

**The *acquis communautaire* in the field of free movement of persons
and the obligations of Macedonia**

Abstract

The free movement of persons is at the heart of the European Union (EU) common market. It has been established as a fundamental right guaranteed to EU citizens by the Treaties. The principle of non-discrimination of citizens from other Member States is the main tool for implementing all Treaty provisions on free movement of persons, while Article 4(3) of the Treaty on European Union (TEU) establishes the basis for all compliance procedures.

The free movement of persons is also attractive for candidate countries given that the prospective EU membership is their strategic goal. Moreover, the progress of candidate countries towards EU is conditional (*inter alia*) upon their successfulness in implementing the *acquis communautaire* or being able to take on the obligations of the membership. This paper discusses the meaning and regulation of free movement of persons in EU context and obligations of Macedonia, which derive from its candidate status in this respect.

1. Introduction

The free movement of persons is a distinguishing feature of the European common market. At earlier times the concept of free movement of persons was traditionally an economic concept confined to the free movement of workers, the freedom of establishment and the freedom to provide services. It has been described as one of the fundamental foundations of the (then) European Community.² Since the establishment of the European Economic Community (EEC) in 1957, different arrangements have gradually rendered such a freedom a concrete reality.³ The Treaty establishing the EEC⁴ provided for the establishment of a common market to be founded on the well known “four freedoms” and namely the free movement of persons, services,

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² Deeper analyses may be found in Nigel Foster, *EU Law* (OUP, 2007) 133.

³ Emiliana Baldoni, ‘The Free Movement of Persons in the European Union: A Legal – historical Overview’ (2003) PIONEUR Working Paper No. 2/4. <http://www.obets.ua.es/pioneer/bajaarchivo_public.php?iden=40> accessed 29 March 2014.

⁴ Treaty on European Economic Community (Rome Treaty as amended) (TEEC).

goods and capitals.⁵ It further provided that the EEC aspired to ‘the abolition, as between Member States of obstacles to freedom of movement for persons, services and capital’⁶ for the purposes set out in Article 2 of the TEEC including the establishment of a common market. The European Court of Justice (ECJ or the Court) further strengthened these provisions confirming that they take precedence over national rules which conflict them.⁷

The idea of European citizenship widened the meaning of the concept of free movement of persons. The result is that the concept is no longer confined merely to the free movement of workers, freedom of establishment and the freedom to provide services. The original economic concept from earlier times has taken on a more general meaning connected with the establishment of the European citizenship and independent of any economic activity or nationality distinction.

Rights derived from the European citizenship go beyond the scope of this paper which rather focuses on the Treaty provisions regulating the free movement of workers, the freedom of establishment and the freedom to provide services. The text shall also explore the obligation of the candidate countries to show their preparedness to take on the obligations of the membership taking the R. Macedonia as a case study in this respect.

2. Free movement of persons

2.1. Free movement of workers within the EU

The main Article regulating free movement of workers within the European Union (EU) is Article 45 of the Treaty on the Functioning of the European Union (TFEU). Article 45(2) prohibits ‘discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’.⁸ It further confirms the right of Member States’ workers to accept offers of employment made in another Member State, to move freely within the EU and to reside and remain in another Member State after having been employed.⁹ However, the ambitious provision of the Treaty did not provide a general right for free movement for all people and companies. In order to exercise this right, the individual, or the company, had to fulfil two criteria, and namely to be a national of a Member State and to be engaged in an economic activity as a worker, a

⁵ Former Article 2 of the EEC Treaty provided that ‘The Community shall have as its task, by establishing a common market and progressively approximating the economic policies 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’. In accordance with Article 26(2) TFEU, ‘[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.

⁶ Former Article 3(1)(c) of the TEEC.

⁷ Case 118/75 *Watson and Belmann* [1978] ECR 1185, para. 16.

⁸ Article 45(2) TFEU.

⁹ Article 45(3&4) TFEU.

self employed person/company/ branch/agency or as a provider or receiver of services.¹⁰ While the determination of nationality was left to national laws, the terms “worker” and “activity as an employed person” fell within the EU scope and had to be defined in accordance with objective criteria that would provide uniform application on the territory of the whole Union.¹¹ The status of “worker” was thus accorded to a person who performs services for and under the direction of another person for a certain period of time and under the direction of another person for certain remuneration.¹² Due to the importance of the concept of a “worker”, the Court accepted wide interpretation of the term in some of its earlier decisions confirming that part-time workers may also fall under Article 45 TFEU.¹³ In this respect the ECJ explained that the application of the rules on freedom of movement for workers cover ‘the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’.¹⁴ The Court further established that the motives which may have prompted the person to seek employment in another Member State are of no account once he/she has been qualified as a worker.¹⁵

2.2. Freedom of establishment within the EU

While Article 45 TFEU concerns the free movement of workers, Article 49 TFEU covers the free movement of self-employed persons and companies. It provides that ‘restrictions on the freedom of establishment of nationals in the territory of another Member State shall be prohibited’. The same prohibition applies to the right to set up agencies, branches or subsidiaries by nationals of any Member States established on the territory of another Member State.

In respect to the first category, the Treaty does not define the term “self-employed”. Nevertheless, the Court explained that contrary to the workers, self-employed persons are not subordinated and bear the risk of the success or failure of their employment on their own and they are paid directly and in full.¹⁶ As for the undertaken activities, the Court gives a broad interpretation, stating that a self-employed person could conduct ‘activities of an industrial or commercial character, activities of craftsmen or activities of the professions of a Member State’.¹⁷ Individuals may also exercise their right of establishment by

¹⁰ See Catherine Barnard, *The Substantive Law of the EU* (OUP, 2007) 249.

¹¹ See Case 75/63 *Unger v. Bestuur der Bedrijfsvereniging voor Detail handel en Ambachten* [1964] ECR 1977.

¹² Case 66/85 *Lawrie-Blum v. Land Baden Wurttemberg* [1986] ECR 2121, para. 17.

¹³ Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035.

¹⁴ *Id.*, para. 17.

¹⁵ *Id.*, para.22.

¹⁶ Case C-268/99 *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie* [2001] ECR I-8615, paras 70–71.

¹⁷ Case C-257/99 *R. v. Secretary of State for the Home Department, ex p. Barkoci and Malik* [2001] ECR I-6557, para. 50.

participating in the creation of a company in another Member State in the sense of Article 54 TFEU.¹⁸

2.3. Free movement of services within the EU

Finally, Article 56 TFEU prohibits the restriction on the freedom to provide services. Its first paragraph provides that ‘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 that of the person for whom the services are intended’.¹⁹ Article 57 TFEU further explains the meaning of the term “services” for the purposes of the Treaty suggesting that the services provisions are subordinated to the other freedoms. Within the meaning of the Treaties, services shall include services ‘that are normally provided for remuneration in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons’.²⁰ Further in the text of Article 57 TFEU, the Treaty gives examples on what constitutes services including activities of an industrial and of a commercial nature, as well as activities of craftsmen and the professions. However the list of services enumerated in Article 57 TFEU is not exhaustive. The ECJ has further broadly interpreted this term in its rulings.²¹

The main component distinguishing the free movement of services from the freedom of establishment is the moment of duration. Namely in order to be covered by Treaty provisions on services a person shall stay in the host country as a provider of services only temporary,²² while the person who stays on a more permanent basis in the host country is likely to be covered by the rules relating to establishment.²³

¹⁸ *Barnard* (n 9) 309.

¹⁹ Article 56(1) TFEU.

²⁰ Article 57(1) TFEU.

²¹ See eg. how tourism activities in C-198/89 *Commission v. Greece* [1991] ECR I-727, medical activities in C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, financial activities in C-384/93 *Alpine Investments BV* [1995] ECR I-1141, business and educational activities constitute services. Same applies to the transmission of a television signal in C-155/73 *Sacchi* [1974] ECR 409 and a signal by cable television in Case 52/79 *Procureur du Roi v. Debauve* [1981] ECR 833, debt collection work in C-3/95 *Reisebüro Broede v. Sandker* [1996] ECR I-6511, lotteries in C-275/92 *Schindler* [1994] ECR I-1039, bank building loans in C-484/93 *Svensson v. Ministre du Logement et d’Urbanisme* [1995] ECR I-3955, insurance in C-118/96 *Safir v. Skattemyndigheten i Dalarna Län* [1998] ECR I-1897, and sporting activities in C-51/96 & C-191/97 *Deliege* [2000] ECR I-2549 represent services. More rulings in this respect may be found in *Guide to The Case Law of the European Court of Justice on Articles 49 et seq. EC Treaty: Freedom to Provide Services*, available at: <http://ec.europa.eu/internal_market/services/docs/infringements/art49-establishment_en.pdf> accessed 29 March 2014. Deeper analyses on the activities’ qualification may be found in *Barnard* (n 11) 354–408.

²² Article 57(2) TFEU.

²³ Case 2/74 *Jean Reyners v. Belgium State* [1974] ECR 631.

3. Implementation of the EU law on free movement of persons in Macedonia

As one of the “Western Balkan”²⁴ countries (WBCs), Macedonia has been covered by the Stabilisation and Association Process (SAP) since its initiation in 1999.²⁵ The country signed the Stabilisation and Association Agreement (SAA) with the European Communities on 9 April 2001 in Luxemburg, which entered into force four years later, on 1 April 2004.

The fifth title of the SAA with the Macedonia is entitled “movement of workers, establishment, supply of services and capital”. The provisions confined to the movement of workers include the prohibition for discrimination on the basis of nationality of the Macedonian workers legally residing on the territories of the Member States. Spouses and children of these workers shall enjoy the same rights as the worker.²⁶ Macedonia shall secure the same rights to the citizens of the EU Member States working on its territory.²⁷ Bilateral agreements for accession of Macedonian workers shall be preserved and if possibly improved with the Member States depending on their labour markets.²⁸ The SAA further provides for the rights of the Macedonian workers in the EU countries and *vice versa* derived from their status.²⁹

In respect to the freedom of establishment, the SAA *inter alia* provides that Macedonia shall not discriminate the establishment of EU companies or the operation of their subsidiaries and branches.³⁰ As to the supply of services, the Parties to the SAA undertake to take the

²⁴ Under the term ‘Western Balkan’ the EU subsumes: Albania, Bosnia and Herzegovina, Croatia, Serbia (including Kosovo), Montenegro and the Republic of Macedonia. The term is used in political, rather than geographical connotation to distinguish the Balkan countries with similar regional and developmental context. The reasons for this grouping are more extensively referred to by Vladimir Gligorov, ‘European Partnership with the Balkans’ (2004) 2 European Balkan Observer 2, 3.

²⁵ In its Operational Conclusions from 26 May 1999, the Commission proposed creation of a SAP for South-eastern Europe (hereafter SEE). The Commission’s initiative was sanctioned by the Council which confirmed the development of the previous Regional Approach into a SAP in its conclusions of 21 June 1999. The SAP was exclusively directed towards the WBCs and it became a touchstone of the Union’s stability and enlargement policy towards these countries. The SAP is composed of three main instruments: Stabilisation and Association Agreements (hereafter SAA), Autonomous Trade Measures and other economic and trade relations and Financial Assistance. The conclusion of a SAA with each WBC individually as a mid-term of the SAP and its implementation were in the centre of the SAP and became the main instruments of the Union’s enlargement strategy towards the WBCs. The SAAs are tailor-made for each country, but have the same purpose of bringing countries to association after a transitional period through implementation of the same core obligation. By signing the SAA, WBCs commit *inter alia* to gradual alignment to EU legislation in a number of areas, to respect the shared values of the Member States and to cooperate with the Union on security issues.

²⁶ Article 44(1) SAA.

²⁷ Article 44(2) SAA.

²⁸ Article 45 SAA.

²⁹ Article 46 SAA.

³⁰ Article 48(1) SAA.

necessary steps to allow progressively the supply of services by companies and nationals from both Parties, which are established in a Party other than that of the person for whom the services are intended.³¹

Less than two years after Macedonia submitted its application for EU membership, on 9 November 2005, the Commission adopted its opinion joint by an Analytical Report in which it concluded generally that the country has made significant efforts to align its legislation with the *acquis*. However, the Commission also emphasised that the country will have to make further effects to align its legislation with the *acquis* and to effectively implement and enforce it in the medium term in the fields of freedom of movement for workers, right of establishment and freedom to provide services.

In addition the Commission also presented a proposal for a new European Partnership³² in line with the “Thessaloniki Agenda for the Western Balkans: moving towards European integration”,³³ which was meant to update the 2004 Partnership.³⁴ The new Partnership identified the priorities, which the country needed to address for the opening of negotiations.

In respect to the ability of the country to assume the obligations of membership and the freedom of movement of workers, the development of administrative capacity for implementation of the EU rules on the coordination of social security schemes was estimated to be a mid-term priority of the country. Same applies to the right of establishment and the freedom to provide services, the adoption of legislation for recognition of foreign professional qualifications and creation of administrative structures and procedures for that purpose as well as the adoption of postal policy on the Postal Directives, including the establishment of an independent national regulatory authority in the respective field. The progress made with the implementation of the priorities identified in the European Partnership has been monitored regularly by the Commission through the Progress Reports and structures set up under the SAP.

Following the Commission’s proposal on 18 February 2008 the Council adopted a decision for renewal of the principles, conditions and priorities contained in the previous Partnership.³⁵ In the light of the candidate status of the country, the renewed document was entitled Accession Partnership. The Accession Partnership enumerated several

³¹ Article 55(1)SAA.

³² Commission (EC), ‘Proposal for a Council Decision on the Principles, Priorities and the Conditions contained in the European Partnership with the Former Yugoslav Republic of Macedonia’ COM (05) 557.

³³ Thessaloniki Agenda for the Western Balkans – Moving towards European Integration annexed to the Thessaloniki European Council’s Presidency Conclusions (Thessaloniki Agenda).

³⁴ The European Partnerships are the most important innovation endorsed with the Thessaloniki Agenda for enrichment of the SAP. The European partnerships are documents identifying the priorities and the specific needs of each country that contain a list of criteria which serve as basis for measuring the progress of the country.

³⁵ Council Decision (EC) 2008/212 on the principles, priorities and the conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [2008] OJ L80/32.

priorities in respect to the right of establishment and freedom to provide services. On a short term the R. Macedonia shall remove the remaining barriers to establishment and to provision of cross-border services facing natural or legal persons from the EU and shall introduce in its legislation a differentiation between provision of services on a temporary basis and provision through permanent establishment. On a medium term, it shall align with the EU *acquis* on mutual recognition of professional qualifications, including training provisions and develop the required administrative structure and with the postal services *acquis* including (again) the establishment of an independent national regulatory authority.

Same as with the European Partnerships, the implementation of the priorities identified in the Accession Partnership are examined by the mechanisms established under the SAP, *i.e.* the Progress Reports.

In its latest report dedicated to the progress made by the R. Macedonia from 2013, the Commission appointed several weaknesses in respect of the obligation for alignment of the Macedonian legislation with the *acquis* in the field of the free movement of persons. Namely, the commission stated that in the area of access to the labour market, the legislation does not allow EU citizens access to posts in the public service.

There were no developments in regards to the preparation for participation in the EURES (European Employment Services) network. In regards to the coordination of social security systems, there are 19 bilateral agreements on coordination of social security systems, of which 11 are with EU Member States. Ratification/signature of agreements with Denmark, Hungary and Italy is pending. Negotiations on relevant agreements with Kosovo and Albania are ongoing. The government adopted a draft decision of the Stabilization and Association Council on the coordination of social security systems. In this area, the country is moderately advanced. An agreement on the use of the European Health Insurance Card was signed with Austria and entered into force, bringing the number of agreements to eight. Preparations in this area are slowly progressing. But the Commission concluded that little progress was made in the area of freedom of movement for workers during the report period. Preparations in the area of free movement of workers are still at an early stage.³⁶ In respect of the free movement of workers the Commission concluded that there has been little progress, emphasizing that the administrative capacity for coordination of social security schemes and for participation in the European Employment Services Network is insufficient.³⁷

In respect to the right of establishment and the freedom to provide services the Commission concluded that the progress has been partial and mainly confined to the area of postal services and the legislative changes related to the right of establishment.³⁸ The Commission also recognized that there is a lack of coordination between

³⁶ The Progress Report The Former Yugoslav Republic Macedonia, Progress Report 2013. COM 2013, 700 final at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/mk_rapport_2013.pdf > last accessed 14 March 2014.

³⁷ *Id.*

³⁸ *Id.*

various bodies responsible for authorizing cross-border services and that the country is not well prepared for mutual recognition of qualifications.

³⁹

4. Conclusion

The free movement of persons is one of the fundamental freedoms guaranteed by the EU law. As seen above, the concept of the free movement of persons rotates around the free movement of the worker. The importance of this field may be also seen from the activism of the ECJ. As seen above, the ECJ attached great importance to the concept by interpreting crucial terms in the field at EU level. In this way the Court provided for effective and uniform application of EU legislation and prevented divergent applications by Member States.

Apart from the Member States, which are obliged to apply the EU law provisions in their national legal systems, the candidate countries willing to become part of the Union shall also align their national legislation with the EU law. Thus, the candidate country shall adopt the *acquis* including the free movement of persons. In this respect, R. Macedonia was analysed as a case study. As the other European countries willing to join the Union, the R. Macedonia was obliged to fulfil the well-known Copenhagen criteria requiring from the country to show *inter alia* its ability to cope with the membership obligations. Its application and the application of the Copenhagen criteria as a whole was made possible because of the well-established principle of conditionality according to which the progress of the country towards the fulfilment of these criteria is always “awarded” by the Union. This progress of the country is regularly estimated in the Commission annual reports. So far, R. Macedonia has made certain progress in respect to its obligation for alignment of its legislation with the Union’s *acquis* on a free movement of persons. Thus, the R. Macedonia shall continue its efforts in this respect following the given recommendations for improvement.

³⁹ *Id*

Bibliography

Articles and Books

Baldoni E, 'The Free Movement of Persons in the European Union: A Legal – historical Overview' (2003) PIONEUR Working Paper No. 2/4, <http://www.obets.ua.es/pioneer/bajaarchivo_public.php?iden=40>.

Barnard C, *The Substantive Law of the EU* (OUP, 2007).

Foster N, *EU Law* (OUP, 2007)

Gligorov V, 'European Partnership with the Balkans' (2004) 2 European Balkan Observer.

Progress Report The Former Yugoslav Republic Macedonia, Progress Report 2013. COM 2013.

Council Decision (EC) 2008/212 on the principles, priorities and the conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [2008] OJ L80/32.