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EUROPEAN LEGAL INTEGRATION: NEW POSSIBILITIES FOR EU AND NON-EU CITIZENS?*

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Outline

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1. Introduction

In 1965, a few years after the establishment of the European Economic Community (EEC), Mr. Bonsignore, an Italian national who resided and worked in Germany, accidentally caused the death of his brother by his careless handling of a firearm which he unlawfully detained. Because of the fact he was unlawfully in possession of a firearm, the relevant criminal court sentenced him to a fine for an offence against the firearms legislation. The court also found him guilty of causing death by negligence but imposed no punishment on this count, considering that no purpose would be served thereby in view of the circumstances, notably the mental suffering caused to the individual concerned as a result of the consequences of his carelessness. Following the criminal conviction the German aliens authority (*Auslaenderbehoerde*) ordered Mr. Bonsignore to be deported in accordance with the aliens law (*Auslaendergesetz*) of 28 April 1965, in conjunction with the law on the entry and residence of nationals of member states of the European Economic Community of 22 July 1969, which was adopted in order to implement European directive n. 64/221 in the Federal Republic of Germany.

The *Verwaltungsgericht*, which heard the appeal against this decision, considered that by reason of the particular circumstances of the case, the deportation could not be justified on grounds of a „special preventive nature" based either on the facts which had given rise to the criminal conviction or on the present and foreseeable conduct of the plaintiff in the main action. According to that Court, the only possible justification for the measure adopted would be the reasons of a „general preventive nature", which were emphasized by the *Auslaenderbehoerde* and were based on the deterrent effect which the deportation of an alien found in illegal possession of a firearm would have in immigrant circles having regard to the resurgence of violence in the large urban centers. As the national legislation was enacted in order to implement a European directive, the Court decided that it was necessary to request the European Court of Justice (ECJ) to give an interpretation of the relevant provisions of that directive, in order

to ensure that national law would be applied in accordance with the requirements of Community law.

The European Court of Justice (judgment of 26 February 1975, *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln*, case 67-74) indeed, declared that, according to article 3 of Directive n. 64/221/EEC (now repealed by Directive n. 38/2004) „prevents the deportation of a national of a member state if such deportation is ordered for the purpose of deterring other aliens".

The judgment of the European Court of Justice is relevant for both social and legal reasons. First of all, because it shows how reciprocal fears are, and probably will continue to be, an important characteristic of European integration, that required, requires and will require political, legislative and judicial intervention. For example, as Germans and Belgians feared the immigration of Italians in the Sixties and Seventies, now Italians fear the immigration of Romanians. Secondly, because it underlines the supremacy of European law over national law in the field of migration of European nationals and how the European supranational judge has worked in order create a common area where European foreigners could move freely, without being discriminated or deported for the purpose of deterring other aliens.

The aim of this lecture is twofold: first of all, it will focus on the possibilities for people to move between European Union countries; secondly, on the legal mechanisms and consequences of such opportunities.

2. The establishment of the European internal market and the principle of mutual recognition

By signing the 1951 and 1957 Treaties, the founding Member States of the European Communities meant to establish an area where goods, workers, services, companies and capitals would be able to move freely.

However, it soon became clear that the European Communities were much more than a simple free trade area or an economic union. As the Court of Justice established as early as in 1962 (in the judgment of 16 August 1962, *Van Gend en Loos*, case 26/62)

> *„the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".*

Not only the European Communities (and especially the European Economic Community, which later became the European Community and, afterwards, the European Union) were a very special kind of supranational organizations, but even the principles that constituted the internal essence of the common market, the four (and then five or six) freedoms had a very special significance.

In particular, in a period of strong political difficulties regarding the process of European integration (which was accomplished mainly by the establishment of regulations and directives requiring unanimous approval by the Council), the Commission (who had – and still has – the exclusive power to submit legislative proposals to the Council and Parliament) began to use the principle of mutual recognition.

The principle, based on article 28 of the EC Treaty (TEC, now article 34 of the Treaty on the Functioning of the European Union – TFEU) which provides that «quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States», was firstly stated by the Court of Justice in the judgment of 20 February 1979, *Rewe-Zentral AG v*

Bundesmonopolverwaltung für Branntwein, case 120/78 (so-called *Cassis de Dijon* case).

The Court of Justice, in a case dealing with a national legislation fixing a minimum alcohol content for alcoholic beverages, established that

> *„in the absence of common rules, obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer"*

and that

> *"the concept of measures having an effect equivalent to quantitative restrictions on imports, contained in article 30 of the EEC Treaty, is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned".*

The judgment of the Court was later explained by the Commission (in the Communication from the Commission *concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')*, published in the OJ of 3 October 1980, C256, p. 2) which stated that

> *"the principles deduced by the Court imply that a Member State may not in principle prohibit the sale in its territory of a product lawfully produced and marketed in another Member State even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. Where a product 'suitably and satisfactorily' fulfils the legitimate objective of a Member State's own rules (public safety, protection of the consumer or the environment, etc.), the importing country cannot justify prohibiting its sale in its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products".*

The principle of mutual recognition (and its applications, such us the principle of the country of origin, of functional equivalence, of functional parallelism, etc.) has been progressively applied by the Court of Justice to goods (in the Eighties especially food and beverages), even as concerns their manufacturing, their characteristics and their name and packaging, and progressively to all of the other freedoms.

3. New rights and possibilities: *choosing the law*

Due to the possibility to choose the country where to settle, to reside, to work and where to manufacture products, Europe is not only and not any more just a market for economic activities. Indeed, it is a field where countries and public administrations are encouraged to compete against each other, giving rise to the mechanism that Charles Tiebout defined as «voting by foot».

Law shopping or *regulatory competition* are phenomena that now characterize not only the European economic activities, but also the field more linked to the personal sphere. For example, as it is happening on the United States, it will soon become possible to choose the country were to celebrate gay marriages (as it is now allowed in Spain) and having it recognized by the home country.

National and European laws interact with each other, thus enhancing the possibilities for individuals and companies to find the most favourable legal environment, or, eventually, to attract the laws of another Member State in their own country. For example a company may choose to establish his seat in the country with the lowest tax rate (as in the *Centros* case); an individual may find the way to be treated in the best public health service, having it paid by its own national health service (as in the health and social tourism cases); and even a third country national may find the way to have European law applied to its specific situation in place of the national law of the European country where he wishes to settle, even if he is a „third country" national (as in the *Akrich* case).

The possibility to „choose the most favourable law" rises many problems: (a) how does this tool work? (b) is it a tool typical of the European Union or is it common to other legal orders (supranational? federal? international?)? (c) are there limits to choosing the most favourable law? (d) do national legal orders react? does this phenomenon create a competition between national legal systems?

In order to understand this phenomenon, three different cases will be discussed, and, then, the main theoretical problems will be pointed out.

3.1. The Centros *Case*

An important example of the possibility of choosing the most favorable law may be found in the field of the free movement of companies: the *Centros* case.

On May 1992, Mr and Mrs Bryde, Danish nationals residing in Denmark, formed the company „Centros" in the United Kingdom, for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up. However, the Danish Department of Trade refused to register a branch of Centros in Denmark, on the grounds, inter alia, that Centros, which did not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by

circumventing the national rules concerning, in particular, the paying-up of minimum capital.

Centros brought an action before the Østre Landsret against the refusal of the Board to effect that registration. The Østre Landsret upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed to the Højesteret. The latter judge referred a question to the Court of Justice concerning the interpretation of the relevant articles of the EC Treaty, in order to ascertain if it was contrary to the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.

The Court of Justice (judgment of the Court of 9 March 1999, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, case C-212/97) established that

> *„the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty" (§ 27),*

although it may be possible for Member States, on a case by case basis, to prevent the abuse of EC law:

> *„the national courts may, case by case, take account - on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions" (§ 25).*

The *Centros* case, and the subsequent case law of the Court of Justice in the area of the freedom of establishment of companies, raised the idea that choosing the law would be possible also in the European Union, and that a „Delaware case" would be possible also in Europe.

3.2. New possibilities for European citizens: the case of health and social tourism

Due to the evolution of European legislation and especially of the case law of the European Court of Justice (and to the growing acceptance of it by the national courts), European workers and citizens have acquired little by little an increasing number of rights.

The case law of the European Court of Justice created many opportunities for European workers and, then, for European citizens. Some of the most well known cases are those related to „health tourism", „social tourism", and so on.

Those are cases of (temporary) migration caused not by the typical migratory reasons (search for a job, family reunification, etc.) but by the search of better health care or of social security benefits (such as the jobseeker allowances) that are provided only by some countries. The scope was clearly underlined by Advocate General Ruiz-Jarabo Colomer in the case *Müller-Fauré*:

> *«There is another reason why I believe there would be a relatively high number of patients who, if they could be certain of being reimbursed, would choose to travel to another*

> *Member State in order to see a specialist. They would be those who, having the means to afford it, would not wish to wait a relatively long time before being seen by a doctor. The patient seeks, with legitimate eagerness, to do everything in his power to look after himself. Let us bear in mind that, as far back as the eighteenth century, Molière was aware of that human tendency since Argan, the main character in his comedy Le malade imaginaire, sought to marry his daughter Angélique, irrespective of her wishes, to a doctor in order to ensure for himself treatment for any complaint from which he might ail» (Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 22 October 2002, in the case C-385/99, V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen).*

European secondary legislation and ECJ case law have shaped and reshaped such cases, opening up new possibilities for migrant citizens, but also providing for some limitation, such as the need of a real link with the country that provides the benefits. It seems that although some new possibilities have been created by the Court of Justice, through an incremental approach, the case law does not suggest (yet) that *all* migrant EU citizens have immediate right to claim *all* benefits in the MS on the same terms as nationals.

In short, the Court of Justice has used the provisions on the European citizenship to grant workers right to work, or even to non workers. Two examples may be given.

The first (case *Collins*) has to do with a dual (US and Irish) citizen, born in the US, who, as part of his college studies, spent one semester in the United Kingdom in 1978 and then returned to the UK in 1980 and 1981, for a stay of approximately 10 months, during which he did part-time and casual work in pubs and bars and in sales. Then he went back to the US, to Africa

and, on 31 May 1998, he returned to the United Kingdom in order to find work there. On 8 June 1998 he claimed a jobseeker's allowance, which was refused by decision of an adjudication officer of 1 July 1998, on the ground that he was not habitually resident in the United Kingdom. Then Mr. Collins appealed to a Social Security Appeal Tribunal, which upheld the refusal, and to the Social Security Commissioner, which referred the case to the Court of Justice.

The Court ruled that

> *«in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.*
>
> *The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon and in Case C-278/94 Commission v Belgium» (judgment of the Court of Justice of 23 March 2004, in case C-138/02, Brian Francis Collins vs Secretary of State for Work and Pensions, §§ 61-63).*

The Court openly distinguished this case from its previous judgment of 18 June 1987, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon.Lebon*, case 316/85 (where it was ruled that social advantages apply only to *actual* workers and not to those who move in search of employment), also because of the new provision on European citizenship. Thus, European

citizenship influences the interpretation of Art. 48, then Art. 39 TEC (now Art. 45 TFEU) on the free movement of workers, although Member States have the right to verify that a genuine link exists between the person seeking work and the employment market of the country.

The second example is the case *Trojani*, which deals with the complex relationship between right of residence, working conditions and social security benefits. Mr. Trojani, a French national, went to Belgium in 2000 (after a previous stay in 1972 as a self-employed person in the sales sector), where he resided, without being registered, first at a campsite and then in Brussels. After a stay at a youth hostel, he was given accommodation in a Salvation Army hostel, where in return for board and lodging and some pocket money he did various jobs for about 30 hours a week as part of a personal socio-occupational reintegration program. He then applied for the minimum subsistence allowance (*minimex*), which was refused on the grounds that, firstly, he did not have Belgian nationality and, second, he could not benefit from the application of Regulation n. 1612/68. Mr. Trojani appealed to the *Tribunal du travail* of Bruxelles, which referred the case to the Court of Justice.

The Court ruled that the right to reside according to Art. 18 TEC is not unconditional; that in case of a lawful residence (according to national or European law) the immigrant European citizen enjoys the benefit of the fundamental principle of equal treatment; and that, however, «it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure» (judgment of the Court of Justice (Grand Chamber) of 7 September 2004, in case C-456/2002, *Michel Trojani vs. Centre public d'aide sociale de Bruxelles*, §§ 32, 40, 45).

3.3. The free movement of third country nationals: the **Akrich** *case*

An interesting case explains the new opportunities of „choosing the law" that European law may afford even to third country nationals in the area of immigration law (that may be considered the hearth of public law, and of the idea of the national State, as it deals with membership of a national community).

European migration policy is fragmented at different levels: the Protocols appended to the Treaty provide for exception and opting in/out clauses, especially as concerns the United Kingdom, Ireland and Denmark; the Schengen agreement and *acquis* have been transferred into the first pillar, but subject to the above said limitations, and secondary legislation is still far from providing a comprehensive framework, due to lack of agreement on many important aspects.

As concerns family reunification, it is necessary to distinguish between third country nationals that are married (or are relatives) to EU citizens and third country nationals that are married (or are relatives) to third country nationals lawfully resident in the European Union. Indeed, although family reunification is not considered to be a fundamental right falling under the provision of article 8 of the European Convention of Human Rights (ECHR) (see e.g. the judgment of the European Court of Human Rights of 31 January 2006, *Rodrigues da Silva and Hoogkamer vs. the Netherlands*, application 50435/99, § 39), it is a very important aspect of migration policies (also because it is one of the widest sources of legal immigration) and it is provided by both the regulation concerning the free movement of European workers (article 10 of regulation n. 1612/68, and now article 16.2 of regulation 2004/38) and some specific rules concerning the status of third country immigrants. Article 10 of regulation n. 1612/68 provides that "the following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse. […]".

In this field, the Court of Justice gave an extremely important contribution, favoring EU citizens who had some kind of trouble with their own national legislation. After the first attempts of third country nationals to circumvent the limitations set by national legislation, where the Court of Justice found that EC law was not applicable to „merely internal situations" (judgments of 27 October 1982, joined cases 35 & 36/82, *Elestina Esselina Christina Morson and Sewradjie Jhanjan vs. Netherlands*; of 5 June 1997, *Land Nordrhein-Westfalen vs. Kari Uecker and Vera Jacquet vs. Land Nordrhein-Westfalen*, joined cases C-64/96 & C-65/96), in the case *Singh*, concerning an Indian citizen who married a British citizens and lived and worked for a few years in Germany, and their right to family reunification also after the return to the home country, the Court held that European laws

> *«require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there … and returns to establish himself or herself … in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State» (judgment of the Court of Justice of 7 July 1992, in case C-370/90, The Queen vs. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department).*

The *Akrich* case more clearly explains the new possibilities granted to third country nationals married to EU citizens.

In February 1989, Mr. Akrich, a Moroccan citizen, was granted leave to enter the United Kingdom on a one month's tourist visa; then he applied for a student visa, but his application was refused in July 1989 (and his subsequent appeal was dismissed in August 1990). In June 1990, he was convicted of attempted theft and use of a stolen identity card and, on the basis of a deportation order by

the Secretary of State, he was deported to Algeria (on 2 January 1991). In January 1992 he returned to the United Kingdom, by using a false French identity card, but he was arrested and again deported in June 1992. After one month he clandestinely returned to the United Kingdom, where he resided unlawfully and, on 8 June 1996, he married Mrs. Helina Jazdzewska, a British citizen.

One month after the wedding, he applied for leave to remain as the spouse of a British citizen. However, according to the British legislation, a person who applies for leave to enter the United Kingdom whilst a deportation order is in force against him must be refused leave to enter, even if he might otherwise qualify for leave to enter in some capacity.

As a person who enters the United Kingdom when a deportation order is in force against him is considered to be an illegal entrant and is thus liable to be removed from the United Kingdom, Mr. Akrich was detained (as from the beginning of 1997) and then deported (in August 1997), in accordance with his wishes, to Dublin (Ireland) where his spouse had established since June 1997 and where she has been working since August 1997 and where she found a full-time work in a bank since January 1998.

In January 1998 Mr. Akrich applied for revocation of the deportation order and for entry clearance, as the husband of a British citizen. During an interview by a British official at the embassy in Dublin concerning their stay in Ireland and their intentions, Mr. and Mrs. Akrich declared that they were applying for entry clearance on the basis of the decision of the European Court of Justice in the *Singh* case and that they intended to return to the United Kingdom because they had heard – by solicitors and others in same situation – about the right, conferred by European Union law, to be able to go back to the UK after staying six months in another Member State.

On 21 September 1998 the Secretary of State refused to revoke the deportation order and on 29 September 1998 also the application for entry clearance was refused. The reason of the refusal was the consideration that Mr. and Mrs. Akrich moved to Ireland on a temporary absence deliberately to „manufacture" a

right of residence for Mr. Akrich on his return to the United Kingdom and thus to evade the provisions of the United Kingdom's national legislation.

In October 1998, Mr. Akrich appealed against those two decisions to an Immigration Adjudicator, who decided that, as a matter of law, there had been an effective exercise by Mrs. Akrich of Community rights and that Mr. Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify the continuation of the deportation order. Against such a decision, the Secretary of State appealed to the Immigration Appeal Tribunal, which referred the question to the European Court of Justice.

The decision of the Court of Justice seems to uphold Mr. and Mrs. Akrich strategy. Very clearly, Advocate General Gelhoedm, in delivering his opinion in the case Akrich, stated that

> *„Community law makes it possible for a national of one Member State to install himself in another Member State. A citizen of the Union may have all kinds of reasons for installing himself in another Member State. One such reason may be that another Member State offers him a more favourable legal regime. [..] Community law can have no complaint with such mobility; rather it is precisely the objective of Community law to promote mobility.*
>
> *The installation of Mr and Mrs Akrich in Ireland must be viewed as a use of EC law for a purpose not contemplated by the EC legislature but which is inherent in EC law. The EC legislature did not intend to create a right that can be used in order to evade national immigration laws but did create a right in favour of a national of a Member State to install himself in another Member State together with his spouse. Installation in that other Member State constitutes the key element of the*

> *freedom given by Community law to nationals of the Union.*
>
> *In other words, the installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law" (Opinion of Advocate General Geelhoed delivered on 27 February 2003, in the case C-109/01, Secretary of State for the Home Department v Hacene Akrich, §§ 179-181).*

The Court ruled that:

> *„where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State" (third ruling of the case Akrich)*

and that

> *„where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in article 10 of regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention*

> *for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine" (fourth ruling of the case Akrich).*

The *Akrich* case may be read – and it was read in such a way by a certain number of commentators and eventually confirmed by the Court itself in the judgment of 25 July 2008, *Blaise Baheten Metock et al v. Minister for Justice, Equality and Law Reform*, in case C-127/08) – as the Court opening the doors to the use of European law in order to circumvent the national law, with the only exception of marriages of convenience. According to the judgment of the Court, thus, an „abuse" of EC law would occur only in cases of marriages of convenience, and not in the case where a European citizen, accompanied by his or her partner, migrates to another country – with the aim to come back soon to his or her home country – and works there for a while.

3.4. Choosing the law: theoretical problems

In a very simplified manner it may be said that the traditional theories of law and of international law are based (of course with the exception of monist legal systems) on the dualistic conception of international law: national legal orders are separate and different from each other, and interact with each other through the instruments of international law (treaties etc.).

When citizens (or companies) of a country get in touch with citizens (or companies) of another country in their private relations (e.g. in order to buy goods from a foreign company, or to marry a citizen of another country) the so-called rules of private international law (or conflicts of laws, or choice of law) provide a set of criteria to identify the applicable national law. However, these rules are usually nationals rules (although sometimes may be based on international agreements) which establish how and which foreign rules will be applied, and which limit the application of foreign rules by the internal public order criteria. For example, countries which do not recognize gay marriages and consider gay marriages to be against the national public order, may not

recognize such relationship although if it is established between one of its citizens and a foreign citizen under the law of another country.

However, globalization and increased economic and legal relationship between national countries have strongly changed the traditional idea of the separation of national systems.

As it has been pointed out by Saskia Sassen

> *„Economic globalization denationalizes national economies; in contrast, immigration is renationalizing politics. There is a growing consensus in the community of states to lift border controls for the flow of capital, information, and services and, more broadly, to further globalization. But when it comes to immigrants and refugees, whether in North America, Western Europe, or Japan, the national state claims all its old splendour in asserting its sovereign right to control its borders" (S. Sassen, Losing control? Sovereignty in an age of globalization, New York, Columbia University press, 1996, p. 59)*

Economic globalization has created a global market which can not be confined in national borders and has a tendency to become global. As a consequence, a global legal order (or dis-order) has arisen, which is characterized by a plurality of sources of law, opening of the national legal borders, development of public arena (S. Cassese) and governance without government (J.E. Stiglitz).

In such a public arena, national laws may circulate from one country to another, from a national or international legal order to another one. It is increasingly possible for phenomena such us „law shopping" or „competition between legal orders" to develop.

In order to provide a simple description of the phenomenon, it will be necessary to describe, firstly, the different notions which are used; secondly, the context of the phenomenon; and, thirdly, the main elements.

As concerns the different notions that are used, it is possible to distinguish between choosing the law, law shopping and competition among rules. *Choosing the law* is the possibility to use the laws (even public laws) of another legal order by moving there or by using other devices. It has a different meaning from the notion of „choice of law" (or private international law rules) as already explained.

Law shopping (or *[regulatory] arbitrage*) is the possibility to use rules or other characteristics of other legal orders by attracting them in the original legal order („shopping").

Regulatory arbitrage and *competition among rules* (or among jurisdictions) may be the consequence of choosing the law or of law shopping: „regulatory competition can be defined as the process where regulators deliberately set out to provide a more favorable regulatory environment, in order either to promote the competitiveness of domestic industries or to attract more business activity from abroad" (K. Gatsios – P. Holmes).

As concerns the context (area) where such phenomena may develop, it is possible to distinguish between phenomena that develop at the national level, both in unitary States (e.g. tax advantages for activities in certain areas) and in regional or federal countries (e.g. in the US with the so-called Delaware case); at the supra-national level (e.g. EU); and at the global level (e.g. mutual recognition rules established by the WTO; international tax treaty shopping).

The main elements of the „choosing the law" phenomenon are the actors, the differences (of rules, regulations, administrative practice, judicial review) between the legal orders compared and the link between such legal orders (a linkage rule or other instrument that lets interested people to choose the rule or other factor of another legal order).

The actors are usually private parties (such us multinational companies, assisted by international law firms; but also private persons or small companies, as in the *Centros* and *Akrich* cases), that usually are the promoters of the choice of law. States (or international organizations) usually react and act against the

development of such phenomena, but sometimes they may take advantage from the choosing the law phenomenon. Also other actors carry out a very important role: e.g. judges (by defining at the supranational level the limits of the phenomenon, e.g. by establishing if there is an abuse of European or international law), international institutions (e.g. the European Commission, who may act in support of private parties and companies against States), lobbies (who may provide strong influence on the administrations involved) etc.

As concerns the links, it may be underlined that those are stronger in the framework of federal countries and strong supranational organization as the European Union. Indeed, the high level of European integration may be observed taking account of the development of the common market on the basis of the „four freedoms" and comparing them (and their outcome) to the US integration tools.

The US „full faith and credit clause" (Art. IV, I US Const.) provides that

> *„Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof*"

and the „commerce clause" (Art. I, X, n. (2) US Const.) provides that

> *„No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress".*

3.5. Limits and reactions

The most important character of the „choosing the law" phenomenon is that it is a lawful activity. At least, it is a lawful activity according to the superior legal order, which is the only system which has the possibility to establish the unlawfulness or abuse of the rules or instruments that permit legal shopping.

This is the main difference with private international law or conflicts of law criteria: according to private international law the national legal order that „imports" rules from another country may decide whether such „shopping" is lawful or not (using the public order criteria). Indeed, when different countries belong to a supranational legal order to which they have transferred part of their competences (as in the case of the United States and the European Union) the superior legal order has the competence to define the possibilities to use certain national rules (or standards, etc.) in another country, according to the free circulation rules or principles (such us the full faith and credit clause in The United States or the free circulation and mutual recognition principles in the European Union).

Thus, it is the judge of the superior legal order that decides whether such „shopping" can be limited (e.g. by applying the limits established by the European Treaties and secondary legislation to the four freedoms, e.g. „on grounds of public morality, public policy or public security" as established by Art. 30 TEC now Art. 36 TFEU) or whether it has been accomplished by abusing the supranational laws.

As concerns the European Union, the Court of Justice has not provided a general definition of abuse of European law, but has established to use a case-by-case approach, e.g.. in the judgment of 30 September 2003, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, case C-167/01, where it held that

> *„it is contrary to Articles 43 EC and 48 EC for national legislation […] to impose on the exercise of freedom of secondary establishment in that*

> *State by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carries on its activities exclusively or almost exclusively in the Member State of establishment, do not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse is established on a case-by-case basis".*

The second most important aspect of the phenomenon is the difference between the legal orders compared: if such a difference disappears, there is no more an interest in choosing the law of another country.

Due to the important consequences that the choice of the most favourable foreign law (or administration) may have, countries may react in order to counteract such strategies. Two main kind of reactions may be envisaged: unilateral reactions and multilateral reactions.

Unilateral reactions may consist in (a) the establishment of limitations (e.g. changing the national legislation in order to limit the possibility of choosing the law or to limit the advantages of that strategy) or (b) engaging in regulatory competition.

Multilateral (or joint reactions) may consist in the establishment of joint policies and regulations. For example, States may sign agreements in order to decrease or eliminate the differences, or in order to strengthen the barriers, increasing multinational cooperation (as in the OECD strategy against tax heavens, with the establishment of black lists of uncooperative countries, etc.).

As concerns the competitive reactions, which may give rise to the so-called regulatory competition, it may be underlined that it usually consists in the modification of national legislation in order to make the national legal environment more convenient and

attractive to foreign investors and companies. The most important example is the Delaware case: as it is published in the official website of that US state, „almost a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500. Businesses choose Delaware because we provide a complete package of incorporation services including modern and flexible corporate laws, our highly-respected Court of Chancery, a business-friendly State Government, and the customer service oriented Staff of the Delaware Division of Corporations" (http://delaware.gov).

4. Fears and national reactions: the *Polish plumber* case

Migration and choosing the law opportunities have raised a number of fears, such us the idea that opening European markets to "social law shopping", by establishing a country of origin principle, would create a high risk of social dumping; or that the new enormous European area, created by the enlargement of the EU to the new Eastern European countries, may bring new public security issues.

An example of such fears is given by the „Polish plumber case".

In January 2004 the European Commission announced it had presented a proposal for what it considered to be the «biggest boost to the Internal Market since its launch in 1993» (as declared by the Internal Market Commissioner, Mr. Frits Bolkestein), that is, the Proposal for a Directive of the European Parliament and of the Council on services in the internal market. One of the main objectives of the proposal was to provide „a balanced mix of measures involving targeted harmonisation, administrative cooperation, the country of origin principle and encouragement of the development of codes of conduct on certain issues", with the aim to „implement in practice the country of origin principle, whereby once a service provider is operating legally in one Member State, it can market its services in others without having to comply with further rules in those „host" Member States. Service providers would no longer be subject to a plethora of divergent national regulations, administrative requirements and a duplication

of supervisory controls which raise costs and often dissuade service providers from engaging in cross-border activities". Four articles (from 16 to 19) and a number or recitals dealt specifically with the country of origin principle and its derogations.

However, a strong reaction against the directive was promoted by Euro-sceptics. After a first appearance, in December 2004, in a satiric article by Philippe Val, published in a December 2004 issue of the French satiric newspaper *Charlie Hebdo*, the idea that a Polish plumber and an Estonian architect could move to other European countries in order to offer their services at a cheap price was used by Philippe de Villiers, in an interview appeared on *Le Figaro* of 15 March 2005. According to Mr. de Villiers, the possibility for such workers to provide services in other countries according to the wage and social security provisions of their country of origin would have led to the „*démantèlement*" of the French (and Western European) economic and social model:

> *„cette affaire est très grave, car la directive Bolkestein permet à un plombier polonais ou à un architecte estonien de proposer ses services en France, au salaire et avec les règles de protection sociale de leur pays d'origine. Sur les 11 millions de personnes actives dans les services, un million d'emplois sont menacés par cette directive. Il s'agit d'un démantèlement de notre modèle économique et social".*

As an ironic answer to that interview, the former Commissioner, Mr. Bolkestein, noted during a press conference he gave in France (and published on *Libération* of 25 April 2005) that he would have hired a Polish plumber due to the difficulties to find a good one for his second house in the countryside of Ramousies, in the Nord-Pas-de Calais. Shortly afterwards, the major of the village in which Bolkestein had his second house gave him a list of available plumbers found in the phone book.

A strong debate developed, concerning both the principle of the country of origin and the referendum that had to be taken in some countries in order to ratify the *Treaty establishing a Constitution*

for Europe, signed in Rome on 29 October 2004. The "Polish plumber" became the symbol of wild liberalization and of the invasion of hungry and underpaid workers, willing to work at any hour of day and night in order to earn a few Euro.

Besides a few folkloristic and ironical aspects, such as the printing and diffusion in France, on behalf of the Polish tourist board, of a poster with a seductive image of a Polish plumber, to counter what was perceived as a negative French rhetoric about East European workers and Poland, the issue was extremely important: as it is well known, the debate led to the failure of the referendum on the *Treaty establishing a Constitution for Europe* held in France on 29 May 2005 (where the negative votes have been 54.68%) and in the Netherlands on 1 June 2005 (where negative votes have been 61.6%).

Also the *Bolkenstein directive* proposal was strongly modified, and the principle of the country of origin was replaced by the more general and less effective „freedom to provide services" established by article 16 of the directive n. 2006/123/EC of 12 December 2006, on services in the internal market.

5. Conclusions

In Europe, the convergence of market forces and of the strong legal principles enshrined in the free movement principles have created a phenomenon that, according to the words of an eminent British judge and scholar, may be compared to

> *„…when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law …" (Lord Denning, in case Bulmer v. Bollinger (2 All E.R. 1226, 1231 (C.A. 1974))*

or even, as the same author declared a few years later,

> *„… no longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all …" (Lord Denning, in G. Smith, The European Court of Justice judges or policy makers?, London, Bruges Group, 1990)*

Although the last few words of the cited sentence reflect the Euro-sceptic view of European integration, there can be no doubt as concerns the incredible degree of integration that, in fifty years, has been achieved between countries divided by centuries of wars and reciprocal fears.

The possibility to move from one country to another, even only to get some advantages from the „target" country (e.g. a professional qualification, or the authorization to sell a pharmaceutical product, or the establishment of the main seat of a company that will operate in the home country), demonstrates how European integration, at least as concerns many important areas, is comparable to that of federal countries, as a comparison with US.

Notwithstanding the lack of a common foreign and defense policy and the reciprocal fears that characterize a large part of national public opinions, European integration is an extremely positive central aspect of everyday life of every European citizen.

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