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ASYLUM POLICY AND CUSTOM CLEARANCES IN THE PERSPECTIVE OF THE REFORM TREATY

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Abstract:
One of the four fundamental freedoms of Community law is the free movement of persons and labor. Freedom of movement for persons are intended to create a single market for labor and achieve greater cohesion of the peoples that make up the European Union by removing barriers to migration and promoting a "European citizenship". This article aims to present aspects of policies on asylum and border controls within the European Union. Thus, we will discuss the most representative regulations on these notions, such as the Single European Act (SEA), the Maastricht Treaty, the Amsterdam Treaty, the Schengen Agreement, and not least the Lisbon Treaty. This treaty shall pay particular attention to the policy on asylum and border control.

Keywords:
European citizenship, free movement of persons, asylum right, policy regarding custom clearances, Reform Treaty (Treaty of Lisbon)

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The Treaty of Lisbon defines the European Union as a space of freedom, security and justice without internal borders, instituted in the respect of fundamental rights and of different systems and legal traditions of the Member States. In such sense, the Union develops common policies in what concerns the asylum, immigration and clearance of exterior borders. Thus, the European Union’s objective regarding the borders consists of the elimination of any clearance on persons, irrespective of their nationality, under the circumstance of crossing the borders, the clearance of persons and the effective surveillance of exterior border-crossing, as well as the progressive implementation of an integrated system of exterior borders’ management.

At the same time, within the current asylum policy, the two legislative authorities – the Council and the Commission – adopt measures supporting a European asylum system. This comprises a unified statute of the asylum regarding the third-country nationals, a unified statute of the subsidiary protection of the asylum for these nationals, a common statutes of temporary protection of persons who move in the case of a mass influx, common procedures regarding the granting or withdrawal of the uniform statute of asylum and subsidiary protection, which criteria and mechanisms should determine the Member State responsible for examining the request for asylum. In the case of Member States’ confrontation with spontaneous influxes of third-countries nationals, the Council adopts provisory measures for their support, at the Commission’s proposal and after consulting the Parliament.

The common policy on immigration tends to ensure an efficient management of influxes of nationals, an equitable treatment of the third-countries nationals’ stays in the Member States, the prevention of illegal immigration, as well as human trafficking.

THE EVOLUTION OF THE ASYLUM POLICY BORDER CONTROL OF THE EUROPEAN UNION

Since 1957, the Treaty establishing the European Economic Community comprised provisions which should ensure the freedom of movement of workers within the Community. Such right has become reality as a result of the various European instruments created in such sense. The idea allows individuals to move
freely imposed, steadily, due to the Single Market institution. Free movement of persons, services, goods and capitals, immigration included, are guaranteed by the Union within its territory at the same time. Thus, according to the provisions of the art.14 of the EC Treaty⁶, all the citizens in the Member States are allowed to move and establish wherever within the European Union, as a consequence of the rights conferred by the concept of “European citizenship”. Having regard to the European citizenship, we may notice that article 17 from the Treaty establishing the European Economic Community providing expressly that: “any national of a Member State is a citizen of the Union”.⁷

The Single European Act (SEA) in 1987 defines for the first time the “internal market” as being an area without internal borders, within which the free movement of goods, persons, services and capitals is guaranteed in compliance with the provisions of the current treaty⁸. This idea implies the fact that, sooner or later, the clearances at internal borders will be abrogated both in what regards the persons and the goods. In practice, though, the free movement of persons accomplished with difficulty, while the term imposed by the Act, respectively the 1st of January 1993, was not respected.

In fact, the Member States interpreted differently the meaning of this principle. Some of them considered that it is applied only to the citizens within the Community, so that the clearances at the borders were necessary for further controlling the identity of European citizens or of third-countries nationals. For other states, the principle applied to all persons, so that the custom clearances were no longer necessary. Confronted with the impossibility to reach a compromise, in 1985, France, Germany and the Benelux countries signed the “Schengen Agreement” outside the community’s legislation framework, enacting the principle of free movement of all persons with the residence in the respective countries or who travel on their territories. Furthermore, not all states are members of the Schengen territory, either because they do not desire the elimination of border controls, or they do not accomplish the necessary conditions for the application of the Schengen acquis.⁹ A significant aspect is the fact that are part of the Schengen space certain states which are not members of the EU, such as Switzerland, Iceland and Norway.

The main purpose of this Agreement was the abolishment of internal borders between the signatory states and the creation of an area of free movement in the absence of controls, the so called “Schengen space”. The elimination of the control at the internal borders outlined certain problems of

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⁶ EC Treaty.
security, which fact led to compensatory measures taken in what regards the granting of visas, asylum, police, custom and judicial cooperation\textsuperscript{10}.

This opening made that the European Community Treaty in 1993 place the asylum policy, next to external borders crossing of the European Union and immigration policy, among the subjects of common interest for the Member States, such as they are defined by Title VI of the Treaty. After the enforcement of the Treaty of Maastricht, a subject of common interest for the Member States became the policy of granting asylum which is founded, in general, on legally valueless instruments, such as the London Resolution (1992) on granting the asylum on unfounded reasons and on the principle of “host third country” according to which the first country in front of which the solicitant of the asylum request presents is responsible for the solution of that request. However, once with the enforcement of a common position in 1996, which allows the passage from a harmonized definition of the term of “refugee”, in the context of the sense given by the Geneva Convention in 1951, convention constituting the main instrument of the international law on the statute of refugees\textsuperscript{11}.

In what concerns the statute of “temporary protection” applied to displaced persons, in 1999, the Commission presented a directive proposal regarding the minimum standards which should be ensured in the case of a mass influx of displaced persons, as well as the balancing measures of the efforts made by different Member States at receiving these persons.

At the level of the year 2004, according to the Maastricht Treaty, the Council had to define, among others:

- the criteria enabling a Member State responsible for the examination of the request for asylum;
- the minimum standard related to receiving the asylum seekers;
- the conditions under which the statute of refugee can be requested;
- the minimum conditions for the granting and the withdrawal of the statute of refugee;
- the minimum standards by means of which is ensure the temporary protection of displaced persons from a Member State;
- the measures of insurance for the financial balance between the Member States by receiving displaced person.

Within the action plan initiated in 1998, both the Commission and the Council presented measures for the accomplishment of these objectives, underlining the fact that the issued related to immigration are different from those related to asylum. A general strategy regarding migration was, yet, still

\textsuperscript{10} Frangulea Sandu, \textit{op.cit.}, p 105.

\textsuperscript{11} The refugees represent a distinct category of existing foreigners, at a given point, on the territory of a state.
needed, inclusively for covering political aspects, the observance of human rights and the development of countries of origin, as well as of countries of transit.

A few time later, the Amsterdam Treaty (1999) marked an important step by means of the enactment of the provisions in the Schengen Agreement at the level of European Union’s institutions, as well as by establishing an “area of freedom security and justice” without clearances of persons at intercommunity borders, irrespective of their nationality. Thus, the protocol attached to the Amsterdam Treaty provides the possibility that European citizens request asylum in any other Member State different from the habitual residence. Due to the fact that all Member States are considered secure states of origin, the citizens of Member States may seek asylum under certain circumstances, such as:

- the Member State of origin of the citizen who took actions contravening the Rome Convention regarding human rights and fundamental freedoms’ protection;
- the Council confirms the severe and repeated breach of human rights or fundamental freedoms, by applying the procedure provided in article no. 7 of the European Union’s Treaty;
- the Member State decides unilaterally to solve the asylum request starting from the premises under which the request is unfounded;

In the perspective of the Treaty of Nice, the policy of visas, asylum and immigration was decided upon by the application of the ordinary legislative procedure of co-decision. The passage from the system of making decisions in qualified majority provided by the article 63 of the EC Treaty refers to the decisions related to asylum and temporary protection, under the conditions of adopting a common legislative framework on asylum. Moreover, by means of will of chiefs of state and government, the passage from the systems of decision-making in qualified majority to the one of co-decision has been accomplished automatically, without being necessary the unanimous agreement, for the following articles: article 62, respectively article 63 of the EC Treaty.

In another line of ideas, by means of the Regulation of the European Council of 2004, was instituted the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union (FRONTEX). Among the main tasks of this agency, are enlisted:

- the coordination of the operative cooperation between Member States in what concerns the management of the external borders;
- the support granted to Member States in what concerns the professional education of custom police officers;
- the support granted to Member States for the organisation of common operations of refoulement;
• the monitorization of the relevant research for the control and surveillance of the external borders.

NEW REGULATIONS BROUGHT TO THE REFORM TREATY

The Treaty of Lisbon pays an increased attention to the policy of asylum and to the policy regarding the border clearance. From completion reasons, it is opportune to reflect upon such aspects outlining the novelties they imply.

This treaty confirmed the essential objective of the Union “of preserving and enhancing the Union as a space of freedom, security and justice within which territory it is guaranteed the freedom of movement of persons, in correlation with appropriate measures on the control of external borders, asylum, and immigration”.

For the enforcement of the asylum policy, a particular role is played by the directives 2004/83/EC and 2005/85/EC. In particular, the directive 2004/83/EC, which offers a minimum definition for “refugee” as well as for “person seeking international protection”, permitting at the same time a logical organization of concession criteria of the international protection. Its positive impact is obvious in a number of Member States, although the acknowledgement of protection exigencies of the solicitors coming from the same states of origin still vary sensitively from one state to another. Concerning the same directive, remain numerous the faculties of derogation acknowledged in favour of Member States, as well as their possibility to subordinate the concession of renditions in assistance and sanitary matters at the issue of a staying permit. It is discussed, among others, about the possibility of introducing a mechanism of mutual recognition of different national decisions with reference to the asylum policy, as well as the provisions of transfer to another Member State of the responsibilities of protection.

Complementary to the latter is the directive 2001/55/EC which aims to grant the protection of those who cannot return to their country of origin, as well as to promote a balance of the Member States’ efforts receiving such category of persons.

On its turn, the directive 2005/85/EC is mainly oriented towards agreeing upon the minimum harmonization for the applicable procedures of the statute of refugee, permitting at the same time a minimum alignment of the criteria for granting international protection (art.3). However, even in such case,

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the acknowledgement of the demands of protection of the solicitants coming from the same countries of origin yet sensitively vary from one Member State to another.

In practice, are acknowledged certain notable divergences between Member States in what regards the provisions regulating the access of persons seeking asylum on the labour market, the material receiving conditions, the general applicability of detention measures. All these, obviously, demand a necessary approach of the national laws with the purpose to consent for the creation of common related regime.

By stating, in synthesis, the main instruments of derived law relevant for this matter, we are now coming with the novelties introduced by the art. 63 TFEU on the asylum policy. Concerning this matter, it must be stated since the beginning the manner in which the latter present as significant and seem to represent a positive evolution of the provisions in force up to present. Thus, the European Union must develop a common policy in the domain of the right to asylum, the subsidiary and temporary protection, aiming to offer a corresponding statute to every third-country national who needs protection and to ensure the observance of the principle of non-refoulement. The way it is defined in the art. 33 of the Geneva Convention in 1951, the principle of non-refoulement stops the states from refouling a refuges “to a state where his/her life or freedom would be threatened by reasons of race, religion of nationality” or to a state where the refugee would not be protected from such refoulements.\(^\text{15}\)

Additionally, the examined norm, replaces the expression of “minimum norms” from the art. 63 TEC with that of common norms, which element facilitates undisputedly the over passing of difficulties determined by the existence of irreconcilable normative discrepancies with the creation of a common policy.

Upon this point, we should reflect on what stated the Commission in the Green Book about the future European regime on asylum matters where it underlines especially the exigency to proceed, up to 2010, to a harmonization of national laws in the field with the purpose of obtaining a common level of protection, higher and more uniform within the European Union.

A ulterior aspect which must be outlined is the one with reference to the observance of the principle of non-refoulement. The express appeal to this content in the examined norm indicates the assumed importance by such principle as an efficient guardianship instrument for refugees (art.63 para. 1 TFEU). It disappears instead the reference to the promotion of certain measure which should ensure a balance of efforts, or the distribution of taxes for the states receiving refugees or displaced persons. Such an aspect is inserted in the norm already cited which encodes “the principle of interdependence and

\(^{15}\) Alexandru Burian, s.a., *Drept internaţional public*, Chişinău, 2012, p 191.
equitable distribution of responsibilities between Member State also at the financial level”.

Another provision suffering certain amendments regarding the text in force is that reproducing the art.64 para.2 TEC referring to the manners stipulated in favour of one of several Member States when confronted with emergency situations, such as the unexpected inflow of third-countries nationals. In such sense, the Council deciding with qualified majority upon the Commission’s proposal may adopt, for the benefit of the Member State of States in cause, provisory measures for a term of six months the most. In the view of the Treaty of Lisbon, the Council’s action is not subject to the anterior and possible exercise from the side of the Member State, but has as purpose the maintenance of public order and ensures the internal security. Such novelty has as possible consequence the avoidance of an interpretation of the norm which would not allow the functionality of the mechanism of maintenance and the authorization of the Member States to not receive foreigners if these would not constitute a danger for the public order or the national security.

Furthermore, it is not mentioned the indication according to which temporary measure which could be adopted by the Council do not have to last longer than six months. The disposition eliminates the deprivation of any temporal limitation. Finally, it must be positively assessed the necessity, not provided in the TEC text, to consult the European Parliament on the adoption of written temporary measures mentioned above to the benefit of the Member State and States envisaged.

As well as in the case of the provisions of the Treaty on the Functioning of the European Community it is as well confirmed the fact that the policy of asylum must be conformed with the Geneva Convention in 1951 and the Protocol from 1967 on the statute of refugees, as well as other treaties in the domain.

The Reform Treaty, although reproduces the essential structure of a relevant norm with reference to the asylum matter, indicated by the art. 63 TEC, introduces, as previously presented, significant novelties in the examined matter. It is registered, indeed, a clearer legal basis as well as a substantial correspondence of the legal regimes concerning the refugees and the legal protections afforded by host Member States. This is the result of the acknowledgement that there exists now an important acquis on the asylum, despite the fact that still persist the notable differences between the decisions taken in the matter at the national level.

However in what regards the dispositions regarding the policy in matter of custom clearances, art.62, para. 4, TFEU, after making the distinction between internal and external borders, it is added the precision, which is absent in the present art. 62 TEC, according to which it remains “unprejudiced the competence of Member States, regarding the geographical delimitation of the
respective borders, according the international law”. Probably such precision has the objective of confirming the fact that the Union’s competences on such sector does not undermine in any manner the zones reserved to the authorities of the Member States.

As central objective of the European Union in the matter of borders, art.62 para.1 has in view the elimination of any control on persons, irrespective of their nationality, under the circumstance of crossing the interior borders, the control of persons and the efficient surveillance of passing the exterior borders, as well as the progressive implementation of an integrated system of management of the exterior borders.

Thus, the Treaty of Lisbon, beside the expressed enunciation according to which such policy must enforced progressively an integrated system of management of the external borders does no present amendment in comparison to the disposition mentioned in the Treaty of establishing the European Community. It is obvious that such last precision tends to underline the importance attributed to the necessity of border clearances so that these become more efficient and make the necessary development of certain policies for the border control coherent with the policies on custom control and the prevention of certain threats for the security, thus allowing the accomplishment of a “space” where free movement of persons and citizens safety can be considered as being effectively accomplished.

In June 2009, the European Council adopted the Stockholm Programme “Towards a wider Europe, safer and in the service of citizens”\textsuperscript{16}, which programme envisages the development and consolidation of the space of freedom, security and justice, containing a number of references to the migration policies, the common European system of the asylum and border management.

**CONCLUSIVE OBSERVATIONS**

From the preceding considerations results the extent to which the novelties introduced in the Treaty of Lisbon regarding the space of freedom, security and justice, in general and the policy of immigration in particular, could offer the circumstance for an improvement of the current common policy on the asylum, immigration and control of exterior borders, competing to a re-launching of it, founded on a more ample legislative harmonization and more efficient elaboration of the institutions of the Community.

Along with these data, it is however undisputedly that, following the institutional novelties introduced by the Reform Treaty, the policy of immigration could develop \textit{interiorly} within a more homogenous legal framework.

\textsuperscript{16} Nicolaie Iancu, \textit{op.cit.}, p.184
Additionally, the passage towards the qualified majority’s vote provides the possibility for all judges to go in front of the Court of Justice, by introducing an emergency prejudicial process. At the same time, the extension of the procedure of co-decision for the adoption of the instruments, will contribute, on one hand, to the over passing of the reduced implication of the European Parliament, on the other hand, to the determination of the expansion of the Community Court’s attributions, and consequently to the redefinition of the system of juridictional protection of the rights in matter of equity of treatment between the citizen within or outside the Community as well as a more general consolidation of the legal status of the non-communitarian citizen, legal resident on the territory of the Union.

To conclude, we cannot avoid not observing that within such an ample and complex matter such as the one of the immigration, the closeness of national legislations, or even more, the harmonization of the matter, would strengthen the efficiency of the communitarian regulation within a medium which is yet strongly characterized by the reticence of the States as against the renouncement to certain sovereign prerogatives.

Thus, it is requested on one hand, a wider cooperation between the communitarian institutions and the Member States, on the other hand by proposing the latter to renounce to certain authorities in a matter to such an extent dedicated to their sovereignty in order to confront, at the level of the European Union, the challenges and opportunities offered by such policy. “Governing” the migratory phenomenon means, in consequence, understanding, first of all, that the management essentially “internal” of the phenomenon does not respond to the real interest of the European community.

This aspect aims to be both for the Union and its Member States the foundation of a common policy of immigration and asylum, inspired by a sense of interdependence between the Member States and of cooperation with the third countries. Such common policy must be founded on an adequate management of migratory influxes, for the interest not only of the receiving countries but of the countries of origin of the immigrant him/herself also.

We may mention that the analysis of certain relevant regulations on the matter of the asylum at the EU level highlighted the fact that the European Union plays a significant role in what regards the issues of asylum granting and refoulement procedures outside and inside the Union.

Communitarian regulations on the free movement of persons passed over their initial context. While, at the beginning, it was conceived as a necessary element in the establishment of the internal market, the perception of these fundamental freedoms tends to be considered as fundamental right afforded to all the citizen of the European Union.

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