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Directorate-General Internal Policies

Policy Department C

Citizens Rights and Constitutional Affairs

DILEMMAS IN THE IMPLEMENTION OF DIRECTIVE 2004/38 ON THE RIGHT OF CITIZENS AND THEIR FAMILY MEMBERS TO MOVE AND RESIDE FREELY IN THE EU

BRIEFING PAPER

Summary:

This Briefing Paper examines the main dilemmas that prevent EU citizens and their family members from fully enjoying their freedom of movement-related rights on the basis of 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. It assesses the most relevant deficits in the transposition of the Directive in light of the answers and data provided by the National Parliaments of 11 EU Member States (Austria, Belgium, Cyprus, Czech Republic, Italy, Lithuania, Poland, Romania, Slovak Republic, Slovenia and Spain) to the questionnaire prepared by the Committee on Civil Liberties and Justice and Home Affairs (LIBE) of the European Parliament.

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1. ASSESSING NATIONAL TRANSPOSITION OF DIRECTIVE 2004/38: SCOPE AND METHODOLOGY

The Committee on Civil Liberties and Justice and Home Affairs (LIBE) of the European Parliament launched an assessment procedure[1] aiming at highlighting the main problems entailed in the transposition of 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 (hereafter Directive 2004/38).[2] The EP transmitted a questionnaire to all the National Parliaments of the EU Member States (MS) requesting qualitative, quantitative and statistical information on transposing legislation, administrative procedures and practical implementation of Directive 2004/38. The latter should have been implemented by 30 April 2006. The responses provided to the questionnaire at the end of 2008 have been often partial and obscure, and at times completely absent – only the following eleven MS provided an answer: Austria, Belgium, Cyprus, Czech Republic, Italy, Lithuania, Poland, Romania, the Slovak Republic, Slovenia and Spain. The resulting data offers however some valuable information concerning relevant weaknesses in the transposition of the Directive.

The EP's overall exercise constitutes a positive, while challenging, endeavour at times of strengthening the bridges and cooperation with National Parliaments in the so-called 'Area of Freedom, Security and Justice' (AFSJ) with the prospect of the entry into force of the Treaty of Lisbon in areas of such relevance such as the freedom of movement and, more widely, European citizenship.[3] Indeed, in addition to Article 18 EC Treaty, the Charter of Fundamental Rights of the EU recognizes in Article 45 that the freedom of movement and residence constitutes one of the dearest European citizens' fundamental rights.[4] The relevance granted by European citizens to the achievement of the freedom to move, as well as to its seminal role and added value in the promotion of European identity, has been often evidenced in various Eurobarometer reports.[5] This freedom, and its linkage with the citizenship of the Union, has been revisited, developed and proactively interpreted by both substantive and institutional mechanisms characterizing the EU legal system, i.e. respectively, the Directive 2004/38[6] and the jurisprudence of Community Courts, most particularly that of the European Court of Justice (ECJ). The assessment of the national implementation of Directive 2004/38 by the EP contributes to the promotion and protection of fundamental rights in the EU, the reinforcement of European citizenship as well as the democratic accountability of MS actions in the scope of EC free movement law.

In the Fifth Report on Citizenship of the Union [COM(2008) 85], the European Commission confirmed that the control of the correct implementation of Directive 2004/38 remained a

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[1] EP Resolution on application of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, 15 November 2007, P6_TA(2007)0534, paragraph 8. See also EP Working Document, on Follow up to the EP resolution of 15 November on the application of Directive 2004/38 on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, Rapporteur: Adina-Iona Vălean, 13 June 2008.

[2] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[3] On the stronger role of national parliaments under the institutional landscape provided by the Treaty of Lisbon in relation to an AFSJ see Carrera, S. and F. Geyer (2008).

[4] Charter of Fundamental Rights of the European Union, OJ 2007/C 303/01, 14 December 2007.

[5] See *inter alia* European Commission (2002), Candidate countries Eurobarometer: Public opinion in the countries applying for EU membership, The Gallup Organization, Hungary, DG Communication; European Commission (2006), The European Citizens and the Future of Europe – Qualitative Study in the 25 Member States, Eurobarometer, Optem, DG Communication; European Commission (2009), Awareness of Key Policies in the Area of Freedom, Security and Justice, Analytical Report, Flash Eurobarometer, The Gallup Organization, Hungary, DG Communication, page 36, point 4.2.

[6] For an analysis refer to Carrera (2005).

central priority.[7] On the basis of the call given by a EP Resolution of November 2007[8] and Article 39 (1) of the Directive, the Commission carried out an evaluation on its application which materialized in a Report published in December 2008 [COM (2008) 840]. The latter has been rather critical on MS and has qualified the overall transposition as 'rather disappointing'.[9] In particular, the Commission noted that there has been no MS which has 'effectively and correctly' transposed the entire Directive into their domestic legal regimes. It added that there is actually not a single provision of the measure which has been adequately implemented by all the MS! The information available in the Report has also substantiated, and has also somehow confirmed, some of the core findings emerging from the study of the information in the questionnaires presented in this Briefing Paper.

The incapacity shown by MS to fulfil their 'obligation to act' under Article 10 EC Treaty[10] has negative implications on fundamental rights, the status of European Citizenship, the principle of equality and non-discrimination as well as the very foundations upon with the European Community is being rooted. The EU legal system relies on MS' capacity to implement correctly and in a timely manner EC law. It also 'takes for granted' that MS comply with, and adhere closely to, the dynamic jurisprudence of the ECJ on these matters, and that the European Commission can secure compliance through its Treaty-based powers (e.g. Article 226 EC Treaty) and its current human and financial resources. Notwithstanding, the freedom of movement of EU citizens and family members constitutes an illustrative example where these presumptions simply do not work in the ground. The main victim of this failure is the liberty and security (fundamental rights) of the individual who remains vulnerable at times of 'moving' and encounters obstacles while trying to benefit from fundamental rights and freedoms attached to European citizenship. The legitimacy and credibility of the EU toward citizens' expectations remains therefore very much at stake.

This Briefing Paper sets out where the key deficits are in respect of realizing the principle of free movement of Union citizens and their family members. Our focus centres on the identification of problematic areas where difficulties can be pointed out in the national implementation of Directive 2004/38. While our examination acknowledges results coming from other publicly available sources of information, such as those of the European Commission and previous EP questions and work, the foundations of this Paper are based on the data provided by National Parliaments in their responses to the questionnaires. From a methodological perspective we deem it also appropriate to stress that while the Briefing Paper underlines certain 'bad practices' and gaps between the framework of protection envisaged by Directive 2004/38 and its corresponding national legislation/administrative practices, our driving logic has not been 'to name and shame' those MS which have implemented 'the least well' the content and rights envisaged in the Directive. Rather, we aim at illustrating in a synthesized manner how some of the provisions of this piece of EU secondary law might have been misinterpreted and/or badly/inconsistently applied across the national arenas, and therefore at pointing out key thematic dimensions which remain critical and where the EP and National Parliaments should express their greater concerns.

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[7] European Commission, Fifth Report on Citizenship of the Union, COM(2008) 85, Brussels, 15 February 2008.

[8] See footnote no. 1 above, paragraph 7, where the EP requested the Commission to deliver 'a detailed assessment of the steps taken by Member States to implement Directive 2004/38 and of the correctness of its transposition...'.

[9] Commission Report on the application of 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, COM(2008) 840 final, Brussels, 10 December 2008. See also Commission Communication, The impact of free movement of workers in the context of EU enlargement Report on the first phase (1 January 2007 – 31 December 2008) of the Transitional Arrangements set out in the 2005 Accession Treaty and as requested according to the Transitional Arrangement set out in the 2003 Accession Treaty, COM(2008) 765 final, Brussels, 18 November 2008.

[10] Article 10 TEC states that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's task. They shall abstain from any measure which could jeopardize the attainment of the objective of this Treaty".

Furthermore, the questionnaire which was forwarded to the National Parliaments was structured by the LIBE Committee into nine headings intending to cover all stages relevant to the free movement of persons as stipulated by the Directive (refer to questionnaire provided in Annex 1 of this Paper). The shape of the questions was also based on those issues that had been already identified as problematic by the EP.[11] As stated above, however, the information that has been provided by national authorities has been partial, incomplete and selective. As the MEP Adina-Ioana Vălean, Rapporteur on the Initiative Report on the Application of Directive 2004/38,[12] underlined at the Joint Committee Meeting on 'Progress in the Area of Freedom, Security and Justice' of 19-20 January 2009,[13] National Parliaments have not demonstrated much enthusiasm in complying with the EP's request and answers have been scarce. This becomes obvious when taking into account that only eleven EU MS replied and sent back the questionnaire. Furthermore, the amount of information requested in each section of the questionnaire (approximately six sub questions per heading) seems to have encouraged the National Parliaments 'to pick and choose' those questions they were more willing to address, as well as the scope of the answers given. This has resulted in some MS providing detailed accounts of their implementing legislations that contrasted with other very succinct or non-existent answers. Indeed, while some National Parliaments have provided lengthy explanatory accounts on the content of their legislation, others have merely referred to the corresponding legal provisions without duly addressing the actual ways in which they are being interpreted and practiced. The diverse puzzle of data resulting from the materials has not facilitated the cross-comparison of the various transposition measures and the identification of common weaknesses.

Next Section aims at overcoming some of these open methodological issues by focusing on thematic areas where fundamental deficits might be identified at times of conducting a cross-comparative account of the results provided by the questionnaires. In short, the following four problematic topics can be underlined as showing major deficits and leading to conflict with the Directive: 1. Third-country nationals family members and registered partnerships; 2. Administrative requirements to the right to move and reside; 3. Restrictions to the access to social benefits; and 4. Use and abuse of expulsion powers.

2. THEMATIC AREAS / PROBLEMATIC TOPICS

2.1. THIRD-COUNTRY NATIONAL FAMILY MEMBERS OF EU CITIZENS AND REGISTERED PARTNERSHIPS

2.1.1. Third-Country National Family Members

As long as citizens of the Union exercise their free movement rights accompanied by family members who are also citizens of the Union they do not generally encounter many difficulties in light of Directive 2004/38.[14] However, when they seek to be joined or accompanied by third-country national (TCN) family members many MS place obstacles which go against the spirit and wording of the Directive, as well as the case law of the Court of Luxembourg. As a

[11] EP Working Document, on Follow up to the EP resolution of 15 November on the application of Directive 2004/38 on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, Rapporteur: Adina-Iona Vălean, 13 June 2008, page 6, where seven issues where already identified as problematic (i.e. notion of family member, authorisation of entry and issuing of residence cards for third country family members, documents demanded by border authorities and air carriers, the interpretation of sufficient resources and of the notion of 'unreasonable burden to the social assistance system, the interpretation of 'serious/imperative grounds of public policy and public security, abuse of rights and marriages of convenience).

[12] INI 2008/2184.

[13] Joint Committee Meeting on the initiative of the European Parliament and the Czech Republic, Progress in the Area of Freedom, Security and Justice, 19-20 January 2009, European Parliament, Brussels. See http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=LIBE

[14] Article 5 (2) (3) (4) and article 6 (2) of Directive 2004/38.

way of illustration, the following problems can be highlighted across the MS subject to study in this paper in what concerns the treatment given to TCN family members at times of entry/admission. In **Italy** the entry requirement for all non-EU national family members to be in possession of an identification document is conditional upon holding a passport.[15] This is not consistent with Article 5(2) of the Directive which allows for the entry into a MS if in possession of other documentation such as a residence card issued by another MS. According to the questionnaire from the **Czech Republic** "a family member of an EU citizen who is not himself a citizen of the European Union is also obliged, during border control, to present the police with a visa authorizing him to present in the territory of the country if he is subject to a visa duty".[16] Furthermore in light of the provisions of the Directive, entry visa for TCN family members should be obtained free of charge, as soon as possible and on the basis of an accelerated procedure. This, however, does not seem to have been interpreted by all MS as a binding rule as few of them make mention of the existence of such procedures in their answers to the questionnaires. For example in **Slovenia**,[17] although it is a requirement for family members that are not EU nationals to hold a valid passport with a visa, no special procedure to obtain this document in a easier way ('as soon as possible and on the basis of an accelerated procedure') appears to have been put into place. Moreover, the visa requirement should, according to the Directive, be waived when a TCN family member is in possession of a passport as well as a residence permit issued by another MS.

The ECJ has showed important interventions and proactive interpretations of the foundations of European citizenship which have expanded the enactment of this status both *ratione materiae* and *ratione personae*. The judicialization of the status of European citizen, and the freedoms and rights attached to it, has gradually enlarged and liberalised the limits of European citizenship.[18] It remains unclear the extent to which all the EU-25 MS have yet applied fully the ECJ jurisprudence according to which TCN family members cannot be required to have been previously legally residing with an EU citizen in another MS in order to benefit from freedom of movement and the right of residence.[19] Other MS are applying the ruling only to spouses and children of EU citizens exercising their free movement rights and not to wider family members, such as parents and grandparents who are also covered by the Directive. There seems to be also a tendency in some administrations to apply a sufficient resources requirement for TCNs' family members even where the principal is a worker or self employed even though this is not permitted under Article 7 of Directive 2004/38.[20] Indeed,

[15] Article 4 and 5 of the Legislative Decree No 30/2007, 6.02.2007 consolidated by Legislative Decree No 32/2008, 28 February 2008. They provide for free movement of all "Union Citizens with a 'document valid for foreign travel in accordance with the legislation of the Member State' and their family members who are not Community nationals but who hold a valid passport."

[16] It is however very interesting to note that in the second questionnaire provided this time by the Senate of the Parliament of the Czech Republic it is however said that "A family member of a European Union citizen, who is not a national of a EU Member State, is obliged to prove his/her identity by means of submitting a travel document or card of residence of a family member of a EU citizen or card of permanent residence permit; if the alien does not hold any of the aforementioned documents, s/he can prove his/her identity by means of submitting another type of document, however, s/he must concurrently prove that s/he is a family member of a European Union citizen".

[17] In Slovenia, the provisions of the Directive 38/2004 have been, for the most part, incorporated into the Aliens Act, setting out the conditions for the entry into and residence of aliens in the Republic of Slovenia.

[18] The literature has focused on the dynamic role of Community Courts in the enactment of European citizenship and the significance of their successive rulings. See among others, Craig and De Búrca (2007), Kostakopoulou, (2007), Jacobs (2007) and Guild (2007b). For a 'state of the art' see Carrera and Merlino (2008).

[19] According to the European Commission's Report COM(2008) 840, on the basis of the Akrich judgement, Case C-109/01, Denmark, Ireland, Finland and the UK had made the right of residence conditional on their prior lawful residence in another MS. The report also highlights how other seven Member States had adopted a similar position through administrative practices. See page 4 of the Report.

[20] Article 7(1) of the Directive provides that "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a)are workers or self-employed persons in the host Member State; **or** (b)have sufficient resources for themselves and their family members (...) and 7(2) "The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen

the relevance of ECJ rulings is exemplified by *Metock,*[21] where the Court overruled its previous arguments in *Akrich*[22] and held that there is a right for citizens of the Union who are exercising their free movement rights in a host state to be joined or accompanied by TCN family members irrespective of where they are coming from (i.e. outside the EU or not) and prior lawful residence. From the questionnaires no information on the potential impact of these important judgments has been obtained.

2.1.2. Same-Sex Marriages and Registered Partnership: An Uneven Recognition

For those EU nationals who are entitled, under the national law of their home MS, to marry someone of the same sex, there is no clarity on the recognition of their marriages across the EU for the purpose of exercising free movement rights.[23] Not only is this disparity in the recognition of different types of union misleading, but it also gives rise to frustration and exclusion of some citizens of the Union. For instance, in the **Czech Republic** while same-sex marriages are not permitted under national legislation, those concluded in another MS are recognized and the spouse is treated as family member of an EU citizen.[24] **Austria, Cyprus, Poland** and **Slovakia,** on the other hand, do not recognize same-sex marriages or partnerships whether they take place on their territory or abroad.[25] Registered partners also encounter problems when seeking to enforce their free movement rights. According to Articles 2 and 3 of the Directive, the duty on MS is to permit the residence of registered partners in the same way which they do for their own nationals (which presupposes that registered partnerships are recognized in the state). In some states this obligation has been interpreted more favourably. This has been the case in **Spain** which recognizes same sex registered partnerships and where the rules for entry and residence of registered partners are the same as for spouses.[26] In **Slovenia** however the Aliens Act does not recognize these when concluded abroad even though their conclusion within the country is permitted under the Registration of a Same-Sex Civil Partnership Act. In **Romania** same gender partnerships are not recognized, but 'taken into consideration' if they were "registered before proper authorities and under legal provisions of the Member State of origin or provenience … and only for the purpose of their exercise of right of free movement on Romanian territory".[27]

In addition, as regards the children of same sex partnership, the Directive 2003/86 on the right of family reunification[28] and the right to non-discrimination require that children be granted entry and residence rights regardless of their parents' legal status and sexual orientation. In respect to those MS which do not recognize same sex marriages or/and partnerships, this situation may consequently interfere with the right of the child to be with both his/her parents.

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satisfies the conditions referred to in paragraph 1(a), (b) or (c); Refer to Section 2.3. of this Briefing Paper for its implementation.

[21] C-127/08 *Metock* 25 July 2008. See also C-1/05 *Jia*; C-459/99 *MRAX*; C-60/00 *Carpenter*, C-291/05, *Eind*, 11 December 2007, para. 45.

[22] Paragraph 58 of *Metock*.

[23] Article 2 (2) and 3 of Directive 2004/38. On this point see Carlier, J.Y. and E. Guild (2006).

[24] Act No. 326/1999 Coll. On the Residence of Aliens in the Territory of the Czech Republic.

[25] As reported by both national Parliaments in their answers to the questionnaire. Slovenia does not recognize same sex marital unions either.

[26] Royal Decree No 240/2007, 16.02.2007 on the entry, free movement and residence in Spain of citizens of the Member States of the European Union and other states party to the Agreement of the European Economic Area which, according to the questionnaire recognizes that "partners, whatever their sex, are subject to the same rules as spouses if they are registered in a public register established for this purpose in a Member State of the EU or EEA. There is also no discrimination with regard to children".

[27] GEO no. 102/2005 on the free movement of citizens of the Member States of the European Union and the EEA on the Romanian territory.

[28] Council Directive 2003/86/EC on the right to family reunification, 22.09.2003, OJL 251.

2.1.3. Family Members who are Dependants

There is also wide variety across the MS in relation to the interpretation of the concept of dependant person.[29] The European Commission's Report COM(2008) 840 stipulated that almost half of the MS had not transposed Article 3 (2) in a satisfactory way. As evidenced in the already restrictive interpretation of the category of other beneficiaries of the Directive, this statement of failure is based upon a practice of interpreting more restrictively MS' obligations towards family members of EU citizens.[30] The information provided by the questionnaires in this regard has been unsatisfactory. The definition of this category has been given a very broad scope in **Belgium**.[31] In **Cyprus** this definition is narrower.[32] It also appears that the documents requested to substantiate this dependency status are very different from one MS to the other. These documents mainly purport to prove family ties and relationship, physical dependence and financial circumstances. The case of **Belgium** provides us again with a good example where the administrative requirements at national level are subject to a large margin of appreciation. In fact, in this country, 'there is no exhaustive list of documents'[33] accepted by the authorities to prove the existence of dependency. As exemplified in the answers to the questionnaires by other MS, the national authorities retain a significant margin of manoeuvre to define who qualifies for this category and how this is can be evidenced. In **Italy**, while other family members do not seem to be covered by Legislative Decree 30/2007 transposing the Directive, 'durable partners' may be allowed to enter with an entry visa if "the relationship is duly attested by the Union citizen's state"![34]

2.2. RIGHT OF ENTRY, STAY AND EXIT: DELAYS AND OBSTACLES

2.2.1. Entry

In order to enter the territory of a MS, Union Citizens and their family members need to be able to prove their identity.[35] Although this usually means holding a valid identity card or passport, a resident permit issued by another MS seems only to be considered acceptable by **Belgium**, **Lithuania** and **Spain,** even though this is an obligation under the Directive! Once on the territory, most MS now ask for individuals, in particular non-nationals, to be holding a valid Identity Card or Passport. Moreover, what seem to be more problematic are the procedures which apply once the EU citizen and/or family member do not hold the necessary identification documents. For instance, the obligation to give family members who do not satisfy the requirements for entry in a MS every reasonable opportunity to demonstrate that they are covered by the right of free movement and residence has been interpreted as equivalent to granting time to obtain the missing documents. However, as shown by the case of **Lithuania**, although phone and fax services are provided, no indication is given as to the

[29] Article 2 (2) and 3 (2) of Directive 2004/38.

[30] The Report also states that ten MS had transposed it in a more favourable way. See page 4 of the Report.

[31] Art. 40 bis, § 2, Loi 15.12.1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (LAT). See also for example Article 2 (1) of the Ordinance NO. 102/2005 implemented by Government Decision NO. 1864 of 21 December 2006 which broadly states that "any family member, irrespective of their nationality, not falling under the definition provided at point (3) and that is dependent of the citizen of the EU in the country of origin or country from which they are arriving", instead of direct descendant.

[32] For instance, the questionnaire from Cyprus only states that "a dependent direct relative of the Union citizen in his ascending line and those of his/her spouse".

[33] Reference BRI/108.2008 - LT/749087EN.doc. The Belgian questionnaire states that "The determination of whether anyone is or is not dependent is first of all an issue of facts, which makes it difficult to draw up general provisions. Nevertheless we can provide a broad outline of our administrative practice".

[34] Article 3 of Legislative Decree 30/2007.

[35] Article 5 of Directive 2004/38.

length of a "reasonable period" given "before starting the return procedure".[36] The actual application of this requirement is thus entrusted to the complete discretion of the border guard. In **Slovenia**, in such situations, an exceptional authorization to stay six hours in the border crossing area is granted![37] In **Italy** a Union citizen or a family member who do not hold travel documents (or for TCNs family members an entry visa) will be refused entry unless they can provide the necessary documents (or provide proof of entitlement to freedom to move by means of 'other appropriate documents') within 24 hours. Not only Italy, but also other MS like **Poland**[38] and **the Czech Republic**[39] seem to accept other types of documents; however it is not clear which other documents this refers to and whether this is applicable to Union citizens and/or TCN family members.

2.2.2. The Obligation to Report or Register

Directive 2004/38 provides for administrative formalities for citizens of the Union who move from one MS to another to be very light and to only apply after the first three months of residence.[40] In the **Slovak Republic**[41] and the **Czech Republic** there is no registration system,[42] but EU citizens are still under an obligation to report their presence to police authorities. According to the Czech legislation, failure to comply with this requirement results in an administrative offence and a fine.[43] Similarly, in the Slovak Republic, if reporting is not done within 10 days, a fine of up to 1,659 Euros may be applied.[44] These types of financial sanctions need to be tested against the principle of proportionality and that of non-discrimination as required by Article 5 (5) of Directive 2004/38, since it may be rather difficult for anybody to be aware of such administrative procedures upon arrival in a foreign country.

Under Article 8 (3) of the Directive, MS can require citizens to obtain a registration certificate after three months, in the event this is not done, they can even impose proportionate and non-discriminatory sanctions. In **Italy**, although there is no obligation for Union citizens to register in the three first months, in the absence of evidence of the duration of the stay, an EU citizen without statement of presence will be considered to have been in the country for

[36] Order of the Ministers of interior and external affairs No 1V-280/V-109, 2.09.2004 "On the Rules of providing documents for visa, issuing visa, also issuing visa in the border control posts, extending the time of stay in the Republic of Lithuania, withdrawing visa, accrediting travel agencies" (Zin., 2004, Nr 136-4961).

[37] Slovenian Parliament's answer: this however "is an exception to the general provisions, contained in the National Border Control Act".

[38] Polish Parliament answer: for a period no longer than 72 hours, the commandant of the Border Guards post gives "an opportunity to take steps to obtain a valid travel document or another valid document stating his/her identuity znd citizenship, or to prove in another unquestionable way that these persons have the right of free movement."

[39] In the questionnaire filled in by the Senate of the Czech Republic it is stated that "according to Article 6 paragraph 10 of the Residence of Aliens Act, if, at the time of border control, a European Union citizen does not have a travel document or cannot obtain one, the Police will allow him/her to prove his/her identity and the fact that s/he is a citizen of a EU Member State by means of another type of document (e.g. driving licence). If, at the time of border control, the family member of a EU citizen does not have a travel document or cannot obtain one, the Police will allow him/her to prove his/her identity and the fact that s/he is a family member of a EU citizen by means of another type of document".

[40] Articles 5 (5), 6 (1) and 8 of Directive 2004/38.

[41] Section 49 §2 of the Act no. 48/2002 Coll. On the residence of foreigners.

[42] Czech Parliament's answer: "Under certain preconditions, all foreigners, i.e. also EU citizens and their family members, and also persons with permanent residence must report their presence in the territory of the country". Refer to Article 93 (2) of the Residence Aliens Act which states that EU citizens and family members are under the obligation to report the place of their residence in the territory to the police within 30 days of the date of entry.

[43] Article 157 (1) (r) of the Residence of Aliens Act. The fine will be of 3,000 Czech crowns.

[44] Section 46 §1 (e) of the Act no. 48/2002 Coll. On the residence of foreigners.

longer and will therefore be subject to a fine.[45] In practice, this actually amounts to compulsory reporting within the first three months of stay.

Registration certificate should be also delivered 'immediately'. However it appears that many MS have disregarded this aspect as well. **Belgium** has ignored this provision in its national implementing legislation and it has not included it as a positive obligation.[46] This is even more worrying when one considers that in this country EU citizens may be detained in Belgium if they do not comply with administrative formalities.[47] However, in one of the answers provided in the Belgium questionnaire, it is assured that the certificate is delivered immediately "when little examination is required to investigate whether the conditions for a registration certificate are satisfied",[48] while according to the information provided in another of the questionnaires provided by the Belgium National Parliaments (a total of three different questionnaires were provided by Belgium), the procedure to complete the registration appears to be long and tedious in practice.[49]

2.2.3. Residence for more than Three Months

One of the main issues giving rise to delay in the issue of certificates relates to evidence of 'sufficient resources' as included in article 7 (1) (b) of Directive 2004/38. MS are prevented from applying this requirement to workers or the self-employed but they can require other categories of citizens of the Union exercising their free movement rights to show that they have sufficient resources where they reside for longer than three months. In practice, it seems that the administrations in many MS make mistakes as regards each of these categories, and ask often workers (particularly those working part-time or carrying out casual jobs) to show evidence of sufficient resources. Where citizens of the Union have TCN family members who must obtain residence cards, the delay in issuing them can be substantial. This is notwithstanding a general requirement to issue documents as quickly as possible and in any event within six months of the application.[50] While few MS refer in their transposing legislations to a maximum time limit for their issuing, it is difficult to assess whether this requirement is actually respected. In **Cyprus** for instance, although there is a legal obligation to respect this six months period, it has been reported that it in fact takes much longer.

In transposing Article 10 of Directive, MS have indeed largely reinterpreted the documents required, narrowing documentary evidence to the presentation of very specific documentation, such as an officially translated marriage certificate to prove family relationship, and adding new criteria like the possession of a health insurance or the proof of sufficient means. In the **Czech Republic**, a residence permit is issued to TCNs upon showing the residence card of his/her EU family member. Consequently, EU citizens with a TCN family member do need to register.[51] In **Lithuania**, the registration procedure takes place in two steps (first the obtaining of the residence permit from the local migration unit and then its

[45] According to article 5(5)(a) of Legislative Decree 30/2007 and the answer given by the Italian Parliament: "Although this is an optional procedure, failure by a Community citizen to report presence may be to his or her disadvantage: a Community citizen who does not hold a statement of presence is regarded, in the absence of evidence to the contrary, as having been resident in Italy for over three months."

[46] Art. 42, §4 LAT does not refer to this obligation.

[47] See the Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation from the Committee on Civil Liberties, Justice and Home Affairs (LIBE), (PV723427, PE 404.465, 28.05.2008)

[48] Questionnaire BRI/108.2008, page 15.

[49] LT\749082EN.doc "The aliens Office will take a decision within five months of the application."

[50] Article 10 (1) of Directive 2004/38.

[51] These circumstances then fall under the category of the "certain preconditions" referred in footnote 43 above.

'personalization'), and although this should according to the law be dealt with within two months, the administrative burden appears to be far heavier for this category of persons.[52]

It also appears that some MS have not at all transposed the Article on the conditions for residence of TCN family members of EU citizens as some have not referred to a specific implementing legislation.[53] This further substantiates an additional concern expressed in the European Commission's Report 2008 (840) whereby most MS do not comply with the obligation to issue specific residence cards for family members of Union citizens that would more favourably categorized them as such.[54] At times of receiving the treatment they deserve in their capacity of family members of a Union citizen, such an omission will most probably prove to be a handicap.

2.3. RESTRICTIONS TO THE ACCESS TO SOCIAL BENEFITS

One of the most common sources of friction between citizens of the Union and host MS is around access to social benefits. Not only do MS tend to apply a sufficient resources test to all citizens of the Union whether or not they are workers or self-employed, but they also tend to refuse registration certificates or family reunification on the basis of 'insufficient resources'. Workers are entitled to all social benefits on the basis of equal treatment with own nationals. The Directive 2004/38 does however provide for different treatment whether the free mover is economically active or not.[55] Taking into account the answers provided in the questionnaire, the practice for applying the sufficient resources test seems to be highly inconsistent. An example of this is **Belgium**, where although the test is not systematically applied, it includes many different variables and the distinction between economically and non-economically active is not made.[56] **Poland** applies similar rules.[57] Other MS, such as **Lithuania**, have not transposed this obligation and check on a case-by-case basis whether EU citizens and their family members possess at least the minimum level of national income supported by the state; however it is not clear whether this is assessed in the light of the expected length of stay and whether the presence of dependants is taken into account.[58]

Furthermore, EU citizens who lose their employment retain their status as worker for the purpose of residence rights and of access to social benefits under the Directive.[59] However, many MS fail to give effect to this right to benefits when unemployed instead treating citizens of the Union who are in this situation as if they were new arrivals.[60] In fact while this was not a specific question included in the questionnaires, this obligation should be kept in mind in

[52] In application of Article 99 of the Law on the legal status of aliens as reported in the Lithuanian's Parliament questionnaire.

[53] On the basis of the information provided in the questionnaires this appears to be the case in Slovenia and Romania.

[54] Page 6 of the Report which expressly states that "A serious problem is that in a number of Member States the residence card is not called "Residence card of a family member of a Union citizen", as required by Article 10. Family members concerned may find it difficult to prove that their situation falls under the Directive, and not under the more restrictive national rules on aliens".

[55] Article 7 and 8 of Directive 2004/38.

[56] Article 40 (4) of the Law of 15 December 1980. The questionnaire states that "Only persons likely to be in a precarious situation are assessed (doubtful case, application to the C.P.A.S. – public social assistance centre)". The competent authority is either the Commune or the Aliens Office.

[57] §2, Dziennik Ustaw, No. 217, item 1616, read together with article 15§3 of the Aliens Act. The border guards are responsible for enforcing these provisions, and their decisions apply immediately.

[58] According to the questionnaire "There is no definition of 'sufficient resources' in the laws. The situation of every particular is assessed individually...In case of the family member, both the resouces of the family member and the partner may be taken into account. In order to prove the sources of their income, applicants must provide respectice documents. No other measures of control are applied".

[59] Article 7 (3) and 24 of Directive 2004/38; See also Case C-456/02, *Trojani* [2004] ECR I-7573 and Case C-184/99, *Grzelczyk* [2001] ECR I-6193.

[60] Refer to Minderhoud (2009).

particular when considering the implementation of Article 14 of the Directive which refers to the unreasonable burden to social assistance threshold (See Section 2.4.2 below).

2.4. USE AND ABUSE OF EXPULSION POWERS

2.4.1. Expulsions

According to Article 28 of the Directive, automatic expulsion of Union citizens is prohibited and MS are only permitted to exclude or expel citizens of the Union on the grounds of "public policy, public security or public health".[61] Furthermore, expulsion decisions must be based exclusively on the personal conduct of the individual concerned.[62] On the basis of the questionnaires, a number of *lacunas* can be identified. Some MS do not provide for a conceptual framing of what the normative categories of public policy, public security and public health really mean. This is the case for instance in the **Czech Republic**[63] and **Slovak Republic**.[64] Such omissions leave wide room for discretion to the police and allows for diverse administrative practices. In **Italy**, for example, restrictions are allowed on grounds of 'State security, imperative reasons of public security and other grounds of public policy or public security'.[65] However, Italian law only offers a definition of 'imperative reasons of public security". The ways in which national authorities take into account and examine the protection against expulsion provided in Article 28 (1) of Directive 2004/38, and more particularly "the social and cultural integration into the host Member State and the extent of his/her links with the country of origin", is also far from clear.

As already highlighted by the European Commission Report COM(2008) 840,[66] there are still two MS, **Italy** and **Finland**, which provide in their national law for automatic expulsions of citizens of the Union serious criminal convictions or 'having committed a crime of certain gravity' at times of deciding whether the person constitutes a threat to public policy and public security. The Italian Penal Code states that the expulsion of a Community national will occur in the case of a sentence of imprisonment of at least two years or in the case of a crime against the personality of the state (irrespective of the duration of the sentence).[67] Furthermore, the legal concept of "imperative reasons of public security" includes 'any previous convictions for serious offences handed down by an Italian or foreign Court'. Finally, in the context of its 'security package', new grounds for expulsion will be introduced.[68] It follows that EU citizens and their family members may be removed from the

[61] Refer to *inter alia* Case C-413/99, *Baumbast* [2002] ECR I-07091 and Case 67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln* [1975] ECR 00297. See also Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, para. 15, and Case C-30/77, *Régina v. Pierre Bouchereau* [1977] ECR 01999, para. 35.

[62] Article 27 (2) of Directive 2004/38.

[63] The questionnaire from Czech Republic states that "In general, it should be stated that State security and public policy are 'indefinite' legal terms that must be construed according to the specific situation". Refer to the Act on Residence of Foreigners in the Territory of the Czech Republic, Article 9.1 and 2.

[64] According to the questionnaire "As to restrictions on the free movement the police may deny entry to a citizen of the EEC and his/her family member if there is a reasonable suspicion that he/she threatens security of the state, public order or for the reason of protection of public health". See Act. No. 48/2002 Coll., Sec. 6, paragraph 1.

[65] See Decree 30/2007 of 6 February 2007 as amended and consolidated by Decree No. 32 of 28 February 2008, Article 20.

[66] Page 8.

[67] See Articles 235 and 312 of the Penal Code as amended by Decree-Law No 92 of 23 May 2008 (converted finally into Law No 125 of 24 July 2008).

[68] In particular the Legislative Decree Scheme establishes that EU Citizens wishing to reside in Italy for more than three months have the obligation - for reasons of public order and public security - to register with the competent authorities within 10 days after the expiration of the three month period residence. According to Article 20 Legislative Decree N°30/2007 - as modified by the scheme of Legislative Decree scheme - the failure to comply with this rule represents "an imperative reason of security" allowing limitations to the right to entrance and residence of EU Citizens and their family members. Schema di decreto legislativo recante ulteriori modifiche e

Italian territory if they do not register with the competent authorities within 10 days after the established three month period. In the **Czech Republic**, it appears that the most frequent criminal law punishment imposed on foreigners is expulsion if this is required for the safety of persons or property or other public interest.[69] In this context, the issue of compliance with the proportionality requirement of the Directive may be raised. A similar concern applies to **Romania** where restrictions to free movement and expulsions can take place if there is an 'imminent danger' for the public policy and public security. The meaning and scope of this category is not developed in the law.[70]

Some MS do not accept that the limitations on expulsion apply even where the citizen of the Union has resided for more than three months and does not yet fulfil the conditions of work, self employment or residence. Further, in some MS, in particular **Italy** and **France**, the expulsion of citizens of the Union after three months residence where they cannot show that they have sufficient resources seems disproportionately exercised against nationals of one particular MS: i.e. Romania**.**[71] Very little quantitative, and hardly any qualitative data, was provided in this respect by the national answers provided by Italy in the questionnaire.[72]

2.4.2. Linkage of Recourse to the Social Assistance System and Expulsion

While Directive 2004/38 does not permit MS to automatically expel a citizen of the Union because s/he has become an 'unreasonable' burden on the social assistance system,[73] a number of MS seem to take this approach. Notwithstanding the need to take into account conditions of proportionality and individually assessed decisions of the personal situation, the criterion not to represent an 'unreasonable burden' has been implemented in very different ways at national level. While some MS do not specify how this is actually applied, such as for example **Austria** that merely states that it takes all relevant criteria into account,[74] others like the **Czech Republic** appear to have created detailed national scaling systems in the shape of a points-based system. This system comprises the duration of residence to date, the duration of employment and education and potentials for future employability, qualifications as well as

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integrazioni al decreto legislativo 6 febbraio 2007, n. 30, di attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri. Available at: http://www.camera.it/_dati/leg16/lavori/AttiDelGoverno/pdf/0005.pdf

[69] Section 57 of the Czech Criminal Code as described in the Czech answer to the questionnaire.

[70] Refer to Article 25 (2) of Law No. 260/2005, Official Gazette, No. 900, 7 October 2005.

[71] European Parliament Resolution on the application of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States, 15.11.2007.

[72] On the legal measures adopted by the Italian Government in the framework of the 'Security package' see European Parliament resolution of 10 July 2008 on the census of the Roma on the basis of ethnicity in Italy, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0361+0+DOC+XML+V0//EN&language=EN#ref_1_12; Council of Europe, Memorandum presented by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe. Available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH(2008)18; European Union Fundamental Rights Agency, Incident Report: Violent attacks against Roma in the Ponticelli district of Naples, Italy; Available at: http://fra.europa.eu/fra/material/pub/ROMA/Incid-Report-Italy-08_en.pdf.

[73] Recital 16 and Article 14 (3) of Directive 2004/38. Recital 16 states that "As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host member state they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host member state should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security".

[74] The Austrian questionnaire states that "According to administrative data and case-law, a person would become an unreasonable burden on the social assistance system if the purpose of their entering the country was in order to draw social benefits; Where there is no early indication of abuse, an individual assessment is made, whereby all relevant circumstances – especially the duration and purpose of stay (entry for employment purposes or as a student, etc) – are taken into account".

the unemployment rate in the region of residence. In **Belgium**, the administrative authorities can declare the termination of residence of less than three years of a foreign national who has been dependent on social assistance (*centre public d'aide sociale* – C.P.A.S) for more than three months. In the **Slovak Republic** on the other hand, family members of EU citizens have to submit a declaration that they will not become burden to the health care and social assistance system.[75] In **Cyprus** the competent authority (The Social Welfare Services of the Ministry of Labour and Social Insurance) will take into consideration 'the personal situation' of the person and "this assessment shall not be carried out systematically".[76]

2.4.3. Procedural Safeguards

An expulsion order may only be enforced after a month of notification except in duly substantiated cases of emergency.[77] According to the Commission Report COM(2008) 840 few MS have transposed the safeguards correctly and inaccurate transposition constitutes the general rule.[78] Indeed, from the information provided by the questionnaires it appears that this requirement was misinterpreted, and at times completely ignored, in a number of MS. As a way of illustration, in **Lithuania**, the decision obliging an EU national or his/her family member to leave the country must be implemented without delay, within one month of the taking of the decision.[79] In **Romania**, while no timeframe is given for the enforcement of an expulsion decision, the right of residence terminates on the day of the ruling and appeals (which might be presented within 10 days as from the notification date) do not have a suspensive effect.[80] The transposition of the Directive 2004/38 carried out by **Spain** has been partial. The national law does not include an express reference to the need for allowing an evaluation of the legality of the expulsion decision and on the facts and circumstances on which the expulsion measure has been based (Article 31 (3) of Directive 2004/38).[81] In the case of **Slovenia**, the situation appears to be even more worrying as according to the answers provided by the Slovenian National Parliament, no data on procedural safeguards in the country are at all available.

[75] Article 45b (3) (d) of the Act no. 48/2002 Coll. on the residence of foreigners.

[76] Article 10 (5) of the Law on the Right of Union Citizens and their Family Members to Move and Reside Freely within the Territory of the Republic of Cyprus, 9 February 2007.

[77] Articles 28, 30 and 31 of Directive 2004/38.

[78] For instance the Report highlights that "in cases of absolute urgency, no procedural safeguards apply in France. The EU citizen receives no written notification of the expulsion decision, is not informed of the grounds on which the decision was taken and has no right of appeal before the decision is enforced", see point 3.8.2, page 9 of the Report.

[79] Article 127 of the Law on the Legal Status of Aliens, Žin., 2006, Nr. 137-5199.

[80] The Questionnaire also states that "In strongly motivated cases and in order to prevent imminent damage, the plaintiff may ask the Court to take the decision of suspending the materialization of the decision of declaring undesirable person, up to the moment the action is solved. The court shall urgently solve the suspension request, the decision in this case being de iure executorial".

[81] See Article 17 (1) and (2) of the Royal Decree No. 240/2007 of 16 February 2007 on the entry, free movement and residence in Spain of citizens of the Member States of the EU and other States party to the Agreement on the European Economic Area. Furthermore the Spanish national implementing law refers only indirectly to the requirements stipulated in Article 30 (1) and 2 of the Directive. No express reference is being made in Spanish law to the need to notify in writing the person concerned of the expulsion decision, and that they need to be informed "precisely and in full, of the public policy, public security and public health grounds on which the decision taken in their case is based".

3. CONCLUSIONS

Union citizenship constitutes the fundamental status of nationals of the MS.[82] This status, as well as the rights attached to it (e.g. the freedom of movement), is dynamic and transformative in scope and potentials. It remains in constant change thanks to the substantive instruments and institutional structures of the EU legal system. EU secondary law has progressively affected and expanded its original substance provided by the Treaties. The increasing involvement of the Community Courts is also limiting MS's discretionary powers and exceptions to the European fundamental rights that Union citizenship confers.[83] The Directive 2004/38 has substantially revisited the nature of and limits to the freedom to move. It has also reduced the administrative formalities for exercising free movement rights. It has brought a great simplification to previous regulatory framings, by merging into a single instrument all former sectoral legislation (two regulations and nine directives).[84]

Notwithstanding, citizens of the Union and their family members continue to face significant barriers at times in accessing and enjoying their full set of rights and freedoms across the national arenas in the EU. This Briefing Paper has examined some of the main deficits emerging from the responses provided by National Parliaments to the questionnaire elaborated by the LIBE Committee of the EP. While acknowledging the limitations and methodological deficiencies characterizing the EP's overall evaluation exercise – the partial and incomplete nature of the information coming out of the answers by the 11 National Parliaments to the questionnaires – the following four thematic areas of particular concern have been identified on the basis of the questionnaires: First, the treatment granted to third-country nationals' family members and registered partnerships; Second, the administrative requirements applying to the rights to enter and reside; Third, restrictions from having access to social benefits; and finally, the use of expulsion powers.

The European Commission Report COM(2008) 840 and the Draft Opinion of the Committee on Legal Affairs of the EP[85] have both concluded that the national transposition of Directive 2004/38 in the legal systems in a majority of MS contradicts directly the supranational framework of protection provided by Directive 2004/38. This paper has confirmed these critical concerns by further illustrating some problematic implementing measures and domestic practices that are incompatible with the fundamental right of freedom of movement by EU citizens and their family members (including TCNs), and therefore contravene the very institution of European citizenship. The synthesized overview which has been provided gives grounds for challenging common assertions that 'take too easily for granted' the capacity of MS, and therefore that of the Union as a whole, to ensure proper and timely implementation of EU legislation and ECJ jurisprudence, and that of the European Commission to ensure MS compliance through its current structures (human resources and budget) and enforcement mechanisms.

The protection of the freedom to move (as a seminal part of the status of European citizenship) as provided by EU law and as developed by Community Courts constitutes a central element of EU citizens' expectations towards the Union. It is in the national transposition phase where the greatest care and attention needs to be taken in order to ensure that MS discretion and 'exceptionalism' (i.e. exceptions to European fundamental rights) do not go beyond the level of protection provided by the common set of guarantees and freedoms envisaged in the EU legal regime. The incapacity of current structures and enforcement mechanisms to duly ensure a correct and timely transposition of EU law in such a

[82] Case C-184/99, *Grzelczyk* [2001] ECR I-6193, paragraph 31.

[83] Carrera and Merlino (2008).

[84] Refer to Apap (2002).

[85] European Parliament, Draft Opinion of the Committee of Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs, on the application of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2008/2184(INI), Rapporteur: Monica Frassoni, 16 January 2009.

fundamental aspect of European identity such as that of the freedom of movement is simply unacceptable for the sake of the legitimacy and reputation of the EU project as a whole. Further, the main victims of this failure are the liberty and security of the individual. If the EU wants to communicate with the citizen and for the citizen honestly to engage with EU law and policy, it must show the citizen that fundamental rights are duly protected against improper use – including unacceptable laws and practices by MS in the scope of EU law.[86] By delivering protection to the individual beyond the nation-state, the EU fosters European identity and confidence amongst its citizens and others.

The EP, in cooperation with National Parliaments, could (and should) play a more decisive role at times of exercising a democratic account/review of the national laws and practices covering the common set of European rights and fundamental freedoms, and that they are respected consistently and implemented coherently all across the Union. This would help overcome illiberal interference and unacceptable exceptions by MS in relation to the freedom of movement and the status of Union Citizenship. The innovative institutional setting provided by the still pending Treaty of Lisbon will guarantee an enhanced and active role to National Parliaments in the evaluation mechanisms for the implementation of AFSJ-related policies. Ideally this role should favour an increased involvement of National Parliaments at times of safeguarding European interests and fundamental rights in their respective domestic arenas in the scope of a common AFSJ. It is also for National Parliaments to assist citizens in gaining more consciousness of the rights guaranteed by this instrument and in enforcing them before relevant authorities. The cooperation and commitment by National Parliaments in assessment exercises such as the one launched by the LIBE Committee regarding Directive 2004/38 is indeed central for this goal to succeed in the future and for the EU to be able to deliver citizens' expectations.

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[86] See Guild (2007a).

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ANNEX

QUESTIONNAIRE ON THE TRANSPOSITION OF DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

Has Directive 38/2004 been implemented in your Member State? Could you provide the LIBE Committee with the transposition measures?

Do you keep qualitative, quantitative and statistical data on the application of Directive 38/2004? Could you provide the LIBE Committee with such information?

Specific questions:

1. **Definitions of spouse and registered partnership in relation to free movement**

   (Articles 2,3,7,8,10,12,13,17)

   Does your Member State (MS), in its national law or in reference to the application of the Directive:

   - recognize as "spouse" EU and third country same-sex partners of Union citizens?
   - recognize as "partner" EU and third country different-sex registered partners or also same-sex partners?
   - recognize as family member second/third/fourth spouses of EU citizens?
   - facilitate entry and residence for "other" family members and partners , including of same sex and how? Does the term "partners" include cohabitants, also of same-sex?
   - What about children of same-sex couples?

2. **Right of Exit and Right of Entry**

   (Articles 4 and 5)

   - Does your MS impose any restriction to the right of exit and in what cases?
   - Are other documents recognized as equivalent to ID or passport or entry visa to enjoy free movement?
   - According to your national law, are EU citizens and/or his/her family members, obliged to hold an ID/passport and is the same obligation imposed to nationals?
   - Does your national legislation impose to airlines or other travel companies (Eurostar, Thalys or others) to check identity of passengers at borders and on what ground?
   - Shall an EU citizen and/or his/her family members not satisfy the requirements for entry in your MS, what measures would be taken ? How do you apply the obligation "to give such persons every reasonable opportunity to demonstrate that they are covered by the right of free movement and residence"?

3. **Reporting presence**

   (Article 5.5)

- Does your national legislation require EU citizens and/or their family members to report their presence in their territory ? Please provide details (to whom, how, when, where...) If so, does your MS provide for sanctions in the case EU citizen do not comply? If so, what kind of sanction?

4. Right of residence and conditions

(Article 6, 7 and 14)

- How does your MS count the 3 months period from the date of arrival ? If a person leaves the host MS before the end of 3 months period and comes back immediately after does the 3 months period start again?
- How does your MS apply the condition of „sufficient resources“ ? Does national legislation take into account the personal situation of the person concerned such as, for instance, having a free accommodation? Does national legislation take into account the resources of a family member or a partner ? Does your MS assess the condition of sufficient resources systematically? Or does it apply a random control system ? If so, on what basis ? What authority is competent for the assessment of the condition of sufficient resources ? In case local authorities are involved in or are in charge of this assessment, are they allowed to issue additional requirements at local level ? What kind of requirements ?
- How does your MS apply the condition for persons not to be an „(unreasonable) burden on the social assistance system of the host MS“ ? Please illustrate in detail: basis for the assessment, competent authority and procedure, outcomes / consequences / sanctions, verifications, application of the prohibition of systematic verifications and of automatic expulsion, related data available etc.
- How does your MS apply the condition for persons to have a „comprehensive sickness insurance“ ? Please illustrate in detail.

5. Registration of Union citizens and their family members, Residence card

(Articles 8,9,10 and 11)

- Does your MS require EU citizens and/or their family members to register after 3 months ? Please provide exact details: to what authority, documents and „proofs“ required for each category of persons, reasons for refusal, deadline for registering after arrival, what „proportionate and non-discriminatory“ sanctions are imposed in case of non compliance, any statistical or detailed data or information available in relation to registrations, any other document requested that is not listed in the directive (such as medical declarations, for instance on HIV), etc.

6. Restrictions to free movement and expulsions an grounds of public policy, public security and public health

(Articles 27 to 29, 31)

- Does your MS restrict free movement on grounds of „public policy“, „public security“ or „public health“ ? Please provide details on: definitions in national law ans jurisprudence, authorities involved, possibility for expulsion orders or other

measures to be issued on these grounds, if any sickness constitute a ground for expulsion (for instance HIV), methods of assessment, implementation of the requirement for personal conduct of the individual concerend to be a „genuine, present and sufficiently serious threat affecting one of the fundamental interests of society“, of the prohibition for previous criminal convictions not to constitute grounds for restrictive measures, etc.

- How does your MS take into account what provided in art. 28.1 before taking an expulsion decision on grounds of public policy and public security ? How does your MS define *serious* and *imperative* grounds of public policy or public security to order expulsion for permanent residents, more than 10 years residents and minors ?
- How many expulsion orders have been issued so far ? Please provide quantitative and qualitative data available by ground for expulsion, nationality, age, etc.

7. Procedural safety and redress procedure

(Articles 15, 30 and 31)

- How does your MS ensure the application of the procedural safeguards provided in the Directive? Please illustrate in detail (notification in writing, translations, information provided, existence of a format, competent authorities to appeal against the decision, deadline to leave the country, redress procedure, possibility to request and to suspend the decision, proportionality requirement, exclusion orders, how this works in practice, etc.)

8. Other issues

- Does your MS national legislation allow for expulsion orders to be taken as a penalty or legal consequence of a custodial penalty (Article 33) ?
- How does national legislation implement „abuse of rights and fraud“ ? (Article 35)
- „effective and proportionate“ sanctions (Article 36): please illustrate in detail which sanctions (administrative, civil or criminal), maximum and minimum penalties, detention or other restrictive measures, exclusion and expulsion orders, any related data and information.

9. Other information

Please provide any other information or comment that you think might be useful.