

THE COMPATIBILITY BETWEEN THE DECISIONS OF SUSPENSION OF THE RIGHT OF ROMANIAN CITIZENS TO MOVE FREELY AND THE COMMUNITY REGULATIONS

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The Community legislation doesn't set measures to restrict the right to move freely, the countries having a large freedom to appreciate this subject, on the condition that the measures taken should respect the requirements of article 39 of the EU Treaty and of article 27 of 2004/38/EC Directive, both regarding the justifying reasons and the proportionality of the measure with the purpose.

As it follows, the Romanian judge who has been notified about an action of suspension of the right of free movement abroad, checking the compatibility between the internal law and the community regulations on the subject, has to analyse if, related to the particularities of the case, the person who is about to be subject of such a measurement, represents a danger to the order, safety or public health both for the state in which he was forbidden to travel (following the decision of a court of law to restrict his/her right) and especially for the other states and if that measure respects the principle of proportionality.

Key-words: the right of free movement, the suspension of the right of free movement, justifying reasons, the principle of proportionality.

The accession of Romania to the European Union, legally meant the obligatory and prior application of the community law. According to article 148, line 2 of the Romanian Constitution “following the accession, the provisions of the constitutive treaties of the European Union, as well as the other obligatory community regulations are prior to the contrary dispositions from the internal laws, respecting the provisions of the accession documents”.

Consequently, after the first of January 2007, the national judge has become a community judge, having the responsibility to analyse the compatibility between the national law and the community law and to apply the community law, due to the principle of the direct effect of the community law¹ and to its supremacy².

Regarding the restriction of the right of the Romanian citizens to circulate freely in the Union area, article 39, line 2 of the European Committee Treaty³ (the former article 48 of the EEC Treaty) acknowledges the right of the citizens of the European Union to enter and settle freely in the member states under the same conditions as the nationals of the host

¹ Case 26/62, Court's decision from 05.02.1963 Van Gend en Loos c. der Belastingen Administration ;

Case C 8/81, Court decision from 19.01.1982, Becker v. Finanzamt Munster – Innenstadt

² Case C6/64, Court decision from 13.07.1964 Costa c. E.N.E.L

³ According to article 39 (former article 48) line 2 of the Maastricht Treaty regarding the foundation of the European Community, *free circulation implies the elimination of any discrimination on grounds of citizenship among the workers of the member states, regarding the employment, payment and other working condition.*

country, because the Treaty establishes the term “citizen of the Union”⁴. The Maastricht Treaty acknowledges the right of the citizens, including the Romanian citizens to settle freely on the territory of another member state and to initiate and manage business in that state.⁵

This right to move freely of the Romanian citizens can be limited only for reasons of public order, public security and health⁶.

Also, article 27 of Directive no 2004/38/EC⁷, regarding the right of free circulation and stay on the territory of the member states for the Union citizens and their families, establishes the right of the member states to *restrict* the free circulation of the Union citizens and of their family members, regardless their nationality, only for reasons of public order, public security or public health.

The restriction measures have to respect the proportionality and be exclusively based on the personal behaviour of the person in question. This behaviour must represent a real threat, present and dangerous enough to justify the measure of restriction of the right to circulate freely.

The internal regulations which establish the restriction of the right of the Romanian citizens to circulate freely abroad fall within law no 248/2005⁸. Article 23 of this law establishes the measures that restrict this right, respectively restriction and suspension.

According to article 3, line 2 of the Law, the suspension of the exercise of the right to circulate freely abroad represent *the temporary interdiction to leave the Romanian territory*, and the restriction of this right represent, according to line 3 of the same article *the temporary interdiction to travel to certain states*.

The cases of suspension of this right are established by article 40 of Law no 248/2005. According to this legal text, the exercise by a person of the right to circulate freely abroad can be suspended under the following conditions:

- a) is charged or convicted in a penal cause and a preventive measure has been taken, under the terms of the Penal Code;
- b) was convicted and has to execute a punishment which deprives him/her of his/her freedom;
- c) is admitted into a re-educational centre or into a medical-educational centre, under the terms of the penal law;

⁴ Article 17 of The Maastricht Treaty has established the citizenship of Union, stating that *any person who has the citizenship of a member state is the citizen of the Union. Union citizenship does not replace the National citizenship, it merely completes it.*

⁵ Manolache, O, *European Law*, All Beck Publishing House, the fourth edition, Bucharest, 2003, pages 247-248; Cotea, F. *Business Community Law*,.....

⁶ Article 39, line 3 of the EC Treaty talks about “restrictions justified by reasons of public order, public safety and public health”.

⁷ According to article 27 of the Directive no. 2004/38/EC/29.04.2004, *the member states can restrict the freedom of movement and staying of the citizens of the Union and of their family members, no matter their citizenship, for reasons of public order, public safety or public health. These reasons can not be invoked in economical purposes (line 1). The measures taken out of reasons of public order or public safety must respect the principle of proportionality and be exclusively based on the behaviour of the person in case. The prior penal convictions can not justify by themselves such measures. The behaviour of the person in case must constitute a real threat, present and serious enough for a fundamental interest of the society. Motifs which are not directly connected to the case or which are connected to reasons of general prevention are not acceptable (line 2)*

⁸ Law no. 248 from the 20th of July 2005, regarding the free circulation of Romanian citizens abroad was published in the Official Monitor no. 682 from the 29th of July 2005

d) has not respected the measure of restriction of the right to circulate freely abroad, under the terms of the current law.

Regarding the first three cases in which the suspension of the right to circulate freely can be disposed, the reason of the law is in concordance with the community legislation, because the measure to restrict the free circulation is justified on grounds of public order and safety, the Romanian citizens being legally deprived of their freedom or having to execute an imprisonment.

On the other hand, some remarks must be made regarding the concordance of the internal law with the community law in the situation described under the letter “d” of article 40, which establishes that the measure of suspension of the right to circulate freely abroad is taken if the Romanian citizen has not respected the measure of restriction of the exercise to circulate freely abroad, disposed under the terms of the present law.

Analysing the concordance of the internal dispositions respectively article 4, letter “d” of Law 248/2005 together with article 3 of the same normative act, with the provisions of the Directive 2004/38/EC, can be concluded, on the one hand, that the right to circulate freely abroad of the Romanian citizens is not an absolute one, article 27 of the Directive establishing the possibility of its restriction and, on the other hand, that the Directive does not establish concretely measures of restriction, but only the reasons for which the restriction of this right can be disposed.

The result is that the member states have the obligation to establish concretely the measures of restriction, but *in such a way that the measures should be able to be disposed solely if the motifs established by the Directive are respected*. As it follows both the restriction and the suspension of the exercise of the right to circulate freely can be taken if two conditions are respected at the same time:

- 1 the restriction is imposed by motifs *of public order, public safety or public health*
- 2 the principle of proportionality between the measure disposed and the followed purpose

Consequently, the internal judge can dispose both the restriction and the suspension of this right on the territory of a state or abroad if he/she appreciates the presence of the two requirements at the same time.⁹

It must be noticed that the community law does not establish measures to restrict the right to circulate freely, the states having a large space of appreciation of these measures. It is necessary, though, that the measures taken by the member states in this direction should respect the requirements of the EC Treaty and the Directive 2004/38/CE, both regarding the justifying motifs, and the proportionality of the measure with the followed reason.

From the economy of article 3, line 2 of Law no. 248/2005 results that the suspension of the right to circulate freely has as an object the restriction of the right to exit the country, consequently of *the right to travel abroad*. As seen by the Romanian lawmaker, the suspension is applied whenever a Romanian citizen has broken the measure of restriction of the exercise of this right.

Article 27, line 2 from Directive 2004/38/EC stipulates that *the measures of restriction of the right to circulate freely, taken from reasons of public order and public safety, must respect the principle of proportionality and be based exclusively on the*

⁹ For a more detailed analysis, see Tudorel Stefan, *An introduction in community law*, C.H. Beck Publishing House, Bucharest, 2006, pages 135-137

personal behaviour of the person in case...The personal behaviour of the person in case must represent a real threat, present and serious enough against a fundamental interest of the society. Justifications which do not take into consideration the particularities of the case or which are based on considerations of general prevention are not acceptable.

Consequently, the judge which receives a complaint through which the suspension of the right to circulate abroad is requested has to analyse if, related to the particularities of the case, the citizen who is the subject to the complaint represents a danger for the public order, safety or health both for the state in which he was forbidden to travel (following a court decision that restricts his right), and, especially for the other states.

Only with the condition that the proof of the fulfilment of the justifying reasons under the terms of the Directive is made it can be considered that the measure of the suspension of the right to circulate freely abroad is proportional to the purpose of the community regulations.

Otherwise, unless the proofs shown lead to the conclusion that the person's behaviour represent a threat to the values defended by the Directive, the measure of suspension of the right to travel abroad appears to be disproportional. In this situation, the measure of suspension of the right to circulate freely should be limited only for the state on the territory which the right to circulate freely has previously been restrained. The fact is, that in this case, the content of these two restrictive measures established by Law no 248/2005 (the restriction and the suspension of the right to circulate freely) is identical and, from a practical point of view, the suspension is transformed in the measure of restriction of the right to circulate freely, but only applying this way the disposition of the domestic law its conformity to the community law on the subject is being realised.

In the judiciary practice¹⁰, the disposition in article 40, letter "d" of Law no. 248/2005 has been interpreted in this way, the courts of law considering that in the case of the measure of the suspension of the right to circulate freely abroad, the conditions established by the Directive, both regarding the justifying motifs and related to the proportionality of the measure with he purpose followed, must be fulfilled.

¹⁰ Through decision no. 6207/2008, taken by the Supreme Court- The Civil Section and of Intellectual Property- it was noticed that it wasn't proved that the public order, safety and health are affected by he behaviour of the accused, reason for which the measure of suspension of the right to circulate freely abroad is disproportional with the requests of the Directive, and the dispositions of article 40 of Law no. 248/2005 are contrary to the community regulations.

Through the civil decision no. 104/A/2010, The Court of Appeal Alba- Civil Section- has also noticed that, related to the particularities of the deed committed by the accused (the gravity of the deed, the reduced punishment, the circumstances in which the deed was committed) do not justify the suspension of her right to circulate freely abroad, but only on the territory of the state from which she was returned.