

# FREE MOVEMENT OF PERSONS AND CURRENT MIGRATION CHALLENGES IN THE EU'S FRAMEWORK

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## Abstract

The topic of the article is the EU's freedom of movement rules and the role of the current migration crisis as it plays in the discussions. The migration flows are considered as new challenges to internal market, Schengen area and external border management, mainly as the reasons which influence the concept and principles of free movement of persons in the EU legal regulation. We illustrate how the migration flows lead to discussion at the European Union level about the limitations of free movement of persons, contrary to the liberal development in the last sixty years.

**Key words:** free movement of persons, migration, recognition of qualification, education

Free movement of persons is one of the fundamental freedoms in the European Union single market. This freedom was established by the European Economic Community Treaty (1957) and its development was connected mainly with the proactive approach of the European Court of Justice. This is also confirmed by public opinion survey, when respondents agree with the position, that „EU's freedom of movement provisions” are as much an economic concept as they are a symbol of what the EU represents. .... Therefore the current situation regarding

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freedom of movement is set within a wider context, arguing that it has been a core feature of European integration (albeit in a weaker form) ever since the foundation of the European Economic Community“[<http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-4---Free-Movement-of-Persons-&-Migration-REPORT.pdf>].

## **HISTORICAL DEVELOPMENT OF THE CONCEPT OF THE EU FREE MOVEMENT OF PERSONS**

The basic idea and initial justification of free movement of persons was to strengthen the building of common market and to encourage people to travel to find jobs after deconstruction in Europe in the post WW II period. The idea of mobility of persons within the territory of six founding member states should have helped accelerate economies of founding countries as well as to prevent situation as had happened before the WW II.

The system of free movement of persons was at the beginning established in a way to regulate free movement of workers, which should be understood as the part of the common market and the economic character of European Communities, the EU predecessor. It was later spread by the case-law of the European Court of Justice in a way to provide freedom of travelling, working and studying to citizens of member states, as well as family members of EU member states. The territory of free movement was open also to countries and their citizens regarding European Economic Area treaty (EEA) signed between EU and Norway, Liechtenstein and Iceland. “There's also Switzerland, which has a bilateral deal with the EU when it comes to border controls” [<https://www.weforum.org/agenda/2016/09/free-movement-of-people-explainer/>].

While firstly it was introduced as part of the EU internal market it was extended with the Schengen Agreements in 90s. We have to consider its roots, free movement of persons was primarily guaranteed to the EU citizens, later to their family members and now the whole concept is facing the migration and connected movement of persons (workers, asylum seekers, refugees) and their rights. The EU representatives understood, that “It is also inexorably linked to European citizenship. However, real difficulties have affected the free movement of Europe's citizens. Closely associated with the building of the Internal Market it seems to have suffered the loss of impetus by the latter and also the serious consequences of the crisis. It is also struggling due to rising concern about external migratory pressure and the enlargement” [<http://www.robert-schuman.eu/en/european-issues/0312-the-free-movement-of-people-in-the-european-union-principle-stakes-and-challenges>].

Founding treaties in its original version presents regulation of the individual mainly as an economic actor who contributes to the productive process. Follow in the framework of building the single market, the legal system seemed to consider individuals more as production factors than persons. This optic was changes after the adoption of the Amsterdam Treaty, when the humanitarian reasons were introduced as those, which justify free movement across internal borders of the EU member states. Amsterdam Treaty also presents for the first time new ways and regulations of cross-border movement for asylum seekers, refugees and displaced persons [Baldoni 2003]. Situation in the Europe, especially after 2008 and first modern wave of migration flows initiate the work of the European Commission and

member states in relation to existing legislation on protection of external borders in Schengen area.

## **EU LEGAL FRAMEWORK ON FREE MOVEMENT OF PERSONS AND “EUROPEAN JUDICIAL OPTIC”**

The principle of the free movement of workers is guaranteed by the Article 45 of the Treaty on the Functioning of the European Union (hereinafter as TFEU), following by extensive number of secondary law. The Court of Justice of the European Union (hereinafter also as ECJ or European Court of Justice) had adopted huge number of decisions and contributes to wide understanding of free movement in its case law.

At the beginning of the legal regulation in the European Communities rules solely focus on employed persons and job-seekers. The range of persons entitled to exercise the right of free movement of persons was actively spread upon ECJ ruling, as in cases identifying term “worker” (Hoekstra 75/63), and related elements of the term’s evaluation (Case 66/85 Lawrie-Blum, Case 196/87 Steymann, Case 53/81 Levin), or starting to identify specific position of frontier workers (Case C-149/92 Scholz, Case C-212/05 Hartmann) and providing legal protection within the single market of work-seekers (Case C-316/85 Lebon).

The huge number of decisions led to the adoption of secondary legislation, especially Family Directive (2004/38/EC), Regulation No 492/2011 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which are together with current primary regulation in Article 21, para 1 of TFEU and Article 45, para 1 of the Charter of Fundamental Rights of the European Union understand as legal framework of this freedom.

While the legal framework looks especially after the Lisbon Treaty as the stable one, the development in the member states and also current migration flows influence the work of the European Commission. In 2015 the Commission announced a specific document Labour Mobility Package with the aim to achieve better coordination of social security systems and to review Posting of Workers Directive within the European Employment Services. Building of a strong social insurance system without discrimination based on nationality looks closer after the Package adoption as even before. Unfortunately this Package is not interlinked with the immigration policy, which should reflect the principle of balanced approach, as stated in Articles 79 and 80 of TFEU. According to Article 80 TFEU, „the principle of solidarity requests fair sharing of both responsibility and the financial implications of measures agreed upon between the Member States. After the Lisbon Treaty came in force, the ordinary legislative procedure applies to both illegal and legal immigration policies. Provisional measures, however, to be instituted in the event of a sudden inflow of third-country nationals, are to be adopted by the Council alone, after consulting Parliament“ (Article 78(3) TFEU).

As stated in the annual evaluation report of the Committee on Regions, the European Commission acts actively in relation to migration, when adopted the “Return Directive” (2008/115/ EC), setting out common EU standards and procedures for returning illegally staying third-country nationals, including promoting consistent and fundamental rights-compatible practices, improving

cooperation between Member States and enhancing the role of Frontex (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), which was established in 2004. Moreover, Directive 2009/52/EC specifies sanctions and measures to be applied in Member States against employers, who infringe the prohibition on employing illegally staying third-country nationals. For 2016, the European Commission has announced to review the so-called “Blue Card Directive” (COM(2014)287), which lays down the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment“ [<http://cor.europa.eu/en/welcome/Documents/Update%204%20June%2015/06%20Free%20movement%20and%20migration.pdf>]. This presents the final adopted steps in the moment influencing the substantial legal development in the EU within free movement of persons, including migrants and their family members. Procedural issues were regulated later regarding to the concrete circumstances of the case and the whole legislation process on the EU level was much more sensitive then the “migration legislation” before.

## **MIGRATION CRISIS AND EU RESPONSE**

Since 2014 Europe has been facing a so-called migration crisis, when migrants and refugees coming from Africa, the Middle East, and South Asia “have presented European leaders and policymakers with their greatest challenge since the debt crisis. The International Organization for Migration calls Europe the most dangerous destination for irregular migration in the world, and the Mediterranean the world's most dangerous border crossing. Yet despite the escalating human toll, the European Union's collective response to its current migrant influx has been ad hoc and, critics charge, more focused on securing the bloc's borders than on protecting the rights of migrants and refugees” [Park 2015]. As the migration flows were not eliminated, and political situation in North Africa and Middle East is still very much floating and not stable, the European Commission in relation to more effective management of migration had adopted European Agenda on Migration on 13 May 2015.

The Agenda is built upon four pillars:

- reducing the incentives for irregular migration: the focus is on addressing the root causes behind irregular migration in non-EU countries, dismantling smuggling and trafficking networks and defining actions for the better application of return policies.
- saving lives and securing the external borders: this involves better management of the external border, in particular through solidarity towards those Member States that are located at the external borders, and improving the efficiency of border crossings.
- strengthening the common asylum policy: with the increases in the flows of asylum seekers, the EU's asylum policies need to be based on solidarity towards those needing international protection as well as among the EU

Member States, whose full application of the common rules must be ensured through systematic monitoring.

- developing a new policy on legal migration: in view of the future demographic challenges the EU is facing, the new policy needs to focus on attracting workers that the EU economy needs, particularly by facilitating entry and the recognition of qualifications.

Immediate actions include, among others, increased funding for joint operations and for frontline Member States, an EU-wide resettlement scheme, and operations in the Mediterranean to fight people smuggling” [[https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration_en)]. In relation to proper implementation of the Agenda, the European Commission had proposed two implementation packages (one in May and the second one in September 2015) and later also two joint action plans, particularly focused on relation with Turkey (as one of the transit countries) and with western Balkans (both proposals were announced in October 2015).

## **WHAT DID AND SHOULD DO THE EUROPEAN UNION?**

Legal proposals and new legislation presents only formal steps the EU does in relation to guaranteeing of free movement development. The concrete actions and steps look contrary to some of the EU successes in this area. The Schengen agreement is considered generally as one of the biggest success of the EU, when establishing common rules for protection of external borders. Instead of exercise of full range of Schengen area benefits, it became under strict criticism regarding the flow of refugees and migrants into the EU. “From September 2015, the sheer number of new arrivals prompted several member states to temporarily reintroduce checks at the internal Schengen borders. In May 2016, this went further when the Council — acting on a Commission proposal — recommended that five countries reintroduce temporary border controls for up to six months owing to ‘persistent serious deficiencies’ in external border management identified in Greece. While all the temporary border checks have been in line with the rules in the Schengen Borders Code [Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), which is a codification of Regulation (EC) No 562/2006 as amended], this marks the first time in the history of Schengen that temporary border checks have been instituted on such a scale. A further challenge to the passport-free Schengen area comes in the form of an increased terrorist threat, with the Paris and Brussels attacks highlighting the ease with which suspected and even indicted terrorists entered and travelled through the Schengen area. The ongoing challenges have served to underline the inextricable link between robust external border management and free movement inside those external borders and led to a series of new measures both to enhance security checks on persons entering the Schengen area and to improve external border management” [[http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html)].

Although restrictions on borders were of temporary character they negatively influenced freedom of movement. Stricter security controls are also reflected in decreasing number of persons moving in the EU for the primary purpose – economic activity. For this moment we miss statistics on other purposes as the education reasons or other stated in the secondary legislation.

What concrete steps may be presented by the Commission in a way to shift the freedom of movement into the previous state of art and to accelerate again its development? Freedom may be exercised properly conform to provisions of the Treaty on the Functioning of the European Union in secure environment. The reform of the EU Common Asylum system, especially the amendment of Dublin Regulation may help make the system stable in relation to external challenges as well as the other problems national authorities are facing in migration. The financial sources allocated by the Commission to protect external borders are not sufficient, and these should be regarding to principle of solidarity allocated by all EU member states. One of the biggest challenges to freedom of movement is connected also to missing inclusion of migrants and people granting asylum to labour market. Once these persons become of legal status, the EU is obliged to guarantee them complementary rights regarding international legal regulations – in the area of education, social rights and health care. The problems are in the implementation practice, when there are not sufficient financial, personal and technical sources for a proper implementation. The another obstacle is qualification recognition, when especially asylum seekers and refugees are missing documents proving their qualification necessary to initiate process of qualification recognition, as precondition for proper inclusion to labour market in one of the EU member states.

What next steps should be then more done then agreed in legislation? The implementation practice needs again pro-active approach as in the previous period presented by the ruling of the ECJ. Today more than even before, the ruling should be accompanied by the European Commission and member states policies, proper and effective exercise of its competences to achieve common goals as identified and agreed in founding treaties.

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