



Policy Department C  
Citizens' Rights and Constitutional Affairs

## APPLICATION OF DIRECTIVE 2004/38/EC 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

### EXECUTIVE SUMMARY

LEGAL AFFAIRS

This executive summary belongs to a study, whose final version will be ready for publication and distribution in March 2009.

This executive summary is published in the following language: EN.

Authors: European Citizen Action Service

Information on the publication of the final study can be obtained through:

Ms Roberta Panizza

Tel: +32 2 2831433

Fax: +32 2 2832365

E-mail: [roberta.panizza@europarl.europa.eu](mailto:roberta.panizza@europarl.europa.eu)

Informations on DG Ipol publications:

<http://www.ipolnet.ep.parl.union.eu/ipolnet/cms>

Brussels, European Parliament

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

**Comparative study on the application  
of Directive 2004/38/EC  
on the right of citizens of the Union and their family members  
to move and reside freely  
within the territory of the Member States**

**Executive Summary**

This study by European Citizen Action Service (ECAS) was commissioned by the Committee on Legal Affairs of the European Parliament and carried out by an editorial team and a network of legal experts in all Member States. The study began in June 2008 and ended in February 2009. As requested by the Committee, the study is not intended to be as comprehensive as that carried out by the European Commission and reflected in its report of 10 December 2008 on the application of Directive 2004/38/EC. It does cover in a comparative table the laws and executive acts transposing the Directive into national law for all 27 Member States. However, in terms of the Parliament's mandate, it focuses in more depth on 10 Member States (Belgium, Estonia, France, Greece, Hungary, Ireland, Italy, Romania, Sweden and the UK) chosen as representative of the problems of applying the Directive, significant migration flows and a reasonable geographical balance within EU 27. Following the presentation country-by-country the study then goes on to describe the main findings for the 10 but also for other Member States issue-by-issue (entry, short-term and permanent residence, the definition of sufficient resources, problems encountered by third country national family members, ground for expulsion and procedural safeguards).

The European Parliament also asked for an evaluation of the provision of information and administrative services to mobile citizens. The study refers throughout not only to the formal instruments but how they are applied in practice on the ground. Knowing that there have been a number of problems with the late and incorrect implementation of the Directive, the European Parliament also asked for an evaluation of the role of the Commission to ensure it is correctly transposed. Such is the overall organisation of this study.

**I. Background to the Directive and overall assessment**

The Directive is, as the study points out, 'a landmark policy development' that has consolidated free movement rights:

- It grants the right to cross borders and right of residence for up to three months without any conditions or any formalities other than the requirement to hold a valid passport or ID card.
- It establishes progressive residence rights - unconditional residence right up to three months; residence right up to the acquisition of the permanent resident status; permanent residence.
- It confirms equal treatment rights and protection of migrant Union citizens in a host Member State.
- It defines the status of workers' families and makes travelling and residence

easier for family members.

- It simplifies lengthy administrative procedures.
- It extends Union citizens' family reunification rules.
- It guarantees the right of permanent residence after 5 years of residence.
- It provides for an autonomous right of residence of family members in case of death/departure/divorce/termination of registered partnership.
- It limits the circumstances of rejection and revocation of the right of residence for motives of public order, public security and public health.

Described as the 'citizenship Directive', the comprehensive approach chosen brings together 9 former pieces of legislation for categories in the population. It also clarifies and applies the case-law of the European Court of Justice which in a number of judgements has given substance to article 18 of the Treaty making free movement a primary right of citizenship. By establishing a single legal regime for free movement and residence, the Directive ought to be easier to understand for citizens and easier to apply for the authorities. To what extent has the spirit of the Directive – before examining its letter – to bring together concepts of citizenship and better regulation, been carried through to member states in their implementation acts? The general findings on the implementation of the Directive show that this has been the case only to a limited extent. To their credit some member states have followed the spirit of the Directive. Others have shown that it is possible to go further than the provisions of the Directive in recognition of European citizenship and unrestricted, free movement. The majority of member states have not however respected the spirit of this citizenship Directive:

- Implementation has been inconsistent with the concept of European citizenship, through the aliens act, the laws on entry, settlement and removal of foreigners from the territory or immigration provisions.
- Whilst some member states have adopted a 'copy and paste approach' or an autonomous and new law, others have scattered implementation across a wide range of existing laws, thus undermining the concepts of consolidation and better regulation. Many have amended their implementing provisions more than once.

The problem of the gap between the spirit of the Directive and the way it has been applied has been compounded by other legislative initiatives cutting across the implementation of Directive 2004/38.

The comparative study raises the questions: Should these problems have been foreseen by the Commission? Was sufficient will shown by the EU not just to ensure the Directive was adopted, but also implemented? On the one hand, implementation might have been foreseen not to give rise to too many problems, because the Directive consolidates law already in force. On the other hand, the wide scope of the Directive, the case law of the European court, debates on the impact of enlargement on free movement of people and the wider debate on migration ought to have alerted the European Commission to act at an earlier stage. Initial advice by the Commission concentrated largely on late transposition (c.f. the table in the study) and infringement procedures against 19 member states for their failure to meet the deadline of 30 April 2006.

## **II. Selected country reports**

**1. Belgium.** The Directive has been implemented by multiple acts reflecting the federal structure of the country on the basis of a law of 25 April 2007 on entry, residence and removal of foreigners, followed by implementing royal decrees. Belgium has modelled its laws on expulsion following judgements by the Court of Justice of the European Communities. The study finds that ‘the transposition level (...) can be considered satisfactory’. Belgium has also gone further than the Directive in an extensive definition of family member and allowing permanent residency after 3 instead of 5 years. Doubts are expressed about the information efforts, which, because of the very late transposition of the Directive, are directed more at the administration than the public, and how the Directive will be applied by administrations which vary from one region and commune to the next. There may be problems with the registration of some categories of EU migrants, such as job seekers from new member states.

**2. Estonia.** The main act that transposes the Directive is the Citizen of European Union Act, of 17 May 2006. The Estonian CEUA extends the concept of EU citizen to include the European economic area and Swiss citizens. On the other hand, it leaves to the Aliens Act the sizeable proportion of Russian federation citizens residing in the country. Not many EU citizens have settled in Estonia. There are some problems with recognition of entry rights, but in other respects the regime is more liberal on residence. The study ‘has led to the overall conclusion that the rights of the EU citizen appear to be observed, whereas the rights of family members who are third country nationals are not regulated with enough discipline.’ The equal treatment clause has not been implemented. Nor is it clear how expulsion orders are regulated, leaving too much discretion to the administration.

**3. France.** The Directive was transposed by two acts – a law on immigration and integration of 24 July 2006 and a ministerial decree on the right to stay. The survey shows that in rewriting the Directive and structuring the provisions differently, transposition in France gives rise to a large number of points of contradiction or ambiguity i.e. on the definition of partnership (despite France’s own national law), delay for registering with the authorities, conditions for delivering a residence title or card to third country national family members and access to permanent residence, allows the administration to delay or scrutinise rather than facilitate residence in the spirit of the Directive, and also impose somewhat disproportionate fines. Protection against expulsion for recourse to social assistance is not guaranteed. The study highlights the issue of administrative procedures, and the failure by the authorities to publish an ‘arrête’ on how to implement and define the certificate of registration. The study concludes:

‘The main discrepancies are the re-introduction of a ‘residence title’ which EU citizens may require ‘on a voluntary basis’ and the administrative instructions are still missing for the effective implementation of the registration certificate at the level of local authorities. In particular, the failure to implement the registration

certificate is aggravated by the incoherent administrative practice of the authorities in charge of delivering residence documents (i.e. préfectures). All this goes against the general philosophy of the Directive, which is to facilitate formalities for EU citizens and their family members. Paradoxically, it has become more difficult for migrant EU citizens in France to establish their right of residence under EC law than before the implementation of the Directive.'

**4. Greece.** The Directive has been transposed by a presidential decree on 'Free movement – residence in Greece of EU citizens and members of their families' of 21 June 2007. The national provisions are mostly explicit and clear and in some respects more favourable to the citizen who does not for example have to report his or her presence, than the Directive. On the other hand, there is a gap where recognition of partnerships is concerned. There is also potential discrimination against third country national family members who face higher fines than EU citizens for failure to apply for a residence card, which may be denied. The survey concludes that 'the Directive is relatively well transposed into Greek law'. There would be some problems as a result of a proliferation of legal acts, ministerial decisions and circulars.

'On an administrative level, the lack of a central registry or portal containing all the information needed for EU citizens and their family members has also been identified. Moreover the fragmentation of powers and competences to two different authorities, Greek Police for EU citizens and the Regions of the Country, Immigration Office, for EU citizens' family members who are third country nationals, causes several problems in relation to the flow of information despite the fact that they both belong to and are supervised by the same Ministry, the Ministry of Interior.'

**5. Hungary.** The Directive was implemented by multiple acts on the entry and residence of persons with the right of free movement and residence and the entry and residence of third country nationals. It also applies to Hungarian nationals who do not hold Hungarian citizenship, which is a source of confusion and discrepancies in treatment between the two groups, for example on family reunion rights. There are many positive features: implementing the equal treatment provision required changes in more than 50 laws and decrees. Also 'information communicated on the website of the national authority is clear and easily understandable' and there are no serious administrative problems. Similarly in some respects to France, two main problematic issues are highlighted by the survey:

- residence cards

'The overlapping range of residence documents has given rise to a great degree of confusion for EU citizens and their non-EU family members. EEA citizens and their family members are also issued with a so-called 'address card', a document commonly used by Hungarian Citizens to have access to a personal identification number and as an official proof of address. This card is valid together with national passport/ID card and with registration certificate or residence card for non-EU family members. Registration certificates and (permanent) residence cards contain a more limited amount of personal information than classic

Hungarian ID cards do, therefore the acceptance of the new residence documents by public and private services is particularly problematic.’

- grounds for expulsion

‘This is the part of the Directive where transposition is particularly insufficient and incomplete. The Hungarian legislators have chosen not to fully implement the provisions set out in Article 27 of the Directive leaving out certain imperative guarantees such as the prohibition to impose restrictions on economic grounds, the prohibition of general prevention and the clarification regarding the standing of previous criminal convictions vis-à-vis expulsion.’

**6. Ireland.** The Directive was implemented by several statutory instruments in April 2006 and at the end of that year. The insistence by the Irish Naturalisation and Immigration Service (INIS) on prior residence in another Member State before granting a residence card to a non-EEA family member of an EEA national adversely affected a large number of couples and was the subject of numerous complaints. The matter was ultimately resolved in the case of *Metock & Others v Minister for Justice Equality and Law Reform* 2008 IEHC 77 which was referred to the European Court of Justice from the High Court in Ireland under Article 234 of the Treaty establishing the European Community. The European Court of Justice decided, in a Judgment delivered on 25 July 2008 (*Metock*), that, secondary legislation requiring a non-EEA spouse of an EEA national to have lived in another Member State of the EU prior to applying for a residence card in Ireland, was contrary to EU law.

An amendment to Article 3.2 of Statutory Instrument 656 of 2006 to reflect the terms of the *Metock* decision was introduced into law under Statutory Instrument 310 of 2008. All those who had been adversely affected by Article 3.2 as previously drafted and the practice of INIS have been invited by INIS to return to have their cases reviewed. This review process is ongoing. It will take until July 2009 to discern whether, in the aftermath of the *Metock* decision, Ireland is fully or largely compliant with the provisions and purpose of the Directive.’

This has been the overriding issue in Ireland, but the survey also shows that there have been more minor problems with onerous requirements and delays in issuing residence cards, and potential problems in the failure to implement safeguards against expulsion. Furthermore, the immigration, residence and protection bill 2008, which is not yet in force, would according to the Immigration Council, allow the Irish authorities to deport any person who is unlawfully present in Ireland without prior notification. The survey concludes:

‘(...) it is currently difficult to assess whether the *Metock* decision paves the way for flawless implementation of the Directive in Ireland. In view of the number of outstanding transposition inconsistencies, such an outlook may prove to be overly optimistic.’

**7. Italy.** The Legislative Decree No. 30 of February 2007 is entitled ‘Transposition of Directive 2004/38/EC’ but in reality there are numerous problems, stemming from

other laws or legislative proposals, particularly the ‘Pacchetto Sicurezza’ which could adversely affect the Directive’s aim of limiting grounds for expulsion. On the insistence of Commission officials, the Italian authorities promised to amend the security package to bring it in line with the Directive, but have yet to implement such a commitment. Because of the expulsion of Roma from Italy, this issue has been highlighted in debates in the European Parliament. In some other respects, implementation does not appear to be in line with the Directive: the requirement to provide proof of sufficient resources for the EU citizen and family members. Italian law does not recognise civil partnerships or the status of ‘partner’ granted by other member states, so partners are not included in the definition of family members. Legislation on third country nationals accompanying or joining an EU citizen does not contain any definition of ‘dependent’ which gives discretionary power to the administration to decide on their status. Other laws and administration practices by regions cause concern. In particular, non-Italian citizens have been asked to prove that they have been residing on the Italian territory for at least ten years or in the same Region for at least five years in order to access a range of social benefits. Such requirements infringe article 12 of the EC Treaty establishing non-discrimination on the basis of nationality.

**8. Romania.** The Directive has been implemented by government ordinance 102/2005 and a further three acts each one amending the last. The survey concludes that ‘the implementation (...) has been strenuous, lengthy and heavily fragmented.’ A commitment to republish the legislation in the form of a single new act has yet to be implemented. On the other hand, the survey finds that access to the services for registration in Romania is unproblematic and that all the documents are drawn up in Romanian, English and French and are ‘easily understandable and user-friendly.’

In the implementing legislation, various beneficiaries of the Directive are not included. A partner is not included in the category of family member, nor are descendants and relatives in the ascending line of a partner considered as in this category. Also the deadline for registration in Romania is within 90 days, or less than the three months from the date of arrival – in contradiction of the Directive. Nor does Romanian legislation transpose the provision that ‘an expulsion measure shall not be the automatic consequence of a Union citizen’s or his or her family member’s recourse to the social assistance system of the host member state.’ EU citizens and family members who do not comply with the conditions for exercising the residence rights, have to leave the country within 30 days and can be escorted to the border within 24 days if they do not respect the order. This is clearly against the spirit of the Directive which seeks to limit expulsion to clearly defined circumstances. Furthermore, there is the possibility that third country nationals, but not EU citizens to be expelled from Romania, may be held in custody, contrary to the equal treatment clause.

Finally, the survey raises a question about the compatibility with at least the spirit of the Directive, of the law which places restrictions on Romanian citizens’ freedom to travel to other member states. These restrictions are based on admission agreements signed by Romania with EU member states before accession, when its citizens were repatriated on account of their illegal residence. The law for example which prevents a Romanian minor to travel abroad accompanied by a parent without the other

parent's written consent is a restriction on free movement, particularly when the family or one of the parents are permanent residents in another member state.

**9. Sweden.** The Directive has been implemented by the Aliens Act of 30 April 2006 and amended several times. The survey states that transposition could be improved and that 'the text of the Act has been introduced by pieces into the previous Aliens Act and makes the reading, the interpretation and even the understanding of the full text difficult.' As in some other EU member states, France for example, Sweden has chosen to opt for the 'registration' clause, but without any clear practice being put in place so that the old system of residence cards remains.

How to reconcile the Directive's abolition of residence cards with Sweden's system of identification cards? This problem is best summed up in the following extract from the survey:

'Sweden has retained a number of valid ID cards. Swedish citizens born in Sweden and residing in Sweden are entitled to receive an ID card issued by police authorities. Until recently, ID cards were also being distributed to EU-Citizens by the Swedish Cashier Service (Svensk Kassaservice) through the banking system. However this service has been terminated as from 30 April 2008. Currently, newly arrived EU citizens and their families do not have access to the Swedish cashier service and, as a result, the persons concerned are not able to apply for official documents, open a bank account, apply for a Swedish driving licence, to receive registered mail. In sum, an EU citizen may enter the Swedish territory with a valid passport (or ID card). Nevertheless, in order to work or to carry out basic administrative tasks, the ID cards distributed by the Swedish cashier service were required.'

This very specific situation in Sweden is a barrier to free movement. On the basis of pending court cases, the right of reunification for family members is the biggest issue. Another problem is that Sweden has a study loan system considered to be particularly generous and has placed requirements of at least two years prior residence in Sweden for accessing the system on an equal basis to Swedish students.

**10. The United Kingdom.** The Directive is implemented by the Immigration (European economic area) regulation 2006 of 30 April 2006. The survey concludes that the majority of 'the rights (...) have been correctly implemented. However, a number of problematic areas have been identified. Firstly, there is considerable divergence between the Directive and the regulations as regards third-country nationals who are family members of EU citizens in relation to their rights of entry and residence. Secondly, the right to equal treatment has yet to be introduced in the implementing regulations.'

The survey describes the following problematic areas:

- The regulations appear to exclude the possibility for a non-EU family member who has a residence card issued by another country from entering the country without a visa. At the same time, the regulation does not facilitate obtaining

visas for third-country national family members which ‘shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.’ On the contrary, there are complaints of extensive delays. In order to enter the UK, all third country family members have to apply for an ‘EEA family permit’.

- The regulation imposes a condition of prior residence in the EEA on such third-country family members, which if not met means they have to meet additional conditions for entry. However, in large C-127/08 *Metock*, the European Court of Justice states that ‘Directive 2004/38/EC (...) precludes legislation of a member state which requires a national of a member country who is the spouse of a Union citizen...to have previously been lawfully resident in another member state.’
- These problems of interpretation of the case-law of the Court and restrictions in the regulations should also take into account the fact that the UK immigration authorities enjoy a very wide margin of discretion to examine and possibly refuse entry and residence. There are also delays:

‘Based on information published on the Home Office’s website, we understand that there are considerable delays in processing applications for residence cards of family members who are third-country nationals. According to the Home Office, it currently takes approximately 11 months to process an application for a residence card.’

Finally, the United Kingdom is another example of a member state which has found it difficult to implement the spirit of the Directive on including registered partners in the definition of ‘family member.’ The partners to a heterosexual partnership registered in another member state would not be considered as ‘family member’ whereas a registered homosexual partnership would be.

### **III. Non conformity issues identified for EU-27 with special focus on the 10 Member States selected**

This chapter examines the issues of non-compliance focussing on the 10 selected member states, not bringing in examples from all 27, often in the form of comparative tables. The overall result is comparable to that of the Commission’s report of 10 December, but the approach is more qualitative. In other words the survey does not attempt to give an exact picture across EU 27 of how each article is implemented, that has been done by the Commission based on a more extensive survey which has not unfortunately been published. The survey does however give more analysis and qualitative background than the Commission’s approach. The two exercises therefore come to similar conclusions and are complementary.

#### **1. Entry and residence rights**

The analysis of the transposition and application begins with the right of entry and of residence, which could be considered as the foundation of the Directive. It is the

section of the Directive which is most closely linked to the Treaty and it is arguably the most crucial part of the Directive in the everyday life of Union citizens. It is interesting to note that the study has identified a number of inconsistencies throughout the Member States. The inconsistencies identified ranged from oppressive questioning by border guards to difficulties in securing permanent residence rights. Notably, the study identified the widespread breaches committed in relation to the three month period prior to registration. Another cause of concern are the disproportionate penal sanctions imposed on Union citizens who fail to respect national implementing laws. The current status of the various residence cards that proliferate in the absence of previous residence card replaced by the certificate is highly confusing to Union citizens.

## **2. Sufficient resources**

The comparative table shows that the threshold requirement of sufficient resources has been implemented in different manners by the Member States. This was allowed for in the Directive which leaves a considerable margin of interpretation. The most noteworthy implementations relate to Member States which have failed to give an indication of what constitutes sufficient resources according to the Directive. Such omissions and resulting uncertainty will clearly obstruct free movement of Union citizens, and it is one of the points on which it would be useful for the Commission to provide common guidelines.

## **3. Equal treatment**

Likewise, with regard to the equal treatment principle, many Member States failed to ensure the implementation of Article 24 in a clear manner by including an express provision in the main transposing act or adding an equal treatment clause to the sector-specific laws. We believe that even if a Member State has recourse to the application of Article 24.2 allowing temporary restrictions on access to certain social benefits, the transposition shall be clearly limiting its application to those beneficiaries and to those periods that are covered by the said Article in order to avoid any restrictive or vague interpretation of the limitations.

## **4. Third country national family members**

The treatment of third country national family members remain, by far, the most problematic area as this is the boundary of free movement rights and the immigration. Transposing acts were meant to clearly and unequivocally make the difference between the rules applicable to third country nationals and those third country nationals who are family members of the Union citizen. Member States tend to check the family relation in a meticulous and therefore time-consuming manner and tend to issue visas that are no different to those given to other third country nationals.

## **5. Other issues**

It can be noted that there have been many national provisions introduced by the transposing instruments that are clearly not in conformity with the Directive. For example replacing the residence cards by the registration certificates is a problem of daily life in Spain. There are also those provisions which will touch upon very limited number of people, e.g. some over restrictive expulsion procedures and limited right of appeal against them, but which are crucial for safeguarding the very principles of European citizenship. It transpires that Member States should align their notion of public policy, public security and public health to what is established by the Directive and to the interpretations that flows from the jurisprudence of the European Court of Justice.

## **6. Information requirement**

In order to comply with Article 34 of the Directive, Member States are called on to disseminate information about the Directive. Confusion caused by delayed transposition has hampered these efforts. So far, the actions have been mainly limited to putting the relevant information on-line. In an ideal world targeted information campaigns should be organised to enable a bigger number of persons to be aware of their free movement rights. Likewise, professional and language training should be organised for the personnel of the authorities dealing with citizens' requests on residence rights. Information leaflets, brochures and forms should be translated at least in one foreign language and preferably in the languages used by a significant number of migrants. Under the Directive, member states were required to launch awareness campaigns and they have not done so.

## **IV. The Role of the Commission with regard to the implementation of Directive 2004/38/EC**

In order to present a comprehensive picture of application of the Directive, the survey covers not only Member States' role but also that of the European Commission in ensuring implementation of the Directive by member states.

In its report of 10 December, the Commission states that 'the overall transposition of Directive 2004/38/EC is rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States. The annex on the state of play of transposition shows – as does this study – that some Member States have even found it possible to provide more favourable treatment for citizens than the Directive. According to the Commission, only 63% of the Directive's transposition can be considered as correct and complete. This is low by single market scoreboard standards. In the remaining 37%, 16% represents incorrect and incomplete transposition and it is also found in this comparative study that there are some articles that are not transposed at all, or are transposed in an ambiguous way.

The report provides summary information on the Commission's own role in monitoring the transposition of the Directive (heading 2 of the report). It is stated that

between June 2006 and February 2007, infringement proceedings were initiated against 19 Member States for their failure to communicate the text of the provisions of national law adopted to transpose the Directive <sup>(1)</sup>, most often tantamount to the delay in transposition. These proceedings were dropped as Member States adopted the transposition measures. On the substance, the Commission has registered 115 complaints and opened five infringement cases for incorrect application. Of course, in addition there have been many more national complaints and court cases. In the preparation of this comparative study it has not been possible to obtain information about which Member States are involved in the complaints, or to what extent the Commission has been able on its own initiative or in response to complaints to improve the application of the Directive by Member States.

This study shows that the Institution should have the same political will to ensure that European law is correctly applied as it does to see it adopted in the first place by the European Parliament and Council. The Commission has also lacked the resources necessary to deal with the scale of the problem of implementing this Directive, and thus had to prioritise and deal with the most serious problems. The Commission appears to have been most active and made most progress in areas where there have been significant numbers of complaints, linked to public debate and interventions by the European Parliament and individual MEPs:

- The situation of the Roma and the Security package ('Pacchetto sicurezza') in Italy has led to several interventions by the Commission as well as delegations of the European Parliament visiting Rome and endless negotiations.
- Complaints from non-active British residents in France supported by associations <sup>(2)</sup> and MEPs that they were being denied sickness cover, led the French government to reconsider amending legislation to restrict access to universal sickness cover ('CMU'). The complaints led the Government to soften the impact of the new measure, linked to the implementation of the Directive, so that it will not apply to those already resident, but after a transitional period to those newly arrived or coming to France in the future until they have acquired permanent residence.

The problem though is that the well-publicised cases are only a *tip of the iceberg*, and not only are there other problems with implementation in the Member States concerned, but the same ones can occur in more subtle, less overt form elsewhere. Nor is it easy to set priorities, i.e. apparently minor problems over the status of residence permits, time limits, definition of sufficient resources etc. have less dramatic impact than expulsion orders, but affect large numbers of people.

Two major problems were already apparent before the transposition of the Directive and where the Commission should have been more active. The Commission itself recognises that these are priorities in heading 4 of its report:

---

<sup>1</sup> All Member States except Denmark, Ireland, the Netherlands, Austria, Slovenia, Slovakia, Bulgaria and Romania.

<sup>2</sup> Association of British citizens create for this purpose and ECAS which formed the complaint to the Commission.

- **Registration certificates and identity cards**

Due to the late transposition of the Directive in a majority of Member States, European citizens and the authorities have been unclear as to whether a residence card was still required. Interpretations differed across different services, so that whilst residence cards were in practice required in some countries to access a broad spectrum of services and entitlements, they were also difficult to obtain. The 'registration certificate' is supposed to replace the residence card, but is considered a 'weak' document providing insufficient data. As a result, Union citizens are witnessing a proliferation of additional ID and residence cards. Here, preventive action by the Commission would have been desirable, because this is a weakness of the Directive.

- **Third country national family members**

In this comparative study and in the Commission's own report, there are numerous violations of the principle of family reunion, which has always been recognised as fundamental to the exercise of Union citizens' free movement rights, and in particular to recognise the status of third country national family members. In those cases, too, the Commission should have been more pro-active before the *Metock* ruling of 25 July 2008, which as the Commission's report itself points out has led to controversy not only in Ireland, but also in Denmark and to calls among Member States for revision of the Directive.

The authors of this comparative study have regretfully concluded that the Commission has not done enough to secure full and timely compliance. It is ultimately for the Commission to explain its position (as the Commission may have done more than meets the eye), but a number of points can be made here.

First, the Commission did not properly 'prepare' the Member States for transposition. It could have followed the approach taken in the Services Directive, where it engaged in extensive assistance and communication efforts.

Apart from different tools available to different DGs of the European Commission, one may wonder whether the Commission's extensive assistance in case of the Services Directive is linked to its commercial implications and for that reason the assistance is somewhat scarce for the Citizenship Directive.

It is only now, that the Commission foresees in its steps to be taken the issuing of guidelines in the first half of 2009 to Member States (<sup>3</sup>), but even at this late stage, the intention is not to cover all issues that proved problematic in the transposition and application of the Directive. It was only in September 2008 that the Commission created a group of experts for Member States. The question of assistance is the question of resources yet an imbalance between citizenship and Services Directives - two equally broad pieces of legislation is striking. It is regrettable that the same effort expended for the Services Directive has not been expended for a Directive so central to the life of Union citizens.

---

<sup>3</sup> Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC 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) 840/3, p.10.

Secondly, the preparation phase for the Citizenship Directive being virtually non-existent, it comes as no surprise that the errors and delays in transposition are numerous with consequent infringement procedures.

Thirdly, the Commission has failed properly to handle the large number of complaints from Union citizens in relation to transposition of the Directive. Commission officials claim to be overstretched in dealing with such a high number of complaints.

Fourthly, the Commission could provide more information about its role in enforcement. Whilst it is understandable that the detail of negotiations with Member States if published could jeopardise the Commission's powers to investigate and start infringement procedures, the recent report could have provided more information.

The European Parliament could make the following recommendations to the Commission:

### **1. A comprehensive approach to enforcement**

On the basis of its own report and the finding that not one article of the Directive has been transposed effectively by all Member States, a comprehensive approach is necessary to bring implementation in line with the Directive's objectives. The Commission is right in heading 4 to single out the 'core rights' of Union citizens related to entry and residence of third country national family members and the residence requirements. However, these are by no means the only issues highlighted by this comparative study and the Commission's own report. Similarly, the guidelines to be issued by the Commission should also be comprehensive and not just focus on 'problematic areas' such as expulsions and abuse. Such an approach requires human and financial resources. Furthermore, the Commission should be asked to accompany a strategy for better enforcement of the Directive with a timetable.

### **2. A right combination of persuasion and infringement procedures against Member States**

It is a welcome step forward that the Commission is now engaging with Member States and assisting them with the implementation of the Directive both through meetings and by issuing guidelines. But is this likely to be enough where Member States have already adopted and put in place laws and practices which are contrary to the Directive? In line with its own report, the Commission should combine persuasion of Member States with infringement procedures covering all aspects of the Directive and all Member States named under the specific headings..

### **3. An approach to Member States to regain the spirit of a Citizenship Directive, easy to understand and apply to facilitate free movement**

As already noted, the application of this Directive suffers from a paradox. At the outset it was designed as an initiative to clarify free movement rights and bring together in a single text existing Directives aimed at particular groups in society. This meant though, especially bearing in mind also the case law of the ECJ that the new Directive covered a wide scope. Whilst a number of Member States have implemented the Directive in a way which reflects its original intentions, the majority

have not, often amending several existing laws. The Commission should now set out to convince all Member States, in turn, to consolidate their implementing legislation in a single and easily understandable text.

#### **4. An awareness campaign for European citizens**

Among the steps to be taken, the Commission rightly identifies ‘awareness campaigns to inform citizens of their rights under the Directive’ as required under Article 34 of the Directive. In this comparative study, the quality of information services available, largely through the Internet, has been shown to vary, in particular in the extent that different language versions are available. Similar variations exist in the quality of administrative services to citizens ‘on the move’. Although this Directive was singled out as a priority for the Commission’s communication policy in 2008, there is no real sign that apart from the guide for citizens, any extra measures have been taken. Here, the main responsibility lies with the Member States, but none have launched ‘awareness campaigns’. For the Czech Presidency of the Council with its slogan ‘A Europe without barriers’ this should be a priority issue.

Finally, the Commission should provide more information from the study on which its communication is based and a more detailed account of its informal requests and formal procedures in relation to member states. The follow-up measures should be supported by a timetable and action plan.