the European Union Internal Market to be guaranteed it is essential that capital is able to be moved freely from European Union Member State to European Union Member State.

The free movement of capital has benefits for all of us both in an individual capacity but also for business which will then have a knock on effect for consumers. Citizens are thus provided with the ability to do many operations abroad for example

[27]Banking and finance: free movement of capital. (n.d.) <http://ec.europa.eu/finance/capital/overview_en.htm#what> accessed 10 April,2017

[28]'Consolidated version of the treaty establishing the European Community, Article 67 ' (Official Journal of the European Communities C325/33 2002) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 10 April, 2017

[29]Usher J.A. , 'The evolution of the free movement of capital' [2007] Volume 31 (Issue 5, p. 1534) Fordham International Law Journal <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2122&context=ilj> accessed 10 April, 2017

opening bank accounts, buying shares in non-domestic companies, investing where the best return is and even going as far as purchasing property.

European companies are thus able to invest in and own other European companies and take an active part in their management. The free movement of capital is therefore essential to guarantee the other fundamental freedoms of the European Union. Citizens are able to act in the same manner as the citizens of another Member State when moving there freely to undertake work due to the fact that they are able to open bank accounts and get themselves on the property ladder.

There are certain exceptions to the free movement of capital within the European Union Member States and also within those countries having trade agreements with the European Union. These are mostly in relation to taxation, prudential supervision, public policy considerations and financial sanctions agreed under the Common Foreign and Security Policy[30]. Specifically sanctions and strict controls have been put in place in order to monitor suspicious transactions which may involve the movement of criminal funds through money laundering. If such transactions are found by financial institutions they are required to notify the requisite authorities of any such transactions. More recently with the increasing fears concerned with terrorist activity additional controls have been put in place in order to try and track funds being used to prepare or to support terrorist attacks.

The prohibition in Article 63(1) TFEU on restrictions on the movement of capital between Member States and between Member States and third countries is directly effective. The types of activity that could potentially restrict free movement of capital are any restrictions or regulation of profit-making activity. For free movement of capital is about the accessibility of a particular economic sector to market operators, namely whether they can invest in it and can buy and sell in it. It is, moreover, not just a question of access but also one about making profit out of that activity. If this is not possible, there will be no investment. Insofar as any measure might lower the possibility for profit, a question arises about a possible restriction on free movement of capital. On such a view, restrictions on the narcotics trade could breach Article 63(1) TFEU by preventing foreign investors investing and thereby preventing these investors moving their capital into narcotics or companies which traded narcotics.

[30]European Union Law: free movement of capital. (n.d.) <http://www.inbrief.co.uk/regulations/free-movement-of-capital.htm> accessed 11 April, 2017

Such an interpretation would lead the Court of Justice into intervening in almost everything Article 63(1) TFEU raises three questions, therefore: first, what constitutes a capital movement for the purpose of the Treaty; secondly, as with other economic freedoms, what national measures are perceived as illegal restrictions; thirdly, what types of justification might be legally provided for such restrictions.

The Court has followed the lead of the legislature on the first question of the material remit of the provision and what constitutes a 'capital movement'. In the late 1980s, Member States liberalized capital movements in a phased manner. They adopted Directive 88/361/EEC which set out the different types of capital of movement that were to be liberalized. The Court has consistently interpreted this document, in particular Annex I, as setting out what constitutes a capital movement for the purpose of Article 63(1) TFEU. The Annex is too long to set out verbatim. Broadly speaking, it is non-exhaustive but sets out thirteen groups of transactions which are to be covered now by Article 63(1) TFEU. These include direct investments, such as investment in a company or finance provided to an entrepreneur; investments in real estate, such as a purchase of a house; operations in securities, such as trading in bonds, shares and any other market instruments; financial loans and sureties; operations in current and deposit accounts with financial institutions; transfers relating to insurance contracts, and finally, personal capital movements, such as gifts, inheritances or personal loans. The Court has indicated that these will only not fall within Article 63(1) TFEU if the constituent elements all fall within a single Member State: so a tax on an inheritance left by a national of that state to her children who are resident within that state will not fall within Article 63(1) TFEU as none of the constituent elements have a transnational dimension.

The second question is what sort of restriction is covered by this provision. Annex I to Directive 88/361/EEC indicates that Article 63(1) TFEU is not merely to cover restrictions on use of currency to purchase an asset, bet must also cover restrictions that go to the heart of the transaction, and those which prevent an asset being sold. This is quite logical. A restriction on the sale or purchase of property in a MemberState is as restrictive of investment as one that prevents one exchanging the currency necessary to purchase it. But does Article 63(1) TFEU only cover discriminatory restrictions which prevent foreigners investing or foreign capital

investments in such schemes, or is it to be interpreted in a similar manner to the other economic freedoms as covering both discriminatory and non-discriminatory restrictions on movement of capital? The Court has, unsurprisingly, followed a similar line here as elsewhere, although its language has been vaguer than with the other economic freedoms.

The most prominent example of its reasoning is its famous 'golden shares' judgment in relation to the German authorities' involvement with the German car manufacturer, Volkswagen (VW). The Commission brought an action against Germany for breach of Article 63(1) TFEU because of three provisions in its VW Law. Paragraph 4(3) provided many important decisions over Volkswagen could be blocked by a blocking minority of 20 per cent of shareholders. The Land of Lower Saxony, the regional authority, owned about 20 per cent of the shares. Paragraph 2(1) provided that no shareholder could have voting rights of more than 20 per cent, no matter how many shares they owned. Finally, paragraph 4(1) provided that the federal authorities and the authorities of the Land of Lower Saxony could each appoint two representatives to the supervisory board of the company. The German government observed that none of these measures stopped anybody buying and selling shares in Volkswagen. Indeed, these were amongst the most highly traded shares in Europe. The Court of Justice rejected these arguments on the basis that these provisions restricted the influence and value of what was being bought, and therefore constituted a restriction under Article 63(1) TFEU.

2. LEGAL ACTS, REGULATING THE FREE MOVEMENT OF PERSONS IN THE EU

Freedom of movement and residence for persons in the EU is the cornerstone of Union citizenship, which was established by the Treaty of Maastricht in 1992. Its practical implementation in EU law, however, has not been straightforward. It first involved the gradual phasing out, of internal borders under the Schengen agreements, initially in just a handful of Member States. Today, the provisions governing the free movement of persons are laid down in Directive 2004/38/EC[31] on the right of EU

[31]'Official Journal of the European Union' (Directive 2004/38/EC of the European Parliament and the Council 2004) <http://eur-

citizens and their family members to move and reside freely within the territory of the Member States. However, the implementation of this directive continues to face many obstacles[32].

Table 1. EU legislation on free movement

Treaty of Rome	Main legislation concerning free movement of workers	Three directives: students, pensioners, non-actives	EU citizenship	Enlargement (transitional measures)	New residence Directive 2004/38/EC	Enlargement (transitional measures)
1957	1968	1990	1992	2004	2006	2007

Source: Unesco Migration Studies, p. 18

EU citizens' right to move freely within the EU is central to the European project. Initially established as a freedom designed exclusively for workers (Article 48, Treaty of Rome), the free movement of persons is nowadays enshrined as one of the EU citizenship rights in Article 21 TFEU. Therefore, "every citizen", independent of his/her age, professional activity or status as a salaried worker has the "right to move and indwell freely within the territory of the EU Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect". The significance of the free movement provisions has also been highlighted in Article 4533 of the Charter of fundamental rights of the EU. Nevertheless, the challenges currently confronting Europe have put this cornerstone of the EU construction under attack. Firstly, in dealing with local unemployment and squeeze on social security systems, some scholars see a tendency on the part of national authorities to reinstall a certain degree of labor market protectionism and invoke the so-called "social benefits tourism" argument in order to launch a renegotiation of the free mobility terms.

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> accessed 11 April, 2017

[32]Free movement of persons. (n.d.) <http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_2.1.3.html> accessed 11 April, 2017

[33]Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title III: Free movement of persons, services and capital - Chapter 2: Right of establishment - Article 45, (n.d.) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E045:EN:HTML>accessed 11 April, 2017

Secondly, on the 31 December 2013 restrictions on the right of Bulgarian and Romanian nationals to work in several Member States are to be lifted. The end of this transitional period is prompting anxious debate across Europe with some politicians warning against an alleged flood of immigration from these two countries.[34].

2.1. The right of free movement and residence within the territory of the Member States

The free movement of persons means EU citizens can move freely between member states to live, work, study or retire in another country. This required the lowering of administrative formalities and more recognition of professional qualifications of other states[35]. Fostering the free movement of persons has been a major goal of European integration since the 1950s.

The free movement of persons raises a question what does it mean to be an EU citizen? Any person who holds the nationality of an EU country is automatically also an EU citizen. EU citizenship is additional to and does not replace it. EU citizenship gives every EU citizen a number of important rights, including[36]:

- the right to move freely around the European Union and settle anywhere within its territory;
- the right to vote or stand as a candidate in elections to the European Parliament and in municipal elections in the EU country in which you reside, even if you are not a national of that country;
- the right to protection by the diplomatic or consular authorities of any EU country in a third country (country outside the EU) where your home EU country is not represented by a consulate;
- The right to petition the European Parliament, to apply to the Ombudsman, and to write to any of the EU institutions or bodies.

[34]'Free movement of persons in the EU: how free, under what conditions and for whom?' (EPRS Library 25 June, 2013) <http://epthinktank.eu/2013/06/25/free-movement-of-persons-in-the-eu-how-free-under-what-conditions-and-for-whom/> accessed 13 April, 2017

[35]Living and working in the Single Market. European Commission (n.d.) <http://ec.europa.eu/internal_market/top_layer/living_working/index_en.htm> accessed 13 April, 2017

[36]Freedom to move and live in Europe: a guide to your rights as an EU citizen.

Broadly defined, this freedom enables citizens of one Member State to travel to another, to reside and to work there (permanently or temporarily). The idea behind EU legislation in this field is that citizens from other member states should be treated equally with domestic ones – they should not be discriminated against. The main provision of the freedom of movement of persons is Article 45 of the TFEU that prohibits restrictions on the basis of nationality. Hence, free movement of persons is related to Schengen Area. Free movement of persons is usually described in to forms: in the form of workers and in the form of non-economically active persons. These aspects are also examined in this part of Thesis.

2.1.1. Analysis of free movement of the non-economically active

As it is already known, the EU's Single Market was at the heart of the original Treaty of Rome, which aimed to create a 'common market' and later an 'internal market' covering the entire territory of the then six members of the EEC. As expound in detail in the Balance of Competences Report on the Single Market, the aim was to create an area without internal frontiers designed to assure the free movement of goods, services, capital and workers – the so-called "four freedoms. Free movement was therefore initially focused on those who were 'economically active' – such as workers and self-employed persons, and those giving or receiving services. Free movement was therefore intended to support the development of an EU labor market where workers could move across the EU to fill skills and employment gaps and improve their own economic opportunities. From the outset EU law included supporting provisions to ensure rules within national social security systems would not act as a barrier or disincentive for workers and their families to move between Member States[37]. Following the Maastricht Treaty, the rights of economically active persons to free movement within the EU have been complemented by limited rights for non-

[37]'Review of the Balance of Competences between the United Kingdom and the European Union Single Market: Free movement of Persons, HM Government, P. 13' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf> accessed 17 April, 2017

economically active citizens to move freely within the EU, under Article 21 (1)[38] of the TFEU and Directive 2004/38/EC on the right to move and reside freely within the EU.

Economically inactive persons benefit from even fewer social assistance rights[39]. The ECJ has nevertheless stated that a student's temporary lack of resources does not automatically make him a burden for the host society (Case C-184/99, Grzelczyk v Centre public d'aidesocialed'Ottignies-LLN, 28.09.2000). This ruling is now codified in article 14(3) of the 2004/38 Directive. The same way as for the "job seekers" category, the ECJ take into consideration that Member States can refuse social assistance such as loans or grants to students who cannot "demonstrate a certain" into its society (Case C-209/03, Bidar v London Borough of Ealing and Secretary of State for Education and Skills, 15.03.2005) – the three year residence condition imposed by the British authorities was judged by the ECJ as being a guarantee of sufficient integration into the society of the host Member State.

However, it is worth mentioning that the 2004/38 Directive introduced the right of permanent residence – and in its Lassal ruling (Case C-162/09, Secretary of State for Work and Pensions v Lassal, 7.10.2010) the ECJ confirms that once this right acquired, EU citizens residing in a different Member State than their country of origin are entitled to social assistance, even if they become a social burden for the host society.

According to above mentioned, free movement of persons includes workers and non-economically active or inactive persons. The Directive on the right of citizens of the Union and their family members to move and reside freely into the domain of the Member States says that: "Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is thus needful to codify and survey the existing Community instruments dealing apart with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens"[40].The circumstances in which Union citizens and their

[38]'Consolidated version of the Treaty on the functioning of the European Union' (Official Journal of the European Union 26.10.2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN > accessed 17 April, 2017

[39]'Free movement of Persons in the EU: How free, under what conditions and for whom? European Parliament Research Service ' (n.d.) <http://epthinktank.eu/2013/06/25/free-movement-of-persons-in-the-eu-how-free-under-what-conditions-and-for-whom/> accessed 17 April, 2017

[40]Directive 2004/38/EC of the European Parliament and of the Council of April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the

families implement their right to move and reside freely within the Member States for pending three months: All Union citizens have the right to enter another Member State by virtue of having an identity card or valid passport. Under no circumstances can an entry or exit visa be required. Where the citizens concerned do not have travel documents, the host Member State must provide them every objective in obtaining the requisite documents or having them sent.

Family members who do not have the nationality of a Member State enjoy the same rights as the citizen who they have accompanied. They may be expose to a short-stay visa demand under Regulation (EC) No 539/200141. Residence permits will be considering equivalent to short-stay visas. For stays of less than three months, the only requirement on Union citizens is that they possess a valid identity document or passport. It does not include the requirements of the economic activity. The host Member State may require the persons concerned to register their presence in the country within a reasonable and non-discriminatory period of time. The right of residence for more than six months is subject to certain conditions. The applicant must:

- either be engaged in economic activity (on an employed or self-employed basis);
- Or have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay. The Member States may not specify a minimum amount which they deem sufficient, but they must take account of personal circumstances;
- or be following vocational training as a student;
- Or be a Family member of a Union citizen who falls into one of the above categories.

Residence permits are abolished for Union citizens. However, Member States may require them to register with the competent authorities within a period of not less than three months as from the date of arrival. Proof of registration will be issued immediately on presentation of:

- an identity card or valid passport;

Member States (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038&from=EN> accessed 18 April, 2017

[41]Council Regulation (EC) No 539/2001 of 15 March 2001, Official Journal of the European Communities, (21.03.2001) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0539&from=EN> accessed 18 April, 2017> accessed 18 April, 2017

- A declaration by the citizen that he meets the aforementioned conditions, or any other evidence to be determined by him or her.

Family members of Union citizens who are not nationals of a Member State must apply for a residence permit for Family members of Union citizens. These permits are valid for at least five years from their date of issue.

The death of the Union citizen, his or her departure from the host Member State, divorce, annulment of marriage or termination of partnership does not affect the right of Family members as adequation to marriage; the direct offspring who are under the age of 21 or are dependants and those of the partner as defined above; the dependent direct relatives in the ascending line and those of the spouse or partner. Family members who are not nationals of a Member State to continue residing in the Member State in question, subject to certain conditions.

Union citizens acquire the right of permanent residence in the host Member State after a five-year period of uninterrupted legal residence, provided that an expulsion decision has not been enforced against them[42]. This right of permanent residence is no longer subject to any conditions. The same rule applies to Family members as equivalent to marriage; the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined above; the dependent direct relatives in the ascending line and those of the spouse or partner.'); Family members who are not nationals of a Member State and who have lived with a Union citizen for five years. The right of permanent residence is lost only in the event of more than two successive years' absence from the host Member State. Permanent residence permits are valid indefinitely and are renewable automatically every ten years. They must be issued no more than three months after the application is made. Citizens can use any form of evidence generally accepted in the host Member State to prove that they have been continuously resident.

Union citizens qualifying for the right of residence or the right of permanent residence and the members of their family also benefit from equal treatment with host-country nationals in the areas covered by the Treaty. However, until the right of

[42]Davies K., *Understanding European Union Law* (2nd edition, 2003) <https://books.google.lt/books?id=_sfWB5q2dMkC&pg=PA104&lpg=PA104&dq=Free+movement+of+persons+non+economically+active&source=bl&ots=dkRAECdF_P&sig=GFZrr2OpC-xkoRf-H9Ww1Zn4Pj4&hl=lt&sa=X&ei=sHdTVeyHGaPmyQPJqYD4CQ&redir_esc=y#v=onepage&q=Free%20movement%20of%20persons%20non%20economically%20active&f=false> accessed 20 April, 2017

permanent residence has been acquired, the host Member State is not obliged to grant entitlement to social security to persons other than employed or self-employed workers and the members of their family. Family members as equivalent to marriage; the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined above; the dependent direct relatives in the ascending line and those of the spouse or partner.; Family members, irrespective of their nationality, will be entitled to engage in economic activity on an employed or self-employed basis.

Union citizens or members of their family may be restricted from the host Member State on grounds of public policy, public security or public health. It relates to measures concerning entry into the territory, issue or renewal of residence permits, or expulsion from the territory, taken by Member States on grounds of public policy, public security or public health. Such grounds may not be invoked to service economic ends. Measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions do not automatically justify such measures. Nor the mere fact that the entry documents used by the individual concerned have expired does not constitute grounds for expulsion. Before taking such a restrictive decision, the Member State must assess a number of factors such as the period for which the individual concerned has been resident, his or her age, degree of integration and family situation in the host Member State and links with the country of origin. The decision should be adopted no latter than within 6 months after the application. The person concerned by a decision refusing leave to enter or reside in a Member State must be notified of that decision. The grounds for the decision must be given and the person concerned must be informed of the appeal procedures available to them. Lifelong exclusion orders cannot be issued under any circumstances. Persons concerned by exclusion orders can apply for the situation to be reviewed after a maximum of three years. The Directive also makes provision for a series of procedural guarantees.

2.1.2. Analysis of free movement of workers

After the biggest EU enlargement in 2004 the legal issues of free movement of persons as well as workers became an important issue and a relevant research object. A number of scientists emphasized the legal aspects of free movement of workers moving

to EU15 countries after the enlargement of EU in 2004[43]. The theoretical aspects of free movement of workers and its adoption to practice were highlighted as well as a need to overcome barriers for efficient free movement of workers and to make free movement and residence rights more inclusive was emphasized. The movement of workers from Central and Eastern Europe to Western countries was pointed out. The EC responding to on-going changes in the EU constantly initiates the development of legal regulations of free movement of workers in creating various legal documents.

Nowadays the freedom of movement of salaried and non-salaried workers allows EU citizens to seek, within the Union, better living and working conditions than are available to them in their region of origin. It therefore boosts greatly the chances of improving the standards of living of the individual. At the same time, freedom of movement reduces social pressure in the poorest regions of the European Union and allows the living conditions of those remaining to improve. In the EU in general it facilitates the adjustment of the labour supply to the variations in the demand of undertakings and opens the way for more coherent and more effective economic policies at a European level. Thus, freedom of movement of workers contributes to the attainment of the objectives of the common market as well as to the flexibility and efficiency of the labour market[44].

Free movement is not restricted to workers. Article 21 of the Treaty on the functioning of the EU, which has direct effect, gives every citizen of the Union the right to move and reside freely within the territory of the Member States. A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy a right of residence there by direct application of Article 21(1) TFEU [Case C-413/99[45]]. The same right is enjoyed by his spouse, their descendants under the age of 21 and their dependent relatives in the ascending line. This right contributes to a concrete and practical expression of European citizenship. Freedom of movement may contribute to the attainment of the objectives of

[43]Pauzaite Z., Baryniene J. Legal regulations of free movement of workers in the European Union as a boost to business development and employment: case study of EURES network activities in Lithuania. Kaunas University of Technology. European integration studies, (2014, No 8. P. 16) <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=ae462121-c5cf-4693-b5af-7907412c8b53%40sessionmgr4003&vid=1&hid=4204> accesseed 21 April, 2017

[44]Free moveent of workers in the EU, Europedia (n.d.) <http://www.europedia.moussis.eu/books/Book_2/3/6/04/?all=1> accessed 22 April, 2017

[45](n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0413&from=EN> accessed 22 April, 2017

the common market, while giving more flexibility and thus greater efficiency to the labour market. The challenge to the Union now is, however, to create a real European mobility area, in which freedom of movement becomes not only a legal entitlement but also a daily reality for people across Europe. Although the free movement of workers has advantages, it also has disadvantages such as, the impoverishment of regions of emigration in terms of their most dynamic human capital and an overloading of the social services in the areas of immigration. The free movement of labour within the European Union is therefore no panacea. It has to be channelled and supported by social measures in favour of migrant workers and their families. It has above all to be coupled with an efficient regional policy capable of creating jobs in the less favoured regions of the Union to provide employment for the labour available in situ. Under these conditions, freedom of movement is an acquired right of EU workers.

Article 18(1) EC[46] states:„Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.“

It is to be noted that the right to free movement of a member of an EU national‘s family is not an independent right but derives from the right conferred upon the EU national, unless the family member himself/herself has rights as a national of a Member State. A member of an Eu citizen‘s family who is a national of third country cannot exercise the right to free movement unless this is done in parallel with the EC national.

Under Article 18(2) EC the Council may adopt measures facilitating the exercise of the aboce rights. Such measures must be proposed by the Commission and require the unanimous vote of the Council and the assent of the European Parliament.

The ECJ has greatly contributed to the development of Article 18(2) EC. The council‘s contribution is the adoption of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens and Their Family Members to Move and Reside Freely within Territory of the Member States.

[46]Treaty establishing the European Community (Nice consolidated version) - Part Two: Citizenship of the Union - Article 18, (n.d.) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E018:EN:HTML> accessed 22 April, 2017

The free movement of workers and their families is governed by Article 39 EC[47], which has been implemented by secondary legislation, in particular:

- Regulation 1612/68 of 15 October 1968 on the free movement of workers within the Community, which governs access to and conditions of employment[48];
- Directive 2004/38/EC of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States[49];
- Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[50].

The right granted under Article 39 EC is not absolute. It suffers two exceptions expressly mentioned in that Article. By virtue of Article 39(4) EC employment in the public service may be reserved to nationals of a host Member State and under Article 39(3) EC some limitations may be imposed on the grounds of public policy, public security and public health. Some further exceptions are provided for in secondary legislation, for example, under Article 3(1) of Regulation 1612/68 a Member State is allowed to impose genuine linguistic requirements. The discriminatory or which constitute non-discriminatory obstacles to the free movement of workers. These exceptions are based on overriding reasons of public interest and are allowed if they pursue legitimate aims compatible with the EC Treaty and do not go beyond what is necessary and appropriate to achieve those aims[51].

Article 39 EC is both vertically and horizontally directly effective.

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[47]Consolidated version of the treaty establishing the European Community, Official Journal of the European Communities, C325/33, (24.12.2002) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 22 April, 2017

[48]Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community, (15 October 1968) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:en:HTML> accessed 24 April, 2017

[49]Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, Official Journal of the European Union, L 158/77, (30.4.2004) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> accessed 24 April, 2017

[50]Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, (14 June 1971) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1971R1408:20060428:en:PDF> accessed 24 April, 2017

[51]Kaczorowska A. , *European Union Law* (Routledge Cavendish, London,) 2009, p. 612

The scope of application ratione personae of Article 39 EC is very broad, as not only workers and their families can rely on it, but so can employers and even, in certain circumstances, private sector recruitment agencies.

Resulting from the enlargement of the EU in May 2004 and in January 2007, the territorial scope of Article 39 EC has become rather complex, as the "old" Member States were allowed to impose transitional measures restricting access to their labor markets for workers from "new" Member States. In any event, the transitional measures for those countries which joined the EU on 1 May 2004 must end on 30 April 2011, and for Bulgaria and Romania (which joined the EU on 1 January 2007) on 31 December 2013. Nationals of states belonging to the European Economic Area that is, Iceland, Liechtenstein and Norway, are also beneficiaries of Article 39 EC[52].

The concept of "worker" has been broadly interpreted by the ECJ and has an autonomous Community meaning. The essential feature of the concept of a worker is that a person must perform services of some economic value for and under the direction of another person, in return for which she/he receives remuneration. This definition has two elements. The first relates to the requirement that the activities performed by a worker must be real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The second concerns the requirement that a worker must perform activities of an economic education.

Some rights guaranteed to EC migrant workers survive the termination of an employment relationship, for example, in the field of financial assistance for university education.

The rights of family members of a worker are parasitic on or derivative from those of the worker. Directive 2004/38/EC defines who are to be regarded as members of worker's family. Regardless of their nationality, they are entitled to move with a worker, reside with him/her in a host Member State, take up employment as employees or self-employed persons, and be treated in the same way as nationals of a host Member State. The ECJ has interpreted broadly the extent of rights to which members of a worker's family are entitled.

[52]Consolidated version of the treaty establishing the European Community, Official Journal of the European Communities, C325/33, (24.12.2002) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 25 April, 2017

Article 39 EC prohibits all forms of discrimination, whether direct or indirect, and (as interpreted by the ECJ) any national provisions which create a substantial obstacle to access to a labor market in a Member State. Directly or explicitly discriminatory national provisions can only be justified if permitted under the EC Treaty. National provisions which are indirectly discriminatory or those which are not discriminatory but nevertheless constitute an obstacle to freedom of movement for workers, can be justified only if they pursue a legitimate aim compatible with the EC Treaty, can be justified by overriding reasons in the public interest and do not go beyond what is necessary and appropriate to achieve that aim.

Regulation 1612/68 provides a list of rights to which EC migrant workers and their families are entitled once they have settled in a host Member State. Regulation 1612/68 states[53]:

- Under Article 1 EC migrant workers have the right to take up employment in a host Member State under the same conditions as its nationals.
- Under Article 2 all discrimination against migrant workers is prohibited with regards to conclusion and performance of their employment contracts.
- Under Article 3 and 4 all directly and indirectly discrimination law, regulations and administrative practices are prohibited. National quota systems which provide for a limit to the percentage or number of EC migrant workers in a particular area, which restrict advertising of vacancies, or which set a special recruitment of registration procedure are prohibited. However, some genuine linguistic requirements may be imposed upon EC migrant workers.
- Under Article 5, where assistance in finding employment is granted to nationals of a host Member State, it must equally be offered to EC migrant workers.
- Under Article 6 discriminatory vocational or medical criteria for recruitment and appointment are prohibited.
- Under Article 7(1) any discrimination concerning conditions of employment or work is prohibited.

[53]Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community, (15 October 1968) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:en:HTML> accessed 25 April, 2017

- Under Article 7(2) EC migrant workers and their families are entitled to the same social and tax advantages as nationals of the host Member State.
  - The broad interpretation of this provision by the ECJ has significantly enhanced the rights of workers and their families in other Member States:
    a) Social advantages. In Case 207/78[54] Even the ECJ defined social advantages as "those which, whether or not liked to a contract of employment, are generally granted to national workers primarily because of their status as workers or by virtue of the mere fact of their residence on the national territory". It is impossible to give a list of social advantages because each Member State determines what advantages are to be regarded as such, and thus they vary from one Member State to another – the basic principle is that workers from other Member States and their families are entitled to benefit on equal terms. The case law of the ECJ shows that EC migrant workers and their families, even after worker's death, have been entitled to a vast range of social advantages. In Case 39/86[55] Lair the ECJ held that entitlement to higher education study finance is to be regarded as a social benefit under Article 7(2). However, the entitlement is subject to the requirement of continuity between the previous occupational activity and the studies pursued, except where a migrant worker involuntarily becomes unemployed and, as a result, are obliged by conditions of the labor market to undertake occupational retraining.
    b) Tax advantages refer mainly to tax deductions which reduce taxable income, for example deductions for private sickness insurance premiums, or for contributions to an occupational pension scheme. A host Member State is required to make deductions in relation to contributions paid in the worker's home Member State.

[54]Judgement of (31.3.1979) – Case 207/78,<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0207&from=EN> accessed 25 April, 2017
[55]Judgment of the court (21 June 1988,) Judgment of (21.6.1988) – Case 39/86,<http://eur-lex.europa.eu/resource.html?uri=cellar:636df053-6dc3-4fac-b395-9498c1398a51.0002.06/DOC_1&format=PDF> accessed 25 April, 2017

Under Article 8 EC migrant workers are entitled to equal treatment is respect of the exercise of trade union rights, including the right to vote and be eligible for the administration and management posts of a trade union.

Under Article 39 EC migrant workers have the same access to all rights and benefits in matters of housing and house ownership as do nationals of a host Member State.

Article 39 EC provides:

1. "Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other condition of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or publish health:
    a) To accept offers of employment actually made;
    b) To move freely within the territory of Member States for this purpose;
    c) To stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
    d) To remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission?
4. The provisions of this Article shall not apply to employment in the public service."

Secondary legislation adopted on the basis of Article 39(3) and Article 40 EC[56] gives effect to the principle of the free movement of workers enshrined in Article 39 EC. The most important secondary legislation is:

- Regulation 1612/68 of 15 October 1968 on the free movement of workers within the Community, which governs access to and conditions of employment;

[56]European Union, Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, Official Journal of the European Union, C321 E/1, (29.12.2006)<https://www.ecb.europa.eu/ecb/legal/pdf/ce32120061229en00010331.pdf> accessed 26 April, 2017

- Directive 2004/38/EC of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. The Directive consolidates much secondary legislation and introduces new solutions;
- Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The Regulation co-ordinates national legislation on social security rights of person who move within the EU in order to guarantee that all migrants have an adequate level of social protection and do not lose social security benefits when they move to another Member State.

The right of free movement of workers is not absolute. It suffers two exceptions expressly provided for in Article 39 EC[57]:

- First, restrictions may be justified on the grounds of public policy, public security and public health (Article 39(3) EC);
- Second, employment in the public service may be reserved to nationals of a host Member State (Article 39(4) EC);

Secondary legislation contains some further exceptions: for example, Article 39(1) of Regulation 1612/68 allows a Member State to impose genuine linguistic requirements on EC migrant workers. The third category of exceptions is based on the case law of ECJ. It concerns national measures which are indirectly discriminatory or which constitute non-discriminatory obstacles to the free movement of workers. These exceptions are based on overriding reasons of public interest, and are allowed if they pursue legitimate aims compatible with the EC Treaty and do not go beyond what is necessary and appropriate to achieve those aims.

2.2. EU free movement – Brexit

With the free movement of goods and people one of the most discussed issues during the EU referendum campaign, the teams at Newington and Camber have a look at the possible scenarios and what they indicate for business.

[57]Consolidated version of the treaty establishing the European Community, Official Journal of the European Communities, C325/33, (24.12.2002)<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 26 April, 2017

One of the most discussed issues during the UK referendum campaign was the free movement of labor and people – or immigration. The different choice of words which determine the Stay and Leave campaigns may be seen as more of a PR exercise, but for anybody trying to predict what might happen in the months and years of negotiations to follow, the otherness is important to understand. It matters for the simple ground that how the UK Government positions itself on this issue will be pointed for its negotiating stance and equally to the response that follows from the EU.

Those who dedicated for the UK to 'take back control' of immigration believe that they won the debate, and that the free movement of labor and people – which they believe is justification to 'uncontrolled' immigration – is not consistent with the new relationship that follows with Brussels. In her discourse at Conservative Party Conference in October, Prime Minister Theresa May seized this mind set when she said: "We are not leaving the European Union only to give up control of immigration again."[58]' In that speech, May said 'immigration' side by side 'control' on four separate occasions, but did not once touching the free movement of people and labor. Based on this marker in the sand, it is safe to suppose that the UK Government does not for free movement of labor and people – one of the four pillars of the UK's flowing relationship with the EU – to be included in any new arrangement.

Unfortunately, there are so many in Brussels and other European capitals who consider it is not feasible for the UK to extract one of the pillars of the EU's architecture without the risk of the whole thing eventually fall to pieces. German Chancellor Angela Merkel, for example, has mentioned that full access to the single market is impossible without accepting the free movement of people. Guy Verhofstadt, the European Parliament's chief Brexit negotiator, has set that "For everybody in the European Parliament, the four so-called fundamental freedoms that underpin the Union are key and you cannot start to make a distinction between them and to split them."[59]

With British and European politicians seeing the disputation in very different ways it is hard to forecast the model of a future attitude between the EU and the UK. Potential scenarios include the following:

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[58](n.d.) <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of> accessed 21 May 2017

[59](n.d.) <http://www.euractiv.com/section/uk-europe/news/verhofstadt-brexit-immigration-controls-risk-destroying-eu/> accessed 27 April 2017

- If the UK becomes member of the European Economic Area (EEA), it will not be admitted to set up any limitations to the free movement of labor.
- If the UK arrives at a decision to have bilateral close cooperation, similar to Switzerland, it will enjoy more freedom, but will still be due to allow the free movement of EU citizens.
- If the UK and the EU mislay a free trade agreement without provisions on free movement of labor, then the influx of low-skilled labor could drop to close to nil. There have to, be a higher inflow in high-skilled labor.

  In terms of working circumstances and social protection, there are two eminent issues: access to social benefits and the ceiling on working time.

The discussion around Brexit often focused on EU migrants' social profits rights. The February 2016 deal between the EU and the UK offered to go behind regulations on the agreement, of social security systems with regards to child benefits and the creation of an 'emergency brake' on migration. This process was proper to start in December but may no longer be mature a priority for the EU members given the rejection of the February package on 23 June. Political focus will likely shift elsewhere, for example to the "posted workers" Directive (96/71) where Germany, France, Poland and Belgium all have high stakes.[60]

Upon working hours, we capacity see the long-held UK aversion towards the Working Time Directive – which adjust the maximum hours to be worked per week and has been bitter excoriated in the UK because of the substantial costs to employers and in specific hospitals – translate into the EU legislation being out on the back burner, for reduction once the UK leaves the table.

Furthermore, the UK government can in the future make use of its regulatory independence from the EU to consider the Directive on Temporary Agency Work (2008/104/EC). This grants agency workers in the EU the idem pay and rights as full time employers. It has been take part in a violent struggle by the Confederation of British Industry, which described it as a "drag" one year after its realization.

[60]DIRECTIVE 96/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (EC) [16 December 1996]

Draw a conclusion, whatever methods is used, the discussion and debate around the movement of people will continue to be at the point of the negotiations and relationship between the EU and the UK. It is rational for employers to not only stay up to haste with the latest progress, but to pro-actively scenario plan, be ready for the influence of these changes on their organization, and lobby as needed to defend their trade interests and those of their staff.

2.2.1. Exceptions to the free movement of persons

Free movement of workers in the public sector remains different from free movement of workers in the private sector because of a number of legal aspects. Before analyzing the exceptions, it should be noted that the definition of worker in the sense of Article 45 TFEU includes civil servants and public sector employees with a work relationship under public law and public sector employees with a private law contract. As a matter of fact, the nature of the legal relationship between the employee and the employer is of no consequence in determining worker status[61].There is no specific EU legislation on employment in the public sector that develops the general rules on free movement of workers laid down in Article 45 TFEU and in secondary legislation (in particular Regulation 1612/68, Directive 2004/38 and Directive 2005/36[62]). The role of the ECJ is therefore decisive in the interpretation of EU law in this field.

Article 45(4) TFEU makes an exception to the general right to free movement of workers. It states that "The provisions of this Article shall not apply to employment in the public service". However, this exception is of limited scope: the ECJ has ruled that it only covers restrictions of access to certain posts in the public service to the nationals of the host Member State. For any other aspect of access to a post (e.g. recognition of qualifications) or determining working conditions (e.g. taking into account professional experience and seniority), equal treatment of migrant workers with national workers must be guaranteed. This means that once a post is open to migrant workers or if a

[61]European Commission Staff Working Document: free movement of workers in the public sector. Brussels, SEC(2010) 1609 final. P. 10, (14.12.2010) <http://ec.europa.eu/social/BlobServlet?docId=6400&langId=enaccessed> 27 April, 2017

[62]Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications, (7 September 2005) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0036:20110324:EN:PDF> accessed 28 April, 2017

returning migrant worker is applying for or occupying a post reserved for nationals, no different treatment can be justified by invoking Article 45(4) TFEU.

1. The exceptions to the free movement of workers are based on Article 39(4) and 45 EC, and can be summarized as follows:

Article 39(4) EC: the concept of "employment in the public service" applies to workers. "Employment in the public service" is within the scope of Article 39(4) EC if:

- The post concerned requires a special relationship of allegiance to the Member State on the part of the person occupying it, which only the bond of nationality ensures;
- The post involves the exercise of powers conferred by public law;
- The holder of the post is entrusted with responsibility for the general interest of the Member State.

A. Article 45 EC: the concept of "exercise of official authority" applies to self-employed persons (Case 2/74 Reyners[63]). Article 45 EC has been constructed by reference to Article 39(4) EC. The difference between Article 39(4) and Article 45 EC is that under Article 45 EC a Member State may rely on the exception when the holder of the post carries out activities connected with the exercise of official authority "even occasionally".

2. The exceptions based on the grounds of public policy, public security and public health. What includes public policy and public security is defined in Directive 2004/38/EEC, which contains the minimal procedural measures to protect migrant workers, discrimination in the areas of public policy, public security and public health. The Directive 2004/38/EEC provides the exceptions, where the employee of another member-state can be deported for violating security as a measure of preventive nature. These measures are conditioned by the existence of the serious threat that could risk the social interests of member-state. In the case Calfa, the Court of Justice of EC on the request of the person's decision for permanent removal from the Greek authorities, because the person was accused of using drugs, stressed that the expulsion of citizens of the Community action is justified only if it presents serious threats violating the fundamental interests of society. In this case, the Court concluded that the conditions of

[63](n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0002&from=EN> accessed 28 April, 2017

expulsion had not been met, so it cannot justify such restriction is inconsistent with democratic interests[64].

Endangering public policy and public security, as usually considered in terms of people's personal behavior, and measures taken on the basis of public policy and public security will be based solely on personal behavior in question. It is worth mentioning the case Bo signore, who was an Italian citizen who had gone to Germany for work. Three years later he injured his brother in an accident, using gun which possession was illegal. He was imprisoned because of negligence causing the stabbing and was then ordered to be deported. German court asked the Court of Justice of EU to answer the question whether Community law allows member-states to deport persons for preventive reasons or reasons must be specific to individual cases. To that question for preliminary issues the Court answered that: these measures should be based only on the personal conduct in question and previous accusation not present basis to undertake such measures. In fact, it should avoid the belief that the deportation of foreign workers, particularly those of the common market, represents the result of the expression of hostility, and xenophobia against foreigners.

B. Any measure taken by the host Member State restricting freedom of movement on the grounds of public policy and public security:
    - Must be based on personal conduct of the individual concerned. If relevant, this includes present membership of organizations but not past membership (Case 41/74 Van Duyn[65]);
    - Must not be based on previous criminal convictions of the person concerned unless they show that the individual concerned has the propensity to act in the future as he/she did in the past (Case 30/77 R v Bouchereau[66]);
    - Must not be a penalty or legal consequence of a custodial penalty unless it conforms with the requirements of Article 27,28,29 of Directive 2004/38/EC;

[64]Elezi Z., Azizi A., Steriopol O.D. Exceptions to the principle of free movement of workers in the European Community: the Case of Persons Infected with HIV/AIDS. The 7th edition of the International Conference: European Integration Realities and Perspectives. Legal Sciences, (2012) <http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1262/1170#> accessed 30 April, 2017
[65]Case 41/74 Van Duyn, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0041&from=EN> accessed 30 April, 2017
[66]Case 30/77 R v Bouchereau, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61977CJ0030&from=EN> accessed 30 April, 2017

- Must show that the personal conduct of the individual concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society of the host Member State (Case 131/79 Santillo[67]; C-493/01 RaffaeleOliveri[68]);
- Must not be based on reasons of a general preventive nature (Case 67/74 Bonsignore[69]);
- Must not be based on Economic considerations (Case 139/85 Kempf[70]);
- Must comply with the principle of proportionality (Case 352/85 Bond Van Adverteerders[71]);
- Must provide evidence that it has taken repressive or other effective measures to combat such conduct with regard to its own nationals (joined Cases 1 and 6/81 Andoui and Cornuaille[72]).

3. The individual nation states are signatories to Europe within the International Health regulations, but the capacity of states to undertake measures to control transmissible disease is constrained by their obligations to comply with EC law. Some, but not all states are signatories to the Schengen Agreement that provides further constraints on disease control measures. The porous nature of borders between EC member-states, and of their borders with other non-EC member-states, limits the extent to which it protects states are odious to their populations in a pandemic disease.

C. Any measures restricting freedom of movement on the ground of public health may be taken by the host Member State:

"1. The only diseases justifying measures restricting freedom of movement diseases with the scarf done Epidemic Potential as defined by the relevant Instruments of the World Health Organization and Other infectious diseases or contagious parasitic

[67]Case 131/79 Santillo, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61979CJ0131&from=EN> accessed 30 April, 2017
[68]C-493/01 Raffaele Oliveri, (n.d.) <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48717&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=691280> accessed 30 April, 2017
[69]Case 67/74 Bonsignore, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0067&from=EN> accessed 30 April, 2017
[70]Case 139/85 Kempf, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61985CJ0139&from=EN> accessed 30 April, 2017
[71]Case 352/85 Bond Van Adverteerders, (n.d.) <http://eur-lex.europa.eu/resource.html?uri=cellar:ae51e8cf-f21c-4d14-b93e-53f05d6e13d5.0002.06/DOC_1&format=PDF> accessed 30 April, 2017
[72]Cases 1 and 6/81 Andoui and Cornuaille, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0115&from=EN> accessed 30 April, 2017

diseases are the subject IF broke Protection of provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from date of the Arrival scarf not constitute grounds for expulsion from the territory.

3. Where there are indications Serious That it is necessary, Member States may, Within three months of the date of Arrival, require Persons entitled to the right of residence to undergo, free of charge, a medical examination to certify That broke are not suffering from Any of the Conditions referred to in paragraph 1. Such medical examinations required may not even do a Matter of routine."

The exception on the right of free movement of persons is also provided because of the protection of public health. Disease and disability that justify a refusal of entry into member-state reject the granting of residence permits are only those diseases that are listed in the Annex of this Directive and are listed in 1951 in World Health Organization (WHO):

A) Diseases that may endanger the public health:

- Diseases that subservient to quarantine, listed in Section 2 of the International Health Regulation of 25 May 1951,
- Tuberculosis of reparative system in an active state or trend of development,
- Syphilis, and
- Other infectious diseases or infectious verminous disease, if are subject to the provisions for

the protection of citizens of member-state.

B) Diseases and invalidities that may present threats to public policy or public security:

- Drug dependants,
- Hard mental disturbance Anxiety, state of psychotic disturbance with agitation, Delirium, hallucinations or confusion.

Illness and disability to be presented after the residence permit doesn't provide a legal basis for refusing renewal of residence permit or expulsion from the territory.

The decision to grant or refusal of residence permits should be taken up within six months from the date of application for obtaining the permit.

Member-State may require from the other countries of origin of person who has submitted the request to provide information to police for the person in question and the

answer must be given within period of two months. The person concerned will be informed officially for the decision regarding the permit application or his expulsion from the territory. At the same time, will set the exit deadline from the territory, which except in an emergency should not be shorter than 15 days. A person has the right to use the legal means regarding of decision to refuse the application for stay, or expulsion from the territory (Article 8).

3. ANALYSIS OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE ON THE FREE MOVEMENT OF PERSONS

3.1. European citizenship and restrictions on migration

European citizenship is largely based on the right of free movement and residence for citizens within the EU under Article 21(1) TFEU. This gives every Union citizen the right to move and reside freely in the Member States, subject to the limitations and conditions laid down in the Treaties and the measures adopted to give them effect. The importance of right of free movement has led the ECJ to develop a series of protections designed to ensure the right is not unduly restricted by the Member States so the citizen can move freely within Europe, particularly in granting residency and access to benefits for non-nationals through the equal treatment provision on the ground of nationality in Article 18 TFEU[73]. Even where European law restricts the free movement of European citizens, national authorities must apply these restrictions proportionately (Case C-413/99 Baumbast and R [2002] E.C.R. I-7091[74]). This extends to legislation which does not directly affect free movement rights but may affect a person's decision to move (Case C-406/04 DeCuyper [2006] E.C.R. I-6947[75]). In McCarthy, the ECJ stated that if the Member State applies a national measure which will cause serious inconvenience to the citizen in exercising his/her free movement rights or impeding the exercise of the right of free movement, it can only be justified on

[73]Lamont R. Free movement of persons, child abduction and relocation within the European Union, Journal of Social Welfare and Family Law, Vol. 34, No., (2 June 2012,) 231-244
[74]Case C-413/99 Baumbast and R [2002] E.C.R. I-7091, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0413&from=EN> accessed 2 May, 2017
[75]Case C-406/04 DeCuyper [2006] E.C.R. I-6947, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CC0287&from=EN> accessed 2 May, 2017

objective considerations and must be proportionate to the legitimate aim pursued (Case C-434/09 McCarthy, nyr5 May 2011, paras 51–52[76]).

In Baumbast, the Court found that limitations on free movement subordinate the right of residence for the citizen to the legitimate interests of the host Member State. As a result those limitations must be applied in accordance with the principle of proportionality so the national measure must be necessary and appropriate to achieve the aim pursued. The ECJ will have regard to the context of the restriction on free movement but Baumbast signals that the Court will use the principle of proportionality vigorously to defend citizenship rights. The ECJ will therefore police the enforcement of any rule or law that restricts the free movement of European citizens for a justifiable, legitimate aim and its proportionality. For a measure to be proportionate it "is necessary to establish, in the first place, whether the means it employs to achieve the aim correspond to the importance of the aim, and, in the second place, whether they are necessary for its achievement" (Case 66/82 Fromancais [1983] E.C.R. 395, para. 8[77]). Proportionality remains a rather vague concept. In cases such as Baumbast, the ECJ utilizes the citizenship provisions to change the implementation of European law by the Member States to ensure that there is appropriate compliance to protect the free movement rights, rather than mechanical rule enforcement.

The effect of the free movement of person's principle has been seen in family law on the registered surname of children who are nationals of one State, but resident in another Member State. Having to use a surname in the state of nationality that is different from that conferred and registered at birth in a host Member State was deemed a barrier to free movement (Case C-353/06 Grunkin and Paul [2008] E.C.R. I-7639, para. 21[78]). This places nationals at a disadvantage simply because they have exercised their right to reside in another Member State (para. 20). This case demonstrates the reach of the principle of free movement of persons into family law. Inconvenience and restrictions arising from family law following the cross- border migration of the individual can constitute a barrier to free movement which must be objectively justified

[76]Case C-434/09 McCarthy, nyr (5 May 2011,) paras 51–52, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0434&from=LT> accessed 3 May, 2017
[77]Case 66/82 Fromancais, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0066&from=EN> accessed 3 May, 2017
[78]Case C-353/06 Grunkin and Paul, (n.d.) <http://ec.europa.eu/dgs/legal_service/arrets/06c353_en.pdf> accessed 3 May, 2017

for ‘appropriate compliance’. This encourages questions over rules that take no account of the principle of free movement and the validity of the justifications offered for decisions refusing or encouraging international migration by family members.

It has been also suggested that the citizenship provisions could be used as a basis for a proportionality review of European legislation which affects or restricts fundamental rights, not just freedom of movement[79]. This sort of assessment would mean that, if the application of European legislation affected the fundamental rights of an individual, this interference must be objectively justified and proportionate. The law regulating cross-border family relationships may affect the individual fundamental rights of all family members, in particular under Article 8, European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), which protects an individual’s right to respect for his/her private and family life. The protection of fundamental rights by the EU and the ECJ has been fundamental rights guarantees which must be protected by European law. Article 7 of the Charter mirrors Article 8 ECHR in respecting private and family life, and Article 24 protects the right of the child to be heard in proceedings, to have decisions taken in his/her best interests and to have contact with both parents. Not only will the principle of free movement of persons be protected by the ECJ, but the fundamental rights of the parties in disputes affected by European law should also be protected.

The free movement of persons presents problems for family migration where one parent wishes to migrate with a child, disrupting contact between the child and the other parent, which may be achieved lawfully by applying to the court for an order for relocation, or unlawfully by abducting the child abroad. In McB, the mother had removed her children from Ireland to England, without the father’s permission or a court order. Since the father had no rights of custody over the children at the time of the removal, the migration was lawful (Case C-400/10 PPU McB[2010] E.C.R. I-8965, para. 64[80]). Despite the father’s interest in maintaining contact with his children, the Court stated that: “Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in

[79]Dougan M. The Bubble that Burst: Exploring the Legitimacy of the Case law on the Free Movement of Union Citizens, (2013) <http://repository.liv.ac.uk/1716786/> accessed 3 May, 2017
[80]Case C-400/10 PPU McB, (n.d) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81398&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=691819> accessed 5 May, 2017

Article 20(2)(a) TFEU and Article 21(1) TFEU" (para. 58). This statement indicates that Court regards family migration within

Europe as an exercise of individual citizenship rights, even where the exercise of these rights affects other family relationships. It is therefore necessary to examine whether any restrictions created by the law regulating the migration of children could be affected by the application of the principle of free movement of persons in the EU.

3.2. The judgements on free movement of workers

In the Case 36/74 Walrave and Kochthe Union Cycliste Internationale (UCI),an international sporting association which was neither a public body nor part of the state, imposed nationality requirements in respect of "pacemakers" and "stayers" in the world cycling championships[81]. Sport is an international phenomenon. Whilst regulatory control of sport is vested at national level, national associations are affiliated to regional and global regulatory bodies. For instance, in the case of cycling, the national associations are affiliated to the global regulator, the Union Cycliste Internationale. The Union CyclisteInternationale raised the jurisdictional question – in other words can certain prohibitions contained in the European Treaty invalidate a provision contained in the rules of an international association covering countries not subject to the jurisdictional reach of European law? If the answer to that question was affirmative, the Union Cycliste Internationale contended that the rules of the (at that time) nine European Economic Community (EEC) member states would invalidate a rule applicable to over 100 countries. The Advocate General dismissed this argument. Advocate General pointed out that sovereign states are entitled to enact that a particular type of provision in the rules of an international association of private persons shall be deemed unlawful in its territory and shall not be applied here[82]. The ECJ ruled that a nationality requirement was contrary to Article 39 EC since the prohibition of discrimination "does not only apply to the action of public authorities but extends likewise to rules of any nature aimed at regulating in a collective manner gainful

[81]Judgement of (12.12.1974)– Case 36/74, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0036&from=EN> accessed 7 May, 2017

[82]Anderson J. ASSER International Sport Law Series: Leading Cases in Sports Law, (2013) P. 54 <https://books.google.lt/books?id=6ZFEAAAAQBAJ&pg=PA54&lpg=PA54&dq=In+the+Case+36/74+Walrave+and+Koch&source=bl&ots=9Ey2hXTN2V&sig=KyVjPRNwoJj3hwiruEZy6jvrv-k&hl=lt&sa=X&ei=2ylWVc_jKMbfywPv2YCABw&redir_esc=y#v=onepage&q=In%20the%20Case%2036%2F74%20Walrave%20and%20Koch&f=false> accessed 10 May, 2017

employment and the provision of services". The jurisdictional question had another dimension. Given that the 1973 cycling world championship were held in Spain, a country not at that time a member of the EEC, the reach of European law would, on first glance, appear limited. However, the effect of the UCI's nationality requirement was felt within the territory of the EEC because the world championships determined the choice of a pacemaker in competitions staged at national level. Consequently, European law was engaged in circumstances where a Member State national was placed at a disadvantage, albeit by a rule regulating the conduct of a tournament held outside the EU.

The CJEU agreed with this view by finding that in relations to the applicability of European law to events of world-wide significance, such as the cycling championship in question, the rule on non-discrimination applied to all legal relationship in so far as those relationships, by reason either of the place where they were entered into or the place where they took effect, could be located within the territory of the EU. Walrave and Koch therefore laid to rest any notion that collective regulators, such as sports governing bodies, could escape the reach of European law by locating their headquarters outside the EU. It is of course well known that a number of sports governing bodies such as FIFA, UEFA and the International Olympic Committee are located in the non-EU Switzerland.

The Case was summarized as follows:

- The practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.
- The prohibition of discrimination based on nationality in the sphere of economic activities which have the character of gainful employment or remunerated service covers all work or services without regard to the exact nature of the legal relationship under which such activities are performed.
- The prohibition of discrimination based on nationality does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.

- Prohibition of discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.
- The rule on non-discrimination applies to all legal relationships which can be located within the territory of the Community by reason either of the place where they are entered into or of the place where they take effect.
- The first paragraph of Article 59, in any event in so far as it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.

In the Case C-281/98 Angonese v Casa de Risparmio di Bolzano SpA[83], MrAngonese, an Italian national whose mother tongue was German and who was resident in the province of Bolzano (Italy), when applying for a job in a private bank in Bolzano was required to submit a certificate of bilingualism issued by the local authorities. When MrAngonese's application was rejected because he did not submit the particular certificate even though he was totally bilingual and had other relevant linguistic qualifications, he argued that the requirements to evidence his linguistic knowledge solely by means of one particular certificate issued in a single province of a Member State was contrary to Article 39 EC[84].

The ECJ held that the requirements imposed by the private bank were within the scope of Article 39 EC. The ECJ held that: "Limiting application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application." Thus, the prohibition of discrimination applies to both agreements intended to regulate paid labor collectively and agreements between individuals. The Court constructed a bridge with Article 39 EC in the present case, emphasizing that "such considerations must, a fortiori, be applicable to Article 39 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination. In that respect it is designed to ensure that there is

[83]Angonese, Judgement of the Court, (6 June 2000) <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45323&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=339039> accessed 12 May, 2017

[84]Consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, C325/33, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 12 May, 2017

no discrimination on the labor market". At this point, everything was put in readiness for le moment supreme, which was not long in coming: "Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 39 of the Treaty must be regarded as applying to private persons as well".

The judgment was summarized as follows:

- Under the preliminary ruling procedure provided for by Article 177 of the Treaty (now, after amendment, Article 234 EC), it is for the national courts alone, which are seized of a case and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action.
- The prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty (now, after amendment Article 39 EC), which is drafted in general terms and is not specifically addressed to the Member States, also applies to conditions of employment fixed by private persons.
- Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.
- That requirement puts nationals of the other Member States at a disadvantage, since persons not resident in that province have little chance of acquiring the diploma, a certificate of bilingualism, and it will be difficult, or even impossible, for them to gain access to the employment in question. The requirement is not justified by any objective factors unrelated to the nationality of the persons concerned and in proportion to the aim legitimately pursued. In that regard, even though requiring an applicant for a post to have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as the certificate may constitute a criterion for assessing that knowledge, the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent

qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view. Therefore, the requirement constitutes discrimination on grounds of nationality contrary to Article 48 of the Treaty.

In the Case 35 and 36/82 Morson and Jhanjan[85], two Dutch nationals working and residing in the Netherlands wanted to bring their mothers of Surinamese nationality to reside with them in the Netherlands. Under Dutch law they were not permitted to do so. The ECJ held that EC law did not apply to cases which have no factor connecting them with any of the situations governed by EC law. Accordingly, as the matter was of a purely internal nature, EC law was not applicable.

Mrs Morson and Mrs Jhanjan had applied for permission to reside in the Netherlands in order to install themselves with their daughter and son respectively[86]. Since these were Dutch nationals who were employed in their own country and who had never exercised their right to freedom of movement within the Community, the cases had, as the Court said, no factor linking them with any of the situations governed by Community law. Accordingly, the Treaty provisions on freedom of movement and the rules adopted to implement them did not apply.

The Judgment of the Court summarized:

- The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law is not required to refer to the Court a question of interpretation as referred to in the first paragraph of that article if the question is raised in interlocutory proceedings and the decision to be taken is not binding on the court or tribunal which later has to deal with the substance of the case, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case even before the courts or tribunals of another jurisdictional system and that during such proceedings any question of

[85]Judgement of (27.10.1982) – joined cases 35 and 36/82, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0035&from=EN> accessed 15 May, 2017
[86]Alexander W. Free movement of non-EC Nationals: a review of the case-law of the Court of Justice. P. 55 (n.d.) <http://ejil.org/pdfs/3/1/1180.pdf> accessed 15 May, 2017

Community law provisionally decided in the summary proceedings may be re-examined and be the subject of a reference to the Court under Article 177.

- The Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law. It follows that Community law does not prohibit a Member State from refusing to allow a relative, as referred to in Article 10 of Regulation No 1612/68 of the Council, of a worker employed within the territory of that State who has never exercised the right to freedom of movement within the Community to enter or reside within its territory if that worker has the nationality of that State and the relative the nationality of a non-member country.

In the Case C-208/05 ITC Innovative Technology Center[87] it was stated that under German legislation persons entitled to claim unemployment benefit who had not found a job after three months of collecting such benefit were entitled to a recruitment voucher, which constituted an undertaking made by the German Government to pay a private sector recruitment agency the amount stated on the voucher in a situation where the agency found employment for the voucher-holder. The voucher specified that the holder must-be placed in employment subject to compulsory social security contributions for a minimum of 15 hours per week. Under this scheme Mr Halacz, a voucher-holder, instructed a German private sector recruitment agency, ITC, which found him employment in The Netherlands subject to compulsory social security contributions in The Netherlands and for more than 15 hours a week. When ITC asked the relevant Garman authority for payment under the recruitment voucher, this was rejected on the ground that Mr Halacz had not been placed in employment subject to compulsory social security contributions in Germany. ITC challenged the refusal before the German Social Court in Berlin, which referred for a preliminary ruling to the ECJ the question of compatibility of the German legislation with Article 39 and 49 EC[88].

[87]ITC, Judgement of the Court (Third Chamber), (11 January 2007,) <http://curia.europa.eu/juris/showPdf.jsf?docid=64739&pageIndex=0&doclang=EN&dir=&occ=first&part=1&cid=340690> accessed 17 May, 2017

[88]Consolidated version of the Treaty establishing the European Community, Official Journal of the European Communities, C325/33, (n.d.) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> accessed 18 May, 2017

One of the main issues was whether a private sector recruitment agency could rely on Article 39 EC.

The ECJ held that a private sector recruitment agency may, in some circumstances, rely on Article 39 EC. First, the ECJ gave consideration to the natural and ordinary meaning of Article 39 EC and started that nothing in the wording of that article indicates that persons other than workers may not rely upon it. This was not very convincing, since there was equally no mention of the possibility of persons other than workers relying on it. Consequently, the Court turned to schematic and teleological interpretation, it stated that bearing in mind that ITC acted as a mediator and intermediary between jobseekers and employers, and thus represented the applicant and sought employment on his behalf; it is possible that it may, in certain circumstances, rely on Article 39 EC. Consequently, the ECJ did not extend the scope of Article 39 EC to all activities of private sector recruitment agencies, but started that in some circumstances they may rely on the rights granted directly to workers by Article 39 EC – exactly how far the principle goes will depend on future case law. The fact that raised after the judgment were:

- It is possible that a private-sector recruitment agency may, in certain circumstances, rely on the rights directly granted to Community workers by Article 39 EC, where that agency acts as a mediator and intermediary between those applying for and those offering positions of employment and a recruitment contract concluded with a person seeking employment confers on such an agency the role of intermediary, inasmuch as it represents the applicant and seeks employment on his behalf. In order to be truly effective, the right of workers to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State without discrimination must also entail as a corollary the right of intermediaries, such as a private sector recruitment agency, to assist them in finding employment in accordance with the rules governing the freedom of movement for workers.
- Articles 39 EC, 49 EC and 50 EC prohibit national legislation which provides that payment by a Member State to a private-sector recruitment agency of the fee due to that agency by a person seeking employment in respect of that persons recruitment is subject to the condition that the job found by that agency be subject

to compulsory social security contributions in that State. In so far as national legislation provides that a Member State will pay a fee which is owed to a private-sector recruitment agency only where the employment found by that agency is subject to compulsory social security contributions in that State, a person seeking employment for whom that agency has found a job subject to compulsory social security contributions in another Member State is placed in a less favorable situation than if the agency concerned were to have found a job in that Member State, because he would, in the latter case, have been entitled to payment of the fee due to the recruitment agency in respect of his recruitment. Such legislation thus creates an obstacle to the free movement of workers which is capable of discouraging persons seeking employment, particularly those whose financial resources are limited, and, accordingly, private sector recruitment agencies, from looking for work in another Member State because the recruitment fee will not be paid by the Member State of the person's origin. Moreover, such legislation gives rise to a restriction on the freedom to provide services based on the place where that service is provided, since it is capable of affecting the recipient of the services, that is to say the person seeking employment, who must himself, where the job found by the private-sector recruitment agency is in another Member State, pay the fee due to the agency. As regards the private-sector recruitment agency, which is the provider of the services, the opportunity to extend its activity to other Member States will be restricted, since the use by many employers of the services of such an agency will largely be dependent on the existence of the system in question, and it will also be by virtue of that system that the agency will be able to find a job for a person seeking employment in another Member State without incurring the risk that it will not be paid. The fact that such a system is designed to improve workers' recruitment and to reduce unemployment, to protect the national social security system or to protect the national labor market against the loss of qualified workers cannot justify such an obstacle. By systematically refusing the benefit of that system to persons seeking employment who are recruited in other Member States, the legislation in any case goes beyond what is necessary to attain the objectives pursued.

- It is for the national court, to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to display any provision of domestic law which is contrary to those provisions.

3.3. Limitations to free movement of workers

The most well-known limitation to the free movement of workers is that Member States' authorities are allowed to restrict certain posts to their own nationals. Article 45(4) TFEU states that "the provisions of this Article shall not apply to employment in the public service". This is an exception to the general rule of free movement of workers and must therefore be interpreted restrictively.

What is conceived as being part of the "public service" and "public administration" (terminology of Article 45 (4) TFEU in several other language versions) has always varied considerably from one Member State to another. If the EU were to accept that each Member State applies its own definition of "employment in the public service", the meaning of Article 45(4) TFEU, and thus the scope of its application, would vary considerably from one Member State to another. Such variation would be contrary to the principle of equality between Member States and to the principle of uniform application of EU law which is inherent to the system of the Treaties.

The CJ therefore formulated its own criteria for the concept of "employment in the public service" to be applied in all Member States in the same way and which restrict possible limitations to the principle of free movement of workers.

3.4. Employment in the public service, according to the Court of Justice

In its judgment of 1980 in case 149/79 (Commission v. Belgium)[89] the ECJ held that Article 45(4) TFEU covers "posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume

[89]Commission of the European Communities v Kingdom of Belgium, (n.d.) <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90501&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=691880> accessed 20 May, 2017

on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality".

In subsequent case law on Article 45(4) TFEU, the ECJ has always confirmed this first interpretation and made it clear that both criteria are not alternative but cumulative (exercising of powers conferred by public law and safeguarding general interests). The ECJ ha ruled, for example, that jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be reserved for nationals of the host Member State. Criteria must be assessed on a case-by-case basis with regard to the nature of the tasks and responsibilities involved: this is the so-called functional approach. It is important to always bear in mind the purpose of the exception, i.e. whether the post requires "a special relationship of allegiance".

In 2001 the ECJ held that the exception of Article 45(4) TFEU cannot be applied to private sector posts, whatever the duties of the employee. However, in 2003 the ECJ gave an additional interpretation of the application of Article 45(4) TFEU to private sector posts to which the State assigns public authority functions. The judgments concern the posts of captain and chief mate on private sector ships flying the Member States' flags. According to the ECJ, a Member State may reserve those posts for its nationals only if the rights under powers conferred by public law on masters and chief mates are actually exercised on a regular basis and do not represent a very minor part of their activities.

It is very important that when a post is reserved for nationals under Article 45(4) TFEU as interpreted by the ECJ, this must not mean that EU law on free movement of workers does not apply at all. When a national, after working in another Member State, returns to work in the public sector of his own Member State in a post reserved for nationals, EU law applies in relation to all the other aspects of equal treatment as regards recruitment and working conditions.

Third-country national family members of a Union citizen who has the right of residence in another Member State are also entitled to have access to posts in the public sector of the host Member State. Article 23 of Directive 2004/38[90] guarantees these

[90]Directive 2004/38/EC of the European Parliament and od the Council of (29 April 2004,) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF> accessed 22 May, 2017

family members the right to take up employment or self-employment there. Article 24 of Directive 2004/38 provides that Union citizens and their family members' resident in the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law. Therefore family members (including those who are nationals of a third country) should have access to posts in the public sector in the same way as the EU migrant workers.

In the Case 41/74 Van Duyn[91], a Dutch national, was a member of the Church of Scientology. She wanted to enter the UK to take up employment with the Church of Scientology in the UK but was refused entry. She brought an action against the UK Home Office. The High Court referred, inter alia, the following questions to the ECJ: whether membership of organizations should be considered as "personal conduct" within the meaning of Article 3(1) and if so, whether such conduct must be illegal in order to justify the application of the public policy exceptions.

The ECJ answered that past association cannot count as personal conduct but present membership of an organization, being a voluntary act of the person concerned, counts as "personal conduct". The activities of the Church of Scientology were not illegal in the UK. However, the UK Government considered them as socially harmful. The ECJ held that it is not necessary that the conduct in questions is illegal in order to justify exclusion of EC nationals from other Member States in so far as a Member State makes it clear that such activities are "socially harmful" and has taken some administrative measures to counteract the activities.

Also, in the case Van Dyne the Court of Justice of EC was interpreting the exclusion from the freedom of movement of workers due to the protection of public policy, as a discretionary right of member- state. Indeed, the United Kingdom authorities refused to permit entry into its territory to a German lady, that wanted to work at a Scientology Church, organization which activities was considered by the state as harmful. Longtime states undertake administrative measures to eliminate the organization's activities, but because of fact that UK could not deport its citizens who worked in scientology church, the Court of Justice of EC accepts the deportation of foreigners for the same activities on the grounds of protecting public policy. The case

[91]Judgement of (4.12.1974) – Case 41/74, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61974CJ0041&from=EN> accessed 25 May, 2017

drew a critical comment to the recognition of inequality in the treatment of local citizens and foreign nationals. If such activities are indeed oppose to the public policy that results in undertaking measures to deport foreign citizens or their refusal to enter in the territory of the State, without a doubt that action must be taken against own citizens engaged in such activities. The court stated that there is an inevitable discrimination between the local citizens and nationals of other countries and must be taken restrictive measures against activities that endanger public policy.

The Community law doesn't specify what measures should be taken against member-state citizens, when they should protect the public interest. More logical measure that can be taken is the deportation, but it is calculated as the last, when other options have been expended to discipline the person and to harmonize the actions of current regulations.

The Judgment of the Court was as stated below:

- As the limitations to the principle of freedom of movement for workers which Member States may invoke on grounds of public policy, public security, or public health are subject to the control of the courts, the proviso in paragraph (3) does not prevent the provisions of Article 48 from conferring on individuals rights which they may enforce in the national courts and which the latter must protect.
- It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directives, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before the national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine in every case whether the nature, general

scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

- Article 3 (1) of Council Directive No 64/221[92] of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health confers on individuals rights which are enforceable by them in the national courts of a Member State and which the latter must protect.
- The concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.
- Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 must be interpreted as meaning that a Member State, imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with the same bodies or organizations.

[92]Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, (25 February 1964)<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31964L0221:EN:HTML> accessed 26 May, 2017

CONCLUSIONS

After the analysis of theoretical aspects of free movement of persons, the analysis of legal acts and study of the cases of the European Court of Justice, it is concluded that:

1. The right of free movement of persons within the European Union is largely based on the citizenship. This means that each Union citizen have the right to move and reside freely in the Member States, but it is also a subject to the limitations and exceptions.
2. From the historical point of view, free movement of persons was originally focused on those who were economically active, it means workers and self-employed persons, because at the time of creating Single Market it was intended to support the development of an EU labor market where workers could move across the EU to fill skills and employment gaps and improve their own economic opportunities. After the Maastricht Treaty, the free movement of workers was complemented by free movement of non-economically active persons. Therefore nowadays free movement of persons is described in two forms: in the form of workers and in the form of non-economically active persons.
3. The research of the Thesis showed that there are two main Treaty-based exceptions to the free movement of persons. The first allows a host Member State to restrict access of EC migrant workers to "employment in the public service" (under Article 39(4) EC) and of self-employed persons to posts where it is necessary for the holder to "exercise official authority" (under Article 45 EC). The second applies to all persons exercising their right to free movement within the EU and based on the grounds of public policy, public security and public health.
4. The European Court of Justice has interpreted that the Member States can autonomously limit the rights of free movement only within and with accordance to the European Union law.

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Annex

Master Thesis

„The Freedom of Movement of Persons in the EU and its Present Major Obstacles“

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Language

☒ German

☐ English

Die Freizügigkeit ist eine der vier Grundfreiheiten des Binnenmarktes - die anderen sind der freie Kapitalverkehr, Waren und Dienstleistungen. Diese Freiheiten wurden 1957 im Vertrag von Rom verankert, in dem der Vorgänger der EU, die Europäische Wirtschaftsgemeinschaft (EWG) gegründet wurde. Die Freiheit der Bewegung begann als eine Möglichkeit, Menschen zu ermutigen, nach dem Zweiten Weltkrieg zu reisen, um Arbeitsplätze zu füllen. Die Idee war, dass eine mobile Belegschaft dazu beitragen würde, die Volkswirtschaften der sechs Gründungsmitglieder der EU zu stärken und vielleicht den Konflikt auf dem Kontinent zu entmutigen. Fast 60 Jahre später ermöglicht das System den Bürgern, überall in der Europäischen Union zu arbeiten, zu studieren und in den Ruhestand zu ziehen - plus Norwegen, Liechtenstein und Island, von denen alle drei dem Europäischen Wirtschaftsraum (EWR) beigetreten sind und von den vier Freiheiten regiert werden. Es gibt auch die Schweiz, die ein bilaterales Abkommen mit der EU hat, wenn es um Grenzkontrollen geht. Diese Abschlussarbeit besteht aus drei Hauptteilen. Das erste Kapitel gibt einen Überblick über das

theoretische Konzept der Freizügigkeit. Dieser Teil besteht aus zwei Abschnitten und drei Unterabschnitten, die den freien Waren-, Dienstleistungs- und Kapitalverkehr beschreiben. Der Abschnitt 1 erörtert die Geschichte eines Binnenmarktes, definiert die Unterschiede zwischen dem internen, dem einheitlichen und dem gemeinsamen Markt, erklärt die Art der vier Freiheiten der EU, während Abschnitt 2 vier Freiheiten der EU erörtert. Kapitel 1 enthält Hintergrund für eine detaillierte Analyse der Freizügigkeit von Personen. Die Forschung zeigt auch, dass die Freizügigkeit keine negativen Auswirkungen auf die Beschäftigungsquoten und die Löhne der Staatsangehörigen des Gastlandes hatte. Die Arbeitnehmer aus den neueren EU-Ländern nehmen in den Bereichen Landwirtschaft, Pflegedienste, Gastronomie, Reinigung und Bau in der Regel niedrigere Qualifikationen ein. In der Praxis setzt dies in die Konkurrenz um Arbeitsplätze mit gering qualifizierten Arbeitskräften von außerhalb der EU und nicht von Staatsangehörigen. Die Beschränkung der Freizügigkeit könnte zu einem Mangel an Arbeitnehmern in bestimmten Sektoren führen. Freizügigkeitsrechte wurden nicht nur von Bürgern aus neueren EU-Mitgliedsländern genutzt. Die Forschung zeigt, dass die Freizügigkeit eine Zwei-Wege-Straße ist. Auch die These berührt die heutzutage Probleme wie Brexit. Die Freizügigkeit wird im Vereinigten Königreich nach dem Brexit-Referendum weiterhin diskutiert, und das EWR-Abkommen wird häufig in Bezug auf die künftige Beziehungen des Vereinigten Königreichs mit der EU genannt. Dieser Posten beabsichtigt, zwei Unterschiede im Recht auf Freizügigkeit von Personen in einem Vereinigungsmodell mit der EU außerhalb der Mitgliedschaft zu vermitteln - das EWR-Abkommen im Vergleich zum Recht auf Freizügigkeit in der EU. Das EWR-Abkommen erweitert den EU-Binnenmarkt um drei der Parteien der Europäischen Freihandelsassoziation (EFTA) - Norwegen, Island und Liechtenstein - aber ohne Mitgliedschaft in der Union. Die Ausweitung des Binnenmarktes bedeutet grundsätzlich parallele Rechte und Pflichten im Bereich der Freizügigkeit (einschließlich des Rechts auf Freizügigkeit) und des Wettbewerbsrechts. Dennoch sind bestimmte Erzeugnisse (Fisch und landwirtschaftliche Erzeugnisse, siehe Artikel 8 Absatz 3 EWR) und die Steuerharmonisierung außerhalb des Geltungsbereichs des Abkommens.