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The admissibility of restrictions on free movement of workers in the context of the decision of the European Commission of 11 August 2011, No. 2011/503

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ABSTRACT

On July 22, 2011, Spain suspended the application of freedom of movement for workers within the European Union with regard to certain categories of Romanian workers in all sectors and regions, grounding its decision in the difficult economic situation, high level of unemployment and approaching season in the agricultural sector, therein Romanian citizens were undertaking an employment. European Commission in the decision of August 11, 2011, did not consider the decision of Spain as unjustified. As a result of the decision, the discriminatory treatment of the Romanian citizens was maintained till the end of 2013. The correctness of the decision was not deeply examined on the ground of both the Polish and international legal writing. The aim of the paper is to examine the correctness of the decision of the European Commission of 11 August 2011, No. 2011/503 and to cover the gap in the legal discourse provided both on the international and domestic level. In the paper Author presents the essence of the free movement of workers and describes exceptions to this rule, with particular emphasis on exceptions established directly in the treaties of accession, having regard the exception in which the decision of Spain was grounded. In such a context Author casts doubts on the correctness of the decision of European Commission, which did not consider the restrictions as being contrary to the European law and formulates a thesis on excessive and unjustified character of restrictions implemented by the Government of Spain. Adopted methodology consists in the analysis of the case law of the European Court of Justice, legal acts, reports of the European Commission, international and domestic literature, with particular reference to the international scientific journals.

***Keywords*:** free movement of workers, transitional arrangements, restrictions, Romania, Spain, European integration, European Commission decision no. 2011/503

1. INTRODUCTION

The year 2011 came to be called in the Polish legal literature the significant period for the development of the citizenship of the European Union - in particular for deriving from that institution the right to move and reside freely within the territory of the Member States (Frąckowiak-Adamska, 2012: p. 31). This point of view is grounded in the three judgements, issued by the Court of Justice of the European Union (hereinafter: CJEU) in the cases: C-34/09 Zambrano[1], C-434/09 McCarthy[2], C-256/11 Dereci[3].

The influence on the European Union law of the aforementioned rulings was even directly equated with the effects of the judgement of the European Court of Justice (hereinafter: ECJ) in 26/62 van Gend & Loos[4] (Frąckowiak-Adamska, 2012: p. 31). At the same time, European Commission accepted that Spain could temporarily restrict the free movement of Romanian workers, despite the fact that Romania had accessed to the European Union almost four years earlier[5].

The decision of the European Commission has not been wider analysed in both Polish and international legal writing. Furthermore, it has not triggered such a strong reaction as the three judgements of the CJEU indicated above, even after the restrictions were extended to the end of the 2013 by the virtue of the Commission Decision 2012/831[6]. It should be therefore stressed that the article covers the gap in the legal writing concerning that issue.

The far-reaching restriction implemented by Spain, concerning one of the fundamental freedoms in which the European Union is grounded, and the posterior decision of the European Commission, approving the legality of the Spanish Government's actions, shall provide to the comprehensive analysis of the decision of the Commission and to the assessment of its correctness.

To achieve that objective it is necessary to present the essence of the free movement of workers and its fundamental significance for migrant workers, to outline the permissible exceptions to that rule, with particular emphasis on the transitional arrangements specified in the accession acts, including safeguard clause stated in the Annex VII to the 2005 Act of Accession for Romania – a legal basis to the proceedings of Spain and the subject of analysis in the Decision 2011/503.

At the end there will be demonstrated the circumstances that, according to the European Commission, justified actions undertaken by the Government of Spain and – as a conclusion – the correctness of the Decision 2011/503 will be assessed.

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1 C-34/09 Zambrano [2011] ECR I-01177.
2 C-434/09 McCarthy [2011] ECR I-03375.
3 C-256/11 Dereci [2011] ECR I-11315.
4 26/62 van Gend & Loos [1963] ECR 3.
5 Commission Decision 2011/503 authorising Spain 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 [2011] OJ L. 207, hereinafter: Decision No. 2011/503.
6 Commission Decision 2012/831 authorising Spain to extend the temporary suspension of the application of Articles 1 to 6 of Regulation 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 [2011], OJ L 356.

2. FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION

The freedom of movement for workers within the European Union was guaranteed at the level of European primary legislation and – pursuant to art. 45 sec. 2 TFEU[7], it shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. Its scope consists of the right to accept offers of employment actually made, to move freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment in accordance with the provisions, governing the employment of nationals of that State laid down by law, regulation or administrative action, to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. The objective of the free movement of workers is described generally as "looking for a job"[8]. The scope of the free movement of workers was clarified in the Regulation No. 492/2011[9] and is strictly connected with the freedom of persons, regulated in the Directive 2004/38[10]. In the legal writing and in the case law of the CJEU it is stressed that art. 45 TFEU is a concretization of a general prohibition of discrimination on grounds of nationality, expressed in art. 18 TFEU[11]. It should be marked that the ECJ case law concerning the free movement of workers reaches far and is being called even as having a constitutionalizing effect (White, 2009-2010: p. 1581).

The free movement of workers is being described as a "fundamental right of workers and their families"[12] a "special aspect of the free movement of persons, which – next to the free movement of goods, services and capital – is an essence of the Common Market"[13], and – finally – as a one of the four cornerstones of the common market (Woodruff, 2008: p. 130). The European legislator directly indicates the purpose, which is about to be accomplished by the mobility of labour within the European Union – the possibility of improving the workers' living and working conditions, promoting their social advancement, helping to satisfy the requirements of the economies of the Member States[14]. As a result of that regulations, within the European Union it has been created the "supranational labour market" (Wood, 1984-1985: p. 451).

It should be also marked that the free movement of workers applies not only to workers migrating from one Member State to another, but also to workers migrating from the Member States of the European Union to the Member State of the European Economic Area, even if such a state does not belong to the European Union. There is also stressed that the EU, since the Treaty of Rome, had transmitted from organization "broad and encompassing economic considerations" to organization having into regard "individual rights", what gave the Community a "human dimension" (Shine, 1999-2000: p. 856).

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7 Treaty on the Functioning of the European Union [2012], OJ L. 326, hereinafter: TFEU.
8 Florek Ludwik (2010), Europejskie prawo pracy, Warsaw. p. 49.
9 Regulation No. 492/2011 on freedom of movement for workers within the Union, OJ L. 141.
10 Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ L. 158.
11 Mitrus Leszek (2010), Zakaz dyskryminacji pracowników migrujących, in: Zbigniew Hajn (edt.), Swobodny przepływ pracowników wewnątrz Unii Europejskiej, Warsaw.
12 Regulation 492/2011: Par. 4.
13 Florek, supra note 8, p. 47.
14 Regulation 492/2011: par. 4.

The current shape of the free movement of workers proves that worker is no longer a mere mean of production (Shine, 1999-2000: p. 854).

3. RESTRICTIONS OF THE FREE MOVEMENT OF WORKERS

3. 1. General notes

The free movement of workers can be restricted by the virtue of rules indicated directly in the primary law. In the legal writing it is stressed that the European Union – which is not a federation – acts only within the limits of the powers conferred on the Union by the treaties. There was thus recognized in the primary law an authorization to Member States to take measures that provides to protect their particular interests[15]. Under art. 45 sec. 3 TFEU the three limitations of the right to free movement were established, i.e. limitations justified on grounds of public policy, public security or public health. Furthermore, pursuant to art. 45 sec. 4 TFEU, the provisions concerning free movement of workers does not apply to employment in the public service. Having regard the literally meaning of art. 45 TFUE, in the legal writing it is stressed that limitations of the free movement of workers can be divided into the two categories:

1. limitations justified on grounds of public policy, public security or public health,
2. limitations related to the protection of the Member States' interests in the scope of employment in the public service, which could be reserved exclusively to their citizens[16].

With regard to the latter category it should be marked that in the case law of the ECJ it had been clarified the limitation of the free movement of workers concerning employment in the public service is justified only if it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the state, to which the specific interests of local authorities such as municipalities must be assimilated[17]. In particular, those limitations must not be applied to such posts as: secondary school teachers[18], nurses in public hospitals[19] or masters and chief mates of merchant ships, if rights under powers conferred by public law are exercised only sporadically (Case C-405/01 *Colegio de Oficiales* [2003], ECR I-10391).

The limitations specified above under the first point should be just outlined to the extent necessary to achieve the objective of this paper. Grounds of public policy, public security or public health, stated under art. 45 sec. 3 TFEU, can justify the limitation of the free movement of workers only if there exists a genuine and sufficiently serious threat, affecting one of the fundamental interests of society[20]. That premises were clarified in the secondary legislation - under the Directive 2004/38[21]. Pursuant to art. 27 sec. 1 Directive 2004/38, Member States

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15 Smusz-Kulesza Monika (2010), Ograniczenia swobody przepływu pracowników, in: Zbigniew Hajn (edt.), Swobodny przepływ pracowników wewnątrz Unii Europejskiej, Warsaw, p. XV-99.
16 Id., p. XV-100.
17 Case 149/79 Commission v. Belgium [1982] ECR 1845.
18 Case C-4/91 Bleis [1991] ECR I-5627.
19 Case 307/84 Commission v. France [1986], ECR 1725.
20 Case 30/77 Bouchereau [1977] ECR 1999, so the Case C-363/89 Roux [1991] ECR I-273.
21 Directive 2004/38 of the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, hereinafter: Directive 2004/38.

may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. However - what was clearly expressed in art. 27 sec. 1 *in fine* Directive 2004/38 - these grounds shall not be invoked to serve economic ends. Also in the legal writing there is directly stressed that it is unacceptable to invoke the grounds of public policy and public security e.g. "to protect economic ends of the Member States in case of the high level of unemployment"[22]. Furthermore, pursuant to art. 27 sec. 2 Directive 2004/38, measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted. The measures undertaken in the certain case, have to be in each case precisely and comprehensive examined, having regard the exceptional character of the limitations, what is consequently stressed in the case law of the ECJ[23].

According to the grounds of public health, it should be just marked that only diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases can justify the measures restricting freedom of movement. Furthermore, the limitation will be justified if such a disease occurs in relation to the certain person.

It clearly results from the above that limitations of the free movement of workers are treated as an exception to the rule. Such a statement affects the interpretation of these norms, which has to be made in accordance with the *exceptiones non sunt extendendae* principle. In the legal writing it is correctly stressed that "the Court consequently interprets the rights of the migrating workers in the extensive manner and – in contrary – restricts the interpretation of provisions concerning permissible exceptions"[24].

3. 2. Limitations set up in the acts of accession

Notwithstanding the above exceptions to the free movement of workers, the temporarily limitations, strictly connected with the issue of the transitional periods, had been provided in the acts of accession of the following member states of the European Union:

1. Greece (1981)
2. Spain and Portugal (1986)
3. Cyprus, Czech Republic, Estonia, Lithuania, Latvia, Malta, Poland, Slovakia, Slovenia and Hungary (2004),
4. Bulgaria and Romania (2007)

The above summary, presented by Z. Hajn[25], for the reason of the date of publication, does not include information concerning the corresponding provision provided in the Act of

[22] Mitrus Leszek (2012), Komentarz do art. 45 Traktatu o funkcjonowaniu Unii Europejskiej, in: Miąsik D., Półtorak N., Wróbel A. (edts.), Traktat o funkcjonowaniu Unii Europejskiej. Komentarz, t. I. Art. 1-89, Warsaw, p. 809.

[23] e.g. Case C-100/01 Oteiza Olazabal [2002] ECR I-1091.

[24] Mitrus, supra note 11, p. XV-157.

[25] Hajn Zbigniew (2010), Pojęcie i podstawy prawne swobodnego przepływu pracowników wewnątrz Unii Europejskiej, in: Zbigniew Hajn (edt.), Swobodny przepływ pracowników wewnątrz Unii Europejskiej,

accession of Croatia[26], annexed to the Treaty concerning the accession of the Republic of Croatia to the European Union[27].

Implementation of the above stated limitations was motivated by the "fear of mass migration of workers from the new Member States to the Member States of the <<old>> Union"[28]. In the legal writing occasionally there is used more expressive, but difficult to deny, wording - the limitations were implemented after the extension of the European Union through the accession of the "weaker and poorer states" (Ambroziak, 2013: p. 121). Such an issue is clearly visible on the example of the "big bang expansion", which took place on May 1, 2004, when European Union expanded from 15 to 25 member states overnight (Woodruff, 2008: p. 127). Then the fear, which partially occurred in societies of the old, 15 European Union countries, was directly described as fear regarding "a flood of the poor migrants from the East", who are going either to work abroad or to take advantage of foreign welfare programs (Woodruff, 2008: p. 129). The Central and Eastern European Countries were also called a post-communist countries "that does not have the same tradition of stable democratic institutions and capitalist infrastructure common to certain Western European nations" (Woodruff, 2008: p. 134). In such a context it should be emphasised that transitional measures are a compromise between the fear of the citizens of the old European Union and the expectations of the new member states to benefit from the common market immediately after the treaties of accession are signed (Woodruff, 2008: p. 137). That same fear caused implementation of the transitional measures in the treaties concerning Portuguese and Spanish accession, for the reason of highly unemployment rate occurring within their territories (Wood, 1984-1985: pp. 449-459).

As it is stressed in the case-law of ECJ, issued in relation to the acts of accession of the eighties, also those limitations of the free movement of workers, which are clearly grounded in the primary legislation, have to be interpreted restrictively[29]. The immediate adoption of the whole *acquis communautaire* at the moment of accession is a principle on the ground of the European law and all of the transitional periods are an exception, which must not be interpreted extensively[30]. It should be also underlined that pursuant to the temporarily measures established in relation to the "big bang expansion" from 2004, in the legal writing the question is stated if such measures were a necessity or overreaction (Woodruff, 2008: p. 140). It is even concluded that restrictions of the free movement of workers, based solely on fear, were "contrary to the EU history and EU free movement rhetoric" and should be preceded by the evidential proof of the absolute necessity of such limitations (Woodruff, 2008: pp. 145-146). In the legal writing it is clearly stressed that transitional arrangements could be not the most "politically fairest and psychologically wisest" solution for the economies of the Member States (Lang, 2007: p. 270). Furthermore, implementing such restrictive means of protection is described even as constituting a "second-classed membership" (Woodruff, 2008: p. 145; Lang, 2007: p. 270) and having moreover less

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Warsaw, p. XV-17.

[26] Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community [2012], OJ L 112.

[27] Treaty concerning the accession of the Republic of Croatia to the European Union [2012], OJ L 112.

[28] Hajn, supra note 25, p. XV-13.

[29] Case 77/82 Anastasia Peskeloglou [1983], ECR 1085, Case C-3/87 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd. [1989] ECR 4459.

[30] Mitrus, supra note 22, p. 805.

axiological significance – it provides to the increase of illegal work, the promotion of the black economy and worker exploitation[31]. Therefore the institutions of the European Union called to the abolition of the transitional measures[32].

3. 3. Particular competition to limit the free movement of workers in relation to the citizens of Romania

Romania accessed to the European Union by virtue of the Treaty of accession[33]. An integral part of the Treaty is a Protocol[34]. Pursuant to art. 23 of the Protocol, to Romania the measures listed in Annexes VII to the Protocol shall apply, under the conditions laid down therein.

According to par. 2 part I of the Annex VII to the Protocol, by way of derogation from Articles 1 to 6 of Regulation No. 1612/68[35], the Member States of the pre-accession Union were entitled to apply measures regulating access to their labour markets by Romanian nationals in in the five year period following the date of accession. In the two year period applying the limitations was obligatory[36]. Under conditions set up under par. 5 Part I of the Annex VII to the Protocol, a Member State maintaining national measures at the end of the five year period might continue to apply these measures until the end of the seven year period following the date of accession.

Pursuant to par. 7 Part I of the Annex VII to the Protocol, those Member States in which, by virtue of paragraphs 3, 4 or 5, Articles 1 to 6 of Regulation No. 1612/68 apply as regards Romanian nationals, might resort to the special procedure of derogation, until the end of the seven year period following the date of accession. That procedure consists of suspending - wholly or partially - the application of Articles 1 to 6 of Regulation No. 1612/68, after free movement of workers was applied to Romanian nationals. Annex VII states the foregoing premises, which have to be jointly fulfilled in order to use the special procedure of derogation:

1. The Member State undergoes or foresees disturbances on its labour market
2. That disturbances could seriously threaten the standard of living or level of employment in a given region or occupation.

The objective of the limitation is to restore to normal the situation in certain region or occupation.

The procedure occurs in the two types: ordinary (when Commission *ex ante* states that the application of art. 1 to 6 of Regulation No. 1612/68 is wholly or partially suspended) and

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[31] European Parliament resolution 2006/2036(INI) on the transitional arrangements restricting the free movement of workers on EU labour markets [2006] OJ C 293, let. P, hereinafter: Resolution 2006/2036.

[32] Id., pt. 1.

[33] Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union [2005], OJ L 157, hereinafter: Treaty of accession.

[34] Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union [2005] OJ L 157, hereinafter: Protocol.

[35] Regulation No. 1612/68 on freedom of movement for workers within the Community, [1968] OJ L 257, hereinafter: Regulation 1612/68.

[36] Subject to provisions of par. 12 part I of the Annex VII to the Protocol, concerning the possibility of introducing, under national law, greater freedom of movement than that existing at the date of accession, including even full labour market access.

urgent (when the suspension of the free movement of workers is subjected just to the *ex post* notification to the Commission, which may not consider the suspension justified).

According to the provisions concerning the ordinary procedure, a Member State, which undergoes or foresees disturbances on its labour market, shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars. Then the Member State may request the Commission "to state that the application of Articles 1 to 6 of Regulation No. 1612/68 be wholly or partially suspended in order to restore to normal the situation in that region or occupation" (Annex VII to the Protocol, Part I, par. 7 sec. 2). The Commission shall decide on the suspension and on the duration and scope thereof not later than two weeks after receiving such a request and shall notify the Council of such a decision. Furthermore, any Member State may, within two weeks from the date of the Commission's Decision, request the Council to annul or amend the decision. The Council shall act on such a request within two weeks, by qualified majority.

In urgent and exceptional cases, suspending the application of Articles 1 to 6 of Regulation No. 1612/68, may be done under the simplified procedure, i.e. a Member State suspends itself the application of free movement of workers, however such a suspension requires ex-post notification to the Commission together with the groundings of the particular circumstances of that case.

It should be also stressed that pursuant to par. 2 Part I of the Annex VII, Romanian nationals legally working in another Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer, enjoyed access to the labour market of that Member State, notwithstanding the transitional measures. That restrictions did not apply also if Romanian nationals had been admitted to the labour market of a Member State following accession for an uninterrupted period of 12 months or longer. The mentioned rights were granted to the moment when Romanian national voluntarily left the labour market of the Member State.

4. IMPLEMENTING RESTRICTIONS TO THE ROMANIAN NATIONALS AND COMMISSION DECISION NO. 2011/503

4. 1. The ground of the suspension of the free movement of workers

On July 22, 2011, the Government of Spain had decided to re-introduce restrictions on Spanish labour market access for Romanian workers[37]. At the same time, the Spanish Government submitted a reasoned ex-post notification with supporting information as to the labour market disturbance, what – in the opinion of the Government – justified application of the urgent procedure. By letter of July 28, 2011, Spain followed up the notification of July 22, 2011, requesting the Commission to state that Articles 1 to 6 of Regulation No. 492/2011 were wholly suspended in respect of Romanian workers throughout Spain and in all sectors of the labour market.

[37] Instruction of Department of Immigration, concerning the right to entry, stay and work in Spain of Romanian workers and their families DGI/SGRJ/5/2011 [2011], access: http://www.policia.es/documentacion/comunitarios/inDGI_05_2011.pdf [20.05.2017].
The Instruction was replaced in April 2012 by the Instruction no. SGIE/1/2012, concerning the Romanian workers status and their families.

Legal acts, introduced by the Government, by the virtue of the explicit exclusion, did not affect the freedom of movement those Romanian nationals and their family members who were already employed in the Spanish labour market on the day of July 22, 2011, and who already were registered as jobseekers by the Public Employment Services in Spain. In relation to the other categories of Romanian citizens there was introduced the requirement to receive the prior work permit on undertaking the employment within the territory of Spain. Before the Romanian citizen applied for a permit, he had been obliged to present the contract of employment signed by the Spanish employer.

The Government of Spain, requesting the Commission to state that art. 1 to 6 Regulation No. 492/2011 are wholly suspended in respect of Romanian workers, stressed that economic recession that started in 2008 had resulted in a "large increase in the level of unemployment with the unemployment rate currently exceeding 20%"[38]. It was also pointed out that the disturbance in the Spanish labour market seriously threatened the level of employment and were of a general nature, not being limited to a particular region or sector[39]. The request was also justified by the decrease in the employment rate of Romanian nationals in Spain, the steady rise of unemployment and the high increase in the number of Romanian nationals resident in Spain, which had occurred despite the adverse evolution of the labour market in Spain and which had an impact on the capacity of Spain to absorb new inflows of workers.

The European Commission, considering the application, analysed the available economic data which showed i.a. that Spain had been facing a serious labour market disturbance, characterised by the far highest unemployment rate in the EU in the amount of 21,0%, against 9,4% on average in the EU and 9,9% in the Euro area (in June 2011). European Commission also stressed there was in Spain a particularly dramatic unemployment among youth (45,7% in June 2011) and a slow economic recovery (GDP growth for the first quarter 2011 was only 0,3%). There was also observed a general fall in the employment level of 9%, in the construction sector even of 33%, affecting all regions, varying between 6% in the Basque country to 13% in the Valenciana Autonomous Community[40]. Furthermore, the unemployment rate among Romanian nationals was supposed to be at the level of over 30% and the number of Romanians arriving in Spain was expected to increase from 388 000 on 1 January 2006 to 823 000 on 1 January 2010[41].

On the basis of the above presented data, the Commission stated that Spain had been undergoing a labour market disturbance in a generalized way which seriously affected the level of employment in all regions and all sectors and was liable to persist in the near future. Such a disturbance could furthermore seriously threaten the standard of living or level of employment in all regions of Spain and all occupations. Therefore Commission stated that it is appropriate to authorise Spain to limit temporarily the free access of Romanian workers to that labour market. Otherwise, it was likely that a continuing unrestricted inflow of Romanian workers would be a factor in increasing pressure on the Spanish labour market[42]. It should be also marked that Commission approved the application of the urgent procedure, what – according to the argumentation provided by the Spanish Government - was caused by the

[38] Decision 2011/503: Par. 4.
[39] Decision 2011/503: Par. 5.
[40] Decision 2011/503: Par. 9.
[41] Decision 2011/503: Par. 11.
[42] Decision 2011/503: Par. 10, 12.

need to take immediate action in view of the seasonal situation in the agricultural sector in the summer, while awaiting a Commission Decision, pursuant to the provisions related to the ordinary procedure, would endanger the very effectiveness of the re-introduced restrictions[43].

The free movement of worker was primarily suspended until December 31, 2012. The Commission restricted however, that this timeframe or the scope of derogation might be shortened or reduced if the Commission determined that the relevant particulars which led to the adoption of this Decision had changed or its effects proved to be more restrictive than its purpose required, in particular for employed activities requiring university degree and equivalent qualifications[44]. Furthermore, Spain was obliged to provide quarterly to the Commission statistical data, as to ascertain the evolution of the labour market per sector of activity and occupation. There was also stressed that the restrictions would not apply to those Romanian nationals and their families who already had been employed in the Spanish labour market and who has been already registered as jobseekers by the Public Employment Services in Spain[45]. The limitation was maintained unchanged – i.e. in relation to the all of sectors and regions of Spain – to the end of the transitional period, to the end of 2013 by the virtue of the Commission Decision No. 2012/831[46]. On the other hand, both on the ground of the Decision 2011/503, and also in the report on the functioning of the transitional arrangements on free movement of workers from Bulgaria and Romania (European Commission, 2011a), it was clearly expressed that limitations applied by Spain were strictly limited to the scope of this Decision and could in no way affect any other rights that Romanian nationals and their family members enjoy under Union law, in particular freedom of establishment and the free movement of persons (European Commission, 2011a: p. 3).

In such a context it should be marked that in the international legal writing it was stressed that the instruction restricting the free movement of workers *de facto* had been "a legal way to force the legalization of Romanians residing in Spain, but not registered with the authorities" (Groenendijk et al., 2013: p. 93). That statement should not be supported. Workers residing illegally are not usually interested in concluding employment contracts, and even more so applying to the competent authorities for a work permit, before the illegal work is undertaken. The quoted observation skips also the conclusion concerning the strictly limited scope of the decision and the possibility of enjoying other fundamental European freedoms by Romanian nationals – such as freedom of establishment (Romanian National News Agency WWW). As it was clearly stated on the ground of the limitations related to the "big bang accession", transitional periods concerning the free movement of workers do not provide *per se* to the limitation of other fundamental freedoms, such as freedom of establishment, what could result in a "sham self-employment" to avoid restrictions[47].

Spanish Labour and Immigration Minister Valeriano Gomez, by grounding the decision of the Spanish Government said that the Romanian citizens are still more favourable treated as workers being a national of the non-Member State of the European Union or European Economic Area. V. Gomez stressed that if a non-EU citizen would like to work in Spain, the work he would perform should range within the catalogue of hard to cover jobs, which Spanish people cannot cover (Romanian National News Agency WWW). At the same time,

[43] Decision 2011/503: Par. 2.
[44] Decision 2011/503: Par. 15, Par. 16.
[45] Decision 2011/503: Par. 19.
[46] Commission Decision No. 2012/831, *supra* note 6.
[47] Resolution 2006/2036, pt. 3.

V. Gomez "underlined that the measure on the work permit being introduced for Romanian citizens was a decision that does not incorporate any discriminating element" (Romanian National News Agency WWW). It was also marked that Spain had been the first Latin country in the European Union, which had lifted the moratorium on Romanian workers (Romanian National News Agency WWW).

4. 2. The assessment of the correctness of the Spain actions and the decision 2011/503

In such a context, it should be stressed that the breach of the freedom of movement for workers and the prohibition of discrimination on grounds of nationality, in contrary to the comment made by V. Gomez, is an obvious, *prima facie* conclusion. In that scope, discussion should be provided only to the issue of the justified nature of that infringement. Furthermore, the statement that Spain had been the first Latin country in the European Union, which had lifted the moratorium, could be misleading and has to be further clarified. As it is stated in the legal writing, on the day the decision 2011/503 was issued, Romanian citizens had freely accessed to the labour markets of 15 from 25 Member States, different than Spain and Romania i.e. to the labour markets of Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Finland, Lithuania, Latvia, Poland, Portugal, Slovakia, Slovenia, Sweden, Hungary (Papademetriou, 2011). The restrictions were still maintained in Austria, Belgium, The Netherland, Germany, France, Ireland, Italy, Luxembourg, United Kingdom and Malta (Papademetriou, 2011). The nature of that restrictions varied significantly from country to country – e.g. Italy did not require a work permit for employment in certain sectors, such as agriculture, hotel and tourism, domestic work, care services, constructions, managerial and highly skilled work, seasonal work (European Commission, 2011b: p. 1). As a result, although the limitations were maintained in Italy, that state widely opened the labour market for Romanian nationals and the restriction were not at an excessive level.

From the above summary it clearly results that Portugal, which undoubtedly belongs to the category of Latin countries within the European Union, did not introduce limitations on free movement of workers in relation to Romanian citizens, but fully opened its labour market on January 1, 2009 (European Commission, 2011a: p. 4.). Spain also belongs to the group of Member States which fully opened their labour market in relation to Romanian citizens on January 1, 2009. Spain was, however, neither the first Member State, which undertook such decision[48], nor the only state among the Latin countries that had opened their labour market on January 1, 2009.

According to the merits, it should be firstly stressed that the analysis of the legal basis of the limitations on free movement of workers and above invoked case-law of ECJ (CJEU) leads to the conclusion that both premises concerning the possibility of implementing the restrictions and premises concerning initiation the simplified, urgent procedure, have to be interpreted restrictively. In such a context raises reasonable doubts the admissibility of initiating the urgent procedure, which required only notification to the European Commission. Particular importance should be given to the premise of "urgent and exceptional case", which implies the possibility of replacing the ordinary procedure by the urgent procedure. Urgent nature of the case should be analysed having regard the short, two-week period, in which the

[48] It should be stressed that on the day of accession (January 1, 2007) the following Member States fully opened their labour markets: Czech Republic, Estonia, Cyprus, Lithuania, Latvia, Poland, Slovenia, Slovakia, Finland, Sweden (European Commission, 2011a: p. 4).

Commission shall decide on the suspension, duration and scope of restrictions in the ordinary procedure. In particular it is therefore admissible to apply the simplified procedure, if there is a need to undertake immediate, or even instant reaction (within the two-week time), what is justified by the exceptional circumstances of the case. In recitals of the decision 2011/503 it was explicit stated that the reason for which Spain did not initiate the ordinary procedure was the need to take immediate action in view of the seasonal situation in the agricultural sector in the summer. Whereas Spain introduced limitations not only in relation to the agricultural sector but also to the whole labour market – also in relation to the occupations requiring university degree or high qualifications. Furthermore, the restrictions were maintained not only in the summer, but within almost two and a half year period. In such a context the application of the simplified procedure would not be so doubtful if the procedure had been initiated only in relation to the restrictions concerning the free movement of workers in the agricultural sector. The admissibility of implementing the limitation concerning the other sectors should be analysed by the Commission in the ordinary procedure. It should be also stressed that the Government of Spain did not even make an attempt to prove the urgent and exceptional situation in the other sectors than agricultural sector. In relation to the other sectors, implementation of restrictions should have been made under ordinary procedure, when the Commission had been obliged to issue a decision within a short, fourteen-day period. It should be furthermore stressed that application of the ordinary procedure would allow to move the dispute on the political, not only legal, level. Commission, acting in the ordinary procedure, would be obliged to notify the Council undertaken decision. Any Member State could then request the Council to annul or amend the decision. The Council would act on such a request within two weeks, by qualified majority.

It should be also marked that the safeguard clause may be used if there occurs or is foreseen the disturbance on its labour market, which could seriously threaten the standard of living or level of employment in a given region or occupation. The purpose of the undertaken actions is to restore to normal the situation in that region or occupation. The admissibility of the safeguard clause depends therefore on the certain situation in "regions" or "occupations", which furthermore has to be concretized ("given"). It causes the necessity of proving by the Member State fulfilling premises, which determine the possibility of implementing derogation, in certain regions and occupations. The citation of statistics concerning state as a whole or all occupations in the labour market should be assessed as insufficient to prove the general nature of disturbances. Such conclusion follows directly from the exceptional nature of limitations and the requirement of restrictive interpretation of the exceptions on free movement of workers. Whereas the Government of Spain, notifying the suspension of the free movement of workers to the Commission, just underlined that the disturbance in the Spanish labour market seriously threatens the level of employment and is of a general nature and is not limited to a particular region or sector[49].

In view of the exceptional and far-reaching nature of the limitations on the free movement of workers, such a general statement is insufficient. Both the decisions - of Spain and of the European Commission - should be preceded by the depth analysis of fulfilling the premises in all regions of state and in all occupations in the labour market. For the reason that the burden of proof rests with the state, which introduces the limitations - in analysed case it was falling on Spain. It should be stressed that the base for the Commission was "the analysis

[49] Decision 2011/503: Par. 5.

of the available economic data"[50]. The analysis of the situation in particular regions and sectors has not reflected in the content of the decision. The application of limitations in all sectors and regions was justified in the decision by the displacement and other potential spill-over effects between regions and sectors that may have been caused by a selective restriction[51]. In the view of the requirement of restrictive interpretation the safeguard clause, the correctness of such a statement raises reasonable doubts.

5. CONCLUSIONS

The re-introduction of the restrictions in the access to Spanish labour market for Romanian workers within the whole territory of Spain, in all sectors and occupations, in the opinion of the Author, was unjustified and goes beyond the competence granted by the Treaty of accession. The safeguard clause is an exceptional institution which has to be interpreting and applying restrictively. Having regard considerations made in the paper, it should be concluded that there are three main allegations that should be made against the Decision 2011/503: the first one is related to the substantive law and recognition of fulfilling premises being a legal basis for suspension of the free movement of workers. The second one is strictly connected with the first one and is related to the scope of implemented restrictions. The third one concerns the procedure in which the limitations could be implemented.

In reference to the first and second one premise, the limitations on the free movement of workers were excessive in their nature. Restrictions set up by Spain were proved to be justified and in accordance with the European law at most to one sector and only to the summer season. Whereas introduced limitations applied to all sector of the Spanish economy, all regions and all occupations – not only in the summer 2011, but also to the end of transitional period on December 31, 2013. Introducing the maximum extent of limitations indicates that it is hard to imagine more serious disturbance to Spanish labour market, which could seriously threaten the standard of living or level of employment in a given region or occupation, than the migration of Romanian workers was in 2011. Meanwhile, what is even a paradoxical situation, during the first year after the limitation period was closed and Spanish labour market was fully opened for Romanian workers, the unemployment rate in Spain not only did not increase, but also dropped by 1,6 pps – from 26,1% in 2013 to 24,5% in 2014 (EUROSTAT WWW), what is a significant illustration of a lack of negative impact of introduced restrictions on Spanish labour market. In relation to the prior "big bang expansion" from 2004, the decision of the British, Irish and Swedish authorities not to enact the transitional measures was in the legal writing also described as having either positive results for the national economy (Woodruff, 2008: pp. 140-141) or modest, but broadly positive, impact thereon (Lang, 2007: p. 270).

The decision to benefit from the free movement of persons is much more complicated than basing solely on the financial reasons - migrant workers take into consideration also obstacles grounded in e.g. language, cultural differences or familial interests (Woodruff, 2008: p. 142). Furthermore, migrant workers, if they decide to move on, often undertake unemployment in the low-paying and undesirable branches, providing labour beneficial to the economy (Woodruff, 2008: p. 143). In relation to the Romanian citizens; case, it should be

[50] Decision 2011/503: par. 9.
[51] Decision 2011/503: par. 15.

pointed out that even though the restrictions imposed by the virtue of the Decision 2011/503 could be justified to the agricultural sector in the summer 2011, there was no attempt to show the necessity of application restrictions to the other sectors, periods and, in particular, to certain, single regions of Spain and single occupations in the labour market. Furthermore there was no attempt to demonstrate by Spain the necessity of introducing restrictions, besides invoking general economic data. Although the necessity of restrictions has not been *expressis verbis* set up as a premise to impose limitations, that condition results both from the well-grounded case law of ECJ and from the purpose of the safeguard clause, expressed in Annex VII, i.e. to restore to normal the situation in certain region or occupation, what also should impact on the way of interpretation the premises. It is also important to point out that the burden of proof rested with Spain. Having regard what has been stated above, it should be concluded that the restrictions introduced by Spain and maintained by the virtue of Decision 2011/503 were an overreaction.

In reference to the third one allegation against the Decision 2011/503, the immediate nature of disturbance of the Spanish legal market and applying the urgent procedure was justified at most to the agricultural sector. The other restrictions should have been introduced as a result of application the ordinary procedure, in which the decision had been issued before the limitations would enter into force. It should be stressed that Spain even did not attempt to prove the urgent and exceptional nature of the case to the other sector than agricultural and to the other periods than summer 2011. A particular emphasis should be given to the short, fourteen day period, in which European Commission had to issue a decision in the ordinary procedure. That procedure, however, would make it possible for Council to decide on the correctness of the decision – therefore the decision would be a result of the pan-European, wide political dialogue between all of Member States, instead of the decision of Spain, controlled by the European Commission.

Decision 2011/503 is seldom analysed in the legal writing concerning the issue of European integration[52], what is surprising in the context of the importance of suspending the fundamental freedom of the migrant workers in relation to citizens of the new Member State. It should be stressed that the last year of maintaining the restrictions to the Romanian nationals came to be called even the "year of the European citizens" (Poboży, 2014: p. 45). At the beginning of the paper it was stated that the year 2011 was called in the Polish legal writing the "significant" year for the development of the institution of the European Union citizenship. The year 2011 in fact was significant - from the perspective of the "old" European Union that year meant primarily the deepening of the rules concerning European citizenship. The case-law issued by CJEU seemed to be a breakthrough, compared to the effects of the ruling in the case 26/62 *van Gend & Loos*[53]. In the legal writing the judgment in the case C-34/09 *Zambrano*[54], came to be called even a "constitutional seismic shock" (Frąckowiak, 2010: p. 25) for the values on which the "old" European Union was grounded. From the perspective of the "new" European Union, year 2011 was also significant, however for another reason – for the reason of symbolic and unjustified inhibition of a process of adoption

[52] That issue was just mentioned in the Polish legal writing: see Mitrus, supra note 22, p. 822; Tim Artur (2015), Zapobieganie podwójnemu opodatkowaniu dochodów z pracy najemnej w kontekście unijnej swobody przepływu pracowników, in: Anna Rogozińska-Pawełczyk (edt.), Gospodarowanie kapitałem ludzkim. Wyzwania organizacyjne i prawne, Łódź, p. 194.

[53] Supra note 4.

[54] Supra note 1.

acquis communautaire by one of the Member States, which accessed to the European Union in 2007 and - as it is stated in the legal writing - the constitution of the "first" and "second" classed EU citizenship (Woodruff, 2008: p. 145).

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