

Implementation of Directive 2004/38 in the context of EU Enlargement

A proliferation of different forms of citizenship?

CEPS Special Report/April 2009

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Abstract

This paper assesses the impact and potential effects of inadequate domestic 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 and the effects of the transitional arrangements secured in the latest rounds of enlargement on the status and practice of European citizenship in an enlarged EU. The authors argue that one of the major consequences of these processes has been the proliferation of different forms of European citizenship whose normative framing and implementation by the nation-states foster differential treatment that sometimes conflicts with fundamental rights. They also highlight that the narrow national interpretations of the scope of rights conferred by European citizenship are subject to supranational guarantees provided by the EU legal system.



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IMPLEMENTATION OF DIRECTIVE 2004/38 IN THE CONTEXT OF EU ENLARGEMENT A PROLIFERATION OF DIFFERENT FORMS OF CITIZENSHIP?

CEPS SPECIAL REPORT / APRIL 2009

SERGIO CARRERA AND ANAÏS FAURE ATGER*

1. Introduction

European citizenship has been characterized since its very first days by a dynamic and inherently transformative nature. This notwithstanding, one of its long-standing features has been the fundamental right of citizens of the European Union (EU) to move from one Member State to the other and while doing so to enjoy equal treatment and non-discrimination.¹ Council 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 has further reinforced this attribute of Union citizenship by extending the scope and nature of the set of rights thereby attached and by granting a right to permanent residence. Its adoption has also meant that the economic/market-oriented rationale embracing the original status of European citizenship moved closer to a rights-based approach. While the principle of equal treatment among Union citizens and their family members has been therefore strengthened in the European Union, there are still open questions concerning the way in which European citizenship is actually being practised by the Member States (MS) in what concerns national transposition, divergent degrees of EU membership resulting from the last EU enlargement processes and compliance with the rule of law by Member States as guaranteed by Community courts.

A highly diversified picture emerges when one examines the way in which this Directive has been implemented by Member States. There are serious deficits in national transposition in relation to thematic areas that are central in the framework of protection provided by Directive 2004/38. The national realm has also opened the door for Member States to apply a whole range of illiberal exceptions to the granting of EU rights and guarantees embracing ‘the freedom to move’. Concurrently, the 2004 and 2007 enlargement processes have implied the liberalization of the status of European citizenship in an EU at 27. However, for the nationals of the last acceding Member States, namely Bulgarians and Romanians, the right to have access to the labour market has been at times restricted by the application of transitional measures/arrangements included in the Acts of Accession. This ‘exceptionality’ constitutes

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¹ Article 45, Charter of Fundamental Rights of the European Union, OJ 2007/C 303/01, 14 December 2007.

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.

another expression of the ways in which the EU and Member State governments still struggle to find ways of limiting the scope of common rights and freedoms attached to the fundamentals of European citizenship.

This paper assesses the impact and potential effects of inadequate domestic transposition of Directive 2004/38 and the effects of the transitional arrangements secured in the latest rounds of enlargement on the status and practice of European Citizenship in an enlarged EU. We argue that one of the major consequences of these processes has been the proliferation of different forms of European citizenship whose normative framing and implementation by the nation-states foster differential treatment that sometimes conflicts with fundamental rights. Furthermore, this ‘proliferation’ of forms of citizenship is mainly a product of the resistance from Member States towards latest post-national developments surrounding the institution of Union citizenship of nationals and their third-country nationals’ family members in the scope of EU secondary law and in accordance with the jurisprudence of the European Court of Justice (ECJ). It is also an expression of their willingness to preserve national discretion when granting citizenship-related rights to non-nationals by using derogations that often go beyond the rems of liberalism and the EU rule of law. It is therefore critical to examine whether the foundations and potential of European citizenship are being challenged, and to a certain extent undermined, through these ‘nationalistic processes’. Section two assesses the implementation of Directive 2004/38 at national level and highlights key deficiencies after analysing a selection of national transposition legislation. The application of the Directive is further scrutinised through the examination of the content and occurrence of transitional arrangements in light of their repercussions over Union citizenship, and the principles and liberties that the latter is deemed to bestow. Section three examines the nature and limits of national resistance and the proactive role of the ECJ in the enforcement of the rights conferred by Directive 2004/38 through the analysis of one of its most recent decisions which has encountered much controversy and unsuccessful contravening strategies among a small group of Member States inside the Council: the *Metock* ruling. Section four offers some conclusions by building upon current state practices and resistances and by analysing the potential and remaining obstacles that might be still encountered while enacting European citizenship in an enlarging EU.

2. Towards a Proliferation of Different Forms of European Citizenship

2.1. The Right to Free Movement as a Constitutive Element of European Citizenship

The enactment of European citizenship has been substantially shaped through the use of one of its main normative attributes: i.e. the right of nationals of the Member States and their family members to move and reside freely inside the EU. From the end of the transitional period, 1968 until 2004, the principle of free movement of persons was mainly ruled by two Regulations and nine Directives which were adopted in 1968 and even before.³ While in 1990 three Directives were added to cover students and the economically inactive, the ECJ had in parallel built a strong body of jurisprudence in this field over the years. Until 2004 there was no consolidation of the common general framework and free movement rights were granted on the basis of a scattered, sector-specific or piecemeal approach, which resulted in a fragmentation of the status

³ J. Apap (2002), *Freedom of movement of persons: A practitioner's handbook*, The Hague: Kluwer Law International.

of Union citizenship.⁴ On 1 May 2004, Directive 2004/38, also called the ‘Citizenship Directive’, came into force thus codifying the previously dispersed legislative corpus and case law.

The Directive creates a single legal regime in the context of European citizenship in that it sets out the rights of all citizens of the Union to move and reside in other Member States.⁵ The key provisions can be summarised as follows: first, it strengthened the right to move and reside for all citizens of the Union and their family members; second, it reinforced and extended the definition of family members and registered partners who have the right to move and reside with their principal (whether they are citizens of the Union or not) and who are also entitled to independent rights; third, it simplified and improved the administrative formalities applying to the right to move and reside; fourth it specified, and fine tuned according to previous ECJ jurisprudence, the grounds on which a receiving Member State can expel a citizen of the Union and the procedural rights and judicial redress; and finally it established a right of permanent residence after five years. As Kostakopoulou (2009) has argued, this Directive provides the grounds for the creation of a notion of citizenship that is more inclusive than traditional nationality-based models of citizenship.⁶

Two years after the deadline for national transposition of the Directive (30 April 2006) and following an express request from the European Parliament,⁷ the European Commission published a Report on its application within the territory of the Member States.⁸ In its Report, the Commission was extremely critical of the national transposition measures, labelling them as ‘disappointing’. Most worrying is the fact that the Report underlines that “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.”⁹ In addition, in its Fifth Report on Citizenship of the Union,¹⁰ the European Commission had already announced that 19 infringement procedures against Member States had been opened, four of which went as far as referrals to the ECJ, and that it had also received a high number of individual complaints in particular from third-country family members.

Concerned by this critical scenario, the Committee on Civil Liberties and Justice and Home Affairs (LIBE) of the European Parliament launched its own assessment procedure among

⁴ The Directive replaced, integrated and supplemented the existing Community legal instruments dealing separately with the categories of workers, self-employed persons, students and other economically inactive groups.

⁵ J.Y. Carlier and E. Guild (eds) (2006), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L’Homme de l’Université Catholique de Louvain, Brussels: Bruylant; Refer also to S. Carrera (2005), “What does free movement mean in theory and practice in an enlarged EU?”, *European Law Journal*, Vol. 11, No. 6, November, pp. 699-721.

⁶ T. Kostakopoulou (2009), “On the Fifth Report on Citizenship of the Union,” Briefing Paper for the European Parliament, Brussels: Policy Unit, January.

⁷ 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 Member States, 15.11.2007, P6_TA(2007)0534 §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.’

⁸ 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.

⁹ COM(2008) 840 final, 10 December 2008, p. 3.

¹⁰ European Commission, Fifth Report on Citizenship of the Union, COM(2008) 85, Brussels, 15 February 2008.

National Parliaments in order to gather information on transposing legislation, administrative procedures and practical implementation of Directive 2004/38. The EP transmitted a questionnaire to all the National Parliaments requesting qualitative, quantitative and statistical information on the implementation.¹¹ On the basis of the Report published by the Commission as well as the information provided in the questionnaires, substantial shortcomings across the national transposition measures can be identified in relation to the following four topics: first, the definition of who qualifies as a family member and the treatment applied in this capacity, in particular when also a third-country national (TCN); second, the administrative requirements to the right to move and reside; third, the restrictions to the access to social benefits; and fourth the use and abuse of expulsion powers. The cross-comparative account and study of the questionnaires that will be presented in the next section provides us with substantial grounds for asserting that inadequate national transposition of Directive 2004/38 has deep implications for the legal elements of European citizenship. In fact, it facilitates the emergence of different normative categories of European citizenship, which generate inequality and vulnerability for the individual on the move inside the EU, whose degree of insecurity will actually depend on his/her geographical location inside the Union, i.e. the Member State where s/he is seeking to benefit from and/or enjoy EU fundamental rights embracing the freedom to move.

2.2. Assessing National Transposition of Directive 2004/38¹²

2.2.1. Third-Country National Family Members and Registered Partnerships

2.2.1.1. 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. However, when they seek to be joined or accompanied by TCN family members, some Member States place obstacles which go against the spirit and wording of the Directive,¹³ as well as the case law of the Court of Luxembourg. As a way of illustration, the following problems can be highlighted across the Member States which answered the questionnaire concerning 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.¹⁴ This is not consistent with Article 5(2) of the Directive which allows for the entry into a Member State if in possession of other types of documents such as a residence card issued by another Member State. 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 be present in the territory of the country if he

¹¹ The questionnaires and responses to it can be viewed at:

<http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=LIBE>

¹² This section is based on some of the findings coming out of S. Carrera and A. Faure Atger (2009), “Dilemmas in the implementation of Directive 2004/38 on the right of citizens and their family members to move and reside freely in the EU”, Briefing Paper for the European Parliament, Brussels: Policy Unit, January.

¹³ Article 5 (2) (3) (4) and article 6 (2) of Directive 2004/38.

¹⁴ 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.”

is subject to a visa duty.”¹⁵ Furthermore in light of the provisions of the Directive, an 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 Member States 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,¹⁶ 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 facilitated way 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 Member State.

2.2.1.2. Same-Sex Marriages and Registered Partnership

For those EU nationals who are entitled, under the national law of their home Member State, 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.¹⁷ 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 Member State are recognised and the spouse is treated as family member of an EU citizen.¹⁸ 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.¹⁹ 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 Member States 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.²⁰ 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 recognised, but ‘taken into consideration’ if they were “registered before proper authorities and under legal provisions of

¹⁵ 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.”

¹⁶ 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.

¹⁷ Article 2 (2) and 3 of Directive 2004/38. On this point see Carlier, J.Y. and E. Guild (2006).

¹⁸ Act No. 326/1999 Coll. On the Residence of Aliens in the Territory of the Czech Republic.

¹⁹ As reported by both national Parliaments in their answers to the questionnaire. Slovenia does not recognize same sex marital unions either.

²⁰ 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”.

the Member State of origin or provenience ... and only for the purpose of their exercise of right of free movement on Romanian territory.”²¹

2.2.1.3. Family Members who are Dependents

There is also wide variety across the Member States in relation to the interpretation of the concept of ‘dependent person’.²² The European Commission’s Report COM(2008) 840 stipulated that almost half of the Member States 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 narrowing down Member States’ obligations towards family members of EU citizens.²³ The information provided by the questionnaires in this regard has been unsatisfactory. While in Belgium, the definition of this category has been given a very broad scope,²⁴ in Cyprus it was reduced.²⁵ It also appears that the documents requested to substantiate this dependency status are very different from one Member State 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 discretion. In fact, in this country, “there is no exhaustive list of documents”²⁶ accepted by the authorities to prove the existence of dependency. As exemplified by other Member States’ answers to the questionnaires, the national authorities retain a significant margin of manoeuvre to define who qualifies for this category and how this 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”!²⁷

2.2.2. Right of Entry, Stay and Exit: Delays and Obstacles

2.2.2.1. Entry

In order to enter the territory of a Member State, Union citizens and their family members need to be able to prove their identity.²⁸ Although this usually means holding a valid identity card or passport, a residence permit issued by another Member State seems only to be considered

²¹ 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.

²² Article 2 (2) and 3 (2) of Directive 2004/38.

²³ The Report also states that ten Member States had transposed it in a more favourable way. See page 4 of the Report.

²⁴ 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.

²⁵ 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”.

²⁶ Reference BRI/108.2008 - LT/749087EN.doc. The Belgian questionnaire states: “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.”

²⁷ Article 3 of Legislative Decree 30/2007.

²⁸ Article 5 of Directive 2004/38.

acceptable by Belgium, Lithuania and Spain, even though this is an obligation under the Directive! Once on the territory, most Member States now ask for individuals, in particular non-nationals, to be holding a valid identity card or passport. Moreover, what seem to be problematic are the procedures that 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 Member State 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 length of a “reasonable period” given “before starting the return procedure”.²⁹ The actual application of this requirement is thus entrusted to the complete discretion of the border guard. In Slovenia, in such situations, an exceptional authorisation to stay six hours in the border crossing area is granted!³⁰ In Italy, Union citizens or family members 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 Member States like Poland³¹ and the Czech Republic³² seem to accept other types of documents; however it is not clear what those are and whether this provision is applicable to Union citizens and/or TCN family members.

2.2.2.2. *The Obligation to Report or Register*

Directive 2004/38 provides for administrative formalities for citizens of the Union who move from one Member State to another to be very light and to only apply after the first three months of residence.³³ In the Slovak Republic³⁴ and the Czech Republic, there is no registration system³⁵ 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

²⁹ 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).

³⁰ Slovenian Parliament’s answer: this however “is an exception to the general provisions, contained in the National Border Control Act.”

³¹ 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 identity and citizenship, or to prove in another unquestionable way that these persons have the right of free movement.”

³² 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.”

³³ Articles 5 (5), 6 (1) and 8 of Directive 2004/38.

³⁴ Section 49 §2 of the Act no. 48/2002 Coll. On the residence of foreigners.

³⁵ The 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.

in an administrative offence and a fine.³⁶ Similarly, in the Slovak Republic, if reporting is not done within 10 days, a fine of up to 1,659 Euros may be applied.³⁷ 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 of the Directive, Member States 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 a statement of presence will be considered to have been in the country for longer and will therefore be subject to a fine.³⁸ In practice, this actually amounts to compulsory reporting within the first three months of stay. A registration certificate should be also delivered ‘immediately’. However it appears that many Member States have disregarded this aspect as well. Belgium has ignored this provision in its national implementing legislation as it has not included it as a positive obligation.³⁹ This is even more worrying when one considers that in this country, EU citizens may be detained if they do not comply with administrative formalities.⁴⁰ 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”,⁴¹ while according to the information provided in another of the questionnaires provided by the Belgium National Parliaments, the procedure to complete the registration appears to be long and tedious in practice.⁴²

2.2.2.3. 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. Member States 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 Member States make mistakes as regards each of these categories, and often ask 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.⁴³ While few Member States refer in their transposing

³⁶ Article 157 (1) (r) of the Residence of Aliens Act. The fine will be of 3,000 Czech crowns.

³⁷ Section 46 §1 (e) of the Act no. 48/2002 Coll. On the residence of foreigners.

³⁸ 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.”

³⁹ Art. 42, §4 LAT does not refer to this obligation.

⁴⁰ 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)

⁴¹ Questionnaire BRI/108.2008, page 15.

⁴² LT\749082EN.doc “The aliens Office will take a decision within five months of the application.”

⁴³ Article 10 (1) of Directive 2004/38.

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-month period, it has been reported that it in fact takes much longer.

In transposing Article 10 of the Directive, Member States 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 health insurance or 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.⁴⁴ 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 'personalisation'), 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.⁴⁵

It also appears that some Member States 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.⁴⁶ This further substantiates an additional concern expressed in the European Commission's Report COM (2008) 840 whereby most Member States do not comply with the obligation to issue specific residence cards for family members of Union citizens that would more favourably categorise them as such.⁴⁷ 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.

2.2.3. Restrictions on Access to Social Benefits

One of the most common sources of friction between citizens of the Union and host Member States arises around access to social benefits. Not only do Member States 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 under the principle of equal treatment with own nationals. Directive 2004/38 does however provide for different treatment depending upon whether the free mover is economically active or not.⁴⁸ 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

⁴⁴ These circumstances then fall under the category of "certain preconditions" referred in footnote 35 above.

⁴⁵ In the application of Article 99 of the Law on the legal status of aliens as reported in the Lithuanian's Parliament questionnaire.

⁴⁶ On the basis of the information provided in the questionnaires this appears to be the case in Slovenia and Romania.

⁴⁷ 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."

⁴⁸ Article 7 and 8 of Directive 2004/38.

between economically and non-economically active is not made.⁴⁹ Poland applies similar rules.⁵⁰ Other Member States, 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.⁵¹

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.⁵² However, many Member States 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.⁵³ In fact while this was not a specific question included in the questionnaires, this obligation should be kept in mind in particular when considering the implementation of Article 14 of the Directive which refers to the unreasonable burden to social assistance threshold (See Section 2.2.4.2 below).

2.2.4. Use and Abuse of Expulsion Powers

2.2.4.1. Expulsions

According to Article 28 of the Directive, automatic expulsion of Union citizens is prohibited and Member States are only permitted to exclude or expel citizens of the Union on the grounds of “public policy, public security or public health.”⁵⁴ Furthermore, expulsion decisions must be based exclusively on the personal conduct of the individual concerned.⁵⁵ On the basis of the questionnaires, a number of *lacunas* can be identified. Some Member States 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 Republic⁵⁶ and the Slovak Republic.⁵⁷ Such omissions leave wide room for discretion to the police and allows for diverse

⁴⁹ 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.

⁵⁰ §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.

⁵¹ 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 resources of the family member and the partner may be taken into account. In order to prove the sources of their income, applicants must provide respective documents. No other measures of control are applied.”

⁵² 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.

⁵³ Refer to Minderhoud (2009).

⁵⁴ 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.

⁵⁵ Article 27 (2) of Directive 2004/38.

⁵⁶ 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.

⁵⁷ 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

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.”⁵⁸ 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 (p. 8), there are still two Member States, Italy and Finland, which provide in their national law for the automatic expulsion of EU citizens upon serious criminal conviction or for having committed a crime of a ‘certain gravity’. 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).⁵⁹ 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.⁶⁰ It follows that EU citizens and their family members will be removed from the 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.⁶¹ 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 on 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.⁶²

Some Member States do not accept that the limitations on expulsion apply even where the citizen of the Union has resided there for more than three months and does not yet fulfil the conditions of work, self-employment or residence. Further, in some Member States, 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

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.

⁵⁸ See Decree 30/2007 of 6 February 2007 as amended and consolidated by Decree No. 32 of 28 February 2008, Article 20.

⁵⁹ 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).

⁶⁰ 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 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

⁶¹ Section 57 of the Czech Criminal Code as described in the Czech answer to the questionnaire.

⁶² Refer to Article 25 (2) of Law No. 260/2005, Official Gazette, No. 900, 7 October 2005.

nationals of one particular Member State: i.e. Romania.⁶³ Very little quantitative, and hardly any qualitative data, were provided in this respect by the Italian answers to the questionnaire.⁶⁴

2.2.4.2. *Linkage of Recourse to the Social Assistance System and Expulsion*

While Directive 2004/38 does not permit Member States to automatically expel a citizen of the Union because s/he has become an ‘unreasonable’ burden on the social assistance system,⁶⁵ a number of Member States 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 Member States do not specify how this is actually applied, such as for example Austria, which merely states that it takes all relevant criteria into account,⁶⁶ 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 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.⁶⁷ In Cyprus, the competent authority (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.”⁶⁸

⁶³ 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 November 2007.

⁶⁴ 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](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.

⁶⁵ Recital 16 and Article 14 (3) of Directive 2004/38. Recital 16 states: “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.”

⁶⁶ The Austrian questionnaire states: “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.”

⁶⁷ Article 45b (3) (d) of the Act no. 48/2002 Coll. on the residence of foreigners.

⁶⁸ 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.

2.2.4.3. Procedural Safeguards

An expulsion order may only be enforced after a month of notification, except in duly substantiated cases of emergency.⁶⁹ According to the Commission Report COM(2008) 840 few Member States have transposed the safeguards correctly and inaccurate transposition constitutes the general rule.⁷⁰ Indeed, from the information provided by the questionnaires it appears that this requirement was misinterpreted and at times, completely ignored in a number of Member States. 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 taking the decision.⁷¹ 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 from the notification date) do not have a suspensive effect.⁷² 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).⁷³ 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 available at all.

2.3. Transitional Measures for the Treatment of EU Citizens

The 2004 and 2007 enlargements have also inflicted various transformations over the nature and limits of the status of European citizenship and the principle of free movement of persons. In respect of all the new Member States' nationals, the recognition of the right to free movement of persons was immediate. The right of free movement as workers however was limited and delayed through the use of the so-called transitional arrangements envisaged by the Accession Treaties.⁷⁴ So while the EU8 and EU2 nationals falling within the categories of self-employed, students and pensioners are entitled to full exercise of free movement rights immediately,

⁶⁹ Articles 28, 30 and 31 of Directive 2004/38.

⁷⁰ 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, p. 9 of the Report.)

⁷¹ Article 127 of the Law on the Legal Status of Aliens, Žin., 2006, Nr. 137-5199.

⁷² The Questionnaire also states: "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*."

⁷³ 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."

⁷⁴ Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, Act of Accession, in Annex VI, chapter 1 for Bulgaria and Annex VII chapter 1 for Romania, signed in Luxembourg on 25 April 2005. Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Act of Accession, Part Four: Temporary Provisions, Title 1: Transitional Measures, signed in Athens on 16 April 2003.

nationals from these same countries who aim to take employment in another Member State can be excluded by national law as long as transitional arrangements are being used.

Some Member States have exercised their right to apply these ‘arrangements’. In what concerns EU8 nationals, Austria, Belgium, Denmark and Germany are the only Member States that are still applying transitional restrictions. If any of these Member States wishes to continue applying restrictions after 31 April 2009, they will be required to justify this on the basis of a “serious disturbance to the labour market or a threat thereof”. All the other Member States are now barred from re-introducing or introducing restrictions on free movement of workers (Guild et al., 2007).⁷⁵ The picture is less positive for nationals of the EU2. The same scheme of transitional restrictions for a period of up to seven years applies as is now ending for the EU8. While among the EU10 Member States only Malta applies restrictions, of the EU15 Finland and Sweden were the only two choosing not to, but have since been joined by Portugal, Greece and Spain. The end of controls for Bulgarian and Romanian citizens should be 2012.

The emergence of transitional arrangements came as a result of the feared impact the opening of the labour market to new Member States would have on the local economies and ‘social-welfare tourism’.⁷⁶ The apprehension that national labour markets would be flooded by waves of ‘new’ European citizens was used as an excuse for imposing these ‘safeguards’. They generally consisted in the restriction of the access to the labour market through a variety of national measures alternatively consisting of complex application procedures, quota arrangements or/and work permit requirements as provided in their respective immigration laws. The creation of a ‘second’ or rather, various classes of citizenship as a consequence of the application of the transitional measures has given rise to several critical reactions in the academic literature (e.g. Craig & De Búrca, 2007; Carrera, 2005b; Adinolfi, 2005; etc). The extension of ‘the Community of European citizens’ has led to the appearance of various degrees of European citizenries in light of EU law. It has provoked a cascade of diversified classes of European citizenship with different degrees of rights/liberties and, to some extent, a hierarchy of European statuses (Carrera & Merlino, 2008).⁷⁷ This patchwork of citizenries constitutes a basis for unequal treatment in what was designed to be a *common* and *consistent* post-national citizenship status across the EU. The latter therefore contradicts the spirit of the Treaties substantiating European integration processes. The right to equal treatment and its corollary, the prohibition of discrimination on grounds of nationality are indeed both embodied in the founding texts of the EU and remain however at stake in light of the transitional arrangements.⁷⁸

The transitional measures have in this way justified the application of specific legal regimes⁷⁹ to a certain category of European citizens. In respect to the A8 workers, several reports have shown that this process has had severe consequences on the actual treatment of economic migrants from those countries, raising preoccupation as regards the situation of the A2 (ECAS,

⁷⁵ E. Guild, K. Groenendijk, R. Fernhout, R. Cholewinsky and P. Minderhoud (2007), *European Report on the Free Movement of Workers in Europe in 2006*, European Commission: DG Employment, Social Affairs and Equal Opportunities, Chapter VIII on EU Enlargement, retrievable from http://ec.europa.eu/employment_social/free_movement/docs/europe_2006_en.pdf

⁷⁶ M. Byrska, (2004), *The Unfinished Enlargement: Report on free movement of people in EU-25*, European Citizen Action Service, Brussels: ECAS, p. 12.

⁷⁷ S. Carrera, and M. Merlino, (2008), *The European Court of Justice and Enacting Citizenship*, State of the Art Report, ENACT (Enacting European Citizenship), retrievable from http://www.enacting-citizenship.eu/index.php/sections/deliverables_item/141

⁷⁸ Article 12 and 18 EC Treaty.

⁷⁹ At times less favourable than those applicable to certain categories of TCNs.

2005; Carby-Hall, 2008).⁸⁰ Labour exploitation aspects of intra-European migration as experienced by the A8 workers have been repeatedly mentioned and little doubt is permitted when asserting that these are to be seen as direct consequences of the differential access to the enlarged European labour market. It is yet necessary to acknowledge that the different statuses are time-limited and should converge within 7 years from the dates of accession (2004 and 2007) in a common status which aims at granting ‘full’ freedom of movement of workers within the enlarged EU.

In its Report on the impact of free movement of workers in the context of EU enlargement,⁸¹ the European Commission also highlighted the prejudicial impact the transitional arrangements have had on the treatment of certain EU nationals. It particularly stressed its incidence on practices of undeclared work and its “undesired social consequences both for undeclared workers and the regular labour force,” while at the same time underlining the negative implications such practices may have on the workers’ inclusion in the receiving society. It called for the removal of national barriers to the labour market as they constitute a limitation to a fundamental freedom/right and an obligation under EU law which can only be based on “justifiable grounds” and which must be interpreted restrictively.⁸² Since 2006, the Commission and non-governmental organisations have repeatedly stated that mobility flows from the EU10 had been modest and that when they were indeed able to take place they had actually shown positive effects on the economies of the Member States.⁸³ The rights of free movement and residence are sometimes qualified as the most tangible rights available to Union citizens. Therefore their unavailability to certain categories of European citizens identified purely on the basis of their nationality clearly creates conflict with the principles of free movement of persons and non-discrimination on grounds of nationality, which, we remind the reader, lie at the root of European citizenship.

3. National Resistances and the Role of the ECJ in the Enforcement of the Rights conferred by the Directive: The *Metock* Ruling

3.1. The Significance of the *Metock* Ruling

As we have seen in Section 2.2 above, citizens of the Union who exercise their free movement rights when accompanied by family members who are also citizens of the Union encounter far less difficulties than when they seek to be joined or accompanied by so-called ‘third country national family members’. In 2003, before Directive 2004/38 came into force, the ECJ ruled in *Akrich*⁸⁴ that the right to be joined by a TCN family member was guaranteed under European law as long as the European citizen was seeking to enforce this right in another Member State

⁸⁰ See in particular J. Traser, (2005), *Report on the Free movement of workers in EU-25, Who’s afraid of EU’s enlargement?*, European Citizen Action Service, Brussels: ECAS, p.29 and J. Carby-Hall (2008), *The Treatment of Polish and other A8 economic migrants in the EU Member States*, chapter VIII

⁸¹ 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.

⁸² E. Guild (2001), “Security of Residence and Expulsion of Foreigners: European Community Law”, in E. Guild and P. Minderhoud (eds), *Security of Residence and Expulsion, Protection of Aliens in Europe*, The Hague: Kluwer Law International, p. 66.

⁸³ COM(2008) 765 final, 18.11.2008 and J. Traser (2008), *Who’s Afraid of the EU’s latest enlargement*, European Citizen Action Service, Brussels: ECAS.

⁸⁴ Case C-109/01, *Akrich* [2003].

than the one of his/her nationality. In fact, the Court affirmed that when the marriage between a Member State national and a TCN was genuine, the fact that the spouses had settled in another Member State for the sole purpose of obtaining rights under EU law was not relevant in the assessment of their legal situation by the competent national authorities.⁸⁵ The ECJ thereby conveyed the impression that Article 10 of Regulation 1612/68⁸⁶ could only be invoked if the TCN spouse of an EU national moving to a Member State had previously been lawfully residing in another Member State.⁸⁷ Following this decision, Ireland, the UK and Denmark introduced a fundamental distinction in their respective immigration legislations between the movement of ‘lawfully residing TCNs’ (who benefited from EU free movement and citizenship laws) and ‘new entries’ from outside the EU (who were subject to national immigration law).

That notwithstanding, in July 2008, the ECJ reconsidered whether Directive 2004/38 provided a right to family reunification with TCN family members who had not already resided ‘lawfully’ in another Member State.⁸⁸ Four TCNs had unsuccessfully applied for asylum in Ireland before meeting and marrying EU citizens exercising their free movement rights in this country. They were then refused a residence card by the Irish authorities on the grounds that the national legislation only applied if the family member was lawfully resident in another Member State and was seeking to enter Ireland with an EU citizen or was seeking to join the EU citizen there. Reconsidering and clarifying its previous jurisprudence,⁸⁹ the ECJ 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. inside or outside the EU) and of the legality of their residence in another Member State. In particular the Court held that:

therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words ‘family members [of Union citizens] who accompany ... them’ in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.⁹⁰

⁸⁵ Paragraph 61 of the judgement.

⁸⁶ Council Regulation on freedom of movement for workers within the Community, 1612/68/EEC of 15 October 1968. Article 10 stated that “1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse”.

⁸⁷ Paragraph 61 of the judgment stated that “In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated”.

⁸⁸ ECJ, Case C-127/08, *Metock* [2008].

⁸⁹ See for instance C-1/05 *Jia*; C-459/99 *MRAX*; C-60/00 *Carpenter*, C-291/05, *Eind*, 11 December 2007, para. 45.

⁹⁰ Paragraph 93 of Case C-127/08.

Furthermore, the ECJ also stated that the Directive builds on the existing rights of citizens of the Union and that European legislation cannot be used to restrict or remove ones which were held previously. In the light of this, the ECJ clarified its previous decision in *Akrich*.⁹¹ While it seems that all Member States are now complying with the decision in *Metock*, as we have highlighted in the previous Section of this paper, some Member States 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 Directive 2004/38. Further, some national administrations apply a sufficient resources requirement for TCN family members even where the principal is a worker or is self employed. This is not permitted by the Directive.

The political turmoil which followed this judgement provides us with an illustrative example regarding the resistance shown by certain Member States to European legislation and ECJ rulings on the freedom to move. As we will see in the next Section, a small group of Member States unsuccessfully sought to reopen the negotiations in order to ‘revise’ Directive 2004/38 to specifically address practices which they considered to be facilitated by this judgement: i.e. “*marriages of convenience*” and “*illegal immigration*”. This group aimed at bringing pressure through the Council on the European Commission to present an amendment to the Directive in order to allow Member States having more control over the admission and exceptions applicable to TCN family members. Under Article 35 of Directive 2004/38 however, Member States may already adopt measures to prevent the so-called abuses of rights conferred by the Directive such as ‘marriages of convenience’⁹² *in so far as* they respect the principle of proportionality and provide for procedural safeguards.⁹³

3.2. National Resistance: Public Policy or Public Security as Exceptions to Rights of TCN Family Members

Subsequent to the *Metock* ruling, the dynamic and transformative nature of European citizenship was confronted with an initiative by a group of Member States aiming at narrowing down the scope of Directive 2004/38. They intended to insert ‘extra-safeguards’ under the justification that the rights conferred by EU law and as interpreted by the ECJ left room for ‘abuses’ and ‘misuses’ of the freedom to move. In this sense, the UK proposals for the November 2008 Council Conclusions on free movement of persons⁹⁴ constituted a clear will to restrict the scope of the rights and freedoms envisaged by the EU legal system to the very institution of European citizenship. The national resistances driving these proposals however proved unsuccessful thus providing a demonstration of the strength of the normative elements surrounding citizenship of the Union. In fact, this move was in particular confronted by the

⁹¹ Paragraph 58 of Case C-127/08.

⁹² This article states that “Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.”

⁹³ Section 3.8.3. of COM(2008)840 final states that “where there are doubts that the marriage is not genuine, Member States can investigate to determine whether the rights granted by the Directive are being abused for example to circumvent national rules on immigration, and can refuse or withdraw the rights of entry or residence if abuse is proven. The Directive requires the respect of the principle of proportionality and of the procedural safeguards.”

⁹⁴ Draft Council Conclusions, *Free movement of persons: abuses and substantive problems*, 15903/08 of 18 November 2008 and 16151/1/08 of 26 November 2008.

popularity of this status amongst a majority of EU Member States which defended the rights of their citizens and TCN family members to freely move and reside inside the Union.

Since September 2008, several discussions on the implications of the *Metock* ruling took place inside the Council.⁹⁵ Denmark, Ireland, Italy and the UK considered that the findings of the case would make it harder for them to address the phenomenon of irregular immigration. They seemed to be of the opinion that following this judgement, action was needed “in order to combat any misuse, offences or abuse”. In this context, the UK redirected the focus of the debate towards potential ‘uses and abuses’ of the Directive and proposed a number of paths to address this issue. In its proposals for Council Conclusions, while qualifying the right to freedom of movement as one of the main achievements of the EU⁹⁶ and a fundamental freedom for citizens, it stressed the necessity to adhere to its “relevant responsibilities”. The UK interpreted the ruling in *Metock* as an open invitation to enter into sham marriages and post fraudulent claims of family relationships. It therefore proposed to call for the stepping up of Member States’ practical cooperation in order to address this phenomenon. The first draft of the Conclusions reiterated the commitment of the Council to the right of free movement while “protecting this right from being misused as a route for illegal immigration into the EU.” It then proposed the insertion of what appeared to be a new condition in order to benefit from the right of free movement, i.e.: “only those exercising their rights in the spirit of the treaty should benefit from freedom of movement”!

Most probably inspired by the legislation currently adopted in Italy,⁹⁷ the Conclusions also called for a stricter attitude with those persons labelled as “offenders”, be they citizens from other Member States or not. By referring to criminal acts as a ground for expulsion the UK attempted to further expand the circumstances under which this ‘exceptional sanction’ could be applied. The relevant obligations for Member State compliance at times of applying such a measure are currently described in Chapter VI of Directive 2004/38 under the title ‘Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health’. The UK proposals therefore sought to further delineate these provisions by reinterpreting the rules foreseen in Directive 2004/38 in light of the concerns expressed by some of the Member States highlighted above. In addition, by stating that the “cumulative damage caused by continuous low-level offending can amount to a sufficiently serious threat to public policy”, the draft Conclusions openly called for an infringement of the Directive.⁹⁸ Indeed this wording encouraged breaches of Article 27 (2) of Directive 2004/38 which states that “measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking

⁹⁵ Justice and Home Affairs Council on 25 September 2008.

⁹⁶ “And the UK is one of its stongest proponents” (!), Draft Council Conclusions of 18 November 2008.

⁹⁷ 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](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. Refer to M. Merlino (2009), The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU, CHALLENGE Research Paper No. 14, Centre for European Policy Studies, Brussels: CEPS.

⁹⁸ See S. Peers’ analysis, “The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms.”, retrievable from <http://www.statewatch.org/>

such measures.” Furthermore, this kind of assertion would have directly disregarded previous ECJ rulings on the subject matter.

The Final version of the Conclusions that were adopted by the Council on 27 and 28 November 2008, entitled “*Abuses and misuses of the right to free movement of persons*”⁹⁹ were hence initially intended to substantially modify both the meaning and the reach of the Directive. This is well illustrated when looking at sentences included in the Conclusions such as this one:

The Council considers that, in compliance with and in the interests of the right of free movement, every effort must be made to prevent and combat any misuses and abuses, as well as actions of a criminal nature, with forceful and proportionate measures with due regard to the applicable law, against citizens who break the law in a sufficiently serious manner by committing serious or repeated offences which cause serious prejudice.

That notwithstanding, the UK ultimately failed in its attempt for pushing the European Commission to put forward restrictive amendments to Directive 2004/38. The final version of the Council Conclusions only stated that the Commission will *only* present a report providing Guidelines on appropriate measures and proposals that could be lawfully taken by Member States in the scope of EU free movement law to address phenomena such as that categorised as ‘sham marriages’.¹⁰⁰

3.3. The Framing of National Resistance to European Citizenship

The UK initiative for Council Conclusions provides an interesting case of a Member State aiming at recapturing and reassuring its national competence over the paths toward, and scope of, European citizenship. It represented a clear strategy towards limiting Europeanization processes covering European citizenship rights of TCN family members of EU nationals. By framing free movement rights under the insecurity discourse of ‘misuses and abuses’ and by associating it with illegality and even criminality, some Member States sought to resist the liberal judicial interpretation of the ECJ over derivative rights of TCNs who are family members of EU citizens (independently of their irregular or regular administrative migration status according to Member States’ national legal systems). This however encountered the resistance from the European Commission and the rest of the Member States.

While it is true that Member States’ nationality laws provided the basis upon which access to EU citizenship is ‘exclusively’ determined,¹⁰¹ their discretion over matters relative to the rights

⁹⁹ Justice and Home Affairs Council, 2908th meeting, on 27-28 November 2008.

¹⁰⁰ The Conclusions finally added: “Concerned that the provisions of Directive 2004/38/EC should be fully and correctly implemented in order to improve the prevention and combating of misuses and abuses, while adhering to the principle of proportionality, the Council requests the Commission to publish guidelines for the interpretation of that Directive early in 2009 and to consider all other appropriate and necessary proposals and measures. The Council will make a more extensive examination of the issue after the report has been submitted and in the light of the other discussions that will continue at the same time”.

¹⁰¹ Refer to Article 17 Treaty establishing the European Community. Declaration on nationality of a Member State attached to the final Act of the Treaty on European Union, OJ C 191, 29 July 1992. European Council, Conclusions of the Presidency, Edinburgh, 11 and 12 December 1992, Annex 1: Decision of the Heads of State and Government concerning certain problems raised by Denmark on the Treaty on European Union, Section A: Citizenship. See for instance De Groot, G.R. (1998), “The relationship between the nationality legislation of the Member States of the European Union and European Citizenship”, Chapter VI, in M. La Torre (ed.), *European Citizenship: An Institutional*

inherent to the status of European citizenship is now limited and subject to supranational guarantees provided by the EU legal system.¹⁰² Indeed, the only possible leeway available to the nation state would be to widen the interpretation of the exceptions to rights provided by the Directive at times of practising them in their national arenas. These exceptional measures to ‘the freedom to move’ include, for instance, derogations on grounds of ‘public security and public policy.’¹⁰³ However, and as the ECJ has ruled on many occasions on these matters, a Member State’s margin of discretion is now very much limited particularly as regards the degree of exceptionalism and national derogations affecting EU rights and liberties.¹⁰⁴ Furthermore, the relevant provisions of the Directive require that national measures taken on such grounds comply with the general principles of EU law, and more particularly that of proportionality. These later constitute crucial mechanisms at times of resisting any interference by Member States considered to be unlawful because of their contested proportionate nature or lack of compliance with fundamental rights.¹⁰⁵

The first draft of the UK’s proposals for Council Conclusions moved further away from such considerations towards a more reprehensive examination of the personal conduct of the individual (and more particular TCN) on the move.¹⁰⁶ The consequences of such a political discourse and nationalistic strategy could be devastating at times of implementing European citizenship rights. The fact that the *Metock* ruling was ‘misused’ by certain Member States as an incentive to link the attribution of fundamental rights to free movement together with public responses to irregular migration leads to bringing a veil of suspicion on any application by TCN spouses claiming their freedom of movement rights. On the other hand, *Metock* also demonstrates the whole array of tools available to the individual for the enactment of European citizenship post-nationally. Confronted by the resistance and potential illiberal practices of certain Member States, one of the key recourses available in the EU legal system for the affected individual to claim and enforce fundamental rights (and have access to ‘effective remedies’) is indeed before Community Courts on the basis of the rule of law. Furthermore, the final version of the Council Conclusions on *Abuses and misuses of the right to free movement of persons* shows how resilient the institution of citizenship of the Union is against political attacks such as the ones planned by the UK and a other few Member States.

Challenge, The Hague: Kluwer International Law. De Groot, G.R. (2005), “Towards a European Nationality Law”, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe’s Future*, Vol. I, pp. 13-53.

¹⁰² K. Groenendijk (2006), “Citizens and Third Country Nationals: Differential Treatment or Discrimination?”, in J.Y. Carlier and E. Guild (eds), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L’Homme de l’Université Catholique de Louvain, Brussels: Bruylant, pp. 79-101.

¹⁰³ See in particular Chapter VI of Directive 2004/38 on restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.

¹⁰⁴ 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.

¹⁰⁵ For a study of the principle of proportionality in EU immigration law, see to S. Carrera (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Leiden: Martinus Nijhoff Publishers, forthcoming. See also P. Craig (2006), *EU Administrative Law*, Oxford: Oxford University Press.

¹⁰⁶ In this document, the UK delegation proposed to introduce the new requirement of *genuine integration*: “The safeguards against expulsion for long-term residents are intended to reflect time spent genuinely integrating into a host Member State.”

4. Conclusions: The Potential for Enacting European Citizenship

The protection of the freedom to move provided by EU law and as developed by Community Courts constitutes a central element of EU citizens' expectations towards the Union.¹⁰⁷ It is in the national transposition phase that the greatest care needs to be taken in order to ensure that a Member State's derogations to EU fundamental rights and freedoms do not go beyond the remits of liberalism and the common level of protection provided by the European set of guarantees inherent in the EU legal system. The incapacity of current structures and enforcement mechanisms to duly ensure a correct and timely transposition of EU law in such a fundamental aspect of European identity such as that of the freedom of movement undermines the legitimacy and reputation of the EU project as a whole. Furthermore, the existence and application of transitional arrangements have shown to have had a negative impact on EU10 and EU2 nationals' claims for European citizenship. The extension of 'the Community of European citizens' together with the failure to transpose correctly the provisions of the Directive has led to the appearance or proliferation of various statuses of European citizenship.

The incorrect transposition and practical implementation of Council Directive 2003/38 by some Member States has adverse implications for fundamental rights, the status of European citizenship, the principle of equality and non-discrimination as well as the very foundations upon which the European Community is rooted. The EU legal system relies on Member States' capacity to implement correctly and in a timely manner EC law. Nevertheless, the freedom of movement of EU citizens and family members constitutes an illustrative example that these presumptions at times do not work on the ground. The main victim of this failure might well be the liberty and security of the individual and their family who often remain vulnerable at times of 'moving' and encounter administrative obstacles while trying to benefit from fundamental rights attached to European citizenship.

As the circumstances evolve, some Member States tend to practise a narrow national interpretation of the scope of the rights conferred by European citizenship, and this is especially so in what concerns TCN family members. At times of transposing Directive 2004/38, Member States have demonstrated restrictive readings of the derogative clauses, in effect creating further exceptions that had not originally been foreseen by EU law. Further, as illustrated by the latest discussions surrounding the Council Conclusions on Abuses and Misuses, particular Member States have, unsuccessfully, attempted to expand their margin of manoeuvre through a wider interpretation of the exceptions to EU rights allowed by the Directive and the ECJ jurisprudence. However, as it has been shown in this paper, these nationalistic attempts are doomed to fail within a supranational system where the rule of law and fundamental rights are amongst the key principles upon which citizenship of the Union has been formally constructed. If the EU wants to communicate with the citizen and for the citizen honestly to engage with EU law and policy, it must show them that fundamental rights are duly protected against improper use – including unacceptable laws and practices by Member States in the scope of EU law. Community courts, and the ECJ in particular, have also once again proved in the *Metock* judgement to be one of the privileged locations for individuals to enforce their European citizenship. By delivering protection to the individual beyond the nation-state, the EU fosters European identity and confidence amongst its citizens and others.

¹⁰⁷ 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.

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