

THE MAIN JUDICIAL IMPEDIMENTS IN THE TRANSPOSITION OF THE DIRECTIVE 2004/38/EC

Lecturer **Mihaela Cărăușan**, PhD
National School of Political Studies and Public Administration
Faculty of Public Administration

Abstract:

Through its policy, the EU plans to create a European area of freedom, security and justice where there is no need to check on persons at internal borders; European citizens benefit from the fundamental right to move and settle wherever they wish.

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States encountered difficulties in implementation at national level. As stipulated in the Directive, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 April 2006. But, from twenty-seven Member States only eleven (Austria, Belgium, Cyprus, Czech Republic, Italy, Lithuania, Poland, Romania, Slovak Republic, Slovenia and Spain) could respond to the questionnaire submitted by the European Parliament, through the Committee on Civil Freedoms, Justice and Home Affairs (LIBE), that they accomplished entirely or part of the transposition process. Given this state of fact, we will promote a study which will review the legal impediments that have led to the adoption in 2008 of European Commission report, report that endeavour to draw attention to the fundamental role of the Directive.

By the adoption of Directive 2004/38, European law has made a step forward the third millennium law, giving to its citizen's one of the fundamental freedoms - the freedom of movement. We must recognize that now the law cannot be conceived without the existence of few 'global freedoms', freedoms granted to all without discrimination.

Keywords: freedom of movements, European citizenship, member state, family member

Through its policy, EU wants to create a European area of freedom, security and justice. In such an area, the citizen's control at the internal boarder is no longer needed because they are the fundamental right holder - the right to move freely and establish their residence were they want. Mobility of persons is one of those conditions necessary to promote and sustain a competitive system among the member states and also among them and the third countries.

The free movement of citizens constitutes one of the fundamental liberties of the internal market, introduced for the benefit of the EU citizens, of the member states and for the competitiveness of the European economy. This right is mentioned in the EU Fundamental Rights Charta – art. 45. At the beginning of the European project only the employers had the right of free movement, in time, this right has been extended to all EU citizens. The right can be exercised under the reserve of its limitations and conditions which have been set up in the treaty and in its rules for application. Such limitations and conditions are established in Directive 2004/38/EC.

Starting with the existence of the European citizenship which gives to its holder fundamental rights and duties, Directive 2004/38/EC establishes a unique judicial instrument for the free movement of EU citizens and their family members. The Directive sets up administrative procedures and gives to the citizens and their family members the right for permanent stay after five years of staying in the host member state. Under some conditions, the directive extends this right to declared partners for family reunion.

Prior to the adoption of the Directive the free movement right was regulated through different disposition of the EU, and for this, the Directive set up a Unitarian system for the exercise/implementation of this right.

In the field regulated by the Directive we can find some references in documents such as:

- Council Directive no. 64/221/EEC of 25 February 1964 on coordination of special measures concerning the movement and residence of aliens, justified on grounds of public order, public security or public health;
- Council Directive no. 72/194/EEC of 18 May 1972 extending the scope of the Directive of 25 February 1964 on workers who exercise their right to remain in a Member State after having been employed there;
- Council Directive no. 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community of nationals of Member States on the establishment and provision of services;
- Council Directive no. 75/34/EEC of 17 December 1974 on the right of nationals of a Member State to remain in the territory of another Member State after carrying out independent activities on this territory;
- Council Directive no. 75/35/EEC of 17 December 1974 extending the object of the Directive no. 64/221/EEC of February 25, 1964 at the nationals of a Member State exercising the right to remain in the territory of another Member State after carrying out independent activities on this territory;
- Council Directive no. 90/364/EEC of 28 June 1990 on the right of residence;
- Council Directive no. 90/365/EEC of 28 June 1990 on the right of residence of those employed and those who perform independent activities, who ceased work;
- Council Directive no. 93/96/EEC of 29 October 1993 on the right of residence for students;
- Council Directive no. 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families;
- Regulation no. 1251/70/EEC of 29 June 1970 on the right of workers to remain in a Member State after having been employed in that State;
- Council Regulation no. 1612/68/EEC of 15 October 1968 on the free movement of workers within the Community.

Taking into consideration that it is applied over all EU citizens and not just over those who provide economic activities, the Directive was named in the doctrine “the citizenship directive¹”.

In EU, the free movement of persons has also been the subject of some limitations established by the European Court of Justice (Case 55/94, Gebhardt, October 30, 1995) as “national measures susceptible to prevent and to make less attractive the exercise of the fundamental rights guaranteed by the Treaty”. In this sense, the General Attorney Cosmas remarked that the exercise of the free movement can be limited as long as the reasons are justified and doesn’t have to affect the entire rights system of EU citizens.

¹ C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press, 2004.

The Directive had some difficulties in its transposition at the national level; the transposition term was established at 30 of April 2006. Only 11 states from 27 members' states (Austria, Belgium, Cyprus, Czech Republic, Italy, Lithuania, Poland, Romania, Slovak Republic, Slovenia and Spain) could respond to the survey given by the European Parliament through the Committee of Civil Liberties, Justice and Home Affairs (LIBE) that have accomplished the transposition process (wholly or partially). Taking this situation into consideration, our study is going to analyse the judicial impediments which lead to the adoption of the European Commission Report in 2008², report which brought the attention to the fundamental role of the Directive. The report presents a picture of how the Directive 2004/38/EC was transposed into national law and how it was applied in everyday life. Realizing this report, the Commission accomplishes its obligation under Article 39 (1) of the Directive according to which "she should prepare a report on the implementation of the directive and to submit to the European Parliament and Council"³.

In relation to the Directive, a study was conducted during June 2008 - February 2009, entitled "Comparative study on application of Directive 2004/38/EC on the rights of Union citizens and their family members to move and reside freely within Member States", requested by the Committee on Legal Affairs and developed by the European Citizen Action Service (ECAS). The ECAS study was commissioned by the Committee on Legal Affairs (JURI) of the European Parliament and carried out by an editorial team and a network of legal experts in all EU Member States. This was achieved through a comparative table of laws and provisions transposing the Directive into the national law of the 27 Member States. The study focuses specifically on the 10 Member States⁴ (Belgium, Estonia, France, Greece, Hungary, Ireland, Italy, Romania, Sweden and UK), considered to be representative regarding the application of the Directive.

The result obtained by ECAS was comparable to the Commission report, but the latter approach is more qualitative. In other words, the Commission's study is not only an attempt to provide an overview but it is also one of the most detailed, accurate, examining how each item was implemented, the analysis was made on the basis of a broader survey.

Transposition of the Directive of the European Commission's report was qualified as disappointing, not even one of the Member States have transposed the entire Directive correctly and by the Members' failure to improve laws and administrative practices so EU citizens' rights are not affected. This directive will not be an effective one. The gap between the spirit of the directive and how it was applied was aggravated by other legislative initiatives or cutting measures throughout the implementation of the Directive.

Only Cyprus, Greece, Finland, Portugal, Malta, Luxembourg and Spain have adopted more than 85% of the Directive correctly. Furthermore, Austria, Denmark, Estonia, Slovenia and Slovakia have adopted less than 60% of the Directive correctly.

This situation was mitigated by the fact that, at least in some cases, even if the Directive was incorrectly transposed, it was correctly applied by national courts and authorities, despite the absence of clear written guidelines for the exercise of judicial and administrative prerogatives in this domain.

² Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, COM(2008) 840/3.

³ To see in this sense the European Parliament Resolution from November 15, 2007 on the application of the Directive 2004/38/EC - P6_TA (2007) 0534.

⁴ These member states have been chosen on reason of problems meet in the application of the Directive, the migration level and the reasonable geographical equilibrium in EU27.

On this basis, European Commission Vice-president Jacques Barrot, responsible for Justice, Freedom and Security, at that time, declared: “Free movement of persons is one of the fundamental freedoms of the internal market, to the benefit of EU citizens, Member States and the European economic competitiveness. Poor application of Community legislation in this area could result in breach of the principles underlying European construction. For this reason, the Commission will increase its efforts to ensure that EU citizens and their families have effectively and fully the rights conferred upon them by this Directive. In reaching this result, the Commission will fully use its powers under the Treaty, and to engage, where necessary, infringement procedures, providing guidance to Member States and ensuring that EU citizens are informed of their rights.”

The impediments identified by the two reports in transposing the Directive concern the existence of the necessary elements and the exercise of the right of free movement.

1. Restrictive interpretation by Member States of the concepts of “family members” (Article 2), of “any other family member” and “partner” (Article 3), particularly in terms of same-sex partners and their right to move under the Directive⁵.

2. Member States have adopted different approaches to determine the threshold for the requirement of sufficient resources. This was allowed even by the Directive, which leaves a considerable margin of interpretation for the Member States, creating a means of restriction on free movement of EU citizens between Member States.

3. The two pillars of the Directive, the right of entry and residence, are restricted by requiring additional documents, such as work permit and evidence of the existence of satisfactory living conditions if the application is for residence, and violating the rights of family members, particularly of those who are nationals of third countries (e.g. more states do not provide visa exemption for family members who hold a residence permit issued by another Member State). Likewise, we witness a demand for specific national documents, such as the criminal record of an EU citizen requiring registration of his stay, while in other Member States releasing identity cards and residence permits for the nationals of other Member States is mandatory. In some Member States, in addition to the certificate of registration, EU citizens receive an identification number for foreigners, which is necessary for employment or for entry into the social security system, while in other states, EU citizens must prove the “legality” of their source of revenue.

4. Treatment of family members from third countries remains the most problematic area, because it is at the boundary between freedom of movement and immigration law. Such a situation regards the lack of differentiation between third-country nationals and family members of citizens of a Member State from a third country. However, a serious problem in this matter is that: in some Member States, the permit granted to family members coming from third countries does not have the full name, and it is difficult for them to prove that their situation is covered by Directive and not by the alien’s rules.

Preserving the right of residence in case of divorce, departure or death is allowed for most states for EU citizens, but when it comes to family members who come from a third country the situation becomes problematic because the Directive does not grant them the possibility to maintain this right.

5. Restrictions imposed by some countries affect the equal treatment especially as it concerns the application of Article 24 of the Directive. Thus, the exceptional

⁵ Several states do not recognize same-sex marriage as a reason for granting the right of free movement, also it is a general tendency not to recognize the third/fourth wife.

circumstances set for a certain period of time, are invoked continuously (for economic purposes). State recourses to expulsion of nationals of Member States, not always on reasonable grounds related to public order, public security or public health but mostly based on the personal conduct in question, which confirms the absence of a fair balance between the interests of Member States and the EU citizens. The unsatisfactory degree of transposition in this situation is mitigated by proper implementation of their security by the courts and administrative authorities.

6. Procedural guarantees for expulsion are not required under the laws of many Member States. The EU citizen does not receive written notice of the expulsion decision, so he/she is not informed on the reasons that led to the decision and has no right of appeal before the decision is going to be implemented.

7. The right of residence for more than three months may not be exercised, in some states, without evidence of satisfactory housing conditions or a work permit in the host State. Also, for students, the concept of family member is limited to spouses and dependent children.

8. The right of permanent residence after a continuous period of 5 years in the host Member State, established by Article 17, faces a number of problems especially in the systematic verification of the conditions accomplishment. If, for example, an EU citizen recourse to social assistance during those 5 years, in some states he/she may be expelled.

9. Abuse and fraud are important elements of Community law and for that, the Directive provided in Article 35 the opportunity to take preventive measures in order to avoid it, e.g. marriages of convenience⁶. Despite its importance, Article 35 has not been transposed by Member States entirely.

10. The idea of information requirement was not met by Member States which limited it to displaying relevant information online. One of the problems that have been identified was that of the language barrier since info is not offered in foreign languages, especially that information used by a significant number of migrants.

Also, in the European Court of Justice Decisions on freedom of movement, especially in cases such as Metock, Jipa and Huber we can identify the following principles (current impediments):

- A third country citizen married to an EU citizen who accompanies or joins him becomes eligible for the Directive, despite of the place and date of marriage and without requiring prior lawful residence (Metock Case);

- Although Article 18 EC Treaty and Article 27 of Directive 2004/38/EC does not preclude national legislation to establish restrictions regarding the right of a national of a Member State to travel to another Member State, if he/she was previously repatriated from the State because he/she was "illegally" on its territory. To do this a condition must be accomplished: the person's conduct constitutes a genuine, present and sufficiently serious threat to the fundamental interests of society. The restrictive measures taken shall be appropriate to achieve the objective pursued and shall not go beyond to what is necessary to achieve and for this case, the national court has the right to decide in advance (Jipa Case);

- Article 12 (1) EC must be interpreted as preventing a Member State to create, for the fight against organized crime, a system for processing personal data of EU citizens who are not citizens of the State (Huber Case).

Even before the implementation of the Directive, two major problems were identified to which the Commission could show greater interest and promote regulations.

⁶ To see in this sense the Metock Case and European Court Decision.

1. *Certificates of registration and identity cards* - due to the late transposition of the Directive in most Member States, citizens and authorities were puzzled regarding the need to issue residence cards. Certificate of residence replaced the registration card, but the document is considered “weak” because it contains insufficient data. As a result, citizens are also required to have an identity card or residence card.

2. *National Family members of third countries* - both the comparative study and the Commission report, indicated that there were numerous violations of this principle of family meeting, which was always recognized as a fundamental exercise of free movement of European citizens and as recognition of the member family status.

In conclusion, despite these obstacles in adopting Directive 2004/38/EC, European law moves foreword to the third millennium law - giving to the EU citizen's one of the fundamental freedoms – the freedom of movement. We must recognize, now that the law cannot be conceived without the existence of “global freedoms”, freedoms for all without discrimination. Free movement of persons is more than just a European Union objective. This is, without any doubt, linked to exercise of active European citizenship based on democratic principles.

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