ASPECTS REGARDING THE FREE MOVEMENT OF WORKERS IN THE COMMUNITY SPACE

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ABSTRACT: *The authors have understood to make a brief analysis concerning the right to free movement on the territory of the European Union's member states. The citizenship of the European Union gives every citizen of the Union a fundamental right, under the reserves and conditions stipulated by the community rules. Having in view, also, the recent conflict between France, on one side and Romania and some of the European Union's organisms, on the other side, the authors have understood to make some remarks and to express their critic opinion towards both involved parties.*

KEYWORDS: *free movement of workers, fundamental rights, Euroepean Union, Community space.*

JEL CLASSIFICATION: *K 31, K 33*

The free movement of persons represents one of the most important fundamental freedoms in the community space, with great juridical, economic and political implications. A person's right to travel freely regards two aspects: the freedom of movement of a person who finds his/herself lawfully on the territory of a certain state, regards his/her right to move *intra muros*, meaning on the surface delimitated by that state's frontiers; the freedom to move between different states. This last aspect obviously exceeds the field of internal regulations and imposes the devotion of some international laws regarding the movement of unpaid persons, as well as the movement of the persons that the Union's laws call *workers*.

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The Universal Declaration of Human Rights, in article 13, proclaims anyone's right to freely move and to freely choose his/her residence inside a state, the right to leave any state, including his/her own and to return to the country that he/she had previously left.

Article 2 of the Forth Protocol of the Convention for the defence of human rights and fundamental freedoms recognizes anybody's right to freely move, choose his/her residence and leave any country, including his/her own.

The creation of the community space gave birth to some important law sources, which enforce the free movement and recognize it as being a fundamental right that the states' jurisdictions are compelled to protect.

The Treaty of the European Communities (article 29) and the Treaty on the Functioning of the European Union (article 45) both establish that the free movement of workers is guaranteed inside the Community and that it involves the elimination of any discrimination based on citizenship between the workers of the member states, in matters that regard employment, remuneration and other working conditions.

The provisions of the Treaty have been developed throughout a series of community laws comprised in regulations and directives; we hereby mention The European Parliament and Council's Directive no. 2004/38 from April the 29th 2004 regarding the right to free movement and residence on the territory of the member states for the European Union's citizens and for their family members[1] and Regulation no. 1612/68 from October the 15th 1968 regarding the movement of workers inside the Community[2]. Both documents are applicable for all the European Union's member states starting from April the 30th 2006. The purpose aimed at through the elaboration of Directive no. 2004/38 was the formation of a basic legislative act in this field, different community rules that used to approach the matter of free movement and the right of residence in the member states on sectors being replaced.

As underlined in the exposition of grounds of Directive no. 2004/38, the right to reside in a member state strengthens the feeling of EU citizenship and promotes the social cohesion, fact that represents one of the Union's fundamental objectives.

The objectives of Directive no. 2004/38 reside in[3]:

a) the establishment of the conditions in which the citizens of the European Union and their family members can freely move and settle down on the territory of the member states;

b) the right to permanent establishment in the member states, given to the citizens of the Union and to their family members;

c) the limitations of the right to free movement and of the right of residence, for public order, security or health reasons.

The right to free movement and residence must be recognised, without discrimination, for 'permanent', seasonal and frontier workers, as well as for those employed in activities of service providing, as it is motivated in the Preamble of Council's Regulation no. 1612/68.

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[1] Published in the Official Journal of the European Union (OJEU) no. L 158 from April the 30th 2004

[2] Published in the Official Journal of the European Communities (OJEC) no. L 257 from October the 19th 1968

[3] O. Ţinca, Social community law – Compared law. Romanian legislation, „Lumina Lex" editions, Bucharest, 2005, p. 43

The matter of free movement implies, from a juridical point of view, to know the meaning of two terms: the notion of *citizen* of the Union and the notion of *worker* in the community space.

A) The citizenship matter.

The citizenship of the Union is the one the grants the fundamental and individual right to free movement and residence on the territory of the member states.

As mentioned in the Preamble of Directive 2004/38, the citizenship of the Union must represent the main statute for the nationals of the member states, if they exert their right to free movement and residence.

In the spirit of community laws, citizen of the European Union is any person who enjoys the citizenship of a member state. The attribute of citizen of the European Union neither eliminates nor replaces national citizenship; the two citizenships do not exclude one another and are interdependent, because European citizenship is conditioned by the existence of a member state's citizenship.

Each member state is sovereign to decide upon the rules in base of which citizenship is given, since the European Union must not inferfere in the juridical system of a member state.

Having in view that a citizen is, usually, part of a family group, Directive no. 2004/38 defines, in article 2, the notion of family member, which means:

a) the husband/wife;

b) the partner with whom the citizen of the Union has contracted a registered partnership, in base of a member state's legislation if, according to the host member state's legislation, registered partnerships are considered as equivalent to marriage and in accordance with the conditions stipulated by the relevant legislation of the host member state;

c) the direct descendants aged up to 21 years old or who find themselves in maintenance, as well as the direct descendants of the husband or partner, according to the definition from letter b);

d) the direct ascendants who find themselves in maintenance, as well as the direct ascendants of the husband or partner, according to the definition from letter b).

The recipients of the Directive are all the Union's citizens who move or reside in a member state, other that the one of origin, as well as their family members.

The freedom of movement, according to article 3 paragraph 2 letter a of the Directive, also applies for other family members, no matter their citizenship, that are not included in the definition given by article 2 and that – in the state from which they came – find themselves in the maintenance / are members of the household of the Union's citizen that primarily benefits from the right to reside, or have serious health problems that imperatively require the care offered by the Union's citizen.

As resulted from the content of Directive 2004/38, the beneficiaries of this European legislative act can be classified in two categories[4]:

- *the direct beneficiaries*, meaning the citizens of a member state and their family members;

[4] O. Ţinca, cited above, p. 46

- *the persons favoured by the host state*, according to article 3 paragraph 2 letters a and b.

The difference between the two categories of beneficiaries is that in the case of European citizens, the provisions of the Treaty have a direct effect, which means that the member state has no right to refuse the entrance and residence on its territory (except for cases of public order, health and security) meanwhile, in the case of favoured citizens, the host state's own provisions for the entrance and residence on its territory are required[5].

As mentioned in the exposition of grounds of Directive no. 2004/38, point (6), in order to maintain the unity of the family and without disrespecting the prohibition of discrimination on citizenship criteria, the situation of the persons who are not included in the definition of family members, in accordance with this Directive, and who, consequently, do not directly enjoy of the right to enter and reside in the host member state should be examined by this in base of its own legislation, in order to decide if the entrance and residence can be granted to these persons considering their relationship with the citizen of the Union or any other circumstances, such as their financial or physical dependence to the citizen of the Union.

The content of the right to free movement also covers the right to leave a state on the territory of which a person is found, even when it is his/her own state.

The right to exit a country implies that the citizen of the Union and his/her family members must have valid identity cards or valid passports, without them being requested to have exit visas or other equivalent formalities.

According to Protocol no. 4 of the Convention for the protection of the human rights and fundamental freedoms – Strasbourg, September the 16th 2003 – any sanction or teasing addressed to the person who wants to leave a state are forbidden. As resulted from the practice of the ex-European Commission of Human Rights, the freedom to leave any country implies the right of the interested person to leave for any country that is willing to receive him/her. In this context, the ex-European Commission of Human Rights has stated that Finland's refuse to hand in a passport to a Finnish citizen who was, at the time, living in Sweden was a violation of the individual's right to leave his/her country. The solution is also identical in the case in which the granting of a passport is rejected because the person did not finish his/her military service[6].

In another case of the same ex-Commission, it was retained that the claimants, although they had been able to freely leave a country (Sweden), complained that they had not been authorized to transfer certain amounts of money in their new country of residence (USA). The Commission has stated that 'the right to draw out their goods, under no restrictions, from one country to another, is not part of the right to freely leave a country'[7]. The decision was appreciated as being fair, as it was reckoned that the analyzed case 'rather refers to the juridical regime of someone's goods … than it regards the freedom of movement'[8].

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[5] Ibidem

[6] These cases were settled by the European Commission of Human Rights and cited by C. Bârsan, in The European Convention of Human Rights. Commentary on articles, the Ist volume, C.H. Beck editions, Bucharest, 2005, p. 1114

[7] C. Bârsan, cited above, p. 1114

[8] Ibidem

B) The notion of *worker*.

The main beneficiaries of the right to free movement are the workers from the member states. Until now, no European law that defines the notion of worker has been elaborated, but the content of the notion can be deduced from the text of article 39 of the Treaty on European Union; paragraph 2 of the article – mentioning the free movement of workers – has in view the employment, the remuneration and the other working conditions.

In the Romanian literature of speciality, the worker was defined as being 'the person who moves to a member state of the European Union, other than his/her own, with the intention of finding a job, of being hired and of having a paid activity, enjoying proper working conditions and not being exposed to discriminations'[9].

In the Romanian juridical terminology, the notion of *worker* may appear bizarre, since – with a sole exception – the Romanian legislation does not utilize it. The exception is Law no. 319/2006 regarding the security and health in labour[10], where the worker is defined as being an employed person, including students and pupils found in stages of practice, apprentices and other participants to the labour process, except for the persons who have household activities. In the doctrine, this definition is appreciated as being very close to the one that is used by the Community law[11].

The necessity of utilizing the notion of worker is justified, since the Community law has the objective to harmonize the national law systems that contain different rules and definitions, in respect of their own economic and juridical traditions[12].

The Court of Justice of the European Communities has brought an important contribution to the clarifying of the notion of *worker*, by saying that it is specific for the community law and not for the national one, because if this term had had its origin in the internal law, then every state would have had the possibility to change the meaning of migrant worker, depriving certain categories of persons of the protection granted by the Treaty[13].

As it results from the content of the Treaty and from the case-law of the Luxembourg Court, the notion of worker implies the following elements:

- to carry on an economic activity;
- to be paid;
- to be subordinated to the employer.

The practise of an economic activity.

The free movement in the European Union – community of an economic origin – implies the practise of an economically valued activity; any national of a member state, no matter his/her residency, has the right to pursue a paid activity[14].

The fields in which labour is carried on and the nature of the relations between employee and employer have no importance, the essence being the establishment of a labour-based relation, even without the closing of an individual working contract.

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[9] Al. Ţiclea, C. Gâlcă, The free movement of workers in the European Union, in R.R.D.M. no. 5/2008, p. 13

[10] The Official Gazette of Romania no. 646 from July the 26th 2006

[11] A. Popescu, The international law of labour, C.H. Beck editions, Bucharest, 2006, p. 339

[12] A. Popescu, T.G. Savu, The notion of „worker" in the community law, in R.R.D.M. no. 4/2002, p. 15

[13] The Court of Justice of the European Communities' Decision from March the 19th 1964, in File no. 75/63, Recueil 1964, p. 347

[14] Article 1 from the Council's Regulation no. 1612/68, published in The OJEC no. 268 from November the 6th 1967, p. 9

The Court of Justice has stated that the citizen of a member state who works for a special institution of international law (The European Space Agency), who has closed an occasional work contract or who has closed a contract for a formation stage may also enjoy the statute of worker[15].

In the case of activities pursued for certain religious or spiritual communities, the work that is carried on – as decided by the Court – can represent an economic activity 'if it tends to guarantee an economic independence of the community…'[16].

The same Court consideres that worker, in the meaning used by the community law, may also be the person who carries on an activity that involves normal work duration and productivity, without doubt creating a benefit for his/her employer. It is the famous case of the Belgian footballer Jean Marc Bosman, which allowed the Court to state that the pursue of a sport – in this case, football, since J.M. Bosman was a professional football player at a Belgian football club – can be included in the meaning of community laws, as long as the sportive activity has an economic content. The professional and semi-professional sportsmen carry on their activities through sportive associations, pursuing patrimonial advantages, case in which their right to free movement cannot be restricted in base of different laws that invoke the 'clause of nationality'[17].

The amateur sportsmen, as well as those who participate at the games of a national team do not pursue an economic activity in the meaning of community law and are not under the incidence of the laws regarding the right to free movement.

The remuneration.

In order to be granted the statute of worker, a person must be involved in a labour-based relationship that implies remuneration, no matter its level or modality of payment. The essential is for the work to be real and actual, meaning that 'the activity pursued by the worker must contribute to the quantitative or qualitative improvement of the company's production'[18].

The Luxembourg Court has stated that the recognition of the attribute of worker does not depend on the level of the salary, since the received payment does not need to cover all the incomes necessary for living; it can be inferior to the minimum level of existence in the host state. The internal motive that had determined a citizen of the European Union to search for work in a different member state and to accept a level of inferior remuneration in the host state is irrelevant while he/she pursues a real and actual activity. It is also considered to be a worker the person who is involved in a stage of professional formation under the surveillance of the host state's authorities, period during which he/she also pursues paid activities in favour of certain beneficiaries.

The subordination of the worker to the employer.

The statute of worker implies the execution of work under the rulling of the work's beneficiary, who can give dispositions, controle and apply sanctions, fact which determines a typical subordination of the employee to his/her employer.

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[15] O. Ţinca, cited above, p. 63-64 (Decision from March the 15th 1989, in cases no. 389 and 39o/87; Court's Decision from November the 21st 1991, in case no. 27/91; Decision from February the 26th 1992, in case no. 3/1990)
[16] A. Popescu, T.G. Savu, cited above, p. 17 (Court's Decision from October the 5th 1988, in file no. 196/87)
[17] Court's Decision from December the 15th 1995, in file no. 415/93
[18] O. Ţinca, cited above, p. 65

In the western doctrine it was discussed whether this subordination is a simple one, of an economic nature (the statute of employee is recognized to the person who is found under the economic dependence of another person, in whose profit he/she works and from where he/she receives his/her financial resources) or is a juridical subordination, which involves the recognition of the statute of employee to the person who carries on his/her work under the orders of another person, the last being able to give directives regarding the execution of the work and to controle the fulfilment of the duties and the quality of the work that has been done[19].

The Court of Justice of the European Communities has stated in favour of the approach of subordination from a juridical perspective, involving the power of the employer at an organizational, normative and disciplinary level[20].

The matter whether free movement also applies to public employees has long been controversial, due to the lapidary manner in which paragraph (4) of article 39 in the Treaty was formulated: 'The provisions of the present article do not apply to the appointment in public administration'.

The position of the Court of Justice was determinant, for it was decided that the provisions regarding the free movement of workers do not apply for the 'workplaces that involve a direct or indirect participation to the exertion of public authority and to the functions that pursue the safeguarding of the general interest of the state and of other public collectivities. Therefore, these kinds of workplaces imply, from their holders, the existence of a specific relation of solidarity towards the state and the reciprocity of the rights and obligations that form the base of the citizenship connection'[21].

The community law does not have a defition of the notion of 'public interest' but the constant practice of the Court of Justice considers that the text of the Treaty refers to the activities that imply the exercise of public authority and the necessity to preserve the general interest. The Court has stated that the notion of public authority consists of the authority that follows from the state's sovereignty and from its possibility to utilize the constraint towards its citizens. Next to the Court of Justice, the Commission has also agreed that the provisions of article 39 paragraph (4) of the Treaty must regard specific functions of the state, such as: the order forces, the army, the diplomacy, the magistrature, various workplaces in the ministeries, the regional governments, the local collectivities, all of which imply the exercise of the public juridical power of the state[22].

Throughout various decisions, the Court of Justice has decided that the exercise of the public function can only be accepted if it is a direct or indirect participation to the exercise of public authority and only if by means of that function the general interests of a member state are defended.

Teachers and research workers are not included in this category even if, in some states (like Germany), teachers are considered to enjoy the prerogatives of public power, since they hold lectures, give note and decide to promote to the higher classes[23].

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[19] B. Teyssie, Droit europeen du travail (European Law of Labour), 2nd edition, Litec, Paris, 2003, p. 93
[20] Ibidem; Court's Decision from May the 31st 1989, in case no. 344/87
[21] Court's Decision from May the 30th 1989, in case no. 33/88.
[22] O. Ţinca, cited above, p. 67-68
[23] Ibidem; Court's Decision from July the 3rd 1986, in case no. 66/85

In some of the European Union's countries, it was admitted that the citizens of the member states can accede to public administration specific positions, as long as the attributions fulfilled do not imply the exercise of sovereignty[24].

The free movement of workers implies the setting up of a system that assures the right of the migrant workers and of the persons found in their maintenance to:

a) the cumulation of all the periods taken into consideration by various internal legislations, for obtaining and keeping the right to pension and for calculating it;

b) the payment of the remuneration to the persons residing on the territories of the member states[25].

The mention that the notion of worker in the community law is not univoque is called for; this means that the notion of worker, in the field of work-based relationships, is different from the notion of worker in the field of social security.

According to article 1 of Regulation no. 1408/71, the notion of worker refers to the paid worker or to the independent worker, affiliated to a national regime of social insurance[26]. The Court of Justice has allowed the widening of the notion's sphere, also including the citizens of the European Union who travel to a member state for their personal interest and can benefit from the provisions of Regulation 1408/71 even if they do not have employment in the host state, but are the beneficiaries of a social insurance regime and were insured as workers[27].

In another decision of the Court of Justice[28], it was specified that the community laws regarding social security apply to all the insured workers, the cause for which they move to a different member state of the European Union being irrelevant.

From the jurisprudence of the Court of Justice it can be found that the notion of worker in the field of social security is not identical in all the member states, the national legislation being the one that establishes the beneficiaries of the general regime of social security. However, the Court puts the member states on guard on the fact that a person who benefits from the general regime of social security is included in the sphere of application of the community laws regarding the coordination of the social security regimes[29].

From the Preamble of Regulation no. 883/2004 of the European Parliament and Council, dated April the 29th 2004, it results that the rules of coordination of the national social security systems are part of the free movement of persons. The Regulation, through article 1, makes some terminological specifications, including those regarding the paid and the independent activity, contributing to the best understanding of the right to the free movement of workers.

The freedom of movement, with its three main components – the right to freely move on a state's territory, the right to choose one's residence on a state's territory and the right to leave the territory of a state – is recognized to all the EU citizens, without

[24] A. Popescu, T.G. Savu, cited above, p. 26

[25] Article 48 from the Treaty on the Functioning of the European Union (ex-article 42 from The Treaty on the European Union)

[26] O. Ţinca, The notion of worker in the European Union's law of social security, in R.R.D.M. no. 4/2010, p. 18

[27] Court's Decision from March the 19th 1964, in case no. 75/63

[28] Court's Decision from December the 9th 1965, in case no. 44/65

[29] O. Ţinca, cited above, p. 21

discrimination but may, in some circumstances, be submitted to certain limitations.

The restriction of the freedom of movement of the EU citizens and of their family members must be founded on a juridical act, must follow a legitimate purpose, must be necessary and useful and must be carried out by the specific means of a democratic society. It is highly important for the restriction to take place in respect of the proportionality between the intended purpose and the means that are used for its achievement and to be exclusively based on the personal condition of the involved person.

In accordance with the Treaty, the free movement cannot be limited, except for reasons of public order, safety and health. These reasons cannot be invoked for economic purposes. The conduct of the person must constitute a real, present and sufficiently serious threat for one of the fundamental interests of the society. Motivations that are not directly linked to the case or that are connected to considerations of general prevention cannot be admitted. The ex-Commission of Human Rights has decided, in the settling of some disputes, that the following acts cannot be considered limitations of the right to free movement[30]:

- the obligation imposed to every citizen to have with him/her an identity document and to present it to the public authorities, at their request;
- the detention of a person against whom the procedure of penal pursuit had started, when the conditions provided by the law are respected;
- the legal condition of the establishment of a permanent residence on the territory of the host state for the returning of some goods, at demand.

Personal behaviour, in order to be a motive for the restriction of the right to free movement, must represent a real, serious and present threat for a fundamental interest of the society.

The Court of Justice had established that a member state can invoke, in case of restriction of the free movement, the behaviour of a person residing in his/her affiliation to a group or to an organization that, although it is not forbidden, represents – because of its activities – a doubtless social danger.

When personal behaviour is invoked for the restriction of the freedom of movement, the arguments must mention that the threat for the public order and safety reside in the personal act of an individual; the expulsion cannot be decided for reasons of general prevention or with the purpose of discouraging other persons[31].

The justification of the measures to restrict the right to free movement based on public order reasons must be evaluated by respecting all the community law rules, in order to avoid the discretionary appreciations of the member states and to guarantee the rights of the European citizents that are submitted to this kind of measures.

In the case of gypsies of Romanian citizenship, found on the territories of other European Union member states, the restriction of their right to move, reside and return is only possible for the same reasons that are invoked in the Treaty. For the actual situation that has been taking place in France in the last months, the European Union is confronted with a situation that was not previewed, although it should have been, and that has created difficulties in the relations between some of the member states, especially because, in our opinion, none of the involved states assumes its responsibility for what they did – it is

[30] C. Bârsan, cited above, p. 1115 - 1116

[31] Court's Decision from February the 26th 1975, in case no. C-67/74

France's case, for proceeding to masqued expulsions – or for what they should have done, a long time before these events – it is Romania's case, for not making enough efforts to socially integrate gypsies and for inneficiently and, maybe, irresponsibly spending the public money that had been destined for the policy of education and for the social insertion of this ethny.

We express categorically our opinion on the guilt of the Romanian state for the delay *sine die* of the solutions for the integration of the gypsy ethny by means of ferm and constant planned policies, especially on an educational level. Since the emancipation of the gypsies in the XIXth century, that took place in the Romanian Principates, the issue of their social integration has been totally neglected considering, without justification, that it will produce on its own, as effect of time passing and only by the own effort of this ethny, fact that obviously did not happen.

In the same time, we express our complete surprise towards the attitude that some of the leaders of the country in which the fundamental principle of human freedom was born, that found appropriate to utilize means of removing some of the citizens – we want it or not, we like it or not – Europeans, trying to masque the real intentions of expulsion, for which they had no reasons and especially not in group.

The use of cheap and malicious ways to hide the real expulsion intentions by tempting groups of very economically vulnerable people with small amounts of money is no pride for a leader, especially when he is the head of a state that really leads the human culture and civilisation.

Without trying to exonerate the Romanian state of the obligations that it has towards its own citizens, no matter their ethnic nature, we express our belief that the issue of the gypsies, which might be the last ethnic group in Europe with migratory cultural traditions, is also a European issue, which requires a united effort in order to reach the parameters that were established in the Union.

The placement of the guilt from one side to the other, as well as the lack of vision of the EU leading organisms in the real and actual matter of the existence – in Europe – of some ethnical groups with specific cultural values and millenary migratory traditions are proof of the abyss that still exists between the modern, elegant, humanitarian provisions regarding the equality in right and lack of discrimination on one side, and the cruel, sometimes shocking, daily life facts that prove some high levels of intolerance, which are much more unpleasant when they are manifested by the representants of a nation that, by blood spilling, fought for and gained the recognition of some fundamental human rights.

As far as the restriction of the right to free movement for reasons of public health is concerned, according to article 29 of Directive no. 2004/38/CE, the only diseases that justify restrictive measures are those that have an epidemic potential, as they are defined by the relevant documents of the World Health Organization, as well as other infectious and parazitary contagious diseases, if they are the object of some protection provisions that apply to the nationals of the host member state.

The diseases that start after a three-month period since the date of arrival cannot motivate the expulsion from that territory.

The removal of a person from the territory of a host state must respect the European rules of material and procedural law, a series of guarantees regarding the right to free

movement, the right to reside and the right to leave an EU member state being granted. The expulsion, by individual or collective measures, of a state's citizens from its territory is prohibited.

It is important to make the difference between *expulsion* and *extradition*[32].

By *expulsion* we understand the execution of an order to leave a certain statal territory, while by *extradition* takes place a 'putting' or a 'handing over' of a person to another state, usually in vue of the pursuit, judgement or execution of a penal penalty. The extradition and its reglementation pertain to the juridical acts of each state, some states allowing the procedure of extradition and others rejecting it.

The expulsion of the European citizen and of his/her family, after he/she had been granted the right to permanent stay on the territory of a EU member state is not possible, except for the situations when imperative reasons of public order and safety interfere. From a procedural point of view, the persons that find themselves in a situation of this kind must be informed (by means of a notification) in regard to the reasons invoked in vue of their expulsion.

It is compulsory to specify in the notification the right to contest the measure and the judiciary or administrative organ in front of which the contest must be deposited. The settling of the contest takes place in respect of the procedural and defence rights that must at least be recognized at the level of the conditions which apply in front of certain equivalent national instances.

The persons who are subjected to a decision of prohibition of their entry on the territory of a member state, for reasons of public order, security or health, are entitled to the raising of the prohibition, based on their request, after a reasonable period of time, depending on the circumstances and, in any case, after three years from the execution of the definitive decision of prohibition of the entry.

During the analysis of their request, the involved persons do not have the right to enter the territory of the state that had imposed the prohibition.

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[32] C. Bârsan, cited above, p. 1122