

REPORT
on the Free Movement of Workers
in Romania in 2010-2011

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Introduction

The period 2010-2011 corresponds to the fourth and fifth years of free movement and also to the continuing economic crisis started in 2008. This stage, at least its first part is characterized by legislative stability, but in the end of the analyzed period an important change in legislation intervened: it was adopted a law to reform the legislative act transposing Directive 38/2004.

The regulation in force on free movement in Romania is still the Government Emergency Ordinance no. 102/2005 on the free movement of citizens of the Member States of the European Union and the European Economic Area on the Romanian territory.¹ This Emergency Ordinance transposed the Directive 2004/38/EC.² It was modified in the ‘last minute’ of the period in concern, by the Law no. 80/2011, published in the Official Journal on 24th of June 2011 and entered into force on 27th of June 2011. The title of the Emergency Ordinance was completed with a reference on the citizens of the Swiss Confederation, as an indication that the personal scope of the Emergency Ordinance was modified or clarified. The provisions of this revised legislation are analyzed in this Report.

There was no radical change in the number of European Union citizens using their right to free movement, which remains relatively reduced due the recent accession of Romania, continuing problematic issues related to the large presence of Romanian citizens in some Member States.³ From this point of view it must be mentioned – because the internal debate on this issue – the approval by the EC of the restrictions imposed by Spain towards Romanian workers.

The labor migration of European Citizens in Romania remained unproblematic in this period, no court cases or conflicts to be reported. As mentioned in previous reports, because the reduced number of people exercising their right to free movement in Romania, the specific problems arising in member states where this fundamental freedom has a longer tradi-

1 This emergency ordinance entered into force at the date of Romania’s accession to the European Union. But before the accession, 1st January 2007, the ordinance was modified three times and were elaborated methodological norms for its application:

- by the Law. no. 260/2005;
- by the Government ordinance 30/2006;
- methodology adopted through Government Decision 1864/2006;
- by the Law no. 500/2006.

2 The legal instrument of harmonization was the emergency ordinance. The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents. The ‘exceptional case’ was the harmonization necessity itself and the Schengen Action Plan. An emergency ordinance shall only come into force after it has been submitted for debate in an emergency procedure to the Chamber having the competence to be notified, and after it has been published in the Official Gazette of Romania. If not in session, the Chambers shall be convened by all means within 5 days after submittal, or, as the case may be, after forwarding. If, within 30 days at the latest of the submitting date, the notified Chamber does not pronounce on the ordinance, the latter shall be deemed adopted and shall be sent to the other Chamber, which shall also make a decision in an emergency procedure. An emergency ordinance containing norms of the same kind as the organic law must be approved by an absolute majority.

3 For general data and analyze: Dimitris Papadimitriou & David Phinnemore, *Romania and the European Union: from marginalisation to membership*, Routledge 2008; Steven Blockmans & Adam Lazowski, *The European Union and Its Neighbours: A Legal Appraisal of the EU’s Policies of Stabilisation, Partnership and Integration*, Cambridge University Press 2006, the chapter dealing with Romania; Elena Jileva, Visa and free movement of labour: the uneven imposition of the EU acquis on the accession states, *Journal of Ethnic and Migration Studies*, Volume 28, Issue 4 October 2002, p. 683-700.

tion, mainly related to the status of family members or social protection issues, are still not reflected in practice. Frequently, from a sociological point of view, these people are generally high or middle level managers and executives of companies with foreign capital. Similarly as in previous years, it has to be showed anyway the existence of practical problems regarding the administration of the social security coordination. No discrimination cases in the labor market against EU citizens can be reported. The implementation of European rules does not involve complex procedures, and from political or social point of view, free movement in Romania is not controversial.⁴ Compared to the inverse of the situation, in concrete the free movement of Romanian workers in the single market, the legal and practical problems are much smaller.

It was a great question and a disputed topic that what will happen to the Romanian migrant workers in Western Europe, will they return to the country due to economic crisis? If so, what will be the effects of the mass return on the domestic economy, on the macroeconomic indicators or on unemployment? After the clash of political, economical, sociological arguments the life has proved that there was no mass return of migrant workers, they assumed the risks to remain in Western Europe.

Another concern related to migration or migrant workers and persons exercising their right to free movement, was the issue of the Roma minority (especially Romanian and Bulgarian citizens), and their 'voluntary return'/masked expulsion to the source states. This problem, in addition to complex legal issues raised immediately, brings forward wider inquiries: that of discrimination or that of the need for effective programs to integrate the (trans European) Roma minority.⁵

The Emergency Ordinance 102/2005 lays down the regulations for the conditions governing the exercise of the right of free movement, residence and permanent residence within the Romanian territory by the citizens of Member States of European Union or European Economic Area and of the Swiss Confederation, and their family members and the limits placed on these rights on grounds of public order, national security or public health.

Article 3 of the Emergency Ordinance 102/2005, before the recent modifications, stated that the European Union citizens and their family members who exert the right of free movement and residence on Romanian territory shall benefit from the following rights and freedoms recognized by the Treaty:

- a) General protection of persons and property, guaranteed by the Constitution and other laws, as well as from other rights provided for by the European Union and other international treaties Romania is a party to.
- b) They may move freely and establish their residence or, by case, domicile anywhere on the Romanian territory;
- c) Social protection measures from the state, under the same conditions as the Romanian citizens;

4 Frank Schimmelfennig & Ulrich Sedelmeier (eds), *The Europeanization of Central and Eastern Europe*, Cornell University Press 2005, p. 112-134.

5 For details, see Emőd Veress, *The Legality of Expulsion of Roma as Union Citizens under the Conditions Imposed by the Directive 2004/38/EC*, in: *Central and Eastern European Countries after and before the Accession*, Volume 2, Budapest 2011, p. 103-108.

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- d) They have the right to check the personal data written on official documents issued by Romanian authorities and, if the case may be, to request the correction or exclusion of data that do not correspond to reality;
- e) They have unlimited access to the Romanian labor force market, under the condition, if the case may be, of applying the provisions of the transitory measures stipulated in the Treaty of Romanian Accession to EU, as well as they are allowed to carry on other economic activities, according to the law applicable to the Romanian citizens.
- f) They have unlimited access to the educational and training activities within the national educational system.

This text was replaced by Law no. 80/2011 with a more laconic and economical text: EU citizens and their family members exercising their right of residence in Romania enjoy equality of treatment with Romanian citizens within the scope of European Union Treaties, subject to these treaties and to the measures taken in their application.

The dependents, as well as the partner, benefit of the rights granted to the family members of the Union European citizen regarding the entry and residence in/on the Romanian territory under the conditions stipulated by the emergency ordinance. Exerting any rights or fulfilling any administrative formality by the European Union citizens or their family members shall not be conditioned by the possession of documents issued by the Romanian authorities under the provisions of the Romanian law, if the concerned person proves by any means of proof that he/she is the beneficiary of that right.

Anyway, during their stay in Romania, the European Union citizens and their family members are compelled to comply with the provisions of Romanian legislation.

The serious public discussions on the Schengen Area accession, indirectly related to the subject of free movement, are ongoing.⁶

⁶ The Government adopted Decision no. 1540/2008 approving the National Strategy on joining the Schengen area for the period 2008-2011.

Chapter I: The worker: Entry, residence, departure and remedies

As detailed information on the transposition of Directive 2004/38/EC was already provided in the previous reports on Romania, in this chapter the object of examination is, firstly, the transposition of provisions specific for workers (a), and secondly, the situation of jobseekers (b).

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

Art. 7(1a) of Directive 2004/38

According to the referred text, governing the right of residence for more than three months, all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State.

The Government Emergency Ordinance no. 102/2005 on the free movement of citizens of the Member States of the European Union and the European Economic Area on the Romanian territory transposed the specific provisions of the Directive correctly.

According to the initial text of the Emergency Ordinance, the European Union citizens shall have the residence right in Romania for a period over three months if they carry out dependent or independent activities, according to the law.⁷ This text was slightly changed by the Law no. 80/2011, this right is now related to the status of being a *worker*. But the essence is identical because the Law no. 80/2011 added a definition of this status. According to this definition, is a worker the EU citizen who is performing dependent or independent activities, according to the law.

There is no legal definition for dependent and independent activities, but the provisions on the registration certificate established that, in order to be registered and to be granted the registration certificate, the European Union citizens shall submit to the competent territorial branch of the Immigration Authority, within 3 months starting the date of their entry on the Romanian territory, an application accompanied by the national identity document or valid passport, as well as the employment contract or a certificate issued by the employer endorsed under the law or the authorization for carrying out the independent activities issued according to the law.

Therefore, the principal situations are as follows:

- a) the European Union citizen concluded a labor contract with an employer, in concordance with the Romanian Labor Code (Law no. 53/2003, with subsequent modifications);
- b) the European Union citizen concluded a management contract with an employer, in accordance with the Law no. 31/1990 on commercial companies, with subsequent modification and acts as an executive officer of a business entity;
- c) the European Union citizen obtained an authorization under the specific regulations to carry out independent activities.

⁷ Art. 13 (1) a) from Emergency Ordinance no. 102/2005.

Before 2008, were required a legalized copy of the authorization issued by the mayor.⁸ According to the previous legislation, those authorizations for most of independent activities were issued by the mayor. The legislative changes adopted in 2008, respectively the Government Emergency Ordinance No. 44/2008 for carrying out economical activities by authorized individuals, individual enterprises and family enterprises,⁹ took away this entitlement from mayors, mainly due the non-unitary administrative practice at the level of different administrative-territorial units. Now any permanent, temporary or occasional economic activity carried out in Romania by authorized individuals, individual enterprises and family enterprises must be registered and authorized by the Trade Registry. The legal text explicitly opens all three forms of independent activities for European Union citizens and EEA citizens.

Art. 7 (3 a-d) of Directive 2004/38

According to the Directive, a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

- a) he/she is temporarily unable to work as the result of an illness or accident;
- b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;
- c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;
- d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

The Government Emergency Ordinance no. 102/2005 transposed these rules accordingly.¹⁰

As a general rule, the right of residence has a duration determined by the period in which the entitled person meets the conditions of its exercise, under the Emergency Ordinance 102/2005. But:

The resident, who was a worker for more than one year and has subsequently become unemployed, under the conditions of the law, has the right of residence, during the period of his unemployed status.

The resident who had an employment contract for a limited period, less than one year, or was a worker for maximum 12 months period and has subsequently become unemployed, shall benefit of the right of residence for 6 months starting the date of obtaining the unemployed status.

The resident who was a worker and lost this status, but has not subsequently become unemployed and who is registered in a vocational training program, has the right of residence

⁸ Law no. 300/2004, with subsequent amendments.

⁹ The Ordinance does not apply to liberal professions and certain other economic activities, which are regulated by special laws.

¹⁰ Art. 13 from Emergency Ordinance no. 102/2005.

on condition that the training is related to the field of the previous job and just for its duration.¹¹

During the period into which the resident worker has temporarily lost capacity to work due to a disease or an accident, the resident maintains its right of residence and the status of being a worker.

Art. 8(3a) of Directive 2004/38

The Directive states that for the registration certificate to be issued, Member States may only require that Union citizens, workers or self-employed persons, to present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons.

The Romanian regulation is in accordance with the community rules. For the issuance of the registration certificate, the European Union citizen must submit the following documents to the competent territorial branch of the Immigration Authority:

- application form;
- national identity document or valid passport;
- the employment contract or a certificate issued by the employer. The contract or the certificate must be registered before at the territorial labor inspectorate;
- or the authorization for carrying out independent activities.¹²

On the basis of the documents, the competent authorities are issuing the registration certificate on the same day when the application was submitted.

Art.14 (4 a-b) of Directive 2004/38

The Directive states that an expulsion measure may in no case be adopted against Union citizens or their family members if: (a) the Union citizens are workers or self-employed persons, or (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

The rule was transposed by Government Emergency Ordinance no. 102/2005, which, in its form before the recent modifications, stated that the leaving order of Romanian territory can not be issued against European Union citizens and their family members, if the European Union citizen carries out dependent or independent activities or proves by any means that is searching for employment and has real prospective to be employed.¹³

The Law no. 80/2011 substantially modified the text. The introductory part of the new text is similar. The decision to leave the territory of Romania may not be issued against EU citizens and their family members if the EU citizen has the status of worker or the EU citizen prove by any means that is searching for a job and has real possibilities to be employed. The novelties are:

- the decision to leave the territory of Romania may not be issued automatically as a consequence of a request for assistance to the national social security system;

¹¹ See also ECJ cases C-3/90 Bernini and C-357/89 Raulin.

¹² Art. 15 from Emergency Ordinance no. 102/2005.

¹³ Art. 24-3 from Emergency Ordinance no. 102/2005.

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- in the case of EU citizens and their family members who are without means of support and they are receiving social assistance, a decision to leave the territory of Romania may be issued only if, after a social survey, it appears that the person has become a burden on the national social security system.

The specialized public institution of the territorially competent local public administration authority carries out the social survey. The minimal subject of the survey is the following:

- the proportion between the period of stay in Romania and the period for which social benefits were granted;
- the possibility that in the next period the person may not need social benefits;
- the degree of integration into society of the person and his family;
- the existence of personal circumstances, such as age or health, family or economic status;
- the amount of benefits provided and their share in total means of support of the person concerned.

Art.17 of Directive 2004/38

The provisions of article 17 from the Directive are transposed duly into the Romanian legislation. The European Union citizens who have a continuous legal stay of more than 5 years shall benefit of the right of permanent residence.

The text was completed in 2011 through the provisions of the Law no. 80/2011 with a definition of the continuous residence. Continuous residence means the right of residence under the law, in the last 5 years preceding the application for permanent residence address. Proof of continuity of residence is in the responsibility of the applicant and may be justified by any mean of evidence. Legal residence means the right of residence in Romania, under the law, without being interrupted by a measure to limit or restrict the right of residence under the Ordinance 102/2005, or a measure of departure from the territory Romania, according to Government Emergency Ordinance no. 194/2002 on the status of aliens.

Continuity of residence shall not be affected by:

- temporary absences not exceeding a total of six months a year;
- absences of a longer duration for compulsory military service;
- absence of a maximum of twelve consecutive months from the Romanian territory for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a relocation in another Member State or a third country.

To the cases when the continuity of residence is not affected were added a new one in 2011: privation of liberty in Romania, according to a criminal court decision, with a duration less than 6 months. *Per a contrario*, if a criminal conviction is manifested through a privation of liberty longer than a period of 6 months, the continuity of residence is affected.

The right of permanent residence shall be lost in the case of an absence from the Romanian territory longer than two consecutive years.

By way of derogation, the right of permanent residence shall be granted, before completion of a continuous period of five years, to the residents who:

- are workers and who, at the moment they cease activity, have the right an old age pension or whose working contract ceases with entitlement to early retirement according to the law, provided that they have been working in Romania for at least the preceding twelve months and have stayed legally and continuously for more than three years on the Romanian territory. For the residences carrying out a liberal profession the conditions re-

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ferring to the retirement age shall be considered fulfilled when reaching the age of 60 years if otherwise provided by the law;

- are workers and have a continuous stay on the Romanian territory for more than 2 years and stop working due to totally losing or losing at least half of the capacity to work. If such incapacity is the result of an accident at work or an occupational disease, no condition shall be imposed as to length of residence;
- after three years of residence as workers, start to work in an employed or self-employed capacity in another Member State, while retaining their place of residence in Romania, to which they return, as a rule, each day or at least once a week.

Periods of unemployment, medical leave or ceasing of activity due to illness or accident as well as any other periods of ceasing activity for reasons that are not imputable to the person concerned shall be taken into account when establishing continuity of the periods. The conditions as to length of residence and employment and the condition as to length of residence shall not apply if the person concerned who is employed or carries out independent economic activities is married to a Romanian national. Irrespective of nationality, the family member of the European Union national who has permanent residence are entitled to permanent residence only if they are members of the household of the respective EU national.

If, however, the resident who carries out dependent or independent activities dies while still working but before acquiring the right of permanent residence, his family members who are also members of the household shall acquire the right of permanent residence, on condition that:

- the resident had, at the time of death, resided continuously on the territory of Romania for two years; or
- the death resulted from an accident at work or an occupational disease.

The Law no. 80/2011 introduced some cases of derogation from the 5 year of continuous residence condition for granting permanent residence, when the Romanian State can grant a dispense:

- in case of EU citizens or their family members who are of Romanian origin or born in Romania;
- in case of EU citizens or their family members whose residence is in the interest of the Romanian State;
- in case of EU citizens who can prove they have made investments of at least 1,000,000 euros or created over 100 full-time jobs.

The Law no. 80/2011 introduced another special case also. A minor whose parents are holders of a right of permanent residence can enjoy the right of permanent residence without fulfilling the conditions on duration of residence, at the request of both parents, the surviving parent, the parent who has its custody based on final and irrevocable court decision or, where appropriate, at the request of the legal representative. If only one parent is the holder of a right of permanent residence in Romania, the other parent's consent is required, given in front of the representative of the Romanian Immigration Office, at the application or, where appropriate, in authentic form (when the parent in concern is not personally present).

Art. 24 (2) of Directive 2004/38

Article 24 of the Directive sets the rules regarding the right to equal treatment. The second paragraph contains derogation from the general principle of equal treatment. According to the legal text, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period when a European Union citizen is continuing to seek employment and he/she have a genuine chance of being engaged, nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

The Government Emergency Ordinance no. 102/2005 states as a general rule that the European Union citizens benefit social protection measures accorded by the state, in the same conditions as the Romanian citizens. There are no other rules in the Emergency Ordinance transposing article 24 (2) of the Directive.

2. SITUATION OF JOBSEEKERS

In the initial text of the in the Government Emergency Ordinance no. 102/2005 There were no detailed rules on jobseekers. The explanation of this regulatory approach of the Romanian legislators was that there is no significant presence of EU nationals seeking for job in the Romania territory.

The term itself occurred only once in the text of the act, where referring the banning of removal, in case when the EU citizen can prove by any means that he/she is looking for a job and there are real possibilities to be employed, analyzed above.

In other cases, where the Directive uses the term jobseeker, the Romanian rule operated with the word unemployed.

In the previous reports was concluded that in order to reflect the achievements of case law,¹⁴ and to put into practice the recital 9 of the Directive, with a programmatic value, stating that ‘Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favorable treatment applicable to job-seekers as recognized by the case-law of the Court of Justice’, there can be identified methods to regulate better this specific issue of jobseekers.

The Law no. 80/2011 made an important change regarding the situation of jobseekers. It recognized a right of residence for EU citizens who enter Romania and are looking for a job, for a period of up to 6 months from the date of entry without any additional conditions.

3. OTHER ISSUES OF CONCERN

The Law no. 80/2011 introduced new texts and explicated or detailed preexisting rules in the legislation regarding some aspects of the right of residence and its limitations.

¹⁴ For example, ECJ cases C-292/89 *Antonissen*; C-138/02 *Collins*.

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EU citizens and their family members have the right of residence provided for until they become a burden on the national welfare.

When there is no data or information on the failure to respect the legal framework governing the right of residence, the Romanian Immigration Office can check the conditions for exercising the right of residence by Union citizens and their family members. Such checks are cannot be carried out systematically.

Against European Union citizens and their family members who do not meet the conditions for exercising the right of residence, the Romanian Immigration Office may issue a decision to leave the territory of Romania. The person against whom the decision was issued to leave the territory is bound to leave Romania within one month from the date of decision. The decision to leave the territory of Romania may be appealed within 10 days from the date of the Court of Appeal in whose jurisdiction is the issuing authority. The court resolves the request within 30 days of its receipt. The appeal suspends the execution of the decision to leave the territory of Romania. Court decision, which resolves the appeal, is final and irrevocable (single grade of jurisdiction).

The decision to leave the territory of Romania may not be issued against EU citizens and their family members if the EU citizen has the status of worker; the EU citizens can prove by any means that is looking for a job and has real possibilities of being hired.

The decision to leave the territory of Romania may not be issued automatically as a consequence of a request for assistance to the national welfare system. In the case of EU citizens and their family members have no means of support and they are receiving social assistance, a decision to leave the territory of Romania may be issued only if, after a social investigation, it appears that the person has become a burden on the national welfare.

The Romanian Immigration Office shall cancel, by reasoned decision, the right of residence in Romania, residence following registration if it finds that:

- at the date of registration of residence, the status of EU citizen family member or a citizen of the European Union was established by using false, forged or falsified documents or by other illegal means;
- the right of residence was recorded based on a marriage of convenience, found under the terms of the Emergency Ordinance no. 194/2002, republished, amended, or under a partnership if it has been concluded or is declared that this partnership was concluded to obtain the right of residence in Romania.

The cancellation decision shall be communicated:

- by the Romanian Immigration Office if the person is in Romania, through the return decision issued under the Emergency Ordinance no. 194/2002, republished, with completions;
- by the Romanian Border Police, when the person is present at the border in order to enter Romania, by handing the decision of cancellation issued by the Romanian Immigration Office.

Romanian authorities may restrict the right of free movement and residence in Romania by the European Union citizens or their family members only on grounds of public policy, national security or public health. These reasons cannot be invoked to serve economic ends. Against EU citizens or their family members, irrespective their nationality, having the right to permanent residence, it may be disposed under the law, specific measures to restrict the

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freedom of movement only if it represents an imminent danger to public order or national security.

The right to free movement in Romania, for the following categories of EU citizens, may be restricted only for imperative reasons of national security:

- persons with continuous and legal residence in Romania in the last 10 years;
- minors, except where removal is necessary for the child's interest, according to the UN Convention on the Rights of the Child of 20 November 1989, ratified by Law no. 18/1990, republished.

The adoption by the competent authorities of any decision to restricting the right to free movement, especially with regard to removal from the territory of Romania, can be ordered only taking into account the actual duration of stay of the person in Romania, its age, health status, family and economic situation, degree of social and cultural integration in Romania and the capability to ensure maintenance of its links with the country of origin.

Disposal of any measures restricting the right of free movement in Romania of EU citizens and their family members should be taken only with respect to proportionality and must be based exclusively on the person's behavior. This behavior must be a genuine, present and sufficiently serious threat to fundamental values of society. Such a measure cannot be based solely on the existence of a previous criminal conviction. Motivation cannot be accepted that are not directly related to the case or that rely on considerations of general prevention.

Any measure restricting the freedom of movement in Romania to European Union citizens and their family members may have only temporary character and can be ordered only for a limited period of time to the time required by the reasons of the measure. Such measures are not allowing entry in Romania, removal from the Romanian territory for public health reasons, declaration as undesirable and expulsion. Declaring undesirable a person is a measure ordered against an European Union citizen or member of his/her family who has carried out or which there are solid indications that they intend to carry out activities which endanger national security or public order, for a extendable 1-10 years period.

The decision to restrict the right of free circulation shall be communicated to the EU citizen or family member thereof, in writing, by the authority, which ordered such action under the law. The decision must contain accurate and complete presentation of all the factual and legal reasons that led to the disposition of such measures, its implications for the person concerned, information on where to appeal the court decision, the deadline for taking action and the time limit for the European Union citizen or his family member to leave Romania. The period within the European Union citizen or member of his family must leave the territory of Romania is one month from the date of the decision to restrict the right of free movement, except in those cases where the competent authority issuing the decision to restrict the right of free movement finds that he must immediately leave the Romanian territory or in a shorter period to avoid an imminent and serious risk of breach of public order, public health or national security. If expulsion is accompanying imprisonment, the term is calculated from the starting date of the criminal sanction.

The court shall, in case of action brought against a decision to restrict the right of free movement, to examine the legality of the decision, the principle of proportionality of the measure and the legal conditions laid down and the facts and circumstances justifying the measure taken.

4. FREE MOVEMENT OF ROMA WORKERS

As Romania is one of the main source states of Roma migrants, there are no problems regarding the free movement of Roma workers from other member states inside Romania.

Chapter II: Members of the family

1. THE DEFINITION OF FAMILY MEMBERS, THE ISSUE OF REVERSE DISCRIMINATION

The notion of family member, according the Romanian regulation in force, the Government Emergency Ordinance no.102/2005, includes:

- the spouse;
- direct descendants of the European Union citizen or of the spouse, irrespective of their citizenship, who are under the age of 21 or those who are in their care;
- direct ascendants of the European Union citizen or of the spouse, irrespective of their citizenship, who are in their care.

The dependent and the partner, who can be recognized as family members are defined also by the law. Dependent is any other family member, irrespective of citizenship, who is not covered by the definition provided above and who, in the origin or provenience country, is in the care, is a member of the household of the European Union citizen or due to serious health grounds requires personal care by the Union citizen. Partner is the person who lives together with the European Union citizen if the partnership is registered in accordance with the conditions laid down in the relevant legislation of the origin or provenience country or in case the partnership is not registered the durable relationship can be duly attested.

2. ENTRY AND RESIDENCE RIGHTS

As general rule, the family members of a European Union citizens may move freely and establish their residence, or, by case, domicile anywhere on the Romanian territory.

The family members who are not citizens of the European Union may enter the Romanian territory on the basis of a valid passport and an entry visa, exempt those cases when, the requirement to obtain an entry visa had been abolished under the conditions of the law. According to the modifications introduced by the Law no. 80/2011, entry visa for third country family members shall be granted upon request by diplomatic missions and consular offices of Romania, with prior approval of the National Visa Center in the Ministry of Foreign Affairs within 48 hours and without payment of consular fees. The documents required for issuing an entry visa is determined by the methodological norms approved by Government Decision.

The family member who is not an EU citizen is exempt from the requirement to obtain an entry visa, if satisfies the both of the following conditions:

- he/she is accompanying a Union citizen or is joining a Union citizen exercising his right of residence in Romania;
- he/she holds a valid document proving residence in another Member State as family members of EU citizens that which accompanies or joins in Romania.

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The family members of the European Union citizens, irrespective of citizenship, accompanying or subsequently joining the EU citizen, benefit of 3 months stay right from the date of entry in Romania, without fulfilling any additional conditions.

Family members who do not have the European Union citizenship may benefit of the residence right for a period over three months if they accompany or subsequently join the European Union citizen who fulfills one of the conditions established by the law (is a worker; has means of support for themselves and for their family members, usually, at least at guaranteed minimum income level in Romania and they have medical insurance or they are registered at a institution from Romania, accredited by the law, having as main purpose educational and vocational training activities, they have social health insurance and they declare by their own liability that they have means of support for themselves and for their family members, usually, at least at the guaranteed minimum income level in Romania).

In order to be registered in the database and to be granted the registration certificate, the family members with a EU or EEA citizenship of a Union European citizen shall submit to the competent territorial branch of the Immigration Office, within 3 months starting the date of their entry on the Romanian territory an application accompanied by the national identity document or a valid passport as well as, as the case may be, the following documents:

- the civil status document attesting the marriage or, by case, documents attesting the existence of a family relationship with the resident;
- the registration certificate of the European Union citizen whom they are joining, if the European Union citizen has been previously registered in the data base.

The procedure is applicable for dependents and partner, citizens of the European Union, case in which they shall present the documents issued by competent authorities, as well as the documents issued by the competent authority in the origin or provenience country attesting these qualities.

In order to be register in the database record and to be issued the residence card, the family members who do not have the European Union citizenship may benefit of the residence right for a period over three months if they accompany or subsequently join the European Union citizen who fulfills the legal conditions.

They shall submit to the competent territorial branch of the Immigration Office, within 3 months starting the date of their entry in Romania, an application accompanied by the following documents:

- valid passport;
- the civil status document attesting the marriage or, if the case, the existence of a family relationship with the European Union citizen, accompanied by a legalized copy in case the document is not issued by the authorities of a member state.

The same provisions shall be applied subsequently to the persons who are in the care of the resident as well as to the partner, which are not European Union citizens, exempt presenting the civil status document attesting the marriage or, if the case, the existence of a family relationship with the European Union citizen, accompanied by a legalized copy in case the document is not issued by the authorities of a member state, in which situation they shall present, following the case, documents issued by the competent authority from the origin state or provenience, attesting these qualities.

Upon submission of the application, the competent authorities issue to the applicant a certificate, attesting the right of residence, valid until the residence card is granted. The resi-

dence card shall be issued within maximum 90 days starting the day the application was submitted.

Within the period of 90 days the competent authorities do all the necessary checks, ascertaining that the conditions for granting the residence card are fulfilled, including, if the case may be, the conditions referring to the elements on which can be proved a convenience marriage, in compliance with the provisions of the Government Emergency Ordinance no.194/2002 on aliens' regime in Romania.

In case, on the basis of the checks, the competent authorities who have received the application ascertain that the conditions stipulated by the law for granting the right of residence are fulfilled, they issue to the applicant 'the residence card for a family member of a European Union citizen'. In case the competent authorities ascertain that the conditions provided by the law for granting the residence right are not fulfilled, they shall notify in written the refusal of granting the residence card, the grounds on which the decision was based, mentioning in the same time the competent court and the period of time within which the decision can be appealed. The refusal of granting residence card can be appealed before the competent specialized administrative court.

The validity of residence card for the family members, who do not have the European citizenship, is up to 5 years from the issuing date and it shall not exceed the period of residence of the European Union citizen whose family member is.

This residence card loses his validity in the case of a temporary absence of the bearer from the Romanian territory for more than 6 months within a year, with the following exceptions:

- the absence from the Romanian territory for the performance of military duty, irrespective the period;
- the absence from the Romanian territory justified by the pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country, for a period of maximum 12 consecutive months.

The right of residence of the family member who do not have the citizenship of European Union shall be valid for the entire period of the stay right of the European Union citizen whose family members they are, as well as in the following situations, during the period they prove that they have the means of support for themselves at least at the guaranteed minimum income level in Romania, as well as in the following situations until the deadline for obtaining the permanent residence is fulfilled:

- in case the European Union citizen whose family member they are, is deceased, provided the family member had the residence right for at least one year having this status, or
- in case of spouses, if the marriage is dissolved or annulled in the following conditions:
- at least 3 years had passed from the conclusion of marriage up to the moment when the competent court was notified for dissolving, declaring the nullity or annulling the marriage, from which a period of at least 1 years (they lived having this status) on the Romanian territory;
- by the spouses' agreement or by court decision, the spouse who is not European Union citizen was entrusted to bring up and educate the child of the European Union citizen;
- the divorce is ordained by the court for particularly difficult circumstances, and that the husband / wife who does not have EU citizenship has been the victim of domestic violence during marriage (the original legal text, according to which 'the court decided the

dissolving of the marriage based on the fault of the European Union citizen' was repealed;

- by the spouses' agreement or by court decision, the court establishes the right of the spouse who is not European Union citizen to visit the minor child. In this case, the court has to specify in the decision that the visits shall be done on the Romanian territory, stating precisely the period of time for which the right is granted.

The partner who does not have European citizenship retains the right of permanent residence if the registered partnership is dissolved or annulled, as explicated above for marriages.

The persons who do not have the European Union citizenship and have a continuous residence on Romanian territory at least 5 years, as family members of a European Union citizen who is a resident or permanent resident, shall benefit of the provisions of the right of permanent residence.

Irrespective of citizenship, the family member of the European Union national who has permanent residence are entitled to permanent residence only if they are members of the household of the respective EU national. If, however, the resident who carries out dependent or independent activities dies while still working but before acquiring the right of permanent residence, his family members who are also members of the household shall acquire the right of permanent residence, on condition that:

- the resident had, at the time of death, resided continuously on the territory Romania for two years; or
- the death resulted from an accident at work or an occupational disease; or
- the surviving spouse lost the Romanian nationality following marriage to the EU national, bearer of the primary stay right.

The persons fulfilling the conditions shall submit to the competent territorial branch of the Immigration Office an application for issuing the permanent residence card for European Union citizens, respectively permanent residence permit for family members who are not citizens of the European Union.

The validity of the permanent resident card for family members who are not European Union citizens shall be of 10 years from the issuing date and shall be renewed upon request. If Immigration Office ascertain the fulfilling the conditions for issuing the permanent resident card it shall grant within 90 days from the date of submitting the application the permanent residence card for family members who are not European Union citizens. It is a difference, the term is shorter for EU citizens: within 30 days from the date of submitting the application the permanent residence card for European Union citizens. In case it is a certain that the condition provided by the present law are not fulfilled, the competent authorities shall notify in written the refusal of issuing the permanent residence card, the grounds on which the decision was based mentioning in the same time the competent court and the period of time in which the decision can be appealed. The refusal of issuing the documents mentioned can be appealed before the competent specialized administrative court.

The law seems to provide for no big distinction to the situation of family members of EU national who are EU nationals and those, who are nationals of third countries. The family members who are not citizens of the European Union may enter the Romanian territory on the basis of a valid passport and an entry visa, while the EU citizens do not need an entry visa.

Another thing is, that only the marriages between an EU citizen and a national of third countries are verified by the authorities, to see if it is a convenience marriage, excepting that situation, if the non EU citizen had benefit a right of residence in another member state on the base of this marriage. These verifications are made on the base of the Emergency Ordinance no. 194/2002 the Alien's Law in Romania, containing verifications, declarations of the married people, other people declaration, interviews, or documents.

Regarding to the permanent residence, for the length of the stay in Romania for the third country citizens family members, we have to calculate the period which he had stayed here on the base of the Alien's Law, but just in case if he/she was a family member of an EU citizen.

The family members who do not have the EU citizenship, may benefit of the residence right for a period over three months just in case if they accompany or subsequently join the European Union citizen who fulfills one of the conditions (being a worker, self-employed, or a student). They get a residence card, and the EU citizens will obtain just a certificate. In comparison with the alien's regime, the family members of the EU nationals have got a better situation: they do not have to present the documents when they enter in the territory of Romania regarding the purpose of stay, financial means for the return to their home country, guarantees for leaving the Romanian territory when they are in transit etc.

Concerning the applicability of Akrich judgment (C-109/01), the Emergency Ordinance no. 102/2005 says that the family members who are not citizen of the European Union but are holding a valid document attesting the residence on other Member State as a family member of a European Union citizen shall be exempted from the requirement to obtain an entry visa. The border police authorities shall not apply an entry or exit stamp in the passports of these persons.

The conclusion of the *Metock* judgment (C-127/08)¹⁵, that Directive 2004/38/EC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive. Secondly, article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

The national law of some member states made the right of residence for non-EU family members contingent on them having lived in another EU Member State before they arrived in that state.

The Romanian regulation – Government Emergency Ordinance no.102/2005 – doesn't require prior lawful residence in another Member State for third country national's family members. The interpretative arguments are similar as the European Court of Justice used:

- according to the Romanian regulation, the family members who are not citizen of the European Union may enter the Romanian territory on the basis of a valid passport and an

15 For details, see Samantha Currie, Accelerated justice or a step too far? Residence rights of non-EU family members and the Court's ruling in *Metock*, *European Law Review*, no. 2, 2009, p. 310-326; Cathryn Costello, *Metock*: Free movement and 'normal family life' in the Union, *Common Market Law Review*, no. 2, 2009, p. 587-622.

entry visa.¹⁶ The family members who are not citizens of the European Union but are holding a valid document attesting the residence in another Member State as a family member of a European Union citizen shall be exempted from the requirement to obtain an entry visa. Therefore can enter into Romania a third-country family member of a European Union citizen with no residence card – and without any previous residence in another Member State, of course, if it complies with the other conditions stated by the law (valid passport and the entry visa, if necessary).

- the documents requested for the issuance of a registration certificate are the national identity document, especially the valid passport, the civil status documents and the residence card of the European Union citizen whom they are joining, if the European Union citizen has been previously registered. Therefore is not necessary the presentation of a registration certificate from another Member State, because the previously mentioned has exhaustive character.

Regarding the abuse of rights, according to art. 35 of the Directive, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.¹⁷

Upon submission of the application, the competent authorities issue to the applicant a certificate, attesting the right of residence, valid until the residence card is granted. The residence card shall be issued within maximum 90 days starting the day the application was submitted.

The competent Romanian authorities do the necessary checks, ascertaining that the conditions for granting the residence are fulfilled, including, if the case may be, the conditions referring to the elements on which can be proved a convenience marriage, in compliance with the provisions of the Government Emergency Ordinance no.194/2002 on aliens' regime in Romania. The detailed regulation on convenience marriage is in that normative act. The Romanian authorities can use declarations, documents, interviews or other methods to investigate if there is a convenience or genuine marriage (or partnership) situation. These verifications are proportionate and reasonable, with the only objective to identify the possible fraud. In front of the courts there were at least some cases related convenience marriages, but all of the identifiable cases are related to Emergency Ordinance no.194/2002, and not to the Directive 2004/38 and Emergency Ordinance no.102/2005.

Trough Law no. 80/2011 the legal status of the third country national family members of EU citizens was unequivocally granted to third country national family members of Romanian citizens with domicile or residence in Romania.

If the European Union citizen leaves Romania or dies, the right of residence of his child and the parent who has the children in care, regardless of nationality, remain valid until graduation, with the following conditions the children are living in Romania and the children are enrolled in an educational institution in Romania.

16 Exempt those cases when, the requirement to obtain an entry visa had been abolished under the conditions of the law.

17 Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

3. ACCESS TO WORK

Regarding the situation of family members of jobseekers there are no specific regulations, the general rules apply.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

There are no regulation concerning this problem, and no practical cases in the litigation practice.

Chapter III: Access to employment

1. PRIVATE SECTOR

1.1 Equal treatment in access to employment (e.g. assistance of employment agencies)

The freedom to work is guaranteed by the Constitution. This freedom includes that the right to work cannot be restricted. Therefore all persons shall be free to choose their work place and profession, trade, or activity to carry out. No one may be forced to work or not in a certain work place or profession, whatever that might be. The detailed regulation is the Romanian Labor Code, in force from 2003, with several subsequent modifications. The provisions of the Labor code apply also to European Union citizens.

Within the work relationships, the principle of the equal treatment for all employees and employers shall apply; therefore it is prohibited to discriminate – directly or indirectly – the European Union citizens also. This is the case of employment agency services also, where the information and services must be granted to European Union citizens as well.

There are specific anti-discrimination rules in the Romanian legislative system. All direct or indirect discrimination towards an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, color of the skin, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities, trade union membership or activity, are prohibited.¹⁸ A direct discrimination shall be represented by any actions and acts of exclusion, differentiation, restriction, or preference, based on one or several of the criteria mentioned above, the purpose or effect of which is the failure to grant, the restriction or rejection of the recognition, use, or exercise of the rights stipulated in the labor legislation. An indirect discrimination shall be represented by actions and facts apparently based on criteria other than mentioned above, but which cause the effects of a direct discrimination to take place. Any employee who performs a work must benefit from adequate work conditions for the activity carried out, social protection, labor safety and health, as well as the observance of his/her dignity and conscience, with no discrimination.

An employee's main rights include the right to equal opportunities and treatment. Men and women shall get an equal pay for equal or equivalent work, guaranteed by the Law no. 202/2002 on equal opportunities and treatment between men and women.¹⁹

When establishing and granting the wages, all discrimination is prohibited for criteria such as gender, sexual orientation, genetic characteristics, age, national origin, race, color of the skin, ethnic origin, religion, political options, social origin, disability, family situation or responsibility, or trade union membership or activity.

Any employee who performs a work shall benefit from adequate work conditions for the activity carried out, social protection, labor safety and health, as well as the observance of his/her dignity and conscience, with no discrimination. They have the right to collective negotiations, right to personal data protection, as well as right to protection from unlawful dismissal. The employees and also the employers may associate freely for the defense of their

¹⁸ The Labour Code implements Directives as 97/80/EC, 2000/43/EC, 2000/78/EC.

¹⁹ The mentioned law transposed Directive 76/207/CEE, art. 1, 2, 4, 5, 6 and 7 from Directive 75/117/CEE, art. 10 and 12 from directive 92/85/CEE, Directive 97/80/CE, clause 2, points 5 and 6 from Directive 96/34/CE, Directive 86/613/CEE.

rights and the promotion of their vocational, economic, and social interests. In general, labor relationships are based on the principle of consensus and good faith. To ensure a proper progression of labor relationships, the participants in labor relationships shall inform and consult one another, in compliance with the law and the collective labor contracts.

Individual labour contract is a contract based on which a natural entity, called employee, undertakes to perform work for and under the authority of an employer, who is a natural or legal entity, in exchange for a pay, called wages. The clauses of the individual labor contract may not contain contrary provisions or rights below the minimum level set up by the laws or collective labor contracts. It is prohibited, under the sanction of absolute nullity, to conclude an individual labor contract for the purpose of performing an illicit or immoral work or activity. An individual labor contract must be concluded based on the parties' consent, in written form, in Romanian. There is no obstacle to conclude the contract in two languages, but to have a Romanian version is mandatory. The employer has the obligation to conclude the individual labor contract in written form.

In 2011 the Labor code was substantially modified through the Law no. 40/2011,²⁰ under different aspects, such as the explicit right of the employer to set individual performance goals, establishment of workers' activity evaluation procedures and criteria, detailed and more relaxed rules on fixed-term employment contracts (maximum duration extended from 24 to 36 month, and two more consecutive contracts, which may not exceed one year can be concluded after the expiration of the first fixed-term individual labor contract etc.²¹), a more relaxed regulation on temporary employment.²² Under the conditions of the economic crisis, the regulation gave for the employer a right to unilaterally introduce a 4 day week, with a corresponding wage reduction, if the employer faces economical or technical problems and respected a consultation requirement with trade union or employee representatives. Trying to fight illegal employment, the employment of more than five people without an individual labor contract will be punished by imprisonment of up to two years under the criminal law,²³ other types of sanctions being introduced, such as exclusion of the employer from public funding programs (EU funds included) and public procurement procedures over a period of up to five (5) years. Another sanction is full or partial recovery of public aid or subsidies, EU funds included, which were granted to employer within an up to 12-month time interval before committing the offence. Should an employer accept up to five (5) individuals to work for its benefit without concluding a labor contract, such employer shall be punished with a fine ranging between RON 10,000 and RON 20,000 (approx. 2360 EUR – 4720 EUR) for each unemployed individual.

Under the previous version of the Labor code, if an individual labor contract has not been concluded in written form, it must be presumed it has been concluded for an unlimited period, and the parties may make the proof of the contract provisions and the work performed by means of any other type of evidence. Under the new rules introduced by the Law no. 40/2011, the written form of the labor contract is a validity requirement. Under the new rules, to verify employee skills, the individual labor contract may establish a probationary period not exceeding 90 calendar days for executive functioning and a maximum of 120 calendar days for management positions. The previous periods were 30 and 90 days. In the

20 The constitutionality of this law was established through the Constitutional Court Decision no. 383/2011

21 See also Directive 1999/70/EC.

22 See also Directive 2008/104/EC.

23 Art. 264 (3) of the Labour code.

case of verification of professional skills persons with disabilities the probationary period is up to maximum 30 days. During or at the end of the probationary period the labor contract may be terminated by written notice, without any time limit, at the initiative of either party, and without the need for its motivation. During the probationary period the employee shall enjoy all rights and has all obligations under the labor laws, the applicable collective agreement, internal regulations and the individual labor contract.

Another novelty is that any employer may request information regarding the individual applying for employment from such individual's former employers, but only in respect to his/her fulfillment of employment duties and employment period, as well as only after informing that individual thereof. Overtime shall be compensated for by paid free time taken in the following 60 calendar days.

These modifications have direct effects also in workers exercising their right to free movement.

Since 2000, in Romania is in force a Government Ordinance on the prevention and sanctioning all forms of discrimination.²⁴

The normative act adopts a sanctionatory approach towards discrimination, punishing as contraventions the discriminatory conducts. A section of the ordinance is dealing with equality in economic activity, employment and profession. The equality of treatment is mandatory for the natural persons and legal entities involved in work mediation and distribution. Any person looking for a working place shall have free and equal access to information regarding available working places or calcification opportunities.

There is no limitation regarding citizenship for the administrators of commercial companies. (A third country national can be also an administrator of a Romanian commercial company). For the experts in legal medicine (forensic medicine) the regulation in force requires Romanian citizenship.²⁵

During 2007, the statute of teaching personnel also states that the higher education teaching positions are reserved for Romanian citizens, and only as an exception, in this type of functions can be appointed other citizens, for a determined period, as associated lecturers. The rule was modified only in 2008, through the Emergency Ordinance 88/2008, and some universities faced problems during the years 2007 and 2008 because the national regulation was in contradiction with EU law.

The Law no. 51/1995 regarding the organization and practice of lawyer's profession, through its modifications, implemented the Directives no. 77/249/EEC and 98/5/EC.

The Law no. 36/1995 requires Romanian citizenship for public notaries.²⁶ It can be discussed if the public notary is a private sector or a public sector function. According to current interpretations, because is invested with specific powers by the state, article 45 (4) from the Treaty of the Functioning of the European Union (ex article 39 (4) from the EC Treaty) applies.

A new regulation, adopted in 2011, Law. no. 51/2001 on the exercise of activities carried out by the occasional day laborers requires no citizenship condition in the case of day laborers.²⁷

No cases of discrimination can be reported for the reporting period.

²⁴ Government Ordinance no. 137/2000.

²⁵ Order 938/2005.

²⁶ Article 16.

²⁷ Article 1 a).

1.2 Language requirements

In general, the language requirements in the private sector are not regulated. In practice, in some cases the language requirements can be found discriminatory, if the mandatory knowledge of a certain language is not necessary for the concrete function in the private sector, but there is no jurisprudence yet in this sense. According to the Law no. 35/1995 the knowledge of the Romanian language is mandatory for public notaries.²⁸

In some cases, there are regulations on language requirements. For example, in the case of credit institutions, if no one of directors or the members of the directorate has Romanian citizenship, at least one of them must know the Romanian language. If this person does not have documents about his language proficiency, it is enough to prove his/her language abilities in the discussions with the Romanian National Bank.²⁹

2. PUBLIC SECTOR

2.1 Nationality condition for access to positions in the public sector

There was no modification on nationality condition for access to positions in the public sector during 2010-July 2011. Romania, based on the article 45 (4) from the Treaty of the Functioning of the European Union (ex article 39 (4) from the EC Treaty), reserved for its citizens the civil service positions, and most of the political dignities.

According to the constitutional provisions in force on the equality of rights, access to public – civil or military – positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania.³⁰

Civil servant is a person who has been appointed to officiate as a public functionary. Civil service represents the ensemble of prerogatives and responsibilities established with regard to the law, by central, local or autonomous public authorities, in order to fulfill their attributions. The civil servant has a service relationship with the public authority (there is no labor contract, but an appointing administrative act).

There are several regulations on the general and special civil services. The general regulation is the Law no. 188/1999 on the Statute of civil servants, with the subsequent modifications, but without influence on the question observed here. According to article 54 a) of the Law no. 188/1999, in order to work as a civil servant a person must fulfill the condition of Romanian citizenship and the condition of domicile in Romania. The first version of the legal text (1999) conditioned the appointment as a civil servant to the exclusive Romanian citizenship; starting with year 2003, persons with another citizenship beside the Romanian, can be civil servants (permissive regulation for the persons with dual citizenship).

The special regulations reiterate the general rule, for example: Law no. 293/2004 on the Statute of civil servants of the National Administration of Penitentiaries (art. 11), Law no. 7/2006 on the Statute of parliamentary servants (art. 11), Law no. 44/2007 on the organization and operation of the National Agency for Integrity (art. 17-18) etc.

²⁸ Article 16 from the Law no. 36/1995.

²⁹ Romanian National Bank Regulation no. 11/2007, art. 16 (3), art. 22 (3).

³⁰ Art. 16 of the 1991 Constitution, revised in 2003.

In the judicial branch of power, judges and prosecutors must have also Romanian citizenship. This condition is mandatory for candidates to the National Magistrate Institute also.³¹ The National Magistrate Institute trains the future judges and prosecutors, and candidates must hold a degree in law. The citizenship condition is applicable in the case of the judicial assistants – representing the interests of employers and employees in labor litigation. The situation is the same for law clerks.³²

As a measure of ‘political integration’ of EU citizens, EU citizens can:

- participate and be elected at local elections for the functions of local or county councilor. The function of mayor, vice-mayor, president of the county council and vice-president of the county council are excluded.³³
- participate and be elected at European Parliamentary elections.³⁴

The former article 39 (4) from the EC Treaty must be interpreted in a way that public sector employment includes only those posts which involve direct or indirect participation in the exercise of powers conferred by the public law in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities.³⁵ In line with this interpretation, in Romania functions like teachers,³⁶ nurses,³⁷ post officers³⁸ etc. are not considered civil servant positions.

Anyway, at this time there are no any discussions for opening-up the public sector for European Union citizens, the civil service being considered as a territory belonging to national sovereignty.

The conclusion of the Report on the Free Movement of European Union Citizens and Employment in the Public Sector, prepared by Prof. Jacques Ziller, deals with some issues regarding Romanian regulation.

One issue that must be addressed, is that the conclusion of the Report that

‘the Constitutional and legislative criteria for reserving posts in public administration do not coincide with the criteria for the application of Art. 45(4) TFEU. They are apparently in contradiction with EU law when requiring candidates to have domicile in Romania, as this might impede Romanian citizens who make use of their right to free movement in the EU to apply.’ And: ‘the requirement to have domicile in Romania in order to become a civil servant might impede Romanian citizens who make use of their right to free movement in the EU to apply. It is not clear whether the constitution and of relevant legislation leaves room for an interpretation according to which the residence condition applies only once appointment to the civil service has been made. If so, it is only an issue of clarification in notices of competition. Otherwise, amendments to existing law would be needed.’

According to the Romanian Legislation (art. 54 a) from the Law no. 188/1999 on the Status of civil servants, domicile is a precondition for fulfilling a public sector position involving exercise of public authority. This issue caused no practical problem or court cases (Romanian domicile in practice can be maintained formally even in the case when a Romanian citizen

31 Law no. 303/2004; Law no. 304/2004.

32 Law no. 567/2004.

33 Law no. 67/2004, with subsequent modifications.

34 Law no. 33/2007, with subsequent modifications.

35 Roger Blanpain, *European labour law*, Kluwer Law International 2003, p. 311-331; Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press 2007, p. 481; ECJ case C-149/79.

36 ECJ case C-33/88.

37 ECJ case C-307/84 *Commission v. France*.

38 ECJ case C-152/73.

is exercising his/her right to free movement), but can be considered as limitative if it is applied as a precondition, and not as a condition to be met after the entrance in civil service of the person in concern.

Another concern is a mistake made in the Report:

‘According to Decree n° 92 from 16th of April, 1976 regarding the labor book, a labor book has been filed in and kept by the Territorial Labor Inspectorate for the employees of the most employers, which seem to include public employers.’

The system of labor books was applied only in case of contractual personnel, employed under the provisions of the Labor code, and recently was replaced by another system of registry. In case of civil servants, there is a specific registry system. In close connection, the conclusion of the Report, is very correct:

‘As for positions for which have to be filled on the basis of a contract, the application of ordinary labor law which establishes the principle of equal treatment with Romanian citizen means that they are open to nationals of EU Member States.’

The formal correspondence between the national regulation and applicable EU legal texts regarding the partial opening of the public sector (for the contractual personnel, not exercising public authority) is recognized by the Report:

‘the criteria of Art. 6 of the Law 188/1999 1999 on the status of a public servant might correspond with the criteria for the application of Art. 45(4) TFEU when it comes to posts reserved to Romanian citizens, but it is a question of practice, for which there is little information available.’

There is no statistical data if migrant workers applied or obtained such a position and no court cases to be reported.

The Report considers that

a constitutional provision may be the source of non compliance with Art. 45 TFEU if it contains a limitation of access to nationals worded in a way which cannot coincide with the cumulative criteria of direct or indirect exercise of public authority and safeguard of general interest... Monitoring the exact scope of positions reserved to national and, above all, administrative practices in recruitment should be undertaken by Romanian authorities... In a number of Member States as different as Austria, Finland, Portugal, Romania, Slovenia, the absence of a comprehensive list of posts reserved to nationals makes it difficult to assess whether they are indeed complying with EU law for each of the relevant posts.

Regarding this issue, there is a central catalogue of all civil servant positions, managed by the National Agency of Civil Servants.

2.2 Language requirements

For civil servants, the knowledge of the Romanian language – spoken and written – is mandatory. In certain administrative-territorial units, where the percentage of a national minority is above 20% of the total population, the knowledge of the minority language is mandatory for the civil servants dealing with public relations.

In the case of criminal experts also, which is considered a civil servant position,³⁹ the knowledge of the Romanian language is mandatory.⁴⁰ The Ziller report concludes that

‘information on how knowledge of Bulgarian [in reality: Romanian, this is an editing error of the document] is being verified and on what level of knowledge of the language is required in practice was not available to the author of this report. It is therefore not possible to assess to what extent the principle of proportionality is taken into account in applying language requirements.’

There are no specific language tests, the knowledge is verified in the context of the specific examination of candidates.

2.3 Recognition of professional experience for access to the public sector

Because the access to civil service is restricted to Romanian citizens only, the subject presents no relevance in this report regarding the experience (seniority) of migrant workers coming to Romania.

But it can present an importance in case of Romanian citizens. Therefore another issue addressed by the Ziller Report regarding Romania is related to portability of working periods from other Member States, and according to the Report,

‘the absence of specific clauses on the recognition of professional experience and experience acquired in other EU Member States, – with the exception of the above-mentioned recognition of vocational and professional training ‘in this country or abroad’- although not being as such a source of infringement of EU law, may generate obstacles to free movement, especially as far as Romanian citizens having made use of their right to free movement are concerned.’

Regarding seniority for fulfillment of a civil service position, the Romanian regulation necessitates the specific length of employment in the field of the studies necessary and required for the particular civil service position. This text does not exclude in any way that this seniority to be obtained abroad, and as a conclusion, this is not an infringement of free movement rights or an obstacle of free movement. No practical or court cases can be reported regarding this problem.

2.4 Other aspects of access to employment

Because the access to public service is restricted to Romanian citizens only, the issue presents no relevance in this report.

39 Government Decision no. 368/1998.

40 Order 177/2008.

Chapter IV: Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

The Romanian Labor Code, within the work relationships, the principle of the equal treatment for all employees and employers shall apply. The directly applicable Regulation no. 1612/68/EEC necessitates Romania to provide equal treatment in the field of social and tax advantages (codified and replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, which entered into force on 16 June 2011).

The Government Ordinance on the prevention and sanctioning all forms of discrimination, analyzed above, is applied for natural persons, public or private legal entities, in the area of conditions for access to employment, recruitment, selection and promotion criteria and conditions, access of all forms and levels of professional orientation, formation and perfection. The principle of non-discrimination refers also on social protection and security and access to public services.

The access to trade unions is not conditioned to citizenship. All persons legally working in Romania can join a trade union.⁴¹ A normal restriction in force is that one person can have a membership in only one trade union. There is no statistical data on trade union memberships of EU citizens.

2. SOCIAL AND TAX ADVANTAGES

The workers from other member state are not treated differently from Romanian national workers by reason of the citizenship, in respect of any conditions of employment and work, such as remuneration, dismissal.

The worker from another member states enjoy the same social and tax advantages as national workers. They have access to the services provided by the unemployment agencies.

Regarding the taxation, the EU citizens pay the same taxes on income as Romanian citizens (16% personal income tax). One of the basic principles of fiscality is the neutrality of fiscal measures. From the point of view of taxation, any natural person, regardless citizenship, is considered as a resident if has its domicile in Romania or the center of the vital interests is in Romania or is present in Romania more than 183 days in a 12 month period. The income tax is paid by resident natural persons, non-resident natural persons who carry out independent activities through a permanent establishment in Romania, non-resident natural persons who carry out dependent activities in Romania and non-resident natural persons who obtain other incomes in Romania.

No regulation or practical problems on the issue of jobseekers.

41 Art. 2 from the Law no. 54/2003 on trade unions.

Chapter V: Other obstacles to free movement of workers

No legislative obstacles to the free movement of workers can be reported. In the present context, the free movement is in the incipient phases.

Chapter VI: Specific Issues

1. FRONTIER WORKERS

Initially, the specific Romanian regulation on frontier workers deals with third country nationals only. The frontier workers are defined in the Emergency Ordinance No. 56/2007 about the engagement to work and the detachment of an alien on the Romanian territory, published on 26th June 2007. The frontier worker is that alien engaged in work in the frontier localities from the Romanian Territory, and who is going back every day, or at least once in a week in the frontier zone of a state which has common border with Romania, and he has the residence there, and also has that states citizenship. In conclusion, the frontier workers enjoy all the rights granted to migrant workers in Romania.⁴² There is no undergoing debate regarding frontier workers in Romanian politics, administration or between legal academics. There are no specific schemes for frontier workers.

The Law no. 80/2011 introduced in the transposing legislation of Directive 2004/38 rules regarding frontier workers. EU citizens or their family members proving that they are frontier workers according to the Regulation (EC) no. 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems are assigned personal identification number, without releasing a document to prove residency in Romania.

Regarding the case C-212/05 Hartmann, the following points can be revealed:

- The Law no. 61/1993 on state allowance for child, with subsequent modifications, established that the allocation is granted non-discriminatory. The allocation is available also for child of foreign citizens and of persons without citizenship, if they are resident in Romania, and the child live together with parents. Trough interpretation of the text, can be concluded that the residence condition applies only in case of third country nationals. No practical problems reported on the application of the above mentioned law. The regulations were not changed in the period covered by the Report.
- Government Emergency Ordinance no. 105/2003 on the additional family allowance and on the single-parent support allowance states that the allowances are available to Romanian citizens living in Romania, and for citizens of other states and of persons without citizenship, if they are legally resident in Romania. The same comment can be made as in the previous point. No practical problems reported on the application of the above mentioned law. This regulation was replaced by the Law no. 277/2010 on family allowance, but the rules mentioned above were preserved.
- Identical regulation is included in several other normative acts, such as into the Law no. 448/2006 about protecting and promoting the rights of persons with handicap, Law no. 416/2001 on the minimal guaranteed income, Government Emergency Ordinance no. 5/2003 on the award of dwelling heating aids as well as some facilities to the population for the payment of the thermo energy.
- Government Emergency Ordinance no. 158/2005 regarding the leaves and indemnities for health insurance established that benefits from the provisions of the law the persons with domicile or residence in Romania. Similar rules are in the Government Emergency Ordinance no. 148/2005 regarding the support of the family to raise the child.

⁴² Regulation no. 1408/71/CEE is directly applicable in Romania too.

2. SPORTSMEN/SPORTSWOMEN

The legal provisions in the Romanian law are in conformity with community law. Some statutes of sport organizations states that foreign citizens cannot be members in the managing boards of the federations or other structures (for example, art. 15 from the Statute of the Romanian Federation of Alpinism and Climbing, art. 37 of the Statute of the Romanian Federation of Gymnastics, art. 33 and 34 of the Statute of Romanian Federation of Sportive Dance, art. 38 of the Statute of Romanian Canoeing Federation etc.). It cannot be excluded that there are restrictive provisions, especially in transfer regulations.

3. THE MARITIME SECTOR

In the case of naval commanders ('captain' of maritime ships) and naval chiefs ('captain' of fluvial ships) the current regulation, the current, in force version of the Government Ordinance 42/1997 doesn't require the condition of Romanian citizenship. Art.5 of the mentioned act, as modified in 2006,⁴³ defines the Romanian naval personal as all of the persons, regardless citizenship, which possesses a license or a capacity certificate, obtained or recognized under the provisions of the law, which grants the right to hold functions on the ships. This is a labor relationship, not a civil service, even in the case when the employer is the state.

4. RESEARCHERS, ARTISTS

EU nationals are treated equally, they are considered to have the same legal status as national researchers/artists.

5. ACCESS TO STUDY GRANTS

There were no complaints regarding study grants for EU citizens. In fact, the number of EU citizens studying in Romania for a whole cycle is relatively reduced in present, but certainly will be a gradual rise of the number of workers and students.

The major universities have a clear procedure of giving study grants, in accordance with the Community law. For example:

- the study grant regulation of the Babes-Bolyai University clearly states that study grants can be accessed by Romanian, EU member states, ECC states and the Swiss Confederation citizens (art. 3);
- the study grant regulation of the Bucharest University does not contain any criteria regarding citizenships.

⁴³ Government Emergency Ordinance no. 74/2006.

6. YOUNG WORKERS

No specific regulation on young workers and no specific obstacles.

Chapter VII: Application of transitional measures

Regarding transitional measures, the position of Romania remained unchanged in the analyzed period.

In 2007, the first year of EU membership, at the beginning Romania applied the principle of the correlation towards the EU member states. Therefore, if a Member State applied restriction in the relation with Romania, similar restrictions were imposed by Romania also. The Romanian Government, on the base of reference of the Work Minister admitted a memorandum about liberalizing the labor market, so the EU citizens do not need work permission to work in Romania.

The decision not to apply any restriction for the EU citizens was discussed in May 2007 with the Commissioner for Employment, Social Affairs and Equal Opportunities. It was not necessary another notification to the European Commission, because Romania decided to eliminate all the restrictions in the field of free movement of the people. The Romanian Work Minister had the opinion that the holding of the restriction would have created tensioned diplomatic relationships. On the other side, this decision to liberalize the labor market maybe can change the decision of those states which apply restrictions toward Romanian citizens.

In conclusion, Romania during 2010 at in the present moment does not apply any transitional measures.

An internal political debate was caused by the initiative of Spain – based on serious disturbances of the Spanish labor market – to temporarily suspend the application of Articles 1 to 6 of Regulation (EU) No 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union with regard to Romanian workers, authorized by the Commission. Spain applied no transitional measures with regards to Romanian workers since 1 January 2009.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFUE AND REGULATION 1612/68

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, with further amendments is excluded from application if the territorial, personal or material scope of regulation is not fulfilled.⁴⁴ In such cases article 39 and the Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community is applicable anyway (the Regulation (EEC) No 1612/68 was codified and replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, which entered into force on 16 June 2011).

In special, administrative problems and delays are complained, by persons who worked in Romania for a period, and migrated into another EU member state in time, and now are requesting pensions from the Romanian State.

As showed also in the previous report, there can be reported a pioneer decision of the Bucharest Tribunal (case no. 5536/3AS/2008, judgment no. 5601/10.09.2008), which stated in general terms the obligation of Romanian administrative authorities to solve in the legally provided period these complaints. In April 2009 the Bucharest Court of Appeal rejected both appeals declared by the national and local pension authorities, therefore the decision is irrevocable. A large number of such petitions still waits to be solved by the National House of Pensions and Other Social Insurance Rights and subordinated authorities. The social effect of such delays is high (persons can receive only partial pensions or no pensions at all until the petitions are solved). The importance of the problem is showed also by the fact that the Legal Research Institute of the Romanian Scientific Academy organized a workshop at 20th May 2009, discussing especially this pioneer decision.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

No specific rules in the national law or cases.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

3.1 *Integration measures*

No specific integration measures for EU member states citizens.

44 Frans Pennings, *Introduction to European Social Security Law*, Antwerp: Intersentia nv, 2003.

3.2 Immigration policies for third-country nationals and the Union preference principle

In concordance of the preference principle and the common immigration policy.

3.3 Return of nationals to new EU Member States

No relevance in the case of EU member states citizens working in Romania.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

Complaints can be addressed to the competent national authorities, especially to the Ministry of Labor, Family and Social Protection and subordinated authorities, or the Immigration Authority.

Beside the national courts, which can give the most effective protection in case of a breach of the law, on the possible problems can be informed also the ombudsman.

Due to the relatively reduced number of EU citizens working in Romania, there is no intensive civil society activity regarding the violation of Community law on free movement.

5. SEMINARS, REPORTS AND ARTICLES

Relevant publications:

Alexandru Țiclea, *Tratat de jurisprudenta in materia dreptului muncii* (Treatise of jurisprudence in the field of employment law), Universul Juridic, Bucharest, 2011

Claudia-Ana Moarcas Costea, *Instrumente de coordonare a sistemelor de securitate sociala* (Tools for coordinating social security systems), C.H. Beck, Bucharest, 2011

Claudia-Ana Moarcas Costea, *Drepturile sociale ale lucrarilor migranti* (Social benefits of migrant workers), C.H. Beck, Bucharest, 2011

Laura Georgescu, *Raspunderea patrimoniala a lucrarilor – raspundere civila-contractuala* (Patrimonial responsibility of workers – a contractual liability), Universul Juridic, 2011

Emőd Veress, The Legality of Expulsion of Roma as Union Citizens under the Conditions Imposed by the Directive 2004/38/EC, in: *Central and Eastern European Countries after and before the Accession*, Volume 2, Budapest, 2011, p. 103-108