

## INTERNATIONAL LAW



### Limited Border Traffic. Juridical Regime from an European Perspective

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**Abstract:** *The basis of the individuals' freedom of movement is to eradicate discrimination between nationals of the Member State in whose territory they reside or work, and nationals of other Member States living or working in that territory. Discrimination can refer to the conditions of entrance, travel, work, employment, or compensation. Freedom of movement is separated from other human rights in that the exercise and full accomplishment of it involves affiliations between states, the compatibility of their position on this right, which positively influences the international environment. By exploiting the right to the freedom of movement there are consequences both in macro and micro-social plan, fulfilling the role of progress factor both for communities and for the human personality, enriching their knowledge and developing their feelings.*

**Keywords:** *border traffic; European law; freedom of movement; fundamental rights*

### 1. Introduction

Aristotle defined in his work *Politics* the intrinsic tendency of man to seek the society among his fellows. Today, this public market is the planet. History evokes, in the name of a primary instinct that has become a ration to be, man's desire to travel, overcoming spaces out of the need for a relationship, for progress. Tamerlane, Alexander the Great, Napoleon Bonaparte were crowd leaders who took the expansion in the name of "living space" to the extreme. From the ambition to remove conventional barriers including borders, overcoming prejudices, dialogue for ethno-religious compatibility of the solution to create free zones, visa-free spaces like European Schengen, neighborhoods like China - town in New York where coexistence along with inter-human relations are non-antagonistic. The interaction of world cultures is what enhances the evolution of civilization. Thus, to fade hegemonic and at the same time adventurous tendencies, in today's society there must be principles, norms of international law,

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improvements and global assumptions meant to favor progress, facilitate communication and manage the phenomenon, so as not to degenerate into primitive-military expansions, neo-colonial expansions, migrations of poverty, expedients, overpopulation or enslavement.

The heterogeneity of populations, economic, cultural and environmental disparities impairs, on the one hand, the globalizing effect, but on the other hand it catalyzes the migration phenomenon. The integration of Europe into the "planetary village" spoken of by the editor of the magazine "Foi et Development" Albert Longchamp presupposes that the ideal of the suppression of space and time becomes a reality<sup>1</sup>. Giving up borders seems, at first superficial analysis, the first sign of the birth of a society without ideology, subject to pressure from community institutions. To exclude such a specific interpretation of Europeanists, the European Constitution provided that the Union respects the richness of its cultural and linguistic diversity and ensures the preservation and development of the European cultural heritage, as regulated in the third article. On the other hand, we must not ignore the fact that freedom of movement is differentiated from other human rights in that its exercise and full realization involves relations between states, harmonizing their position on this right, which positively influences the international atmosphere. Man's need to travel is a constant in life. Consequently, the harmonization and functioning of the right of free movement of citizens remains a constant priority and an obligation of vital importance.

## 2. History of Small Border Traffic Procedures

The first global glorification of the principle of free movement of persons was achieved by art. 13 of the Universal Declaration of Human Rights of December 10, 1948: "Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country"<sup>2</sup>. At European status, this right was included in the 1957 Treaty of Rome which laid the foundations of the European Economic Community. Among the objectives of the C.E.E. it stated "the removal, between Member States, of obstacles to the free movement of persons, services and capital". The essence of the freedom of movement of persons is to eliminate discrimination between nationals of the Member State in whose territory they are or work and nationals of other Member States living or working in that territory. Discrimination can refer to the conditions of entry,

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<sup>1</sup> Albert Longchamp, *The Planetary Village and the Globalization of Communication*, Pluralitas Magazine, vol.4, 2001, p. 3.

<sup>2</sup> Universal Declaration of Human Rights, art. 13.

travel, employment or remuneration<sup>1</sup>. Although the Treaty of Rome declares the Community's duty to ensure the free movement of persons, by 1985 efforts to do so had succeeded in partially adjusting issues relating to the free movement of certain categories of persons: workers and their families, service providers and economic agents. The European Court of Justice has played an extremely important role in consolidating this process, both by signaling and eliminating uncertainties, and by signaling legislative disparities<sup>2</sup>. During the 1980s and 1990s, European debates took place on the meaning of the notion of "free movement of individuals".

For some Member States, this right was to be applied only to European citizens of the Member States, which meant maintaining border control in order to distinguish European citizens from third-country nationals. Other states, on the other hand, wanted to establish free movement for all and, consequently, abolish border control. Faced with the impossibility of reaching an agreement in the Treaties of the European Community, France, Germany, Belgium, the Netherlands and Luxembourg signed on 14 June 1985 in the Belgian town of Schengen the "Agreement on the gradual reduction of checks at common borders". The objective of this agreement was the progressive abolition of controls at the common borders and the establishment of a free movement regime for all individuals who are nationals of the signatory States, of other States of the Community or of third countries. To this agreement is added the Single European Act, which entered into force on 1 July 1987, a document which removed the last barriers to the completion of the single market and led to the acceleration of the process of extending the right to free movement to new categories of persons such as students, people who do not engage in economic activities, but have sufficient living resources<sup>3</sup>.

Free movement of individuals is defined by the Single European Act of 1987 as one of the four fundamental freedoms that formed the Internal Market together with the freedom of movement of goods, services and capital. The internal market was defined as an area without internal frontiers which had to function under the same conditions as a national market: it was necessary for goods, persons, services and capital to move within or without any control at the frontiers between Member States<sup>4</sup>. The five countries that have concluded the Schengen Agreement will sign a Convention implementing it on 19 June 1990. Entered into force on 26 March 1995, it allowed the abolition

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<sup>1</sup> Ileana Pascal, Ștefan Deaconu, Codru Vrabie, Nicolae Fabian, *Free movement of persons*, Ed. Centrul de Resuse Juridice, Bucharest 2002, p. 15.

<sup>2</sup> *Idem*, p. 15.

<sup>3</sup> Dr. Viorel Marcu, *Community Institutional Law*, Ed. Lumina Lex, Bucharest, 2001, p.13.

<sup>4</sup> Camelia Stoica, *Free movement of persons in the European Union*, Oscar Print Publishing House, Bucharest, 2001, pp. 17-18.

of internal borders between signatory states and the creation of a single external border where entry controls into the Schengen Area are carried out following an identical procedure.

Thus, foreigners entering this area with a visa and residence permit issued by a signatory country may move freely on the territory of any country that has acceded to the Convention<sup>1</sup>. Common visa rules by establishing a uniform visa for all Member States, the right of asylum and control at the external borders have been adopted to allow the free movement of persons within the signatory countries without disturbing public order. To reconcile freedom with internal security, the consecration of the free movement of persons was accompanied by compensatory measures. The Member States have therefore agreed to work to improve coordination between the police, customs, and justice services and to take the necessary measures to combat terrorism and organized crime. Thus, an entire administrative procedure for the management of the Schengen Area was developed by creating a complex information system on the exchange of identity data of persons and the description of the investigated objects, the Schengen Information System (SIS).

The Treaty of Amsterdam of 1997 and the Treaty of Nice of 2001, in turn, enshrined the completion of the internal market and the important position of the four fundamental freedoms in the process of European integration<sup>2</sup>. Thus, the Treaty of Amsterdam introduced provisions related to visas, asylum, immigration, and policies specific to the free movement of persons and provided for a period of 5 years until the time when Community procedures will be applied in these areas as well. The conditions for the progressive establishment of a common area of freedom, security and justice have been created in Amsterdam. At the time of drafting the Amsterdam Treaty, it was decided to integrate the Schengen acquis into the European Union from 1 May 1999, as it corresponds to one of the main objectives of the single market, namely the free movement of persons. The legal integration of the Schengen acquis into the European Union has been accompanied by institutional integration, meaning that the Council has replaced the Schengen Executive Committee and the General Secretariat of the Council has replaced the Schengen Secretarial Office.

An important document for the free movement of individuals was the Charter of Fundamental Rights signed at the Nice European Council in December 2000. Article 45 of the Charter provides in the first instance that *"every citizen of the European Union has the right to travel and to reside freely*

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<sup>1</sup> Ionel Fecioru, *Freedom of movement between desideratum and reality*, Ed. Of the Ministry of Interior, Bucharest, 2000, p.13-14.

<sup>2</sup> Dreptul Magazine, no. 11/2002, p.85.

*within the territory of the Member States*<sup>1</sup>, and secondly, 'freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to third-country nationals legally residing in the territory of a Member State. The retrospective of the acts that enshrined the free movement of persons in Community law shows the evolution of the meaning of this right. Thus, if initially the first provisions in this field considered the individual only as an economic agent - as an employee or service provider, has been extended to include issues related to the approach of citizen of the Union, regardless of any economic dimension or differences in nationality'<sup>2</sup>.

The main measures adopted by the Schengen States concern the abolition of controls at common borders and the intensification of control at external borders, the common definition of the conditions for crossing external borders, the separation at airports and ports between Schengen and non-Schengen travelers, harmonization entry and visa requirements for short stays, coordination between administrations to monitor borders, the obligation to declare for all third-country nationals moving from one country to another, stepping up judicial cooperation by moving to a faster deportation system and better enforcement of court orders and last but not least the creation of the Schengen Information System (SIS). All such measures taken by decisions and declarations adopted by the Executive Committee established by the 1990 Implementing Convention, the acts adopted for the implementation of the Convention by the courts to which the Executive Committee has conferred decision-making power, the Agreement signed on 14 June 1985, The Convention implementing it, signed on 19 June 1990, the following protocols and accession agreements form the "Schengen acquis".

The Maastricht Treaty, which entered into force in 1993, introduced the concept of "European citizenship" by which all citizens of the Member States of the European Union were granted the right of free movement and residence within the Union. Moreover, the Treaty placed in the field of common interest of the Member States and asylum policy, the issue of crossing external borders and immigration policy, notions contained in Title VI - cooperation in the field of justice and home affairs, also known as the name of the Third Pillar of the EU<sup>3</sup>. Also, by exercising the right to free movement, both macro and micro-social effects are produced, fulfilling the role of progress factor both for communities and for the human personality,

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<sup>1</sup> Charter of Fundamental Rights of the European Union (2010 / C 83/02).

<sup>2</sup> Ileana Pascal, Ștefan Deaconu, Codru Vrabie, Niculae Fabian, *Free movement of persons*, Ed. Centrul de Resurse Juridice, Bucharest 2002, p. 16.

<sup>3</sup> Ileana Pascal, Ștefan Deaconu, Codru Vrabie, Niculae Fabian, *op. cit.*, p. 17.

enriching their knowledge and developing their feelings. Through its policy, the European Union aims to create a European area of freedom, security and justice in which there is no longer a need for control of people at internal borders, with European citizens enjoying the fundamental right to move and settle where they want.

### **3. Legal System Applicable at European Standard**

In 2015, more than 50 million non-EU nationals visited the EU, representing more than 200 million crossings at the external borders of the Schengen area. In addition to these regular travel flows, conflicts in the Middle East and elsewhere alone in 2015 generated around 1.8 million illegal crossings of the EU's external borders. Taking these figures into account in the context of the terrorist attacks of late 2015 and early 2016, the European Commission published a communication setting out options on how existing and future intelligence systems could strengthen both the management of external borders, as well as internal security in the EU. This was a foundation for launching work to improve the EU's data management architecture, with full respect for fundamental rights, in particular as regards the protection of personal data. Thus, the elaboration of Regulation no. 1931/2006 establishes a specific regime for small border traffic at the external land borders of the European Union countries and introduces a local border crossing license for that purpose<sup>1</sup>.

Taking into account the current Community legal framework as well as European trends, the need to develop rules on small border traffic was highlighted in the Commission Communication entitled "Towards an integrated management of the external borders of the Member States of the European Union". This was confirmed by the Council with the approval of the "External Borders Management Plan of the Member States of the European Union", which was subsequently approved by the Seville European Council on 21 and 22 June 2002. The specific regime for small border traffic is a derogation from the general rules governing the control of persons at the external borders of the Member States of the European Union, provided for in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the crossing borders by people. However, Regulation No 1936/2006 constitutes a development of the Schengen acquis in which both the United Kingdom, in accordance with Council Decision 2000/365 / EC, and Ireland, by Council

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<sup>1</sup> Ioan Alexandru, Mihaela Cărăușan, Ilie Gorjan, Ivan Vasile Ivanoff, Cezar Corneliu Manda, Alina-Livia Nicu, Crina Rădulescu, Cătălin Silviu Săraru, *Administrative Law in the European Union*, Ed. Lumina Lex, Bucharest, 2007, p. 427.

Decision 2002/192 / EC participate. An important note is that this Regulation also applies to Iceland and Norway, as it constitutes a development of the Schengen acquis, in particular of existing EU laws on the Schengen area - an area of Europe without internal borders, in which Citizens, many non-EU nationals and tourists can move freely without border crossings, as well as Switzerland and Liechtenstein.

The small border traffic is carried out according to the bilateral agreements concluded by Romania with neighboring third countries in accordance with Regulation (EC) no. Regulation (EC) No 1.931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on small-scale border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention. The subject of small border traffic concerns the regular and frequent crossing of the external border of the European Union by nationals of countries outside it, living in areas bordering the EU, for legitimate reasons. In their case, they may cross the external land border of an EU country with the obligation to comply with the conditions set out in Article 4 of this Regulation as follows: be in possession of a license issued to allow such passage and a passport, if this is required by the bilateral agreement, there should be no persons for whom there are alerts in the Schengen Information System and last but not least, they should not be considered a threat to public policy. These persons are allowed to remain in the border area for a maximum period provided for in the bilateral agreement between an EU country and a neighboring non-EU country, provided that the stay may not exceed a period of more than three months.

This license is the document that entitles the residents of the border area to cross the common state border, in a regime of low border traffic, according to the above mentioned regulation and based on the concluded agreements. Thus, according to art. 12 of the present regulation, the small border traffic licenses are issued by the diplomatic missions and consular offices of Romania in the neighboring third countries with which Romania has concluded agreements in this respect. The legislator stipulates in art.10 of Regulation 1931/2006 the fact that the legitimacy of the local border crossing license will be between one and five years<sup>1</sup>. Taking into account the above information, the legislator mentions a series of obligations incumbent on the holder of the small border traffic license, namely to have the document on him at all times, not to alienate it and to present it to the competent

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<sup>1</sup> Regulation (EC) No Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on small-scale border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, art.10.

authorities or whenever required. The holder of the small border traffic license is also bound to notify the qualified border police bodies about the theft, loss, damage or destruction of the small traffic license, within 5 days from the finding of any of these situations.

Regarding the tax regime, they will be equivalent to those of a short-stay visa with multiple entries. However, EU countries are free to decide to reduce taxes or even waive them. Pursuant to Regulation (EU) 2017/1954, amending Regulation (EC) no. 1030/2002 on the EU model residence license for non-EU nationals, the security features of local border crossing licenses are harmonized with those of residence licenses in order to increase their security and prevent fraud<sup>1</sup>.

The Annex to Regulation (EU) 2017/1954<sup>2</sup> contains the technical specifications of the model for side I and side II of the card. These specifications include a photo ID that is safely included in the card body and protected by a diffracting element with a variable optical image, the material of which the card is made (polycarbonate or equivalent synthetic polymer), and the color, process of printing and techniques to be used. Further analyzing the agreements on the implementation of the regime specific to small border traffic, the legislator provides in Article 13 that the member states of the European Union may conclude agreements on small border traffic with neighboring non-EU countries. Countries may also maintain existing agreements, provided that they comply with this regulation. In addition, EU countries need to ensure that non-EU countries apply the principle of reciprocity and that they give comparable treatment to EU citizens wishing to travel to their border area.

These agreements may allow border area residents to use border crossing points reserved for border area residents, special color at ordinary border crossing points and exceptional licenses granted to border area residents to cross the border outside authorized crossing points, and outside the hours established as stipulated in the present regulation in art.15 thus meeting the essential norms regarding the facilitation of the border crossing. Considering all of the above, it is necessary to mention the need for EU countries to apply effective, proportionate and dissuasive sanctions in case of misuse of the specific border treatment regime. These may include the cancellation or revocation of the license, regulations that are subjected to national law, elements that will be discussed in the next chapter.

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<sup>1</sup> Regulation (EC) no. 1030/2002 on the EU model residence permit for non-EU nationals.

<sup>2</sup> Regulation (EU) 2017/1954 of the European Parliament and of the Council of 25 October 2017.



#### 4. Conclusion

Freedom of movement is one of the most complex and precise human right in view of the fact that its full exercise and recognition involves relations between states and at the same time harmonize their position on this right, which can only have a positive impact on the international atmosphere. Given the constant human need to travel, therefore, the harmonization and functioning of the right of free movement of citizens remains a constant priority and an obligation of vital importance. The very essence of the freedom of movement of individuals is to eliminate discrimination between nationals of the Member State in whose territory they are or work and nationals of other Member States living or working in that territory, thereby discriminating on the conditions of entry, travel, work, employment or remuneration. We conclude by stating that, through its policy, the European Union envisages the creation of a European area of freedom, security and justice in which there is no longer a need to control people at internal borders, with European citizens enjoying the fundamental right to move and to establish where they want, to respect their physical and moral integrity, aspects that can be achieved through the permanent cooperation of the Member States in order to develop and regulate a complete and complex legislative framework.

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