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A COMPARATIVE STUDY ON THE IMPLEMENTATION OF THE FREE MOVEMENT DIRECTIVE:
Transposition, Application and Enforcement in Belgium, Italy and the UK Compared

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To Tiziana

To my parents

To my sisters Jenny, Vanessa and brother Terence

À Baba

To my fellow free movers

Preface

It is hoped that the results of this study will provide novel insights into the implementation of Directive 2004/38 and contribute more generally to the growing body of scholarship on what has become known as compliance studies. It is also hoped that this study will inspire others to apply a similar approach in studying the implementation of other directives that grant rights to individuals.

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Anthony Valcke
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CHAPTER 1. INTRODUCTION

'Free movement by the citizen is of course as dangerous to a tyrant
as free expression of ideas or the right of assembly ...
it often makes all other rights meaningful –
knowing, studying, arguing, exploring,
conversing, observing and even thinking.'

Aptheker v Secretary of State[1]

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1.1 Introductory Remarks

The year 2016 will see us celebrate the ten-year anniversary of the entry into force of Directive 2004/38[2] that was intended to simplify and strengthen the free movement rights of EU citizens. Yet a decade later, those fine ideals still appear like an unfulfilled promise for a significant proportion of the 14 million citizens who reside in a European country other than their own[3] and the 300 million citizens who make use of their right to travel within the European Union

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[1] *Aptheker v Secretary of State*, 378 US 500, 519-520 (1964) (Douglas J concurring).

[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 [2004] OJ L 158/77 (hereafter the Free Movement Directive, Directive 2004/38 and the Directive). The Directive was incorporated at point 3 of Annex VIII to the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L 1/3 by EEA Joint Committee Decision No 158/2007 of 7 December 2007 [2008] L124/20.

[3] Eurostat, Migration and migrant population statistics (migr_pop1ctz) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics> accessed on 9 May 2015. As at 1 January 2014, there were 14.3m EU citizens living in a country other than their country of nationality. See also Eurostat, 'Foreign citizens living in the EU Member States'. News Release 230/2015 (18 December 2015).

every year.[4] If the results of the 2012 EU Citizenship consultation are any indication of the scale of the problem, almost one in five EU citizens have encountered difficulties when making use of their right of free movement in the EU.[5]

The Free Movement Directive is the key EU legal instrument that regulates the free movement of persons within the thirty-one countries that make up the European Economic Area. Adopted in 2004, it aimed to consolidate the existing different EU legal instruments on residence rights, reflect developments in the case law on EU citizenship, simplify visa and residence formalities and improve the rights of family members. However, the implementation of Directive 2004/38 by the Member States has been far from satisfactory and the Commission has deplored the fact that not a single Member State had been able to implement the Directive correctly.[6]

Despite the Commission's acknowledgement that the free movement of persons is 'one of the pillars of EU integration' which warrants a 'rigorous enforcement policy', [7] the progress made in improving the situation in certain Member States has been disappointing. Although the closure of infringement

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[4] Eulalia Claros, Alessandra Di Tella, 'Briefing: Tourism in the EU Economy', (European Parliament Research Service, July 2014) <http://www.europarl.europa.eu/EPRS/140843REV1-tourism-in-the-EU-economy-FINAL.pdf> accessed on 9 May 2015. In 2012, over 300 million EU citizens travelled to another Member State.

[5] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: EU Citizenship Report 2013 - EU citizens: your rights, your future', COM(2013) 269 final, (hereafter 2013 Citizenship Report (I)), in which the Commission reports at para 2.2 that 'almost one in five of all participants in the 2012 public consultation on EU citizenship reported problems with moving to or living in another EU country'.

[6] Commission, '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 final (hereafter 2008 Implementation Report), 1.

[7] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: On progress towards effective EU Citizenship 2011-2013', COM(2013) 270 final (hereafter 2013 Citizenship Report (II)), para 2.3.1.

cases[8] might suggest that the implementation of the Directive has improved since 2008,[9] many of the problems that were identified at that time continue to plague citizens who choose to exercise their fundamental right to free movement within the EU.[10] The practical application of the Free Movement Directive by the Member States therefore still has some way to go before it complies with the way in which the free movement rules were designed to function.[11]

The enforcement action that the Commission has so far taken does not appear to have necessarily been linked to how well transposition complies with the Directive in individual Member States. In other words, the way in which the Directive has been written into national law does not seem to be the only factor that determines how well that Member State might implementing the Directive. By way of example, judging by the Commission's 2008 implementation report, the quality of transposition of Belgium, Italy and the UK could be considered as having been close to the EU average.[12] Yet the Commission went on to open infringement procedures against each of these countries in 2011.[13] The same fate

[8] 2013 Citizenship Report (II), para 2.3.1.

[9] The year in which the Commission released its 2008 Implementation Report (n 6).

[10] See for example, Niam Nic Shuibhne and Jo Shaw, 'General Report' in 'XXVI FIDE Congress Report, Volume 2: Union Citizenship: Development, Impact and Challenges' (Copenhagen, 28-31 May 2014) (hereafter FIDE 2014 Report).

[11] Ibid, 137, where the authors observe that 'national practices consistently fall short of the citizen-centric framework established by EU law'. See also, European Parliament, Report on the activities of the Committee on Petitions 2013 (2014/2008(INI) (hereafter 2013 Petitions Committee Report) which '[d]eplores that European citizens continue to experience frequent problems caused by the misapplication of Internal Market law by public authorities while exercising their freedom of movement'.

[12] Annex, State of Play of Transposition of Directive 2004/38, 2008 Implementation Report (n 6). See further Chapter 10 (The Implementation of Directive 2004/38 Compared).

These studies served as the basis for the 2008 Commission Implementation Report.

[13] Commission documents released on 28 April 2015 (GestDem 2015/1535); see also 'Free movement: Determined Commission action has helped resolve 90% of open free movement cases', Press release IP/11/981 (25 August 2011); 'Free movement: Commission asks the UK to uphold EU citizens' rights' Press release IP/12/417 (26 April 2012); 'February infringements package: main decisions (Free

has befallen Cyprus, Germany, Poland and Spain[14] whose transposition efforts fared better than the EU average.[15] Conversely, countries like Denmark, France, Hungary and Slovenia, whose overall transposition was arguably more problematic,[16] have not been the subject of such formal proceedings.[17]

As the Commission rightly claims, progress has surely been achieved in persuading some of the Member States to address problems in the implementation of Directive 2004/38.[18] The Commission's avowed strategy to attempt to resolve instances of the incorrect application of EU law dialogue with the Member States has certainly had a positive role to play.[19]

Nonetheless, the situation as experienced by citizens on the ground tells a somewhat different story. The results of the 2012 EU citizenship consultation[20] are echoed by reports of the EU's assistance services such as Your

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movement: Commission asks Belgium to comply with EU rules), Press release MEMO/13/122 (21 February 2013). The infringement proceedings against Italy were closed on 10 December 2013, following commitments made to amend the Italian implementing law, Legislative Decree No 30/2007 (*Decreto Legislativo 6 febbraio 2007, n 30 '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', GU n 72 del 27 marzo 2007*). For an examination of implementation in Italy, see Chapter 8 (Implementation in Italy). For a review of the Commission's enforcement action, see Chapter 10 (Implementation of Directive 2004/38 Compared).

[14] Annex, 2008 Implementation Report (n 6).

[15] See further Chapter 10 (The Implementation of Directive 2004-38 Compared).

[16] Annex, 2008 Implementation Report (n 6); see further Chapter 10 (Implementation of Directive 2004/38 Compared).

[17] Commission documents released on 28 April 2015 (GestDem 2015/1535).

[18] 2013 Citizenship Report (II) (n 7), para 2.3.1: 'In 2011, the Commission took action against twelve Member States. In 2012 - beginning of 2013, it sent reasoned opinions in seven of these twelve cases. As a result, so far, five Member States have amended their legislation or committed themselves to doing so.'

[19] Commission, Communication 'A Europe of Results - Applying Community Law', COM(2007) 502 final, 7-8; Commission, 'EU Pilot Evaluation Report', SEC(2010) 182, 3.

[20] 'Europeans have their say: Analysis report - Public consultation 2012 "EU citizens - your rights, your future" (hereafter 2012 EU Citizenship consultation), para 2.3, which reports that 27% of EU citizens residing in an EU country other than their own report having encountered problems.

Europe Advice[21] and SOLVIT,[22] which face almost yearly increases in reported problems.[23] In addition, the EU institutions continue to receive significant numbers of complaints[24] and petitions[25] from individuals and civil society organisations. This state of disconnect between the ways in which we might expect the Free Movement Directive to be applied in theory and the way the

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[21] Annual reports for Your Europe Advice (2007-2010) <http://europa.eu/youreurope/advice/about_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (Your Europe Advice governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015.

[22] Annual reports for SOLVIT (2004-2011) <http://ec.europa.eu/solvit/documents/index_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (SOLVIT governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015.

[23] 2013 Citizenship Report (I) (n 5), para 2.2 which notes that 21% of Your Europe Advice enquiries and 13% of SOLVIT complaints related to free movement and residence rights in 2012. For a detailed examination of these problems, see Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services' (Report for Commission, Ramboll 2011) <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed on 26 May 2015.

[24] Commission, '25th Annual Report on Monitoring the Application of Community Law (2007), COM(2008) 777 final; idem, '26th Annual Report on Monitoring the Application of Community Law (2008), COM(2009) 675 final; idem, '27th Annual Report on Monitoring the Application of EU Law (2009), COM(2010) 538 final; idem, '28th Annual Report on Monitoring the Application of EU Law (2010), COM(2011) 588 final; idem, '29th Annual Report on Monitoring the Application of EU Law (2011), COM(2012) 714 final; idem, '30th Annual Report on Monitoring the Application of EU Law (2012), COM(2013) 726 final; idem, '31st Annual Report on Monitoring the Application of EU Law (2013), COM(2014) 612 final; 'Report from the Commission - Monitoring the application of Union law 2014 Annual Report' COM(2015) 329 final. These reports contain statistical information on the number of complaints received by policy area, including in respect of the free movement of persons. An overview of the data as it relates to the free movement of persons can be found in Chapter 10 (Implementation of Directive 2004/38 Compared).

[25] In its 2013 Petitions Committee Report (n 11) the European Parliament notes that '[t]he number of petitions received has highly increased, almost doubled since 2012.'

rules are applied in practice by the Member States is a manifestation of the so-called 'implementation gap'.[26]

1.2 The Proposed Research

The purpose of this study is to investigate the implementation gap in the context of Directive 2004/38. This study is primarily concerned with the practical implementation of EU law in the Member States in the specific area of the free movement of persons. This dissertation seeks to engage with the established theoretical legal scholarship on the free movement of persons, as well as with ongoing discussions that continue to animate empirical research on the implementation of directives. The research is intended to make an original contribution in the field of implementation research by focusing on the practical implementation of EU directives which has so far been neglected by the majority of studies that engage in empirical research on the implementation of directives.

This study pursues a two-fold aim. Firstly, it aims to identify the various elements of implementation that should be taken into account to assess the overall implementation of the Free Movement Directive both in law and in practice. More specifically, the first purpose of this research is to investigate

[26] The Commission has coined the term 'implementation gap' to refer to the divide 'between the EU legal framework and the way it is implemented and applied in practice Commission': 'The Single Market through the eyes of the people: a snapshot of citizens' and businesses' views and concerns', Press Release IP/11/1074 (26 September 2011); see further Commission, 'The Single Market through the lens of the people: A snapshot of citizens' and businesses' 20 main concerns', SEC(2011) 1003. The existence of this divide has previously been highlighted in Your Europe Advice Reports (n 21). See also, European Citizen Action Service (ECAS), 'Difficulties Experienced by Citizens When Exercising their Mobility Rights in Single Market - A Citizens Signpost Service feedback report' (July 2008), 37: 'there is a growing gap between the case law of the European Court, the much improved legislative framework and the way it is being applied on the ground by Member States'; Mario Monti, 'Report to the President of the European Commission José Manuel Barroso' (9 May 2010): 'There is a significant gap between what is in the law books and what happens in practice'. See further Simona Millio, *From Policy to Implementation in the European Union: The Challenge of a Multi-Level Governance System* (I.B.Tauris 2010) 3-21.

how implementation may be measured as a dependent variable in a way that goes beyond transposition so that it also encapsulates application and enforcement. In other words, a first aim is to explore how all elements of implementation could be measured in a way that can better reflect how well the Directive has been implemented by a Member State.

Secondly, the study will also investigate how Member States exercised their discretion as to the 'form and methods' of implementation under Article 288(3) TFEU[27] – in other words by looking at the policy choices that were made by Member States in order to implement Directive 2004/38 – and test a number of hypothesis to determine whether they have a bearing on how successfully the directive has been implemented. In other words, the second aim of this study is to explore the existence of any correlation between, on the one hand, the policy choices that were made by the Member States as part of the implementation process, and on the other hand, how correctly the Directive has implemented by the Member States.

The first line of research will look beyond the approach that the Commission has used when assessing the implementation of the Directive in its role as guardian of the Treaties.[28] In this connection, various studies have suggested that the Commission often limits the assessment of implementation

[27] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[28] Article 17 TEU and Article 258 TFEU. The term 'guardian of the Treaties' has been used by the Court of Justice; see for instance Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para 22; Case C-365/97 *Commission v Italy* (San Rocco case) [1999] ECR I-7773, para 60.

to transposition[29] or 'formal legal compliance'.[30] In the specific context of the Free Movement Directive, the Commission's assessment of its implementation has arguably relied heavily on an examination of the national implementing

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[29] See for example, Deidre Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights (1990) 27 Common Market Law Review, 703-739, 710-711: 'the systematic monitoring by the Commission of the incorporation of directives into national law resulting in the immediate initiation of infringements procedures as soon as the deadlines are reached is superficial in the sense that it does not reach the substantive content of the implementing measures'; Sacha Prechal, *Directives in EC Law* (2nd edition, Oxford University Press 2005) 7: 'As such it is relatively simple to initiate infringement procedures more or less automatically as soon as the period provided for implementation has expired if no national implementing measures have been notified. Yet, if they have been notified, nothing is said about either their quality or their application and enforcement in practice. Without much exaggeration it can be said that there is a large area of "hidden failures" by the Member States which the Commission is not able to deal with in more systematic fashion which a successful strategy for safeguarding compliance would require. In this respect, especially individual complaints from the Member States plays an important role in discovering the (potential) failures.'; Marta Ballasteros, Rostane Mehdi, Mariolina Eliantonio and Damir Petrovic, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness', (PE493.014, European Parliament, 2013), 43-45: 'As the Guardian of the Treaties, the Commission checks compliance of the Member States' transposition measures (when they have been communicated) with EU law. The assessment is done horizontally for all Member States and is usually presented jointly through studies which serve to highlight possible inconsistencies in the way Member States have transposed EU law. Often these studies are undertaken by subcontractors. Conformity checking studies are only occasionally made available to the public on a cases by case basis'; Antoaneta Dimitrova and Bernard Steunenberg, 'Too difficult to handle? Compliance with EU policy in a multi-level context' (2014) (Annual APSA Conference in Washington, 24 August 2014) 7: 'The European Commission is often quite well informed about the legal transposition of a directive from the obligatory member state notifications of domestic legislative measures, often combined with qualitative expert reports. This is not necessarily the case with the actual implementation of policy.' See also, Commission, Communication 'Better Monitoring of the Application of Community Law', COM(2002) 725 final, 8-9; COM(2007) 502 final (n 19) 2-3 and 6; Commission, Communication 'Better governance for the Single Market', COM(2012) 259 final, 3-4.

[30] Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 1-30. Conant uses the terms 'compliance with law on the books' to denote formal legal compliance that involves the adoption of national implementing measures and 'compliance with law in action' to refer to practical application and enforcement, while arguing that 'future scholarship should merge research on the law on the books and the law in action for more useful results', ibid, at 15.

measures that transpose the Directive into national law.[31] In other words, the assessment has been undertaken primarily on the basis of the legal instruments that incorporate the Directive into the national legal order.

However, implementation is not solely concerned with transposition,[32] given that the obligation to implement is addressed to all branches of government.[33] Implementation also requires the effective application[34] of the national implementing measures that are intended to give effect to directives.[35] The national administrative authorities are therefore obliged to apply the

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[31] Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union - Final Report' (December 2008) (hereafter 2008 Conformity Study). This study served as the basis for the 2008 Commission Implementation Report.

[32] See Samuel Krislov, Claus-Dieter Ehlermann and Joseph Weiler 'The Political Organs and the Decision-Making Process in the United States and the European Community', in Mauro Cappelletti, Monica Seccombe, Joseph Weiler (eds.), *Integration Through Law, Volume 1: Methods, Tools and Institutions Book: Political Organs, Integration Techniques and Judicial Process* (de Gruyter 1986) 3-112, 62; Heinrich Siedentopf and Christoph Hauschild, 'Phases of Implementation' in Heinrich Siedentopf and Jacques Ziller (eds), Making European Policies Work, Volume 1: Comparative Syntheses (Sage 1988) 26-72, 42-72; Curtin (n 28), 710-711; Francis Snyder, 'The Effectiveness of European Community Law. Institutions, Processes, Tools and Techniques', (1993) 56 Modern Law Review, 19-54, 22-23; Richard *Brent, Directives: Rights and Remedies in English and Community Law* (Informa Law / Routledge 2001) 97; Prechal (n 28) 5-6, and 32; Oliver Treib, 'Implementing and Complying with EU Governance Outputs', (2014) 9(1) Living Reviews in European Governance, 6 <http://www.europeangovernance-livingreviews.org/Articles/lreg-2014-1/> accessed on 2 June 2015.

[33] Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26. See further Chapter 3, Section 3.1 (General Obligations Relating to Implementation).

[34] See further Chapter 3, Section 3.5 (Obligations Relating to the Application of Directives).

[35] See to that effect Declaration (19) on the Implementation of Community Law annexed to the Maastricht Treaty (1992) OJ C 191/1 at 102, which stresses that it is 'essential for the proper functioning of the Community that the measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law.'

national implementing measures in a way that does not undermine the effectiveness[36] (*effet utile*)[37] of the EU rules.[38]

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[36] As pointed out by Snyder (1993) (n 31) 24-27, the term 'effectiveness' is capable of being ascribed several different meanings in EU law.. Moreover, as observed by Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012) 42-43, citing Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (Sage 2002), the notion of effectiveness has a broader meaning in international relations theory and refers to 'the degree to which a rule induces changes in behaviour that further the rule's goals; improves the state of the underlying problem; or achieves its policy objective' .

[37] The reference to effectiveness as used here is to the concept of 'effet utile' as developed by the Court of Justice in its case law; see for example, Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, para 55. See further Malcolm Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?' (2006) 31 European Law Review, 476-498; Vassilios Skouris, 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives' (2006) 17 European Business Law Review, 241–255; Koen Lenaerts and Piet Van Nuffel, *European Union Law* (Robert Bray and Nathan Cambien (eds), 3rd edition, Sweet and Maxwell 2011) 154-155, 761;

[38] Case 158/80 *Rewe (Butter-buying cruises)* [1981] ECR 807, paras 41 and 43 (national authorities should not apply legislative or administrative measures which are contrary to directly effective provisions of a directive); Case 14/83 *Von Colson and Kamann* (n 32), para 26 (obligation to achieve the result of a directive is binding on all authorities of the Member States; national implementing measures must be interpreted in the light of wording and purpose of the directive, even in the absence of direct effect); Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paras 30-33 (administrative authorities under obligation to apply directly effective provisions of directives and to refrain from applying conflicting provisions of national law); Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8 (duty of consistent interpretation applies regardless of whether national rules where adopted before or after directive); Case C-63/97 *BMW* [1999] ECR I-905, paras 22-23 (duty of consistent interpretation applies to national implementing measures, including any transitional rules); Case C-224/97 *Ciola* [1999] ECR I-2517, paras 30-34 (supremacy of EU law binds administrative authorities, when making administrative acts and issuing decisions); Case C-218/01 *Henkel* [2004] ECR I-1725, para 60 (duty of consistent interpretation applies to administrative authorities which are competent to apply a directive); Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, para 114 (duty of consistent interpretation is inherent in the Treaty in order to ensure the full effectiveness of EU law). See also Krislov, Ehlermann and Weiler (1986) (n 31) 67; Prechal (n 28) 51-54, 65-72 and 180-215 which respectively discuss the obligation of result under Article 288(3) TFEU, administrative compliance and the duty of consistent interpretation; see further Maartje Verhoeven, *The Costanzo Obligation*

Moreover, implementation also concerns enforcement by the national courts. As will be seen,[39] the redress mechanisms before the national courts must allow for effective remedies.[40,41] Such remedies can ensure the

(Intersentia 2011) for a detailed examination of the obligations incumbent upon the national administrative authorities in the case of conflict between national law and EU law.

[39] See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[40] The right to an effective remedy is guaranteed by Article 47 of the EU Charter of Fundamental Rights, which by virtue of Article 51(1) of the Charter, also applies to the Member States when they are implementing EU law.

[41] Case 13/68 *Salgoil* [1968] ECR 453, 463 (national courts must protect rights conferred by EU law; national law determines which courts are competent); Case 179/84 *Bozzetti* [1985] ECR 2301, para 17 (Member States are responsible for ensuring that individual rights conferred by EU law are effectively protected in each case), Case 45/76 *Comet* [1976] ECR 2043, para 12-13 and Case 33/76 *Rewe* [1976] ECR 1989, para 5 (national courts are entrusted with ensuring the legal protection conferred on individuals by directly effective provisions of EU law; national law determines what procedural rules apply, subject to the principle of equivalence that requires that such rules must be no less favourable than those governing similar actions under national law); Case 106/77 *Simmenthal* [1978] ECR 629, paras 21 and 22-23 (national courts are obliged to give primacy to EU law in case these conflict with provisions of national law; national courts need not await a decision of a higher court which has sole jurisdiction to rule on the constitutionality of a national law); Case 19/82 *San Giorgio* [1983] ECR 3595, para 14 (national law determines what procedural rules apply, subject to the principle of effectiveness that requires such rules not to make it virtually impossible or excessively difficult to exercise rights conferred by EU law); Case 14/83 *von Colson and Kamann* (n 32), para 26 (obligation to achieve the result of a directive is binding on all authorities of the Member States, including the courts); Case C-106/89 *Marleasing* (n 37), para 8 (national courts have to interpret national law, as far as possible, in the light of the wording and the purpose of the directive in order to achieve its intended result); Case 222/84 *Johnston* [1986] ECR 1651, at para 18 (the principle of effective judicial protection is a common principle of law among the constitutional traditions of the Member States); Case C-213/89 *Factortame I* [1990] ECR I-2433, para 19 (it is for the national courts, in application of the principle of cooperation laid down in Article 4(3) TEU, to ensure the legal protection which persons derive from directly effective provisions of EU law); Joined Case C-87/90 to 89/90 *Verholen* [1991] ECR I-3757, para 16 (EU law does not preclude a national court from examining of its own motion whether national rules are in conformity with directly effective provisions of a directive); Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, para 22 (EU law does not require national courts to raise of their own motion a breach of EU law, where this would require them to abandon the passive role assigned to them by going beyond the ambit of the dispute as defined by the parties and by relying on facts and circumstances which the parties have not put forth); Case C-302/05 *Unibet* [2007] ECR I-2271, para 38 (the principle of cooperation laid down in Article 4(3) TEU requires the Member States to ensure judicial protection of an individual's rights under Community law).

enforcement of the EU rules in case these come into conflict with the national implementing measures[42] or their practical application by the national administrative authorities falls foul of the objectives of the directive.[43] In addition, in situations where such court proceedings raise a question of interpretation of the directive, the national courts may have the obligation in certain cases to refer the matter to the Court of Justice for a preliminary ruling under Article 267 TFEU.[44]

This study will engage with the existing literature on EU compliance studies,[45] which has identified the limitations of relying on transposition to measure the dependent variable of implementation.[46] This becomes all the

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[42] Case 158/80 *Rewe (Butter-buying cruises)* (n 37), para 41 (conflicting provisions of national law may be legislative in nature); Case 106/77 *Simmenthal* (n 40), para 21 (national courts are obliged to give primacy to EU law in case these conflict with provisions of national law); Case 14/83 *von Colson and Kamann* (n 32), para 26 (national implementing measures must be interpreted by the national courts in the light of wording and purpose of the directive, even in the absence of direct effect); Case C-63/97 *BMW* (n 37), paras 22-23 (duty of consistent interpretation applies to national implementing measures, including transitional rules); Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519 (judgment of 5 September 2012), para 25 (where the provisions of a directive are not directly effective, an applicant is still entitled to judicial review of national measures taken in application of the directive to determine whether these have remained within the limits of the discretion set by that directive).

[43] Case 158/80 *Rewe (Butter-buying cruises)*, (n 37), para 41 (conflicting provisions of national law may be administrative in nature); Case 222/86 *Heylens* [1987] ECR 4097, para 14 (national law must provide a right to an effective judicial remedy against a national decision refusing free access to employment); Case C-224/97*Ciola*, (n 37), paras 30-34 (conflicting provisions of national law include not only general abstract rules but also specific individual administrative decisions); Case C-459/99 *MRAX* [2002] ECR I-6591, paras 101-103 (national law must provide right to an effective judicial remedy against a national decision refusing entry to an individual claiming to be the family member of an EU citizen); Case C-83/11 *Rahman* (n 41), para 25 (where the provisions of a directive are not directly effective, an applicant is entitled to judicial review of whether the application of the national measures taken in application of the directive have remained within the limits of the discretion set by that directive).

[44] See further, Chapter 5, Section 5.3.4 (Reference for a preliminary ruling).

[45] See Chapter 4 (Factors Affecting Non-Compliance).

[46] Esther Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 West European Politics, 50-67, 64, who has remarked that 'practical implementation requires more of the Commission's attention. When directives are 'only' transposed into national legislation, while

more apparent when it is considered that a core provision of the Free Movement Directive could be correctly transposed into national law, but might nonetheless be the subject of incorrect application by the national authorities[47] and proves excessively difficult to enforce before the national courts.[48]

In pursuing the first aim of examining implementation through its constitutive elements, this research aims to propose a framework for assessing the implementation of the Free Movement Directive which will allow for fuller consideration of all constitutive elements of implementation and which goes beyond transposition, so that it also addresses the Directive's application by the national administrative authorities and its enforcement by the national courts. In order to ensure that such a framework remains workable – so that it could potentially be extended to assess implementation of Directive 2004/38 by all Member States and perhaps even to serve as an inspiration for other directives – the proposed implementation framework will suggest indicators derived from existing publicly available information and internal documents obtained through freedom of information requests.

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they are not applied in practice, the usefulness of legislation becomes questionable'. See also, Tanja Börzel, 'Non-compliance in the European Union: pathology or statistical artefact?' (2001) 8 Journal of European Public Policy, 803–824, 804-806; Ellen Mastenbroek, 'EU Compliance: Still a "Black Hole"?' (2005) 12 Journal of European Public Policy, 1103-1120, 1104; Miriam Hartlapp and Gerda Falkner, 'Problems of Operationalization and Data in EU Compliance Research' (2009) 10 European Union Politics, 281-304, 284-296; Dimiter Toshkov, Moritz Knoll and Lisa Wewerka, 'Connecting the Dots: Case Studies and EU Implementation Research' (2010) Institute for European Integration Research Working Paper 10/2010, 5; Mariyana Angelova, Tanja Dannwolf and Thomas König, 'How Robust Are Compliance Findings? A Research Synthesis' (2012) 19 Journal of European Public Policy, 1269-1291, 1273; Treib (n 31) 17-20.

[47] See for example, Lenaerts, Maselis and Gutman (n 43) 165-166: 'while the applicable national legislation itself complies with Union law, it is the application of the relevant Union law rules by the national administrative (or other) authorities that constitutes the basis for the Member State's failure to fulfil obligations.'

[48] A practical example relates to the requirement that EU citizens who do not work must be in possession of 'comprehensive sickness insurance' in order to enjoy a right of residence under the Directive. As will be seen in Chapter 10 (Implementation of Directive 2004/38 Compared), such problems affect Italy and the UK, as well as France, Spain and Sweden for different reasons.

At the same time, the second objective of this study is to determine what policy choices were made by the Member States when they implemented the Directive[49] and investigate whether there may be any correlation between these policy choices and the extent to which the implementation by the national authorities comply with the EU rules.

In particular, this will involve consideration of the extent to which the choices made by Member States in exercising their discretion under Article 288(3) TFEU as to the form and method of application of the Directive by the administrative authorities and its enforcement by the national courts might account for the discrepancy between formal legal transposition – the incorporation of a directive on the statute books – and the situation on the ground – how the law is applied and enforced in practice. This study will proceed by comparing the implementation of the Directive in three Member States where transposition was above the EU average but against which the Commission nevertheless initiated infringement proceedings under Article 258 TFEU.

For example, it could be that when a Member State chooses to adopt transposition measures its officials do so by replicating the terms of the Free Movement Directive. One might expect that this policy choice is likely to increase the chances of overall compliance by that Member State when implementing the Directive. On the other hand, such a replicative approach to transposition might create problems further down the line for administrative authorities tasked with interpreting unfamiliar or unclear legal terminology.[50]

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[49] For a discussion in the environmental field, see Sonja Bugdahn, 'Of Europeanization and Domestication: The Implementation of the Enviromental Information Directive in Ireland, Great Britain and Germany' (2005) 12 Journal of European Public Policy, 177-199, 178-179: '[t]he implementation of EU policies is best conceptualized as a blend of domestic choices of options in a policy area, only some of which have been determined by the EU. Member states can make choices of non-prescribed or non-recommended policy options that limit, mediate or accompany the Europeanization of the policy area in various forms ('forms of domestication').'

[50] Prechal (n 28) 32-33.

As will be seen, the concepts of 'registered partnership' and 'durable relationship, duly attested' contained in the Directive have been transposed verbatim into national law by many Member States, but this has resulted in diverse national interpretations of these concepts within the EU.[51]

Likewise, a Member State may choose to endow its courts with the power to hear new evidence that might not have been presented to the administrative authorities, when ruling on appeals made against administrative decisions that deny or restrict rights under the Directive. We might infer that this policy choice might enhance the likelihood that a Member State's implementation will comply with the Directive. However, the introduction of such evidential flexibility in appeal proceedings does not necessarily guarantee that the courts will always judge cases in compliance with EU law because the underlying legal rules might be unclear or ambiguous and therefore subject to multiple interpretations by the judicial authorities, as the example of 'comprehensive sickness insurance' will show.[52]

It is anticipated that exploring these themes will enable useful comparisons to be made between Member States that could help to shed light on examples of best practices in the implementation of the Free Movement Directive. In this way, conclusions will be drawn that will encourage achievement of the underlying objective of the Directive 'to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members'.[53]

[51] See further Chapter 10 (Implementation of Directive 2004/38 Compared).

[52] See further Chapter 10 (Implementation of Directive 2004/38 Compared).

[53] Directive 2004/38, recital (14).

1.3 Terminology

Research on the implementation of directives concerns the analysis of how EU legislation is given effect by the Member States.[54] It has previously been observed that while 'the implementation process of a directive can … be divided into several stages, the major problem one encounters in this respect is that neither the EC institutions, including the Court of Justice, nor many scholars follow a coherent terminology'.[55] While some consider this lack of consistency in terminology immaterial,[56] others consider it a necessity to 'draw a sharp distinction between legal incorporation [i.e. transposition] and the later stages of the implementation process'.[57] Given that this study is intended to explore the various legal factors that might affect implementation outcomes, it will therefore be necessary to refer with precision to the relevant stages of the implementation process.

When a directive is adopted by the EU institutions, EU law requires the Member States to give this directive legal effect in its domestic legal order. The process by which this is achieved is termed 'implementation'. Overall, implementation comprises three interlinked stages: transposition, application and enforcement.[58] These different stages of implementation can be represented graphically as follows:

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[54] Ulf Sverdrup, 'Implementation and European Integration: A Review Essay' (ARENA Working Paper 25/2005) 3; Michael Zürn and Christian Joerges (eds), *Law and Governance in Postnational Europe* (Cambridge University Press 2007) 8; Treib (n 31) 1.

[55] Prechal (n 28) 6.

[56] ibid.

[57] Treib (n 31) 8.

[58] See Chapter 3 (The Implementation of EU Directives: Transposition, Application and Enforcement).

Implementation	= <u>Transposition</u> +	<u>Application</u> +	<u>Enforcement</u> (decentralised)
Member States' organ	*Executive/legislative*	*Executive/regulatory/ autonomous agency*	*Judiciary*

Table 1.3 Three stages of implementation

The term 'transposition' refers to the process by which a directive is incorporated into the national legal order. The Member States have a discretion in choosing the 'form and methods' with which they implement an EU directive, to ensure that implementation caters to the specificities of each country's legal system. As a result, the ways in which a Member State transposes a directive can take several forms. This could involve the enactment of a legislative act or, for example, the adoption of regulations under delegating legislation. Whatever the form chosen by a Member State, transposition generally refers to the process of enacting or adopting a legal instrument that incorporates an EU directive in the domestic legal system through legally-binding instruments. Such instruments are collectively referred to as 'national implementing measures'. These include legislative instruments, delegated legislation and regulations. They may also be complemented by administrative circulars issued to guide the authorities when they apply the national implementing measures.

Once the national implementing measures have been adopted by the Member States, these need to be applied and enforced. The term 'application' is used to refer to the administrative measures taken by the authorities of the Member states to give practical effect to the national implementing measures (and therefore also the EU directive in question). The measures will be taken in respect of the persons and situations falling within the scope of the EU directive concerned. Such administrative measures include individual decisions and other acts of the administrative authorities taken to ensure a directive is applied to persons and situations falling within its scope.

The term 'enforcement' refers to the processes by which observance of EU directives is monitored and secured, whether at the national level ('decentralised enforcement') or the EU level ('centralised enforcement'). The term 'decentralised enforcement' refers to proceedings before the national courts that ensure the Member State and individuals observe the terms of a directive. EU law requires that the application of EU directives by the administrative authorities of the Member States should be subject to scrutiny by the national courts. As a result, Member States must provide for a right of judicial review against measures taken in application of an EU directive by the Member States. Decentralised or internal enforcement therefore describes the processes by which the judicial authorities of a Member State ensure observance with an EU directive by adjudicating disputes concerning its application at the national level.

The terms 'centralised enforcement' or 'EU enforcement' refer to the process whereby the EU institutions secure the observance of EU directive by the Member States. The Commission has the power to monitor the implementation of EU directives by the Member States. In case problems are identified, it may have recourse to several non-judicial processes to ensure observance of directives by the Member States. If such processes are unsuccessful, the Commission may initiate legal proceedings before the EU Court of Justice in case Member States fail to comply with EU law.

The term 'compliance' is used here to refer to the outcome of implementation and relates to 'the extent to which rules are complied with by their addressees'.[59] When Member States implement a directive this may result in different outcomes that reflect the extent to which implementation by the Member States is consistent with the objectives laid down by the directive and EU law more generally. When implementation by the Member States complies with EU law, this is termed 'compliant implementation'. In situations where implementation does not comply with EU law, this is referred to as 'non-

[59] Zürn and Joerges (n 50) 8.

compliance' or 'non-compliant implementation'. This might result from problems in national transposition of an EU directive by the legislative or executive, problems in the application of the directive by the administrative authorities, or problems in the enforcement of an EU directive by the judicial authorities of a Member State.

1.4 Research Questions

This research aims to investigate the implementation of Directive 2004/38 on residence rights – the most important legislative instrument governing the free movement of persons within the European Union – by undertaking a comparative analysis of its implementation in Belgium, Italy and the UK.

The purpose is, firstly, to identify the constitutive elements of implementation and how these should be taken into account to assess the implementation of the Free Movement Directive and, secondly, to explore the existence of any correlation between, on the one hand, the policy choices that were made by the Member States as part of the implementation process, and on the other hand, how correctly the Directive has implemented by the Member States.

The research therefore contemplates two sets of questions. The first one aims to determine what factors relating to transposition, application and enforcement should be taken into account to determine the overall outcome of a Member State's performance in the implementation of Directive 2004/38.

The first set of questions relates to measuring implementation outcomes as a dependent variable.[60] This will involve an examination of the various stages involved in the implementation of directives, namely transposition, application and enforcement. The identification of these stages and the corresponding obligations that they generate for Member States will serve as the basis for uncovering the specific obligations that implementation of the Free Movement

[60] Treib (n 31) 18-20.

Directive entails. This will then be followed by the identification of suggested indicators that could be used to measure all aspects of implementation of the Directive.

The second set of questions involve an investigation of independent variables[61] of a legal nature that might allow for intervention that could improve implementation outcomes.[62] The research will explore what policy choices are open to the Member States when transposing, applying and enforcing the Directive and whether these affect implementation outcomes. This will then be followed by an investigation into the existence of any correlation between such legal policy choices that are made by a Member State and implementation outcomes. These research questions will be addressed through a detailed review of the state of implementation in the Member States under study, which will scrutinise the state of transposition, application and enforcement in Belgium, Italy and the UK. The treatment of certain key issues under the Directive in the three Member State will also be compared.

The study will close with an evaluation of the results and the formulation of recommendations relating to the implementation of the Directive by the Member States and its enforcement by the European Commission.

1.5 Research Methods

This dissertation aims to engage in qualitative research. The study will involve an examination of the legal frameworks governing the free movement of persons and their application by reference to legislation and other official documents. It aims to engage in empirical legal research and will therefore draw on data contained in official reports and public requests for information. In

[61] Treib (n 31) 20, 29.

[62] Dimiter Toshkov, 'The Quest for Relevance: Research on Compliance with EU Law' (2011) online paper <http://www.dimiter.eu/articles/Compliance%20review.pdf> accessed on 30 May 2015. Toshkov argues that 'even if scholars can increase the reliability and validity of their causal inferences about the determinants of compliance, the research will still remain of limited practical significance if the variables we study cannot be subject to intervention.', ibid, 16.

comparing the implementation of the Free Movement Directive in Belgium, Italy and the UK this study will also give due consideration to the scholarship on comparative law.

1.5.1 Using Comparative Law Methods

When comparing the implementation of EU directives across several Member States, it is appropriate to have regard to the methods advocated by scholars of comparative law.[63] Several comparatists would even argue it is essential.[64]

Infusing research on EU directives with the methods of comparative law is warranted because comparative legal research has contributed to the elaboration and evaluation of EU law.[65] It has also been specifically referred to

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[63] John Bell, 'Comparative Law' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2008), 183-184: 'Comparative law involves a process of drawing lessons from a confrontation of two or more legal systems. Comparison is a method which can serve a number of purposes. It can illuminate the researcher's understanding of their own legal system by highlighting features that are distinctive or those that are shared by many legal systems. It can be a way of approaching a new legal system, seeking to understand its distinctive features; and it is used as a method of law reform—examining how other systems tackle a problem within the home system.'

[64] Meinhard Hilf, 'Comparative Law and European Law' in Encyclopaedia of International Law (Rudolf Bernhardt, 1997) Volume 10, 45-49, 47: 'A comparative approach is essential for the effective implementation of Community law within the Member States and thus for a law which is felt to be a *jus commune* throughout the Community.' See also Peter De Cruz, Comparative Law in a Changing World (3d ed, 2008, Routledge-Cavendish), 182: 'The need to employ the comparative method, to be able to deal with different European systems of law, is becoming increasingly evident'.

[65] George Bermann 'Comparative Law in the New European Community' (1997-1998) 21 Hastings International and Comparative Law Review, 865-869. See also Rob van Gestel and Hans-W Micklitz, 'Comparative Law and EU Legislation' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing 2014) 301-317, 307-316: the authors observe that '[d]uring the early years of the European Community, comparative law was a rich source of inspiration for the harmonisation of the laws of the Member States. Comparative research was often undertaken to look for common ground in the laws of the Member States and to find general principles of European law to inform the legislature.' While comparative research is still undertaken today, the authors lament that 'the function of comparative law as a source of inspiration and evaluation has become less important, whereas its potential for justifying predetermined policy goals and plans for new legislation has grown', ibid, 316.

in the case law of the Court of Justice[66] and has influenced the way the Court adjudicates cases.[67] Moreover, doing so would heed the call of some comparatists for fuller integration of the study of EU law in comparative law.[68]

As in other disciplines, there are several methods advocated for undertaking comparative law research.[69] However, these various approaches can be combined in order to operationalise comparative legal research.[70]

In the first place, it is necessary to determine the parameters of the comparison. In the context of the implementation of the Free Movement Directive, this means comparing the national measures related to transposition,

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[66] Pierre Pescatore 'Le recours, dans la jurisprudence de la Cour de Justice des Communautés Européennes, à des normes déduites de la comparaison des droits des États Membres' (1980), Revue Internationale de Droit Comparé, 337-346; Lord Steyn, 'The Challenge of Comparative Law' (2006) 8 European Journal of Law Reform,

3-12, 4-5; Koen Lenaerts, 'Le Droit Comparé dans le Travail du Juge Communautaire' in François van der Mensbrugghe, *L'Utilisation de la Méthode Comparative en Droit Européen* (Presses Universitaires de Namur 2003), 111-168; Takis Tridimas, *General Principles of EC Law* (Oxford 1999), 15-16.

[67] Thijmen Koopmans, 'The Birth of European Law at the Crossroads of Legal Traditions' (1991) 39 American Journal of Comparative Law, 493-507.

[68] See for example, Mathias Reimann, 'Beyond National Systems: A Comparative Law for the International Age' (2000-2001) Tulane Law Review, 1103-1120, 1111; Mathias Reimann, 'Comparative Law and Neighbouring Disciplines' in Mauro Bussani and Ugo Matei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 21.

[69] See for example, Béatrice Jaluzot, 'Méthodologie du Droit Comparé: Bilan et prospective' (2005) 57 Revue Internationale de Droit Comparé, 29-48; Pier Giuseppe Monateri (ed), Methods of Comparative Law (Edward Elgar 2012).

[70] The methodology used here follows that suggested in Esin Örücü, 'Methodology of Comparative Law' in Jan Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2012), 560-576. Similar approaches are suggested by John Reitz, 'How to Do Comparative Law' (1998) 46 American Journal of Comparative Law 617-636; See further Gerhard Dannemann, 'Similiarities or Differences' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 383-419, 406-418; De Cruz (n 58) 240-247; Koen Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship' in Maurice Adams and Jacco Bomhoff, *Practice and Theory in Comparative Law* (Cambridge University Press 2014) 302-325; Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 13-40. See also, Esin Örücü, 'Methodological Aspects of Comparative Law' (2006) 8 European Journal of Law Reform, 29-42.

application and enforcement of the Directive. The purpose is to identify whether the policy choices made by the Member States in implementing the Directive affect overall implementation outcomes.

When engaging in micro-comparison relating to a specific legal problem,[71] the so-called 'functional method'[72] examines legal rules by reference to their function, namely by comparing the rules that address a given problem in the different countries concerned. A comparative study of the implementation of an EU directive therefore calls for identifying all legal rules that give effect to that directive.[73] In order for the assessment of implementation

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[71] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (translation Tony Wier, 3rd ed, Oxford University Press 1998), 4-5, explain that '[c]omparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is sometimes called *macrocomparison*. … *Microcomparison*, by contrast, has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests.' (emphasis in original); see also Dannemann (n 64) 387-388.

[72] Zweigert and Kötz (n 65) 34 state that '[t]he basic methodological principle of all comparative law is that of *functionality*. From this basic principle stems all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.' (emphasis in original). See further Ralf Michaels, 'The Functional Method of Comparative Law', in Reimann and Zimmermann (n 64) 339-382; Dannemann (n 64) 386-390; Antonios Emmanuel Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' (2008) 12(3) Electronic Journal of Comparative Law <http://www.ejcl.org/123/art123-3.pdf> accessed on 10 July 2015; James Gordley, 'The Functional Method' in Monateri (n 63) 107-119. For a brief discussion of the use of the functional method in Italy, see Pier Giuseppe Monateri, 'Critique et différence: le droit comparé en Italie' (1999) 51 Revue Internationale de Droit Comparé, 989-1002, 991-992. The functional method is considered the mainstream approach in traditional comparative law; see for example Annalise Riles, 'Wigmore's Treasure Box: Comparative Law in the Era of Information' (1999) 40 Harvard International Law Journal, 221-283, 231.

[73] Zweigert and Kötz (n 65) 35-36: 'The basic principle for the student of foreign legal systems is to avoid all limitations and restraints. This applies particularly to the question of 'sources of law'; the comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers there would treat as a source of law, and he must accord those sources the same relative weight and value as they do. He must attend, just as they do, to statutory and customary law, to case-

to be as comprehensive as possible, consideration must also be given to all potential instances of non-compliance that can be found in national law. In the specific context of the Free Movement Directive, this involves examining connected rights, such as the rights of EU citizens to access social assistance, or the rights of family members to work or study.

The 'formants approach' also gives consideration to the legal professionals who shape the law, which it views 'as a set of interlocked documents used by professionals according to their personal and institutional strategies '.[74] Accordingly, a comparison must include not only legislation and case law, but also 'soft law' instruments such as parliamentary reports, ministerial circulars or internal guidance, as well as academic and professional writings. It should also encompass reports by governmental and non-governmental organisations. This ensures that consideration is given to as many legal sources as possible in order to address all aspects of implementation in the national legal order.

A descriptive account of the different legal orders can then follow. At this stage, a first vertical comparison is made between the Directive and the national implementing measures to identify areas of divergence between the two sets of rules. This will cover transposition, application and enforcement by individual Member States.

The next step involves comparing implementation horizontally across Member States by identifying both similarities and differences[75] between the national implementing measures by reference to key concepts of the Directive.

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law and legal writing, to standard-form contracts and general conditions of business, to trade usage and custom. This is quite essential for the comparative method.'

[74] Dannemann (n 64) 306-307; Pier Giuseppe Monateri, 'Methods in Comparative Law: An Intellectual Overview' in Monateri (n 63) 7-24, 8.

[75] Dannemann (n 64) 396: 'The functional comparatist will find greatest satisfaction in unearthing similarities in results which are hidden deep inside a jungle of different styles, methods, procedures, and sources of law – just as critics of functionalism may derive the greatest pleasure from uncovering hidden differences where the law appears similar'. For a defence of the view that comparative law should analyse both convergence and divergence between laws, see Ruth Sefton-Green, 'Compare and Contrast: Monstre à deux têtes' (2002) 54 Revue Internationale de Droit Comparé, 85-95.

This comparison must be operated by reference to the national context in which implementing rules operate.[76] In addition to constitutional traditions, due consideration must also be given to the divergent functions of the Free Movement Directive and the national legal framework within which the national implementing rules are to be found, because they pursue different objectives, namely market integration and immigration control respectively.[77]

An explanation of the observed similarities or differences in implementation of the Directive can then follow. At this stage, certain hypotheses can be formulated[78] to explain how legal policy choices might affect implementation outcomes and whether certain policy choices could be considered as promoting better implementation outcomes.[79]

The confirmation stage involves verifying these hypotheses against available empirical evidence. This will be done by examining whether there is any correlation between various legal policy choices and implementation outcomes even if only on a probability basis.[80] The results can serve to confirm or refute these hypotheses. Based on these results, recommendations can then be formulated as to how implementation of the Free Movement Directive could be improved both at EU level and at national level.

It has been suggested that the EU has led to the development of 'multi-directional legal transplants' whereby, on the one hand, legal concepts of EU law are received into national law,[81] and on the other hand, Member States

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[76] Örücü (n 64) 569.

[77] Renaud Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) 42 American Journal of Comparative Law, 761-781, 769-780: regarding environmental policy, '[w]hereas the primary objective of national policies is to protect the environment, many Community measures are primarily inspired by another function concern, namely to avoid that differences between national policies which hamper intra-Community trade.'

[78] Örücü (n 64) 569.

[79] Siems (n 64) 297-301; Örücü (n 64) 569.

[80] Örücü (n 64) 570.

[81] Foxerramon Bengoetxea, 'A Case of Multidirectional Constitutional Transplant in the EU: Infra-state Law and Regionalism' in Sacha Prechal and Bert Van Roermund (eds), *The Coherence of EU Law*

influence each other in the shaping of their national laws.[82] For example, Member States may look to the experience of other countries to decide upon the ways in which to transpose a specific directive.[83] Moreover, following

(Oxford University Press 2008), 423-447,428-429: 'EC law neither clearly, nor openly, contains domestic transplants. It presents itself as an autonomous legal order – a law with its own language. What really came as a surprise was the opposite phenomenon – transplants moving from EC law to domestic legal systems. Indeed, it is surprising that it should be the newly created Community law and its concepts that should end up exerting an important influence on domestic laws, legal systems, and cultures. Such transplants are now part and parcel of the theoretical training in domestic law. These include direct effect, direct applicability, Member State liability for breaches of Community law (even domestic judicial liability for wrongful applications of EC law), provision of interim measures where rights might be in jeopardy, limits to procedural autonomy – like the duty to raise, ex officio, issues of EC law – institutional autonomy, equal pay for equal work, and competition law. They are not all regulated in the same way. Some of them have entered domestic legal orders through EC law. Some of these top-down influences might themselves be the result of the initial influence of a particular domestic law on EC law, which is then exported to other domestic systems. ... One such type of multidirectional transplant is regionalism. The regional transplant originates in domestic legal systems, or rather in some of the constitutions of the original Member States and those of the Member States that later joined the EC, as well
as in the constitutional evolution of some Member States, original or adhered'. On legal transplants more generally, see Michele Graziadei, 'The Comparative Law as the Study of Transplants and Receptions' in Reimann and Zimmermann (n 64) 441-475; Jörg Fedtke, 'Legal Transplants' in Smits (n 64) 550-554. On legal transplants in European law, see Alan Watson, 'Legal Transplants and European Private Law' (2000) 4(4) Electronic Journal of Comparative Law: <http://www.ejcl.org/44/art44-2.html> accessed on 10 July 2015.

[82] Ibid, 432: 'We have explained top-down dynamics where domestic legal orders and constitutional systems are influenced by constitutional developments at the EU level, or by recognitions of institutions or specificities of some but not all of the existing Member States. We have also explained side-to-side dynamics where developments of one particular EC or EU institution influence other institutions at the same level, or where institutions or specific institutional arrangements at the domestic level inspire those in a different Member State.'

[83] Jane Bates, 'The Conversion of EEC Legislation into UK Legislation' (1989) 10 Statute Law Review, 110-123, 122-123: 'A further factor which should be mentioned as an influence upon the draftsmen is the attitude taken by other Member States in implementing Community legislation. Where a draftsman is unsure of the best method of implementation of, for example, a permissive directive the approach taken by other Member States can often provide useful guidelines and in this case it can be a good reason for slowing down the implementation timetable in order to take a lead from another Member State. The approach taken by other Member States is particularly useful where implementation of a concept which is alien to our legal system is required. For example, when first implementing Community legislation

transposition, the existence of networks also provides another forum within which best practices in application and enforcement can be shared between the Member States.[84] Comparative legal research can therefore help to identify best practices in implementation and thereby offer alternative policies that can be the subject of intervention by the Member States.

1.5.2 Sources of information

This study will draw upon sources of information that are currently available in the public domain, supplemented by those obtained through public requests for information. These will include documents relating to the formulation and implementation of Directive 2004/38 that were adopted by the EU institutions, including internal documents relating to infringement procedures that have been released in the public domain. It will also review documentation published by the national authorities including legislation and other documents issued by government ministries and agencies tasked with the application of the Directive. In addition, where available, it will draw upon documents published by the national courts relating to the enforcement of the Free Movement Directive including case law and activity reports. The above information will also be supplemented by interviews with officials and practitioners.

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on Value Added Tax, the draftsman studied the French and German legislation for clues as to how best to carry out implementation in the United Kingdom.'

[84] Bengoetxea (n 75) 432: 'The top-down and side-to-side dynamics interact with other less institutionalized dynamics arising from sub-state or infra-state actors and from citizens and economic actors. Networks of regions sharing best practice in law and policy making are examples to the point and these are flourishing in different areas: employment, social policy, education, environment, transport, and urban planning. All these dynamics create a competing logic of change at all levels of governance.'

CHAPTER 2. THE SIGNIFICANCE OF DIRECTIVE 2004/38 AND THE CHOICE OF MEMBER STATES

Contents:

2.1 Free Movement of Persons as a Driver of European Integration – 28
2.2 Free Movement of Persons under Challenge – 44
2.3 The Choice of Member States – 50

Directive 2004/38[1] is an instrument of significant legal importance within the EU's legal order. It determines the conditions under which EU citizens can exercise their right of free movement within the EU, which today is still considered by the majority of EU citizens as the EU's most positive achievement.[2]. The first part of this Chapter examines how this right has been an early feature of the European integration process (section 2.1). However, the right of free movement has come under challenge as never before and there is some doubt whether the Directive will survive in its current form (section 2.2). It is against this background that an examination of the implementation of the Directive will be undertaken in three different Member States. The final part of this Chapter provides an explanation for electing to use Belgium, Italy and the UK for this case study (section 2.3).

2.1 Free Movement of Persons as a Driver of European Integration

Freedom of movement within a state's national territory is a core right of citizenship which democratic states tend to guarantee.[3] Historically, the control

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[1] 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 [2004] OJ L 158/77 (hereafter the Free Movement Directive, Directive 2004/38 and the Directive).

[2] See Commission, 'European Commission upholds free movement of people', Press release MEMO/13/1041, 25 November 2013 and other materials cited at n 95.

[3] Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III), art 13(1); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 21(1); see also Willem Maas, 'Equality and the Free Movement of People: Citizenship and Internal Migration' in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Nijhoff 2013) 9-30, 9.

of borders has been an intrinsic aspect of a state's territorial sovereignty,[4] which enables a state to prevent interference with 'the territorial integrity of the state'.[5] Seen from this perspective, the freedom of movement represents 'a substantial and important departure from international law'[6] where the obligation of States to admit non-nationals on the national territory is limited to humanitarian situations.[7]

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4 Mark Salter, 'Rights of passage. The Passport in International Relations' (Lynne Reiner 2003) 12-123 and 128-129.

5 Charter of the United Nations, 26 June 1945, 1 UNTS xvi, art 2(4); see further Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) 123-126.

6 Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and EU Migration Law* (Kluwer 2004) 86.

7 Universal Declaration of Human Rights, n 3, arts 13-14; Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, arts 31-33. See further Alice Edwards, 'Human Rights, Refugees, and The Right "To Enjoy" Asylum' (2005) 17 International Journal of Refugee Law 293-330, 302, who argues that '[t]he right to leave any country and the right to seek asylum are two sides of the same coin in the refugee context. Although Article 13(2) of the UDHR does not mention a right 'to enter any country', it would make a nonsense of the 1951 Convention if this was not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country's territory, such as its territorial seas or a waiting zone in an international airport.'

The free movement across borders is an original European construct.[8,9] It is a product of the European integration process[10] that emerged from a desire to prevent the possibility for renewed conflict on the continent following the end of the Second World War and which proposed economic integration[11] as the antidote[12] that would ensure that war would become 'not merely unthinkable, but materially impossible'.[13]

[8] Admittedly, the Agreement of the Common Nordic Labour Market, 22 May 1954, 199 UNTS 3, predates the EEC Treaty by three years, however this does not undermine the European origins of the right of free movement across borders. The EEC Treaty was followed a year later by the Treaty establishing the Benelux Economic Union, 3 February 1958, 381 UNTS 166. For an overview, see Sara Iglesias Sánchez, 'Free Movement of Persons and Regional International Organisations' in Richard Plender (ed), *Issues in International Migration Law* (Brill/Nijhoff 2015), 231-235.

[9] The EU rules on the free movement of people across borders have served as an inspiration for a number of other regional economic areas, such as the European Community of West African States and the Southern Common Market, Mercosur/Mercosul: see, for example, Kristina Touzenis, 'Free Movement of Persons in the European Union and Economic Community of West African States' (2012) UNESCO migration studies 4; Diego Acosta Arcarazo, 'Is Free Movement in Europe an Anomaly? The New Open Borders Policy in South America' (*EU Law Analysis*, 14 November 2014) <http://eulawanalysis.blogspot.be/2014/11/is-free-movement-in-europe-anomaly-new.html> accessed on 4 June 2015. For an overview of free movement rules in other regional blocs, see further Sánchez (n 8).

[10] For a summary of the competing theories of integration, see Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 9-35, 31-34.

[11] Bela Balassa, *The Theory of Economic Integration* (George Allen & Unwin, 1961 / Routledge 2011), 1-2, defined 'Economic integration ... can take several forms that represent varying degrees of integration. ... A higher form of integration is attained in a common market where not only trade restrictions but also restrictions on factor movements are abolished '; for a critical examination of this definition see Jacques Pelkmans, *Economic Integration: Methods and Economic Analysis* (Pearson Education, 2006) 2-9. See further Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* (5th ed, McGraw-Hill, 2015).

[12] Mette Eilstrup-Sangiovanni and Daniel Verdier, 'European Integration as a Solution to War' (2005) 11 European Journal of International Relations, 99–135, 104-111.

[13] Robert Schuman, Declaration of 9 May 1950.

The initial impulse for free movement in the EU was the signing of the European Coal and Steel Treaty[14] whose provisions[15] later inspired the free movement provisions found in the Treaty establishing the European Economic Community[16] between the Benelux states,[17] France, Germany and Italy. The EEC Treaty foresaw the formation of a common market in which factors of production – labour, capital and entrepreneurship[18,19] – would be free to move around the Community.[20] The four freedoms[21] did not initially provide for a

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[14] Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 UNTS 140 (hereafter the ECSC Treaty), which would pool coal and steel production under a common supervision by a supranational authority.

[15] Article 69 of the ECCSC Treaty provided for a right of free movement albeit limited to workers with qualifications in coal mining and steel-making; see further Willem Maas, 'The Genesis of European Rights' (2005) 43 Journal of Common Market Studies, 1009-1025, 1010; Friedl Weiss and Frank Wooldridge, *Free Movement of Persons within the European Community* (Kluwer 2007) 14.

[16] Treaty establishing the European Economic Community, 25 March 1957, 298 UNTS 11 (hereafter EEC Treaty or Rome Treaty)

[17] Belgium, the Netherlands and Luxembourg. While the UK's initial attempts to join were thwarted by Charles de Gaulle, the country eventually acceded in 1973 along with Denmark and Ireland in the first wave of enlargement. For a historical perspective, see Danny Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press 2001) 34-35.

[18] Richard Lipsey and Colin Harbury, *First Principles of Economics* (Weidenfeld and Nicolson 1988) 5-6.

[19] The fourth factor of production, land, is not covered by the freedom of movement because it is by its very nature immovable. However, it is affected by other Treaty rules including, among others, Article 18 TFEU which prohibits discrimination on grounds of nationality that would prevent a Member State from enacting rules that reserve ownership of land to its own nationals.

[20] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th ed, Oxford University Press 2014) 9.

[21] The free movement of goods (Articles 12-17 and 30-37 EEC, now Articles 30 and 34-37 TFEU), the free movement of workers (Article 48-51 EEC, now Article 45-48 TFEU), the freedom of establishment and the provision of services (Articles 52-58 and 59- EEC, now Articles 49-55 and 56-62 TFEU) and the free movement of capital (Articles 67-73 EEC, now Articles 63-66 TFEU). For a comprehensive overview of the four freedoms, see Barnard (2014), n 20; for a detailed examination of the development of the free movement of persons, see Sioffra O'Leary, *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship* (Kluwer 1996).

right of free movement for all citizens[22] and instead limited free movement to workers,[23] the self-employed,[24] providers of services[25] and their recipients.[26] Thus, free movement was originally conceived for the benefit of persons exercising some sort of economic activity.[27] Sometimes nicknamed *Homo economicus*,[28] these 'market citizens'[29] benefited from rights as economic actors rather than as political actors.[30]

This first phase in the evolution of the free movement of persons served to advance the objectives of economic integration pursued by the EEC Treaty.[31]

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[22] Barnard (2014), n 20, 229. However, it was not until the end of the transitional period in 1968 that secondary legislation was adopted to give effect to the free movement of these economically active citizens.

[23] Regulation (EEC) No 38/64 on freedom of movement for workers within the Community [1964] OJ 62/965 (not published in the OJ English special edition), replaced by Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community [1968] OJ English special edition, 475; Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ English special edition, 485. These were supplemented by Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ English special edition: Series I Chapter 1970 (II), 402.

[24] Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14; Council Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] OJ L14/10.

[25] ibid.

[26] In Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16, the Court of Justice held that the free provision of services implies the freedom for the recipient of services to travel to another Member State in order to receive services there, whether they be tourists, persons receiving medical treatment, or those travelling for business or educational purposes.

[27] Guild, n 6, 86.

[28] Patrick Dollat, *La Citoyenneté Européenne: Théorie et Statuts* (Bruylant 2008) 63.

[29] Michele Everson, 'The Legacy of the Market Citizen' in Shaw and More (eds) *New Legal Dynamics of European Union* (Clarendon Press 1995) 73-90; See further Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 Common Market Law Review 1597–1628.

[30] Maas, 15, 1020.

[31] Ferdinand Wollenschläger, 'Union Citizenship and its Dynamics for Integration Beyond the Market' (EUSA Eleventh Biennial International Conference, Los Angeles, 23-25 April 2009), 5-7

Free movement has therefore been considered as 'the bedrock upon which the entire construction of European rights has been built'.[32] Besides being a vehicle for economic integration,[33] free movement also encouraged social and cultural exchanges that engendered feelings of an 'incipient common European identity'.[34] Together with the Treaty prohibition on discrimination on grounds of nationality,[35] free movement provided the basis on which a 'nascent' European citizenship could be constructed.[36]

Following a period of political inactivity that hampered efforts[37] to fulfil Community objectives including the freedom to provide services,[38] the Single

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<http://www.unc.edu/euce/eusa2009/papers/wollenschl%C3%A4ger_05E.pdf> accessed 11 June 2015

32 Willem Maas, 'Migrants, states, and EU citizenship's unfulfilled promise' (2008) 12 Citizenship Studies, 583-596, 583.

33 See further Ettore Recchi, 'Cross-State Mobility in the EU: Trends, puzzles and consequences' (2008) 10 European Societies, 197-224, 213-216 who provides a useful analysis of the economic arguments in favour of the free movement of people and the empirical evidence that might support it.

34 Mass, n 32, 584. See also Claudia Aradau, Jef Huysmans and Vicki Squire, 'Acts of European Citizenship: A Political Sociology of Mobility' (2010) 48 Journal of Common Market Studies, 945–965, 947. For a view to the contrary, see Richard Bellamy 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 Citizenship Studies, 597-611, 598.

35 Article 18 TFEU.

36 Espen Olsen, 'The Origins of European Citizenship in the First Two Decades of European Integration' (2008) 15 Journal of European Public Policy 40-57.

37 It was during this time that the Commission issue its first proposal on the creation of European citizenship and its first proposal for a directive on the right of residence that extended beyond the 'market citizen': 'Towards European Citizenship', Report from the Commission to the Council, COM(75) 321 and Commission, Proposal for a Council Directive on a Rights of Residence for Nationals of Member States in the Territory of another Member State, COM(79) 215; see further Andrew Evans, 'European Citizenship'(1982) 45 Modern Law Review 497-515, 502, who notes that 'while the Treaty authors apparently approached free movement merely as a means of ensuring that national immigration barriers would not prevent Community nationals moving to those areas of the Community where they were most in demand, the Community institutions saw this freedom as a basis for European citizenship'. For an overview of developments on the concept of European citizenship prior to the adoption of the Maastricht Treaty, see Weiss and Wooldridge (n 15) 164-168; see also Robin White, *Workers, Establishment, and Services in the European Union* (Oxford University Press 2004) 121-122.

38 See for example, Commission, 'Completing the Internal Market - White Paper from the Commission to the Council' COM(85) 310, para 6. The White Paper identified the physical, technical and fiscal

European Act[39] sought to reinvigorate the EEC[40] and called for the progressive establishment of the internal market by 31 December 1992.[41] In the run-up to the launch of the single market, the EU institutions adopted a series of directives that extended free movement rights beyond 'market citizens' for the benefit of retired persons in receipt of a pension,[42] economically inactive persons[43] and students.[44]

Against this backdrop, the creation of EU citizenship by the Maastricht Treaty[45] and the general right of free movement which it engendered[46] was initially described as a 'catalogue of already existing rights'.[47] This meant that '[i]n practical terms and notwithstanding the direct effect of Article 8a of the EC

barriers which prevented the realisation of the common market. As regards barriers to the free movement of individuals, see paras 47-56 and 88-94.

[39] The Single European Act [1987] OJ L 169/1.

[40] Paul Craig (n 10) 18-20.

[41] Article 13 SEA, which introduced a new Article 8a into the EEC Treaty.

[42] Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28.

[43] Council Directive 90/364/EEC on the right of residence [1990] OJ L180/26.

[44] Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L180/32, which was struck down by the Court of Justice for having been adopted on an incorrect legal basis in Case C-295/90 *European Parliament v Council* [1992] ECR I-4193, para 20. The directive should have been adopted by the Council and the European Parliament under the cooperation procedure rather than the consultation procedure, ibid para 4. The directive was replaced by Council Directive 93/96/EEC on the right of residence for students [1993] OJ L317/59.

[45] Treaty on European Union [1992] OJ C 191/1 (hereafter the Maastricht Treaty). Article G(C) inserted new Articles 8 and 8a-8e into the Treaty Establishing the European Community (hereafter EC Treaty), ibid, 7.

[46] EC Treaty [1992] OJ C 224/6, Article 8a EC.

[47] Maarten Vink, 'Limits of European Citizenship: European Integration and Domestic Immigration Policies' (2003) Constitutionalism Webpapers No 4/2003 <https://www.wiso.uni-hamburg.de/fileadmin/sowi/politik/governance/ConWeb_Papers/conweb4-2003.pdf> accessed 6 June 2015. See also Robert Kovar and Denys Simon, 'La citoyenneté européenne' (1993) 29 Cahier de droit européen, 285-315, 287. Dimitry Kochenov and Richard Plender, 'EU Citizenship: from an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 European Law Review, 369-396, 372-373.

Treaty[48] nationals of the Member States enjoyed no greater migration rights on 1 November 1993 than they enjoyed the previous day'.[49] As a result, many scholars have dismissed the creation of the concept of Union citizenship by the Maastricht Treaty as 'unbalanced, incomplete and ambiguous',[50] a 'citizenship with little substance',[51] and branding it as a form of 'citizenship-lite'.[52,53]

Nonetheless, EU citizenship was intended to be 'a dynamic and evolving concept'.[54] As a result, others have observed that '[t]he importance of the TEU citizenship provisions lies not in their content but rather in the promise they hold out for the future. The concept is a dynamic one, capable of being added to or strengthened, but not diminished'.[55] The advent of Union Citizenship therefore marked a new phase in the evolution of the free movement of persons, which saw the Court of Justice play an active role in extending free movement

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48 Now Article 21 TFEU.

49 Stephen Hall, *Nationality, Migration Rights and Citizenship of the Union* (Nijhoff 1995) 8.

50 Claude Blumann, 'Citoyenneté européenne et champ d'application personnel du droit communautaire' (2003/2004) Revue des affaires européennes, 73-82, 78-79.

51 Willem Maas, 'Unrespected, Unequal, Hollow: Contingent Citizenship and Reversible Rights in the European Union' (2009) 15 Columbia Journal of European Law, 265-280, 277.

52 See for example, Richard Rose, *Representing Europeans: A Pragmatic Approach* (Oxford University Press,2013), 68-69. The term appears first to have been coined by Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (2010) EUI Working Paper RSCAS 2010/60, 1.

53 For references to other scholars who shared the view that EU citizenship was 'purely decorative and symbolic', see Dora Kostakopoulou, 'European Union Citizenship Writing the Future' (2007) 13 European Law Journal, 623-646, 647.

54 Spanish Delegation to the Intergovernmental Conference on Political Union, 'European Citizenship' 21 February 1991, containing annexed Memorandum 'Towards a European Citizenship', 24 September 1990, Council Document SN 3940/90, 2.

55 David O'Keeffe, 'Union Citizenship' in David O'Keeffe and Patrick Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law 1994) 87-108, 106; see also Hall (n 49) 10: '[t]he real importance of the Union Treaty in the area of migration rights, however lies in what it might presage.'

and equal treatment rights to non-economically active citizens.[56,57] The turning point came 'with the Court's judgment in *Martínez Sala*,[58] in which the application of Article 21 TFEU made a distinct legal difference'[59] which ushered in a new era of 'social citizenship'.[60,61]

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[56] It was the Court's ruling in Case C-85/96 *Martínez Sala* [1998] ECR I-2691 heralded the start of this new phase; see to that effect Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *European Public Law* 533-559; Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship' (2002) 27 European Law Review, 260-281.

[57] For a review of these developments, see for example, James D. Mather, 'The Court of Justice and the Union Citizen' (2005) 11 European Law Journal, 722-743; Matthew Elmore and Peter Starup, 'Union Citizenship – Background, Jurisprudence, and Perspective: the Past, Present, and Future of Law and Policy', (2007) 26 Yearbook of European Law, 57-113, 77-95; Peter Van Elsuwege and Dimitry Kochenov, 'On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law 443-466; Ferdinand Wollenschläger, 'The Judiciary, the Legislature and the Evolution of Union Citizenship' in Phil Syrpis (ed), *The Judiciary, The Legislature and the EU Internal Market*, (Cambridge University Press 2012) 302-330.

[58] Case C-85/96 (n 56).

[59] Niamh Nic Shuibnhe, 'The Third Age of EU citizenship' in Syrpis (n 57) 331-362.

[60] Jo Shaw, 'The Interpretation of European Union Citizenship', (1998) 61 Modern Law Review 293-337; Jo Shaw, 'Citizenship of the Union: Towards Post National Membership?' in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, vol VI(1) (Kluwer 1998) 237-347; see further Dollat (n 28) 365-420; Sandrine Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008); Tina Oršolić Dalessio, 'The Social Dimension of EU Citizenship – A Castle in the Air or Construction Gone Wrong?' (2013) German Law Journal, 869-888.

[61] However, for Maas and Plender (n 47) 371: 'the continuity of pre-Maastricht citizenship law was only broken … when *Rottmann* was decided and a new non-market rights-based paradigm of EU citizenship law emerged'; see further Dimitry Kochenov 'A real European Citizenship. A new jurisdiction test' (2011) 18 Columbia Journal of European Law, 55-109. Traditionally it has been the movement across a border that was seen as activating EU citizenship rights: Guild (n 6) 68-81; Bellamy (n 34) 598; Tiziana De Pasquale, 'Problemi interpretativi della nozione giuridica di cittadinanza: un concetto "europeizzato" di diritto pubblico interno? La controversa relazione tra cittadinanza dell'Unione europea e cittadinanze nazionali degli Stati Membri' (2012) 22 Rivista Italiana di Diritto Pubblico Comunitario, 445-479, 456-459; Claudia Aradau, Jef Huysmans, PG Macioti and Vicki Squire, 'Mobility Interrogating Free Movement: Roma Acts of European Citizenship' in Engin Isin and Michael Saward (eds), *Enacting European Citizenship* (Cambridge University Press 2013) 132-154, 133. However, recent developments in the case law of the Court of Justice suggest that in certain circumstances free movement is no longer a pre-condition for claiming the benefit of EU citizenship rights, see for example Case 135/08 *Rottman*

Despite some earlier setbacks,[62] EU citizenship also emboldened the Commission to challenge national administrative formalities that constituted barriers to the free movement of persons before the Court of Justice.[63]

The concept of EU citizenship has also acted as a catalyst for endowing Europe's citizens with additional rights of free movement through the adoption of Directive 2004/38, for example, by creating a new general right of permanent

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[2010] ECR I-1449 (Member States are under an obligation to ensure a decision to withdraw citizenship observes the principle of proportionality); Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177 (Member States may not refuse to grant a right of residence to the non-EU parents of EU children living in their home country where a refusal to do so would deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizenship). See further, Nathan Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5 European Journal of Legal Studies 8-31; Niamh Nic Shuibnhe, *The Coherence of EU Free Movement La*w, (Oxford University Press 2014) 130-156.

[62] Case C-321/87 *Commission v Belgium* [1989] ECR I-997 (Commission failed to prove systematic nature of Belgian border control measures).

[63] See for example, C-68/89 *Commission v Netherlands* [1991] ECR I-2637 (Member States cannot oblige nationals of other Member States to answer questions about the nature and duration of their stay as a condition for entry onto their territory); C-157/03 *Commission v Spain* [2005] ECR I-2911 (Member States cannot require family members of EU citizens to obtain a long-stay family reunification visa as a pre-condition to obtain a residence card; Member States must issue residence cards with six-month deadline imposed by directive); Case C-503/03 *Commission v Spain* [2006] ECR I-1097 (Member States cannot deny entry to the non-EU family member of an EU citizen or refuse to issue them a visa on the sole basis that the family member has an alert issued against them on the Schengen Information System without first verifying if the person represents a genuine, present and sufficiently serious threat to public policy or public order); C-408/03 *Commission v Belgium* [2006] ECR I-2647 (Member States cannot impose limitation on the origin of a student's resources and must accept a declaration from the student as sufficient proof of possessing such resources); C-398/06 *Commission v Netherlands* [2008] ECR I-56 (Member States cannot require non-economically active citizens to demonstrate they possess sufficient resources to cover their needs for a stay of at least a year's duration).

residence[64] without any integration conditions attached.[65] The adoption of the Free Movement Directive has therefore been heralded as marking a third phase in the evolution of free movement in the EU.[66]

Taken together, both legislative and judicial developments in respect of the free movement of persons could be characterised as a 'negative' form of European integration in that they have demanded compliance with EU law in a way which 'reduces the range of national policy choices and represents a fundamental loss of political control'.[67] The EU's action in this field limits the discretion of the Member States to control access of non-nationals to their territory and therefore creates tensions between EU free movement rules and national legislation seeking to regulate immigration.[68]

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[64] Directive 2004/38, arts 16-18. See for example, Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' [2011] 17 European Law Review, 1-34, 19, this represents 'a substantial innovation of the new residence directive'. Note that art 17 is based on the right of permanent residence that was granted to workers and the self employed under Regulation 1251/70 (n 23), art 3(2), and Directive 75/34 (n 24), art 3(2).

[65] Guild (n 6) 93: 'The right to remain completely un-acculturated or un-assimilated is so central to the process of EU citizenship that it becomes transformed into a discourse of strength in diversity'

[66] Nic Shuibnhe (n 59) 333.

[67] Maarten Vink, 'Negative and Positive Integration in European Immigration Policies', (2002) 6 European Integration Online Papers No 13, 2 <http://eiop.or.at/eiop/pdf/2002-013.pdf> accessed on 6 June 2015. Compare for example, Oliver Treib, 'Implementing and Complying with EU Governance Outputs', (2014) 9(1) Living Reviews in European Governance, 16 <http://www.europeangovernance-livingreviews.org/Articles/lreg-2014-1/> accessed on 2 June 2015, who considers that legislation generally belongs to the realm of positive integration 'where the EU defines certain policy goals or standards that
member states are required to implement'.

[68] Robin White 'Conflicting Competences: Free Movement Rules and Immigration Laws' (2004) 29 European Law Review, 385-396; Steve Peers, 'Free Movement, Immigration Control and constitutional conflict (2009) 5 European Constitutional Law Review, 173-196; Jo Shaw and Nina Miller, 'When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law' (2012) 38 European Law Review, 137-166.

Contrary to public perceptions,[69] the right of free movement is not unconditional.[70] Prior to attaining permanent residence, EU citizens who do not work are required to possess independent resources so as not to become an unreasonable burden on social assistance in their country of residence.[71] This has been considered as an example of how EU citizenship 're-affirms the linkage between belonging, rights and participation within the member states'[72] and how EU law provides sufficient protections against 'benefits tourism'.[73]

Since the entry into force of the Free Movement Directive that coincided with enlargement of the EU, it has become apparent that the Member States have been enforcing these conditions with much more vigour[74] by taking advantage of ambiguities in their national implementing measures[75] or

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[69] Simone Veil, 'Report by the High Level Panel on the free movement of persons', 18 March 1997, C4-0181/97, 89 concludes that 'in the minds of European citizens, free movement conjures up an idea which goes well beyond the rights actually conferred by the Treaty. For many people, it suggests a right to move to and live in the countries of the Union without having to comply with any particular formalities, which is not in fact the case.'; Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services', (Report for Commission, Ramboll 2011) 8, 10, 26-28 <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed on 26 May 2015, which gives further examples of this 'expectation gap' in which citizens' perceptions of what their EU rights should be does not match the existing EU legal framework.

[70] Bellamy (n 34) 598.

[71] Directive 2004/38, art 7(1)(b) and (c), art 14(2) and recital (10).

[72] Bellamy (n 34) 598.

[73] Francis Jacobs, 'Citizenship of the EU - A Legal Analysis' (2007) 13 European Law Journal, 591-610, 596.

[74] See for example, Sergio Carrera and Anaïs Faure Atger, 'Implementation of Directive 2004/38 in the context of EU Enlargement A proliferation of different forms of citizenship?' (2009) CEPS Special Report, 8-10: '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." ' For a further examination of the administrative practice of the Belgian, British and Italian authorities in this connection, see Chapters 7, 8, and 9 respectively.

[75] European Parliament, 'Report of the Committee on Civil Liberties, Justice and Home Affairs 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', (PE 418.397, European Parliament,

stretching the scope of permissible transitional restrictions affecting workers from the new Member States.[76] Spurred by the financial crisis,[77] popular resentment towards migrants[78] has engendered a rise in political hostility

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24 March 2009) (hereafter the Vălean Report), in which it is observed that 'the interpretation by Member States of "sufficient resources" under Article 7(1)(b) of Directive 2004/38/EC is often unclear, as most Member States require that evidence of sufficient resources be given; the notion of "unreasonable burden to the social assistance system of the host Member State" and if and in what cases the decision to expel a Union citizen who has become an unreasonable burden (Article 14, recital 10) is in many Member States uncertain as well.'

[76] Samantha Currie, '"Free" movers? The post-accession experience of accession-8 migrant workers in the UK' (2006) 31 European Law Review 207-229, 218-219: 'The United Kingdom has, however, in addition to the [Worker Registration Scheme] put in place restrictions which aim to counteract the alleged threat posed by "benefit tourists" from the A8. Indeed, the United Kingdom purports to be acting in accordance with the transitional arrangements; the explanatory note to the [Worker Registration Regulations states that: "The existing Member States can derogate from the Community free movement rights of workers during the transitional period. This suggests the transitional arrangements permit wide derogation from the free movement acquis when, in actual fact, the Member States can derogate only from the provisions of EU law that provide for access to employment for EU workers, and for the family members of such workers. Once access has been granted, an A8 migrant worker is in the same position as any other EU migrant worker and is entitled to a variety of social and family rights that attach to the status of worker under Community law and operate on the basis of equal treatment.'

[77] Espen Olsen, 'European Citizenship: Towards Renationalization or Cosmopolitan Europe?' in Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopoulo, *The Reconceptualization of European Union Citizenship* (Brill/Nijhoff 2014) 343-360, 351: 'The EU is currently undergoing an institutional and financial crisis which may well lead to increased conflict and contestation on basic principles of integration, such as those linked to free movement and citizenship.' See also Raúl Trujillo Herrera, 'Free Movement of Workers in Times of Crisis. Some Observations' in Silveira, Alessandra, Canotilho, Mariana and Madeira Froufe, Pedro (eds), *Citizenship and Solidarity in the European Union* (Peter Lang 2014) 117-124, 121: 'the Commission is aware of decisions taken here and there by different Member States in the light of the crisis, decisions susceptible to have negative effects on EU nationals willing to move to work in another Member State … or envisaging possible restrictions as regards access to social benefits … [which] can eventually be [the] subject of infringement procedures.'

[78] Thomas Turner and Christine Cross, 'Do Attitudes to Immigrants Change in Hard Times? Ireland in a European Context' (2015) 17 European Societies, 372-379: 'mean scores for those who believed that immigrants are bad for the economy increased in the 12 countries between 2002 and 2010. … Overall, negative attitudes to the impact of immigrants on the economy increased more strongly than positive attitudes between 2002 and 2010 across all 12 countries.' Their findings are based on results of the European Social Survey, a biennial multi-country survey covering over 20 nations. The 12 countries analysed were Belgium, Germany, Denmark, Spain, Finland, UK, Greece, Ireland, Netherlands, France,

towards the very idea of free movement[79] sometimes encouraged by unflattering media reports.[80] Indeed, the free movement of persons appears to have become

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Portugal and Sweden. See also, Dimiter Toshkov and Elitsa Kortensk, 'Does immigration undermine public support for integration in the European Union?' (2015) 53 Journal of Common Market Studies, 910-925, 922: 'immigration has indeed undermined public support for integration. In [Spain, France, Ireland and The Netherlands], aggregate support for the European constitution is negatively associated with the number of [Central and Eastern European] immigrants present in the region'. As regards the UK, see 'Immigration and Euroscepticism: the rising storm', ***The Guardian*** (London, 18 December 2015) <http://www.theguardian.com/news/datablog/2015/dec/18/immigration-euroscepticism-rising-storm-eu-referendum> accessed 18 December 2015.

[79] See previous section; see also 'Editorial Comments: Free Movement of Persons: Salvaging the Dream and Explaining the Nightmare (2014) 51 Common Market Law Review, 729-739, 730-731: 'It would have been difficult these last months to pick up a newspaper without reading of opposition to the free movement of persons. The United Kingdom Government has been vocal, for example, about the need to limit free movement within the European Union … In Germany, the debate has centred on the issue of access to social benefits, specifically the limits to such access for job-seekers and Union citizens who are economically inactive … In Belgium, a dramatic increase in the expulsion of Spanish nationals … has been justified with reference to the excessive burden they were imposing on the Belgian social security system. Switzerland has now voted in favour of the introduction of a cap to immigration from the European Union. The debate on free movement is thus not restricted to one Member State and cannot be explained glibly with reference to any one State's domestic, political scene or the power of its popular press.' See also Anthony Valcke, 'EU Free Movement Rules Come Under Challenge', Europe Update Issue 10, American Bar Association Section of International Law, November 2014, 15-17.

[80] William Allen and Scott Blinder, 'Migration in the News: Portrayals of Immigrants, Migrants, Asylum Seekers and Refugees in National British Newspapers, 2010 to 2012' (2013) Migration Observatory report, COMPAS, University of Oxford; Scott Blinder and William Allen, 'Constructing Immigrants: Portrayals of Migrant Groups in British National Newspapers, 2010–2012' (2016) 50 International Migration Review (forthcoming).

the key issue[81] in the UK's proposed referendum on continued membership of the EU.[82]

This anxiety has not gone unnoticed by the Judges in Luxembourg.[83] The recent rulings of the Court of Justice in *Dano*[84] and *Alimanovic*[85] would suggest a hardening of the Court's case law in respect of the free movement rights not only as regards economically inactive citizens[86] but also formerly employed workers.[87] These two judgments could be considered as the latest in a number

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[81] 'EU referendum: polling reveals freedom of movement most contentious issue', *The Guardian* (London, 9 October 2015) <http://www.theguardian.com/news/datablog/2015/oct/09/eu-referendum-polling-reveals-freedom-of-movement-most-contentious-issue> accessed 9 October 2015, which reports that '[n]early six in ten Britons believe freedom of movement should be restricted, and a further 14% think that there should be no free movement of people between different EU countries at all, according to the analysis. Only 16% of the British public believe freedom of movement should be kept in its current form or that there should no controls at all.'

[82] The European Union Referendum Act 2015 received Royal Assent on 17 December 2015. The question 'Should the United Kingdom remain a member of the European Union or leave the European Union?' will be put to a referendum at a date to be later specified.

[83] Steve Peers, 'Benefit Tourism by EU citizens: the CJEU just says No', (*EU Law Analysis*, 11 November 2014) <http://eulawanalysis.blogspot.be/2014/11/benefit-tourism-by-eu-citizens-cjeu.html> accessed on 15 June 2015; Géraldine Renaudière, 'Free movement and social benefits for economically inactive EU citizens: The Dano judgment in historical context', (*EU Law Analysis*, 12 November 2014) <http://eulawanalysis.blogspot.co.uk/2014/11/free-movement-and-social-benefits-for.html> accessed on 15 June 2015.

[84] Case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358 (judgment of 11 November 2014).

[85] C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597 (judgment of 15 September 2015).

[86] Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52, Common Market Law Review 17-50; Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 Common Market Law Review, 363-390.

[87] Steve Peers, 'EU citizens' access to benefits: the CJEU clarifies the position of former workers' (*EU Law Analysis*, 15 September 2015) <http://eulawanalysis.blogspot.co.uk/2015/09/eu-citizens-access-to-benefits-cjeu.html> accessed 21 December 2015; Sion Kramer, 'Had they only worked one month longer! An Analysis of the Alimanovic Case [2015] C-67/14' (*European Law*, 29 September 2015) <http://europeanlawblog.eu/?tag=c-6714-alimanovic> accessed 21 December 2015; Maria Haag, 'C-67/14 Alimanovic: the not so fundamental status of Union citizenship?' (*Durham European Law Institute law blog*, 29 September 2015) <https://delilawblog.wordpress.com/2015/09/29/maria-

of recent cases where the Court has been granting greater latitude to Member States to restrict the ability of EU citizens to enjoy equal treatment, thereby prolonging the shift in its case law that was first initiated in the context of frontier workers and students.[88] Could this judgment mark a fourth retrograde phase in the development of free movement in the EU?[89]

There is a real risk that Member States take advantage of these rulings to impose new restrictions on the free movement of citizens.[90] As one eminent scholar has warned:[91]

> 'No doubt, under the pressure of public opinion, popular press and Eurosceptics, some Member States will interpret and apply the possibilities offered by the wording of the judgment in *Dano* as broadly as possible. Such a broad interpretation does not only threatens to undermine the acquis of more than 50 years of social security coordination in the EU, but also threatens to throw us back to the era before the introduction of European citizenship by the Maastricht Treaty.'

haag-c%E2%80%916714-alimanovic-the-not-so-fundamental-status-of-union-citizenship/> accessed 21 December 2015.

[88] Síofra O'Leary, 'The curious case of frontier workers and study finance: Giersch' (2014) 51 Common Market Law Review, 601-622, commenting on Case C-20/12, *Giersch* [2013] ECLI:EU:C:2013:411 (judgment of 20 June 2013). See further, Alexander Hoogenboom, 'Mobility of Students and the Financial Sustainability of Higher Education Systems in the EU: A Union of Harmony or Irreconcilable Differences?' (2013) 9 Croatian Yearbook of European Law and Policy, 15-59; François Moyse, 'La Libre Circulation des Étudiants : Les Bourses d'Études' in Jean-Yves Carlier and Cédric Chenevière (eds), 'La Libre Circulation des Travailleurs et des Citoyens' (2013) CeDIE Working Papers 2013/7, 12-20.

[89] See to this effect, Eleanor Spaventa, 'Earned citizenship – understanding Union citizenship through its scope' in Dimitry Kochenov (ed) *EU Citizenship and Federalism: the Role of Rights* (Cambridge University Press 2015) (forthcoming): 'The reactionary phase – which we are witnessing at present – is characterised by an apparent retreat from the Court's original vision of citizenship in favour of a minimalist interpretation, which reaffirms the centrality of the national link of belonging, positing the responsibility for the most vulnerable individuals in society firmly with the state of origin.'

[90] See to this effect, Michael Blauberger and Susanne Schmidt, 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) 1 Research and Politics, 1-7.

[91] Verschueren (n 87) 388.

In light of the potential further degradation of the free movement rights of citizens,[92] it becomes all the more important that national implementation of Directive 2004/38 is effectively monitored so that appropriate remedial action can be taken by the EU institutions. It is in this vein that this study will explore whether a framework can be developed to capture implementation of the Directive in all its guises – be it transposition, application or enforcement.

2.2 Free Movement of Persons under Challenge

Directive 2004/38 on residence rights is the most important legislative instrument governing the free movement of people within the European Union. It seeks to give further expression to no less than six Treaty articles[93] that cover EU Citizenship, the free movement of persons and workers, the freedom of establishment and the provision of services, as well as the prohibition of discrimination on the grounds of nationality. It also gives substance to the fundamental right to free movement guaranteed by Article 45 of the EU Charter.[94] The Directive is without doubt one of the key legal instruments of the Single Market and goes to the heart of what is regarded as the most cherished right of EU citizens.[95]

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[92] Hansen (n 99).

[93] Namely Articles 18 TFEU (non-discrimination on grounds of nationality), 20 TFEU (Union citizenship), 21 TFEU (free movement of persons), 45 TFEU (free movement of workers), 49 TFEU (freedom of establishment) and 56 TFEU (free provision of services). For the sake of completeness, it should also be mentioned that Article 3(2) TEU provides that '[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'.

[94] Charter of Fundamental Rights of the European Union (as adapted by the Treaty of Lisbon) [2007] OJ C 303/1.

[95] Commission, 'European Commission upholds free movement of people', Press release MEMO/13/1041, 25 November 2013, citing Standard Eurobarometer 79, Spring 2013; Eurobarometer 83, Report on European Citizenship, Spring 2015, 4: 'For the first time since the Standard Eurobarometer survey of spring 2012 (EB77), "the free movement of people, goods and services within the EU" has returned to the top of the list of the EU's most positive results (57%, +2 percentage points since autumn 2014), ahead of "peace among Member States of the EU" (55%, -1) which was ranked in first place in autumn 2014.'

Yet recent events would suggest the Directive's integrity is far from assured. The legal framework of the Directive that governs the free movement of persons has come under challenge in the actions and pronouncements of senior governing officials in several Member States. In 2013, ministers in Austria, Germany, the Netherlands and the UK wrote to the Irish Presidency of the European Council on the matter of free movement of persons within the Union.[96] The tone of the letter appeared to call into question the very idea of the free movement of persons[97] and seemed to suggest the Directive's safeguards against 'benefits tourism' were insufficient.[98] However, in their letter, the

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Spring 2013: 'Freedom of movement is the most cherished right of EU citizenship: for 56% of European citizens, free movement is the most positive achievement of the European Union.'

[96] In April 2013, the Ministers of four EU Member States - the UK, Austria, Germany and the Netherlands - wrote to the Irish Presidency of the European Council on the matter of free movement of persons within the Union. The letter specifically criticised the existing legal framework of Directive 2004/38 as regards expulsions and re-entry bans. It also concerned the issue of "benefits tourism", namely the abuse of national welfare systems by EU citizens who move around the EU, and raised concerns of fraud, including marriages of convenience. The measures proposed by the quartet included curtailing the right of newly arrived migrants to claim benefits and introducing bans on re-entry for those found to be abusing or defrauding the system: <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 15 June 2015. The letter was subsequently followed by a personal call by David Cameron to impose further restrictions on the free movement of persons, see 'Free movement within Europe needs to be less free', *Financial Times* (London, 26 November 2013) <http://www.ft.com/intl/cms/s/0/add36222-56be-11e3-ab12-00144feabdc0.html> accessed 15 June 2015.

[97] Yves Pascouau, 'Strong attack against the freedom of movement of EU citizens: turning back the clock', European Policy Centre Commentary (30 April 2013): <http://www.epc.eu/documents/uploads/pub_3491_strong_attack_against_the_freedom_of_movement_of_eu_citizens.pdf> accessed 1 June 2015.

[98] Articles 24(2) and 14 of the EU's Directive on free movement already respectively provide for a ban on newly-arrived inactive migrants claiming social assistance in the first three months of their arrival and for as long as they might be looking for work and allows a Member State to expel inactive EU citizens who become an unreasonable burden on the host country's social assistance system.

quartet offered no concrete evidence to back up the claims of systemic abuse and fraud which would justify the specific measures that it advocated.[99]

This letter came amid troubling developments that have manifested themselves in recent years in connection with the free movement of persons. Since the Directive entered into force in 2006, Belgium,[100] Germany[101] and the UK[102] among others have all adopted questionable policies in respect of EU migrants seeking to access benefits.

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[99] For an overview of reactions by EU officials, see for example, Peo Hansen, 'Undermining Free Movement – Migration in an Age of Austerity' (*Eurozine*, 6 February 2015) <http://www.eurozine.com/articles/2015-02-06-hansenp-en.html> accessed 15 June 2015.

[100] The Belgian authorities are reported to have developed a database that tracks social security claims by EU citizens and this information is then used by the Belgian Immigraion Office to verify the residencerights of claimants on a systematic basis, see for example 'Libre circulation des citoyens européens: du mauvais usage par la Belgique de ses banques de données sociales', *La Libre Belgique* (Brussels, 5 February 2015).

[101] Germany has amended the rules that give effect to the Directive, namely the Act on Freedom of Movement/EU of 30 July 2004 (*Gesetz über die allgemeine Freizügigkeit von Unionsbürgern* (*Freizügigkeitsgesetz/EU - FreizügG/EU*) *vom 30. Juli 2004 (BGBl. I S. 1950, 1986*)), in order to allow for the expulsion and imposition of a re-entry ban on EU citizens and their family members who repeatedly pretend they meet the conditions for entry and residence in Germany. The Law Amending the Act on the Freedom of Movement/EU and Other Regulations of 2 December 2014 (*Gesetz zur Änderung des Freizügigkeitsgesetzes/EU und weiterer Vorschriften vom 2. Dezember 2014* (*BGBl. I S. 1922)*).

[102] The UK has tightened the rules on access to benefits by EU migrants by modifying the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003), which transpose the Directive in the UK. See for example Department for Work and Pensions, 'Improved benefit test for migrants launched', Press release, 13 December 2013 <www.gov.uk/government/news/improved-benefit-test-for-migrants-launched> accessed 22 December 2015; ibid, 'New rules have been introduced to restrict migrants' access to benefits', Touchbase Newsletter, January 2014, 4 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/270302/Touchbase_Jan14.pdf> accessed 22 December 2015; ibid, 'Minimum earnings threshold for EEA migrants introduced', Press release, 21 February 2014 <www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced> accessed 22 December 2015; ibid, 'EU jobseekers barred from claiming Universal Credit', Press release, 9 March 2015 <https://www.gov.uk/government/news/eu-jobseekers-barred-from-claiming-universal-credit> accessed 22 December 2015. The changes are contained in the

The expulsions of Roma from France[103] and Italy[104] has raised concerns about those countries' respect for the procedural safeguards that are intended to protect EU citizens under the Directive. In 2011, the Danish government made a short-lived attempt to reinstate border checks at its borders with the stated intention of addressing cross-border criminality and curbing benefits tourism.[105]

More recently, the combination of the unprecedented refugee crisis and the recent terrorist attacks in Paris have led to the re-introduction of border

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Immigration (European Economic Area) (Amendment) (No. 2) Regulations 201 (SI 2013/3032) and the Immigration (European Economic Area) (Amendment) Regulations 2014 (SI 2014/1451).

[103] See Commission Press Release, 'European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens', IP/10/1027, 29 September 2010; Sergio Carrera and Anaïs Faure Atger, 'L'Affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice' (2010) CEPS Papers in Liberty and Security in Europe, September 2010; Elspeth Guild and Sergio Carrera, 'Introduction' in Didier Bigo, Sergio Carrera and Elspeth Guild, *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Ashgate 2012) 1-20; Sergio Carrera, 'Shifting Responsibilities for EU Roma Citizens: The 2010 French Affair on Roma Evictions and Expulsions Continued' (2013) CEPS Papers in Liberty and Security in Europe No 55, June 2013; Jacqueline Gehring, 'Roma and the Limits of Free Movement in the European Union' in Maas (n 3) 143-174; Julia M. Markham-Cameron, 'The EU and the Rights of the Roma: How Could the EU have Changed the French Repatriation Program of 2010?' (Claremont-UC Undergraduate Research Conference on the European Union, 2013); Sergio Carrera, 'The Framing of the Roma as Abnormal EU Citizens' in Guild, Gortázar Rotaeche and Kostakopoulo (n 77) 33-63.

[104] See Bruno Nascimbene, 'Rom, rumeni e bulgari: una diversa applicazione delle norme dell'Unione europea sulla libera circolazione?' (2010) *Corriere giuridico*, 1545-1550; ibid, 'La disputa sui Rom e i diritti dei cittadini dell'UE' (2010) Istituto Affari Internazionali Documenti IAI 10-19; Kate Hepworth, 'Abject citizens: Italian "Nomad Emergencies" and the Deportability of Romanian Roma' (2012) 16 *Citizenship Studies*, 431-449; Aradau, Huysmans, Macioti and Squire, n 61.

[105] Agreement between the Danish People's Party and the Christian Democrats, '*Permanent toldkontrol i Danmark (styrket grænsekontrol)*' (Permanent customs control in Denmark (strengthened border control)): <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2011/permanent%20toldkontrol%20i%20danmark.pdf> accessed 14 December 2015; Commission Press Release, 'Statement by Cecilia Malmström, EU Commissioner for Home Affairs, on the announced permanent customs controls in Denmark', MEMO/11/296, 13 May 2011. See further Olsen (n 77) 348-352.

controls in several Member States.[106] Following calls from the Council,[107] the current Commission's proposal[108] to amend the Schengen Border Code[109] proposes to impose enhanced security checks against EU citizens entering and leaving the Schengen zone.[110] More worrying, are the reports that Member States are contemplating recourse to Article 26[111] of the Schengen Border Code

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[106] Commission, 'Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 23 et seq. of the Schengen Borders Code' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf> accessed 21 December 2015

[107] Conclusions of the Council of the EU and of the Member States meeting within the Council on Counter-Terrorism, Press release 848/15, 20 November 2015, which invited the Commission to "present a proposal for a targeted revision of the Schengen Borders Code to provide for systematic controls of EU nationals, including the verification of biometric information, against relevant databases at external borders of the Schengen area, making full use of technical solutions in order not to hamper the fluidity of movement".

[108] Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015) 670 final.

[109] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L 105/1.

[110] The proposal aims to amend Article 7 of the Schengen Borders Code by imposing enhanced security checks on EU citizens and their family members. This would require that, on entry to and exit from the Schengen zone, persons enjoying the right of free movement under EU law will be subject to checks on the Schengen Information System, the Interpol database and national databases on travel documents to verify their identity and nationality and the validity and authenticity of their travel document, as well as ensuring such persons are not considered to be a threat to public health or to the internal security, public policy or international relations of the Member States.

[111] Article 26(1) provides that:

> 'In exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control as referred to in Article 19a, and insofar as those circumstances constitute a serious threat to public policy or internal security within the area without internal border control or within parts thereof, border control at internal borders may be reintroduced in accordance with paragraph 2 of this Article for a period of up to six months. That period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.'

to reinstate internal border controls for up to two years throughout the EU.[112] While these proposals – if adopted – will not lead the Directive to be amended, such developments are likely to affect how EU citizens exercise their rights under the Directive and how Member States restrict their free movement in practice.

Furthermore, the British government's calls for further limitations to be placed on EU migrants' access to benefits as part of its strategy to renegotiate the terms of the UK's membership of the EU[113] in the run up to its proposed referendum[114] strikes at the very heart of the Directive, besides also requiring Treaty change.[115]

What has proved even more surprising is the reaction of Commission officials. Some Commissioners have made ambiguous statements about what the free movement of people should entail in practice.[116] For the first time in

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[112] Steve Peers, 'Leaked document reveals EU plans to suspend Schengen for two years' (*EU Law Analysis*, 2 December 2015) <http://eulawanalysis.blogspot.co.uk/2015/12/exclusive-leaked-document-reveals-eu.html>.

[113] Letter from David Cameron to Donald Tusk, 'A new settlement for the United Kingdom in a reformed European Union', 10 November 2015 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf> accessed 22 December 2015.

[114] See n 82.

[115] Steve Peers, 'Cameron's Chatham House speech: Full speed ahead for the renegotiation of the UK's EU membership?' (*EU Law Analysis*, 10 December 2015) <http://eulawanalysis.blogspot.it/2015/11/camerons-chatham-house-speech-full.html> accessed 22 December 2015; ibid, 'The nine labours of Cameron: Analysis of the plans to change EU free movement law' (*EU Law Analysis*, 28 November 2014) <http://eulawanalysis.blogspot.co.uk/2014/11/the-nine-labours-of-cameron-analysis-of.html> accessed 22 December 2015. For background, see for example, Jo Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 Cambridge Yearbook of European Legal Studies, 247-286, 277-284.

[116] In March 2015, Commission Vice-President Timmermans declared that 'access to the labour market does not mean automatic access to social security systems. We will need to work with that with a number of Member states in the years to come': Commission Press Release, 'Transcript of Speech of First Vice-President Timmermans to Policy Network, London: A Fresh Start', Speech 15-4571, 6 March 2015. Such a statement is difficult to reconcile with Article 7 of Regulation (EU) No 492/2011 of the European

history, we are hearing calls at the highest levels in several EU countries for a rethink of one of the cornerstones of the EU's Single Market.[117] Against this background, an examination of the Directive is therefore both timely and topical.

2.3 The Choice of Member States

The research has been limited to a comparison of three Member States in order to allow for a comprehensive analysis of legislation, case law and statistical information whenever available.

In making the choice of the three jurisdictions to compare, consideration was first given to Member States with significant absolute numbers of resident EU citizens, as this would help to ensure that the national administrative authorities have had significant experience in the application of the Directive and increase the likelihood that a substantial body of national case law exists.

France, Italy, Germany, Spain and the United Kingdom have the largest absolute numbers of EU citizens residing on their territory and broadly

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Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1, which guarantees migrant workers access to all social and tax advantages enjoyed by national workers, or even with the Court's case law, see for example, Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, para 32. A month later, the Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, asserted that 'we need to ensure that the rules reflect the changes in the economy and society and, as I said before, that they are seen as being fair by citizens and political leaders': Commission Press Release, 'Intervention of Commissioner Marianne Thyssen at 3rd Labour Mobility Congress', Speech 15-4841 (23 April 2015). This appears to be echoing calls made by politicians in the UK for 'fair movement not free movement'; see for instance 'Nick Clegg to call for tighter controls on immigration from new EU states', *The Guardian*, 4 August 2014 <http://www.theguardian.com/uk-news/2014/aug/04/nick-clegg-tighter-controls-immigration-new-eu-states> accessed 9 October 2015.

[117] For a discussion of the political controversies generated by the EU free movement rules, see for example Christina Boswell and Andrew Geddes, *Migration and Mobility in the European Union* (Palgrave Macmillan, 2010), 190-195. See also Kees Groenendijk, 'Forty Years of Free Movement of Workers: Has it been a Success and Why?' in Paul Minderhoud and Nicos Trimikliniotis (eds) *Rethinking the Free Movement of Workers: The European Challenges Ahead* (Wolf Legal Publishers, 2009), 11-23.

comparable levels of EU residents as a proportion of the total population.[118] The limited linguistic abilities of the author prevented consideration being given to Germany or Spain, because it was felt important to be able to review the source material without relying on translations.[119]

It was also considered appropriate to identify Member States which have resulted in similar transposition outcomes. In transposing the Free Movement Directive into national law, the national implementing measures adopted by Italy and the UK have achieved an average outcome in comparison with the other Member States.[120] France was below average in terms of transposition outcomes but, unlike Italy and the UK, its implementation has not been called into question by the Commission opening formal infringement procedures.[121] It was therefore felt that it would not be appropriate to select France because it

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[118] Eurostat, Migration and migrant population statistics <http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics> accessed on 9 May 2015. In 2014, France, Germany, Italy, Spain and the UK had a resident EU population of 2.2%, 3.8%, 2.4%, 4.3% and 4.1% respectively as a proportion of the total population. These correspond to 1.5m EU citizens living in France, 3.1m in Germany, 1.4m in Italy, 2m in Spain and 2.6m in the UK.

[119] Roberto Scarciglia, *Introduzione al Diritto Pubblico Comparato* (Il Mulino, 2006), 79: 'Per comparare è importante conoscere la lingua'; Vivian Grosswald Curran, 'Comparative Law and Language' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 675-707, 680: 'for comparatists, knowing the languages of legal systems they study signifies access to all that the legal texts imply and connote, but do not state, to their infinity of links to the contexts that spawned them and that they also affect'. On the pitfalls of translation in comparative law, see Barbara Pozzo, 'Comparative Law and Language' in Mauro Bussani and Ugo Matei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012) 88-113. Some scholars appear to advocate more forcefully against the use of translation; see for example, Susan Millns, 'European Comparative Legal Studies in Public Law' in Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law* (Hart Publishing 2014) 283-300, 296: 'translation, particularly if carried out literally, will result in a poor understanding of complex legal phenomena which are known only to individuals systems.'

[120] Commission, '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 final (hereafter 2008 Implementation Report), Annex.

[121] Ibid.

would be more difficult to obtain official information about the Commission's enforcement efforts against France compared to the other two countries who faced such formal infringement procedures. The other Member States with comparable transposition outcomes to Italy and the UK include Belgium and Ireland[122] whose source materials fall within the author's linguistic capabilities.

Belgium was ultimately chosen as the third Member State because it achieved a transposition outcome that was broadly similar to the British and Italian outcomes. It also has significant numbers of EU citizens living in the country[123] and it presented many similarities with France in terms of the policy choices made in the implementation of the Directive.[124] Ireland, on the other hand, has faced no formal infringement action for incorrect transposition and its EU population is relatively small by comparison.[125]

Despite the average levels of transposition in Belgium, Italy and the UK, the Commission opened infringement procedures against all three Member States,[126] although the case against Italy was subsequently closed following amendments made to its national implementing measures that transpose the

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[122] The other Member States whose transposition at the EU average include the Czech Republic, Germany, Lithuania, the Netherlands and Romania, see 2008 Implementation Report (n 120), Annex.

[123] Eurostat, Migration and migrant population statistics (n 118). Belgium had a resident EU population of 824,000 in 2014, or 7.4% of the total population.

[124] France, like Belgium, enacted legislation to amend the country's unitary law on immigration. The countries also shared similarities in their administrative application of the rules on residence. While judicial enforcement in France is entrusted to the administrative courts with two degrees of appeal, redress against administrative decisions in Belgium lies before a specialised tribunal with a single degree of appeal. However, both countries operate limited judicial review which does not allow the courts to remake administrative decisions.

[125] Eurostat, Migration and migrant population statistics (n 118). Ireland had 373,000 EU citizens residing in the country in 2014, which corresponds to 8.1% of the total population.

[126] Information from Commission dated 28 April 2015 (GestDem 2015/1535); see also 'Free movement: Determined Commission action has helped resolve 90% of open free movement cases', Press release IP/11/981 (25 August 2011); 'Free movement: Commission asks the UK to uphold EU citizens' rights' Press release IP/12/417 (26 April 2012); 'February infringements package: main decisions (Free movement: Commission asks Belgium to comply with EU rules), Press release MEMO/13/122 (21 February 2013).

Directive into the Italian legal system.[127] These three Member States therefore present comparable outcomes in transposition.

Finally, it was also deemed necessary to ensure that the chosen Member States had availed themselves of a broad range of policy options in order to implement the Directive. Italy and the UK have adopted a similar approach to transposition, by opting for 'bolt-on' legislation that is distinct from the main immigration legislation, using legislative powers delegated to the executive branch of government. On the contrary, Belgium has chosen to transpose the Directive through the parliamentary enactment of consolidating legislation that amends the unitary law governing the entry and residence of non-nationals on Belgian territory. In addition, the Member States differ in the degree to which they have made use of terminology that replicates the wording of the Directive.

In terms of application, Belgium and Italy have opted for decentralised models of application owing to their constitutional traditions, with the application of the rules shared between the municipalities and centralised agencies to varying degrees. Conversely, the UK has chosen to appoint a centralised administrative authority that applies the national transposition measures due to its unitary tradition.

Finally, judicial enforcement is entrusted to specialised courts in Belgium and the UK, while in Italy it is the ordinary courts that have been given this competence. In addition, Italy and the UK have made the further policy choice of giving their courts full powers of judicial review that include the ability to remake decisions taken by the administrative authorities in application of the national transposition measures. The opposite is true of the Belgian immigration appeals council, which has only been endowed with a limited

[127] 2013 Citizenship Report (II), para 2.3.1. The infringement proceedings against Italy were closed on 10 December 2013, following commitments made to amend the Italian implementing law, Legislative Decree No 30/2007 of 6 February 2006 (*Decreto Legislativo del 6 febbraio 2007, n 30 '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' (GURI n 72 del 27-03-2007)*); see further Information from Commission dated 3 August 2015 (GestDem 2015/2901).

mandate to control the legality of the decisions of the administrative authorities. The countries also differ in the extent to which legal aid is provided to EU citizens and their family members in free movement cases. Legal aid is available at all levels in Belgium and Italy, but free legal representation is conditional upon meeting an income test that is set some way below the average net monthly wage in both countries.[128] Since April 2013 when the Legal Aid and Punishment and Sentencing of Offenders Act came into force,[129] legal aid is generally no longer available for legal representation before the UK's First-Tier Tribunal in free movement cases, save in exceptional circumstances.[130] This study will seek to examine if such differences in enforcement networks have an impact on implementation outcomes.

The three Member States have therefore made policy choices in implementing Directive 2004/38 that provide a compelling basis for comparison.

On a final note it should also be pointed out that each Member State attaches a different degree of importance to the issue of the free movement of persons. In Italy, the issue is of relatively low importance,[131] but overall the issue of immigration has high saliency. This is due to Italy having to bear the burden of the constant arrival of significant numbers of persons seeking refuge in Italy or in EU countries further afield for all sorts of reasons. In Belgium, the free movement of persons is of medium importance[132] because it is associated with a wider political aim of achieving budgetary discipline and control over the country's expenditures at all levels of government. In the UK, on the other hand, the issue has high salience[133] because it is associated with major public discontent about immigration in general and a government motivated by the

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[128] See Chapter 10 (Implementation of Directive 2004/38 Compared).

[129] 'LASPO goes on the statute book', *The Law Society Gazette* (London, 1 May 2012).

[130] See Chapter 9 (Implementation in the UK).

[131] See Chapter 7 (Implementation in Belgium).

[132] See Chapter 8 (Implementation in Italy).

[133] See Chapter 9 (Implementation in the UK).

political desire to assert complete control over all forms of immigration to the UK. The level of salience which attaches to the free movement of persons therefore differs in each Member State.

CHAPTER 3. THE IMPLEMENTATION OF EU DIRECTIVES: TRANSPOSITION, APPLICATION AND ENFORCEMENT

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Directives are one of the main instruments for enacting EU policies under Article 288 TFEU, the other being regulations and decisions. Unlike regulations, which are directly applicable,[1] directives lay down certain objectives that Member States must then achieve through their implementation into the national legal order.[2]

The adoption of a directive imposes certain general obligations on the Member States, which will first be examined (section 3.1). Although Article 288(3) TFEU leaves a discretion to the Member States as to the 'methods and form' of implementation, the Court of Justice's case law has imposed significant limitations on the exercise of that discretion.

These obligations and limitations will then be examined in the specific context of the three stages of implementation. The implementation of a directive entails obligations that apply in respect of directives as regards the form of transposition (section 3.2), as well as specific obligations relating to the

[1] Article 288(2) TFEU: 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.' On the difference between regulations and directives, see for example, Francesco Capotorti, 'Legal Problems of Directives, Regulations and their Implementation' in Heinrich Siedentopf and Jacques Ziller (eds), *Making European Policies Work, Volume 1: Comparative Syntheses* (Sage 1988) 151-168.

[2] Article 288(3) TFEU: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' See further Jos Kapteyn and Pieter VerLoren van Themaat, *Introduction to the Law of the Communities*, (3d edition, Laurence Gormely (ed), Kluwer Law International, 1998), 326-331;

methods of transposition that depend upon the content of the directive (section 3.3). These obligations also have an incidence on the drafting of national implementing measures (section 3.4). Specific obligations also arise in the context of the application of a directive by the national administrative authorities (section 3.5) and their enforcement by the national courts (section 3.6).

3.1 General Obligations to Implement Directives

Directives are one of the legislative instruments that are available to the EU institutions to exercise their competences under the Treaties.[3] They consist in 'a form of indirect regulatory or legislative measure'.[4]

Under the ordinary legislative procedure,[5] which applies to most EU legislation relating to the free movement of persons,[6] the Commission has the sole power to make a proposal for a directive, which the Council and European Parliament are then empowered to adopt jointly.[7] Directives require a simple majority in the European Parliament and a qualified majority in the Council.[8] Once a directive has been adopted, the Member States are under an obligation

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[3] Article 289 TFEU.

[4] Case C-298/89 *Government of Gibraltar v Council* [2003] ECR I-3605, para 16.

[5] The former co-decision procedure under Article 251 EC was renamed by the Lisbon Treaty as the 'ordinary legislative procedure' under Article 294 TFEU.

[6] See for example, Article 18 TFEU (prohibition of discrimination on grounds of nationality), Article 21(2) TFEU (free movement of persons), Article 46 (free movement of workers), Article 50(1) (freedom of establishment), Article 53 (recognition of professional qualifications) and Article 59 (freedom to provide services). Note that Article 48 contains special rules in connection with legislative instruments adopted in the field of social security.

[7] Article 289 TFEU.

[8] Article 289(1) TFEU: '[t]he ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission'; Article 231 TFEU: 'the European Parliament shall act by a majority of the votes cast'; Article 16(3) TEU: '[t]he Council shall act by a qualified majority except where the Treaties provide otherwise.'

to give it effect in their national legal order within the timeframe specified by the directive concerned.

The obligation on Member States to implement EU directives is contained in the third paragraph of Article 288 TFEU:

> 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

Furthermore, Article 4(3) TEU[9] also requires Member States to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions' and to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. This is also given further expression by Article 291(1) TFEU, which provides that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.' In order to take all appropriate measures to implement a directive, the national authorities must insure that they do so in a way that complies with other provisions of the Treaties,[10] fundamental rights[11] and general principles of EU law.[12]

[9] Formerly, Article 10 EC, which provided that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

[10] See to that effect, Case C-410/96 *Ambry* [1998] ECR I-7875, para 30.

[11] Case C-20/00 *Booker Acquaculture* [2003] ECR I-7411, para 88.

[12] Case C-2/97 *Società Italiana Petroli* [1998] ECR I-8597, para 48.

Article 288(3) TFEU lays down an 'obligation of result',[13] which is binding on all the authorities of the Member States.[14] The obligation to implement a directive applies to the national courts[15] and administrative authorities[16] – including decentralised authorities[17] – as well as the legislature[18] and the executive acting in its decision-making capacity.[19]

In order to achieve the result prescribed by a directive, the Member States retain a discretion and they can choose 'form and methods'[20] or the 'ways and means'[21] which are used to give effect to a directive. This is considered to be a reflection of the principle of subsidiarity.[22] The Member States therefore enjoy

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[13] Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union* (Robert Bray (ed), Sweet and Maxwell 1999) 574; Sacha Prechal, *Directives in EC Law* (2nd edition, Oxford University Press 2005) 31.

[14] On the addressees of directives, see Prechal (n 13) 57. See also Richard Brent*, Directives: Rights and Remedies in English and Community Law* (Informa Law / Routledge 2001) 98.

[15] Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26. See further case law cited at n 260.

[16] Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, para 33.

[17] Case 103/88 *Fratelli Costanzo* (n 16), para 31; Case C-8/88 *Commission v Germany* [1990] ECR I-2321, para 13; Case C-438/99 *Melgar* [2001] ECR I-6915, para 32.

[18] This is clear from infringement cases under Article 258 TFEU in which Member States have been found liable for a failure to comply with Treaty obligations due to the delay by the legislative organ of the state to transpose a directive; see for example Case C- 77/69 *Commission v Belgium* [1970] ECR 243, paras 13-15 (delay due to dissolution of parliament); Case 8/70 *Commission v Italy* [1970] ECR 961, paras 8-9 (delay attributed to chamber of deputies).

[19] See to that effect, Case C-339/87 *Commission v Netherlands* [1990] ECR I-851, paras 7-8. See also the Opinion of AG Cruz Vilaça in Case 412/85 *Commission v Germany* [1987] ECR 3503, para 19.

[20] Article 288(3) TFEU.

[21] The expression is used by the Court of Justice in Case 14/83 *von Colson and Kamann* (n 15), para 15.

[22] Commission, 'The Principle of Subsidiarity. Communication of the Commission to the Council and European Parliament' SEC (92) 1990 final, 15: 'the Treaty of Rome devised an original instrument which typifies subsidiarity: the directive sets the result to be achieved but leaves it to the Member states to choose the most appropriate means of doing so.'; Protocol (No 30) on the application of the principles of subsidiarity and proportionality (as annexed to the Treaty Establishing the European Community by the Treaty of Amsterdam) [1997] OJ C 340/105, Article 6: 'The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures.' See also, Lenaerts and Van Nuffel (n 13) 573; Prechal (n 13) 5; Maartje

a discretion as to the 'form' of implementation – namely which organs of the state bears responsibility for implementation and which kind of national legal instrument is used to give effect to a directive in their national legal system[23] – and the 'methods' of implementation – that is to say the content of the national implementing measures.[24] This discretion is sometimes referred to as the principle of national institutional autonomy.[25] Nonetheless, the Member States do not enjoy absolute discretion in this respect and the Court of Justice has placed limitations on the autonomy of the Member States.

Firstly, it is implicit in Article 288(3) TFEU that the Member States have a discretion to determine which organs of the State will be tasked with implementation as they see fit. In line with their respective constitutional traditions,[26] the Member States have the freedom to decide on which authority – national, federal, regional, or local – is competent to transpose a directive and adopt national implementing measures.[27] This discretion also extends to deciding which administrative authority will be responsible for the application

Verhoeven, 'The "Costanzo Obligation" and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?' (2010) 3 Review of European Administrative Law, 23-64, 26.

[23] Capotorti (n 1) 154.

[24] ibid.

[25] Prechal (n 13) 62; Verhoeven (n 22) 24; Maartje Verhoeven, *The Costanzo Obligation* (Intersentia 2011) 43-49.

[26] Article 4(2) TEU specifically recognises that 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' See further Capotorti (n 1) 162; Verhoeven (n 22) 28.

[27] Joined Case 51 to 54/71 *International Fruit Company* [1971] ECR 1107, para 4; Case 96/81 *Commission v Netherlands* [1982] ECR 1791, para 12; Case 97/81 *Commission v Netherlands* [1982] ECR 1819, para 12; Joined Cases C-227 to 230/85 *Commission v Belgium* [1988] ECR 1, para 9; Case C-156/91 *Hansa Fleisch* [1992] ECR I-5567, para 23; C-435/92 *Association pour la protection des animaux sauvages* [1994] ECR I-67, para 26. However, the Court has consistently held that a Member State remains under an obligation to implement a directive no matter to which organ of the State it has delegated the responsibility to implement a directive; see, for example, Case 52/75 *Commission v Italy* [1976] ECR 278, para 14; Case 96/81 *Commission v Netherlands*, cited above, para 12; Joined Cases C-227 to 230/85 *Commission v Belgium*, cited above, para 9; Case C-157/89 *Commission v Italy* [1991] ECR I-57, para 17.

of the national implementing measures[28] and which judicial authority will be entrusted with their enforcement in accordance with the principle of procedural autonomy.[29] Although the Member States are free to decide on which organs of the state will be tasked with the various aspects of implementation of a directive, this internal allocation of powers must not prevent the directive in question from being correctly implemented.[30]

Secondly, the Member States are also required to choose the most appropriate form and method of implementation to ensure the directive can function effectively within the national legal systems. The Court has held that Member States must adopt all necessary measures within the framework of their national legal systems in order to ensure that the directive is fully effective in accordance with the objective it pursues.[31] Such an obligation results from

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[28] See, to that effect, Case 240/78 *Atalanta* [1979] 2137, para 5 (in the absence of any specific provisions to the contrary, Member States have the power to designate the institutions that are responsible for the application of regulations relating to the common organisation of agricultural products). See also Case C-33/90 *Commission v Italy* [1991] ECR I-5987 (failure by the regional authorities to implement various directives on waste by not communicating information on the treatment of waste); Case C-274/98 *Commission v Spain* [2000] ECR I-2823 (failure by autonomous regions to implement a directive on the protection of water against pollution by nitrates by not establishing action programmes); Case C-417/99 *Commission v Spain* [2001] ECR I-6015 (failure by the State to implement a directive on ambient air quality by not designating the competent authorities and bodies responsible for its application in practice). See also Prechal (n 13) 63.

[29] See Case 33/76 *Rewe* [1976] ECR 1989, para 5, and other case law cited at n 247.

[30] Case C-156/91 *Hansa Fleisch* (n 27), para 23; Case C-374/97 *Feyrer* [1999] ECR I-5153, para 34; C-428/07 *Horvath* [2009] ECR I-6355, para 50. Moreover, the Court has consistently held that 'a Member State may not rely on provisions, practices or situations prevailing in its own internal legal system to justify failure to observe the obligations and time-limits laid down by directives', see for example, Case 52/75 *Commission v Italy* (n 27), para 14; Case 163/78 *Commission v Italy* [1979] ECR 771, para 5; Case 283/86 *Commission v Belgium* [1988] ECR 3271, para 7; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer* [1996] ECR I-4845, para 53; C-450/00 *Commission v Luxembourg* [2001] ECR I-7069, para 8, Case C-421/12 *Commission v Belgium* [2014] ECLI:EU:C:2014:2064 (Judgment of 10 July 2014), para 43.

[31] Case 14/83 *von Colson and Kamann* (n 15), para 15; Case C-222/84 *Johnston* [1986] ECR 1651, para 17; Case C-208/90 *Emmott* (n 98), para 18; Case C-145/05 *Levi Strauss* [2006] ECR I-3703, para 16;

the combined application of Article 288(3), which obliges Member States to achieve the result prescribed by a directive, and Article 4(3) TEU, which requires Member States not only to take all appropriate measures to ensure fulfilment of the obligations that result from the directive but also to refrain from taking any measure that could jeopardise its objectives.[32]

As a result, Member States are under an obligation to choose the most appropriate form and methods in order to ensure the effectiveness (*effet utile*) of the directive within the national legal systems having due regard to the objectives pursued by the directive that is being implemented.[33]

The obligation to implement a directive under Article 288(3) TFEU requires the Member States to give effect to a directive both in law and in fact.[34] This is further reflected by Article 197(1) TFEU, as inserted by the Treaty of Lisbon,[35] which provides that '[e]ffective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest'. It therefore follows that implementation goes beyond an obligation merely to incorporate a directive in each Member State's legal system by adopting national

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Case C-268/06 *Impact* [2008] ECR I-2483, para 40; Case C-81/07 *Commission v Greece* [2008] ECR I-48, para 17; Case C-396/07 *Juuri* [2008] ECR I-8883, para 26.

[32] See for example, Case 14/83 *von Colson and Kamann* (n 15), para 26.

[33] Case 48/75 *Royer* [1976] ECR 497, para 73.

[34] See for example, Case C-339/87 *Commission v Netherlands* (n 19), para 25, Case 361/88 *Commission v Germany* [1991] ECR I-2567 at para 24, Case C-214/98 *Commission v Greece* [2000] ECR I-9601, at para 23, and Case C-507/04 *Commission v Austria* [2007] ECR I-5939 at para 298. See further, Prechal (2005) (n 13) 51-52.

[35] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 17 December 2007, 2702 UNTS 3 (hereafter the Lisbon Treaty), Article 1, para 150).

implementing measures.[36] Once adopted, the national implementing measures also need to be applied and enforced by the national authorities.[37]

As a result, it is generally accepted that implementation comprises three separate but inter-related elements: transposition, application and enforcement.[38] The obligation to implement a directive can accordingly be seen as consisting in the following three sets of obligations:

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[36] Richard Brent (n 14) 131; Prechal (2005) (n 13) 52.

[37] See for example, Advocate General Jacobs' Opinion in Case C-237/90 *Commission v Germany* [1992] ECR I-5973, para 14: ' it is not sufficient simply to incorporate the terms of a directive into national legislation; in addition Member States must ensure that the legislation is applied in practice'.

[38] Most research clearly distinguishes the three stages of implementation; see for example, Samuel Krislov, Claus-Dieter Ehlermann and Joseph Weiler 'The Political Organs and the Decision-Making Process in the United States and the European Community', in Mauro Cappelletti, Monica Seccombe, Joseph Weiler (eds) *Integration Through Law, Volume 1: Methods, Tools and Institutions Book: Political Organs, Integration Techniques and Judicial Process* (de Gruyter, 1986) 3-112, 62; Heinrich Siedentopf and Christoph Hauschild, 'Phases of Implementation' in Heinrich Siedentopf and Jacques Ziller (eds), Making European Policies Work, Volume 1: Comparative Syntheses (Sage 1988) 26-72, 42-72; Deidre Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights (1990) 27 Common Market Law Review, 703-739, 710-711; Francis Snyder, 'The Effectiveness of European Community Law. Institutions, Processes, Tools and Techniques', (1993) 56 Modern Law Review, 19-54, 22-23; Brent (n 14) 97; Prechal (n 13) 5-6, and 32; Lorenzo Allio and Marie-Hélène Fandel, 'Making Europe Work: Improving the Transposition, Implementation and Enforcement of EU Legislation' (2006) European Policy Centre Working Paper 25, 10-11; Balazs Mellar, 'Transposition, implementation and enforcement of consumer law', PE416.221 (European Parliament 2009) 2; Dimiter Toshkov, 'The Quest for Relevance: Research on Compliance with EU Law' (2011) 3 <http://www.dimiter.eu/articles/Compliance%20review.pdf> accessed on 30 May 2015; Oliver Treib, 'Implementing and Complying with EU Governance Outputs' (2014) 9(1) Living Reviews in European Governance, 6 <http://europeangovernance.livingreviews.org/Articles/lreg-2014-1/> accessed on 2 June 2015. However, some scholars only identify two stages in implementation, namely legal implementation (transposition) and practical implementation (application and enforcement); see for example Simona Milio (ed), *From Policy to Implementation in the European Union* (IB Tauris 2010) 5-6; Ulrich Sedelmeier, 'Post-accession Compliance with EU Gender Equality Legislation in Postcommunist New Member States' (2009) 13 European Integration online Papers No 23, 3 <http://eiop.or.at/eiop/texte/2009-023a.htm> accessed 4 July 2015, for whom 'Compliance with EU law comprises at least two distinctive stages... The first stage is the correct (and timely) transposition of the requirements of EU law into national legislation. The second stage is the subsequent correct application of the rules by those towards they are addressed, including the enforcement of the rules by

(i) obligations relating to *transposition*,[39] which involves the incorporation of the directive into national law through the adoption of legally-binding national implementing measures that give effect to a directive in the national legal order, including general obligations that apply to all directives, specific obligations contained in each directive and the drafting of national implementing measures;

(ii) obligations associated with the practical *application*[40] of the national implementing measures (and therefore the directive concerned) by the national administrative authorities; and

(iii) obligations connected to the (decentralised) *enforcement*[41] of the national implementing measures, which allows recourse to the national courts and quasi-judicial institutions to compel observance of these measures or of the directive in question in the event of a conflict with provisions of national law.

The different stages of implementation may be illustrated by the following graphic:

Stages of Implementation			
Implementation =	Transposition +	Application +	Enforcement (decentralised)
Member States' organ	Executive/legislative	Executive/autonomous agency	Judiciary
National instrument	National implementing measures (law or regulations + administrative circulars)	Administrative measures (administrative decisions and acts)	Judicial decisions

Table 3.1: Stages of implementation, their instruments and actors

public authorities if the targets of the rules do not comply.'; Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 1-30, who uses the terms 'compliance with law on the books' to denote formal legal compliance that involves the adoption of national implementing measures and 'compliance with law in action' to refer to practical application and enforcement,.

[39] See Sections 3.2 (Obligations Relating to the Form of Transposition), 3.3 (Obligations Relating to the Methods of Transposition) and 3.4 (Implications for the Drafting of National Implementing Measures).

[40] See Section 3.5 (Obligations Relating to the Application of Directives).

[41] See Section 3.6 (Obligations Relating to the Enforcement of Directives).

An examination of the specific obligations relating to each stage of implementation will now follow.

3.2 Obligations Relating to the Form of Transposition

Transposition represents the first stage of implementation and refers to the process of incorporating a directive into national law through the adoption of national implementing measures.[42] It is therefore concerned with 'the simple adoption of law on paper'.[43] Article 288(3) TFEU leaves Member States a choice as to the form and method which transposition can take.[44]

As mentioned above, Member States have a discretion at to which organ of the state will be tasked with transposing a directive into the national legal order. This can be an organ of the legislative[45] or executive[46] branches of the

[42] Krislov, Ehlermann and Weiler (n 38) 62; Siedentopf and Hauschild (n 38) 42-57, who refer to transposition as 'incorporation'; Curtin (n 38) 714-718; Stephen Weatherill, 'Constitutional Issues in the Implementation of EC Law: Addressing the Imbalance in Favour of Market Deregulation' (Biannual Meeting of the European Community Studies Association, 29 May -1 June 1997, Seattle) 1; Brent (n 14) 97; Prechal (n 13) 5-6; Allio and Fandel (n 38) 10-11; Mellar (n 38) 2; Conant (n 38) 15-19, who refers to transposition as part of 'compliance with the "law on the books"'; Treib (n 38) 6. See further Denis Batta, 'Comparative Study on the Transposition of EC Law in the Member States' (PE378.294, European Parliament, 2009).

[43] Weatherill (n 42) 1.

[44] Nonetheless, it should be noted that some directives may also contain detailed provisions on the method of implementation; see for example Case C-195/97 *Commission v Italy* [1999] ECR I- 1169, paras 13-14 (regarding Italy's failure to respect the sequence of measures under a directive aiming to protect waters against pollution caused by nitrates); Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paras 39-40 (concerning the insufficiency of a general water purification programme to implement the more specific objective of the directive in question to reduce water pollution caused by certain harmful substances).

[45] See to that effect, Case C- 77/69 *Commission v Belgium* [1970] ECR 243, paras 13-15 (delay due to dissolution of parliament); Case 8/70 *Commission v Italy* [1970] ECR 961, paras 8-9 (delay attributed to chamber of deputies).

[46] See to that effect, Case C-339/87 *Commission v Netherlands* (n 19), paras 7-8. See also the Opinion of AG Cruz Vilaça in Case C-412/85 *Commission v Germany* (n 19), para 19.

state operating at central[47] or decentralised levels, including federal,[48] regional,[49] local[50] or municipal authorities.[51]

The competent authorities of the Member States also have a choice as to the form of implementation, namely the kind of legal instrument that is used to give effect to a directive in their national legal system. This may, for example, involve the enactment of legislation by parliament, the issuance of a decree by the executive or the adoption of regulations by administrative authorities using delegated powers.

Whatever the form of the national implementing measures, a Member State can also choose to amend its existing national legislation that might already be in place.[52] In such cases, the national implementing measures would then consist in a legal instrument that amends its existing legislation or regulations. Alternatively, a Member State may decide to have recourse to a separate free-standing legal instrument that is separate from existing legislation or regulations,[53] what some authors have termed 'bolt-on transposition'.[54] The

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[47] Case C-260/96 *Commission v Belgium* [1994] ECR I-1611, paras 6-8. See also to that effect, Case C-8/88 *Commission v Germany* (n 17), para 13.

[48] ibid. See also Case C-224/97 *Ciola* [1999] ECR I-2517, para 30; Case C-383/00 *Commission v Germany* [2002] ECR I-4219, para 18.

[49] Case 96/81 *Commission v Netherlands* (n 27), para 12; Case 97/81 *Commission v Netherlands* (n 27), para 12; Joined Cases C-227 to 230/85 *Commission v Belgium* (n 27), para 9; Case C-156/91 *Hansa Fleisch* (n 27), para 23; C-435/92 *Association pour la protection des animaux sauvages* (n 27), para 26.

[50] ibid.

[51] Case 103/88 *Fratelli Costanzo* (n 16), paras 31-33; Case C-438/99 *Melgar* [2001] ECR I-6915, para 32.

[52] Case 8/77 *Sagulo* [1977] ECR 1495, para 4, in which the Court held that "under the third paragraph of Article 189 of the Treaty it is for the Member States to choose the form and methods to implement the provisions of the directive in their territory either by the adoption of a special law or regulations or by the application of appropriate provisions of their general regulations on aliens" in a case concerning the free movement of workers.

[53] ibid.

[54] Stephen Weatherill, 'Rapport Britannique' in XVIII FIDE Congress Report, Volume 1, 'Les Directives Communautaires: Effets, Efficacité, Justiciabilité' (Stockholm, 3-6 June 1998) 124-172, 126 who refers

precise form of the legal instrument does not matter provided that it complies with the internal allocation of powers within the Member State concerned.[55]

The Member States do not have an unfettered discretion in their choice of the form of the national implementing measures.[56] Limits have been placed by the EU judiciary on the kind of instruments which Member States can use to transpose a directive, based on the general principles of legal certainty and effective judicial protection.[57]

Firstly, the Court of Justice has consistently held that whatever instrument the Member States choose in effecting transposition, the national implementing measures must be capable of producing binding legal effects in accordance with the principle of legal certainty.[58] The national implementing

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to '"bolt-on" transposition, i.e. transposition of the Directive in a separate piece of secondary legislation, rather than consolidation of the EC-derived law and the pre-existing law in a single instrument.' He goes on to remark that 'the "bolt-on" approach damages the ease with which the law can be understood. Typically, more than one source must be consulted; and the inter-relation between different sources carefully assessed.' See also Dionyssis Dimitrakopoulos, 'The Transposition of EU Law: "Post-Decisional Politics" and Institutional Economy', (2001) 7 European Law Journal, 442-58, 451.

[55] See to that effect, Case C-8/88 *Commission v Germany* (n 17), para 13: 'it is for all the authorities of the Member States, whether it be central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law *within the sphere of their competence*' (emphasis added). See further Prechal (n 13) 63.

[56] For a fuller exploration of the limits placed by the Court of Justice on a Member State's discretion in implementing directives, see Curtin (n 38) 714-718; Christiaan Timmermans, 'Rapport Communautaire' in XVIII FIDE Congress Report (n 54) 15-37, 21-23; Brent (n 14) 109-129; Prechal (n 13) 31-36 and 73-87.

[57] See further n 89-93 and accompanying text.

[58] Case C-239/85 *Commission v Belgium* [1986] ECR 3645, para 7; Case C-190/90 *Commission v Netherlands* [1992] ECR I-3265, para 23. See also Case C-339/87 *Commission v Netherlands* (n 19), paras 7-8 where the Court accepted that transposition of a directive by way of a law and two ministerial decree was effective because the decrees were adopted pursuant to the law, they were published in the Dutch official gazette and they were of a general nature and capable of creating rights and obligations for individuals.

measures must be legally binding in the sense that they create rights and obligations which can be enforced before the national courts.[59]

As a result, transposition by way of an administrative circular or guidelines or mere administrative practice would not be sufficient.[60] Circulars – whether administrative[61] or ministerial[62] – do not create legal effects *erga omnes*,[63] may be amended at any time[64] and individuals might not be sufficiently informed of their rights and obligations.[65] Similar objections have been raised against the use of administrative guidelines,[66] internal memoranda[67] or general government policy[68] none of which are legally binding. Likewise, administrative practices, which are not legally binding, may be changed at will and lack the necessary publicity.[69]

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[59] Case C-306/89 *Commission v Greece* [1991] ECR I-5863, para 19; Case C-220/94 *Commission v Luxembourg* [1995] ECR I-1589, para 11; Case C-298/95 *Commission v Germany* [1996] ECR I-6747, para 16;

[60] Advocate General Jacobs has previously suggested in his Opinion in Case C-58/89 *Commission v Germany* [1991] ECR I-4983, paras 27-36, that administrative practices could constitute sufficient transposition where certain conditions are met. For further discussion, see Brent (n 14) 113. However, the Court of Justice has yet to depart from its consistent case law that considers transposition by administrative circular or practices to be insufficient.

[61] Case C-145/82 *Commission v Italy* [1983] ECR 711, paras 7-11.

[62] Case 116/86 *Commission v Italy* [1988] ECR 1323, paras 12-16.

[63] Case C-361/88 *Commission v Germany* [1991] ECR I-2567, para 20; Case C-9/92 *Commission v Greece* [1993] ECR I-4467, para 20. See also, Case 29/84 *Commission v Germany*, [1985] ECR 1661, paras 18-21, 27-28, 30-31 and 36-38, in which the German government's contentions that the administrative practice was binding on the authorities and had been publicised were nonetheless not considered sufficient by the Court of Justice to fulfil the obligation to transpose a directive on the recognition of professional qualifications of nurses.

[64] Case C-239/85 *Commission v Belgium* (n 58), para 7; Case 116/86 *Commission v Italy* (n 62), para 15; Case 147/86, *Commission v Greece* [1988] ECR 1637, para 16.

[65] Case C-361/88 *Commission v Germany* (n 63), para 20.

[66] Case 96/81 *Commission v Netherlands* (n 27), para 13.

[67] Case 173/83 *Commission v France* [1985] ECR 491, para 10.

[68] Case C-221/94 *Commission v Luxembourg* [1996] ECR I-5669, para 22.

[69] Case 102/79 *Commission v Belgium* [1980] ECR 1473, paras 10-11; Case 300/81 *Commission v Italy* [1983] ECR 449, para 10; Case 160/82 *Commission v Netherlands* [1982] ECR 4637, para 4; Case

Although the Court of Justice does not consider that administrative circulars or guidelines are of themselves sufficient to transpose a directive into national law, this does not necessarily mean that such instruments should not be taken into consideration when assessing transposition. The purpose of such circulars is to provide direction to the national administrative authorities which are tasked with the practical application of the national implementing measures. As such, administrative circulars are capable of being considered appropriate measures of a general nature that are intended 'to ensure fulfilment of the obligations ... resulting from the acts of the institutions' within the meaning of Article 4(3) TEU.[70] Although they may not be legally binding, such circulars indicate how the national implementing measures are intended to be interpreted and applied by the national administrative authorities. The Court of Justice has previously held that the national implementing measures must be viewed in the light of their interpretation by the national courts.[71] It is therefore submitted that it is also appropriate to examine the national implementing

236/85 *Commission v Netherlands* [1987] ECR 3989, para 18; *Commission v Greece* [1988] ECR 1637, para 16; Case C-236/91 *Commission v Ireland* [1992] ECR I-5933, para 6; Case C-381/92 *Commission v Ireland* [1994] ECR I-215, para 7; Case C-242/94 *Commission v Spain* [1997] ECR I-3031, para 6; Case C-197/96 *Commission v France Commission v France* [1997] ECR I-1489, para 14; Case C-358/98 *Commission v Italy* [2000] ECR I-1255, para 17, C-145/99 *Commission v Italy* [2002] ECR I-2235, para 30; Case C-354/99 *Commission v Ireland* [2001] ECR I-7657, para 28.

[70] Moreover, a directive will usually contain ancillary provisions that oblige the Member States to adopt 'the laws, regulations and administrative provisions necessary to comply with this Directive' and therefore foresee the adoption of administrative circulars as part of the transposition process.

[71] The Court of Justice has consistently held that 'the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts': Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, para 39; Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, para 36; C-300/95 *Commission v United Kingdom* [1997] ECR I-2649, paragraph 37; Case C-372/99, *Commission v Italy*, [2002] ECR I-819, para 20; Case C-129/00 *Commission v Italy* [2004] ECR I-14637 para 30; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, para 42; Case C-490/04 *Commission v Germany* [2007] ECR I-6095, para 49.

measures by reference to the relevant administrative circulars and guidelines that may apply.[72]

A similar problem arises when a Member State claims that transposition is not necessary because existing national case law already implements the directive. The Court of Justice has held that the existence of judicial case law that is consistent with the provisions of a directive cannot of itself fulfil the obligation to implement a directive,[73] since the case law of a Member State does not provide 'the clarity and precision needed to meet the requirement of legal certainty'.[74]

It therefore follows that *de facto* implementation alone will not suffice and Member states are also under an obligation to ensure that there is a specific legal framework that ensures the full application of the directive concerned.[75]

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[72] This is also the Commission's practice as regards conformity assessments undertaken by external consultants; see for example, Serge Gutwirth, Paul de Hert and Pieter Paepe, 'Correspondence Table, Belgium', 1 and 74, Annex to Milieu and Edinburgh University, Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union - Final Report' (December 2008).

[73] Case C-236/95 *Commission v Greece* [1996] ECR I-4459, para 14; Case C-58/02, *Commission v Spain* [2004] ECR I-621, paras 24-25. See further Marcus Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect' (2005) 43 Common Market Law Review, 1251-1275, 1270 who notes 'The question whether a national court decision can bring about adequate implementation of a directive pursuant to Article [288 TFEU] can therefore not be answered in general. First, it depends on the nature of the directive concerned. In most cases its content or addressees will require transparent and legally binding implementing measures. Second, even if the directive allows for "softer" measures of implementation, adequacy depends on the quality of the national case law ... [which would] require a judgment by the national Supreme Court confirming a number of previous decisions by lower national courts. A solitary decision will very rarely suffice as act of transposition.'

[74] Case C-144/99, *Commission v Netherlands*, [2001] ECR 3541, para 21; Case C-421/12 *Commission v Belgium* (n 30), para 46.

[75] Case C-339/87 *Commission v Netherlands* (n 19), para 25; Case C-131/88 *Commission v Germany* [1991] ECR I-2567, para 8; Case C-361/88 *Commission v Germany* (n 63), para 24; Case C-3/07 Commission v Belgium [2007] ECR I-154, para 11.

Transposition must be effected in such a way that it guarantees 'the full application of the directive in a sufficiently clear and precise manner'.[76]

The provisions of a directive may sometimes explicitly require the adoption of national implementing measures.[77] In the absence of such explicit provisions, the Court of Justice has recognised that a directive may implicitly call for the adoption of specific national implementing measures in cases where a directive 'expressly requires Member States to ensure that their measures transposing the Directive include a reference to it or that such reference is made when they are officially published'.[78] However, the enactment of a general

[76] Case C-6/04 *Commission v UK* [2005] ECR I-9017, paras 21 and 27; C-418/04 *Commission v Ireland* [2007] ECR I-10947, para 158.

[77] See for example, Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26, which allows the Member States to refuse a request for environmental information 'if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law'. In Case C-204/09 *Flachglas Torgau* [2012] ECLI:EU:C:2012:71 (judgment of 14 February 2012), paras 61 and 63 , the Court held in this connection that 'by specifying in indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 that the protection of the confidentiality of public proceedings must be 'provided for by law', a condition which corresponds to the requirement laid down in Article 4(4) of the Aarhus Convention that the confidentiality of proceedings must be 'provided for under national law', the European Union legislature clearly wanted an express provision to exist in national law with a precisely defined scope, and not merely a general legal context. ... None the less, public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision, which refers to the final stages of the decision-making process of public authorities'.

[78] Case C-137/96 *Commission v Germany* [1997] ECR I-6749, para 8; Case C-360/95 *Commission v Spain* [1997] ECR I-7337, para 13; Case C-361/95 *Commission v Spain* [1997] ECR I-7351, para 15; Case C-59/07 *Commission v Spain* [2007] ECR I-161, para 19; Case C-502/08 *Commission v Spain* [2009] ECR I-161, para 21; Case C-294/09 *Commission v Ireland* [2010] ECR I-46, para 17; Joined Cases C-444/09 and C-456/09 *Gavieiro and Iglesias Torres* [2010] ECR I-14031, para 62; Case C-523/09 *Commission v Spain* [2010] ECR I-19, para 13; Case C-326/09 *Commission v Poland* [2011] ECR I-28, para 22; Case C-326/09 *Commission v Poland* [2011] ECR I-161, para 58; Case C-29/14 *Commission v Poland* [2015] ECLI:EU:C:2015:379 (judgment of 11 June 2015), para 49. However, the Court has also held that 'a national measure which fails to refer, in its explanatory memorandum, to the directive

enabling law that requires the adoption of ministerial regulations or further implementing measures would not be sufficient in this connection, if the latter have yet to be adopted.[79]

In a case involving the free movement of persons, the Court of Justice has examined the issue in the context of the former EU directives on the residence rights of worked having ceased their activity[80] and those who do not work[81]. The Court held that existing German law, which merely contained a general reference to 'save where otherwise provided by Community law' could not be considered as achieving 'in a sufficiently clear and precise manner the actual implementation in full' of the directives concerned.[82] It follows that national legislation that merely contains a general reference to the directive in question would not satisfy the requirements for correct and complete transposition.[83]

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concerned cannot be regarded as a valid measure transposing the directive'; Joined Cases C-444/09 and C-456/09 *Gavieiro and Iglesias Torres*, cited above, para 63.

[79] Case C-216/94 *Commission v Belgium* [1995] ECR I-2155, paras 7-12. See also, Commission, 'Better Regulation Toolbox' (2015) 237 <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf> accessed on 27 November 2015 (hereinafter 'Better Regulation Toolbox'): 'Occasionally, Member States notify transposition measures that merely specify a framework for future implementation. These so-called "empty shell" transpositions are to be considered as a failure to notify, and such non-compliance should be spotted during the transposition check.'

[80] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28, repealed by Directive 2004/38.

[81] Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/26, repealed by Directive 2004/38.

[82] Case C-96/95 *Commission v Germany* [1997] ECR I-1653, para 36. In this case, the German legislation at issue the Law on Aliens of 9 July 1990 (*Ausländergesetz vom 9. Juli 1990 (BGBl. I S. 1354)*), paragraph 2(2)) merely provided that '[t]his Law applies to non-German nationals who are entitled to freedom of movement by virtue of Community law, save where otherwise provided by Community law and the Law on EEC residence.'

[83] For a discussion on exceptional circumstances where this form of transposition might be appropriate, namely a directive containing detailed prescriptions leaving no discretion to the Member States, see Timmermans (n 56), 22.

Nonetheless, ensuring *de jure* implementation will not necessarily require the Member States to enact legislation or adopt regulations in every single case. In this context, the Court of Justice has consistently recognised that:

> 'the implementation of a directive does not necessarily require legislative action in each Member State. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts.'[84]

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[84] Case 29/84 *Commission v Germany* (n 63), para 23. The Court has reformulated this proposition as follows: 'the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.'; see Case 252/85 *Commission v France* [1988] ECR 2243, para 5; Case 363/85 *Commission v Italy* [1987] ECR 1733, para 7; Case C-360/87 *Commission v Italy* [1991], para 7; Case C-131/88 *Commission v Germany* (n 75), para 6; Case C-361/88 *Commission v Germany* (n 63), para 15; Case C-58/89 *Commission v Germany* [1991] ECR I-4983, para 13; Case C-59/89 *Commission v Germany* [1991] ECR I-2607, para 18; Case C-13/90 *Commission v France* [1991] ECR I-4327, summary para 1 (full text of judgment not reproduced); Case C-14/90 *Commission v France* [1991] ECR I-4331, summary para 1 (full text of judgment not reproduced); Case C-64/90 *Commission v France* [1991] ECR I-4335, summary para 1 (full text of judgment not reproduced); Case C-190/90 *Commission v Netherlands* (n 58), para 17; Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 18; Case C-365/93 *Commission v Greece* [1995] ECR I-499, para 9; Case C-96/95 *Commission v Germany* (n 82), para 35; Case C-217/97 *Commission v Germany* [1999] ECR I-5087, para. 31; Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, para 17; Case C-49/00 *Commission v Italy* [2001] ECR I-8575, para 21; Case C-233/00 *Commission v France* [2003] ECR I-6625, para 76; C-455/00 *Commission v Italy* [2002] ECR I-4201, para 23; Case C-58/02 *Commission v Spain* (n 74), para 26; Case C-410/03 *Commission v Italy* [2005] ECR I-3507, para 60; Case C-6/04 *Commission v United Kingdom* (n 76), para 21; Case C-

Where a Member State contends that implementation has been achieved by relying on general principles of law or existing legal provisions, the Court has emphasised the importance of ensuring that individuals are able to rely on rights created by the EU directive in question[85] and has stressed the significance of this requirement in cases where a directive is intended to confer rights on nationals of other Member States.[86] In practice, however, general principles of law are unlikely to guarantee compliance with a directive in cases where a directive contains 'precise and detailed provisions'.[87] Nonetheless, it may happen that existing legislation is sufficient to ensure that the objectives of a directive are achieved.[88]

It can therefore be surmised from the above that EU law requires that whatever the form of the national implementing measures, these must have binding legal effect and be given the appropriate publicity.[89] The Member States must in any event provide a specific legal framework that enables individuals to exercise rights and enforce obligations arising under a directive.[90] These

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102/08 *Finanzamt Düsseldorf-Süd v SALIX Grundstücks* [2009] ECR I-4629, para 40; Case C-456/08 *Commission v Ireland* [2010] ECR I-859, para 65 ; Joined Cases C-180/10 & C-181/10 *Słaby and Kuć* [2011] ECR I-8461, para 31.

[85] Case C-29/84 *Commission v Germany* (n 63), para 23; Case C-365/93 *Commission v Greece* (n 84), para 9; Case C-144/99 *Commission v Netherlands* (n 84), para 18; Case C-63/01 Evans [2003] ECR I-14447, para 36.

[86] See for example, Case C-144/99 *Commission v Netherlands* [2001] ECR I-3541, para 18 and Case C-478/99 *Commission v Sweden* [2002] ECR I-4147, para 18, which both concerned the implementation of Directive 93/13 on unfair terms in consumer contracts [1993] OJ L 95/29.

[87] Case 29/84 *Commission v Germany* (n 63), para 31.

[88] For an example in which the general legal context was accepted by the Court as consisting in adequate implementation, see Case 248/83 *Commission v Germany* [1985] ECR 1459, paras 18 and 30 concerning directives on gender equality in connection with access to employment and working conditions. See also Case 163/82 *Commission v Italy* [1983] ECR 3273, para 9, in which the Court accepted that a general provision of Italian law covering was sufficient to give effect to the provision of a directive on gender equality as regards working conditions.

[89] See for example, Case C-159/99 *Commission v Italy* [2001] ECR I-4007, para 32.

[90] See n 75 and accompanying text. For examples where the Court accepted that a general legal context consisted in adequate implementation, see case law cited at n 88.

requirements are founded upon the general principles of EU law of legal certainty and effective judicial protection.[91] The former requires that individuals must be able to ascertain the extent of their rights and duties from the national implementing measures,[92] and the latter requires that the legal position of individuals is sufficiently defined by the national implementing measures so it can be relied upon before the national courts.[93]

Secondly, where a directive is intended to regulate a domain that is already the subject of prescriptions under national law, the national implementing measures must be of equivalent legal effect to the national provisions which are already in existence in the national legal order.[94] The Court has previously held that in a situation where national legislation is in conflict with EU law, this conflict can only be remedied by means of provisions of national law which have the same binding legal force as those which need to be brought into line with EU law.[95] The maintenance of conflicting provisions of national law constitutes a breach of EU law because it creates an ambiguous state of affairs, which keeps individuals in a state of uncertainty as to the possibility of relying on EU law.[96] The fact that, where a Member has failed to transpose a directive or has done so incorrectly, certain provisions of a directive

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[91] Brent (n 14) 111; Prechal (n 13) 108; Koen Lenaerts and Piet Van Nuffel, *European Union Law* (Robert Bray and Nathan Cambien (eds), 3rd edition, Sweet and Maxwell 2011) 897.

[92] On the principle of legal certainty, see further Takis Tridimas, *The General Principles of EC Law* (Oxford University Press 1999) 163-169; Mark Brearley and Mark Hoskins, *Remedies in EC Law*, (2nd ed, Sweet & Maxwell 1998) 37-38.

[93] On the principle of effective judicial protection, see further Section 3.6 (Obligations Relating to the Enforcement of Directives).

[94] Case 102/79 *Commission v Belgium* (n 69), para 10. See also to that effect, as regards the obligation to comply with Treaty provisions, Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, para 18; Case C-358/98 *Commission v Italy* [2000] ECR I-1255, para 17; Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, para 41.

[95] Case 168/85 *Commission v Italy* [1986] ECR 2945, para 13.

[96] Case 159/78 *Commission v Italy* [1979] ECR 3247, para 22; Case 74/86 *Commission v Germany* [1988] ECR 2139, para 10; Case C-120/88 *Commission v Italy* [1991] ECR I-621, para 9; and Case C-119/89 *Commission v Spain* [1991] ECR I-641, para 8; Case C-160/99 *Commission v France* [2000] ECR I-6137, para 22.

are capable of producing direct effect[97] – and can therefore be relied upon by individuals before the national courts – does not relieve a Member State from the obligation to adopt the national implementing measures.[98] In circumstances where provisions of a directive may have direct effect, this is only a minimum guarantee and is not sufficient to ensure the correct and complete implementation of a directive[99] or the fulfilment of obligations arising under the Treaty.[100] As a result, the obligation to transpose directives also entails that conflicting provisions of national law should be repealed or amended.[101]

In the circumstances where a directive is required to be transposed by a specific instrument of national law, the various forms which transposition can take can be illustrated as follows:

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[97] On the concept of direct effect, see further Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[98] Case 102/79 *Commission v Belgium* (n 69), para 12; Case C-208/90 *Emmott* [2001] ECR I-4269, para 20; Case C-433/93 *Commission v Germany* (n 84), para 24; Case C-96/95 *Commission v Germany* (n 82), para 37; Case C-253/95 *Commission v Germany* [1996] ECR I-2423, para 13; Case C-298/99 *Commission v Italy* [2002] ECR I-3129 para 23; Case C-475/08 *Commission v Belgium* [2009] ECR I-11503, para 44;

[99] Case 102/79 *Commission v Belgium* (n 69), para 12; C-301/81 *Commission v Belgium* [1983] ECR-467, para 13; Case C-433/93 *Commission v Germany* (n 84), para 24; Case C-96/95 *Commission v Germany* (n 82), para 37; Case C-253/95 *Commission v Germany* (n 98), para 13.

[100] Case C-475/08 *Commission v Belgium* [2009] ECR I-11503, para 44. See also to that effect, the case law confirming that the direct applicability of a provision of the Treaty or of a regulation is only a minimum guarantee and does not displace the obligation on Member States to take all appropriate measures to fulfil their treaty obligations; Case 72/85 *Commission v Netherlands* [1986] ECR 1219, para 20; Case 168/85 *Commission v Italy* (n 95), para 11; Case C-120/88 *Commission v Italy* [1991] ECR I-621, para 10; Case C-119/89 *Commission v Spain* [1991] ECR I-641, para 10; Case C-159/89 Commission v Greece [1991] ECR I-691, para 10; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I 1029, para 20; Case C-132/05 *Commission v Germany* [2008] ECR I-957, para 68; Case C-512/08 *Commission v France* [2010] ECR I-8833, para 54.

[101] See to that effect Case 74/86 Commission v Germany [1988] ECR 2139, paras 10-11; Case 169/87 *Commission v France* [1988] ECR 4093, para 11.

Transposition: Form of National Implementing Measures		
Level of government	Central/Federal/Federated/Regional/Local	
Branch of government	Executive	Legislative
Instrument of national implementing measures	delegated legislation or regulations (+ administrative circulars)	law (+ administrative circulars)
Form of national implementing measures	separate (bolt-on) instrument(s) amending/codifying instrument(s)	
Conditions to be met as to form of national implementing measures	Legal certainty -specific legal framework -publicly available -legally binding (enforceable rights) -same legal effect as existing national law in same field of law	Effective legal protection legal position of individuals must be: -sufficiently defined -capable of being relied upon in court
Expected result	**Transposition must guarantee effectiveness of Directive and full application**	

Table 3.2 Forms of transposition

Having examined the obligations that relate to the form of transposition, one can proceed to identify the obligations relating to the methods of transposition and the content of the national implementing measures.

3.3 Obligations Relating to the Methods of Transposition

In addition to the general obligations arising under the Treaty and general principles of EU law previously discussed, a directive will also impose specific obligations on the Member States. These obligations are not uniform and their nature will depend on the content of the directive itself.[102] These

[102] Case 38/77 *Enka* [1977] ECR 2203, para 11, where the Court held that 'it emerges from the third paragraph of Article 189 of the Treaty [now Article 288 TFEU] that the choice left to the member states as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or the Commission wishes to see achieved.' See also, Capotorti (n 1) 153-154; Brent (n 14) 97-98; European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the '25th Annual report from the Commission on monitoring the application of Community law (2007)' [2011] OJ C 18/95, para 3. which observes that 'when it comes to implementation, Directives permit various degrees of latitude, from non-explicit provisions leaving Member States fairly extensive leeway in choosing national transposition measures,

specific obligations will, to varying degrees, impact the discretion which Member States enjoy as to the 'methods' of implementation and therefore the content of the national implementing measures.[103]

Directives will generally contain two types of provisions, which can be categorised as core provisions and ancillary provisions, some of which may be solely addressed to the EU institutions or other Member States.[104] The nature of the provision does not matter for the purposes of implementation since Member States will be held to the same standards under Article 288(3) to achieve the result prescribed by the directive concerned.[105] The difference is that ancillary provisions do not by their nature require transposition although they will need to be applied in practice.[106]

The core provisions comprise the substance of a directive, in other words, they prescribe the 'result to be achieved' within the meaning of Article 288(3) TFEU. Core provisions include those covering the scope and purpose of the directive and those defining its terms.[107] When transposing core provisions of

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to explicit or prescriptive provisions such as definitions, lists or tables detailing substances, objects, or products which require that Member States enact 'simple transposition measures' to comply with the provisions of the Directive.'

[103] Case C-60/01 *Commission v France* [2002] ECR I-5679, paras 25-29; Case C-32/05 *Commission v Luxembourg* [2006] ECR I -11323, paras 37-40. See further, Capotorti (n 1) 153-154; Prechal (n 13) 49; Lenaerts and Van Nuffel (n 91) 897.

[104] See Prechal (n 13) 41-51; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2014) 169.

[105] See to that effect, Case C-131/88 *Commission v Germany* (n 75), para 61. However, it should be noted that in Case C-32/05 *Commission v Luxembourg* (n 103), para 35, the Court also held that 'a provision which concerns only the relations between the Member States and the Commission does not, in principle, have to be transposed [but] it is open to the Commission to demonstrate that compliance with a provision of a directive governing those relations requires the adoption of specific transposing measures in national law'. See also Case C-296/01 *Commission v France* [2003] ECR I-13909, para 92; Case C-429/01 *Commission v France* [2003] ECR I-14355, para 68. For an example where the Court ruled that a notification obligation required express transposition into national law, see Case C-410/03 *Commission v Italy* [2005] ECR I-3507, paras 49-56.

[106] See further n 131 and accompanying text.

[107] Prechal (n 13) 41.

the directive in the national implementing measures, a Member State is under a duty to satisfy requirements of specificity, clarity and certainty.[108] These requirements find their basis in the principles of legal certainty and effective judicial protection.[109]

Core provisions may lay down objectives that might involve substantive law. The objectives might also extend to procedure,[110] whether administrative[111] or judicial.[112] While a directive as a whole is usually addressed to the Member States, specific provisions may also grant rights to individuals[113] or impose obligations on them.[114] The core provisions may also prescribe the particular

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[108] Case 102/79 *Commission v Belgium* (n 69), para 11 (national implementing measures must be clear, certain and legally binding); Case 300/81 *Commission v Italy* (n 69), para 10 (idem); Case 143/83 *Commission v Denmark* [1985] ECR 427, para 10 (national implementing measures must display the precision and clarity that are necessary for the protection of individuals falling within the scope of the directive); Case 257/86 *Commission v Italy* [1988] ECR 3249, para 12 (the principles of legal certainty and the protection of individuals require that national implementing measures should be worded unequivocally); Case C-361/88 *Commission v Germany* (n 63), paras 20-21 (legal certainty requires that national implementing be legally binding and must exhibit specificity, precision and clarity); Case C-418/04 *Commission v Ireland*) (n 76), para 187 (provisions of national implementing measures must be sufficiently specific to guarantee transposition of the corresponding provisions of the relevant directive); Case C-197/96 *Commission v France* (n 69), para 15 (legal certainty requires that national implementing measures be legally binding and must exhibit specificity, precision and clarity).

[109] See further n 89-93 and accompanying text.

[110] Case 48/75 *Royer* (n 33), paras 71-73, concerning the free movement of workers.

[111] See for example, Articles 8-11 and 19-21 of Directive 2004/38 on the administrative procedure for the issue of residence documentation, discussed further in Chapter 6 (The Obligations Contained in Directive 2004/38). For further examples, see Prechal (n 13) 41-42.

[112] See for example, Articles 15, 30 and 31 of Directive 2004/38 on procedural safeguards, discussed further in Chapter 6 (The Obligations Contained in Directive 2004/38). For further examples, see Prechal (n 13) 41-42.

[113] For example, the core provisions of Directive 2004/38, although addressed to the Member States, grant rights to EU citizens and their family members. See Chapter 6 (The Obligations Contained in Directive 2004/38) for a discussion of the implications of the Directive being addressed to Member States. See further Prechal (n 13) 42-43.

[114] See for instance, the directive on air carrier liability, which imposes obligations on air transport companies to return third-country citizens who are refused entry to the Schengen area and imposes penalties on air transport companies who transport third country nationals without adequate travel

legal or factual state of affairs that the Member States are required to bring about[115] and may contain detailed prescriptions in this connection.[116] As a result, a directive may therefore leave no room for discretion on the part of the Member State as to the content of their national implementing measures.[117]

The opposite may also be true, given that some core provisions may give the Member States a discretion whether to derogate from the contents of a directive[118] or to confer their own interpretation to certain concepts.[119] Some directives may allow Member States to adopt measures that are more stringent than the directive's provisions,[120] or on the contrary measures that are more

documents; Directive 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45, Articles 2 and 4.

[115] Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, para 23; Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para 56; Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, para 66.

[116] See Prechal (n 13) 41. See also Jürgen Bast, 'On the Grammar of EU Law: Legal Instruments' (2003) NYU/Max Plank Institute Jean Monnet Working Paper No 9/03, 13.

[117] Case 38/77 *Enka* (n 33), para 17 (the definition of the terms 'price paid or payable' under a directive concerning the common customs tariff left no room for discretion by the Member States). See also, Capotorti (n 1) 153-154; Economic and Social Committee (n 139) para 3.7, which identifies 'prescriptive/explicit provisions, which require Member States' transposition measures to comply with the provisions of the directive. These include definitions; prescriptive/ explicit provisions, which place specific obligations on the Member States; annexes to directives, which may include lists or tables detailing substances, objects or products; and specimen forms which apply throughout the European Union'.

[118] See, for example, Article 3(4) of Directive 2011/83 on consumer rights [2011] OJ L 304/64, which allows Member States to exclude consumer contracts concluded off-premises with a value not exceeding €50 from the scope of the national implementing measures that give effect to this directive.

[119] See, for example, Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519 (Judgment of 5 September 2012), paras 24-25, concerning the discretion provided to Member States when facilitating the entry or residence of family members other than core family members under Article 3(2) of Directive 2004/38, discussed further in Chapter 6 (The Obligations Contained in Directive 2004/38). See further, Prechal (n 13) 43.

[120] See, for example, Article 8 of Directive 1993/13 on unfair terms in consumer contracts [1993] OJ L 95/29, which allows Member States to impose more stringent protections for consumers. Likewise, Member States are allowed to retain or adopt more stringent protections for consumers under Article 8 of Directive 1999/44 on consumer goods guarantees [1999] OJ L 171/12.

favourable.[121] Specific limitations might also be contained in the relevant directive on how Member States exercise their discretion in this context[122] or impose a duty to inform the Commission of the national measures taken.[123]

When transposing specific provisions of a directive, the Member States are also bound by the principle of proportionality.[124] This is particularly the case when the Member States are exercising their discretion in the transposition of a directive, such as when laying down deadlines[125] or imposing penalties to sanction breaches of the national implementing measures.[126] Likewise, in cases where Member States are explicitly permitted to derogate from the provisions of a directive, the national measures that give effect to such derogations must be limited to those that are strictly necessary to fulfil the objectives of the derogation in question.[127] Where a directive provides for specific criteria that must be met in order to benefit from a derogation, the national implementing

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[121] See, for example, Article 37 of Directive 2004/38, which allows Member States to adopt more favourable provisions that those contained in the Directive. See further, Prechal (n 13) 42-43.

[122] See, for example, the Fourth Anti-Money Laundering Directive, whose Article 2(3) allows Member States to exclude certain persons who engage in financial activity on an 'occasional or very limited basis' in circumstances where 'there is little risk of money laundering'; the provision then goes on to list what factors Member States must take into account to determine the likelihood of such a risk; Directive 2015/849 on preventing money laundering and terrorist financing [2015] OJ L 141/73.

[123] See, for example, Directive 1993/13 on unfair terms in consumer contracts [1993] OJ L 95/29 and Directive 1999/44 on consumer goods guarantees [1999] OJ L 171/12. In the case of both directives, Article 8a requires those Member States which make use of the option to impose more stringent protections for the benefit of consumers under Article 8 to inform the Commission of the measures taken.

[124] Case C-2/97 *Società Italiana Petroli* (n 12) para 48.

[125] ibid, paras 49-50.

[126] Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, para 55; Case C-383/92 *Commission v United Kingdom* [1994] ECR I-2479, para 40. See also to that effect, in cases involving the imposition of penalties for breaches of EU regulations, C-68/88 *Commission v Greece* [1989] ECR 2965, para 24; Case C-326/88 *Hansen* [1990] ECR I-2911, para 17; Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, para 11; Case C-29/95 *Pastoors* [1997] ECR I-265, para 24.

[127] Case C-63/96 *Skripalle* [1997] ECR I-2847, para 26. See also to that effect, C-40/93 *Commission v Italy* [1995] ECR I-1319, para 23.

measures must specifically contain these criteria[128] and must keep to the limits prescribed by the directive.[129]

In addition, a directive will also contain ancillary provisions that complement its core provisions. Although the nature of some ancillary provisions means they do not need to be transposed[130] – because they only concern relations between the Member States and the Commission[131] – the Member States are nonetheless still required to comply with them.[132] Ancillary provisions are therefore no less important or legally binding than core provisions.[133]

Ancillary provisions include provisions that specify the date of entry into force of the directive.[134] These should be distinguished from provisions relating to the deadline for transposition, which corresponds to the period allowed for the adoption of national implementing measures by the Member States. While

[128] Case C-339/87 *Commission v Netherlands* (n 19), para 28; Case C-118/94 *Associazione Italiana per il WWF* [1996] ECR I-1223, para 22.

[129] 412/85 *Commission v Germany* [1987] ECR 3503, paras 17-19.

[130] See further, Prechal (n 13) 49; Better Regulation Toolbox (n 79) 237: 'Frequently, directives contain provisions that require Member States to notify specific reports/action plans/facilities. These provisions often contain separate deadlines and are different from the general obligation to notify transposition measures. Noncompliance with such provisions should be classified as bad application, as opposed to a failure to notify.'

[131] Case C-296/01 *Commission v France* (n 105), paragraph 92, Case C-429/01 *Commission v France* (n 105), para 68; Case C-32/05 *Commission v Luxembourg* (n 103), para 35, where the Court held that 'a provision which concerns only the relations between the Member States and the Commission does not, in principle, have to be transposed [but] it is open to the Commission to demonstrate that compliance with a provision of a directive governing those relations requires the adoption of specific transposing measures in national law'. See also, Case C-72/02 *Commission v Portugal* [2003] ECR I-6597, paras 19-20.

[132] See for example, Case 274/83 *Commission v Italy* [1985] ECR 3583, paras 40-43 (failure to communicate the text of the national implementing measures constitutes a breach of the directive in question). See also, Prechal (n 13) 44.

[133] Prechal (n 13) 44.

[134] In accordance with Article 297 TFEU, directives must be published in the Official Journal of the European Union and 'enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.'

the Treaty is silent on the deadline for transposition, the EU institutions have committed themselves to 'insert into directives a time limit for transposition that is as short as possible and that generally does not exceed two years'.[135] However, this does not appear to have been followed systematically.[136] The deadline for transposition tends to be the same date for all Member States, but for some directives certain Member States have benefitted from longer transposition deadlines.[137]

Ancillary provisions will also include an obligation on the Member States to adopt 'the laws, regulations and administrative provisions necessary to comply' with the directive in question, thus reaffirming the obligations contained in Articles 288(3) and 291(1) TFEU and Article 4(3) TEU.[138] In addition, such a provision will also include a so-called 'interconnection clause' that requires Member States to include a clear reference in their national implementing measures to the directive that is being implemented.[139] The

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[135] European Parliament, Council and Commission, 'Interinstitutional Agreement on better law-making' [2003] OJ C 321/1, para 33; see also European Parliament and Commission, 'Framework Agreement on relations between the European Parliament and the European Commission' [2010] OJ L 304/47, para 44.

[136] See for example, Directive 2006/123 on services in the internal market [2006] OJ L 376/36, which although it entered into force on 28 December 2006 contained a deadline for transposition expiring on 28 December 2009, namely three years after its entry into force; see also Directive 2006/106 on driving licences (recast) [2006] OJ L403/18, which entered into force on 19 January 2007, but only required Member States to transpose certain provisions by 19 January 2011 and to ensure they applied the directive as a whole from 19 January 2013.

[137] See, for example, former Directive 1993/38 on public procurement in the utilities sectors [1993] OJ L 393/84 (repealed by Directive 2004/17 [2004] OJ L 134/1), whose Article 45 provided for longer transposition deadlines for Greece, Portugal and Spain. For other examples, see Prechal (n 13) 18-19.

[138] Prechal (n 13) 44.

[139] Commission, Eighth Annual Report from the Commission on Monitoring the Application of Community Law 1990 [2011] OJ C 338/1, 7: 'the Council has introduced the interconnection principle, which means that in their national implementing measures Member States explicitly refer to the Directive being incorporated'; Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the Communication from the Commission A Europe of results — Applying Community law COM(2007) 502 final' [2008] OJ C 204/9, para 3.6. See further, Commission 'Legislative Drafting – Commission Manual' (1 January 1997) (hereafter Commission Legislative

purpose of such a clause is to make explicit the EU origin of the national implementing measures.[140,141]

Directives also usually require the Member States to communicate to the Commission details of the national implementing measures that have been adopted to give effect to a directive.[142] In practice, this obligation requires the Member States to provide the full text of the national implementing measures that purport to transpose the directive concerned to the Commission, so that the latter can ascertain whether the Member State has 'effectively and completely implemented the directive'.[143] The information provided by the Member States must be clear and precise and it 'must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive'.[144] This obligation applies even in circumstances where a Member State contends that the adoption of national implementing measures is not necessary because the objectives of the directive have already been

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Drafting Manual), para I 6.9.3 <http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf> accessed on 3 October 2015. See also see Timmermans (n 56) 22.

[140] Commission Legislative Drafting Manual (n 139) para I 6.9.3; see also Prechal (n 13) 44-45.

[141] As noted above, n 78 and accompanying text, the Court of Justice has previously ruled that Member States are under an obligation to adopt national implementing measures in cases where a directive 'expressly requires Member States to ensure that their measures transposing the Directive include a reference to it or that such reference is made when they are officially published'; see for example Case C-137/96 *Commission v Germany*.

[142] Prechal (n 13) 45.

[143] Case 274/83 *Commission v Italy* (n 132), para 42; Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, para 107: 'In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely genuinely implemented the directive completely'. See also, Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents [2011] OJ C369/14, para 4, and Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents [2011] OJ C369/15, para 1. See further, Prechal (n 13) 45.

[144] Case 96/81 *Commission v Netherlands* (n 27), paras 7-8; Case 97/81 *Commission v Netherlands* (n 27), paras 7-8.

achieved through an existing legal framework or general principles of national law.[145] A failure by a Member State to notify the Commission of the national implementing measures will constitute a breach of its duty of sincere cooperation under Article 4(3) TEU,[146] which will justify the initiation of infringement proceedings by the Commission under Article 258. [147,148] Under Article 260(3) TFEU,[149] as inserted by the Lisbon Treaty,[150] the Commission can now request the imposition of financial penalties when a Member State has failed to notify its national implementing measures. [151]

In some cases, the obligation on the Member States to notify national implementing measures may be supplemented by a requirement to provide a

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[145] Case C-69/90 *Commission v Italy* [1991] ECR I-6011, paras 11-16.

[146] Ibid. See also to that effect, Case 33/90 *Commission v Italy* (n 28), paras 16-21; Case C-421/12 *Commission v Belgium* [2004] ECLI:EU:C:2014:2064 (judgment of 10 July 2014), paras 33-34.

[147] Case 96/81 *Commission v Netherlands* (n 27), para 8; Case C-456/03 *Commission v Italy* [2005] ECR I-5335, para 27; Case C-427/07 *Commission v Ireland* (n 143), para 107; Case C-421/12 *Commission v Belgium* (n 146), para 34. See further Capotorti (n 1) 162.

[148] For a further discussion of infringement proceedings, see further Chapter 5, Section 5.2 (Consequences of Non-Compliant Implementation at EU Level).

[149] Article 260(3) TFEU provides as follows:

> 'When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.'

[150] Treaty of Lisbon (n 35), Article 1, para 212).

[151] Commission, 'Communication from the Commission - Implementation of Article 260(3) of the Treaty' [2001] OJ C 12/1. See further, Lenaerts, Maselis and Gutman (n 104) 170-171.

so-called 'correlation table'[152,153], which is a document that identifies the provisions of the national implementing measures that correspond to each provision of the EU directive that is being transposed.[154]

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[152] Despite the Commission's efforts, this obligation is not systematically imposed due to the reticence of the Council. The Interinstitutional Agreement on better law-making (n 135), para 34 merely provides that '[t]he Council will encourage the Member States to draw up, for themselves and in the interests of the Community, their own tables which will, as far as possible, illustrate the correlation between the directives and the transposition measures and to make them public'. See also, Commission Communication 'A Europe of Results - Applying Community Law', COM(2007) 502 final, 6, where the Commission indicated it would 'continue systematically to include an obligation for a correlation table to be communicated in each new proposal for a directive'. However, according to former Commission President Manuel Barroso, 'The Council often opposes the adoption of a legal obligation for correlation tables to be provided in new EU directives. The Council opposed any obligation on correlation tables being included in the 2003 Agreement on better law-making. As a result, this agreement, in its paragraph 34, only encourages Member States to provide such tables. The Council therefore often replaces an article in a draft directive with a paragraph in the preamble referring to the value of such tables being provided if considered useful by Member States. This is despite the fact that many Member States use correlation tables as part of their internal administrative or parliamentary procedures.'; see Joint Answer given by Mr Barroso on behalf of the Commission to Written Questions by Chris Davies MEP (ALDE), E-9373/10 and E-9931/10 [2011] OJ C 265E/20, 66
<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-9931&language=SL> accessed on 31 December 2015. The European Parliament and the Commission are broadly in agreement that the obligation to include correlation tables should be systematically imposed; see Framework Agreement on relations between the European Parliament and the European Commission (n 135), para 44: 'In order to ensure better monitoring of the transposition and application of Union law, the Commission and Parliament shall endeavour to include compulsory correlation tables'. At present, the Commission still has to provide justification for the inclusion of such an obligation in directives, as made apparent by the Joint Political Declaration (n 143), para 6 which states that '[i]n justified cases, Member States undertake to accompany the notification of transposition measures with one or more explanatory documents, which can take the form of correlation tables or other documents serving the same purpose.'

[153] The usefulness of such correlation tables has been highlighted by Asya Zhelyazkova and Nikoleta Jordanova, 'Signalling "Compliance": The Link Between Notified EU Directive Implementation and Infringement Cases' (2015) 16 European Union Politics 408-428, 425: 'our findings suggest that the implementation process improves whenever the European Commission or the member states consider compliance with a directive important and clearly signal that in order to generate an expectation of high reputational cost for not (fully) complying with a directive (e.g. with a concordance table requirement)'.

Ancillary provisions may also include reporting obligations on the Member States or the EU institutions or both, which might call for one-off[155] or regular[156] reporting duties in connection with the implementation of the directive in question by the Member States. This might take the form of undertaking assessments or studies or the compilation of statistics relating to matters covered by the directive concerned.[157] Such a reporting obligation might be combined with an option for the Commission to formulate a proposal for to amend the directive concerned where necessary.[158] According to the Court of Justice, the purpose of such obligations is to enable supervision of the application of a directive in two stages: a first assessment being carried out by the Member States and then a subsequent review being conducted by the Commission[159] to enable it to fulfil its role as guardian of the Treaties.[160]

The ancillary provisions may also call for the prior notification of national measures adopted on the basis of the discretion granted to the Member States

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[154] Marta Ballasteros, Rostane Mehdi, Mariolina Eliantonio and Damir Petrovic, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness' (PE493.014, European Parliament, 2013) 38-41.

[155] See for example, Article 9 of Directive 2014/54/EU of the European Parliament and of the Council on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8.

[156] See for example, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22, whose Article 60 requires both the Member States to submit bi-annual reports on the application of the directive and the Commission to draw up a report on the implementation of the directive every five years.

[157] See for example, Article 19 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1, which requires the Member States 'to establish national rapporteurs … [tasked with] the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations active in this field, and reporting'.

[158] See for example, Article 24 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

[159] Case 248/83 *Commission v Germany* (n 88), para 37.

[160] Article 17 TEU and Article 258 TFEU.

under a directive. Depending on the directive in question, a failure to comply with this notification obligation may render a non-notified national measure unenforceable.[161]

Some directives may also contain ancillary provisions that relate to cooperation between Member States,[162] including the exchange of information or the creation of networks between the national authorities.[163] Such provisions

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[161] See for example Article 5 of Directive 2015/1535/EU of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241/1, which requires Member States to notify all draft technical regulations to the Commission. Article 6 provides for the automatic postponement of the entry into force of a technical regulation which the Commission opposes on the grounds that they may restrict the free movement of goods or services or the freedom of establishment. According to consistent case law of the Court of Justice, failure to notify a draft technical regulation renders the standard unenforceable, see for example, Case C-194/94 *CIA Security* [1996] ECR I-2201, para 54 (as regards Directive 83/189 [1983] OJ L 109/8) and Case C-307/13 *Ivansson* [2014] ECR not yet reported (judgment of 10 July 2014), para 48 (as regards Directive 98/34 [1998] OJ L 204/37). However, not all notification obligations necessarily carry such legal consequences; see for example Case 380/87 *Enichem* [1989] ECR 2491, para 20, concerning the notification obligation contained in Article 3(2) of Directive 75/442 on waste [1975] OJ L 194/47, which 'merely requires the Member States to inform the Commission in good time of any draft rules within the scope of that provision, without laying down any procedure for Community monitoring thereof or making implementation of the planned rules conditional upon agreement by the Commission or its failure to object'. Aside from the enforceability of non-notified measures, a failure to comply with notification obligation may also constitute a breach of EU law that can be the subject of infringement proceedings under Article 258 TFEU, see to that effect, Case 128/78 *Commission v United Kingdom* [1979] ECR 419, paras 14-15.

[162] This provides further expression to Article 4(3) TEU which provides that '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.' See further, F. Lafarge, 'Administrative Cooperation between Member States and the Implementation of EU Law' (2010) 16 European Public Law, 597-616; Micaela Lottini, 'From "Administrative Cooperation" in the Application of European Union Law to "Administrative Cooperation" in the Protection of European Rights and Liberties' (2012) 18 European Public Law, 127-147.

[163] See for example, Article 15 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88/45, which provides for the creation of a health technology assessment network tasked with fostering cooperation between the Member States in the field of health technology.

may also impose a duty to consult or engage with certain actors,[164] such as civil society groups.[165] Finally, Member States may also be tasked with informing the public of the contents of a directive.[166]

In the circumstances where a directive needs to be implemented by a specific instrument of national law, the obligations relating to the methods of transposition and their impact on the content of the national implementing measures can be summarised as follows:

Transposition: Content of National Implementing Measures		
	Core provisions	Ancillary provisions
Nature of directive's provisions	-substantive law -procedure - sanctions -remedies -specific factual/legal result	-entry into force -deadline for transposition -communication of NIMs -other obligations (reporting/notification/ cooperation/information)

[164] See for example, Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L 176/57, concerning the obligation to consult other Member States or national regulatory agencies before exempting gas interconnectors from certain provisions of the directive.

[165] See for example Article 5 of Directive 2014/54 (n 155) which requires Member States to 'promote dialogue with the social partners and with relevant non-governmental organisations which have, in accordance with national law or practice, a legitimate interest in contributing to the fight against unjustified restrictions and obstacles to the right to free movement, and discrimination on grounds of nationality, of Union workers and members of their family with a view to promoting the principle of equal treatment.'

[166] See for example, Article 4(1c) of Directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste [1994] OJ L 365/10, as inserted by Directive 2015/720/EU [2015] L 115/1, which requires both the Commission and the Member States to 'actively encourage public information and awareness campaigns concerning the adverse environmental impact of the excessive consumption of lightweight plastic carrier bags'. See also Article 6(2) of Directive 2014/54 (n 155) which requires Member States to 'provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date.'

Conditions to be met as to content of national implementing measures	Legal certainty provisions of national implementing measures must be specific, clear and precise	Effective legal protection legal position of individuals must be sufficiently defined and capable of being relied upon in court	Proportionality discretionary powers must be exercised in accordance with criteria and within limits set by directive	None transposition not usually necessary, but provision must be applied in practice
Expected result	**Transposition must guarantee effectiveness of Directive and full application**			

Table 3.2 Methods of transposition

The different obligations contained in specific provisions of a directive will have an impact upon the choices that the relevant authorities of the Member States make when they endeavour to draft the provisions that feature in their national implementing measures.

3.4 Implications for the Drafting of National Implementing Measures

It has already been noted that the Member States are not necessarily under an obligation to ensure that 'the content of the directive be incorporated formally and verbatim in express, specific legislation' provided that the existing legal framework complies with the principles of legal certainty and effective judicial protection.[167] Nonetheless, it has also been observed that the provisions of a directive may implicitly call for specific national implementing measures to be adopted, such as when a directive requires the Member States to include a reference to the directive in question.[168]

[167] See Section 3.5 (Obligations Relating to the Enforcement of Directives). For a case relating to the free movement of persons, see Case C-96/95 *Commission v Germany* (n 82), para 35, in which Germany unsuccessfully sought to argue that the existing legislation adequately transposed the provisions of Directives 90/364 (n 81) and 90/365 (n 80).

[168] See Section 3.2 (Obligations Relating to the Form of Transposition) and case law cited at n 78. See also, Economic and Social Committee (n 139), para 3.6: 'There are also instances where the directive contains an article to the effect that the national provisions transposing the directive must make

In the event that a Member State does adopt national implementing measures, it is under an obligation to ensure that the national implementing measures do not produce ambiguity that would prevent individuals from understanding their rights and obligations under the directive or prevent the national courts from enforcing those rights and obligations.[169] The national implementing measures must therefore be drafted in specific, clear and precise terms.[170] However, the Court of Justice will not sanction 'a mere terminological difference' which has no effect on the fulfilment of a Member State's obligations to achieve the result prescribed by a directive.[171]

The Member States also have an obligation to transpose a directive in full.[172] As a result, unless explicitly permitted by a directive, the national authorities do not have a discretion to choose to implement some but not all the core provisions of a directive, so-called 'cherry-picking'.[173]

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reference to the directive or be accompanied by a reference of this kind when they are published. Ignorance of this clause, known as the "interconnection clause", is penalised by the Court, which refuses to provide for an exception where Member States plead that their existing domestic law already complies with the directive.'

[169] Case 143/83 *Commission v Denmark* (n 108), para 10; Case 257/86 *Commission v Italy* (n 108), para 12; Case C-120/88 *Commission v Italy* [1991] ECR I-621, para 11; Case C-119/89 *Commission v Spain* [1991] ECR I-641, para 10; Case C-159/89 *Commission v Greece* [1991] ECR I-691, para 11; Case C-306/91 *Commission v Italy* [1993] ECR I-2133, paras 14-15; Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, para 20.

[170] See case law cited at n 108. See further Prechal (n 13) 75.

[171] Case 363/85 *Commission v Italy* (n 84), para 16.

[172] Case C-96/95 *Commission v Germany* (n 82), para 36.

[173] See for example, Opinion of Advocate General Wahl in Cases C-182/15 *Lyttle*, C-392/13 *Rabal Cañas* and C-80/14 *USDAW* [2015] ECLI:EU:C:2015:65 (Opinion of 13 May 2015), para 67: 'Member States may, pursuant to Article 5 of Directive 98/59, grant workers greater protection by, for example, lengthening the time allowed for the tallying of directive-relevant dismissals. However, the directive is no smörgåsbord, meaning that it is not open to cherry-picking! Member States may not offset an increased level of protection by reducing it in other respects, for instance by interpreting the concept of 'redundancy' more restrictively. Like the methods for calculating the thresholds — and therefore the thresholds themselves — that concept does not lie within their discretion.' See also European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on How to improve the implementation and enforcement of EU legislation' [2005] OJ C 24/52, 4.2.8.

When embarking upon the drafting of national implementing measures, the Member States have displayed differing approaches that range from replicating the exact provisions of the directive to using more elaborate drafting techniques.[174] EU law does not favour one approach over the other,[175] since each approach involves its own set of limitations.[176]

The national officials who draft the national implementing measures may choose to resort to verbatim or literal transposition, also known as the 'copy out' technique.[177] While this has the advantage that the national implementing

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[174] Capotorti (n 1) 161; Jane Bates, 'The Conversion of EEC Legislation into UK Legislation' (1989) 20 Statute Law Review, 110-123, 119: 'The draftsman will consider whether or not the terminology used in the Community legislation requires explanation or re-definition in the context of United Kingdom legislation.'; Dimitrakopoulos (n 54) 449: '[f]aced with an unclear text, national officials can either copy it into national law thus effectively leaving unresolved the issue of clarity or elaborate by trying to facilitate subsequent steps in the implementation chain.'; Prechal (n 13) 32: 'Member States have a choice of different modalities of implementation, lying anywhere between verbatim transposition of the directive's provisions into national law at one end of the spectrum and a "translation" of the directive into the terminology and concepts of the national legal system at the other'; ibid, 76: 'Member States have in principle the choice between verbatim transposition on the one hand, and "translation" of the directive into national legal concepts and terminology on the other (plus all the possible variations lying between the two extremes)'; ibid, 187: 'Different modalities of transposition can be chosen, with verbatim transposition a one end of the spectrum and translation into national legal concepts and terminology at the other. ... From a Community law point of view, as a rule neither method is imperative, provided that the content of the measures adopted to transpose the directive is sufficiently clear and precise.'

[175] Prechal (n 13) 187: '[f]rom a Community law point of view, as a rule neither method is imperative, provided that the content of the measures adopted to transpose the directive is sufficiently clear and precise'.

[176] For a review of the relative merits and drawbacks of the respective approaches to the drafting of national implementing measures, see Brent (n 14) 109-110; Prechal (n 13) 31-36.

[177] Lynn Ramsey, 'The Copy Out Technique: More of a 'Cop-Out' than a Solution' (1996) 17 Statute Law Review, 218-228, 222-224: 'Copy out has been defined as: a "technique . . . in which EC directives are simply grafted onto UK law"; "the verbatim transposition of the directive into English law"; and where "the implementing legislation simply refers to or literally adopts the same, or virtually the same, language as the directive itself". Each definition contains an aspect of reproduction. However, the first two definitions suggest that the entire directive is copied whereas the final definition suggests that copy out occurs where certain words or phrases are duplicated. ... In practice, drafters have tended not to copy out the entire directive, even where the directive is brief. Instead they have restricted the use of

measures use the terminology of the directive concerned,[178] there is a danger that this approach may lead to 'under-implementation'.[179] This occurs where 'the measures taken to transpose the directive do not achieve the aims of the directive'[180] or omit 'crucial aspects of the directive thus undermining effectiveness'.[181]

Firstly, replicating the wording of a directive may cause problems of interpretation and create ambiguities contrary to the principle of legal certainty.[182] On the one hand, the wording used in a directive may not be sufficiently clear[183] or might consist in novel concepts unknown in national

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copy out to certain articles, phrases or words which are either replicated or followed more loosely in the implementing legislation. Either way, the resultant legislation is a synthesis of different drafting styles which may pose problems for those seeking to rely upon or interpret the legislation.'

[178] Brent (n 14) 110: '"copy-out" has the merit of ensuring all provisions of a directive are reproduced in English law'; Prechal (n 13) 32: '*Verbatim* reproduction may have the advantage that, at least at first sight, the member state has complied with its obligation. The obvious disadvantage is then, however, that national legislation may be using unfamiliar terms. Consequently, there is no guarantee that the implementing measures will be understood, interpreted, and applied correctly.'(emphasis in original) There may also be instances where replicative transposition is the better approach; see for example, Bates (n 174) 119: '[w]here the terminology has an established Community meaning the wording used in the Community legislation should generally be left unaltered in order to avoid confusion.'

[179] The term is used by Ramsay (n 177) and Dimitrakopoulos (n 54).

[180] Ramsay (n 177) 222.

[181] Dimitrakopoulos (n 54) 449.

[182] Ramsay (n 177) 228: 'The principle of legal certainty must be the aspiration in the creation of all legislation. It is apparent from the foregoing that copy out may adopt ambiguities which are at odds with the principle.'

[183] Krislov, Ehlermann and Weiler (n 38) 82, who take the view that '[a] vague and open-ended directive gives a Member State wide latitude for wrongful application. … A detailed directive which is poorly drafted may itself constitute an obstacle to implementation'; Richard Wainwright, 'Techniques of Drafting European Community Legislation: Problems of Interpretation', (1996) 17 Statute Law Review 7-14, 11, who deplores 'a general deterioration in the quality and consistency of Community legislation … Last minute compromises … produce texts which are, in some cases, specifically designed to be unclear.'; Dimitrakopoulos (n 54) 445-446, who remarks that '[t]he content of directives is frequently vague ('fudges') as a result of political compromises that occur in formulation.'; Prechal (n 13) 33, for whom 'directives themselves are often vague and open to a variety of interpretations, since they must accommodate different national legal concepts and constructions'; Bates (n 174) 119-120 suggests this

law.[184] Reliance on the 'copy out' technique therefore misses the opportunity to elaborate concepts of EU law in the national implementing measures in order to ensure their linguistic compatibility with existing legislation.[185] The absence of explanatory provisions using familiar national legal terminology in the national implementing measures may lead to problems of interpretation by the national authorities or the national courts,[186] which are then faced with the task of interpreting unfamiliar concepts of EU law. This risks undermining the consistent interpretation of EU law in all Member States.[187,188]

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is a problem specific to the transposition of 'the "permissive directive" which requires a minimum standard to be set but prescribes no maximum'.

[184] Bates (n 174) 119 provides an example: 'some provisions do not fit into the domestic drafting style. For example, the use of the word "normally', frequent in Community legislation, is meaningless in a United Kingdom context and the draftsman therefore has to find an alternative on each occasion when this word is used'. See also, Prechal, (n 13) 188 who notes that the national implementing measures 'may literally just take over the terms of the directive, which could be unfamiliar to the national legal order'.

[185] Ramsay (n 177) 'one of the principal objectives which drafters should strive to achieve is legal compatibility. ... [T]he drafter should aim to ensure that the language used is consistent with other legislative measures covering the same subject matters. It is submitted that the use of copy out may call into question the drafter's commitment to the goal of legal compatibility. ... The use of copy out in this way may also create legislation which contains different linguistic styles. Linguistic inconsistencies will arise where if the copied out material contains more general or aspirational statements and other sections, which are not copied out, are characterized by detail and precision.'

[186] See to that effect, European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on "Better lawmaking"' [2005] OJ C 24/39, 1.2.4. See also, Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (5th edition, Sweet & Maxwell, 2000) 407: '[t]he interpretation however of texts copied out, in time may create confusion in the courts, resulting in an increased number of references to the Court of Justice.'

[187] The Court of Justice has consistently held that terms used in EU law must be uniformly interpreted and applied throughout the Member States, except where an express or implied reference is made to national law; see for example Case 29/69 *Stauder* [1969] ECR 419, paras 3-4; Case 49/71 *Hagen* [1972] ECR 23, para 6; Case 283/81 *CILFIT* [1982] ECR 3415, para 7, Case 327/82 *Ekro* [1984] para 11; Case C-273/90 *Mecio-Fell* [1991] ECR I-5569, paras 8-12; Case C-468/93 *Emmen* [1996] ECR I-1721, para 22; Case C-287/98 *Linster* [2000] ECR I-6917, para 43; and Case C-5/08 *Infopaq International* [2009] ECR I-6569, para 27; C-433/08 *Yaesu Europe* [2009] ECR I-11487. para 18.

[188] Although in theory, the national courts could seek the assistance of the Court of Justice by making a reference for a preliminary ruling under Article 267 TFEU, there may be several reasons that lead a

On the other hand, while a directive may refer to a term that might also be in use in the national legal system, an identical term might have a different substantive content in national law compared to the meaning given to it by the directive.[189] The problem here too is that the terms contained in a directive might be interpreted according to national law,[190] rather than given their autonomous meaning under EU law, which again may undermine the consistent interpretation of EU law throughout the Union.

Secondly, a directive may prescribe the result to be achieved in national law 'in general and unquantifiable terms'[191] without containing any detailed specifications as to the methods to be used. Member States are then under an obligation to specify in their national implementing measures how that result is to be brought about.[192] National implementing measures that merely replicate such provisions without further explanation as to how that result should be

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national court to refrain from making a reference to the Court of Justice under Article 267 TFEU; see further Chapter 10 (The Implementation of Directive 2004/38 Compared).

[189] See to that effect, Case 283/81 *CILFIT* (n 187), paras 19-20: 'It must also be borne in mind … that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States. … [E]very provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.' See also, Brent (n 14) 110: '[t]he directive may employ Community law concepts which have a different substantive content from, but used the same terminology as, English law doctrines instead of community law concepts.'

[190] Brent (n 14) 110: '[t]he result is that national courts may be tempted to apply English law doctrines instead of Community law concepts.'

[191] Case C-365/97 *Commission v Italy* (*San Rocco case*) [1999] ECR I-7773, paras 67-68; Case C-60/01 *Commission v France* (n 103) para 27; Case C-32/05 *Commission v Luxembourg* (n 103) para 38; Economic and Social Committee (n 139), para 3.7, refers to 'non-explicit provisions, which merely set forth general goals, leaving Member States fairly extensive leeway in choosing national transposition measures'. See also, Brent (n 14) 110: 'a directive may simply prescribe a result to be achieved without specifying in detail the means.'

[192] Economic and Social Committee (n 139), para 3.8: 'In the case of non-explicit provisions, evaluation of the full, faithful and effective nature of the transposition does not relate to the actual drafting of the national measures but their content, which must enable the directive's objectives to be achieved.'

achieved may result in incomplete transposition that fails to achieve a directive's stated objectives.[193]

On the opposite end of the scale, national officials may also opt for more elaborate forms of transposition that are intended to facilitate the application and enforcement of a directive.[194] However, this approach is also not without its shortcomings[195] and may lead not only to 'under-implementation' but also to 'over–implementation'.[196] The latter occurs when implementation goes beyond the results prescribed by a directive through 'the use of concepts, obligations, mechanisms and procedures that were never meant to be a part of the directive'.[197]

Firstly, the absence of concepts under national law that correspond to those used in a directive may lead the national authorities to try to address this discrepancy. This could take the form of explanatory provisions in the national implementing measures that attempts to elaborate on the concepts contained in the directive by using more familiar national legal terminology. In some cases, this can lead to 'under-implementation' because 'certain provisions of a directive may be omitted from national law in whole or in part'[198] resulting in incomplete transposition. However, in other cases, this can lead to 'over-implementation' because such explanatory wording might impose additional

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[193] Ramsay (n 177) 225-227, who observes that '[t]he use of copy out may result in the adoption of terms which merely replicate the obligation imposed upon the Member States by the directive without providing the mechanism to achieve the required result' and points out the 'obvious risks where drafters copy out ambiguous statements or statements which merely provide the goal to be achieved but leave the Member State discretion in the method to achieve the goal.'

[194] Dimitrakopoulos (n 54) 449, who explains that 'those who take a bolder stance, try to interpret the directive, in an attempt to facilitate street-level implementation.'

[195] Prechal, (n 13) 188, who observes that 'the "translation" of the directive into national legal terminology is not necessarily a safeguard for proper interpretation and application by the courts'. The author goes on to provide several examples drawn from the case law of the Court of Justice, ibid, 188-190.

[196] The term is used by Ramsay (n 177), and Dimitrakopoulos (n 54).

[197] Dimitrakopoulos (n 54) 449.

[198] Brent (n 14) 110

requirements that are not contained in the directive that give a national meaning to what should be an EU concept. In both cases, this leads to a different meaning being ascribed to EU concepts that departs from what the directive had intended,[199] thus undermining its consistent interpretation in all the Member States.

Secondly, the national authorities might be tempted to insert additional provisions in their national implementing measures which are not prescribed by the directive and in connection with which Member States do not enjoy a discretion. This practice is sometimes referred to as 'gold-plating'[200] and consists in the inclusion of additional requirements in the national implementing measures, which are neither required nor foreseen by the directive in question.[201] Gold platting may be benign, but the contrary is also

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[199] Ramsay (n 177) 222: 'Over-implementation may arise where a directive contains words or phrases without legal effect in the UK context and drafters choose alternatives which have a broader meaning than the directive intended. … Over-implementation may also arise where the directive is transposed through regulations adopted under an existing piece of legislation and the scope of that Act is wider than that of the directive.'

[200] See for example, European Economic and Social Committee (n 173) 1.4.

[201] See for example, Michael Kaeding, *Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives across Member States* (Leiden University Press 2007) 176: 'A gold plate is any burden placed on national businesses that is not strictly required by the original EU directive. In other words, anything beyond the minimum requirements necessary for meeting a directive can be considered gold plate'. UK Department for Business, Innovation and Skills, 'Transposition Guidance: How to Implement European Directives Effectively' (April 2013), 8, provides further examples: 'Gold-plating is when implementation goes beyond the minimum necessary to comply with a Directive, by: extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; or not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or retaining pre-existing UK standards where they are higher than those required by the Directive; or providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or implementing early, before the date given in the Directive.' For an alternative view on 'gold-plating', see Eva Thomann, 'Customizing Europe: Transposition as Bottom-Up Implementation' (2015) Journal of European Public Policy (published online, 27 Feb 2015): . See further Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee

true.[202] For example, gold-plating may take the form of the inclusion in national implementing measures of additional exceptions which are not permitted by a directive.[203] Such a practice is therefore also likely to undermine the uniform application of EU law in all Member States, which according to the Court of Justice is a fundamental requirement of the EU's legal order.[204]

In practice, many Member States use a combination of approaches to the drafting of national implementing measures that blend both literal and elaborative techniques of transposition.[205] In general, it would appear that the provisions of a directive which contain detailed specifications will tend to be

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and the Committee of the Regions, 'Internal Market Strategy - Priorities 2003-2006', COM(2003) 238 final, 57; 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Better Governance for the Single Market', COM(2012) 259 final, 5; Jacques Pelkmans and Anabela Correia de Brito, 'Enforcement in the EU Single Market' (2012) CEPS Papers, 5.

[202] Various examples are given in European Economic and Social Committee, 'Abstracts from EESC Opinions Referring to Gold-Platting and Transposition' (25 June 2015) <http://www.eesc.europa.eu/resources/docs/abstract-from-eesc-opinions.pdf> accessed on 28 November 2015.

[203] See for example, Case 247/85 *Commission v Belgium* [1987] ECR 3029, para 58: 'it must be observed that this does not appear amongst the reasons, listed limitatively in … the directive, for which Member States may derogate from the … provisions of the directive'. See further, Case C-71/92 *Commission v Spain* [1993] ECR I-5923, para 24, in which the Court held that 'a provision allowing other exceptions to be introduced by other laws is likely to create an ambiguous legal situation making it impossible for those concerned to ascertain their rights and obligations without ambiguity'.

[204] See for example, Joined cases 66, 127 and 128/79 *Meridionale Industria Salumi* [1980] ECR 1237, para 11; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, para 26; Joined cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd* [2005] ECR I-10423, para 104. See also, Case 10/76 *Commission v Italy* [1976] ECR 1359, para 12, where the Court emphasised that the obligation on Member States to implement directives within the deadline is to ensure the uniform implementation of EU law.

[205] Dimitrakopoulos (n 54) 454.

literally transposed,[206] whilst more loosely drafted provisions of a directive are likely to be the subject of more elaborate forms of transposition.[207]

The risks which drafting techniques pose to the conformity of the national implementing measures can be summarised by the following table:

[206] Economic and Social Committee (n 139), para 4.1, which notes that '[i]t seems to be becoming increasingly common for prescriptive/explicit provisions to be transposed by simply transcribing them, as the transposition of this type of provisions leaves Member States no margin of manoeuvre; the Commission and the Court thus focus their attention more on ensuring that the wording of the transposition measures corresponds with, or even is identical to, the prescriptive provisions of the directive. However, the Court has never gone as far as to rule that the obligation to transpose faithfully necessitates direct transcription. The Commission tends to favour this transcription procedure, while taking particular care to ensure that the definitions included in the directive are faithfully reproduced in the transposition text, so as to prevent any semantic or conceptual disparities which would hinder the uniform application of Community law in the Member States or its effectiveness.' See also, Ramsay (n 177) 228, who suggests that the use of the 'copy-out' technique 'should be restricted to directives which are clear and precise and which cover no pre-existing domestic legislation. If not, the UK runs the risk of enforcement actions raised by the European Commission and, more probably, damages actions raised by aggrieved individuals. This would be ironic given that these were the very dangers it sought to avoid.'

[207] See to that effect, Economic and Social Committee (n 139), para 4.1, which notes that 'Checking the transposition of non-explicit provisions is, however, more problematic. Here we are talking about cases where, in accordance with Article 249 of the EC Treaty, a directive merely sets out general objectives and leaves it to the Member States to determine the ways and means of attaining them. Evaluation of whether the directive has been transposed fully and faithfully must then focus on the actual content of the national measures, and not on the drafting of them. The Court thus advocates that checking of transposition measures must be done pragmatically on a case by case basis, in the light of the objectives of the directive and the sector concerned; and this may throw the Commission off course.'

<table>
<tr><th colspan="4">Drafting Techniques and Risks of Non-Conformity</th></tr>
<tr><th>Drafting technique</th><th>Risk of non-conformity</th><th>Transposition outcome</th><th>Implementation outcome</th></tr>
<tr><td rowspan="3">verbatim transposition</td><td>failure to provide clarity to new or unclear EU provisions</td><td rowspan="2">Ambiguous transposition</td><td rowspan="4">Under-implementation = does not achieve result or undermines effectiveness of directive</td></tr>
<tr><td>EU term also used in national law, but with different meaning</td></tr>
<tr><td>failure to elaborate on national method for achieving result</td><td rowspan="2">Incomplete transposition</td></tr>
<tr><td rowspan="3">elaborative transposition</td><td>omission of EU provisions in whole or part (‘cherry-picking’)</td></tr>
<tr><td>national terminology imposes additional requirements on EU concepts</td><td rowspan="2">Incorrect transposition</td><td rowspan="2">Over-implementation = imposing additional requirements not permitted by directive</td></tr>
<tr><td>inclusion of provisions not permitted by EU provisions (‘gold-plating’)</td></tr>
</table>

Table 3.4 Drafting Techniques and their Risks

When a Member State proceeds to adopt the national implementing measures and transposes a directive, this does not end its obligations under Article 288(3) TFEU. The national implementing measures also need to be applied in practice to ensure they do not become dead-letter law, as will now be examined.

3.5 Obligations Relating to the Application of Directives

The second stage of implementation relates to application of the directive and consists in the administrative measures taken by the national authorities to give practical effect to the national implementing measures that transpose a

directive.[208,209] It is also sometimes referred to as administrative implementation.[210]

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[208] See Krislov, Ehlermann and Weiler (n 38) 62; Siedentopf and Hauschild (n 38) 57-68; Alberto Gil Ibañez, *The Administrative Supervision & Enforcement of EC Law* (Hart 1999) 14: 'Application is, in fact, more concerned with the correct administration of Community law and includes the adoption of acts of individual application. This phase implies an immediate and daily activity on he part of the administrations consisting of putting the law into practice'; Prechal (n 13) 6; Conant (n 38) 27-29, who sees application as an aspect of 'compliance with the "law in action"'. Confusingly, some authors use the term 'implementation' instead of 'application' to refer to 'the process whereby EU law is applied at national and subnational levels'; see, for example, Allio and Fandel (n 38) 11; Mellar (n 38) 2. Compare Treib (n 38), 6, who defines 'application' as 'guaranteeing that the norm addressees actually behave in a way that is in line with the legal norms laid down in the directives in question'; see also to that effect, Dimiter Toshkov, Moritz Knoll and Lisa Wewerka, 'Connecting the Dots: Case Studies and EU Implementation Research' (2010) Institute for European Integration Research Working Paper 10/2010, 6 and 17, who use the term 'administrative implementation' to what is referred here as application and which comprises 'actions that the public administration undertakes in order to ensure compliance'. The authors use the term 'law application' to refer to 'societal compliance with the legislation … [by] citizens, companies, NGOs, etc.', ibid, 10. However, in this study the term 'observance of the law' is used instead of 'societal compliance'. Some authors also use the term 'enforcement' to refer to measures taken by the national administrative or regulatory authorities to secure compliance with EU directives in the environmental, social policy or health and safety fields; see for example Esther Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 West European Politics, 50-67, 62, in which the author considers that enforcement encompasses 'the establishment of administrative agencies, the setting up of necessary tools and instruments, monitoring and inspecting by regulators'; Miriam Hartlapp, 'Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe' (2014) West European Politics, 805-824, 806, who defines enforcement as 'the public or delegated bodies that act to promote compliance and to achieve regulatory outcomes.' Nonetheless, for the purposes of this study, such measures are considered as falling within the concept of application of a directive by the national administrative authorities.

[209] Prechal (n 13) 6 points out that the expression 'application of directives … should in principle refer to the application of the national measures transposing he directive. However, in some situations it is the directive as such which is applied, namely where it is directly effective and there are no appropriate transposition measures. Furthermore it must be observed that both scholars and the Community institutions use the term "application of directives", even in cases where they are actually referring to the application of the national measures transposing them.' In this study, an effort will be made to use the terms the 'application of directives' and 'application of the national implementing measures' in their proper context.

[210] Toshkov, Knoll and Wewerka (n 208), 6 and 17.

As previously mentioned,[211] the Member States have a discretion as to which organs of the state are tasked with application of the national implementing measures. Application may therefore be entrusted to one or several authorities operating at central,[212] federated,[213] regional[214] or local levels[215] or independent government agencies in line with each Member State's institutional structure. Where deemed appropriate, it may even be entrusted to private bodies operating under the supervision of the State, such as in relation to the recognition of professional qualifications.[216]

Whichever authority is tasked with application of a directive, the Member States are required 'to ensure that the provisions of a directive are applied exactly and in full'.[217] In this connection, the Court of Justice has ruled that 'the adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures.'[218]

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[211] See n 28 and accompanying text.

[212] See for example, Case C-292/89 *Antonissen* [1991] ECR I-745, which concerned a deportation decision of a Belgian citizen ordered by the UK's Secretary of State for the Home Department (the Minister of internal affairs).

[213] See to that effect, Case C-8/88 *Commission v Germany* (n 17) paras 13-14.

[214] See for example, C-435/92 *Association pour la protection des animaux sauvages* (n 27) which concerned a situation where administrative application of a directive on the protection of wild birds had been delegated to the prefect of French departments.

[215] Case 103/88 *Fratelli Costanzo* (n 16) which concerned the application of the public procurement rules by the municipality of Milan.

[216] Case 246/80 *Broeckmeulen* [1981] ECR 2311, para 16, which concerned the Dutch medical registration committee.

[217] Joined Case 91/79 and 92/79 *Commission v Italy* [1990] ECR 1099, para 6; Case C-287/91 *Commission v Italy* [1992] ECR I-3515, para 7; Case C-16/95 *Commission v Spain* [1995] ECR I-4883, para 3.

[218] Case C-62/00 *Marks & Spencer plc* [2002] ECR I-6325, para 27. See also, AG Jacob's Opinion in Case C-237/90 *Commission v Germany* (n 37), para 14: ' it is not sufficient simply to incorporate the terms of a directive into national legislation; in addition Member States must ensure that the legislation is applied in practice'.

Member States must accordingly apply their national implementing measures with the same vigour as they would apply their national legislation,[219] and ensure that they display the same diligence when handling cases of non-observance of the EU rules as they would when dealing with a failure to observe their national laws.[220]

Such administrative measures may involve the national authorities issuing decisions that apply the rules contained in the national implementing measures to concrete situations in respect of the persons falling within the scope of a directive.[221] In line with the principle of national institutional autonomy,[222] national law will determine the procedure that will apply to the adoption of such decisions. However, EU law requires that any administrative decision that denies the benefit of rights granted under EU law should contain a statement of reasons in order to allow for its judicial review in the event such a decision is contested.[223]

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[219] Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft* [1980] ECR 1863, para 8 ; See also to that effect Declaration (19) on the Implementation of Community Law annexed to the Maastricht Treaty (1992) OJ C 191/1 at 102, which emphasises that it is 'essential for the proper functioning of the Community that the measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law.'

[220] Case 68/88 *Commission v Greece* [1989] ECR 2965, para 25; C-186/98 *Nunes* [1999] ECR I-4883, para 11.

[221] See to that effect, Case C-224/97 *Ciola* (n 48), para 32 (concerning an administrative decision imposing a maximum quota of boat moorings permitted on the shore of Lake Constance in respect of boats whose owners are resident abroad); Case C-201/02 *Wells* [2004] ECR I-723, para 43 (relating to the absence of an assessment undertaken pursuant to the environmental impact assessment directive); Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paras 24-27 (on the circumstances where administrative authorities are under an obligation to review a previous decision in order to ensure its compliance with a later ruling of the Court of Justice); Case C-2/06 *Kempter* [2008] ECR I-411, paras 37-39 and 44-46 (idem).

[222] See n 25 and accompanying text.

[223] Case 36/75 *Rutili* [1975] ECR 1219, para 52 (the competent national authority is under a duty immediately to inform an EU citizen against whom a restrictive measure has been adopted of the grounds on which the decision taken is based to enable him to make effective use of legal remedies; Case 222/86 *Heylens* [1987] ECR 4097, para 15 (the competent national authority is under a duty to inform

Administrative measures might also consist in the actions taken to ensure that a specific factual situation prescribed by a directive is effectively attained.[224] For example, a directive might lay down certain deadlines relating to the handling of applications lodged by individuals before the national administrative authorities.[225] These authorities are then obliged to take the necessary measures to secure the processing of such applications within the specified deadline. In the field of environmental law, a directive might require Member States to ensure that water pollutants do not exceed a certain level[226] or that waste is disposed of without endangering human health or harming the environment.[227] In such circumstances, the national authorities are obliged to take the necessary measures to attain the results prescribed by the directive[228] and may not plead the existence of external circumstances to justify a failure to meet the targets laid down in the directive.[229]

Depending on the directive concerned, Member States may also need to take certain measures which are not explicitly required by a directive but which

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an EU citizen of the reasons on which its decision to deny them the benefit of EU rights is based, either in the decision itself or in a subsequent communication made at their request).

[224] See for example, Case 56/90 *Commission v United Kingdom* [1993] ECR I-4109, paras 42-46 (obligation to take all appropriate measures to ensure bathing waters comply with the limitations laid down in a directive concerning the quality of bathing waters); Case C-268/00 *Commission v Netherlands* [2002] ECR I-2995, paras 12-14 (idem); Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, para 30 (failure to apply public procurement procedures in respect of a services contract for the treatment of waste); Case C-275/08 *Commission v Germany* [2009] ECR I-168* (summary publication), Operative part, para 1 (failure to apply public procurement procedures in respect of the award of a contract for the supply of motor vehicle registration software).

[225] See for example, Articles 10 and 20 of Directive 2004/38 that oblige Member States to issue residence documents to the family members of EU citizens within six months of submitting an application. See also, Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 45 (failure to issue a residence card to the non-EU family member of an EU citizen within six months).

[226] Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103, paras 21-22.

[227] Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 191), para 111.

[228] Case C-337/89 *Commission v United Kingdom* (n 226), para 24; Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 191), paras 108-109.

[229] Case C-337/89 *Commission v United Kingdom* (n 226), para 24; Case C-45/91 *Commission v Greece* [1992] ECR I-2509, para 21.

are necessary to ensure it is applied in practice.[230] In the absence of any provisions dealing with monitoring or sanction procedures contained in a directive, it is up to the Member States to adopt the necessary mechanisms that ensure observance of the national implementing measures by the persons who fall within the scope of the directive concerned.[231] Alternatively, a directive may oblige Member States to engage in public consultations, but it will leave the Member States the freedom as to how such consultations should be arranged, as in the case of projects that may affect the environment.[232]

For instance, Member States may choose a sanctioning regime that imposes penalties for a failure to observe the rules. The Court has held in this regard that 'whilst the choice of penalties remains within their discretion, [Member States] must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.'[233] In the context of the free movement of persons, the Court has held that it would be excessive in comparison to the gravity of the infringement to impose imprisonment or deportation as the penalty for a failure to comply with residence formalities.[234]

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[230] Brent (n 14) 133.

[231] Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para 19.

[232] See for example, Article 6 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30 and Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

[233] Case 68/88 *Commission v Greece* (n 220), para 24.

[234] Case 48/75 *Royer* (n 33), paras 38-51; Case 118/75 *Watson and Belman* [1976] ECR 1185, paras 20-21 ; Case 157/79 *Pieck* [1980] ECR 2171, paras 18-19; Case 265/88 *Messner* [1989] ECR 4209, para 14; Case C-193/94 *Skavani* [1996] ECR I-929, para 36; Case C-24/97 *Commission v Germany* [1998] ECR I-2133, para 14; Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, para 44; Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, paras 67-70. This case law is reflected in Articles 5(5), 8(2), 9(3), 20(2), 26 and 36 of Directive 2004/38.

Finally, when applying the national implementing measures, the national authorities are under an obligation to interpret the provisions of its national law as far as possible in conformity with the relevant directive.[235] Where national law or administrative measures might be in conflict with a directive, the administrative authorities are also under a duty to refrain from applying conflicting provisions of national law.[236]

A summary of the obligations relating to transposition is contained in the following table:

Obligations Relating to the Transposition of Directives	
General obligations (all directives)	**Specific obligations (dependent on directive)**
National authorities must fully apply national implementing measures (NIMs) that transpose a directive	Administrative decisions relating to individual rights must contain statement of reasons
National authorities must apply NIMs with same vigour as national law	Administrative action must achieve specific factual objectives set by directive/NIMs
National authorities must display same diligence in sanctioning non-observance of the NIM's as breaches of national law	Administrative action must put in place necessary mechanisms to ensure observance of NIMs by individuals
National authorities must interpret national law including NIMs in conformity with directive	Administrative penalties to sanction breaches of NIMs must be equivalent, proportionate and, where relevant, dissuasive
National authorities must uphold supremacy of EU law and set aside provisions of national law that are in conflict with directive	

Table 3.5 Transposition obligations

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[235] Case 14/83 *von Colson and Kamann* (n 15), para 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Case C-218/01 *Henkel* [2004] ECR I-1725, para 60. See further, John Temple Lang, 'The Duties of National Authorities under Community Constitutional Law', (1998) 23 European Law Review, 109-131, 114; John Temple Lang, 'The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections', (2001) 26 European Law Review, 84-93, 88; Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167-206; Prechal (n 13), 65-72. However, there are limitations on how far administrative authorities should be able to interpret EU law since there is no preliminary ruling procedure that can bind the national authorities in their interpretation of unlike Courts, see further Prechal (n 13), 317-318; Michal Bobek, 'Thou Shalt Have Two Masters: The Application of European Law by Administrative Authorities in the New Member States' [2008] 1 Review of European Administrative Law 51-63, 55; Verhoeven (n 25) 31-34, 286-309.

[236] Case 103/88 *Fratelli Costanzo* (n 16), paras 31-33; Case C-118/00 *Larsy* [2001] ECR I-5063, para 53; Case C-224/97 *Ciola* (n 48), 26; Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, para 49; . See also, Temple Lang (1998) (n 235) 113; Verhoeven (n 25) 14-18 and 79-121.

Attention will now turn to the final stage of implementation, namely enforcement by the national courts.

3.6 Obligations Relating to the Enforcement of Directives

The third stage of implementation relates to the enforcement of EU directives by the national courts,[237] also referred to as decentralised enforcement,[238] or judicial implementation.[239]

The national courts fulfil the role of 'Community courts of general jurisdiction'[240] and 'in collaboration with the Court of Justice, [fulfil] a duty

[237] Krislov, Ehlermann and Weiler (n 38) 62; Siedentopf and Hauschild (n 38) 68-72, who refer to 'control' instead of 'enforcement'; Prechal (n 13) 6; Allio and Fandel (n 208) 11, and Mellar (n 38) 2, who define enforcement as 'the process whereby full compliance with EU law is monitored and secured, and non-compliance is systematically sanctioned by national and supranational courts'; Conant (n 38) 27-29, who sees enforcement as another facet of 'compliance with the "law in action"'; Treib (n 38) 6. Compare, Hartlapp (n 208) 806, who defines enforcement as 'the public or delegated bodies that act to promote compliance and to achieve regulatory outcomes' which is considered in this study as forming part of application; Toshkov, Knoll and Wewerka (n 208) 19-20, who do not refer to enforcement by the courts and only identify centralised enforcement by the Commission as a factor that explains differences in implementation outcomes. Nonetheless, one of the authors elsewhere refers to enforcement as 'the process of imposing compliance by external actors (e.g. the Commission)'; see Toshkov (n 38) 3 (n 1), and 6. However, enforcement also involves the national courts as observed by Siedentopf and Ziller (n 38) 200. Given that the national judiciary together with the legislature and the executive make up the authorities of the Member States, enforcement should also be seen as a process involving internal actors (i.e the national courts) and not solely external actors (i.e. the EU institutions). On the use of the term 'enforcement' by national administrative or regulatory authorities in the context of the application of a directive by the national authorities, see n 208. For a detailed review of enforcement of directives by the national courts, see Brent (n 14) 135-148; Prechal (n 13) 131-179.

[238] Prechal (n 13) 9, 131-179 and 309-310; Claus-Dieter Ehlermann, 'Opening Speech at the IVth Erenstein Colloquium' in Siedentopf and Ziller (n 38) 143-150, 147-149.

[239] Prechal (n 13) 190.

[240] Case T-51/94 *Tetra Pak Rausing* [1990] ECR II-309, para 42. See also, David Edward, 'How the Court of Justice Works' (1995) 20 European Law Review, 539-558, 546; Olivier Dubos, *Les juridictions nationales, juge communautaire* (Dalloz 2001) 1; Roberto Baratta 'National Courts as "Guardians" and "Ordinary Courts" of EU Law : Opinion 1/09 of the ECJ' (2011) 38 Legal Issues of Economic Integration 297-320.

entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.'[241]

The Treaties require that Member States should 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[242] The Court has consistently recognised the right to effective judicial protection[243] in its case law:

> 'the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and

[241] Case 244/80 *Foglia* [1981] ECR 3045, para 16; Joined Cases C-422/93 to C-424/93 *Zabala Erasun* [1995] ECR I-1567, para 15; Opinion 1/09 *European and Community Patents Court* [2011] ECR I-1137, para 69; Case C-241/09 *Fluxys* [2010] ECR I-12773, para 29. See also, Case C-253/00 *Muñoz* [2002] ECR I-7289, para 28 (national courts are under a duty to apply the provisions of EU law in areas within their jurisdiction and ensure that they take full effect).

[242] Article 19(2) TEU.

[243] For a review of the principle of effective judicial protection, see for example Damian Chalmers, 'Judicial Preferences and the Community Legal Order' (1997) 60 Modern Law Review, 167-199, 184-189; John Temple Lang, 'The Duties of National Courts under Community Constitutional Law' (1997) 22 European Law Review 3-18; Mark Brearley and Mark Hoskins (n 92) 99-117; Paul Kapteyn and Pieter VerLoren van Themaat, *Introduction to the Law of the European Communities* (Lawrence Gormley (ed), 3rd edition, Kluwer Law 1998) 556-573; Takis Tridimas (n 92) 276-312; Stephen Weatherill and Paul Beaumont, *EU Law* (3rd edition, Penguin Books 1999) 932-934; Ari Afilalo, 'Towards a "Common Law" of Europe: Effective Judicial Protection, National Procedural Autonomy, and Standing to Litigate Diffuse Interests in the European Union' (1999) *22* Suffolk Transnational Law Review 349-404; Brent (n 14) 133-148; Michael Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004) 1-68; Prechal (n 13) 131-179; Anthony Arnull, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) 36 European Law Review 51-75; Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 164-171; Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship Between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31-50; Lenaerts, Maselis and Gutman (n 104) 107-156; Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th ed, Oxford University Press 2014) 182-207; Nina Półtorak, *European Union Rights in National Courts* (Kluwer 2015) 69-100.

Fundamental Freedoms ... and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.'[244]

Pursuant to the duty of sincere cooperation laid down by Article 4(3) TEU, Member States must take all appropriate measures 'to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. It is accordingly for the Member States to ensure that individuals are able to obtain effective judicial protection of their rights under EU law before the national courts.[245]

Although a directive may contain provisions that address specific aspects of the right to judicial protection,[246] in the absence of provisions governing

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[244] See, for example, Case C-432/05 *Unibet* [2007] ECR I-2271, para 37. This was first laid down in Case 222/84 *Johnston* [1986] ECR 1651, para 18 and has been reaffirmed on several occasions; see for instance Case 222/86 Case 222/86 *Heylens* (n 223), para 14; Case C-97/91 *Borelli* [1992] ECR I-6313, para 14; Case C-1/99 *Kofisa Italia* [2001] ECR I-207, para 46; Case C-226/99 *Siples* [2001] ECR I-277, para 17; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45; Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677, para 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, para 61; Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-0000, paragraph 335; Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para 47.

[245] Case 33/76 *Rewe* [1976] ECR 1989, para 5; Case 45/76 *Comet* [1976] ECR 2043, para 12; Case 106/77 *Simmenthal* [1978] ECR 629, para 21 and 22; Case 68/79 *Just* [1980] ECR 501, para 25, Case 199/82 *San Giorgio* [1983] ECR 3595, para 14; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* [1988] ECR 1099, para 12; Case 104/86 *Commission v Italy* [1988] ECR 1799, para 7; Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* [1988] ECR 4517, para 17; Case C-213/89 *Factortame* [1990] ECR I-2433, para 19; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, para 43; Case C-96/91 *Commission v Spain* [1992] ECR I-3789, para 12; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 12; Case C-432/05 *Unibet* (n 244), para 38; C-404/13 *Client Earth* [2014] ECLI:EU:C:2014:2382 (judgment of 14 November 2014), para 52; Case C-160/14 *Ferreira da Silva e Brito* [2015] ECLI:EU:C:2015:565 (judgment of 9 September 2015), para 45.

[246] See for example, Article 31 of Directive 2004/38 concerning appeal rights, discussed further at Chapter 6 (The Obligations Contained in Directive 2004/38); Article 3 of Directive 2014/54 on the free movement of workers (n 155). As regards appeal rights contained in instruments adopted in the field of migration law, see Article 10(2) of Council Directive 2003/109 on long-term residence (n 158); Article 18 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Article 18(4) of Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12; Article 15(4) of Council Directive 2005/71/EC of 12

judicial procedure, it is up to the Member States to determine which courts have jurisdiction[247] and what procedures apply to such proceedings,[248] in accordance with the principle of national procedural autonomy.[249]

October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15; Article 11(3) of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

[247] The Court has consistently held that 'it is for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case'; see for instance Case 179/84 *Bozzetti* [1985] ECR 2301, para 17 (citing Case 13/68 *Salgoil* [1968] ECR 453, 463); Case C-446/93 *SEIM* [1996] ECR I-73, para 32; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 40; Joined Cases C-10/97 to C-22/97 *In.Co.Ge'90* [1998] ECR I-6307, para 14; Case C-258/97 *Hospital Ingenieure* [1999] ECR I-1405, para 22; Case C-462/99 *Connect Austria* [2003] ECR I-5197, para 35; Case C-224/01 *Köbler* [2003] ECR I-10239, paras 44-45; Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para 48; and Joined Cases C-317/08 to C-320/08 *Alassini* [2010] ECR I-2213, para 47; Case C-93/12 *Agrokonsulting* [2013] EU:C:2013:432 (judgment of 27 June 2013), para 35. See also, in the field of the free movement of persons, Case 98/79 *Pecastaing* [1980] ECR 691, para 11, and other case law cited at n 271.

[248] It is settled case law that 'in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law' see for example, Case 33/76 *Rewe* (n 245), para 5; Case 45/76 *Comet* (n 245), para 13; Case 68/79 *Just* (n 245), para 25; Case 199/82 *San Giorgio* (n 245), para 14; Joined Cases 331/85, 376/85 and 378/85 *Bianco and Girard* (n 245, para 12; Joined Cases 123/87 and 330/87 *Jeunehomme and EGI* (n 245, para 17; Joined Cases C-6/90 and C-9/90 *Francovich* (n 245), para 43; Case C-96/91 *Commission v Spain* (n 245), para 12; Case C-312/93 *Peterbroeck* (n 245), para 12; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para 29; Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49; Case C-224/01 *Köbler* (n 247), para 44; C-432/05 *Unibet* (n 244), para 39; Joined Cases C-222/05 to C-225/05 *van der Weerd* [2007] ECR I-4233, para 28; Case C-268/06 *Impact* (n 31), paras 44-45; Case C-567/13 *Baczó* [2015] ECLI:EU:C:2015:88 (judgment of 12 February 2015), para 41.

[249] See for example, Case C-550/07 P *Akzo Nobel* [2010] ECR I-8301, para 123; Case C-93/12 *Agrokonsulting* (n 247), para 35; Case C-567/13 *Baczó* (n 248), para 41. It is only recently that the Court of Justice has explicitly referred to this principle in such terms in its case law, even though the principle was established in Case 33/76 *Rewe* (n 245), para 5, and Case 45/76 *Comet* (n 245), para 13. See further, Verhoeven (n 25) 49-58.

However, the Court of Justice has placed limitations on the discretion that Member States enjoy in this area. According to now settled case law:

> 'while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection … It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right …. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'.[250]

The question whether national rules of procedure renders it 'practically impossible or excessively difficult' to exercise rights under EU law 'must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.'[251] This involves taking into consideration 'the basic principles of the

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[250] See for example, C-432/05 *Unibet* (n 244), paras 42-43. These requirements were first laid down by the Court in Case 33/76 *Rewe* (n 245), para 5, and Case 45/76 *Comet* (n 245), paras 13 and 16, and have been consistently affirmed ever since; see for instance, Joined Cases C-87/90 to C-89/90 *Verholen* [1991] ECR I 3757, para 24; Case C-312/93 *Peterbroeck* (n 245), para 12; Case C-231/96 *Edis* [1998] ECR I-4951, para 34; Case C-343/96 *Dilexport* [1999] ECR I-579, para 25; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727, para 85; Case C-453/99 *Courage and Crehan* (n 248), para 29; Case C-13/01 *Safalero* (n 248), para 49; Case C-224/01 *Köbler* (n 247), para 46; Case C-467/01 *Eribrand* (n 244), para 62; Case C-30/02 *Recheio* [2004] ECR I-6051, para 17; C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para 203; Case C-268/06 *Impact* (n 31), para 46; Case C-542/08 *Barth* [2010] ECR I-3189, para 17; Case C-310/09 *Accor* [2011] ECR I-8115, para 78; C-429/12 *Pohl* [2014] ECLI:EU:C:2014:12 (judgment of 16 January 2014), para 23; Case C-567/13 *Baczó* (n 248), para 42; Case C-160/14 *Ferreira da Silva e Brito* [2015] ECLI:EU:C:2015:565 (judgment of 9 September 2015), para 50.

[251] Case C-312/93 *Peterbroeck* (n 245), para 14; Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, para 19; Case C-473/00 *Cofidis* [2002] ECR I-10875, para 37; Case C-63/01 *Evans*

domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'.[252]

In accordance with the principle of national procedural autonomy, claims brought by individuals to enforce EU rights before the domestic courts will therefore be governed by national rules relating to court procedure – subject to the dual requirements of equivalence and effectiveness – including those relating to the role of the courts,[253] evidence,[254] burden of proof,[255] limitation

[2003] ECR I-14447, para 46; Joined Cases C-222/05 to C-225/05 *van der Weerd* (n 248), para 33; Case C-432/05 *Unibet* (n 244), para 54.

[252] Case C-312/93 *Peterbroeck* (n 245), para 14; Joined Cases C-430/93 and C-431/93 *Van Schijndel* (n 251), para 19; Case C-63/01 *Evans* (n 251), para 46; Joined Cases C-222/05 to C-225/05 *van der Weerd* (n 248), para 33.

[253] Case 106/77 *Simmenthal* [1978] ECR 629, paras 21 and 22-23 (national courts need not await a decision of a higher court which has sole jurisdiction to rule on the constitutionality of a national law in order to give primacy to EU law in case of conflict with provisions of national law); Joined Case C-87/90 to 89/90 *Verholen* [1991] ECR I-3757, para 16 (EU law does not preclude a national court from examining of its own motion whether national rules are in conformity with directly effective provisions of a directive); Joined Cases C-430/93 and C-431/93 *Van Schijndel* (n 251), para 22 (EU law does not require national courts to raise of their own motion a breach of EU law, where this would require them to abandon the passive role assigned to them by going beyond the ambit of the dispute as defined by the parties and by relying on facts and circumstances which the parties have not put forth). On the impact of EU law on the subject-matter jurisdiction of the national courts, see Półtorak (n 243) 199-203.

[254] See for example, Case 199/82 *San Giorgio* (n 245), paras 14-15 (rules of evidence must not make it practically impossible or excessively difficult to prove the existence of a breach of EU law, for example by requiring a claimant to prove that national charges paid in breach of EU law have not been passed on to the claimant's customers); Case 222/84 *Johnston*, 244), para 20 (a certificate issued by the administrative authorities that the conditions permitting derogation from the principle of equal treatment need not be treated by the national courts as conclusive evidence that such conditions have been met). On the impact of EU law on evidential jurisdiction of the national courts, see Półtorak (n 243) 199-203.

[255] See for example, Case 109/88 *Danfoss* [1989] ECR 3199, para 16 (in proceedings concerning equal pay, it is legitimate for national rules to provide for the burden of proof to shift to the employer where this is necessary to avoid depriving workers alleging discrimination of an effective means of enforcing the principle of equal pay due to the lack of transparency of an employer's policy on wages); Case C-127/92 *Enderby* [1993] ECR I-5535, paras 13-14 (idem, where significant statistics disclose an appreciable difference in pay between two positions of equal value, one of which is carried out almost exclusively by women and the other predominantly by men); Case C-400/93 *Dansk Industri* [1995]

ECR I-1275, para 24 (idem, where an employer's pay policy involves a variable element based on output and it is not possible to identify the factors which determined the units of measurement used to calculate the variable element in workers' pay).

periods,[256] forms of remedy[257] and sanctions, [258] as well as the availability of legal aid.[259]

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[256] Case 33/76 *Rewe* (n 245), para 5 (national law may impose reasonable time limits on bringing claims for breaches of EU law); Case 45/76 *Comet* (n 245), paras 16-18 (idem); Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paras 16, 21-23 (national law may impose a one-year limitation period on a claim for back-payment of benefits withheld in breach of a directive on equal treatment between men and women in the field of social security); Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para 52 (national law may impose a five-year limitation period on a claim for reimbursement of charges imposed in breach of EU law); Case C-312/93 *Peterbroeck* (n 245), paras 13, 16-18 (national law may impose a 60-day limitation period on the raising of new issues of law on appeal; provided this does not curtail the power of the national court to consider of its own motion a new plea of law based on EU law or its ability to make a reference for a preliminary ruling); Case C-261/95 *Palmisani* [1997] ECR I-4025, para 29 (national law may impose a time limit of one year for a claim for damages for loss suffered as a result of the belated transposition of a directive when it runs from the date on which national implementing measures are adopted); Case C-228/96 *Aprile* [1998] ECR I-7141, paras 28-29, (it is legitimate for national law to reduce the limitation period from five years to three years in respect of a claim for reimbursement of charges imposed in breach of EU law, provided this applies equally to similar claims under national law); Case C-246/96 *Magorrian* [1997] ECR I 7153, paras 41-46 (national law cannot restrict retroactive membership of an occupational pension scheme to two years of service prior to a claim when enforcing the right of equal treatment between men and women); Case C-78/98 *Preston* [2000] ECR I-3201, paras 43-44 (idem).

[257] Case C-271/91 *Marshall* [1993] ECR I-4367, paras 23-26 (in absence of specific provisions of a directive, Member States have discretion to choose appropriate remedy for breach of rights granted under that directive; choice of remedy must guarantee real and effective judicial protection and have a real deterrent effect on the employer; where remedy chosen is financial compensation, it must be adequate so as to enable full reparation of loss sustained as a result of breach of directive in accordance with the applicable national rules); Case C-460/06 *Paquay* [2007] ECR I-8511, paras 44-46 (idem); Case C-213/89 *Factortame* (n 247), para 23 (EU law requires the national courts to set aside a provision of national law that prevents it from granting interim relief to suspend the application of disputed national legislation until such time as it can deliver a judgment on the issue following its request a preliminary ruling); Joined Cases C-10/97 to C-22/97 *In.Co.Ge'90* (n 247), para 21 (where national rule is incompatible with EU law, a national court is under a duty to refrain from applying the national rule provided this does not restrict the court's power to order other remedies available under national law which are appropriate for protecting individual EU rights).

[258] See for example, Case C-177/88 *Dekker* (sanctions for breach of EU law must have a genuine deterrent effect); Case 68/88 *Commission v Greece* (n 220), para 24 (the choice of penalties remains within the discretion of the Member States, provided that infringements of EU law are penalised under procedural and substantive conditions which are analogous to those applicable to infringements of

In the specific context of the implementation of directives, the obligation to achieve the result prescribed by a directive is also binding on the courts.[260] The right to effective judicial protection implies that individuals must be able to have recourse to the national courts to compel observance of the national implementing measures.[261]

It is also the duty of the national courts, when a national measure is contested on the basis of having exceeded the margin of discretion granted by a directive, to review 'whether the competent national authorities, in exercising

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national law of a similar nature and importance and which, make the penalty effective, proportionate and dissuasive); Case C-186/98 *Nunes* (n 220), para 10 (idem).

[259] Case C-279/09 *DEB* [2010] ECR I-13849, paras 59 and 60; Case C-93/12 *Agrokonsulting* (n 247), para 50; C-413/12 *Asociación de Consumidores Independientes de Castilla y León* [2013] EU:C:2013:800 (judgment of 5 December 2013), para 42; Case C-567/13 *Baczó* (n 248), paras 54-55.

[260] Case 14/83 *von Colson and Kamann* (n 15), para 26; Case 79/83 *Harz* [1984] ECR 1891, para 26; Case 222/84 *Johnston* (n 244), para 53; Case 80/86 *Kolpinhuis Nijmegen* [1987] ECR 3969, para 12; Case C-106/89 *Marleasing* (n 235), para 8; Case C-373/90 *Criminal proceedings against X* [1992] ECR I-131, para 7; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, para 26; Case C-334/92 *Wagner Miret* [1993] ECR I-6911, para 20; Case 72/95 *Kraaijeveld* [1996] ECR I-5403, para 55; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 43; Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para 40; Case C-76/97 *Tögel* [1998] ECR I-5357, para 25; Case C-111/97 *EvoBus* [1998] ECR I-5411, para 18; Case C-131/97 *Carbonari* [1999] ECR I-1103, para 48; Case C-258/97 *Hospital Ingenieure* (n 247), para 25; Joined cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, para 110; Case C-15/04 *Koppensteiner* [2005] ECR I-4855, para 33; Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, para 77; Case C-268/06 *Impact* (n 31), para 41; Joined Cases C-378/07 to C-380/07 *Angelidaki* [2009] ECR I-3071, paragraph 106; Case C-396/07 *Juuri* (n 31), para 27; Case C-555/07 *Kücükdeveci* [2010] ECR I-365, para 47; Case C-227/09 *Accardo* [2010] ECR I-10273, para 49; Case C-177/10 *Santana* [2011] ECR I-7907, para 51.

[261] Case 8/81 *Becker* [1982] ECR 53, para 19 (whenever a directive is correctly implemented, its effects reach individuals through the intermediary of the implementing measures adopted by the Member State concerned); Case 270/81 *Felicitas Rickmers* [1982] ECR 2771, para 24 (idem); Case 222/84 *Johnston* (n 244), para 51 (idem); ibid, para 19 (Member States must provide for effective judicial control to ensure observance of EU law and of national legislation intended to give effect to a directive). See also to that effect, in the context of a regulation, Case C-253/00 *Muñoz* (n 241), para 30 (full effectiveness of the rules on quality standards imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor). See further Prechal (n 13) 187-190.

the choice which is left to them as to the form and the methods for implementing the directive, have kept within the limits as to their discretion set out in the directive'.[262] This duty applies even if the directive has not been transposed into the national legal order.[263]

When a directive is invoked in judicial proceedings, the national courts are also required as far as possible to interpret national law in conformity with its provisions having due regard to its 'wording and purpose' in order to achieve the result that the directive prescribes.[264] This so-called duty of 'consistent

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[262] Case 51/76 *Verbond van Nederlandse Ondernemingen* (n 115), paras 24 and 29; Case C-72/95 *Kraaijeveld* (n 115), paras 56 and 59; Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* (n 115), paras 66 and 69; Case C-83/11 *Rahman* (n 119), para 25. On the judicial review of the exercise of the discretionary power of administrative authority, see further Półtorak (n 243) 196-199; on re-opening administrative proceedings, see ibid, 279-289.

[263] Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* (n 115), para 70.

[264] Case 14/83 *von Colson and Kamann* (n 15), para 26; Case 79/83 *Harz* [1984] ECR 1891, para 26; Case 222/84 *Johnston* (n 244), para 53; Case 80/86 *Kolpinhuis Nijmegen* [1987] ECR 3969, para 12; Case C-106/89 *Marleasing* (n 235, para 8; Case C-373/90 *Criminal proceedings against X* (n 260), para 7; Case C-91/92 *Faccini Dori* (n 260), para 26; Case C-334/92 *Wagner Miret* (n 260), para 20; Joined Cases C-71/94 to C-73/94 *Eurim-Pharm* [1996] ECR I-3603, para 26; Case 72/95 *Kraaijeveld* (n 260), para 55; Case C-168/95 *Arcaro* [1996] ECR I-4705, para 41 ; Case C-54/96 *Dorsch Consult* (n 260), para 43; Case C-129/96 *Inter-Environnement Wallonie* (n 260), ECR I-7411, para 40; Case C-355/96 *Silhouette* [1998] ECR I-4799, para 36; Case C-76/97 *Tögel* (n 260), para 25; Case C-63/97 *BMW* [1999] ECR I-905, paras 22; Case C-111/97 *Rombi* [2000] ECR I-3367, para 23; Case C-111/97 *EvoBus* (n 260), para 18; Case C-131/97 *Carbonari* (n 260), para 48; Case C-185/97 *Coote* [1998] ECR I-5199, para 18; Case C-258/97 *Hospital Ingenieure* (n 247), para 25; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* [2000] ECR I-4941, para 30; Joined cases C-397/01 to C-403/01 *Pfeiffer* (n 260), para 113; Case C-408/01 *Adidas-Salomon* [2003] ECR I-12537, para 21; Case C-196/02 *Nikoloudi* [2005] ECR I-1789, para 73; Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* (n 260), para 78; Case C-555/07 *Kücükdeveci* (n 260), para 48; Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, para 45; Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33 (judgment of 24 January 2012), paras 24-25 and 27; C-428/11 *Purely Creative* [2012] ECLI:EU:C:2012:651 (judgment of 18 October 2012), para 41; Case C-81/12 *Asociaţia ACCEPT* [2013] ECLI:EU:C:2013:275 (judgment of 25 April 2013), para 71; C- 291/13 *Papasavvas* [2014] ECLI:EU:C:2014:2209 (judgment of 11 September 2014), para 56. The Court has also held that 'the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive', see Case C-212/04 *Adeneler* [2006] ECR I-6057, paragraph 122.

interpretation'[265] applies even if the provisions of the directive do not have direct effect.[266,267]

In accordance with the principle of supremacy of EU law, the national courts are under an obligation to refrain from applying provisions of national law in the event these come into conflict with provisions of a directive.[268]

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[265] This is also referred to as the 'indirect effect' of EU directives, see for example, A.I.L. Campbell, 'National Legislation and EC Directives: Judicial Co-Operation and National Autonomy' (1992) 43 Northern Ireland Legal Quarterly 330-358; Eamonn Doran, 'Direct Effect: Need Lawyers Read EC Directives?' (1993) 4 International Company and Commercial Law Review 174-178; Gerrit Betlem, 'The Principle of Indirect Effect of Community Law (1995) 3 European Review of Private Law 1-19; Chalmers (n 243) 189-190; John Temple Lang (n 243) 5-6; Jon Appleton, 'The Indirect-Direct Effect of European Community Directives' (2000) 5 UCLA Journal of International Law and Foreign Affairs 59-100; Brent (n 14) 283-295; Gerrit Betlem, 'The Doctrine of Consistent Interpretation - Managing Legal Uncertainty (2002) 22 Oxford Journal of Legal Studies 397-418; Prechal (n 13, 180-216; Sara Drake, 'Twenty Years after Von Colson - The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 European Law Review 329-348; Klamert (n 73) 1251; Sacha Prechal 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press 2007) 35-69.

[266] C-212/04 *Adeneler* (n 264), para 124. See also, Case 14/83 *von Colson and Kamann* (n 15), para 28, where the Court intimated that the provision concerned did not have direct effect because was not 'unconditional' by holding that it left the Member States free to choose the ways in which a person could pursue a judicial claim for reparation in cases where they had suffered discrimination; Case C-106/89 *Marleasing* (n 235), concerned a situation where the direct effect of a directive could not be invoked by an individual against another: see para 6, where the Court confirmed that a directive cannot generate so-called horizontal direct effect; Case C-98/09 *Sorge* [2010] ECR I-5837, paras 50-51, where the Court explicitly held that a provision of the framework agreement on fixed-term work annexed to a directive in the field of employment was not capable of having direct effect, but the provision nonetheless required the national courts to interpret national law in conformity with it. See further, Brent (n 14) 285-286; Prechal (n 13) 184-185.

[267] On the concept of supremacy, see Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[268] Case 106/77 *Simmenthal* (n 245), para 21 (national courts are obliged to give primacy to provisions of regulations in case these conflict with provisions of national law). See further, Case 249/85 *Albako* [1987] ECR 2345, para 17 (idem as regards decisions); Case C-262/97 *Engelbrecht* [2000] ECR I-7321, para 40 (idem as regards regulations); Case C-462/99 *Connect Austria* [2003] ECR I-5197, para 40 (idem as regards directives); Case C-327/00 *Santex* [2003] ECR I-1877 (idem as regards directives),

Furthermore, in proceedings involving individuals against the State, the national courts are under a duty to ensure that individuals are able to rely on the provisions of a directive which are directly effective[269] against the national authorities in the event that a Member State has failed to implement a directive correctly.[270] Moreover, where a Member State has failed to implement a directive, individuals must also be able to claim damages for any loss they have suffered as a result.[271]

In the field of the free movement of persons, enforcement essentially entails that the application of the EU rules by the administrative authorities of the Member States should be subject to scrutiny by the national courts by way of judicial review.[272] The principle of effective judicial protection requires that

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para 64; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, para 63 (idem as regards directives); Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, para 49 (idem as regards directives).

[269] On the concept of direct effect, see Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[270] Case 8/81 *Becker* (n 261), para 25 (where a Member State has failed to implement a directive correctly, individuals may assert directly effective provisions of the directive against the Member State concerned in proceedings before the national courts).

[271] Joined Cases C-6/90 and C-9/90 *Francovich* (n 245), para 45 (a national court must, in accordance with the national rules on liability, uphold the right of individuals to obtain reparation of loss and damage caused to them as a result of a Member State's failure to transpose a directive). See further Chapter 5, Section 5.3.3 (Member State Liability).

[272] Case 98/79 *Pecastaing* (n 247), para 11 (national law determines which courts have jurisdiction to hear appeals against decisions denying entry or residence to a national of the another Member State; national appeal procedures against must provide remedies which are no less favourable than those granted to nationals in respect of administrative acts); Case 131/79 *Santillo* [1980] ECR 1585, para 19 (national law must provide for review of a decision to deport an EU citizen by an independent body before which the national benefits from rights of representation and defence); Case 222/86 *Heylens* (n 223), para 14 (national law must allow a right of judicial appeal against a decisions denying an EU citizen access to employment); Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, para 59 (national law must provide for an EU citizen the right to apply for a stay of execution of a deportation decision if this remedy is available before the ordinary courts but not the administrative courts); Joined Case C-65/95 and 111/95 *Shingara and Radiom* [1997] ECR I-3343, para 44 (national law must provide a right of judicial appeal against an administrative decision to deny entry to an EU citizen); Case C-357/98 *Yiadom* [2000] ECR I-9265, para 43 (national law must provide a right of judicial appeal against an administrative decision to deny entry to an EU citizen, when the person is physically present in the

judicial review of administrative decisions relating to individual EU rights must address both the facts and the law.[273]

host Member State); Case C-459/99 *MRAX* [2002] ECR I-6591, paras 101-103 (national law must provide right to an effective judicial remedy against an administrative decision refusing entry to an individual claiming to be the family member of an EU citizen); Case C-83/11 *Rahman* (n 119), para 25 (where the provisions of a directive are not directly effective, an applicant is still entitled to judicial review of national measures taken in application of the directive to determine whether these have remained within the limits of the discretion set by that directive). The right of judicial appeal is further provided by Article 31 of Directive 2004/38, whose recital (26) explains should be available in 'all events'.

[273] See to that effect Joined Case C-65/95 and 111/95 *Shingara and Radiom* (n 248), paras 34-35 (national remedies against an administrative decision refusing entry or residence must entail either an appeal before a court that involves a review of the substance and an exhaustive examination of all the facts and circumstances, or, where such an appeal is limited to the legality of the national decision or there is no appeal, the intervention of an independent review authority that engages in an exhaustive examination of all the facts and circumstances before a final administrative decision is taken); Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para 82 (incompatibility of German system of judicial review which did not allow national courts to consider new facts that have arisen after an administrative decision was taken to deport an EU citizen on public policy grounds); ibid, paras 106 and 110-111 (incompatibility of German system of judicial review which only provided for the control of legality of an administrative decision to deport an EU citizen on public policy grounds); Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paras 47 and 57 (incompatibility of Austrian system of judicial review which only provided for the control of legality of an administrative decision ending a right of residence on public policy grounds); Case C-506/04 *Wilson* [2006] ECR I-8613, para 60 (appeal against a refusal to allow lawyer registered in the UK to be admitted to practice in Luxembourg); Case C-69/10 *Diouf* [2011] ECR I-7151, para 57 (appeal against a refusal to grant refugee status under accelerated procedure). See further Półtorak (n 243) 199-201.

The obligations relating to enforcement can be summarised as follows:

Obligations Relating to the Enforcement of Directives	
Obligations relating to judicial procedure	**Obligations relating to judicial decision-making**
Member States must provide for access to national courts to compel observance with the national implementing measures	National courts must review whether national authorities have kept within the margin of discretion granted to them under a directive
National proceedings relating to the enforcement of EU rights must be no less favourable than those governing similar domestic actions (equivalence)	National courts must interpret national law in conformity with a directive's objectives
National proceedings must not render practically impossible or excessively difficult the exercise of rights (effectiveness)	National courts must uphold directly effective provisions of a directive for the benefit of individuals against a Member State which has failed to implement directive fully and correctly
Judicial review of administrative application of a directive which grants individual rights must extend to both law and facts	National courts must set aside national law that is in conflict with a directive
Adequate remedies must be available for breaches of EU law including damages where a Member State fails to implement a directive correctly	

Table 3.6 Enforcement obligations

Following on from this investigation of the obligations that are incumbent upon the Member States when they implement an EU directive, the next chapter will examine the different outcomes in implementation and the consequences of a failure to abide with the obligations relating to the implementation of directives.

CHAPTER 4. IMPLEMENTATION OUTCOMES

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4.1 Compliance and Implementation Outcomes

When a Member State implements a directive this may result in different outcomes that reflect the extent to which a Member State has achieved the result prescribed by the directive and is therefore in conformity with EU law. The categorisation of implementation outcomes can serve as an indication of the degree to which a Member State has implemented a directive in compliance[1] with the objectives laid down by that instrument.[2]

When the implementation of a directive by the Member States complies with EU law, this is generally referred to as 'compliant implementation'.[3] In

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[1] The term 'compliance' is used here to refer to implementation by a Member State that is in conformity with the directive concerned. See further, Michael Zürn, 'Introduction: Law and compliance at different levels' in Michael Zürn and Christian Joerges (eds), *Law and Governance in Postnational Europe* (Cambridge University Press 2007) 1-39, 8, using the term compliance to refer to 'the extent to which rules are complied with by their addressees'; Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012) 39-40, who uses the term to refer to 'conduct in conformity with a specified rule'.

[2] Thomas König and Lars Mäder, 'Non-conformable, Partial and Conformable Transposition: A Competing Risk Analysis of the Transposition Process of Directives in the EU15' (2013) 14 *European Union Politics*, 46-69, 47.

[3] This is the term used by the Commission, see for example, Commission, 'Report from the Commission to the Council and the European Parliament on implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2004-2007', COM(2010) 47 final, 9; Commission, 'Staff Working Document – Situation in the Different Sectors – Accompanying document to the Report from the Commission 27th Annual Report on Monitoring the Application of EU Law (2009)', SEC(2010) 1143 final, 199. However, König and Mäder (n 15) 47, use the term 'conformable transposition' to refer to compliant transposition.

situations where implementation does not comply with EU law, this is designated as 'non-conformity' or 'non-compliant implementation'.[4] Therefore, for the purpose of this study, a distinction is made between 'compliant' or 'non-compliant' implementation outcomes.[5]

It will be recalled that the obligation to implement a directive is binding upon all the authorities of a Member State.[6] A failure to comply with the obligation to implement directives can therefore result from action or inaction by the legislature, the executive or the judiciary at any stage of the implementation process.[7] Wherever transposition, application or enforcement

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[4] This is the terminology in use by the Commission, see for example, Commission, 'Staff Working Document Accompanying the Document "Report from the Commission to the European Parliament and to the Council on the Follow-up to 2013 Discharge"', SWD(2015)194 final 5. See also Tanja Börzel, 'Non-compliance in the European Union: pathology or statistical artefact?' (2001) 8 Journal of European Public Policy, 803–824, 805; Angelova, Dannwolf and König (n 11) 1274. However, König and Mäder (n 15) 47, use the term 'non-conformable transposition' when referring to non-compliant transposition.

[5] Diana Panke, 'The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law' (2007) 14 Journal of European Public Policy 847-866, 849 distinguishes between three outcomes, namely 'complete legal change (domestic norms allow for correct and complete reproduction of the European norm), incomplete legal change (domestic norms are highly ambiguous or overlapping in scope and content, which facilitates incorrect and incomplete reproduction of the European norm), and continued non-compliance (no legal changes are undertaken despite a misfit between domestic and European norms)'. Given that the Court of Justice has ruled that Article 288(3) requires full and effective implementation, incomplete implementation and the absence of any implementation would both be considered as constituting 'non-compliance' in this study. Nonetheless, for the purposes of this study, Panke's distinction between absolute and partial non-compliance has been used to inform the categorisation of motivations of the Member States towards non-compliance, see further Section 4.5 (Motivations of the Member States Towards Non-Compliance).

[6] See Chapter 3, Section 3.1 (General Obligations to Implement Directives).

[7] Samuel Krislov, Claus-Dieter Ehlermann and Joseph Weiler 'The Political Organs and the Decision-Making Process in the United States and the European Community', in Cappelletti, Seccombeand Weiler (n 12) 3-112, 62-64; Alberto Gil Ibañez, *The Administrative Supervision & Enforcement of EC Law* (Hart 1999) 16 ; Sacha Prechal, *Directives in EC Law* (2nd edition, Oxford University Press 2005) 6-7. See also Ulf Sverdrup, 'Implementation and European Integration: A Review Essay' (2005) ARENA Working Paper 25/2005, 9.

fails to ensure its complete execution in the national legal order,[8] this will result in non-compliant implementation [9] in breach of Article 288(3) TFEU.

It therefore follows that implementation outcomes can be further categorised according to the three stages of implementation, namely outcomes relating to transposition (section 4.2), application (section 4.3) and enforcement (section 4.4). Furthermore, determining the motivations of Member States (section 4.5) enables further explanation of what factors affect non-compliance (section 4.6).

4.2 Transposition Outcomes

Transposition involves the incorporation of a directive in the national legal order through the adoption of national implementing measures.[10] The failure by a Member State to adopt its national implementing measures within the deadline set by a directive for transposition[11] or to notify its national implementing measures[12] to the European Commission will constitute non-compliant transposition.[13]

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[8] See Chapter 3, Section 3.1 (General Obligations to Implement Directives).

[9] Krislov, Ehlermann and Weiler (n 20) 62-63; Prechal (n 20) 6-7. See also Tanja Börzel 'Environmental Leaders and Laggards in Europe. Why there is (not) a "Southern Problem"' (Ashgate 2003), 60; See also Angelova, Dannwolf and König (n 11) 1286 (n 7).

[10] See Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

[11] See for example, Case 10/76 *Commission v Italy* [1976] ECR 1359, para 12, where the Court emphasised that the obligation on Member States to implement directives within the deadline is to ensure the uniform implementation of EU law. See for example, in the context of Directive 204/38, Case C-294/07 *Commission v Luxembourg* [2007] ECR I-192, para 11. The delay appears to have been caused by the decision of the Luxembourg authorities to choose to repeal is existing consolidated law on immigration to reflect several legal developments resulting from four directives relating to third country national migration in addition to EU Directive 2004/38, see *Projet de loi portant sur la libre circulation des personnes et l'immigration, No 580 Session 2007-2008* (bill for a law on the free movement of persons and immigration) 2-10 <http://www.asti.lu/media/asti/pdf/projet5208.pdf> accessed 29 December 2015.

[12] See further, Chapter 3, Section 3.3 (Obligations Relating to the Methods of Transposition).

[13] Krislov, Ehlermann and Weiler (n 20) 62; Francesco Capotorti, 'Legal Problems of Directives, Regulations and their Implementation' in Heinrich Siedentopf and Jacques Ziller (eds), *Making*

When transposition had been achieved, it is also necessary to determine whether the national implementing measures comply with the directive to which they are intended to give effect. In this regard, the Court has held that 'it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States'.[14] As a result, when analysing the implementation of directives, it is necessary to examine the conformity of the transposition of each individual provision (or sub-provision) of the directive.[15]

This involves undertaking a comparison between each provision of the directive and the corresponding provision of the national implementing measures. This is the practice currently followed by the European Commission when it undertakes conformity assessments of directives or assigns their performance to external consultants.[16]

When reviewing the conformity of the provisions of the national implementing measures, it is also necessary to examine the interpretation given

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European Policies Work, Volume 1: Comparative Syntheses (Sage 1988) 151-168, 162; Prechal (n 20) 45; Börzel (n 17) 805.

[14] Case C-233/00 *Commission v France* [2003] ECR I-6625, para 77; Case C-6/04 *Commission v UK* [2005] ECR I-9017, para 22.

[15] Robert Thomson, 'Opposition through the back door in the transposition of EU directives' (2010) 11 European Union Politics, 577-596, 578-579; Asya Zhelyazkova and René Torenvlied, 'The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive' (2011) 18 Journal of European Public Policy, 690-708, 691.

[16] Commission, 'Better Regulation Toolbox' (2015) 236 <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf> accessed on 27 November 2015 (hereafter 'Better Regulation Toolbox'): 'The concept of completeness of transposition measures in terms of substantive scope means that every obligation of a directive should find a counterpart in the national transposition measures. Therefore, a complete screening of all articles and subarticles is necessary should fall under the scope of the transposition check as well. For example, if a provision contains an obligation, and the sub articles contain specific derogations therefrom, both should be checked during the transposition check.'

to them by the national courts.[17] Likewise, the existence of administrative practices or circulars should be taken into account when assessing the conformity of the national implementing measures, since such administrative measures are intended to provide direction as to how the national authorities should apply the national implementing measures.[18]

In circumstances where a specific provision contains 'unequivocal wording which would give the persons concerned a clear and precise understanding of their rights and obligations and would enable the courts to ensure that those rights and obligations are observed',[19] transposition of the corresponding provision of the directive concerned will be correct and therefore comply with the objective pursued by the directive.

On the contrary, transposition may not be compliant because the national implementing measures fail to provide legal certainty, enable effective legal protection of individual rights or breach the principle of proportionality. There may be several reasons for this. It could be that the form of transposition is not legally binding or given adequate publicity, in which case there will be a failure to transpose.[20] Alternatively, the content of the national implementing measures may fail to attain the necessary specificity, clarity and precision, in which case transposition will be considered ambiguous.[21] It can also be that a

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[17] The Court of Justice has consistently held that '[t]he scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts'; see for example, Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, para 36; C-300/95 *Commission v United Kingdom* [1997] ECR I-2649, paragraph 37; Case C-372/99, *Commission v Italy*, [2002] ECR I-819, para 20; Case C-129/00 *Commission v Italy* [2004] ECR I-14637 para 30; Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, para 39.

[18] ibid, see reference to 'administrative provisions'. For further discussion, see Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

[19] See for example, Case 143/83 *Commission v Denmark* [1985] ECR 427, para 10. See further Chapter 3, Section 3.4 (Implications for the Drafting of National Implementing Measures).

[20] See Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

[21] See Chapter 3, Section 3.3 (Obligations Relating to the Methods of Transposition).

Member State has exercised its discretion in a disproportionate way[22], for example by imposing excessive penalties.[23] In addition the choice of drafting techniques in the transposition of a directive may also lead to the national implementing measures not being in conformity with the result prescribed by the directive concerned[24] because of so-called 'under-implementation' stemming from ambiguous or incomplete transposition, or 'over-implementation' characterised by incorrect transposition. Needless to say, the failure to transpose a provision of the directive within the deadline fixed for transposition will also result in non-compliant transposition.[25] Likewise, partial transposition of some but not all the provisions of a directive will also constitute non-compliant transposition.[26]

Whatever its origin, non-compliant transposition will automatically result in non-compliant implementation[27] and therefore constitute a breach of Article 288(3) TFEU. The fact that non-transposition causes no adverse effects is irrelevant.[28] However, although transposition may be compliant, this will not automatically result in compliant implementation because Article 288(3) TFEU

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[22] See Chapter 3, Section 3.3 (Obligations Relating to the Methods of Transposition).

[23] See to that effect, Case C-276/91 *Commission v France* [1993] ECR I-4413, para 28 (imposition of penalties for breach of VAT directive); Case C-230/97 *Awoyemi* [1998] ECR I-6781, paras 24-26 (imposition of penalties relating to directive on driving licences).

[24] See Chapter 3, Section 3.4 (Implications for the Drafting of National Implementing Measures).

[25] See for example, Case C-185/98 *Commission v Greece* [1999] ECR I-3047, paras 9-10; Case C-151/00 *Commission v France* [2001] ECR I-625, paras 8-9.

[26] Case C-350/02 *Commission v Netherlands* [2004] ECR I-6213, para 41.

[27] Krislov, Ehlermann and Weiler (n 20) 62-63; Prechal (n 20) 6-7.

[28] See for example, Case C-209/88 *Commission v Italy* [1990] ECR I-4313, para 14; Case C-392/96 *Commission v Ireland* [1999] ECR I-5901, paras 60 and 61; Case C-150/97 *Commission v Portugal* [1999] ECR I-259, para 22; Case C-349/97 *Commission v Germany* [2000] ECR I-4429, para 62; Case C-233/00 *Commission v France* (n 27), para 62; Case C-177/04 *Commission v France* [2006] ECR I-2461, para 52; Case C-61/05 *Commission v Portugal* [2006] ECR I 6779, para 32.

also requires Member States to effectively apply and enforce the directive concerned.[29]

These different transposition outcomes may be illustrated by the following graphic:

Transposition Outcomes and Corresponding Implementation Outcomes	
Transposition outcome	**Implementation outcome**
Compliant transposition NIMs are specific, clear, precise and legally binding and enable individuals to exercise their rights	**?** Implementation will only be compliant if application and enforcement are also compliant
Non-compliant transposition	**Non-compliant implementation**
Failure to notify transposition No NIMs are notified	Non-implementation
Failure to transpose No NIMs adopted or NIMs not legally binding	
Ambiguous transposition NIMs not specific, clear or precise	Under-implementation NIMs do not achieve result or undermines effectiveness of directive
Incomplete transposition NIMs fail to transpose all provisions of directive	
Incorrect transposition NIMs contain obligations not permitted by directive Discretion under directive exercised disproportionately	Over-implementation NIMs impose additional requirements not permitted by directive

Table 4.2 Transposition outcomes

Having examined transposition outcomes, attention can be turned to the next stage of implementation.

[29] Case C-62/00 *Marks & Spencer plc* [2002] ECR I-6325, para 27. See further Krislov, Ehlermann and Weiler (n 20) 62-63; Prechal (n 20) 6-7.

4.3 Application Outcomes

Once a directive has been transposed, the national implementing measures should not remain dead-letter law. A Member State will therefore remain under a continuous obligation to ensure the 'full application of the directive even after the adoption of those measures'.[30]

The national authorities primarily do so by taking actions and making decisions in application of the national implementing measures. Application is therefore intended to give practical effect to a directive.[31] The national authorities are required to 'ensure that the provisions of a directive are applied exactly and in full'[32] and to take the necessary measures to ensure the attainment of any legal or factual results prescribed by the directive.[33]

Where application ensures that the results prescribed by a directive are achieved, application can be said to be compliant. This occurs when 'the provisions of a directive are applied exactly and in full'[34] by a Member State. This requires that Member State should take all necessary measures to ensure the directive is applied in practice[35] and the results which it prescribes are attained.[36]

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[30] Case C-62/00 *Marks & Spencer plc* [2002] ECR I-6325, para 27.

[31] See further Chapter 3, Section 3.5 (Obligations Relating to the Application of Directives).

[32] Joined Case 91/79 and 92/79 *Commission v Italy* [1990] ECR 1099, para 6; Case C-287/91 *Commission v Italy* [1992] ECR I-3515, para 7; Case C-16/95 *Commission v Spain* [1995] ECR I-4883, para 3.

[33] See Chapter 3, Section 3.5 (Obligations Relating to the Application of Directives).

[34] Joined Case 91/79 and 92/79 *Commission v Italy* [1990] ECR 1099, para 6; Case C-287/91 *Commission v Italy* [1992] ECR I-3515, para 7; Case C-16/95 *Commission v Spain* [1995] ECR I-4883, para 3.

[35] Richard Brent, *Directives: Rights and Remedies in English and Community Law* (Informa Law / Routledge 2001) 133.

[36] Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103, para 24; Case C-365/97 *Commission v Italy* (*San Rocco case*) [1999] ECR I-7773, paras 108-109.

There may be several reasons to consider that the application of the national implementing measures by the national authorities fails to comply with the underlying directive. Firstly, where the transposition of a directive has been ambiguous, incorrect or incomplete, the application of a non-compliant provision of the national implementing measures is likely to lead to a situation where application itself is not compliant because it fails to achieve the objectives laid down by the directive.[37] Even if the national implementing measures are subsequently amended to rectify their incompatibility with the directive in question, non-compliant application can still result from administrative decisions that were taken before the national implementing measures were rectified in the event they continue to produce their effects after the date upon which the corrected national implementing measures came into force.[38]

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[37] See for example, Case C-127/08 *Metock* [2008] ECR I-6241. This case concerned several judicial appeals against a refusal by the Irish Minister of Justice to issue residence cards to the family members of EU citizens residing in Ireland on the basis that the family members had not been resident in a Member State prior to their move to Ireland, ibid, paras 21, 26, 30 and 35. The Irish authorities had incorrectly transposed the Directive by way of the European Communities (Free Movement of Persons) (No 2) Regulations 2006 SI 2006/626, whose regulation 3(2), at the time these cases were brought, provided that the transposing measures 'shall not apply to a family member unless the family member is lawfully resident in another Member State', ibid, para 16. This added a requirement not found in the Directive, ibid, paras 49-54. The Court of Justice went on to hold that 'Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive', ibid, para 80. As a result of his judgment, Ireland adopted European Communities (Free Movement of Persons) Regulations 2008, SI 2008/310 to bring its national implementing measures into line with the ruling. The Minister of Justice also reviewed all decisions which were refused on the basis that the family member was not lawfully resident in another Member State before moving to Ireland, see Irish Naturalisation and Immigration Service, Press release, August 2008 <http://www.inis.gov.ie/en/INIS/print/PR08000027> accessed 23 December 2015.

[38] See to that effect C-376/13 *Commission v Bulgaria* [2015] ECLI:EU:C:2015:266 (judgment of 23 April 2015), para 49, in which the Court held that 'the alleged disregard of the provisions of the "authorisation" and "competition" directives as well as the framework directive [on electronic communications networks and services] is likely to have continued for the whole duration of the validity

Secondly, a failure to apply the national implementing measures will also result in non-compliant application.[39] This might arise because the national authorities have failed to achieve a factual result prescribed by a directive.[40] There may several causes for such a failure. For example, it could be the result of a Member State having failed to allocate sufficient resources and equip the administrative authorities with the necessary capabilities to apply a directive in practice.[41]

Non-compliant application might also occur where the national authorities incorrectly apply the national implementing measures that have

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of the rights of use of the broadcasting frequencies which were allocated in breach thereof' (author's translation), even though the Bulgarian authorities had argued that the national implementing measures had already been amended to comply with the directives in question, ibid, para 46.

[39] Krislov, Ehlermann and Weiler (n 20) 63; Prechal (n 20) 6-7; Börzel (n 17) 805.

[40] Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 45 (individual failure to issue a residence card to the non-EU family member of an EU citizen within six months); Case C-456/08 *Commission v Ireland* [2010] ECR I-859, paras 39-41 (individual failure to notify a decision concerning the award of a public contract to unsuccessful applicant). See also, Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 49), para 68 and Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para 37, which both concerned waste disposal in Italy. The Court held that the 'significant deterioration in the environment over a protracted period without any action being taken by the competent authorities … may be an indication that the Member States have exceeded the discretion conferred on them by [the] provision' of a directive on waste management, which requires Member States to take the necessary measures to recover or dispose of waste without endangering human health and without harming the environment, ibid, paras 68 and 37 respectively.

[41] See to that effect, Case C-331/07 Commission v Greece [2009] ECR I-60* (summary publication), Operative part, para 1 (shortage of staff assigned to veterinary controls). See further, Miriam Hartlapp, 'Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe' (2014) West European Politics, 805-824, 819: 'enforcement capacity in the EU multi-level system still seems at some distance from providing what is necessary to make application possible in cases of non-compliance with binding EU social standards'; Gerda Falkner, Miriam Hartlapp , Simone Leiber & Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?' (2004) 27 West European Politics, 452-473, whose study of infringement cases in the area of labour law found that 'administrative shortcomings can also play an important role in non-compliance. Sufficient financial or personnel resources are crucial for efficient implementation.' See further Simona Milio (ed), *From Policy to Implementation in the European Union* (IB Tauris, 2010), 31-57.

been fully and correctly transposed.[42] This might, for example, be caused by contrary administrative practices[43] or guidelines[44] that impose additional administrative requirements which are not foreseen by the directive concerned[45] or which give an incorrect interpretation to terms that are contained (but not defined) in a directive.[46]

The application of a directive might also be considered non-compliant in circumstances where the national administrative authorities fail to interpret national law in conformity with a directive.[47] Likewise, application could also be

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[42] Krislov, Ehlermann and Weiler (n 20) 63; Prechal (n 20) 6-7; Börzel (n 17) 805.

[43] The Court has consistently held that '[a] failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law'; see for example, Case C-278/03 *Commission v Italy* [2005] ECR I-3747, para 13; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, para 47; Case C-342/05 *Commission v Finland* [2007] ECR I-4713, para 22; Case C-489/06 *Commission v Greece* [2008] ECR I-1797, paras 46-47. See also, Case C-212/99 *Commission v Italy* [2001] ECR I-4923, para 31. See further, Alicja Sikora, 'Administrative Practice as a Failure of a Member State to Fulfil its Obligations under Community Law' (2012) 2 Review of European Administrative Law 5-27.

[44] See for example, Case C-459/99 *MRAX* [2002] ECR I-6591, paras 2, 33-34, 78 and 90 (administrative guidelines imposed an obligation on family members of EU citizens applying for a residence card to present a valid visa constitutes an excessive administrative measure not foreseen by the residence directives pre-dating Directive 2004/38).

[45] ibid.

[46] See for example, Case C-423/12 *Reyes* [2014] ECLI:EU:C:2014:16 (judgment of 14 January 2014). This case concerned a restrictive interpretation of the term 'are dependants' in Article 2(2) of Directive 2004/38, ibid, 16. The Swedish authorities unsuccessfully argued that the concept of dependence requires proof that 'dependants' have been receiving material support from an EU relative for a reasonable period, but also to establish that the 'dependants' have tried without success to find work or obtain subsistence support from the authorities of their country of origin or otherwise tried to support themselves, ibid paras 24-25. A further example relates to the requirement that EU citizens who do not work must be in possession of 'comprehensive sickness insurance' in order to enjoy a right of residence under the Directive. As will be seen in Chapter 11, such problems affect Italy and the UK, as well as France, Spain and Sweden for different reasons.

[47] See for example, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Case C-218/01 *Henkel* [2004] ECR I-1725, para 60. See further, Temple Lang (1998) (n 6), 114; idem (2001) (n 6) 88; Prechal (n 20) 65-72 and 317-318; Verhoeven (n 6) 31-34.

non-compliant as a result of a failure by the national administrative authorities to uphold the supremacy of EU law in situations where a conflict with national law arises.[48]

Non-compliant application can be the result of individual failures to achieve the result prescribed by a directive.[49] Failures that are more systematic may be rooted in contrary administrative practices or guidelines[50] or may be the result of non-compliant transposition.[51] The Court has previously observed in this connection a finding of infringement based on administrative practices of 'a consistent and general nature'[52] requires 'sufficiently documented and

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[48] See for example, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paras 31-33; Case C-118/00 *Larsy* [2001] ECR I-5063, para 53; Case C-224/97 *Ciola* [1999] ECR I-2517, para 26; Case C-198/01 *Consorzio Industrie Fiammiferi* [2003] ECR I-8055, para 49. See also, Temple Lang (1998) (n 6) 113; Verhoeven (n 6) 14-18 and 79-121.

[49] See for example, Case C-157/03 *Commission v Spain* (n 53), paras 12 and 46 (two individual complaints concerned, firstly, the imposition of a non-compliant obligation on family members of EU citizens to obtain a long-term family reunification visa in order to obtain a residence card; and, secondly, the failure to issue a residence card within six months and instead taking ten months to process the application). See also Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, para 30 (failure to apply public procurement procedures in respect of a services contract for the treatment of waste); Case C-275/08 *Commission v Germany* [2009] ECR I-168* (summary publication), Operative part, para 1 (failure to apply public procurement procedures in respect of the award of a contract for the supply of motor vehicle registration software); Case C-456/08 *Commission v Ireland* (n 53), paras 39-41 (failure to apply public procurement procedures in respect of public works in respect of a motorway). The Court of Justice has also previously ruled that 'any infringement of the Treaty, irrespective of its gravity, may be the subject of an action under' Article 258 TFEU, see Case C-456/05 *Commission v Germany* [2007] ECR I-10517, para 22

[50] Case C-459/99 *MRAX* (n 57), paras 2 and 33-34 (administrative guidelines imposed an obligation on family members of EU citizens applying for a residence card to present a valid visa).

[51] Case C-157/03 *Commission v Spain* (n 53), paras 10, 35-38 (national implementing measures imposed an additional obligation on family members of EU citizens applying for a residence card to present a valid visa, which was not foreseen by the residence directives pre-dating Directive 2004/38); Case C-127/08 *Metock* (n 50), paras 49-54 (national implementing measures contained an additional condition imposed on family members to have previously lawfully resided in another Member State before residing with their EU relative in Ireland, which is not foreseen by Directive 2004/38).

[52] Case 21/84 *Commission v France* [1985] ECR 1355, paras 13 and 15; Case C-387/99 *Commission v Germany* [2004] ECR I-3751, para 42; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, para

detailed proof of the alleged practice' to be adduced.[53] This involves adducing evidence as to the scale of infringements, their gravity and duration.[54] The Court has held that a 'generalised failure on the part of the administrative authorities to comply with the directive cannot be inferred from a few defective cases in practice.'[55] In this connection, for example, evidence of eleven infringements spread out over five years or seventeen infringements over a period of seven years would not suffice to establish a 'general and consistent practice'[56], nor would eight infringements in a year appear to be sufficient either.[57]

Non-application may also consist in a 'general and persistent' infringement[58] 'where the remedy ... lies not merely in taking action to resolve

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28; Case C-287/03 *Commission v Belgium* [2005] ECR I-3761, para 29; Case C-160/08 *Commission v Germany* [2010] ECR I-3713, para 107.

[53] See for example, Case C-287/03 *Commission v Belgium* (n 65), para 28; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paras 49-50; Case C-156/04 *Commission v Greece* [2007] ECR I-4129, para 50; Case C-489/06 *Commission v Greece* (n 56), para 48. See also to that effect Case C-416/07 *Commission v Greece* [2009] ECR I-7883, paras 45-49. However, the Court appears to have sometimes accepted the existence of an administrative practice without requiring such proof, see Case C-393/05 *Commission v Austria* [2007] ECR I-10195, para 32; C-546/07 *Commission v Germany* [2010] ECR I-439, para 40.

[54] Opinion of Advocate General Geelhoed in Case C-494/01 *Commission v Ireland* ECR I-3338, paras 43-46.

[55] Case C-229/00 *Commission v Finland* [2003] ECR I-5725, para 53. The Court noted that the 'data supplied by the Finnish Government, which have not been challenged by the Commission, [showed] that whilst, in 1999, 3 266 decisions were taken by the Commission for Medicine Prices, only 133 contained an inadequate statement of reasons', namely 4.1% of decisions taken in that year.

[56] C-441/02 *Commission v Germany* (n 66), paras 99 and 124, in which the Court held that 'eleven decisions mentioned by the Commission were taken ... over a period of almost five years' and 'the 17 orders mentioned by the Commission were made ... over a period of seven years. The Court cannot in any event therefore find that there is a general and consistent practice contrary to Community law'.

[57] Case C-156/04 *Commission v Greece* (n 66), para 51, where the Court held that 'given the very large number of Community nationals and Greek nationals established in other Member States who go to Greece by car each year, the eight individual cases to which the Commission refers – even if its allegations were sufficiently established in each case – constitute a substantially inadequate percentage'.

[58] Case C-494/01 *Commission v Ireland* [2007] ECR I-9261, para 136, in which the Court noted that the Commission had supplied sufficient evidence of 'a general and persistent approach of tolerance towards

a number of individual cases which do not comply with the [EU] obligation at issue, but where … non-compliance can only be redressed by a revision of the general policy and administrative practice of the Member State in respect of the subject governed by the [EU] measure involved'.[59]

The different application outcomes outlined above may be depicted by the following table:

Application Outcomes and Corresponding Implementation Outcomes	
Application outcome	**Implementation outcome**
Compliant application NIMs are fully and correctly applied, necessary measures are taken to achieve the results prescribed by the directive	**?** Implementation will only be compliant if transposition and enforcement are also compliant
Non-compliant transposition	**Non-compliant implementation**
Failure to apply NIMs are not applied in practice or partially or selectively applied Directive's specific factual result is not achieved	Non-implementation
Incorrect application NIMs are not applied correctly NIMs not applied consistently with directive Supremacy of EU law not respected	Incorrect implementation

Table 4.3 Application outcomes

numerous situations betraying a breach' of a waste directive. This evidence consisted in furnished 'newspaper articles published between 8 December 2001 and 9 April 2002 and a report dated 7 September 2001 from Wicklow County Council attest inter alia that, around the time when the period set in the 2001 reasoned opinion expired, close to 100 illegal sites were recorded in the county, some of which were of a considerable size and contained hazardous waste originating in particular from hospitals', ibid para 135. The Court appears to use the terms 'general and persistent' and 'structural and general' interchangeably to refer to such infringements, see for example, Case C-135/05 *Commission v Italy* (n 53), paras 22 and 45.

[59] Opinion of Advocate General Geelhoed in Case C-494/01 *Commission v Ireland* (n 67), para 48. See also to that effect, Case C-376/13 *Commission v Bulgaria* (n 51), para 52.

Following consideration of outcomes in the application of a directive by the national authorities, enforcement by the national courts will now be contemplated.

4.4 Enforcement Outcomes

In their capacity as the EU's 'courts of general jurisdiction',[60] the national courts are under a duty to provide effective legal protection of EU rights.[61]

In the context of the implementation of directives, like other organs of the State, the national courts are under a duty to ensure that the results of the directive are achieved.[62] Some directives may explicitly lay down an obligation on Member States to provide for judicial redress.[63] This is notably the case in the area of the free movement of persons.[64] This entails that individuals should have a right to seek judicial review of the practical application of the national implementing measures by the national administrative authorities,[65] so as to ensure that the latter have kept within the margin of the discretion permitted to them under the directive concerned.[66]

Enforcement will be considered compliant if individuals are able to have recourse to the national courts to compel observance with the national

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[60] Case T-51/94 *Tetra Pak Rausing* [1990] ECR II-309, para 42.

[61] See for example, Case 33/76 *Rewe* [1976] ECR 1989, para 5; Case 45/76 *Comet* [1976] ECR 2043, para 12. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[62] See for example, Case 14/83 *von Colson and Kamann* (n 60), para 26. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[63] See further, Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[64] Article 31 of Directive 2004/38 provides that 'judicial ... redress procedures' shall be made available to EU citizens and their family members in order to appeal against or seek review of any decision taken against them' which, according to recital (26), should be available in 'all events'.

[65] See for example, Joined Case C-65/95 and 111/95 *Shingara and Radiom* [1997] ECR I-3343, para 44. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[66] See for example, Case 222/84 *Johnston* [1986] ECR 1651, para 52. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

implementing measures [67] and, where appropriate, set aside national law that runs into conflict with a directive or other sources of EU law.[68] National rules of procedure will apply to such court proceedings, provided they are 'no less favourable than those governing similar domestic actions (principle of equivalence) and [do] not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'.[69]

In proceedings relating to the enforcement of a directive, the national courts are under a duty to achieve the results prescribed by the directive concerned.[70] Firstly, the national courts must as far as possible interpret the national implementing measures in conformity with a directive.[71] Secondly, if consistent interpretation is not feasible, the national courts are under a duty not to apply rules of national law that run contrary to provisions of EU law.[72] Moreover, in situations where a directive has not been transposed or is the subject of ambiguous, incorrect or incomplete transposition, the national courts must enforce those provisions of a directive which are directly effective and create rights for individuals in proceedings against the State.[73] Thirdly, in the

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[67] See for example, Case 8/81 *Becker* [1982] ECR 53, para 19. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[68] See for example, Case 106/77 *Simmenthal* [1978] ECR 629, para 21. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives) and Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[69] See for example, Case 33/76 *Rewe* (n 74), para 5, and Case 45/76 *Comet* (n 74), paras 13 and 16. See further, Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[70] See for example, Case 14/83 *von Colson and Kamann* (n 60), para 26. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives) and Chapter 5, Section 5.3.1 (Enforcement before the national courts).

[71] Case 14/83 *von Colson and Kamann* (n 60), para 26. See further Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[72] See for example, Case C-462/99 *Connect Austria* [2003] ECR I-5197, para 40. See further Section 3.6 (Obligations Relating to the Enforcement of Directives) and Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

[73] Case 8/81 *Becker* (n 80), para 25. See further Chapter 5, Section 5.3.2 (Supremacy, direct effect and consistent interpretation).

event that a Member States has failed to implement a directive, the national courts must be empowered to award damages to individuals who have suffered loss as a result.[74] Where there is doubt as to the interpretation to be given to a provision of a directive, the national courts have the power – and in certain circumstances the duty – to seek a preliminary ruling from the Court of Justice.[75]

As a result, enforcement will be considered non-compliant where there is either a failure by the national courts to uphold these obligations or a mistake is made in interpreting the national implementing measures and/or the directive.

A failure in enforcement occurs where the 'courts disregard ... the substance of [EU] law'.[76] For example, in circumstances where a directive has not been fully and correctly implemented, a Member State's domestic courts might refuse to recognise the direct effect of provisions of a directive.[77] Likewise

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[74] Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, para 45. Chapter 5, Section 5.3.3 (Member State liability).

[75] Article 267 TFEU. See further Chapter 5, Section 5.3.4 (Reference for a preliminary ruling).

[76] Krislov, Ehlermann and Weiler (n 20) 63.

[77] A good example is provided by the position of the French *Conseil d'Etat* (Council of State, the court of final appeal in administrative proceedings), which initially refused to recognise that directives could be invoked by individuals against administrative measures in the notorious *Cohn-Bendit* case, *Conseil d'Etat, 22 décembre 1978, Ministre de l'Intérieur c/ Cohn-Bendit, Rec Lebon p 524* (22 December 1978), [1980] 1 Common Market Law Reports 543, thereby putting it at odds with the *Cour de Cassation* (Supreme Court with jurisdiction in in civil and criminal proceedings) which had previously upheld . This case concerned the absence of transposition of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] Spec Ed 1963-1964 I-117. In 1975, Daniel Cohn-Bendit had sought to challenge an expulsion order issued by the French authorities for his involvement in the events of May 1968, on the basis that the order was in breach of Directive 64/221/EEC. At first instance, the administrative tribunal referred the issue to the Court of Justice for a preliminary ruling and suspended proceedings to await the Court's opinion. The French Minister of the Interior appealed the matter to the Council of State, which took the position that 'directives cannot be invoked by the citizens of these states in support of a challenge to an individual administrative measure'. The Council of State consequently quashed the order of the administrative

judicial practices may make it excessively difficult or practically impossible to enforce a directive,[78] or may require such claims to be adjudicated on the basis of rules of procedure which are less favourable than those which apply to similar domestic claims.[79] This would make it impossible to enforce the directive[80] and result in a breach both Article 4(3) TEU[81] and Article 288(3) TFEU[82] by the national courts.

Non-compliant enforcement might also occur where there is a failure to make a reference for a preliminary ruling to the Court of Justice under Article 267 TFEU.[83] For example, this might occur where a final court of appeal fails to

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tribunal. In doing so, it held that 'the Minister of the Interior [was] justified in arguing that the tribunal administratif of Paris wrongly made a reference to the European Court of Justice on questions of the interpretation of this Directive and in ordering the suspension [of the administrative decision] until a decision of that Court' (translation John Bell). It took more than a decade for the Council of State to reverse its approach and recognise that directives could be invoked in the *Rothman/Philipp Morris* cases (*Conseil d'Etat, Ass 28 février 1992, SA Rothmans International France & SA Philipp Morris France, Rec Lebon p 81* (28 February 1992), [1993] 1 Common Market Law Reports 253). For a review of the initial resistance to and later acceptance of the supremacy of EU law by the French courts, see further, Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 124-181.

[78] Case C-268/06 *Impact* [2008] ECR I-2483, paras 51 and 53 (where national law does not confer jurisdiction on a specialised labour court to hear a claim relating to the enforcement of a directive in the field of employment, the obligation to bring parallel proceedings before the ordinary courts may lead to procedural complications that enders the enforcement of the directive excessively difficult). See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[79] See to that effect, Case 98/79 *Pecastaing* [1980] ECR 691, para 11. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[80] See for example, Reinhard Slepcevic, 'The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits' (2009) 16 *Journal of European Public Policy*, 378-394, 382.

[81] C-404/13 *Client Earth* [2014] ECLI:EU:C:2014:2382 (Judgment of 14 November 2014), para 52.

[82] Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33 (judgment of 24 January 2012), para 24.

[83] See to that effect, Case C-396/03 P *Killinger* [2005] ECR I-4967 (Order of the Court of 3 June 2005), para 28, where the Court held that '[i]n the system of legal remedies provided for by the Treaty, an infringement of Community law by the national authorities, including an infringement of the third paragraph of Article [267 TFEU], may be brought before the Community courts by the Commission or by another Member State, or may be brought before the competent national courts by any natural or legal person.' The Commission considers that 'infringement proceedings in respect of such judgments

make a reference when confronted by a provision of a directive which is unclear and has not been the subject of a previous ruling by the Court of Justice, which has given rise to contradictory domestic judgments and which is the cause of difficulties of interpretation in several Member States.[84] This might also occur

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can only be considered when a judgment by a court of last instance shows clearly that that court is systematically and deliberately unprepared to comply with Article 177 of the EEC Treaty' (now Article 267 TFEU), see Written Question No 526/83 by Mr Alan Tyrrell [MEP] (ED - GB) to the Commission of the European Communities [1983] OJ C 268/25. Although the Commission began infringement proceedings against Sweden in 2003 in view of the country's supreme court to comply with its obligation to refer under Article 267(3) TFEU, the case was closed in July 2006; see Commission Staff Working Document, 'Annex to the 24th Annual Report from the Commission on Monitoring the Application of Community Law (2006)', SWD (2007) 976, 127, 'Manquement de la Cour Suprême Suédoise: Refus de présenter [une] question prejudicielle devant la CJCE' (case 2003/2161). See also, Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2014) 102, n 282, where the authors observe that '[i]f a national court of first instance does not refer under circumstances where it is under an obligation to do so in accordance with the third para of Art 267 TEFU, then this constitutes an infringement of Union law, and often national law as well.' Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd ed, Oxford University Press 2014) 443, also appear to support this view: '[e]xamples of non-compliance are rare and so to the extent that there is a genuine enforcement problem related to the preliminary ruling procedure this does not lie in failure to comply with the Court's preliminary ruling in those cases where a question has been referred; rather it stems from those cases where EU law is being ignored without the national court making a preliminary reference'. See further Peter Wattel, '*Köbler*, *CILFIT* and *Welthgrove*: We Can't Go On Meeting Like This' (2004) 41 Common Market Law Review 177-190; Andersen (n 14) 64-66.

[84] See for example, Case C-160/14 *Ferreira da Silva e Brito* [2015] ECLI:EU:C:2015:565 (judgment of 9 September 2015), para 45, in which the Court held that where 'there are conflicting decisions of lower courts or tribunals regarding the interpretation of [a] concept [contained in a directive] and by the fact that that concept frequently gives rise to difficulties of interpretation in the various Member States, the third paragraph of Article 267 TFEU must be construed as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is obliged to make a reference to the Court for a preliminary ruling concerning the interpretation of that concept'. See also, Case C-224/01 *Köbler* [2003] ECR I-10239, para 118. However, it should be noted that in this case the Court of Justice found that the failure of the Austrian *Verwaltungsgerichtshof* (Supreme Administrative Court) to refer the matter to the Court of Justice did not constitute a manifest breach of EU law that could render the Austrian state liable in damages, ibid, paras 120-126. Note also that a refusal to make a reference under Article 267 TFEU by a final court of appeal may also constitute a breach of Article 6 ECHR on the right to a fair hearing if there is a failure by that court to give reasons for refusing the reference, see

where judicial practices prevent the national courts from referring questions to the Court of Justice.[85]

Even if a directive has been implemented correctly, the national courts may also 'misapply the procedures and/or the substance' of the directive concerned in breach of Article 288(3) TFEU.[86] This then takes the form of incorrect enforcement rather than a failure to enforce. For instance, when interpreting the national implementing measures, it may be that the national courts fail to interpret them in conformity with the directive.[87] This leads to a situation where the national courts 'choose one of the possible options for interpretation and, subsequently the latter leads to a result inconsistent with the underlying directive.'[88] As a result, non-compliant enforcement may occur in a situation where the national courts interpret the provisions of a directive in a restrictive way that undermines its objectives.[89]

Vergauwen v Belgium, App No 4832/04 (ECHR, 10 April 2012), paras 89-90; *Dhahbi v Italy* App No 17120/09 (ECHR, 8 April 2014), paras 31-34.

[85] The Court has previously held that a rule of national law must be set aside where it prevents the procedure laid down in Article 267 TFEU from being followed; see Case 166/73 *Rheinmühlen II* [1974] ECR 33, para 4; Case 146/73 *Rheinmühlen* [1974] ECR 139, para 3; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 13; Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705, para 18. However, some suggest that this case law is far from clear and a source of legal uncertainty, see for example Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th ed, Oxford University Press 2014) 193: '[i]t is not possible to say that the national courts must have the right to refer questions to the CJ of their own motion or, on the other hand that they need not. Instead, the answer to whether national rules limiting national courts' rights to refer questions of EU law to the CJ of their own motion are acceptable is, "it depends".'

[86] Krislov, Ehlermann and Weiler (n 20) 63; Andersen (n 96) 62-64.

[87] See for example, Damian Chalmers, 'The Application of Community Law in the United Kingdom, 1994–1998' (2000) 37 Common Market Law Review 83–128, 95-96, for examples where 'English courts had qualified their otherwise relatively unreserved acceptance of EC law by adopting only a qualified acceptance of the doctrine on the indirect effect of directives' also known as the duty of consistent interpretation.

[88] Prechal (n 20), 188.

[89] For an example of the failure of the UK Upper Tribunal (Immigration and Asylum Chamber) to have due regard to Articles 15 and 31 of Directive 2004/38 on appeal rights which should apply in all cases, see *R (on the application of Bilal Ahmed) v Secretary of State for the Home Department* (EEA/s 10

There is some uncertainty as to whether individual instances of misinterpretation of the provisions of a directive will constitute non-compliant enforcement by the national courts.[90] However, the Court of Justice appears to have settled the issue in a case involving charges levied in breach of EU law:

> 'In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which

appeal rights: effect) (IJR) [2015] UKUT 00436 (IAC). For commentary, see Eslpeth Guild, 'Reflecting EU law faithfully? R (Bilal Ahmed) v SSHD IJR [2015] UKUT 00436 (IAC)' (*Free Movement*, 14 September 2015) <https://www.freemovement.org.uk/reflecting-eu-law-faithfully-r-bilal-ahmed-v-sshd-ijr-2015-ukut-00436-iac/> accessed 23 December 2015, who comments 'Judges Storey and Lane, both senior and experienced members of the Upper Tribunal, came to a rather odd decision: where the Secretary of State claims a reasonable suspicion that the third country national spouse of an EEA national (exercising Treaty rights in the UK) has entered into a sham marriage he or she is no longer a spouse under the EEA regulations and thus gets no in country appeal right. The exclusion is apparently based on Reg 2 EEA Regulations which states that a 'spouse' does not include a party to a marriage of convenience. … This is clearly mistaken. Someone who is appealing against a decision by the Home Office refusing his or her status as a spouse is obviously covered by the appeal right[s] [provided by Articles 15 and 31 of Directive 2004/38]. … The correct course of action for the UT if it was in doubt about the in country appeal right for someone whom the Home Office held was only the spouse of an EEA national as a result of a marriage of convenience … would have been to refer the question to the Court of Justice.'

[90] See for example, Brent (n 48) 99, who remarks that 'it should be noted that the fact that a national court commits an error in a judgment in relation to the application of a directive is unlikely to amount to a breach of a Member State's obligation to implement a directive' citing Advocate General Warner in Case 30/77 *Bouchereau* [1977] ECR 1999, 2020, who opined that '[i]t is obvious on the other hand that a Member State cannot be held to have failed to fulfil an obligation under the Treaty simply because one of its Courts has reached a wrong decision. Judicial error, whether due to the misapprehension of facts or to misapprehension of the law, is not a breach of the Treaty. In the judicial sphere, Article [258 TFEU] could only come into play in the event of a court of a Member State deliberately ignoring or disregarding Community law.' Compare Andersen (n 96) 63, who takes the view that 'Advocate General Warner's argument is sympathetic. However, it may not be sustainable in view of subsequent case law which establishes that judgments under Article 258 TFEU are declaratory. Thus, they are confined to the finding that a member state has not fulfilled an obligation under EU law. Moreover, although not specifically in relation to national courts, there are infringement cases that address single instances of noncompliance.'

has not been disowned by the supreme court, but rather confirmed by it.'[91]

On this basis, it would follow that instances of misinterpretation of a directive by the lower courts will not constitute non-compliant enforcement unless such judicial practice is widespread among the lower courts or has been confirmed by a decision from a supreme court.[92]

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[91] Case C-129/00 *Commission v Italy* [2004] ECR I-14637 para 32 (breach of EU law resulting from judicial interpretation of Italian law on the implementation of EU obligations that made it excessively difficult for taxpayers to obtain the repayment of charges levied in breach of EU law); Case C-154/08 *Commission v Spain* [2009] ECR I-187, para 126 (breach of VAT directive resulting from judicial interpretation by national supreme court). See also to that effect, Case C-156/04 *Commission v Greece* (n 66), paras 50 and 52 (a failure to fulfil obligations on account of a judicial practice requires sufficiently documented and detailed proof of the alleged practice).

[92] See to that effect Opinion of Advocate General Geelhoed in Case C-129/00 *Commission v Italy* [2003] ECR I-14637, paras 63-64:

> 'an individual incorrect judgment of a lower court does not necessarily result in the undermining of the practical effect of the provision of Community law concerned … . At the other end of the spectrum, such consequences are probable if there is contrary national case-law of the supreme national court from which the lower courts will derive guidance within the national legal system. Such effects can arise also where there is disagreement within the national judiciary. Moreover, it should not be ruled out that where, in structural terms, lower courts interpret and apply certain parts of Community law incorrectly, this can have the effect of discouraging individuals from bringing an action or lodging an appeal. In spite of the somewhat lower status of such case-law in the national legal order, such a situation might be regarded as grounds for a declaration that the Treaty has been infringed. … In my view, it is also relevant as to whether or not the failure to fulfil Community obligations by the national courts constitutes a structural phenomenon. Is it an incidental or isolated case or can it be said precisely that it is a trend in national case-law which is at odds with Community obligations in a particular respect? In this regard it will also be relevant whether it constitutes a new development or case-law that has been maintained over a longer period. In the former case it is possible to envisage that the national legal system has an opportunity to correct itself before it is possible to speak of a breach of the Treaty. If such a development is confirmed in an appeal and/or an appeal in cassation, in which case whether or not the legal issue in question has been referred to the Court of Justice by way of an order for reference can also be relevant, it may be concluded that it constitutes a structural phenomenon.'

Where there is a pattern of misinterpretation of a directive by the national courts, it is possible that the existence of non-compliant enforcement will find its roots in non-compliant transposition.[93] This could arise, for example, where 'the national courts systematically construe provisions of national law aimed at transposing a directive in a way which causes the provisions to be a variance with the directive' and might therefore indicate that 'the directive has not been correctly transposed'.[94]

The following table illustrates these various outcomes in the enforcement of a directive by the national courts:

Enforcement Outcomes and Corresponding Implementation Outcomes	
Enforcement outcome	**Implementation outcome**
Compliant enforcement Effective judicial protection enables NIMs to be enforced and interpreted in compliance with directive	**?** Implementation will only be compliant if transposition and application are also compliant
Non-compliant enforcement	**Non-compliant implementation**
Failure to enforce Enforcement of NIMs/directive is subject to less favourable rules than similar domestic actions Enforcement of NIMs/directive is excessively difficult or practically impossible Non-recognition of direct effect of directive Non-recognition of supremacy of EU law Unjustified refusal or inability to make reference for preliminary ruling on interpretation of directive	Non-implementation
Incorrect enforcement NIMs not interpreted consistently with directive Misinterpretation of directive	Incorrect implementation

Table 4.4 Enforcement outcomes

[93] See to that effect, Case C-129/00 *Commission v Italy* (n 104), para 33: 'Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law.'

[94] Prechal (n 20), 187.

Having analysed the different possible outcomes in the transposition, application and enforcement of directives, it is appropriate to examine the motivations of the national authorities to implementation.

4.5 Motivations of the Members States Towards Non-Compliance

The motivations of the national authorities not only affect implementation outcomes[95] they also determine how a Member State reacts to accusations of infringements by the Commission or judicial findings of an infringement of EU law by the Court of Justice.[96] Such motivations can affect how a Member State's level of compliance can change over time.[97] It therefore follows that non-compliance can therefore be unintentional or result from wilful conduct[98] that is undertaken as part of a Member State's intentional strategy.

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[95] See Sonja Bugdahn, 'Of Europeanization and Domestication: The Implementation of the Enviromental Information Directive in Ireland, Great Britain and Germany' (2005) 12 *Journal of European Public Policy*, 177-199, 194, which identifies 'various forms of domestication (business as usual, conservative or progressive interpretation, organizational initiatives and broader reforms) that limit, mediate or accompany adaptation to Europe'.

[96] See to that effect, Zürn (n 14) 9: 'Compliance, therefore, comprises, in addition to the (perceived) differences between obligation and actual behaviour [sic], the way those differences are dealt with once they are on the table. Compliance is thus assessed by dealing with two related questions: (1) What are the demands made on the behaviour [sic] of the addressees and to what extent do the addressees comply with these demands (the first dimension of compliance)? (2) How are accusations of non-compliance handled (the second dimension of compliance)?'

[97] Panke (n 18) 849, deplores how 'instances of prevailing domestic resistance to European demands for change are often under-theorized' and calls for theorize how member states' non-compliance can be transformed into compliance in the longer run, although the absence or incomplete legal transposition of European into national legal acts (non-compliance) is an instance of delayed Europeanization.' However, the argument can cut both ways; although compliance may improve over time it can also get worse.

[98] Krislov, Ehlermann and Weiler (n 20) 63-64. For a similar approach, see Zürn (n 14) 9 and Christian Joerges, 'Compliance research in legal perspectives' in Zürn and Joerges (n 14) 218-261, 228. The authors operate a distinction between '"good compliance" (only minor divergence from the prescriptions of a norm, with discomfort not publicly voiced), "recalcitrant compliance" (negligible disregard but publicly voiced discomfort with a rule), "initial non-compliance" (significant difference and a change in behavior [sic] due to allegations and/or the decision of an authorized dispute settlement

A failure to implement can be benign or unintentional. For example, it may result from 'objective parliamentary and administrative difficulties in the legislative process'[99] or misconception due to ambiguity found in the directive.[100] Nonetheless, it should be noted that the absence of specific intent by a Member State that explains a failure to implement a directive will not affect a finding from the Court of Justice that it has failed to fulfil its obligations under EU law.[101] In such cases, a Member State which is found to have unintentionally

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body), and a "compliance crisis" (significant difference, but no change in behavior [sic] even though the practice has been detected, alleged and/or outlawed)', ibid, 228.

[99] Krislov, Ehlermann and Weiler (n 20) 64. See also n 24 for the background to Luxembourg's delay in transposing Directive 2004/38.

[100] See for example, Case C-392/93 *British Telecoms* [1996] ECR I-1631, para 42, in which the Court of Justice considered that the Utilities Procurement Directive 90/531 [1990] OJ L 297/1 was 'imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance'. As a result the UK's failure to transpose the directive correctly did not constitute a sufficiently serious breach of EU law that could engage that Member State's liability to compensate the contracting entity for any damages it might have suffered as a result of incorrect transposition.

[101] The Court of Justice has consistently held that 'a Member State may not plead provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period'; see for example Case 52/75 *Commission v Italy* [1976] ECR 278, para 14; Case 163/78 *Commission v Italy* [1979] ECR 771, paras 4-5; Case 42/80 *Commission v Italy* [1980] ECR 3635, paras 3-4; Case 100/81 *Commission v Netherlands* [1982] ECR 1837, paras 3-4; Case 390/85 *Commission v Belgium* [1987] ECR 761, paras 6-7; Case 419/85 *Commission v Italy* [1987] ECR 2115, paras 10-11; Case C-42/89 *Commission v Belgium* [1990] ECR I-2821, paras 22 and 24; Case C-259/94 *Commission v Greece* [1995] ECR I-1947, paras 4-5; Case C-312/95 *Commission v Luxembourg* [1996] ECR I-5143, paras 8-9; Case C-297/95 *Commission v Germany* [1996] ECR I-6739, paras 8-9; Case C-107/96 *Commission v Spain* [1997] ECR I-3193, paras 9-10; Case C-208/96 *Commission v Belgium* [1997] ECR I-5375, paras 8-9; Case C-144/97 *Commission v France* [1998] ECR I-613, paras 7-8; Case C-274/98 *Commission v Spain* [2000] ECR I-2823, paras 18-19; Case C-276/98 *Commission v Portugal* [2001] ECR I-1699, para 20; Case C-78/00 *Commission v Italy* [2001] ECR I-8195, para 38; Case C-352/01 *Commission v Spain* [2002] ECR I-10263, paras 5 and 8; Case C-22/02 *Commission v Italy* [2003] ECR I 9011, paras 4-6 and 9; Case C-282/08 *Commission v Luxembourg* [2009] ECR I-13, paras 8-9; . For a discussion, see Prechal (n 20) 23-28; while 'no excuses for delayed implementation have as yet been accepted by the Court of Justice', the author concedes that 'in certain situations a Member State

failed to comply with a directive can be expected to take corrective action to address non-compliance since there is no intention to infringe EU law.[102]

However, non-compliance can also result from an intentional strategy to flout EU law.[103] For example, non-compliant application may be the result of a policy to turn a blind eye to instances of non-observance of a directive in order to give precedence to competing interests,[104] or could be attributable to the fact that the policy field which is regulated by a directive is not politically salient[105]

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could invoke particular circumstances which could free it, at least for a certain period, from the obligation to implement a directive', ibid, 24.

[102] See to that effect, Zürn (n 14) 9, who points out that 'charges of non-compliance can, for instance, arise out of the ambiguity of a rule, without any desire of either side to cheat or to challenge the validity of the rule. In such cases, it is to be expected that compliance is no longer problematic once any differences about the correct interpretation of the rule have been settled.' See Joseph Weiler (n 13) 2465, n 177, who points out that 'As far as directives are concerned, in most cases, nonincorporation is a result of objective constitutional and procedural difficulties at the national level (especially in Italy and Belgium) and not from an evasive or defiant strategy by a Member State.'

[103] See for example, Weiler (n 115) 2464-24655, who warns of the 'selective application' of EU law by Member States.

[104] See for example, Case C-494/01 *Commission v Ireland* (n 71), para 53 where the Court noted that the evidence produced by the Commission showed 'to the required legal standard that in 1997 the competent local authority tolerated unauthorised depositing of construction and demolition waste on wetlands in Limerick, that such depositing continued in the area in question, in particular in the course of the present proceedings, and that other depositing also took place on two further wetlands very close by'. Commission, 'Industry: Commission refers Germany to the Court of Justice of the EU over failure to apply Directive on mobile air conditioning', Press release IP/15/6290 (10 December 2010), in which the Commission notes that 'The German authorities did not take the necessary action to ensure that the vehicles were brought back in conformity with EU law by ordering Daimler AG to recall the vehicles and make the necessary technical adaptations to ensure full compliance with the MAC Directive. … The European Commission considers that in doing so, the German authorities have allowed Daimler AG to circumvent the application of the MAC Directive, which would have required the use of the new [refrigerant] R-1234yf.' See also to that effect, as regards the Treaty provisions on the free movement of goods, Case C-265/95 *Commission v France* (*Spanish strawberries case*) [1997] ECR I-6959 which concerned 'the passivity of the French authorities in face of violent acts committed by private individuals and by protest movements of French farmers directed against agricultural products from other Member States' which had 'taken place regularly for more than 10 years', ibid, paras 2 and 40.

[105] Esther Versluis, 'Explaining Variations in Implementation of EU Directives' (2004) 8 European Integration

and is therefore not considered a priority by the national administrative authorities concerned.[106] Such forms of intentional non-compliance can further be categorised as defiant, evasive or selective depending on how a Member State will react when its non-compliance is discovered.

At one extreme lies 'defiant non-compliance' which takes 'the form of a deliberate failure to implement [EU] law (especially directives); a decision not to apply [EU] law in force; or a failure – especially by the courts – to enforce [EU] law'.[107] What characterises non-compliance as defiant is that the Member State concerned is unlikely to rectify its behaviour even if the practice concerned is challenged by the European Commission or is the subject of an adverse judgment from the Court of Justice.[108] Whether this happens is likely to be influenced by factors such as the political power that a Member State enjoys in

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online Papers No 19, 10, defines 'salience in general terms refers to the visibility of and the importance attached to a topic' and considers 'the main indicator of salience is attention: an issue is salient when it receives much attention, i.e. news coverage. So what makes that an issue receives attention or is covered in the news? There potentially can be many elements that trigger attention, but in the case studies analyzed in this article, especially two elements seem to be of importance: risks and focusing events.'

[106] See for example, Esther Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 West European Politics, 50-67, 62-63, who found that '[t]he Safety Data Sheets Directive seems to indicate the importance of issue salience. While solutions to explain the lack of practical implementation would not be found in the complexity of the directive, administrative incapabilities, misfit or opposition, issue salience does seem to provide an explanation. Member states do not enforce or comply with the SDS Directive, simply because it is not considered to be important enough. This case study suggests that for salient topics the central question remains why enforcement and compliance do not occur.'

[107] Krislov, Ehlermann and Weiler (n 20) 63. Defiant non-compliance would broadly correspond to a 'compliance crisis' within the categorisation developed by Zürn (n 14) 9 and Joerge (n 111) 228

[108] Krislov, Ehlermann and Weiler (n 20) 63 citing the example of the initial reaction of the Italian Constitutional Court to the Court of Justice's judgment in Case 106/77 ***Simmenthal*** (n 81). See further Giorgio Gaja, 'Constitutional Court (Italy), Decison No. 176 of 26 October 1981, S.p.a. Comavicola v. Amministrazione delle finanze dello Stato' (1982) 19 Common Market Law Review 455-461; Marta Cartabia, 'The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community' (1990) 12 Michigan Journal of International Law 173-203; Giorgio Gaja, 'New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law' (1990) 27 Common Market Law Review 83-95;

the EU relative to the other Member States in resisting enforcement by the European Commission,[109] as well as the existence of domestic actors which can bring pressure on the national authorities to amend non-compliant implementation.[110]

Intentional non-compliance may also consist in 'evasive non-compliance'.[111] This occurs where a Member State deliberately seeking to evade implementation of a directive 'but [it] will not defy an open challenge by the Commission – or eventually the Court – if discovered'.[112] As a result, where non-compliance is discovered and triggers an investigation by the Commission, evasive non-compliance is likely to be resolved informally following discussions with the defaulting Member State.[113] It may also be possible that evasive non-

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[109] See for example, Tanja Börzel, Tobias Hofmann, Diana Panke and Carina Sprungk 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 Comparative Political Studies, 1363-1390, 1365: 'The best compliers are member states that have ample administrative capacity and lack the political power to withstand the compliance pressure of enforcement authorities. Conversely, the countries with the worst compliance records are those with limited capacity but enough power to resist the European Commission's enforcement efforts. Member states with weak capacity and limited power are not very good compliers either, but they still fare better than their powerful counterparts. Finally, powerful member states with strong capacity comply better than powerful member states with weak capacity. In short, although power has a negative impact on compliance, the impact is reduced by the interaction with capacity';

[110] Susanne Schmidt, 'Beyond Compliance. Europeanization through Negative Integration and Legal Uncertainty' (2008) 10 Journal of Comparative Policy Analysis: Research and Practice 299-308, 304 who suggests that '[t]he higher the legal uncertainty arising from a Treaty rule and its interpretation, the more opportunities it offers for domestic actors to turn to the European courts in order to press for Europeanization'.

[111] This would correspond to 'initial non-compliance' within the categorisation developed by Zürn (n 14) 9 and Joerge (n 111) 228.

[112] Krislov, Ehlermann and Weiler (n 20) 64.

[113] See further, Chapter 5, Section 5.1.1 (Direct supervision by the Commission). An example is provided by the former practice of the Belgian immigration authorities which refused to recognise the status of a 'worker' to EU citizens working in Belgium under cover of a measure to facilitate access to employment under Article 60 of the law on social assistance centres (*Loi organique des centres publics d'action sociale du 8 juillet 1978, MB 05-08-1976, p 9876*) on the basis that such work created a 'burden on social assistance' under Directive 2004/38. Following the opening of an investigation by the Commission, the Belgian authorities amended their practice from the end of April 2014 so that persons

compliance by a Member State comes nonetheless to be examined by the Court of Justice. For example, a Member State may breach the deadline in transposing a directive due to the low priority it accords to its transposition.[114] Given the Commission's avowed enforcement strategy to combat late transposition,[115] the Commission may well proceed to bring a case before the Court for failure to notify the national implementing measures.[116] This will result in a finding of infringement despite assurances given by a Member State that national implementing measures will be shortly adopted[117] or even if such measures have

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working under such a measure are now considered workers under the Directive, see *Chambre des Représentants de Belgique, 'Note de Politique Générale – Asile et Migration', Doc 54 0588/026* (Chamber of Representatives, 'General Policy Note – Asylum and Migration), 28 November 2014, 27-28 <http://www.lachambre.be/flwb/pdf/54/0588/54K0588026.pdf> accessed 29 December 2015. For background, see Marco Martiniello et al, 'Les expulsions de citoyens et citoyennes européens. Un phénomène qui nous alarme, et nous mobilise' (*Université de Liège*, 26 May 2014) <http://blogs.ulg.ac.be/marcomartiniello/2014/05/26/les-expulsions-citoyens-citoyennes-europeens/> accessed 29 December 2015.

[114] Aneta Spendzharova and Esther Versluis, 'Issue Salience in the European Policy Process: What Impact on Transposition? (2013) Journal of European Public Policy 1499-1516, 1512-1513, who found that '[h]igh salience of environmental issues for a government initially speeds up transposition, but we found that this effect diminishes over time and 191 days after the deadline, it actually slows down transposition.' The authors found some support for the hypothesis advanced by Christoph Knill, 'Implementing European Policies: The Impact of National Administrative Traditions' (1997) EUI Working Paper 97/56, 11, in which he postulated that '[i]f political salience is low, we assume that perception of adaptation pressure shifts from a moderate to a low level. Due to political indifference, policy problems addressed by supranational legislation are either overlooked, neglected, or taken as being satisfactorily resolved by given administrative arrangements'.

[115] Commission, Communication 'Better Monitoring of the Application of Community Law', COM(2002) 725 final, 12 and 17; Commission, Communication 'A Europe of Results - Applying Community Law', COM(2007) 502 final, 9; Commission, 'Report from the Commission - Monitoring the application of Union law 2014 Annual Report' COM(2015) 329 final, 17 (hereafter 'Annual Report on the Application of EU Law for 2014'). See further Chapter 5, Section 5.1.1 (Direct supervision by the Commission).

[116] See further Chapter 5, Section 5.2.2 (Infringement action by the Commission).

[117] The Court of Justice has consistently held that 'question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion', see for example Case C-173/01 *Commission v Greece* [2002] ECR I-6129, para 7. In that case, the Court found that Greece had 'not adopted the measures necessary to comply with the reasoned opinion within the period prescribed for that purpose'

been adopted by the time the case comes before the Court.[118] In such circumstances, an adverse ruling from the Court[119] is likely to lead the Member State to desist from evading its obligations and take the necessary measures to correct its non-compliant implementation.

Nonetheless, there may also be circumstances where, without being outright defiant, a Member State's non-compliance in implementing a directive will persist despite its discovery. In salient policy fields, a Member State may adopt a 'wait-and-see' attitude whenever its non-compliance becomes the subject of judicial intervention.[120] The level of precision displayed by the Court of Justice in its resulting decision will then influence how a Member State reacts.[121] Where a ruling contains ambiguities that can be exploited to its advantage, a Member State which does not agree with the judicial outcome may

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and therefore it was therefore irrelevant that 'the measures necessary to implement the Directive in national law ha[d] been drafted by the competent department and that the draft presidential decree enacting them [would], as soon as it [was] published, be forwarded to the Court and the Commission in its definitive version' ibid, 6-8. The Commission's reasoned opinion defines the subject-matter of the proceedings and is an essential procedural requirement in infringement proceedings under Article 258 which precedes a formal application to the Court of Justice, see Case C-152/89 Commission v Luxembourg [1991] ECR I-3141, para 9.

[118] See for example Case C-110/00 ***Commission v Austria*** [2001] ECR I-7545, paras 11-14, the Court dismissed Austria's argument that following 'the adoption of certain legislative amendments, the directive [had] been fully implemented at federal level' and 'that several implementing regulations have been adopted with regard to the Länder' on the basis that 'it had not adopted, prior to the expiry of the period of two months set by the reasoned opinion, the measures necessary to implement the directive fully in national law'.

[119] Alternatively, it could be that a Member State's evasive non-compliance is challenged before the national courts which then make a reference for a preliminary ruling that leads to the Court of Justice issuing an judgment that is unfavourable for the Member State concerned. See further Chapter 5, Section 5.3.4 (Reference for a preliminary ruling).

[120] See to that effect, Tracy Slagter, 'National Parliaments and the ECJ: A View from the Bundestag' (2009) 47 Journal of Common Market Studies 175-197, 190-191.

[121] Fabio Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the EU' (2010), 1128-1146, 1133: 'the clarity of judicial doctrines determines how strictly national administrations and governments should implement case law.'

take the form of a strategy of 'contained compliance'[122] where limited action[123] is taken to achieve compliance in the immediate context of the finding of non-compliance by the Court of Justice,[124] but without amending its wider non-compliant policy.[125] Alternatively, a Member State may compromise by taking action to forestall future legal challenges that may be generated by a ruling by the Court of Justice,[126] albeit this may be done reluctantly.[127] What will

[122] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Pres 2002) 38, who defines a policy of 'contained compliance' that consists in Member States 'neglecting the policy implications of judicial decisions while simultaneously respecting individual judgments.' The author also observes that, based on her interviews, 'contained compliance constitutes standard administrative practice' in France, Germany and the UK, ibid, 69. Aside from 'contained compliance', another strategic response may include 'restrictive application' that occurs 'when Member States place limits and exceptions on judicial principles in secondary legislation (European directives and regulations or domestic legislation) and treaty provisions' ibid, 32.

[123] Michael Blauberger, 'National Responses to European Court Jurisprudence', (2014) 37 West European Politics 457-474, 471, who notes that 'member state governments may opt for a strategy of contained compliance, i.e. they use loopholes in ECJ rulings to minimise their domestic impact'.

[124] Krislov, Ehlermann and Weiler (n 20) 64, citing the UK government's persistent non-compliance with the tachograph regulation, following its condemnation by the Court in Case 128/78 *Commission v United Kingdom* [1979] ECR 419, and noting that 'Britain has only partly complied with the decision'. A further example is given of the UK Court of Appeal's contained compliance in *R v Secretary of State for the Home Department, ex parte Santillo* [1981] 2 All England Reports 917 that 'paid lip service to the preliminary ruling made by the European Court' in Case 131/79 *Santillo* [1980] ECR 1585.

[125] See n 135.

[126] See for example, Blauberger (n 136) 471, who refers to 'a strategy of anticipatory obedience, i.e. [Member States] engage in encompassing reforms to reduce the pressure from interested litigants; Conant (n 135) 32, who identifies this as 'preemption' which arises 'when Member States carefully construct European or domestic law to avoid future judicial interference in particular areas'.

[127] One example involves the UK's response to the Court of Justice's judgment in Case C-127/08 *Metock* (n 50) and the amendments it made to its national implementing measures that transposes Directive 2004/38. It took three years from the date of the judgment for the UK to adopt the Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247, which removed the requirement in reg 8(2)(a) and 10(1)(b) for direct family members to have been lawfully resident in another EEA State before moving to the UK to join their EU relative. The Home Office justified this approach on the basis that the *Metock* judgment only concerned close family members under Article 2(2) of the Directive, but did not affect 'other family members' falling within the scope of Article 3(2). It took another year and another judgment – Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519

determine a Member State's strategy is likely to depend on the domestic repercussions[128] of the legal uncertainty[129] that is generated by a European ruling.[130]

A Member State may also be indirectly affected by cases concerning non-compliance in other States[131] and may pursue similar strategies based on the

(judgment of 5 September 2012) – for the UK to eventually comply fully with principle laid down in *Metock.*

[128] According to Blauberger (n 136) 460 'legal uncertainty ... is inefficient in a rule of law system and, therefore, costly for those affected. Hence, if legal uncertainty persists despite the court's jurisprudence and unless the parties to a conflict reach a stable compromise by themselves, they have to carry uncertainty costs'. The way that Member State respond to rulings of the Court of Justice then 'depend[s] on how the costs of legal uncertainty are distributed between supporters and challengers of the regulatory status quo (i.e. of existing domestic rules before their adjustment to ECJ jurisprudence). Time constraints, the population of similar cases and each party's worst case scenario for an eventual ECJ ruling affect the distribution of uncertainty costs. If the challengers of the regulatory status quo have to carry the main burden of legal uncertainty, national policy-makers are likely to pursue a strategy of "contained compliance". By contrast, if legal uncertainty is particularly costly for the supporters of the regulatory status quo, a strategy of "anticipatory obedience" with ECJ jurisprudence is more likely.' The author found that 'when member state governments are able to play for time, when they do not face the risk of financial sanctions in the short or medium term, and when challengers have to fight for their cause individually, a logic of contained compliance is likely to prevail ... . By contrast, when legal uncertainty undermines political planning capacity or even involves great financial risks, and when the spectrum of potential litigants becomes too vast, member state governments anticipate future legal challenges by adjusting domestic regulation' ibid, 471-472.

[129] Schmidt (n 123) 300 defines legal uncertainty as 'the lack of predicting law, which is one central element of the term, next to procedural safeguards. ... Legal uncertainty arising in the course of negative integration has important consequences for Europeanization: member states have to devise domestic policies in the absence of certainty concerning their precise obligations under European law', if it is considered that '[n]egative integration normally occurs in a specific way – through judicial and not through legislative policy making'.

[130] Michael Blauberger and Susanne Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) Oct–Dec Research & Politics 1-7, 2, who argue that 'interaction of EU legislation and Court re-interpretation ... results in significant legal uncertainty. ... Legal uncertainty poses a challenge for member states' administrations in terms of workload and rule-of-law procedures. Domestic legislative reforms shift this uncertainty to EU citizens by raising the burden of proof required for these citizens to successfully claim social benefits.'

[131] See for example, Conant (n 135) 69; Blauberger (n 136) 459; It should also be noted here that, where the outcome of a judgment overturns non-compliant practices that are common to a large number of

outcome of judicial intervention against non-compliant implementation in other Member States that are comparable to its own non-compliant practices.[132]

These strategies are not necessarily mutually exclusive. It is not inconceivable to imagine situations where a Member State may combine these strategies as part of a wider policy that aims to give priority to countervailing domestic political interests. In this respect, it has been observed that, in treading 'the fine line "between law and political truth"',[133] a Member State may seek to take full advantage of the ambiguities contained in Directive 2004/38 and other instruments relating to EU free movement rights in order to pursue a policy intended to 'change or limit the present legal effects of the free movement of persons ... while remaining broadly compliant with its responsibilities under the Treaties'.[134] For the purposes of this study, such non-compliance strategies will be termed 'selective non-compliance' to distinguish it from evasive and defiant non-compliance.

Member States, the resulting political fallout may well lead the Member States to concentrate their efforts to effect legislative changes through the Council in order to overturn contested judicial decisions. Wasserfallen (n 134) 1130-1131, provides the example of the exportability of hybrid benefits which, following judicial intervention, led to the amendment of the regulation on the coordination of social security.

[132] See n 140 concerning the UK's response to the judgment in Case C-127/08 *Metock* (n 50). See also, in respect of Ireland's response to the ruling in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, whose facts concerned Belgium, Susanna Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland', (2014) 37 West European Politics 769-785. The author also summarises the impact of the judgment in other Member States, ibid, 779-781.

[133] Jo Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 Cambridge Yearbook of European Legal Studies, 247-286, 248.

[134] ibid. The author provides the example of the UK which pursues three overlapping strategies that tread 'the fine line "between law and political truth"' by 'exploiting the internal resources of EU law; importing new resources into EU law, for example, by making use of the proximity between free movement law and national immigration law; and attempting to change the resource base by bringing about amendments to existing EU law', ibid 248.

The different motivations that Member States may adopt towards non-compliance can be illustrated by the following graphic:

<table>
<tr><th colspan="2">Motivations of Member States towards Non-Compliance</th></tr>
<tr><th>Compliant implementation</th><th>Non-compliant implementation</th></tr>
<tr><td rowspan="4">Directive is correctly transposed, applied and enforced by a Member State</td><td><u>Unintentional non-compliance:</u>
non-compliance is due to objective difficulties or ambiguity in the directive, which will be corrected by MS if challenged</td></tr>
<tr><td><u>Evasive non-compliance:</u>
non-compliance is due to an intentional failure to implement, which will be corrected by MS if challenged</td></tr>
<tr><td><u>Selective non-compliance:</u>
non-compliance is due to intentional failure to implement, which will only be selectively corrected by MS when challenged</td></tr>
<tr><td><u>Defiant non-compliance:</u>
non-compliance is due to intentional failure to implement, which will continue if challenged and will not be addressed by MS</td></tr>
</table>

Table 4.4 Motivations of the Member States Towards Non-Compliance

Having examined implementation outcomes and the motivations of the Member States, attention will now be turned to a review of the variables that can affect non-compliance.

4.6 Factors Affecting Non-Compliance

The established legal scholarship on the implementation of EU directives has been primarily concerned with the scope of the legal obligation that is incumbent upon the Member States to give effect to directives under Article 288 TFEU and has tended to follow judicial developments in the case law of the Court of Justice.[135] As a result, scholarly interest has focused on the obligation

[135] For the sake of completeness, a reference should also be made to legal scholarship that has examined the drafting of EU legislation, see for example Richard Wainwright, 'Techniques of drafting European Community legislation: Problems of interpretation', (1996) 17 *Statute Law Review*, 7-14; E Donelan, 'The Role of the Office of the Parliamentary Draftsman in the Implementation of European Union Directives in Ireland' (1997) 18 *Statute Law Review*, 1-20.

to give effect to directives in the legal order[136] and the jurisprudential constructs that have been developed over time by the Court of Justice to address failures by the Member States to implement directives, namely the doctrine of direct effect, the duty of consistent interpretation and the principle of Member State liability,[137] which find their basis in the supremacy of EU law.[138] A significant proportion of the scholarship is devoted to the role of the national courts,[139] while it is only fairly recently that attention has turned to the obligation of the national administrative authorities to apply EU law.[140] In addition, there is also

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[136] For a detailed analysis of Member States' obligations to give effect to directives, see further Chapter 3 (The Implementation of EU Directives: Transposition, Application and Enforcement).

[137] See Chapter 5 (Supremacy, direct effect and consistent interpretation).

[138] See for example, Koen Lenaerts, Dirk Arts and Ignace Maselis, *Procedural Law of the European Union*, (Robert Bray ed, Sweet & Maxwell, 2006, 84-85.

[139] See for example, Mark Brearley and Mark Hoskins, *Remedies in EC Law*, (2nd ed, Sweet & Maxwell, 1998); Sacha Prechal, 'Community Law in National Court: The Lessons from *Van Schijndel*' (1998) 35 Common Market Law Review 681-706; Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart Publishing, 1998); Walter Van Gerven, 'On Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501-536; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 33-63; Johanna Engström, 'National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?' (2008) 1 Review of European Administrative Law 67-89; Sacha Prechal and Sybe De Vries, 'Seamless Web of Judicial Protection in the Internal Market?'(2009) 34 European Law Review, 5-24; Johanna Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty - Reflection in the light of case C-279/09' (2011) 4 Review of European Administrative Law, 53-68; Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection' (2011) 4 Review of European Administrative Law, 31-5.

[140] John Temple Lang, 'The Duties of National Authorities under Community Constitutional Law', (1998) 23 European Law Review 109-131; Kurt Riechenberg, 'Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration' (1999) 22 Fordham International Law Journal 696-767; John Temple Lang, 'The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections' (2001) 26 European Law Review 84-93; Allan Rosas, 'Ensuring Uniform Application of EU Law in a Union of 27: The Role of National Courts and Authorities', in Jean-Paul Delevoye and P. Nikiforos Diamandouros (eds), *Rethinking Good Administration in the European Union – Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries*, (Office for Official Publications of the European Communities 2008) 16-20; Michal Bobek, 'Thou Shalt Have Two Masters: The Application of European

a wealth of scholarship providing an assessment of the conformity of transposition of specific directives by the Member States.[141]

Nonetheless, there are relatively few examples of legal scholarship going beyond transposition,[142] that is to say the process by which directives are incorporated into the national legal order[143] by way of a binding legal framework.[144] Instead, empirical explorations into the implementation of

Law by Administrative Authorities in the New Member States' (2008) 1 Review of European Administrative Law 51-63; Alija Sikora, 'Administrative Practice as a Failure of a Member State to Fulfil its Obligations under Community Law' (2009) 2 Review of European Administrative Law 5-27; Maartje Verhoeven, *The Costanzo Obligation – The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law* (Intersentia 2011).

[141] See for example, Michael Kaeding, 'Legal Borders in the EU? : Transposition of European Transport Directives in France, Germany, Greece, Italy and the United Kingdom (2007) 9 European Journal of Law Reform (2007) 619-639; Barbara Pozzo, *The Implementation of the Seveso Directives in an Enlarged Europe* (Wolters Kluwer 2009); Ulrish Stelkens, Wolfgang Weiß and Michael Mirschberger (eds), *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (TMC Asser 2012). The EU institutions often have recourse to external contractors to produce transposition studies, for example, in the case of Directive 2004/38, Milieu Ltd. and Edinburgh University's Europa Institute were contracted by the Commission to produce the 2008 Conformity Study, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008), and the European Parliament's Legal Affairs Committee also commissioned a study: ECAS, 'Comparative study on the 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', (PE 410.650, European Parliament 2009).

[142] See for example, Stuart Bell and Laurence Etherington, 'Out of sight, Out of Mind : A Study of the Transposition and Implementation of the Groundwater Directive in the United Kingdom', (2007) 9 Environmental Law Review, 6-24; Efthymis Zagorianakos, 'A qualitative evaluation of current Transposition and Implementation Practice of the SEA Directive in EU Member States', (2006) Journal for European Environmental and Planning Law, 535-548.

[143] See further Chapter 3 (The Implementation of EU Directives: Transposition, Application and Enforcement).

[144] The Court has consistently held that mere administrative practices, which by their nature may be changed at will by the national authorities and are not given appropriate publicity, cannot be regarded as constituting correct implementation; see for example, Case 102/79 *Commission v Belgium* [1980] ECR 1473, para 11. As regards the fulfilment of Treaty obligations in general see: Case C-465/05 *Commission v Italy* [2007] ECR I-11091, para 65; Case C-490/09 *Commission v Luxembourg* [2011]

European directives that goes beyond transposition has tended to be the purview of scholars of political science, social science and interdisciplinary studies in public administration.[145]

Since the challenge to fill the 'black hole' of implementation was first laid down, there has been significant growth[146] in what has come to be known as 'EU compliance research'.[147] Scholars have sought to identify the factors that might affect implementation outcomes and develop theories to explain them. These efforts have been categorised into four phases of research,[148] with current research encompassing institutional features, political factors and substantive factors.

ECR I-247, para 47. See further Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

[145] For a comprehensive review of the existing literature, see also Ellen Mastenbroek, 'EU Compliance: Still a "Black Hole"?' (2005) 12 Journal of European Public Policy, 1103-1120; Ulf Sverdrup, 'Implementation and European Integration: A Review Essay' (2005) ARENA Working Paper 25/2005; Heather Mbaye, 'Assessing Competing Explanations for Compliance and Non-Compliance with European Union Policies', (2009) 10 Midsouth Political Science Review 63-82; Dimiter Toshkov, Moritz Knoll and Lisa Wewerka, 'Connecting the Dots: Case Studies and EU Implementation Research' (2010) Institute for European Integration Research Working Paper 10/2010; Mariyana Angelova, Tanja Dannwolf and Thomas König, 'How Robust Are Compliance Findings? A Research Synthesis' (2012) 19 Journal of European Public Policy 1269-1291; Oliver Treib, 'Implementing and Complying with EU Governance Outputs' (2014) 9(1) Living Reviews in European Governance, 6 <http://www.europeangovernance-livingreviews.org/Articles/lreg-2014-1/> accessed on 2 June 2015. On public administration as an academic discipline see, Dion Curry, Steven Van de Walle and Stefanie Gadellaa, 'On Public Administration as an Academic Discipline: Trends and Changes in the COCOPS Academic Survey of European Public Administration Scholars' (2014) Coordinating for Cohesion in the Public Sector of the Future Report Work Package 8, <http://www.cocops.eu/wp-content/uploads/2014/02/COCOPS_PAasadiscipline_report_09.02.pdf> accessed 13 June 2015.

[146] For reviews of the existing literature, see n 11.

[147] Toshkov, Knoll and Wewerka (n 11). Other related terms include 'EU-related implementation research', see Treib (n 11); 'compliance with EU law', see Lisa Conant, 'Compliance and What EU Member States Make of It' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012); 'EU compliance': Mastenbroek (n 11).

[148] Treib (n 11) 7.

The impact of EU decision-making on implementation outcomes has been the subject of a number of studies.[149] These have examined whether opposition voiced by the Member States during the negotiation preceding the adoption of a directive affects transposition outcomes.[150] One study[151] concluded that 'disagreement [by a Member State] with an outcome [in the final text of a directive] plays a strategic role in the transposition process. The risk of delay for conformable transposition increases significantly when a state has a strong incentive to deviate from the outcome of a directive. … In the case of non-conformable transposition, disagreeing member states seem to follow a 'quick and dirty' strategy and notify non-conformable measures earlier'.[152] Other studies have found limited evidence of such a link [153] or have even concluded

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[149] See for example Robert Thomson, René Torenvlied and Javier Arregui, 'The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives'(2007) 37 British Journal of Political Science 685-709; Thomas König and Lars Mäder, 'Non-conformable, Partial and Conformable Transposition: A Competing Risk Analysis of the Transposition Process of Directives in the EU15' (2013) 14 European Union Politics 46–69. For a more extensive review of the results of these studies, see Treib (n 11) 20.

[150] For example, Thomson, Torenvlied and Arregui, n 151, use the concept of 'incentive to deviate' to represent the difference between a Member State's policy position in the Council and the actual outcome in the adopted text of the directive.

[151] König and Mäder, n 151. This study identifies three levels of transposition outcomes: 'fully conformable … partially conformable and non-conformable transposition according to the extent to which the goals of a directive are correctly transposed into domestic law', ibid, 47. However, the study only focused on 37 contested issues raised during negotiations on 21 directives, which the authors concede, 'is distinct from more qualitative approaches, which may provide a somewhat deeper measure of transposition conformity by considering and evaluating the whole content of a directive', ibid, 56. The project used data developed within the context of the Decision-Making in the European Union (DEU) project: Robert Thomson, Frans Stokman, Christopher Achen and Thomas König, *The European Union Decides* (Cambridge University Press 2006); see further Robert Thomson, Javier Arregui, Dirk Leuffen, Rory Costello, James Cross, Robin Hertz and Thomas Jensen, 'A New Dataset on Decision-Making in the European Union before and after the 2004 and 2007 Enlargements (DEUII)' (2012) 19 Journal of European Public Policy 604-622.

[152] König and Mäder, n 151, 64.

[153] Gerda Falkner, Oliver Treib, Miriam Hartlapp, Simone Leiber, *Complying with Europe - EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005) 278: 'our cases revealed some instances of this pattern, the pattern clearly could not account for a major part of all the

that opposition in the Council does not affect the timeliness or correctness of transposition.[154]

Institutional constraints at the national level have also been examined.[155] Scholars have argued that the timeliness and correctness of transposition is affected by the number of 'veto players' who are able to exert their influence during the transposition process.[156] While some confirm the validity of such an

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transposition problems observed. It has to be noted, however, that establishing which governments actually resisted individual provisions of a draft Directive at some point in the negotiations is not an easy task. The final voting behaviour is not a very good indicator of support or opposition. Especially under the qualified majority rule, which forms the basis of most of our Directives, governments may preventively discard certain policy options which they might have pursued under unanimity. Hence, there may very well be a certain amount of concealed opposition during the EU-level negotiations. On the other hand, it is by no means necessary that a government should resist the transposition of a provision whose adoption it regards with a certain scepticism.'

[154] Asya Zhelyazkova and René Torenvlied, 'The Time-Dependent Effect of Conflict in the Council on Delays in the Transposition of EU Directives' (2009) 10 *European Union Politics*, 35-62, 57: 'conflict in the Council leads to shorter delays in the transposition of EU directives'; Asya Zhelyazkova, 'Complying with EU Directives' Requirements: The Link Between EU Decision-Making and the Correct Transposition of EU Provisions' (2012) 20 Journal of European Public Policy, 702-721, 718: 'Conflict in the Council does not influence transposition success [i.e. correctness] with regard to the provisions of four directives.'

[155] Angelova, Dannwolf and König (n 11) 1276-1278.

[156]See for example, Markus Haverland, 'National Adaptation to European Integration: The Importance of Institutional Veto Points' (2000) 20 *Journal of Public Policy*, 83-103, 100, who argues that 'veto points tend to shape the timing and quality of implementation'. See further Michael Kaeding, *Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives across Member States* (Leiden University Press 2007); Miriam Hartlapp, 'Implementation of EU Social Policy Directives in Belgium: What Matters in Domestic Politics?' (2009) 31 Journal of European Integration 467–488. For a review of studies on 'veto players', see Treib (n 11) 25-26.

approach,[157] it has also been contested,[158] because it has tended to 'presume that transposition follows the same process, independent of the directive at stake'.[159] Research on institutional constraints has also considered administrative

[157] Toshkov, Knoll and Wewerka (n 11) 27, 'for several variables we have relatively strong evidence that they influence the timeliness of formal implementation: administrative efficiency, coordination strength, and parliamentary scrutiny have positive effects while federalism/regionalism, corruption levels, veto players, the number of ministries involved, and domestic conflict have negative effects on compliance'. See also Angelova, Dannwolf and König (n 11) 1283.

[158] See for example, Falkner et al (n 155) 296-298: 'some countries apparently do seem to correspond to the expectations of the veto player theory, like the UK and Italy. But many of the other countries do not fit in nicely. Hence, Greece has as few veto players as the UK, but nevertheless emerges much worse than the latter. Luxembourg, Germany, Portugal, and France are also examples of countries whose performance is far poorer than one would have expected on the basis of their moderate numbers of veto players. Denmark, on the other hand, is clearly better than its institutional reform capacity would suggest. Altogether, therefore, the world seems to be more complicated than implied by such parsimonious hypotheses'; Treib (n 11) 26: 'Some of these findings are open to criticism since they establish statistical effects for factors that may not be causally relevant for the cases analysed. For example, federalism is not relevant for transposition in cases where central government is responsible for adopting transposing laws and federal chambers do not hold veto power. … Similarly, most veto player indices cover aspects of political systems that may be relevant for cases where directives are transposed by formal legislation adopted by parliaments, but they do not seem relevant if directives can be transposed by ministerial orders'.

[159] Bernard Steunenberg and Mark Rhinard, 'The Transposition of European Law in EU Member States: Between Process and Politics' (2010) 2 European Political Science Review 495–520, 499. They propose a 'procedural veto player index, which measures the number of veto players depending on the process of transposition. The index counts the number of players at each relevant stage of this process: the preparations of a measure by one or more ministries (which is sufficient for the adoption of a ministerial order), decision-making within the cabinet (which, together with the first stage, is sufficient for the adoption of a government decree), and decision-making within parliament (which is necessary for the adoption of a bill). Depending on the kind of instrument used or needed to transpose, the index reflects the number of players involved at each stage of the process', ibid, 517. Such an approach has 'turned out to be a powerful predictor of transposition timing' according to Treib (n 11) 26.

capabilities,[160] such as administrative capacity[161] or coordination.[162] The results of such investigations have also been contested.[163]

Political considerations have also been taken into account. Studies have sought to determine whether transposition outcomes are affected by party politics[164] or public support for the EU.[165] The impact of social partners on

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[160] For a review of studies on administrative capabilities, see Treib (n 11) 26-27.

[161] See for example, Tanja Börzel, Tobias Hofmann, Diana Panke and Carina Sprungk 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 Comparative Political Studies 1363-1390, 1382: 'states with high capacities and low political power [as represented by their share of votes in the Council] violate European law less frequently than other member states. Conversely, the combination of constrained government capacity and great political power brings together the inability to comply and the necessary political weight to be obstinate in the face of looming sanctions', namely the opening of infringement proceedings by the Commission; Falkner et al (n 155) 302-303: 'case studies have revealed that a shortage of administrative resources does play a certain role in delaying transposition' but warn that 'a reference to inadequate administrative resources may always be treated as a façade to conceal a political decision not to comply'. For a view to the contrary as regards the timeliness of transposition, see König and Mäder (n 151) 60-62: 'the positive effect of bureaucratic efficiency on the risk of transposition is non-significant, except for the stage of the first four weeks of transposition delay'.

[162] Antoaneta Dimitrova and Dimiter Toshkov, 'Post-accession Compliance between Administrative Co-ordination and Political Bargaining' (2009) 13 European Integration online Papers, Special Issue 2 No. 19 <http://eiop.or.at/eiop/pdf/2009-019.pdf > accessed on 29 June 2015. The authors conclude that 'good administrative capacity, in the sense of good co-ordination of EU policy making is a necessary, but not sufficient condition for transposition', ibid, 12.

[163] Angelova, Dannwolf and König (n 11) 1283-1284: 'Administrative efficiency, as well as national monitoring and enforcement, are robust only across qualitative studies. ... Our research synthesis shows that administrative efficiency is consistent only across case studies, which analyse this argument in Greece, Italy, France, Germany, the United Kingdom (UK) and Spain.'

[164] See for example, Falkner et al (n 155) 309-313. For a review of research on political factors the influence implementation outcomes, see Treib (n 11) 22-23.

[165] See for example, Börzel, Hofmann, Panke and Sprung (n 163) 1379-1381: 'more public support for the EU apparently increases the positive effect of the power of obstinacy on the number of violations of European law. In other words, it seems that support for the EU makes obstinate member states even more, not less, obstinate. ... we rather find a positive correlation between public support and violations of European law than the negative effect that our second legitimacy hypothesis predicts. Countries such as Italy and Belgium, in which the population is supportive of European integration, violate legal acts more frequently than EU-skeptic [sic] member states such as Denmark and the United Kingdom. This counterintuitive finding may be explained by a strong direct and negative relation between capacity and

transposition[166] and the role which civil society can play in decentralised enforcement have also been explored.[167]

Another political factor affecting implementation is 'issue salience', [168] namely the political importance attached by a Member State to the issue which a directive may touch upon. Studies have found that the saliency of a directive will affect the timeliness and correctness of transposition.[169] Following transposition, a directive that is considered highly salient is also likely to result in changes to the enforcement practices of the administrative authorities.[170]

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legitimacy ... Citizens of states with weak capacities turn to the EU as an institution that may be more effective in providing public goods. As a consequence, those member states most supportive of the EU may be among the worst compliers because even if the EU produces rules for the provision of public goods, governments still lack the capacity to effectively implement them on the ground.' For an overview of research on this factor, see Treib (n 11) 24.

[166] See for example, Falkner et al (n 155) 303-309. For a review of studies on the effect of interest groups on implementation, see Treib (n 11) 24-25.

[167] See for example, Panke (n 18); Slepcevic (n 93).

[168] Leonard Ray, 'Measuring Party Orientation Towards European Integration: Results from an Expert Survey' (1999) 36 European Journal of Political Research 283-306.

[169] Saliency can cut both ways. On the one hand, politically sensitive issues might hinder transposition, see Dimitrova and Toshkov, n 164, 12: 'The transposition and implementation of these directives [i.e. the Racial Equality Directive 2000/43 (2000) OJ L 180/22 and other legislation that prohibits discrimination] is clearly a question of politics, a result that can be explained with the high salience of this legislation and with high levels of politicization. On the other hand, saliency might facilitate transposition, see Aneta Spendzharova and Esther Versluis, 'Issue Salience in the European Policy Process: What Impact on Transposition?'(2013) 20 *Journal of European Public Policy*, 1499-1516, 1513: 'We conceptualized issue salience as the relative importance of one issue vis-à-vis others and operationalized what we consider to be its main components relevant for the transposition of environmental directives – salience of directives regulating high-risk materials, salience for political parties in government and salience for the general public. We found that Green parties in government speed up the transposition process and so does public opinion assigning a top priority to environmental issues. High salience of environmental issues for a government initially speeds up transposition, but we found that this effect diminishes over time and 191 days after the deadline, it actually slows down transposition.'

[170] Esther Versluis, 'Explaining Variations in Implementation of EU Directives' (2004) 8 European Integration online Papers, No 19: <http://eiop.or.at/eiop/texte/2004-019.htm> accessed 2 July 2015, 14: 'A salient directive appears to facilitate domestic change [in terms of its practical application] and a non-salient directive seems to impede this. ... issue salience might be taken into account as a

Likewise, a Member State is less likely to monitor, apply or enforce a directive that is considered of low importance.[171]

Attention has also been directed to substantive policy-based aspects. Transposition outcomes can differ according to the level of alignment between EU policy goals and existing domestic policy. This has led to the emergence of a theory of 'goodness-of-fit' that suggests that the higher the degree of misfit between the EU rules and the domestic framework, the more likely problems are to arise in the implementation of directives.[172] The 'goodness-of-fit' approach has found support in a fair proportion of both quantitative and qualitative studies,[173] although it is far from meeting with universal approval.[174]

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complementary factor that emerges and interacts with the existing mediating factors, especially with 'change agents'; it seems to function as a constraining or impeding factor in case of low salience and as a stimulating or strengthening factor in case of high salience. Further operationalization and application is required to test this hypothesis.'

[171] Esther Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 *West European Politics*, 50-67, 62.

[172] See for example, Francesco Duina, 'Explaining legal implementation in the European Union' (1997) 25 *International Journal of the Sociology of Law*, 155-179; Ian Bailey, 'National Adaptation to European Integration: Institutional Vetoes and Goodness-of-Fit' (2002) 9 *Journal of European Public Policy*, 791–811. For a review of other studies, see Treib (n 11) 23-24.

[173] Angelova, Dannwolf and König (n 11) 1278.

[174] See for example, Mastenbroek, n 11, 1109, acknowledging the 'advantage of the goodness of fit literature is its strong theoretical character ... [and] empirical diligence' but pointing out that 'the results for the goodness of fit hypothesis have turned out to be rather disappointing. Various studies showed that a good fit is neither a necessary nor a sufficient condition for smooth compliance, and vice versa'; Ellen Mastenbroek and Michael Kaeding, 'Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront' (2006) 4 *Comparative European* Politics, 331-354, 337: 'the problem is that it is too deterministic, as it presupposes that national governments and parliaments want to maintain the status quo ... Thus, the problem is that the goodness of fit is an essentially apolitical concept that is not geared to explaining the domestic politics of compliance. We hence need to bring domestic politics back in'; Toshkov, Knoll and Wewerka (n 11) 19 and 27: '[f]our variations of the misfit argument can be found in the literature: institutional, legal, normative and policy misfit ... Although most of the studies comment on the degree of misfit, few of them find that it played a significant role for compliance. ... The information about the degree of misfit between new European and old national policies is often purely descriptive and not linked to any causal argument to explain the implementation process.'; ibid, 27: 'The findings about the influence of misfit, corporatism, political constraints, type of government and

Nonetheless, legal studies appear to suggest some support for this approach, at least in the field of the free movement of persons.[175]

Problems in misfit might however be mitigated by the level of discretion that a directive grants to the Member States. As a result, some studies have shown that directives which grant more leeway to the Member States increase the likelihood of correct transposition[176], although this may increase the likelihood of transposition delay.[177]

Significantly less research has been devoted to the substantive legal factors that might affect implementation. Aside from institutional differences resulting from the national constitutional order[178] or the range and complexity of existing

number of parties in government, bargaining power, country disagreement with a directive, EU level conflict, discretion, and the directive voting rule are mixed and inconclusive.'

[175] This is arguably the case for the UK; see Robin White 'Conflicting Competences: Free Movement Rules and Immigration Laws' (2004) 29 European Law Review, 385-396; Steve Peers, 'Free Movement, Immigration Control and constitutional conflict (2009) 5 European Constitutional Law Review 173-196; Jo Shaw and Nina Miller, 'When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law' (2012) 38 European Law Review 137-166. As regards EU migration law, see Boštjan Zalar, 'Constitutionalisation of the Implementing Act of the Procedures Directive: The Slovenian Perspective' (2008) 10 European Journal of Migration and Law 187-217.

[176] Zhelyazkova, n 156, 718: 'provisions granting discretion to member states are more likely to be successfully transposed than provisions that constrain the actions of policy-makers. This finding supports the theory that discretion facilitates compliance'; however, discretion does not always result in better transposition outcomes, see Asya Zhelyazkova and René Torenvlied, 'The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive' (2011) 18 Journal of European Public Policy, 690-708, 704: 'discretion facilitates member states' transposition success for medium levels, but not for low levels of technical fit'.

[177] Thomson, Torenvlied, and Arregui, n 151, 706: 'Discretion does not appear to have a direct effect on the likelihood of infringements, as suggested by our second hypothesis. Nonetheless, in line with the third hypothesis, discretion is a key variable in gauging the impact of states' incentives to deviate. States with high incentives to deviate are less likely to have infringements if the directives grant them high levels of discretion. Discretion also affects transposition delays. Delays tend to be longer on directives that grant high levels of discretion. Neither states' incentives to deviate nor the interaction between incentives and discretion significantly affect delays.'

[178] Krislov, Ehlermann and Weiler (n 20) 80; Dyonissis Dimitrakopoulos, 'The Transposition of EU Law: "Post-Decisional Politics" and Institutional Economy', (2001) 7 European Law Journal 442-58, 444-445.

national legislation that needs to be adapted to transpose a directive,[179] a handful of studies have discussed other substantive factors that may affect the transposition process.

In some cases the directive's features might affect its implementation, such as the level of detail, precision and quality in the drafting of the directive[180] or the margin of discretion it gives to the Member States.[181]

The national legal culture[182] has also been identified as a factor that might affect implementation outcomes.[183] One notable approach has sought to identify similarities in Member States' legal cultures when researching implementation outcomes of social policy directives in the EU's then fifteen

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[179] Ken Collins and David Earnshaw, n 182, 217.

[180] Krislov, Ehlermann and Weiler (n 20) 82: '[a] vague and open-ended directive gives a Member State wide latitude for wrongful application … [and] prevents the possibility of invoking it by an individual before a national court, a possibility which is central to the system of judicial review. The tendency toward the detailed directive becomes thus at least partially explicable. … But … it also increases the potential for non-implementation. A detailed directive which is poorly drafted may itself constitute an obstacle to implementation.' See also Ken Collins and David Earnshaw, 'The Implementation and Enforcement of European Community Environmental Legislation' (1992) 1(4) Environmental Politics 213-249, 217: 'concepts contained in many directives are "bound to result in different definitions when given effect in each member state"'; Dimitrakopoulos (n 180) 446: 'as national policy traditions are not necessarily compatible with each other, conflict [in Council negotiations] can lead to compromise which rests on unclear texts.'

[181] See n 178 and n 179 above.

[182] James Gibson and Gregory Caldeira, 'The Legal Cultures of Europe' (1996) 30 Law and Society Review 55-85, 80: 'given the new impetus toward decentralization, we fully expect that differences in legal cultures will play an even greater role in the ways in which EC law gets implemented within each of the member states.' On the different uses of the concepts of 'legal culture', see for example Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 709-737; David Nelken, 'Legal Culture' in Jan Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2012), 480-490.

[183] Ken Collins and David Earnshaw, n 182, 217: 'member states' "legislative culture" may also prevent early compliance with Community legislation. Member states may have a tradition of lengthy consultation aimed at building consensus; a concern for constitutional rectitude requiring time-consuming review of legislative proposals; or an emphasis on legal certainty encouraging highly detailed legislation'.

Member States.[184] This study sought to categorise Member States according to different 'worlds of compliance' based upon their common approaches to implementation.[185] Proponents of quantitative research have been critical of this approach[186] and 'raised doubts about the explanatory leverage of the typology'.[187]

Contrary to transposition, empirical research on the application and enforcement remains relatively uncharted waters. Several scholars have reported the relative lack of information that could provide reliable indicators of the state of application and enforcement of directives.[188] Given that such research generally proves more laborious than studying transposition, there has

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[184] Falkner et al (n 155).

[185] Falkner et al (n 155), 339-340. Member States were initially grouped into three categories: the 'world of law observance' comprising the Nordic countries where transposition is generally on time and correct; the 'world of domestic politics' comprising Austria, Belgium, Germany, Lithuania, the Netherlands, Spain and the UK, where the timeliness and correctness of transposition depends on political and interest-group preferences; the 'world of neglect' consisting of France, Greece, Luxembourg and Portugal, where transposition tends to be apolitical but bureaucratic inefficiency leads to problems in transposition. Ireland and Italy both bridged the typology: they were included in the 'world of domestic politics' in terms of transposition but in the 'world of neglect' in terms of overall implementation. Following research on the new Member States, a fourth category, the 'world of dead letters' was subsequently created that comprised countries where the transposition process is politicised, resulting in timely and correct transposition but weak application and enforcement. This grouped together the Czech Republic, Slovakia, Hungry and Slovenia, to which were also added Ireland and Italy. See Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU15 Compared to New Member States' (2008) 46 *Journal of Common Market Studies*, 293-313.

[186] Dimiter Toshkov, 'In search of the worlds of compliance - culture and transposition performance in the European Union' (2007) 14 *Journal of European Public Policy*, 933-959.

[187] Treib (n 11) 12.

[188] Mastenbroek, n 11, 1113: 'Unfortunately, data on these dimensions are tremendously hard to gather, which is why they have received only scant attention so far'; Treib (n 11) 15-16: 'as more and more scholars have turned to quantitative approaches, enforcement and application issues have taken a back seat since there is simply no appropriate quantitative data for analysing the practical aspects of implementation'.

been relatively little research devoted to the application and enforcement of directives.[189]

As regards the administrative application of directives, several studies have enquired into the same factors that might affect transposition, namely

[189]Mastenbroek, n 11, 1115-1116: 'we should not lose sight of administrative and legal problems. This is also where the importance of methods comes in. Rather than continuing along the path of small-n comparative or statistical analyses on easy-to-measure indicators, the time seems ripe for multi-method research. This way, we can control for important administrative and legal variables … Finally, let us not forget that compliance is more than transposition. Even though the laws in the books are a useful starting point for research, the really interesting question is to what extent these are given effect.' See also Dimiter Toshkov, 'The Quest for Relevance: Research on Compliance with EU Law' (2011) 6 <http://www.dimiter.eu/articles/Compliance%20review.pdf> accessed on 30 May 2015: 'Despite repeated calls to study the real application of rules rather than formal transposition and administrative implementation, analyzing real application remains the holy grail of compliance studies - very few studies can claim to investigate actual compliance with EU rules at the street level'; Conant (n 149) 2: 'this type of research requires labour-intensive field research and case law analysis, qualitative case studies and small 'n' comparisons (2–4 cases) of member states and/or policy areas are likely to be the most productive. Careful research design in selecting cases should yield results that are ultimately more informative than quantitative studies of formal indicators of dubious validity or very limited variation'; Treib (n 11) 19-20: 'Compared to transposition performance, measuring enforcement and application has been almost exclusively restricted to qualitative studies, which usually rely on interviews with enforcement actors, independent experts or representatives of affected societal groups as well as on analysing media reports and official documents to learn about the extent to which EU rules are actually complied with by norm addressees and the ways in which member states ensure that violations are sanctioned and redressed … This may lead to findings with a relatively high degree of internal validity, although qualitative techniques have more problems establishing the extent to which certain rules are actually complied with in practice than with finding out whether a given legal provision is fulfilled by the laws of a country. At the same time, collecting the wealth of data necessary to assess application and enforcement on a qualitative basis is of course a cumbersome task which reduces the number of cases that can be studied and thus, again, has a negative effect on the external validity of findings generated through such qualitative procedures.

issue saliency,[190] goodness-of-fit[191] and the role of veto players,[192] and administrative capabilities.[193]

Other studies have examined the existence of monitoring and enforcement mechanisms at the national level.[194] A distinction has been made between 'police patrol' and 'fire alarm' approaches to the supervision of administrative application of directives,[195] with the former involving government oversight of the national administrative authorities[196] and the latter relying on oversight by

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190 Versluis, n 172; Versluis, n 173.

191 Duina n 174; Bailey, n 174. Treib (n 11) 30, suggests that '[i]t is [application] where the misfit argument is most plausible, since it is much easier to find a coalition of political actors to support the enactment of a major piece of new legislation than to make a large state machinery fundamentally change its bureaucratic routines or to ensure that economic actors comply with unfamiliar and costly new regulations.'

192 Haverland, n 158.

193 Francesco Duina and Frank Blithe, 'Nation-states and common markets: the institutional conditions for acceptance' (1999) 6 *Review of International Political Economy*, 6(4), 494–530; Peter Hille and Christoph Knill, '"It's the Bureaucracy, Stupid": The Implementation of the Acquis Communautaire in EU Candidate Countries, 1999–2003', (2006) 7 *European Union Politics*, 531-552.

194 See for example, Tanja Börzel, 2000, 'Why There Is No "Southern Problem": On Environmental Leaders and Laggards in the European Union' (2000) 7 Journal of European Public Policy 141-162; Christian Jensen, 'Implementing Europe: A Question of Oversight' (2007) 8 European Union Politics 451-477.

195 Jensen, n 196, 454-456: 'Police patrol oversight relies on constant monitoring for problems by the law-makers in an effort to identify problems and correct them. With fire alarm oversight, lawmakers rely on constituents to complain about the implementation of laws. ... Police patrol oversight emphasizes centralized government control. In contrast, fire alarm oversight emphasizes cooperation between interest groups and government. In particular, fire alarm oversight makes governments dependent upon organized interests for the information they need to monitor administrative activities. ... Under police patrol oversight, the government monitors the implementation process constantly. Under fire alarm oversight, the government receives disproportionate information about those aspects of implementation that most concern constituents.'

196 Jensen, n 196, 460: 'McCubbins and Schwartz (1984) defined police patrol oversight mechanisms as emphasizing Congress's ability constantly to look for problems and rectify them on its initiative, without requiring the cooperation of constituents. The examples they provide include "reading documents, commissioning scientific studies, conducting field observations, and holding hearings to question officials and affected citizens' citing Mathew McCubbins and Thomas Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', 28 *American Journal of Political Science*,

civil society.[197] A Member State that places 'heavy reliance on police patrol oversight will be more likely to resolve infringement cases before the Commission refers the cases to the ECJ',[198] whereas reliance on 'fire alarm oversight at the national level actually hinders member state governments' ability to resolve those failures' before the Commission opens an investigation.[199] However, the existence of civil society organisations with strong substantive expertise in the relevant policy area can enhance conformity in overall implementation outcomes.[200]

In addition, the attitudes of the national authorities towards implementation may present 'various forms of domestication (business as

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165-179, 166. This would also include oversight by 'ministry officials [who] inspect the local inspectorate offices regularly to ensure that they are implementing laws according to the government's priorities … [or] where senior ministerial officials conduct annual assessments of inspectors' enforcement activities and adjust inspectors' pay based on those reports … [or] prior approval requirements', ibid, 461.

[197] Jensen, n 196, 462: 'McCubbins and Schwartz (1984) defined fire alarm oversight as those mechanisms that rely on constituents' complaints to Congress. They characterized fire alarms as: "a system of rules, procedures and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes in prospect), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts and Congress itself."' citing McCubbins and Schwartz, n 198, In the European context, this would extend to 'all those mechanisms that involved some sort of complaint or appeal to a senior government official [and] … any oversight mechanism that depended on the action of a constituent or organized interest group to activate it.' but excluding appeals to courts, ibid.

[198] Jensen, n 196, 466.

[199] Ibid, n 196, 471.

[200] Ulrich Sedelmeier, 'Post-accession Compliance with EU Gender Equality Legislation in Postcommunist New Member States' (2009) 13 European Integration online Papers No 23, 14 <http://eiop.or.at/eiop/texte/2009-023a.htm> accessed 4 July 2015: 'The other path to compliance is the combination of strong social democratic governments and NGOs specialising in EU gender equality legislation. Neither is sufficient by itself. NGOs are powerless when faced with unfavourable governments. Conversely, even favourable governments need the expertise and support of NGOs to devise adequate legislation and equality bodies'. See also, Falkner and Treib (n 187) 299: 'the prevailing *weakness of civil society*' in Central and Eastern European countries 'suggests that less cases of non-compliance will be detected and pursued by collective actors (such as trade unions) which could, in principle, more easily and effectively fight for social rights than individuals'.

usual, conservative or progressive interpretation, organizational initiatives and broader reforms) that limit, mediate or accompany adaptation to Europe'.[201]

These studies provide diverse theoretical explanations for situations where, even though transposition might be compliant with a directive, 'what is written on the statute books simply does not become effective in practice'.[202] Such studies all point to various '[s]hortcomings in the court systems, the labour inspections [i.e. administrative enforcement] and finally also in civil society systems [...] among the detrimental factors accounting for this.'[203]

Turning to judicial enforcement of EU law, it will be recalled that under the EU legal order, individuals are only able to enforce their EU rights against the national authorities before the national courts.[204] In cases where a party in proceedings may claim there is a conflict between a directive and national law,[205] Article 267 TFEU allows the national courts to refer questions on the

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[201] Sonja Bugdahn, 'Of Europeanization and Domestication: The Implementation of the Enviromental Information Directive in Ireland, Great Britain and Germany' (2005) 12 *Journal of European Public Policy*, 177-199, 194. The author describes domestication as 'a situation in which actors at the member state level choose non-EU recommended and non-EU prescribed domestic policy/administrative options in policy areas that have previously been europeanized [sic]. These options can be innovative, transferred from other states or familiar to the member state. … A member state that does not see an obvious need for changing its legislation may adopt a strategy of domestication according to '*business as usual*'. … Administrative decision makers later interpret the transposing legislation, followed up by the courts and Ombudsmen, which may be called upon to take supervisory decisions. In most cases, the institutions involved have room for interpretation that can be used for conserving national patterns … or changing domestic patterns beyond EU requirements (*conservative or progressive interpretation*). Where domestic organizations charged with the implementation develop *special initiatives* there is a clear bias for change. Furthermore, member state policy-makers may implement *broader reforms* in the europeanized [sic] policy area that also influence the application of the transposing legislation' (emphasis added), ibid 180-181.

[202] Falkner and Treib (n 187) 308-309.

[203] Ibid.

[204] See further, Chapter 5, Section 5.3.1 (Enforcement before the national courts).

[205] For a recent case involving Directive 2004/38, see case C-202/13 *McCarthy* [2014] ECR not yet reported (judgment of 18 December 2014), which concerned a conflict between Article 5 of the Directive and regulation 11 of Immigration (European Economic Area) Regulations 2006 SI 2006/1003

interpretation of an EU directive to the Court of Justice.[206] Aside from questions of whether determining whether a claim engages EU law, several factors may influence the ability of individuals to have recourse to the preliminary reference procedure. These might be due to procedural issues, judicial attitudes or even the preferences of civil society.

In situations where individuals intend to seek redress for a breach of a directive, they have the option of bringing proceedings before the national courts. Should they chose to do so, their claim will need to comply with national rules of procedure in accordance with the principle of procedural autonomy that provides that EU claims are subject to national rules of procedure.[207] However, such actions enjoy some protection under EU law through the principle of equivalence, which means the procedural rules that apply to EU claims must be no less favourable than those governing similar actions under national law, and the principle of effectiveness, which requires that such rules should not make it virtually impossible or excessively difficult to exercise EU rights.[208] In addition, given in such cases the Member States are implementing EU law, the EU Charter will generally provide additional safeguards[209] such as the right to an effective remedy.[210] Subject to these requirements, the national rules of procedure will govern matters related to deadlines and court costs, as well as access to legal representation, legal aid and interpretation.

Court costs, the availability of legal representation and other factors relating to access to justice may affect recourse to the national courts by

(exemption from the obligation to hold a visa for family members of EU in possession of a residence card).

[206] See further, Chapter 5, Section 5.3.4 (Reference for a preliminary ruling).

[207] See further, Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[208] ibid.

[209] Article 51 EUCFR.

[210] Article 47 EUCFR.

individuals or civil society groups.[211] As a result, it has been observed that '[t]he EU's legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it.'[212]

Research has also shown that the national courts may be unwilling to make references for a preliminary ruling even if there is a legitimate question of interpretation of a directive that is put before them.[213] This may be due to the absence of a 'judicial review tradition' in the Member State in question,[214] or a reticence to refer an issue for a preliminary ruling in cases where this might interfere with a Member State's control over sensitive policy areas such as criminal law, immigration law, the exercise of private property, or

[211] Karen Alter 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 *International Organization*, 489-518, 502-503 and 516; Tanja Börzel, 'Participation Through Law Enforcement: The Case of the European Union' (2006) 39 *Comparative Political Studies*, 128-152.

[212] Tanja Börzel, 'Patricipation Through Law Enforcement: The Case of the European Union' (2006) 39 Comparative Political Studies, 128-152, 147.

[213] Broberg and Fenger (n 96) 443: 'Examples of non-compliance are rare and so to the extent that there is a genuine enforcement problem related to the preliminary ruling procedure this does not lie in failure to comply with the Court's preliminary ruling in those cases where a question has been referred; rather it stems from those cases where EU law is being ignored without the national court making a preliminary reference.'

[214] Marlene Wind, 'The Nordics, the EU, and Reluctance towards Supranational Judicial Review', (2010) 48 *Journal of Common Market Studies*, 1039-1063, 1057-1058: 'the lack of familiarity in the Nordic countries with the judicial review tradition plays an important role when explaining why the national courts in these Member States have made less use of the preliminary ruling system in the EU. Generally, judicial review implies that an independent judiciary has the right to assess the constitutional legitimacy of any legislative act adopted by parliament or any law implemented by the executive. In relation to the EU judicial review mechanism, this means that national courts can (and in some cases must) review whether the implementation of legislation carried out by their own government corresponds with EU legal acts and fundamental principles. Due to the supremacy of EU law over national law, this sometimes forces national judges to put an international treaty before the acts of their own government and parliamentary majorities. In countries with a strong dualist and majoritarian tradition such as the Nordic countries, this is a very radical move to make – in particular for a judge who sees him/herself most of all as a loyal civil servant'.

environmental policy.[215] It may also be due to a desire not to undermine the referring court's own authority, which may result in higher courts or specialised courts being more reticent to refer matters to Luxembourg than the ordinary courts.[216] It may even come down to a form of defiance that manifests itself in

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[215] Damian Chalmers, '*The Much Ado about Judicial Politics in the United Kingdom'* (2000) Harvard Jean Monnet Working Paper No 1/00, 25-27: 'A far more powerful centrifugal pressure, and one that seemed to be central to explaining variations in judicial behaviour across different sectors, was that there was a greater resistance to the application of EC law wherever it was perceived as disrupting the capacity of the central institutions within the British political economy to secure societal conformity. … [I]n applying the law, judicial identity becomes suffused into identification with protection of these institutions. As this association exists essentially at the level of a belief system, it can not be displaced by the formal process of giving precedence to EC law. The consequence is that there is a greater unreceptiveness to application of EC law where it disrupts these institutions' capabilities to ensure conformity. … There is a positive view to EC law where it builds up the State's capacity to secure repressive conformity and extend sanctions, even if this is at the cost of allowing EC law to determine the normative content of that conformity. There is, however, an extremely resistant approach to EC law and the Court of Justice where, in narrow institutional terms, EC law hinders the capacity to impose not just sanctions, but collective ties. There is further evidence for this hypothesis in the figures on free movement of persons.' See also Damian Chalmers, The positioning of EU judicial politics within the United Kingdom (2000) 23(4) *West European Politics*, 169-210; Damian Chalmers, The application of Community law in the United Kingdom, 1994-1999 (2000) 37 *Common Market Law Review*, 83-128; Jonathan Golub, 'Sovereignty and Subsidiarity in EU Environmental Policy' (1996) 44 *Political Studies*, 686-703.

[216] Alter n, 504-505: 'A significant amount of evidence indicates that the more EU law and the ECJ are seen as undermining the influence, independence, and autonomy of a national court, the more reluctant the national court will be to refer far-reaching and legally innovative cases to the ECJ. … [L]ower courts are often more willing to make references because a reference bolsters their authority in the national legal system and allows the court a way to escape national legal hierarchies and challenge higher court jurisprudence. … Last instance courts are often more reluctant to make a referral to the ECJ, especially when they are threatened by the existence of the ECJ as the highest court on questions of European law or are upset at how EU law undermines their own influence and the smooth operation of the national legal process. Indeed, courts with constitutional powers have made virtually no references to the ECJ, and doctrinal analyses reveal clear efforts by national high courts to position themselves vis-à-vis the ECJ to protect their independence, authority, and influence.'

reaction to instances of controversy generated by the case law of the Court of Justice.[217]

Individuals seeking to uphold their EU rights before the national courts might turn to civil society groups for assistance. The preferences of the civil society group in question will further affect the possibility of the matter being taken before the courts or resolved through negotiation as part of a wider aim to engender changes in policy. The involvement of civil society organisations in national policy policy-making may reduce their desire to effect policy change through litigation.[218] Where a case results in a favourable decision in Luxembourg, civil society groups can help to pursue wider policy changes depending on their resources or capabilities.[219]

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[217] Ibid, 505-506: 'Judges do take into account the political implications of their decisions. Some ECJ decisions have created a divergence in the levels of legal protection and in legal remedies available under national law and under EU law, advantaging citizens who can draw on EU law over those who must rely on national law alone. ECJ jurisprudence has also resulted in great complexities for national legal systems and problematic outcomes. The seeming perversities created by the ECJ and EU law, as well as interpretations with which national courts simply disagree, can sap the willingness of national judiciaries to support the ECJ. … Controversial ECJ decisions have led to rebukes by judges as well as attempts to avoid references to the ECJ and the application of EU law.'

[218] Ibid, 498: 'Another important factor was whether an interest group enjoyed influence in and access to policymaking. In political negotiation, groups can usually strike a deal that will leave them at least better off than before. With legal decisions, groups could well end up with a policy that is more objectionable and harder to reverse than the previous policy. For this reason, and because of the risk and relative crudeness of litigation as a means of influencing policy, organized interests generally prefer to work through political channels. The greater the political strength of a group, and the more access the group has to the policymaking process, the less likely a group is to mount a litigation campaign. In Belgium, for example, neither unions nor women's groups use litigation to pursue equality issues, preferring instead to use their access to the policymaking process to influence Belgian policy.'

[219] Ibid: 507: 'Just because the ECJ decides in favor of the plaintiff challenging national policy, one should not assume that the government will change its policy. The government may simply compensate the litigant while leaving the legislation in effect and administrative policy unchanged. … In many cases, however, translating a legal victory into a policy victory will take follow-through – a second strategy to show a government that there will be costs (financial, political, or both) to not changing its policy. … Combining a legal victory with a political strategy shows the government that the legal case will not be isolated and that faced with a legal challenge, the government would likely lose.'

Based on the above, it can be concluded that, while a significant amount of literature has been devoted to factors affecting transposition outcomes, it appears that EU implementation studies would benefit from further investigation of the legal factors that affect 'the practical application of EU law by domestic implementing authorities and national judges'.[220] This is in particular true as regards factors that affect the institutional autonomy[221] that Member States enjoy when implementing directives that may be more amenable to intervention than political or institutional factors.[222]

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[220] Conant (n 149) 2.

[221] Dimitrakopoulos, n 180, 458: 'the transposition of EU law takes place on the basis of the principle of institutional autonomy... the similarities and differences between the mechanisms [illustrates that] a European style of transposition has been identified. This, it has been argued, isn't [sic] the result of a process of convergence. Rather, despite pressure stemming from the EU, member states have essentially preserved their institutional autonomy. Both conclusions are preliminary. Additional work based on case studies is necessary if we are better to understand a stage of the EU policy process that political scientists have largely neglected.'

[222] Toshkov (n 191) 16: 'even if scholars can increase the reliability and validity of their causal inferences about the determinants of compliance, the research will still remain of limited practical significance if the variables we study cannot be subject to intervention. Even if research convincingly shows that federalism leads to higher transposition delays, for example, there is little policy makers can do about it.'

CHAPTER 5. THE CONSEQUENCES OF NON-COMPLIANCE

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5.1 Supervision of Implementation

The supervision of implementation at the EU level has been described as consisting in 'both centralized, active, and direct "police-patrol" supervision, conducted by the EU's supranational institutions, and decentralized, reactive, and indirect "fire-alarm" supervision, where national courts and societal watchdogs are engaged to induce state compliance.'[1]

As a result, instances of non-compliant implementation of directives may come to light as a result of the Commission's monitoring of implementation (section 5.2.1) or their discovery might result from complaints by individuals and interest groups (section 5.2.2) or when citizens have recourse to one of several EU assistance services (section 5.2.3). The different ways in which non-compliant implementation might be exposed calls for some comments.

5.1.1 Direct supervision by the Commission

As 'guardian of the Treaties',[2] the European Commission has the responsibility of monitoring and supervising compliance by the Member States

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[1] Jonas Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56 International Organization 609-643, 610; Mariyana Angelova, Tanja Dannwolf and Thomas König, 'How Robust Are Compliance Findings? A Research Synthesis' (2012) 19 Journal of European Public Policy, 1269-1291, 1276 who suggest that 'supranational monitoring should be distinguished from national activities. (Supranational) Monitoring by the Commission is a crucial part of the centralized compliance system in the EU … In contrast, national monitoring points to fire-alarm mechanisms that alleviate compliance, such as access to courts … and interest group activities'. See also Christian Jensen, 'Implementing Europe: A Question of Oversight' (2007) 8 European Union Politics 451-477, 453-454.

[2] The term 'guardian of the Treaties' has been used by the Court of Justice to describe the Commission's role in supervising the application of EU law by the Member States; see for instance Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para 22; Case C- 365/97 *Commission v Italy* (San Rocco

in implementing EU directives and investigate infringements of EU law.[3] The Commission exercises this role in the general interest of the European Union.[4]

In order to supervise compliance by the Member States, the Commission has several tools at its disposal. The Commission may undertake an assessment of the transposition of directives to determine whether the national implementing measures have been adopted and whether they comply with the directive. The Commission will initially ensure that national implement measures have been communicated.[5] It will be recalled that Member States are

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case) [1999] ECR I-7773, para 60; Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609, para 30. The term 'custodian of Community legality' has also been used in this connection, see Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para 26.

[3] Article 17(1) TEU provides that "[The Commission] shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.' See further, Francesco Capotorti, 'Legal Problems of Directives, Regulations and their Implementation' in Heinrich Siedentopf and Jacques Ziller (eds), *Making European Policies Work, Volume 1: Comparative Syntheses* (Sage 1988) 151-168, 165-166; Maria Mendrinou, 'Non-compliance and the European commission's role in integration'(1996) 3 Journal of European Public Policy 1-22; Jacquelyn MacLennan, 'Decentralized Enforcement of EC Law: Is the European Commission Still the Guardian of the Treaties? (1997) 91 Proceedings of the Annual Meeting of the American Society of International Law, 165-172; Alberto Gil Ibañez, *The Administrative Supervision & Enforcement of EC Law* (Hart 1999) 23-26; Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) 167-206, 175-176; Melanie Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge 2010) 111-114; Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (Oxford University Press 2012) 13-43.

[4] See for example, Case 167/73 *Commission v France* [1974] ECR 359, para 15; Case C-431/92 Commission v Germany [1995] ECR I-2189, para 21; Case C-35/96 *Commission v Italy* (n 2), para 26; Case C-476/98 *Commission v Germany* [2002] ECR I-9855, para 38; Joined Cases C-20/01 and C-28/01 *Commission v Germany* (n 2), para 29.

[5] The Commission uses the term 'transposition check' to refer the supervision of the communication of national implementing measures; see Commission, 'Better Regulation Toolbox' (2015) 236 <http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf> accessed on 27 November 2015 (hereafter 'Better Regulation Toolbox'). The Commission has developed a database 'Asmodée II' to track the progress in the transposition of directives for which the deadline has expired. This has 'substantially cut the time taken to issue letters of formal notice, which are now all within the rule of one month after the transposal deadline provided for by the Commission's internal rules for

under an obligation to communicate 'clear and precise information' on their national implementing measures as part of their duty of sincere cooperation.[6]

This will then be followed by scrutiny of the correctness of transposition, also known a 'conformity check'.[7] This will often be based upon 'conformity studies' undertaken by external consultants.[8] The monitoring of transposition

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operation infringement proceedings', see Commission, 'Eighteenth Annual Report on Monitoring the Application of Community Law (2000)', COM(2001) 309 final, 9; Commission, Communication 'Better Monitoring of the Application of Community Law', COM(2002) 725 final, 17-18. See also Deidre Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights (1990) 27 Common Market Law Review, 703-739, 710-711, who notes this has led to 'the immediate initiation of infringements procedures as soon as the deadlines are reached'. Sacha Prechal, *Directives in EC Law* (2nd edition, Oxford University Press 2005) 7, also notes this makes it 'relatively simple to initiate infringement procedures more or less automatically as soon as the period provided for implementation has expired if no national implementing measures have been notified'.

[6] See for example, Case 272/86 *Commission v Greece* [1988] ECR 4875, para 32 (failure to provide documents requested by Commission constitutes breach of Article 4(3) TFEU); Case C-65/91 *Commission v Greece* [1992] ECR I-5245, para 17 (idem); Case C-421/12 *Commission v Belgium* [2004] ECLI:EU:C:2014:2064 (judgment of 10 July 2014), para 34. See further Chapter 3, Section 3.3 (Obligations Relating to the Methods of Transposition).

[7] The Commission uses this term in its Better Regulation Toolbox (n 5) 237. See also Marta Ballasteros, Rostane Mehdi, Mariolina Eliantonio and Damir Petrovic, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness', (PE493.014, European Parliament, 2013), 43-45: 'As the Guardian of the Treaties, the Commission checks compliance of the Member States' transposition measures (when they have been communicated) with EU law. The assessment is done horizontally for all Member States and is usually presented jointly through studies which serve to highlight possible inconsistencies in the way Member States have transposed EU law. Often these studies are undertaken by subcontractors. Conformity checking studies are only occasionally made available to the public on a cases by case basis.' See also Sibylle Grohs, 'Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases' in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 57-73, 63. However other terms in use include 'conformity study', 'conformity assessment' and 'compliance assessment', see for example, Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (December 2008);

[8] ibid. Other terms used include 'conformity assessment', see Better Regulation Toolbox (n 5) 237.

will usually take place following expiry of the deadline for transposition[9] and will serve as the basis for the Commission fulfilling its reporting obligations under a directive.[10] Conformity studies are not usually published by the Commission.[11]

In case a conformity check reveals a problem in transposition by a Member State, the Commission will first raise the matter informally.[12] These discussions will be initiated by the Commission[13] as part of the so-called 'EU Pilot' scheme.[14] A Member State will be required to respond to the Commission's enquiries as part of its general duty of sincere cooperation.[15] Where the Commission is unable to resolve the matter through discussion, the Commission may then proceed to open an infringement case.[16]

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[9] Better Regulation Toolbox (n 5) 236-237, but the Commission notes that 'it may even start before (to be decided by the competent service) if national transposition measures for individual Member States have been received in advance'.

[10] See further Chapter 3, Section 3.3 (Obligations Relating to the Methods of Transposition).

[11] Better Regulation Toolbox (n 5) 237: 'Given that conformity studies may feed into infringement proceedings, they should not be published or disclosed'. In this connection, the General Court has held that conformity studies 'are targeted documents, the purpose of which is the analysis of the transposition by a specific Member State of a specific directive, which are intended to form part of a Commission file relating to that transposition. Where infringement proceedings have already commenced, it cannot be held that those studies are not part of the file relating to those proceedings, since those studies are among the material on which the Commission based its decision to commence those proceedings. As regards studies in respect of which the Commission has not yet initiated infringement proceedings, it is equally necessary to maintain their confidentiality, since once information is in the public domain it cannot be withdrawn when the proceedings are commenced, as the Commission rightly submits.', see Case T-111/11, *ClientEarth v European Commission* [2013] ECLI:EU:T:2013:482 (judgment of 13 September 2013), para 79.

[12] Commission, 'Report from the Commission - Monitoring the application of Union law 2014 Annual Report' COM(2015) 329 final, 4 and 7 17 (hereafter 'Annual Report on the Application of EU Law for 2014').

[13] ibid.

[14] Andersen (n 3) 19, 47. See for example, Annual Report on the Application of EU Law for 2014 (n 12), 5. See further Section 5.2.1 (Referral to EU Pilot scheme).

[15] See n 6.

[16] See further Section 5.2.2 (Infringement Action by the Commission).

However, the Commission does not benefit from a general power to undertake inspections or seize evidence in order to investigate suspected non-compliance.[17] The Commission only derives such powers from specific legal instruments,[18] for example in the case of the EU competition rules[19] or the EU air transport safety rules.[20] The Council may also grant it such powers.[21] Moreover, there is no general obligation on Member States to provide statistics on the application or enforcement of EU directives, as this also requires specific legislation.[22]

The supervision of timely and correct transposition can be considered as forming part of the Commission's enforcement priorities.[23] However, non-

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[17] Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 53-55.

[18] For other examples, see Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 53.

[19] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, which provides the Commission with extensive powers to investigate suspected breaches of the EU competition rules contained in what are now Articles 101 and 102 TFEU.

[20] Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 [2008] OJ L 97/72, which empowers the Commission to make unannounced inspections.

[21] In the absence of a more specific legal basis, this is possible under Article 337 TFEU, which provides that 'The Commission may, within the limits and under conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties, collect any information and carry out any checks required for the performance of the tasks entrusted to it.' This has been used as a legal basis several times, see for example, Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia [1997] OJ L 151/1.

[22] Article 338(1) TFEU provides that 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the performance of the activities of the Union'. For example, this has been used to adopt Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [2007] OL L 199/23.

[23] See for example, Commission, Communication 'Better Monitoring of the Application of Community Law' (n 5) 12 and 17; idem, Communication 'A Europe of Results - Applying Community Law', COM(2007) 502 final, 9. For criticism of the Commission's approach, see Smith (n 3) 123-131. It would appear that the non-communication of national implementing measures would also fall within this

compliant transposition or enforcement is only likely to warrant further investigation by the Commission where non-compliance falls within its other enforcement priorities. In the case of the application of a directive, this would include 'systematic incorrect application detected by a series of separate complaints by individuals' or '[c]ross-border infringements, where this aspect makes it more complicated for European citizens to assert their rights'.[24] In the case of the enforcement of a directive this would encompass 'systemic infringements that impede the procedure for preliminary rulings … or prevent the national courts from acknowledging the primacy of Community law, or provide for no redress procedures in national law'. A failure to 'comply with a judgment given by the Court of Justice'[25] also constitutes an enforcement priority which could occur at any stage of the implementation process. As a result, not all instances of non-compliance will necessarily rise to the level of what the Commission considers are its enforcement priorities.[26] The Court of Justice has repeatedly recognised that the Commission enjoys a wide discretion in the exercise of its supervisory powers.[27]

Aside from investigating the implementation of directives of its own motion, the Commission might also receive complaints from the public and civil society groups. Such indirect supervision is the main way in which the Commission will learn about non-compliant application and enforcement,[28] as will be examined next.

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category of enforcement priorities, see to that effect Commission, 'Communication from the Commission - Implementation of Article 260(3) of the Treaty' [2001] OJ C 12/1, para 17.

[24] Communication 'Better Monitoring of the Application of Community Law' (n 5) 11.

[25] Communication 'Better Monitoring of the Application of Community Law' (n 5) 11-12.

[26] See to that effect Andersen (n 3) 19.

[27] See for example, Case C-191/95 *Commission v Germany* [1998] ECR I-5449, para 37; Case T-155/99 *Dieckmann & Hansen* [2001] ECR II-3143, para 54.

[28] See to that effect Prechal (n 5) 7, who notes that if national implementing measures have been notified 'nothing is said about … their application and enforcement in practice. … Without much exaggeration it can be said that there is a large area of 'hidden failures' by the Member States … In this respect, especially individual complaints … play an important role in discovering the (potential) failures';

5.1.2 Complaints by individuals and interest groups

The Court of Justice recognised from an early stage that individuals have a full role to play in the enforcement of EU law.[29] The Treaty provides that individuals and businesses who feel that their EU rights are not being respected by the national authorities have a right to complain directly to the Commission.[30]

Complaints may be sent directly to the Commission. The Commission regularly receives complaints from the public about the implementation of directives by the Member States which it is alleged does not comply with EU law.[31] The application of a directive by the national administrative bodies and the national courts might also be monitored at the domestic level by civil society

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Tallberg (n 134) 616, who remarks that 'the Commission operates an informal procedure through which it records and examines complaints lodged by citizens, firms, nongovernmental organizations, and national administrations. The complaint procedure offers a form of monitoring that is more resource-efficient than systematic in-house inquiries, provides access to information otherwise unobtainable, and points to areas of EU legislation that may be particularly ambiguous and in need of clarification.'.

[29] In Case 26/62 *Van Gend & Loos* [1963] ECR English special edition 1, 13 held that '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258] and [259 TFEU] to the diligence of the Commission and of the Member States'. See also Joseph Weiler (1991) 'The Transformation of Europe' 100 Yale Law Journal 2403-2483, 2421 who considers that individuals become 'decentralized agent[s] for monitoring compliance by Member States with their Treaty obligations'

[30] Article 24(4) TFEU provides that '[e]very citizen of the Union may write to any of the institutions or bodies referred to in this Article [namely the Commission, Council and European Parliament] or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language'. This provision was introduced into by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 9 March 1999, 2700 UNTS 161 Article 2, para 11.

[31] Richard Brent, *Directives: Rights and Remedies in English and Community Law* (Informa Law / Routledge 2001) 162-164. See also Annual Report on the Application of EU Law for 2014 (n 12) 7 in which the Commission notes that 'members of the public, businesses, NGOs and other organisations remained very active in reporting potential breaches of EU law'.

organisations.[32] As part of their advocacy strategies, civil society groups might therefore also address complaints to the Commission.[33]

The Commission has adopted guidelines on the handling of complaints[34] and has established a dedicated computerised system (CHAP)[35] in which all complaints are recorded. The Commission will send an acknowledgement to the complainant within two weeks.[36] Details of complaints held on the CHAP database are not accessible[37] but some statistical data is disclosed in the Commission's annual reports on the application of EU law.[38]

The Commission aims to investigate complaints and take a decision whether to initiate formal infringement proceedings or to close the case within twelve months from when a complaint is registered.[39]

The Commission enjoys a wide discretion in what action it takes following receipt of a complaint. It can decide to deal with the complaint as a possible infringement under the EU Pilot scheme.[40] Alternatively, where the

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[32] See to that effect, Tallberg (n 1) 616; Diana Panke, 'The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law' (2007) 14 Journal of European Public Policy 847-866, 852; Reinhard Slepcevic, 'The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits' (2009) 16 *Journal of European Public Policy*, 378-394, 381.

[33] Annual Report on the Application of EU Law for 2014 (n 12) 5.

[34] Commission, 'Communication from the Commission to the Council and the European parliament - Updating the handling of relations with the complainant in respect of the application of Union law' COM(2012) 154 final (hereafter 'Communication on the Handling of Complaints').

[35] CHAP refers to the 'Complaints handling/Acceuil des plaignants' registration system, ibid, 1. See also Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 62-63.

[36] Communication on the Handling of Complaints (n 34) 5.

[37] Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 62.

[38] See for example, Annual Report on the Application of EU Law for 2014 (n 12) 7-10.

[39] Communication on the Handling of Complaints (n 34) 6.

[40] In 2010, 4,035 complaints were registered on CHAP, 17% of which were allocated to the EU Pilot scheme, see Commission, '28th Annual Report on Monitoring the Application of EU Law (2010), COM(2011) 588 final, 7-8. See also Centre for Strategy and Evaluation Studies, 'SOLVIT Evaluation Report' (November 2011) 7 <http://ec.europa.eu/solvit/_docs/2011/2011_solvit-assesses-relevance_en.pdf> accessed 31 December 2015. In 2015, 3,715 new complaints were received by the

Commission considers the complaint might be capable of informal resolution, it may refer the matter to the SOLVIT network (with the complainant's consent).[41]

The Commission also has the discretion to decide whether or not to commence infringement proceedings[42] and whether or not to refer a case to the Court.[43] The Commission is not required to adopt a specific position on individual complaints.[44] Therefore no action for failure to act will lie in in the event the Commission decides not to pursue the matter further.[45] Nonetheless,

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Commission, 423 (11%) were the subject of an EU Pilot case, see Annual Report on the Application of EU Law for 2014 (n 12) 8-9.

[41] Annual Report on the Application of EU Law for 2014 (n 12) 23, where it is reported that 'in 2014 the Commission connected up the problem solving service SOLVIT with the internal tool for registering complaints, CHAP'. See also Commission, Single Market Scoreboard (SOLVIT governance tool), October 2015 edition (hereafter 'SMS SOLVIT 10/2015'), see 'Achievements' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015, where it is reported that '[b]etter coordination between SOLVIT and the EC complaint handling mechanism has been achieved by establishing a technical link for transferring cases from the Commission to SOLVIT.' See further, Section 5.1.3 (Recourse to EU Assistance Services).

[42] Case C-200/88 *Commission v Greece* [1990] ECR I-4299, para 9; Case C-207/97 *Commission v Belgium* [1999] ECR I-275, para 24; Case C-209/88 *Commission v Italy* [1990] ECR I-4313, para 16; Case C-212/98 *Commission v Ireland* [1999] ECR I-8571, para 12; Case C-236/99 *Commission v Belgium* [2000] ECR I-5657, para 28; Case C-474/99 *Commission v Spain* [2002] ECR I-5293, para 25; Case C-233/00 *Commission v France* [2003] ECR I-6625, para 31; Case C-383/00 *Commission v Germany* [2002] ECR I-4219, para 19; Case C-394/02 *Commission v Greece* [2005] ECR I-4713, para 16; Case C-33/04 *Commission v Luxembourg* [2005] ECR I-10629, paras 66-67.

[43] Case C-562/07 *Commission v Spain* [2009] ECR I-9553, paras 18-20.

[44] Case 247/87 *Star Fruit* [1989] ECR 291, para 11; Case C-72/90 *Asia Motor France* [1990] ECR I-2181 (Order of the Court of 23 May 1990), para 11; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, para 44.

[45] Case C-87/89 *Sonito* [1990] ECR I-1981, para 7; Case T-84/94 *Bundesverband der Bilanzbuchhalter* [1995] ECR II-101 (Order of the Court of 23 January 1995), paras 23-24 (upheld on appeal in Case C-107/95 P [1997] ECR I-947); Case C-422/97 P *Société Anonyme de Traverses en Béton Armé* [1998] ECR I-4913 (Order of the Court of 17 July 1998), para 36.

they may complain to the European Ombudsman in the event of delay or maladministration of their complaint[46] under Article 228 TFEU.[47]

Individuals and interest groups may also file a petition to the European Parliament[48] at the same time they formulate a complaint to the Commission.[49] The European Parliament also enjoys a wide discretion in this area in how to handle the petition,[50] which often results in the Parliament formally requesting the Commission to explain what it has done to resolve the complaint.[51]

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[46] See for example, Decision of the European Ombudsman concerning complaint 953/2009/(JMA)MHZ against the European Commission, 14 June 2010, in which the Ombudsman found that the Commission 'failed to provide clear and convincing reasons for closing the infringement complaint concerning the non-implementation of Article 8 of the Directive [on the protection of employees in the event of the insolvency of their employer] by Spain' which amounted to maladministration. The Ombudsman also found the Commission had committed maladministration by taking fifteen months to close the case without taking further action in breach of its one-year target set out in its Communication on the Handling of Complaints (n 34).

[47] Article 228 TFEU provides that 'European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the
Union institutions'. This is further implemented by Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L 113/15.

[48] Article 227 TFEU provides that 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly.'

[49] European Parliament, Draft Report on the activities of the Committee on Petitions 2014, 2014/2218(INI), recital L, notes that 'a petition is often filed at the same time as a complaint to the Commission'.

[50] See Case C-261/13 P *Schönberger* [2014] ECLI:EU:C:2014:2423 (judgment of 9 December 2014), paras 22-25.

[51] European Parliament Rules of Procedure, 8th Parliamentary term, July 2014, <http://www.europarl.europa.eu/sipade/rulesleg8/Rulesleg8.EN.pdf> accessed 31 December 2015. Rule 216(6) provides that '[t]he [Petitions] committee may request assistance from the Commission particularly in the form of information on the application of, or compliance with, Union law and

Complaints may also be sent directly to one of the EU assistance services which aim to assist citizens and businesses in resolving an issue of non-compliant application of EU law, as will now be discussed.

5.1.3 Recourse to EU assistance services

In order to help resolve disputes about the application or enforcement of EU directives without going to court, several legal information and alternative dispute resolution networks have been established at EU level to inform citizens of their EU rights and try to informally resolve disputes about their application. These are referred to collectively as 'EU assistance services'.[52] Two of the main services include Your Europe Advice and the SOLVIT network, which are the most relevant in the context of the implementation of Directive 2004/38.

The 'Your Europe Advice' service allows citizens and businesses to obtain information about their EU rights.[53] This advisory service aims to explain and confirm rights under EU law, but it does not have a mandate to intervene directly with the national authorities.[54] The services handles over 20,000 enquiries per year,[55] of which approximately 10% relate to potential problems of non-compliance.[56] Where issues of non-compliance are raised, the service

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information or documents relevant to the petition. Representatives of the Commission shall be invited to attend meetings of the committee.'

[52] Commission, *EU Information and Assistance Services* (Office for Official Publications of the European Union 2009). A full list of these services can be found on the Europa portal <http://ec.europa.eu/services/index_en.htm> accessed 31 December 2015.

[53]Your Europe Advice website <http://europa.eu/youreurope/advice/index_en.htm> accessed 9 May 2015. The service is administered on behalf of the Commission by the European Citizen Action Service (ECAS), a non-governmental organisation <http://ecas.org/services/your-europe-advice-yea/> accessed 9 May 2015. It was formerly known as the 'Citizen Signpost Service'.

[54] Your Europe Advice website <http://europa.eu/youreurope/advice/about_en.htm> accessed on 9 May 2015; Commission (n 52) 6.

[55] Commission, Single Market Scoreboard (Your Europe Advice governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015 (hereafter Your Europe Advice Reports).

[56] Interview, YEA legal expert, June 2015. These are identified as 'interesting cases' and include 'infringement, misapplication or ignorance of EC law', see for example, ECAS, '2008 Report on the

can refer them to national non-governmental groups that may be able to assist them in enforcing their rights before the national authorities.[57] Where appropriate, it can also refer a case to SOLVIT.[58] Although potential cases of non-compliance that the service has identified are relayed to the Commission through feedback reports,[59] there is no automatic referral of such cases for assessment under the EU Pilot scheme.

The SOLVIT network was established by the Commission in 2001[60] and 'aims to deliver fast, effective and informal solutions to problems [which] individuals and businesses encounter when their EU rights in the internal market are being denied by public authorities' provided such problems are not the subject of legal proceedings.[61] It comprises a network of officials from the national administrative authorities based in every EEA State.[62]

Problems which are referred to the network will be taken up by the 'home centre' which has the closest links with the complainant.[63] The 'home centre' will then contact the 'lead centre' in the Member State where the problem

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functioning and development of the Citizen Signpost Service' (2009) 20 <http://europa.eu/youreurope/advice/docs/annual_report_2008_en.pdf> accessed 9 May 2015, .

[57] Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services' (Report for Commission, Ramboll 2011), Supplement 1, 2 <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed 26 May 2015.

[58] ibid.

[59] Annual reports for Your Europe Advice (2007-2010) <http://europa.eu/youreurope/advice/about_en.htm> accessed 9 May 2015. See for example, ECAS, 'Difficulties Experienced by Citizens When Exercising their Mobility Rights in Single Market A Citizens Signpost Service feedback report' (2007) <http://europa.eu/youreurope/advice/about_en.htm> accessed 9 May 2015.

[60] Commission, 'Recommendation of 7 December 2001 on principles for using 'SOLVIT' —- the Internal Market Problem Solving Network' [2001] OJ L 331/79.

[61] Commission, 'Recommendation of 17 September 2013 on the principles governing SOLVIT', C(2013) 5869 final, 5 (hereafter '2013 SOLVIT Recommendation').

[62] SOLVIT website <http://ec.europa.eu/solvit/contact/index_en.htm> accessed 9 May 2015.

[63] 2013 SOLVIT Recommendation (n 61) 5. This will be 'based on for example nationality, residence, establishment or the place where the applicant acquired the rights at stake', ibid.

occurred, which will contact the public authority that is the source of the problem. Together they will try to resolve the matter by negotiating an outcome that is in conformity with EU law[64] within a target deadline of 10 weeks.[65] The Commission does not intervene directly in cases handled by the SOLVIT network[66] and only provides administrative and technical support.[67]

The SOLVIT network tends to address problems in the application of EU law,[68] and its caseload will therefore include instances of the non-compliant application of directives.[69] The number of cases have been rising almost every year with the network handling almost 2400 cases in 2014,[70] 12% of which were referred by Your Europe Advice.[71]

Despite its overall relatively high resolution rate of 85%,[72] there are limitations to what SOLVIT can achieve in respect of non-compliant application. This is notably the case as regards 'structural problems'[73] where achieving resolution of the problem in compliance with EU law would 'entail amendments to national laws'.[74] In such cases, the resolution rate in SOLVIT

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[64] ibid, 7.

[65] ibid 5.

[66] Micaela Lottini, 'From "Administrative Cooperation" in the Application of European Union Law to "Administrative Cooperation" in the Protection of European Rights and Liberties' (2012) 18 European Public Law 127-147, 139-140.

[67] 2013 SOLVIT Recommendation (n 61) 8.

[68] Mogens Hobolth and Dorte Sindbjerg Martinsen, 'Transgovernmental networks in the European Union: improving compliance effectively?' (2013) 20 Journal of European Public Policy 1406-1424, 1407.

[69] ibid, who emphasise that 'the disputes dealt with in this type of network concern administrative decisions in concrete instances. Studying Solvit thus contributes to taking compliance research beyond transposition into the 'black box' of practical application of EU law'.

[70] SMS SOLVIT 10/2015 (n 41), see 'Overall caseload' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015.

[71] ibid.

[72] SMS SOLVIT 10/2015 (n 41), see indicator 4 'Resolution rate by country'.

[73] This is defined as 'a breach caused by a national rule running counter to Union law'

[74] SMS SOLVIT 10/2015 (n 41), see 'Structural cases - by area of legislation'.

cases drops to 47%.[75] Such structural cases are likely to comprise instances of non-compliant application originating in non-compliant national implementing measures or administrative guidelines.[76] The SOLVIT database allows problems that remain unresolved to be flagged so they can be directly addressed by the Commission.[77] At present unresolved SOLVIT cases do not automatically trigger the opening of an EU Pilot case.[78]

Recourse to Your Europe Advice and the SOLVIT network does not limit the ability of those affected by non-compliance to make an official complaint to the Commission. In the event their intervention proves unsuccessful, those affected have the possibility to send a complaint directly to the Commission, which would follow the process described. However, as noted above unresolved cases do not systematically result in the opening of an EU Pilot case.

Having seen how various modes of supervision may disclose instances of non-compliant implementation, attention will now be turned to the consequences which non-compliant implementation can have at both EU and national level respectively.

5.2 Consequences of Non-Compliant Implementation at EU Level

As discussed above, the Commission has the responsibility of monitoring the application of EU law. Wherever a complaint is received that might constitute non-compliant implementation of directives, the Commission will first try to resolve infringements informally by referring the matter to its 'EU Pilot' scheme (section 5.2.1). In the event these informal endeavours prove unsuccessful, the Commission will initiate formal infringement action by sending a formal written warning to the Member State in question (section

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[75] SMS SOLVIT 10/2015 (n 41), see 'Structural cases - by area of legislation' which reports that 33 out of 70 cases were resolved in 2014. For 2013, the resolution rate for structural problems was 40% based on 19 cases resolved out of 47 structural cases.

[76] See further Chapter 4, Section 4.3 (Application Outcomes).

[77] 2013 SOLVIT Recommendation (n 61) 8.

[78] Interview, Commission official, December 2015.

5.2.2). Where the issue remains unresolved despite this warning, the Commission can then initiate infringement proceedings before the EU Court of Justice which has final jurisdiction over the matter (section 5.2.3).

5.2.1 Referral to EU Pilot scheme

The Commission may seek to resolve non-compliant implementation by engaging in discussions with the Member State concerned. These take the form of bilateral discussions with Member States under the so-called 'EU Pilot' scheme.[79] There is no specific Treaty basis for the process, but its origins can be traced to the 'Sutherland Report'[80] which called for enhanced administrative cooperation for the enforcement of Single Market legislation.[81]

The EU Pilot scheme aims to resolve problems concerning the conformity of national legislation with EU law or the correct application of EU law through collaboration between the Commission and the Member State concerned,[82] in order to 'to correct infringements of EU law at an early stage … without the need for recourse to infringement proceedings'.[83] It was 'intended to replace sending of administrative letters by the Commission services (so-called "pre-226 letter") to Member States'.[84]

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[79] The EU Pilot Scheme was introduced in order as an exercise to improve the Commission's working methods, see Communication 'A Europe of Results - Applying Community Law' (n 23) 7-8. See further Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 63-84; Smith (n 3) 152-160; Andersen (n 3) 46-47, 72-75.

[80]Andersen (n 3) 73.

[81] Peter Sutherland, 'The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market' (1992), recommendation 32

[82] Commission, 'EU Pilot Evaluation Report', SEC(2010) 182 (hereafter 'First Evaluation Report on EU Pilot'), 4.

[83] ibid, 2.

[84] First Evaluation Report on EU Pilot (n 82) 2; Commission, Staff Working Document 'Facts on the functioning of the system up to beginning of February 2010 accompanying document to the Commission's EU pilot evaluation report', SEC(2010) 182 (hereafter 'Accompanying Document to First Evaluation Report on EU Pilot'), 8.

The scheme is facilitated by a computerised database that allows for secure communication between the Commission and the authorities of the Member States.[85] When an issue of non-compliance is discovered either following a complaint or on the Commission's own initiative, an EU Pilot case file will be opened.[86] A description of the alleged non-compliance and questions from the Commission are uploaded to the database.[87] The EU Pilot file will then be sent to the central contact point appointed by each Member State[88] which acts as a channel for managing the process, and attributes incoming files from the Commission services to the responsible national authority. The Member State concerned is expected to respond within ten weeks.[89] The Commission then has a further ten weeks to consider the Member State's response.[90] In case the Commission considers the Member State's response is incomplete it may request further clarification.[91]

The EU Pilot scheme may be supplemented by 'package meetings'[92] involving officials from the Commission and the Member States to discuss selected instances of non-compliant implementation.[93] The Commission may also organise meetings with national civil society groups to obtain their views on non-compliance.[94]

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[85] First Evaluation Report on EU Pilot (n 82) 2; Accompanying Document to First Evaluation Report on EU Pilot (n 84) 4.

[86] Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 66.

[87] Commission report 'Second Evaluation Report on EU Pilot', COM(2011) 930 final (hereafter 'Second Evaluation Report on EU Pilot'), 3.

[88] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 2-4.

[89] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 17; Second Evaluation Report on EU Pilot (n 87) 3.

[90] Second Evaluation Report on EU Pilot (n 87) 2.

[91] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 19; Second Evaluation Report on EU Pilot (n 87) 4.

[92] Ballasteros, Mehdi, Eliantonio and Petrovic (n 7) 51-52; Smith (n 3) 131.

[93] Alberto Gil Ibañez, 'The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228' (2004) 68 Law and Contemporary Problems 135-159, 146-147 (n 49).

[94] ibid 51.

At the end of this process, two outcomes are likely.[95] The Member State might agree to correct its non-compliance in accordance with EU law. In such a case, the Commission will close the file and consider the matter resolved.[96] Alternatively, the Member State may contest the existence of non-compliance in which case the Commission will reject the Member State's response and provide justification for its position, while reserving the possibility to launch a formal infringement action.[97] In either case, prior to closure of the file, the Commission will inform any complainant of the proposed closure and provide them with four weeks to submit their comments.[98] The Commission has stressed that the entire process from the date of registration of the complaint or initiation of an EU Pilot case of its own motion until closing of the file should take no more than twelve months.[99]

Where dialogue between the Commission and the Member States does not lead to resolution of the alleged state of non-compliance, the Commission may initiate formal infringement proceedings as will be discussed in the next section. Given that the opening of an EU Pilot case will usually precede any formal infringement action,[100] it can therefore be considered a precursor to the pre-litigation phase under Article 258 TFEU[101] but does form part of it.[102]

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[95] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 19; Second Evaluation Report on EU Pilot (n 87) 4.

[96] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 19.

[97] Accompanying Document to First Evaluation Report on EU Pilot (n 84) 19; Second Evaluation Report on EU Pilot (n 87) 3-4.

[98] Communication on the Handling of Complaints (n 34) 7.

[99] Second Evaluation Report on EU Pilot (n 87) 4. This also corresponds to the period set out in its Communication on the Handling of Complaints (n 34) 6.

[100] Second Evaluation Report on EU Pilot (n 87) 2; Annual Report on the Application of EU Law for 2014 (n 12) 5.

[101] Andersen (n 3) 19, 47. See also, Tallberg (n 134) 616, who highlights the advantage that '[t]hese consultations weed out cases that may have arisen due to legal uncertainty and misunderstandings.'

[102] See to that effect, Case C-211/08 *Commission v Spain* [2010] ECR I-5267, paras 21-22 in respect of correspondence preceding a 'letter of formal notice'.

5.2.2 Infringement action by the Commission

Where the Member State's non-compliance persists, the Commission has the power to bring an action for infringement of EU law before the Court of Justice under Article 258 TFEU.[103] The decision whether or not to commence infringement proceedings[104] rests with the Commission.[105] The purpose of such proceedings is to obtain a declaration by the Court of Justice that a Member State has infringed EU law with a view to the termination of non-compliance.[106]

The proceedings comprises a pre-litigation stage of an administrative nature that precedes the contentious stage before the Court.[107] The purpose of the pre-litigation phase is threefold: it provides the Member State an opportunity to remedy its non-compliance, enables it to put forward a defence to the Commission's allegations[108] and defines the subject matter of the dispute

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[103] Article 258 TFEU provides that:

> 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

[104] For a detailed discussion of infringement proceedings, see Gil Ibañez (n 3) 89-134; Brent (n 31) 161-183; Ian Harden, 'What Future for the Centralized Enforcement of Community Law?' (2002) 55 Current Legal Problems 495-516; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2014) 159-214; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (6th ed, Oxford University Press, 2015) 429-463.

[105] See for example, Case C-33/04 *Commission v Luxembourg* (n 42), paras 66-67, and other case law cited at n 42. For an overview of the Commission's enforcement priorities, see Section 5.1.1 (Direct supervision by the Commission).

[106] Joined Case 15/76 & 16/76 *Commission v France* [1979] ECR 321, para 27; Case C-247/98 *Greece v Commission* [2001] ECR I-2001, para 13; Case C-456/05 *Commission v Germany* [2007] ECR I-10517, para 25; Case C-292/11 P *Commission v Portugal* [2014] ECLI:EU:C:2014:3 (judgment of 15 January 2014), para 39.

[107] Case C-362/01 *Commission v Ireland* [2002] ECR I-11433, para 15 See also Tallberg (n 1) 616.

[108] Case C-74/82 *Commission v Ireland* [1984] ECR 317, para 13; Case 293/85 *Commission v Belgium* [1988] ECR 305, para 13; Case C-96/95 *Commission v Germany* [1997] ECR I-1653, para 22; Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, para 23; Case C-439/99 *Commission v Italy*

before the Court.[109] The pre-litigation stage consists in an essential procedural requirement for the proper conduct of infringement proceedings.[110]

The procedure under Article 258 TFEU is formally initiated by the Commission sending a 'letter of formal notice'[111] to the Member State putting it on notice that it is breaching EU law. This will be sent to the permanent representation of the Member State concerned.[112] The letter of formal notice need only contain 'an initial brief summary' of the Commission's complaints,[113] but this must specify how the Member State has breached its obligations under the Treaties.[114]

In the context of the implementation of a directive, this effectively requires the Commission to identify which specific provisions of the directive

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[2002] ECR I-305, para 10; Case C-287/00 *Commission v Germany* [2002] ECR I-5811, para 16; Case C-522/09 *Commission v Romania* [2011] ECR I-2963, para 15.

[109] Case C-362/01 *Commission v Ireland* (n 107), para 18.

[110] Case 124/81 *Commission v United Kingdom* [1983] ECR 203, para 6; Case C-152/89 *Commission v Luxembourg* [1991] ECR I-3141, para 9; Case C-191/95 *Commission v Germany* (n 27), para 55, and Case C-340/96 *Commission v United Kingdom* [1999] ECR I-2023, para 36; Case C-422/05 *Commission v Belgium* [2007] ECR I-4749, para 25; Case C-186/06 *Commission v Spain* [2007] ECR I-12093, para 15; Case C-457/07 *Commission v Portugal* [2009] ECR I-8091, para 55.

[111] Lenaerts, Maselis and Gutman (n 104) 186-188. This is also known as a 'letter before action', ibid, 187. See also Brent (n 31) 165-166.

[112] See in the context of Directive 2004/38, Commission, Letter of formal notice sent to Italy, SG(2011)D/18350, C(2011)7523, 28 October 2011 (Information from Commission dated 3 August 2015 (GestDem 2015/2901)).

[113] Case 274/83 *Commission v Italy* [1985] ECR 1077, para 21; Case C-135/94 *Commission v Italy* [1995] ECR I-1805, para 7; Case C-289/94 *Commission v Italy* [1996] ECR I-4405 para 16; Case C-279/94 *Commission v Italy* [1997] ECR I-4743 para 15; Case C-225/98 *Commission v France* [2000] ECR I-7445, para 70; Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, para 36.

[114] Case C-341/97 *Commission v Netherlands* [2000] ECR I-6611 (Order of the Court of 13 September 2000), para 18; Case C-230/99 *Commission v France* [2001] ECR I-1169, para 32; C-23/05 *Commission v Luxembourg* [2005] ECR I-9535, para 7.

have been breached and identify the specific national measures which are the source of non-compliance.[115]

The letter of formal notice must also provide a reasonable period of time within which the Member State should provide its observations.[116] It appears that it is the Commission's standard practice in this connection to provide a deadline of two months,[117] although in urgent cases the period might be shorter.[118]

Where the Commission considers that the Member State has failed to remedy the non-compliance in the letter of formal notice, it may proceed to issue a 'reasoned opinion'.[119] This constitutes the second-step in the pre-litigation stage.[120] The reasoned opinion must provide a 'cogent and detailed exposition of the reasons' that lead the Commission to consider the Member State has failed to fulfil its obligations under the Treaty,[121] based on the complaints contained in the original letter of formal notice.[122] The reasoned opinion may provide further details on the nature of the Commission's

[115] See in the context of Directive 2004/38, Commission, Letter of formal notice sent to Spain, SG(2011)D/3991, C(2011)1455, 15 March 2011 (Information from Commission dated 3 August 2015 (GestDem 2015/2901)).

[116] Case 293/85 *Commission v Belgium* (n 108) para 14; Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, para 20; Case C-1/00 *Commission v France* [2000] ECR I-9989, para 65.

[117] See in the context of Directive 2004/38, Commission, Letter of formal notice sent to Austria SG(2007)D/206353, C(2007)4953, 23 October 2007 (Information from Commission dated 3 August 2015 (GestDem 2015/2901)); idem, Letter of formal notice sent to Malta SG(2011)D/4011, C(2011)1453, 15 March 2011 (Information from Commission dated 3 August 2015 (GestDem 2015/2901)). See also Letters of formal notice sent to Italy (n 112) and Spain (115).

[118] Case C320/03 *Commission v Austria* [2005] ECR I-9871, paras 33-34.

[119] Lenaerts, Maselis and Gutman (n 104) 188-191; Brent (n 31) 166-168.

[120] Tallberg (n 1) 616.

[121] Case 7/61 *Commission v Italy* [1961] Spec Ed 317, 327; Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, para 18; C-439/99 *Commission* v *Italy* [2002] ECR I-305, para 12; Case C-340/02 *Commission v France* [2004] ECR I-9845, para 27.

[122] Case C-145/01 *Commission v Italy* [2003] ECR I-5585, para 18.

complaints that were made more generally in its letter of formal notice[123] or focus on some but not all of the complaints which the letter contained.[124] However, the inclusion of new complaints in the reasoned opinion that were not included in the letter of formal notice will not be examined by the Court.[125] The reasoned opinion must also take account of the Member State's observations to its letter of formal notice, otherwise the application may be declared inadmissible by the Court.[126] The reasoned opinion may propose corrective measures, but there is no obligation on the Member State to do so.[127]

In essence, this means that in cases involving the implementation of directives, the reasoned opinion must provide a precise and detailed explanation of the nature of the Member State's non-compliance.[128] In cases relating to a failure to communication the national implementing measures that transpose a directive, the reasoned opinion will contain a warning to the Member State concerned that it will lodge a request for the imposition of

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[123] Case 74/82 *Commission v Ireland* [1984] ECR 317, para 20; Case C-279/94 *Commission v Italy* (n 113), para 15; Case C-191/95 *Commission v Germany* (n 27), para 54; Case C-152/05 *Commission v Germany* [2008] ECR I-39, para 10.

[124] Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 2), para 25; Case C-20/09 *Commission v Portugal* [2011] ECR I-2637, para 22.

[125] Case 51/83 *Commission v Italy* [1984] ECR 2793, paras 6-8; Case C-159/99 *Commission v Italy* [2001] ECR I-4007, para 54. This may even lead to the Commission's application being declared inadmissible by the Court Case C-522/09 *Commission v Romania* (n 108), paras 15-20.

[126] Case C-266/94 *Commission v Spain* [1995] ECR I-1975 (Order of the Court of 11 July 1995), paras 16-26 (failure to take into account Member State's response to letter of formal notice constitutes a procedural defect in the pre-litigation stage). Compare Case C-362/01 *Commission v Ireland* (n 107), paras 14-22 (absence in reasoned opinion of an assessment of Member State's response will not render the application inadmissible if this absence did not make it impossible for the Member State to put an end to its infringement, did not compromise its rights of defence and had no effect on the definition of the subject-matter of the dispute).

[127] Case C-247/89 *Commission v Portugal* [1991] ECR I-2963, para 22; C-376/13 *Commission v Bulgaria* [2015] ECLI:EU:C:2015:266 (judgment of 23 April 2015), para 42.

[128] See further, Chapter 4, Section 4.1 (Compliance and Implementation Outcomes) for discussion and example of what forms such non-compliant implementation might take.

pecuniary sanctions under Article 260(3) in the event that the matter is referred to the Court.[129]

The letter of formal notice and the reasoned opinion fix the parameters of the Commission's case against the Member State, so that the Commission's application cannot be extended or altered during the course of the proceedings by going beyond the complaints set out in its letter of formal notice and the reasoned opinion.[130]

The reasoned opinion will also lay down a time limit for the Member State to take the necessary measures to comply with the opinion, which must be reasonable in the circumstances.[131] The standard period of time allowed in this connection Commission appears to be two months,[132] but the urgent nature of a case may justify a shorter period.[133]

In the absence of any corrective measures taken by the Member State to remedy its non-compliance, the Commission may proceed to lodge an

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[129] See to that effect, Commission 'Communication from the Commission - Implementation of Article 260(3) of the Treaty' (n 23), para 31.

[130] Case C-191/95 *Commission v Germany* (n 27), para 55; Case C-139/00 *Commission v Spain* [2002] ECR I-6407, para 18; Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 2), para 25; Case C-185/00 *Commission v Finland* [2003] ECR I-14189 para 80; Case C 147/03 *Commission v Austria* [2005] ECR I 5969, paragraph 23; Case C-105/02 *Commission v Germany* [2006] ECR I-9659, paras 47 and 48; Case C-156/04 *Commission v Greece* [2007] ECR I-4129, para 66.

[131] Article 258(2) TFEU. Case 74/82 *Commission v Ireland* (n 123), para 12 (five days is not a reasonable period of time to require a Member State to amend legislation which has been applied for more than 40 years); Case 293/85 *Commission v Belgium* (n 108), para 14 (very short periods may be justified where there is an urgent need to remedy a breach or where the Member State is fully aware of the Commission's views long before the procedure starts).

[132] Case C-473/93 *Commission v Luxembourg* (n 116), para 21. See also in the context of Directive 2004/38,Commission, Reasoned opinion sent to Cyprus SG(2013)D/9533, C(2013)3569, 21 June 2013 (Information from Commission dated 3 December 2015 (GestDem 2015/2901)).

[133] See for example, Case C-320/03 *Commission v Austria* [2005] ECR I-9871, paras 33-34, where a period of one week was deemed sufficient by the Court due to the urgency of the matter in question (prohibition on heavy vehicles of over 7.5 tonnes carrying certain goods from travelling along a road constituting one of the main routes of land communication between southern Germany and northern Italy).

application at the Court of Justice, but it is not obliged to do so.[134] Indeed, the Commission may withdraw its action at any point during the proceedings without the need to give reasons.[135] In the event it decides to proceed to the contentious stage, the Commission has sole discretion as to when to refer a case to the Court.[136] The Court has also recognised that 'even where the default has been remedied after the time-limit given in the reasoned opinion has expired, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur, as a result of its default, towards other Member States, the Community or private parties'.[137]

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[134] Case C-233/00 *Commission v France* (n 42), para 31. For an overview of the Commission's enforcement priorities, see Section 5.1.1 (Direct supervision by the Commission).

[135] Article 148 of the Rules of Procedure of the Court of Justice [2012] OJ L 265/1 as amended by [2013] OJ L 173/65, which provides that 'If the applicant informs the Court in writing or at the hearing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141.' See for example Case C-545/12 *Commission v Cyprus* [2013] ECLI:EU:C:2013:329 (Order of the Court of 22 May 2013) discussed in Craig and De Búrca (n 104) 455. However, it may issue a press release to explain its reasons to the public, see for example Commission, 'Energy: Commission withdraws Court case against Poland for failing to transpose EU rules', Press release IP/15/4499, 26 February 2015, in which it states that 'in cases where the Commission has asked for a daily penalty, the Commission withdraws its action if the Member State notifies the transposition measures required to put an end to the infringement.'

[136] See for example, Case C-317/92 *Commission v Germany* [1994] ECR I-2039, para 4; Case C-35/96 *Commission v Italy* (n 2), para 27; C 490/04 *Commission v Germany* [2007] ECR I 6095, para 26; Case C-562/07 *Commission v Spain* (n 43), paras 18-20; Case C-546/07 *Commission v Germany* [2010] ECR I-439, paras 21-22; Case C-306/08 *Commission v Spain* [2011] ECR I-4541, para 66. An exception would be 'where the excessive duration of the pre-litigation procedure in that provision is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of the defence', ibid.

[137] Case C-29/90 *Commission v Greece* [1992] ECR I-1971, para 12; Case C-207/00 *Commission v Italy* [2001] ECR I-4571, para 28; Case C-166/00 *Commission v Greece* [2001] ECR I-9835, para 9; Case C-233/00 *Commission v France* (n 42), para 31.

5.2.3 Infringement proceedings before the Court of Justice

The contentious stage[138] of infringement proceedings is triggered by the Commission making an application before the Court of Justice.[139] The Commission need not demonstrate a specific interest in making an application.[140]

The application must indicate in a coherent and intelligible fashion the essential points of law and fact on which the Commission's case is based and set out the heads of claim in unambiguous terms.[141] The application will include the letter of formal notice and reasoned opinion as annexes,[142] together with correspondence received from the Member State and any other evidence it relies upon.[143] In cases relating to the failure by a Member State to notify its national implementing measures to transpose a directive, the Commission will also specify in its application the amount of the lump sum or penalty payment

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[138] Lenaerts, Maselis and Gutman (n 104) 191-198.

[139] Under Article 21 of the Statute of the Court of Justice of the European Union, Protocol (No 3), Consolidated Versions of the TFEU [2012] OJ C 326/210, as further given effect by Articles 120-123 of the Rules of Procedure of the Court of Justice (n 135), a case is brought before the Court of Justice by a written application addressed to the Registrar. See also Case C-490/09 *Commission v Luxembourg* [2011] ECR I-247 para 52.

[140] See Joined Cases C-20/01 and C-28/01 *Commission v Germany* (n 2), para 29, and other case law cited at n 4.

[141] Case C-195/04 *Commission v Finland* [2007] ECR I-3351, para 22; Case C-412/04 *Commission v Italy* [2008] ECR I-619, para 103; Case C-211/08 *Commission v Spain* [2010] ECR I-5267, para 32; Case C-508/08 *Commission v Malta* [2010] ECR I-10589, para 16; Case C-490/09 *Commission v Luxembourg* (n 139) para 50.

[142] Article 122 of the Rules of Procedure of the Court of Justice (n 135).

[143] See for example Commission, 'Application submitted pursuant to Article 258 of the Treaty on the Functioning of the European Union' (4 April 2013) in Case 172/13 Commission v UK [2015] ECLI:EU:C:2015:50 (judgment of 3 February 2015) <http://ec.europa.eu/dgs/legal_service/submissions/c2013_172_req_en.pdf> accessed 31 December 2015.

which it is requesting the Court to impose pursuant to Article 260(3) TFEU.[144] The Member State concerned then has two months to serve its defence.[145]

The Commission has the burden of proving that the Member State concerned has failed to fulfil its obligations.[146] The relevant point in time for determining whether an infringement has taken place is the end of the period laid down in the reasoned opinion,[147] and therefore the Commission must adduce evidence to the Court that the Member State's non-compliance persisted beyond the period fixed in the reasoned opinion.[148] Where the allegations are denied by the Member State concerned, it cannot merely deny the existence of non-compliance[149] and is required 'to contest substantively and in detail' the Commission's case.[150] Where reliance on a derogation contained in a directive

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[144] Under Article 260(3) TFEU, as inserted by Article 1, para 212) of the Lisbon Treaty, the Commission can now request the imposition of financial penalties when a Member State has failed to notify its national implementing measures. See also Commission 'Communication from the Commission - Implementation of Article 260(3) of the Treaty' (n 23). See further, Lenaerts, Maselis and Gutman (n 104) 170-171.

[145] Article 124 of the Rules of Procedure of the Court of Justice (n 135).

[146] Case 96/81 *Commission v Netherlands* [1982] ECR 1791, para 6; Case 141/87 *Commission v Italy* [1989] ECR para 15; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 59; C-404/00 *Commission v Spain* [2003] ECR I-6695, para 26; C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, para 21; Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para 26; C-438/07 *Commission v Sweden* (n 150), para 49. To this end the Commission cannot merely rely on an expert opinion, Case 141/87 *Commission v Italy*, cited above, para 17.

[147] Case C-110/00 *Commission v Austria* [2001] ECR I-7545, para 13; Case C-423/00 *Commission v Belgium* [2002] ECR I-593, para 14; Case C-104/06 *Commission v Sweden* [2007] ECR I-671, para 28; Case C-156/04 *Commission v Greece* (n 130), para 66.

[148] Case 298/86 *Commission v Belgium* [1988] ECR 4343, para 15; Case C-289/94 *Commission v Italy* (n 113), para 20; C-348/99 *Commission v Luxembourg* [2000] ECR I-2917, para 8; C-183/05 *Commission v Ireland* [2007] ECR I-137, para 17; Case C-196/07 *Commission v Spain* [2008] ECR I-41, para 25.

[149] Andersen (n 3) 59.

[150] Case 272/86 *Commission v Greece* (n 6), para 21. See also Case C-365/97 *Commission v Italy* (*San Rocco case*) (n 2), paras 84 and 86; Case C-438/07 *Commission v Sweden* (n 146), para 50; C-297/08 *Commission v Italy* [2010] ECR I-01749, para 102

is invoked by a Member State in its defence, it will bear the burden of proving the existence of circumstances that justify recourse to the derogation.[151]

In the context of the implementation of a directive, the evidence which the Commission will need to adduce will depend on the nature of the alleged non-compliance[152] by the Member State. For example, where a failure to transpose is being alleged,[153] the Commission will need to show that by the end of the period laid down in the reasoned opinion no national implementing measures had been adopted[154] or that the national measures are not legally binding.[155] In case the Commission alleges incorrect or incomplete transposition of directives[156], it must specify the national provisions which are the source of this non-compliance[157] and how they fail to achieve the result prescribed by the specific provision of the directive in question.[158] Where non-compliant application is being alleged,[159] the Commission will need to provide concrete proof of the administrative measures[160] or practices[161] which result in non-compliance and explain how they do not comply with the directive.[162] Similarly, allegations of non-compliant enforcement would require the necessary proof to be adduced.[163]

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[151] See for example, Case 199/85 *Commission v Italy* [1987] ECR 1039, para 14. See also Case 8/81 *Becker* [1982] ECR 53, para 19, paras 36-40.

[152] See further Chapter 4, Section 4.1 (Compliance and Implementation Outcomes).

[153] See further, Chapter 4, Section 4.2 (Transposition Outcomes).

[154] See for example, Case C-383/00 *Commission v Germany* (n 42), para 17.

[155] See for example, Case C-29/84 *Commission v Germany*, [1985] ECR 1661, paras 18-21, 27-28, 30-31 and 36-38.

[156] See further, Chapter 4, Section 4.2 (Transposition Outcomes).

[157] See for example, Case C-274/93 *Commission v Luxembourg* [1996] ECR I-2019, paras 10-12.

[158] See for example Case C-157/91 *Commission v Netherlands* [1992] ECR I-5899, paras 10-12.

[159] See further, Chapter 4, Section 4.3 (Application Outcomes).

[160] See to that effect, Case 298/86 *Commission v Belgium* (n 148), paras 15-16 (no concrete evidence of measures relating to the pricing of tobacco contrary to the directive on the taxation of tobacco products)

[161] See to that effect, Case 321/87 *Commission v Belgium* [1989] ECR 997, para 16.

[162] See to that effect, Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para 45.

[163] See further, Chapter 4, Section 4.4 (Enforcement Outcomes).

There is no requirement on the Commission to ascertain the reasons of the Member State's non-compliance.[164] As a result, the Commission need not prove that a Member State has engaged in 'inertia or opposition'[165] or adduce evidence to establish the 'gravity of the infringement'.[166]

The Court will thus invited to determine whether the Member State has failed to fulfil its obligations[167] on the basis of the Commission's pleadings and the evidence it presents. The Court will determine of its own motion if the conditions for bringing infringement proceedings under Article 258 TFEU are met.[168]

Where the Court finds that the Member State has failed to fulfil its obligations under the Treaties, it will make a declaration that the Member State has failed to fulfil is Treaty obligations. Such a judgment does not compel the Member State to follow any particular course of action.[169] The declaratory nature of the judgment means that the national legislative, administrative or judicial measures that are the source of non-compliance are not automatically annulled as a result of a finding of infringement.[170] Instead, the Member State is obliged to take the necessary measures to comply with the judgment of the

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[164] Gil Ibañez (n 3) 213, who observes that infringement proceedings under Article 258 TFEU do not require 'proof of any resistance on the part of the Member State … In other words, it is not necessary to assess why a Member State does not comply with its obligations, since it is enough to prove that a lack of compliance exists.'

[165] Case 301/81 *Commission v Belgium* [1983] ECR 467-481, paras 7-8.

[166] Case C-456/05 *Commission v Germany* (n 106), para 22.

[167] Case C-209/89 *Commission v Italy* [1991] ECR I-1575, para 6.

[168] Case C-362/90 *Commission v Italy* [1992] ECR I-2353, para 8; Case C-439/99 *Commission v Italy* (108), para 8; Case C-98/04 *Commission v United Kingdom* [2006] ECR I-4003, para 16; Case C-195/04 *Commission v Finland* (n 141) para 21; Case C-487/08 *Commission v Spain* [2010] ECR I-4843, para 70.

[169] Case 70/72 *Commission v Germany* [1973] ECR 813, para 10.

[170] Prechal (n 5) 26.

Court[171] as soon as possible.[172] Where national measures have been found contrary to a directive, Member States are under a duty to amend them in order to ensure their compliance with EU law.[173] Moreover the national administrative authorities and the national courts are prohibited from applying national measures that have been found the subject of a declaration of infringement by the EU Court of Justice.[174]

Having discussed the possible consequences at the EU level, it is appropriate to consider what action may be taken by individuals to enforce directives at the national level.

5.3 Consequences of Non-Compliant Implementation at National Level

In addition to making complaints and petitions to the EU authorities, individuals and non-governmental organisations may take action at national level aiming at the enforcement of rights conferred on them by directive.

Individuals and interest groups may therefore seek to bring proceedings before the national courts to enforce EU rights arising under a directive. More specifically, individuals who are affected by the application of a directive may seek judicial review of the decision taken by the national administrative authorities.[175] NGOs may also engage in strategic litigation before the national courts aiming to overturn non-compliant national implementing measures or

[171] Article 260(1) TFEU provides that 'If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.' See also Case 48/71 *Commission v Italy* [1972], para 8.

[172] Case 131/84 *Commission v Italy* [1985] ECR 353, para 7; Case 160/85 *Commission v Italy* [1986] ECR 3245, para 9; Case C-101/91 *Commission v Italy* [1993] ECR I-191, para 20.

[173] See to that effect, Joined Case 314 to 316/81 and 83/82 *Waterkeyn* [1982] ECR 4337, para 14.

[174] Case C-101/91 *Commission v Italy* (n 172), para 24.

[175] Tallberg (n 134) 622.

obtain clarification of unclear legal concepts.[176] These issues relate to the enforcement of directives.[177]

For the sake of completeness, it should also be mentioned that individuals may also avail themselves of various non-judicial mechanisms in existence at the national level. Individuals may try to obtain the reconsideration of administrative decisions that fail to recognise their EU rights in line with national administrative procedures. They may be able to complain to national ombudsmen where such bodies have been established under national law. While these measures might not arguably constitute legally-binding forms of decentralised enforcement, they should nonetheless be taken into account when considering what forms of redress exist at national level to ensure compliance with EU directives. Finally, advocacy efforts may also be conducted by interest groups in order to persuade a Member State to address its non-compliance.[178]

The remainder of this section will consider the consequences of non-compliance from the perspective of the decentralised enforcement of directives by the national courts. When national courts discharge their duty to uphold the rights that individuals may derive under a directive,[179] the national courts (section 5.3.1) will be guided by the principles of supremacy, direct effect and consistent interpretation (section 5.3.2).[180] In the event that non-compliance causes loss to individuals, they must also be able to obtain reparation from the Member State (section 5.3.3). Wherever a question on the interpretation of directives arise during the course of such proceedings, the national courts may refer these to the Court of Justice for a preliminary ruling (section 5.3.4).

[176] Slepcevic (n 32) 381.

[177] See Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[178] Panke (n 32) 852.

[179] See Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[180] See further Prechal (n 5) 180-216.

5.3.1 Enforcement before the national courts

When considering a matter that falls within the scope of the Treaties, the national courts are bound to uphold the supremacy of EU law[181] by refraining from applying conflicting provisions of national law.

When it comes to the enforcement of EU rights before the national courts, in *Arcaro*[182] the Court of Justice has previously ruled that [t]here is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.' The verbs 'éliminer', 'eliminare', 'eliminar' and in the French, Italian, Portuguese and Spanish versions of the judgment of the Court of Justice would have greatly benefitted from having been rendered as to 'disapply' in English version of the Court's judgment.

As a result, the ability to invoke the supremacy of EU law before the national courts is, for individuals, is dependent on which specific provision of the directive meet the conditions for having direct effect under EU law.[183]

[181] See John Temple Lang, 'The Duties of National Courts under Community Constitutional Law', (1997) 22 *European Law Review*, 3-18. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives) and Chapter 4, Section 4.4 (Enforcement Outcomes).

[182] Case C-168/95 *Arcaro* [1996] ECR I-4705, para 43.

[183] See further Michael Dougan 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy' (2007) 44 Common Market Law Review, 931-963, 934, who suggests that 'the practical remedy afforded by supremacy is available in those individual cases involving a conflict between Community law and national law; but that remedy can only be invoked when Community law has been rendered cognizable before the domestic courts, by satisfying the threshold criteria for enjoying direct effect. Under this model, direct effect encompasses not only the creation and enforcement of subjective individual rights, but any situation in which Community norms produce independent effects within the national legal systems.'

5.3.2 Supremacy, direct effect and consistent interpretation

When directives are invoked in national proceedings, it has been proposed that national courts should consider three guiding principles[184] that can be briefly restated as follows: the national courts should interpret national law in conformity with the provisions of a directive; if this is not possible they should examine whether the provisions under consideration have direct effect and refrain from applying any conflicting provisions of national law; if this is not possible, national law must entertain the ability for individuals to claim reparation for loss suffered as a result of non-compliant implementation.

When applying national law to situations covered by a directive, the national courts are under a duty to interpret national implementing measures and other provisions of national law in conformity with the directive. [185] This is known as the duty of consistent interpretation.[186]

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[184] See further Sacha Prechal 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union' in Catherine Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press, 2007), 35-69. Maartje Verhoeven, *The Costanzo Obligation – The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law* (Intersentia 2011) 39 refers to this as the ' three step model' as elaborated by Prechal.

[185] See for example, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, para 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8; Case C-218/01 *Henkel* [2004] ECR I-1725, para 60. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[186] See further, Brent (n 31) 283-296; Prechal (n 5) 180-216. This is also referred to as the 'indirect effect' of EU directives, see for example Gerrit Betlem, 'The Principle of Indirect Effect of Community Law (1995) 3 *European Review of Private Law* 1-19; Jon Appleton, 'The Indirect-Direct Effect of European Community Directives' (2000) 5 *UCLA Journal of International Law and Foreign Affairs*, 59-100; Gerrit Betlem, 'The Doctrine of Consistent Interpretation - Managing Legal Uncertainty (2002) 22 *Oxford Journal of Legal Studies* 397-418; Sara Drake, 'Twenty Years after Von Colson - The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 *European Law Review*, 329-348; Marcus Klamert, 'Judicial Implementation of Directives and Anticipatory Indirect Effect' (2005) 43 *Common Market Law Review*, 1251-1275.

In the recent case of *Dominguez*,[187] the Court has explained what this obligations entails:

> 'when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them.
>
> It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*'.

The Court added that where the national court is unable to interpret national law consistently with a directive, the national court should consider whether the specific provision of the directive has direct effect so that the individual claimant may rely on it against the State.[188]

In accordance with the doctrine of direct effect,[189] where a directive has not been transposed into national law or the national implementing measures

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[187] Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33 (judgment of 24 January 2012), paras 24-25, citing Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I 8835, para 114; Joined Cases C-378/07 to C-380/07 *Angelidaki* [2009] ECR I 3071, paras 197-199; Case C 555/07 *Kücükdeveci* [2010] ECR I 365, para 48; [2008] ECR I-2483, para 100.

[188] Case C-282/10 *Dominguez* (n 187), para 32.

[189] See further, JA Winter, 'Direct Applicability and Direct Effect – Two Distinct and Different Concepts in Community Law' (1972) 9 Common Market Law Review 425-438; Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 European Law Review 155-177

contain incorrect or incomplete provisions, the Court of Justice has recognised that individuals can rely directly upon the provisions of a directive. The Court did so with a view to securing the effective enforcement of EU law in the national legal order.[190]

However, only certain specific provisions of directives can have such direct effect.[191] In order to produce direct effect the provisions must impose a

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(reprinted (2015) 40 European Law Review, 135-153); Josephine Steiner, 'Coming to Terms with EEC Directives' (1990) 106 Law Quarterly Review 144-159; Deirdre Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 European Law Review 195-223; Paul Craig, 'Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law' (1992) 12 Oxford Journal of Legal Studies 453-479; Eamonn Doran, 'Direct Effect: Need Lawyers Read EC Directives?' (1993) 4 International Company and Commercial Law Review 174-178; Klaus Lackhoff and Harold Nyssens 'Direct Effect of Directives in Triangular Situations' (1998) 23 European Law Review 397-413; Christopher Hilson and Antony Downes, 'Making Sense of Rights: Community Rights in EC Law' (1999), 24 European Law Review 121-138; Miriam Lenz, 'Horizontal What? Back to basics' (2000) 25 European Law Review 502-522; Sacha Prechal, 'Does Direct Effect Still Matter?' (2000) 37 Common Market Law Review 1047-1069; Takis Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2001) 21 Yearbook of European Law 327-354; Steven Weatherill, 'Breach of Directives and breach of contract' (2001) 26 European Law Review 177-186; Daniel Colgan, 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives' (2002) 8 European Public Law 545-568; 'Editorial Comments: Horizontal direct effect – A law of diminishing coherence?' (2006) 43 Common Market Law Review 1-8; Alan Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity' (2006-7) 9 Cambridge Yearbook of European Legal Studies 81-109; Dougan (n 183); Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 European Law Review 349-377; Richard Král, 'Questioning the Limits of Invocability of EU Directives in Triangular Situations' (2010) 16 European Public Law 239-247; Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th ed, Oxford University Press 2014) 105-136.

[190] See for example, Steiner (n 189) 144-145: 'the Court of Justice extended the principle of direct effects to Directives for much the same reason as it introduced that principle for Treaty Articles in *Van Gend en Loos*, namely to secure an effective means of enforcement of EEC law *within* national legal systems' (emphasis in original); Curtin (n 5) 196: 'endowing directives with direct effect promotes the practical operation of Community law insofar as it casts the citizens of the Community in the role of vigilants'.

[191] Compare recommendations which do not have direct effect, but national courts are required to interpret national law in the light of them, without prejudice to their interpretation by the Court of Justice itself, see Case C-322/88, *Grimaldi v Fonds des Maladies Professionelles* [1989] ECR 4407,

particular course of conduct which is sufficiently clear, precise and unconditional. In *Van Duyn*,[192] the European Court of Justice held that:

> 'where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect [*effet utile*] of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking into consideration as an element of [EU] law. Article [267 TFEU], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the [EU] institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals.'

Moreover, the direct effect of directives can only be invoked against the State[193] or bodies under its control.[194] As a result, individuals cannot usually invoke directly effective provisions of a directive in disputes against other private parties.[195]

In accordance with the principle of supremacy of EU law, where national law conflicts with directly effective provisions of a directive, the national courts

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para 18, and Case C-188/91 *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* [1993] ECR 1-363, para .

[192] Case 41/74 *Van Duyn* [1974] ECR 1337, para 12; Case 48/78 *Ratti* [1979] ECR 1629, paras 20-23. See also Case 48/75 *Royer* [1976] ECR 497, para 23; Case 8/81 *Becker* (n 151), para 25; Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu* [2011] ECR I-4599, paras 93-100.

[193] Case 152/84 *Marshall (No 2)* [1986] ECR 723, paras 46-47; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paras 24-25. This is also referred to as horizontal direct effect, see n 189.

[194] Case C-188/89 *Foster* [1990] ECR I-3313, paras 17-20.

[195] Case 152/84 *Marshall (No 2)* (n 193), para 48. This is also referred to as vertical direct effect, see n 322.

are then under an obligation to refrain from applying provisions of national law.[196]

In addition, wherever a Member State has failed to implement a directive, individuals must also be able to claim damages for any loss they have suffered as a result.

5.3.3 Member State liability

The Court of Justice has recognised that '[t]he principle of State liability for loss and damage caused to individuals as a result of breaches of [EU] law for which the State can be held responsible is inherent in the system of the Treaty.'[197] As a result, in situations where an individual suffers loss as a result of the non-compliant implementation, EU law requires that they must be able obtain reparation.[198]

Claims relating to the liability of member states for breaches of EU law must be brought before the national courts under the national law relating to

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[196] Case 106/77 *Simmenthal* [1978] ECR 629, para 21 (national courts are obliged to give primacy to provisions of regulations in case these conflict with provisions of national law). See further, Case 249/85 *Albako* [1987] ECR 2345, para 17 (idem as regards decisions); Case C-262/97 *Engelbrecht* [2000] ECR I-7321, para 40 (idem as regards regulations); Case C-462/99 *Connect Austria* [2003] ECR I-5197, para 40 (idem as regards directives); Case C-327/00 *Santex* [2003] ECR I-1877 (idem as regards directives), para 64; Case C-241/06 *Lämmerzahl* [2007] ECR I-8415, para 63 (idem as regards directives); Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, para 49 (idem as regards directives). See further, Woods and Watson (n 189) 85-104.

[197] Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, para 35.

[198] ibid, para 39. See further, James Hanft, '*Francovich* and *Bonifaci v. Italy*; EEC Member State Liability for Failure to Implement Community Directives' (1991) 15 Fordham International Law Journal 1237-1274; Christiaan Timmermans, 'Rapport Communautaire' in XVIII FIDE Congress Report, Volume 1, 'Les Directives Communautaires: Effets, Efficacité, Justiciabilité' (Stockholm, 3-6 June 1998) 15-37, 33,35; Brent (n 31) 211-228; Peter Wattel, '*Köbler*, *CILFIT* and *Welthgrove*: We Can't Go On Meeting Like This' (2004) 41 Common Market Law Review 177-190,; Prechal (n 5) 271-304; Andrea Biondi and Martin Farley, *The Right to Damages in European Law* (Kluwer 2010) 11-84; Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? – An Assessment 20 Years after Francovich' (2012) 49 Common Market Law Review 1675-1702; Woods and Watson (n 189) 203-204; Nina Póltorak, *European Union Rights in National Courts* (Kluwer 2015), 323-338.

reparation.[199] Claimants have to demonstrate that the EU rule which has been breached by the national authorities confers rights on individuals,[200] the breach of EU law is sufficiently serious,[201] and the claimant suffered loss which was directly caused by the breach of EU law.[202] The reparation must be commensurate to the loss suffered so as to ensure effective protection for the individuals who have been harmed.[203]

The liability of Member States may be engaged where non-compliance results not only from problems in transposition, but also in cases relating to its application by the administrative authorities[204] or its enforcement by the national courts.[205]

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[199] Joined Cases C-6/90 and C-9/90 *Francovich* (n 197), para 42. See further Chapter 3, Section 3.6 (Obligations Relating to the Enforcement of Directives).

[200] Joined Cases C-6/90 and C-9/90 *Francovich* (n 197), para 40; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I 1029, para 74.

[201] The Court of Justice has set a relatively high threshold in order to establish that a breach of EU law is sufficiently serious. In Case C-278/05 *Robins* [2007] ECR I-1053, para 72, the Court held that '[t]he discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law.' In respect of the transposition of directives, the claimant would have to demonstrate that 'a breach is sufficiently serious' which entails that 'in the exercise of its legislative powers, an institution or a Member State has manifestly and gravely disregarded the limits on the exercise of its powers', see Case C-392/93 *British Telecoms* [1996] ECR I-1631, para 42.

[202] Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* (n 200), para 74.

[203] Case C-261/95 *Palmisani* [1997] ECR I-4025, para 26.

[204] See to that effect Case C-302/97 *Konle* [1999] ECR I-3099, para 62 (individuals must be able to obtain reparation for damage caused to them by non-compliance with EU law, whichever public authority is responsible for the breach and whichever public authority is responsible for effecting reparation under national law); Case C-424/97 *Haim* [2000] ECR I-5123, para 31 (individuals must be able to obtain reparation for damage caused to them by measures taken by territorial or other public-law bodies benefiting from a certain degree of autonomy in the carrying out of the legislative or administrative tasks entrusted to them).

[205] Case C-224/01 *Köbler* [2003] ECR I-10239, para 36.

Where a Member State has failed to transpose a directive, the Court held in *Dillenkofer*[206] that 'failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State' s obligation and the loss and damage suffered'.

The position is not so clear cut in respect of incorrect or incomplete transposition. In particular, the Court has recognised that an error of law may allow a national authority to escape liability.[207] As a result, where a provision of a directive is 'imprecisely worded' and is reasonably capable of bearing different interpretations,[208] the fact that a Member State may have interpreted that provision incorrectly will not be considered a 'sufficiently serious breach'[209] if such incorrect interpretation was made in 'good faith' and was 'not manifestly contrary to the wording of the directive or to the objective pursued by it'.[210]

Wherever doubts arise as to the meaning of concepts contained in a directive, the Member States have the possibility to refer the matter to the Court of Justice, as will now be briefly discussed.

5.3.4 Reference for a preliminary ruling

In situations where national proceedings raise a question as to the interpretation of the directive, the national courts may refer the matter to the

[206] Joined Cases C-178/94 *Dillenkofer* [1996] ECR I-4845, para 29. See also Case C-261/95 *Palmisani* [1997] ECR I-4025, para 31

[207] Case C-392/93 *British Telecoms* (n 201), paras 43-45. See also Case C-319/96 *Brinkmann* [1998] ECR I-5255, paras 27-32.

[208] ibid, para 43

[209] ibid, para 45.

[210] ibid, para 43.

Court of Justice for a preliminary ruling under Article 267 TFEU.[211,212] The purpose of such a procedure is to ensure the uniform application of EU law in the Member States,[213] which is a fundamental requirement of the EU's legal order.[214] This is particularly the case as regards the interpretation of directly

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[211] Article 267 TFEU provides that:

> 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[212] See further Brent (n 31) 297-318; Morten Broberg, 'The Preliminary Reference Procedure and Questions of International and National Law' (2009) Yearbook of European Law, 362-389; Albertina Albors-Llorens, 'Judicial protection before the Court of Justice of the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 255-299, 284-299; further, Lenaerts, Maselis and Gutman (n 104) 215-249; Woods and Watson (n 189) 222-262. See further, Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd ed, Oxford University Press 2014).

[213] See for example, Joined Cases 28/62, 29/62 and 30/62 *Da Costa* [1963] ECR 31, 38; Case 62/72 *Bollmann* [1973] ECR 269, para 4; Case 166/73 *Rheinmühlen II* (n 219), para 2; Case 61/79 *Denkavit* [1980] ECR 1205, para 15; Case 66/80 *International Chemical Corporation* [1981] ECR 1191, para 11; Case 283/81 *CILFIT* [1982] ECR 3415, para 7; Case C-192/89 *Sevince* [1990] ECR I-3461, para 11; Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-10513, para 21; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 27; C-404/06 *Quelle* [2008] ECR I-2685, para 22.

[214] See for example, Joined cases 66, 127 and 128/79 *Meridionale Industria Salumi* [1980] ECR 1237, para 11; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415, para 26; Joined cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA Ltd* [2005] ECR I-10423, para 104.

effective provisions of a directive[215] and their effects on individuals.[216] Article 267 TFEU also aims 'to prevent a body of national case-law that is not in accord with the rules of [EU] law from coming into existence in any Member State'.[217] It is through this system that the Court of Justice is able to exercise indirect supervision of the implementation of directives.[218]

The national courts have the freedom to determine the appropriateness of making a reference to the Court of Justice[219] on the interpretation of a

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[215] See also, as regards directly effective provisions of the Treaty, Case 61/79 *Denkavit* (n 213), para 15; Joined cases 66, 127 and 128/79 *Meridionale Industria Salumi* (n 214), para 8.

[216] Case 26/62 *Van Gend & Loos* [1963] ECR English special edition 1, 11 (the Court of Justice has jurisdiction to interpret the scope of EU law with reference to its effects on individuals).

[217] Case 107/76 *Hoffman-La Roche* [1977] ECR 957, para 5; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, para 8; Case C-337/95 *Christian Dior* [1997] ECR I-6013, para 25;

[218] See further, Capotorti (n 3) 166-167.

[219] Case 166/73 *Rheinmühlen II* [1974] ECR 33, paras 3-5 (a national court has the power, or the obligation if it is a court of last resort, to make a request for a preliminary ruling either of its own motion or at the request of the parties; national courts have discretion to determine appropriateness of making a reference; national rules that bind a lower court by the rulings of a higher court on points of law cannot prevent the lower court from making a preliminary ruling); Case 223/78 *Grosoli* [1979] ECR 2621, para 3 (the Court of Justice has jurisdiction to provide the national court with a ruling on the interpretation of EU law so as to enable that court to determine whether a national measure is compatible with EU law and decide the case before it); Case 283/81 *CILFIT* (n 213), para 15 (national courts and tribunals remain entirely at liberty to make a reference for a preliminary ruling if they consider it appropriate to do so); Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-6763, paras 13 and 16-19 (national courts may also make a request for a preliminary ruling where, in order to prevent reverse discrimination, a Member State enacts a national law that extends the benefit of EU rights of residence to their own nationals and their family members); Case C-378/08 *ERG* [2010] ECR I-1919, para 32 (a lower court must be free to make a request for a preliminary ruling if it considers that following a higher court's judgment could lead it to give a ruling contrary to EU law); Joined cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, para 57 (courts must be free to make a request for a preliminary ruling on whether a national law is compatible with EU law, even if the law is the subject of a pending review before the constitutional court or that court has already ruled on the review of constitutionality); Case C-26/11 *Belgische Petroleum Unie* [2013] ECLI:EU:C:2013:44 (judgment of 31 January 2013) (requests for a preliminary ruling are not limited to cases where one or other of the parties has taken the initiative of raising a point concerning the interpretation of EU law, but also extend to cases where such a question is raised by a national court of its own motion). See further, Woods and Watson (n 189) 229, 236.

directive. However, the courts of last resort have a duty to make a reference to the Court of Justice[220] as to the interpretation of the provisions of a directive, unless the issue is substantially the same as that raised in a previous preliminary ruling[221] (*acte éclairé*)[222] or it is 'so obvious as to leave no scope for any reasonable doubt'[223] (*acte clair*).[224]

Where a reference has been made to the Court of Justice, the resulting judgment is binding not only on the court which made the reference,[225] but on all other national courts.[226]

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[220] Article 267(3) TFEU provides that 'Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court'. See also Case 166/73 *Rheinmühlen II* (n 119), para 3. A court of last resort includes supreme courts, see Case C-224/01 *Köbler* (n 205), paras 34-35, which concerned Austria's *Verwaltungsgerichtshof* (Supreme Administrative Court). It would not cover an appellate court whose decisions are conditional upon a preliminary declaration of admissibility by the supreme court (or the appellate court itself), see (Case C-99/00 *Lyckeskog* [2002] ECR I-4839, paras 16-17. See also Brent (n 31) 306; Woods and Watson (n 189) 234-235.

[221] Joined Cases 28/62, 29/62 and 30/62 *Da Costa* (n 214), 38; Case 283/81 *CILFIT* (n 213), para 13.

[222] Wattel (n 198)178. See further, Brent (n 31) 309; Woods and Watson (n 189) 237.

[223] Case 283/81 *CILFIT* (n 213), para 16; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paras 35-39. In the latter case, the Court of Justice clarified that before deciding an issue is '*acte clair*', a court of last resort 'must in particular be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice', ibid, para 39.

[224] Brent (n 31) 307; Woods and Watson (n 189) 238.

[225] Case 29/68 *Milch-, Fett- und Eierkontor* [1969] ECR 165, para 3; Case 52/76 *Benedetti* [1977] ECR 163, para 26; Case 69/85 *Wünsche* [1986] ECR 947 (Order of the Court of 5 March 1986), para 13; and Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, para 49; Case C-173/09 Elchinov [2010] ECR 163, para 26.

[226] See to that effect, Case 68/74 *Alaimo* [1975] ECR 109, paras 5-8; Case 66/80 *International Chemical Corporation* (n 213), para 13. See further, Brent (n 31) 278-279; Lenaerts, Maselis and Gutman (n 104) 243-246; Broberg and Fenger, (n 212) 450-453. This has been the subject of some contention, see for example Alberto Trabucchi, 'L'effet erga omnes des décision préjudicelles rendues par la Cour de justice des Communautés européennes' (1974) 10 Revue Trimestrielle de droit européen 56-87; AG Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' (1984) 4 Yearbook of European Law 1-77; David Anderson and Marie Demetriou, *References to the European Court* (2nd ed, Sweet & Maxwell 2002), 331-334; Giuseppe Martinico, 'The interpretative rulings of the ECJ as a legal source in the EC law' (2008) St Anna Legal Studies Research Paper 2/2008.

CHAPTER 6. THE OBLIGATIONS CONTAINED IN DIRECTIVE 2004/38[1]

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6.1 Overview

The Free Movement Directive[2] was adopted to replace the previous piecemeal approach to residence rights and consolidate several directives into one.[3]

Directive 2004/38 provides for rights of entry and residence and creates a new right of permanent residence for the benefit of EU citizens and their family members.[4] It also places limitations on the restrictions which Member States can impose on these rights.[5] The instrument also addresses associated

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[1] This chapter incorporates content previously published by the author in 'Five Years of the Citizens Directive - Part 1' (2011) 25 *Journal of Immigration, Asylu m and Nationality Law*, 217-244, and 'Five Years of the Citizens Directive - Part 2' (2011) 25 *Journal of Immigration, Asylum and Nationality Law*, 331-357.

[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 [2004] OJ L 158/77 (hereafter the Free Movement Directive, Directive 2004/38 and the Directive).

[3] Recital 4.

[4] Article 1(b).

[5] Article 1(c).

rights to work[6] and the right of its beneficiaries to enjoy equal treatment with nationals of the host Member State.[7] It also provides citizens with procedural and judicial review safeguards against measures taken to restrict rights granted under the Directive.[8] It therefore provides further expression to the rights of EU citizens contained Articles 18, 20 and 21 TFEU.

The Directive is not intended to diminish the rights granted under the previous residence directives, but to simplify formalities, codify case law and strengthen the rights of EU citizens and their family members.[9]

6.2 Legislative history

Discussions on the introduction of a general directive right of residence can be traced back to the 1970's,[10] but the current Directive started out as a

[6] Article 23.

[7] Article 24.

[8] Articles 15, 27-33, 35.

[9] Recital 3. See also Case C-127/08 *Metock* [2008] ECR I-6241, para 59.

[10] It was during this time that the Commission issue its first proposal on the creation of European citizenship and its first proposal for a directive on the right of residence that extended beyond the 'market citizen': 'Towards European Citizenship', Report from the Commission to the Council, COM(75) 321 and Commission, Proposal for a Council Directive on a Rights of Residence for Nationals of Member States in the Territory of another Member State, COM(79) 215; see further Andrew Evans, 'European Citizenship'(1982) 45 Modern Law Review 497-515, 502, who notes that 'while the Treaty authors apparently approached free movement merely as a means of ensuring that national immigration barriers would not prevent Community nationals moving to those areas of the Community where they were most in demand, the Community institutions saw this freedom as a basis for European citizenship'. For an overview of developments on the concept of European citizenship prior to the adoption of the Maastricht Treaty, see Weiss and Wooldridge (n **Error! Bookmark not defined.**) 164-168; see also R obin White, *Workers, Establishment, and Services in the European Union* (Oxford University Press 2004) 121-122; Espen Olsen, 'The Origins of European Citizenship in the First Two Decades of European Integration' (2008) 15 Journal of European Public Policy 40-57.

proposal from the Commission unveiled in 2001[11] and subsequently amended in 2003[12] to reflect comments from the Council and European Parliament.

While the proposal generated some resistance from the Member States, it was only Austria that voted against.[13] However, as the proposal was subject to qualified majority voting,[14] the measure passed.

The Directive was adopted on 29 April 2004 and had to be transposed by 30 April 2006.[15] It comprises 42 Articles which, for the purposes of the Commission's conformity assessment have been further broken down into 144 separate sub-provisions.[16]

6.3 Territorial Scope

The Directive applies to entry and residence within the entire territory of the Member States in furtherance of the Court of Justice of the European Union's case law.[17] In addition, by virtue of a decision of the EEA Joint Committee,[18] the Directive is incorporated into the EEA Agreement and therefore applies to the European Economic Area comprising all 27 Member

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[11] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2001] OJ C270 E 150, COM(2001) 257 final, 15-16.

[12] Amended proposal for a Directive of the European Parliament and of the Council 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(2003) 199 final.

[13] Council, '2525th meeting of the Council of the European Union (Competitiveness - Internal Market/Industry/Research) held in Brussels on 22 September 2003', ST 12773 2003 INIT, 21 October 2013.

2525ème session du Conseil de l'Union européenne "Compétitivité" (marché intérieur, industrie et recherche), tenue à Bruxelles le 22 septembre 200

[14] Commission, 'Communication from the Commission to the European Parliament and the Council - Effects of the entry into force of the Nice Treaty on current legislative procedures', COM(2003) 61 final, 2.

[15] Article 40.

[16] Information from Commission dated 10 March 2015 (GestDem 2015/1508).

[17] Case 36/75 *Rutili* [1975] ECR 1219, paras 46-48.

[18] Decision 158/2007 of the EEA Joint Committee [2008] OJ L 124/10.

States as well as the three European Free Trade Association states that are parties to the EEA Agreement, namely Norway, Iceland and Liechtenstein. In consequence, the Directive applies to nationals from all EEA States and governs their right to reside with their family members in the EU. Whilst citizens from the EFTA states enjoy the same rights of residence under the Directive as EU citizens do, it should be emphasised that they do not benefit from EU citizenship and therefore would not necessarily benefit from the CJEU's case law on EU citizenship. However, the EFTA Court has ruled that it is of no consequence on that the Directive was partly adopted on the basis of EU Citizenship provisions, since the rights of free movement of economically inactive citizens was established in legal instruments that predated the creation of EU Citizenship.[19]

The Directive does not apply to Switzerland since free movement between the EU and Switzerland is instead regulated by the Agreement on the free movement of persons.[20]

6.4 Beneficiaries of the Directive

The Directive is intended to benefit both EU citizens and their family members whatever their nationality. This poses a number of questions as to how EU citizenship is determined, the situation of dual nationals, whether EU

[19] Case E-26/13 *Gunnarsson* [2014] (judgment of 14 June 2014), paras 79 and 80, in which the EFTA Court ruled that 'it is of no consequence that the rights of economically inactive persons in Directive 2004/38 were adopted by the Union legislature on the basis of Article 21 TFEU on Union Citizenship. … However, the rights of economically inactive persons in Directive 90/365, and also Directives 90/366/EEC (students) and 90/364/EEC (other economically inactive persons), were adopted on the basis of Article 235 EEC prior to the introduction of the concept of Union citizenship. … When Directive 90/365 as well as Directives 90/364/EEC and 90/366/EEC were made part of the EEA Agreement in 1994, these directives conferred rights on economically inactive persons. … However, individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU. These established rights have been maintained in Directive 2004/38.'

[20] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6

citizens can benefit from the Directive when they move to a Member State having previously lived outside the EU.

6.3.1 EU citizens

In order to avail themselves of the Directive's provisions, individuals must first demonstrate that they are EU citizens or the family member of such a citizen. Article 2(1) defines an EU citizen as 'any person having the nationality of a Member State'. This provision is based upon Article 20 TFEU, which specifies that '[e]very national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

This raises the question as to who can be considered a 'national' of a Member State The answer is to be found in a declaration on nationality of a annexed to the Maastricht Treaty[21] which explains that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.' Some Member States have issued declarations on their nationality laws[22], including the UK[23].

As a practical matter, therefore, proof of nationality can be established by presenting a valid passport or identity card issued by one of the Member States.

The situation of dual nationals has been the subject of several judgments from Luxembourg.[24] While a person holding the nationalities of both a Member

[21] Declaration (No 2) on nationality of a Member State annexed to the Final Act of the Maastricht Treaty [1992] OJ C 191/98.

[22] For example, Denmark's position is set out in a unilateral declaration annexed to the so-called 'Edinburgh Decision' concerning certain problems raised by Denmark on the Treaty of European Union [1992] OJ C 348/1.

[23] Declaration as to the meaning of the term 'national' under the British Nationality Act 1948 annexed to the UK's Accession Treaty ([1973] OJ L 73/196), as amended by the Declaration on the definition of "nationals" following the entry into force of the British Nationality Act 1981 ([1983] OJ C 23/1). The latter remains a valid statement of the UK's position following entry into force of the Lisbon Treaty by virtue of Declaration 63 annexed to the Final Act of the Lisbon Treaty [2007] OJ C 306/2, 270.

[24] See for example, C-369/90 *Micheletti* [1992] ECR I-4239; C-179/98 Mesbah [1999] ECR I-7955.

State and a third country will be able to rely on their EU citizenship to claim the benefit of the EU free movement rules, the situation of a person holding the nationalities of two Member States has proved more of a challenge for the Court of Justice. The recent ruling in *McCarthy*,[25] makes it clear that a dual national will only be able to rely on his second nationality in either country of nationality if he has previously exercised his right to free movement. The correctness of this approach has been questioned[26] because it appears at odds with cases such as *Zhu and Chen*,[27] in which the Court of Justice ruled that a child born in the UK with Irish citizenship who had never exercised free movement rights could rely on EU free movement rights.

Although the Member States remain competent to determine who is a national, the creation of EU Citizenship by the Maastricht Treaty has had implications for EU citizens living in European territories not forming part of the EU. In *Eman and Sevinger*,[28] the European Court of Justice was provided the opportunity to examine the situation of Dutch citizens living in Aruba, an overseas territory of the Netherlands. Messrs Eman and Sevinger were Dutch nationals residing in Aruba and were seeking to register on the Dutch register of electors concerning the European Parliament elections in 2004. The Dutch authorities sought to argue that Dutch citizens inhabiting Aruba could not rely on the Treaty while they remained in Aruba because it was a territory subject only to the special arrangements for the association of overseas countries and territories (OCTs). The CJEU unequivocally rejected this argument and held at paras 27 & 29 that for the purposes of art 20 TFEU:

[25] Case C-434/09 *McCarthy* [2011] ECR I-3375, in which the Court held that 'directive [2004/38] is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State', ibid, para 43.

[26] See further Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive - A Commentary* (Oxford University Press 2014) 49-54

[27] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

[28] Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

> 'It is irrelevant, in that regard, that the national of a Member State resides or lives in a territory which is one of the OCTs ....
>
> [P]ersons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article [355(2)] may rely on the rights conferred on citizens of the Union in Part Two of the Treaty [which concerns non-discrimination and citizenship of the EU].'

As a result, the fact that an EU citizen and their family members may be residing in a European overseas country or territory immediately prior to exercising their rights to reside within the EU under art 20 TFEU should not in any way affect their right to reside in another Member State under the Directive.

6.3.2 Direct Family members

Directive 2004/38 potentially applies to all family members whatever their nationality and whatever the nature of their personal ties to the EU citizen. However, the Directive operates a distinction between close 'family members'[29] and 'other family members'.[30] Although the Directive clearly grants an automatic right of entry and residence to EU citizens and their close family members,[31] the Member States are only required to facilitate the entry or residence of other family members,[32] such as unmarried partners,[33] and enjoy some discretion in this matter.[34]

[29] Article 2(2).

[30] Article 3(2).

[31] Article 3(1).

[32] Article 3(2) which provides that 'the host Member State shall, in accordance with its national legislation, facilitate entry and residence' of other family members based on 'an extensive examination of [their] personal circumstances'.

[33] Article 3(2)(b).

[34] Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519 (judgment of 5 September 2012), para 24, where the Court held that 'each Member State has a wide discretion as regards the selection of the factors to be taken into account' when examining an applicant's personal circumstances.

Direct family members enjoy an automatic right to reside with the EU citizen in the host Member State. Under the Directive, 'family members' are limited to the citizen's spouse[35] or registered partner,[36] the citizen's or spouse/partner's ascendants who are under the age of 21 or who are dependent on the citizen,[37] as well as the dependent parents and other ascendants of the citizen or his spouse/partner,[38] although the dependent parents do not enjoy such an automatic right in the case of students.[39]

Children over the age of 21 who are dependants are also considered as 'family members' if they are dependent upon the EU citizen or his spouse/partner[40]. According to the Commission's guidance[41], the definition of 'family member' extends to adopted children, 'minors who are in custody of a permanent legal guardian' and foster children 'depending upon the strength of the ties in the particular case'. In the case of students, it is only their dependent children (or those of their spouse or registered partner) who enjoy such an automatic right of residence.

According to the Court of Justice 'the status of dependent member of a worker's family is the result of a factual situation, to be assessed in each specific

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[35] Article 2(2)(a).

[36] Article 2(2)(b).

[37] Article 2(2)(c).

[38] Article 2(2)(d).

[39] Article 7(4).

[40] The Commission's original and revised proposals, COM (2001) 157 and COM (2003) 199, included a right of residence for all parents of the citizen or his spouse or registered partner, not just those who are dependent. However, the final text of the Directive as agreed by the Council restricted the scope of art 2(2) to dependent parent, (Council Common Position (EC) No 6/2004 [2004] OJ C 54E/12 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, at p 30).

[41] Commission Communication on guidance for better transposition and 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 (2009) 313 (2 July 2009), at part 2.1.2.

case'.[42] As explained by the Court in *Jia*,[43] albeit in the context of a former directive on residence of workers and their family members[44], dependence constitutes a situation where family members 'need the material support of that Community national or his or her spouse in order to meet their essential needs'.

As to the means of proving such dependence, the Directive merely requires furnishing 'documentary evidence that the conditions laid down therein'[45] are met'.[46] Guidance has previously been given by the Court on the concept of dependence:

> 'the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance .... The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up paid employment.[47]'

In *Jia*, the CJEU indicated further that 'proof of the need for material support may be adduced by any appropriate means, ... while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.'[48]

It should also be noted that the Directive does not require a family member to have already been in a relationship with the EU citizen prior to moving to the host Member State. In *Metock*, the Court held at para 87 that

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[42] Case 316/85 *Lebon* [1987] 2811 at para 17

[43] Case C-1/05 *Jia* [2007] ECR I-1 at para 43.

[44] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968] OJ Spec Ed Series I Volume 1968-II 485, which was drafted in more restrictive terms than the Directive.

[45] Namely, Article 2(2)(d).

[46] Article 8(5)(d).

[47] Case 316/85 *Lebon* (n 42), paras 21-22,

[48] Case C-1/05 *Jia* (n 43), paras 41-42.

‘none of those provisions [of the Directive] requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive.’[49]

The immigration status of a family member seeking to exercise the right of residence under the Directive is also of no concern. Thus, in, the Court has confirmed that it is irrelevant ‘at the time the family member acquires that status [under the Directive] or starts to lead a family life, he resides temporarily in the host Member State pursuant to that State’s asylum laws.’[50]

The definition of ‘family members’ in the Directive includes ‘the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage’.[51] If national law does not recognise registered partnerships, then such partners may still claim the benefit of provisions on ‘other family members’

6.3.3 Other family members

This category of ‘other family member’ applies to all relatives whatever their degree of kinship and therefore extends to siblings, uncles and aunts, nephews and nieces, cousins, etc. What matters is that they must fall within the scope of the distinct situations enumerated in Article 3(2), namely that they are other family members who, in the country they have come from, are either dependent on the EU citizen concerned, or members of the citizen’s household, or reliant on the EU citizen for their personal care due to serious health grounds.[52] Alternatively, unmarried partners need to demonstrate that they are in ‘a durable relationship, duly attested’.[53]

[49] Case C-127/08 *Metock* (n 3).

[50] Case C-551/07 *Sahin* [2008] ECR I-453 (Order of the Court of 19 December 2008), at para 33.

[51] Article 2(2)(b).

[52] Article 3(2)(a).

[53] Article 3(2)(b).

As the Court has previously ruled in *Rahman*,[54] that 'the Member States are not required to grant every application'[55] submitted by other family members and enjoy a wide discretion in considering such applications.[56] Nonetheless, the Court went on to specify it is 'incumbent upon the Member States'[57] when they transpose Article 3(2) 'to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons'.[58]

When selecting such criteria, 'the Member States have a wide discretion' but their choice of 'criteria must be consistent with the normal meaning of the term "facilitate" and of the words relating to dependence … and must not deprive that provision of its effectiveness'.[59]

These various provisions and the sub-provisions they contain can be presented in tabular form as follows:

Transposition Obligations: Beneficiaries				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
1	*Subject*			
1(a)	right of residence	Ancillary	Not applicable	
1(b)	permanent residence	Ancillary	Not applicable	
1(c)	Limitations	Ancillary	Not applicable	
2	*Definitions*			
2(1)	EU citizen	Substantive	No	
	Family member			
2(2)(a)	Spouse	Substantive	No	
2(2)(b)	registered partnership (equivalent to marriage)	Substantive	No	
2(2)(c)	direct descendants (under the age of 21)	Substantive	No	

[54] Case C-83/11 *Rahman* (n 34).

[55] ibid, para 18.

[56] ibid, para 24.

[57] ibid, para 26.

[58] ibid.

[59] ibid.

Transposition Obligations: Beneficiaries				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
2(2)(c)	direct descendants (dependants)	Substantive	No	
2(2)(d)	direct relatives in the ascending line (dependants)	Substantive	No	
3	*Beneficiaries*			
3(1)	EU citizens and family members in terms of Art. 2	Substantive	No	
3(2)(1)(a)	facilitation for dependants in the country of origin	Substantive	Yes	
3(2)(1)(a)	facilitation for members of the household	Substantive	Yes	
3(2)(1)(a)	facilitation for family members on serious health grounds	Substantive	Yes	
3(2)(1)(b)	facilitation for partners (durable relationship duly attested)	Substantive	Yes	
3(2)(2)	procedure (extensive examination, justification)	Substantive	No	

Table 6.4: Transposition obligations for beneficiaries (Articles 2-3 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.5 Entry and Exit

EU citizens have a right to enter a Member State upon simple presentation of their passport or their national identity card.[60]

Whilst it does not appear EU citizens and their family members are being routinely subjected to systematic questioning, it should be observed that the Court of Justice has previously held that 'the only precondition which Member States may impose on the right of entry into their territory of the persons covered by [the Directive] is the production of a valid identity document or passport.'[61]. The Court went on to specify that 'the carrying out of such [border] controls upon entry into the territory of a Member State may, depending on the circumstances, constitute a barrier to the free movement of persons within the Community, a fundamental principle of the [TFEU] to which the [Directive is] intended to give full effect. That would be the case in particular if it were found that the controls in question were carried out in a systematic, arbitrary or unnecessarily restrictive manner.'[62]

[60] Article 5(1).

[61] Case 321/87 *Commission v Belgium* [1989] ECR 997, para 11.

[62] ibid, para 15

Furthermore, in another case,[63] the Court held that 'the obligation to answer questions put by frontier officials cannot be a precondition for the entry of a national of one Member State into the territory of another.' Moreover in that case, the Court was quick to dismiss the UK government's argument that 'it is necessary [for officials] to ask questions in order to verify the validity of the identity documents produced' by remarking that the 'lawfulness of controls as to the validity of the document produced derives from the requirement laid down in Article [4] of [the Directive] that the identity card or passport should be "valid" ' suggesting that questions as to the purpose of a person's entry to another Member State are not in any way related to determining that a travel document is valid.[64]

In case EU citizens present themselves at the border without such travel documents, the Directive also requires the national authorities to enable citizens to prove by all available means that they benefit from the free movement rules.[65] In practice, this is unlikely to happen for EU citizens trying to travel by airplane due to the carrier liability rules that in effect require airlines to check travel documents of all their passengers.[66] As a result, in such circumstances, citizens without travel documents wanting to travel by air will need to be in possession of an emergency travel document or a laissez-passer.

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[63] Case C-68/89 *Commission v Netherlands* [1991] ECR I-2637, para 13,

[64] ibid, para 15

[65] Article 5(4). As regards entry without visas, in Case C-459/99 *MRAX* [2002] ECR I-6591, paras 61-62, where the Court held 'it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148 [now replaced by Directive 2004/38]. … a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.'

[66] Convention implementing the Schengen Agreement, Article 26 (carrier liability).

Member States can only impose restrictions on entry or exit on grounds of public policy, public order or public health,[67] as well as fraud or abuse.[68] EU citizens or their family members who have previously been banned from entering a Member State have a procedural right to request reconsideration of an entry ban where their material circumstances change.[69]

Transposition Obligations: Entry and Exit				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
4	*Right of exit*			
4(1)	right of exit for EU citizens (ID or passport)	Substantive	No	
4(1)	right of exit for TCN family members (passport)	Substantive	No	
4(2)	no visa or equivalent formality	Substantive	No	
4(3)	ID or passport stating the nationality of the holder	Substantive	No	
4(4)	territorial validity of the passport (5 years if MS do not issue ID cards	Substantive	No	Yes – validity of passport
5	*Right of entry*			
5(1)(1)	right of entry for EU citizens (ID or passport)	Substantive	No	
5(1)(1)	right of entry for TCN family members (passport)	Substantive	No	
5(1)(2)	no visa or equivalent formality	Substantive	No	
5(2)(1)	obligation to hold entry visa for TCN members (Reg. No. 539/2001)	Substantive	No	
5(2)(2)	residence card exemption	Substantive	No	
5(2)(3)	facilitation to obtain entry visa	Substantive	No	Yes – procedure must be simpler
5(2)(4)	accelerated procedure for issuing visa, free of charge	Substantive	No	Yes – procedure must be free
5(3)	entry or exit stamp (passport TCN family member carrying residence card)	Substantive	No	Yes – no stamp in passport
5(4)	all opportunities to enter without valid travel documents	Substantive	No	Yes – entry cannot be denied
5(5)	presence report (optional)	Substantive	Yes	

Table 6.5: Transposition obligations for entry and exit (Articles 4 and 5 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.6 The Right of Residence

The Directive distinguishes between an initial unconditional right of residence of up to three months and a right of residence beyond three months

[67] Articles 27-28.

[68] Article 35.

[69] Aricle 32(1).

which is conditional upon citizens being able to support themselves and members of their family.

6.5.1 Residence for first three months

The Directive provides that EU citizens and their family members have a right to residence in any EU state for up to three months without the need to fulfil any conditions,[70] aside from complying with the formalities relating to entry discussed above.

Member States cannot require EU citizens and their family members to register their residence during this period.[71] Member States can only impose restrictions on residence in the first three months on grounds of public policy, public order or public health[72] as well as fraud or abuse.[73] In addition, Member States can take action against EU citizens and their family members to prevent them becoming an unreasonable burden on social assistance.[74]

6.5.2 Residence beyond three months

Beyond the initial three months of unconditional residence following entry, for EU citizens to have a right of residence, they must work,[75] study[76] or be self-sufficient.[77] Workers include all those engaged in genuine and effective work to the exclusion of marginal and ancillary work[78] and includes anyone who performs services under the supervision or control of another in exchange for

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[70] Article 6.

[71] Article 6(1) read in conjunction with Article 8(1).

[72] Articles 27-28.

[73] Article 35.

[74] Article 14(1). See further 6.9 (Restrictions on Entry and Residence).

[75] Article 7(1)(a).

[76] Article 7(1)(c).

[77] Article 7(1)(b).

[78] See for example, Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paras 26.

remuneration.[79] Students must be enrolled on an accredited course.[80] Those who do not work, including students,[81] must have sufficient resources at their disposal not to become a burden on social assistance.[82] They must also hold comprehensive sickness insurance.[83] For students, a declaration to that effect suffices.[84] Proof of sufficient resources can be adduced by any appropriate means and Member States may not impose a fixed amount in his regard.[85] Family members, whatever their nationality, have a right to reside with their EU relative.[86]

It should be noted that the Directive leaves it to the Member States to decide whether they require EU citizens and their family members to obtain residence documentation.[87] Member States may therefore require EU citizens and their family members intending to stay beyond three months to register within three months of their arrival.[88]

To achieve its stated objective of simplifying formalities,[89] the Directive attempts to lays down the formalities governing the issue of registration certificates, residence cards and documents attesting to permanent residence.[90]

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[79] The Court of Justice has consistently held that the status of 'worker' under EU law must be given a wide meaning. The status of 'worker' applies to any person who for a certain period of time performs services for the benefit and under the direction of another person in return for remuneration, provided that these activities are genuine and effective, rather than being on such a small scale as to be considered merely marginal and ancillary, see for example case C-53/81 *Levin* [1982] ECR 1035; para 17; Case C-66/85 *Lawrie-Blum* [1986] ECR 2121, para 21; Case C-337/97 *Meeusen* [1999] ECR I-3289, para 13.

[80] Article 7(1)(c), which requires a student to be 'enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice'.

[81] Article 7(1)(c).

[82] Article 7(1)(b).

[83] Article 7(1)(b) and (c).

[84] Articles 7(1)(c) and 8(3)

[85] Article 8(4).

[86] Article 7(2).

[87] Article 8(1).

[88] Article 8(2).

[89] Recital 3. See also Case C-127/08 *Metock* (n 3), para 59.

[90] Articles 8, 10, 19 and 20.

The Member States are precluded from requiring documents which are not specified in the relevant provisions of the Directive.[91] EU citizens and their family members must be able to prove their rights by all appropriate means.[92] Following their application, EU citizens must immediately be issued with a registration certificate,[93] whereas non-EU family members must be issued with a residence card within six months of submitting their application.[94]

The Directive allows beneficiaries who cease to fulfil the conditions for residence to retain their right of reside in certain circumstances. First, it allows EU citizens who have ceased work to retain the status of a worker.[95] It also gives family members the right to retain residence following the death or departure of the EU citizen[96] or in the event of divorce or termination of a registered partnership.[97]

[91] Recital (14), which specifies that '[t]he supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.' This was also confirmed by the Court Case C-127/08 *Metock* (n 3), para 53.

[92] See for example, Case C-215/03 *Oulane* [2005] ECR I-1215, paras 25 and 53, where the Court held that where 'the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents' and 'where it is not specified which means of evidence are admissible for the person concerned to establish that he comes within one of the categories referred to in Articles 1 and 4 of Directive 73/148, it must be concluded that evidence may be adduced by any appropriate means'.

[93] Article 8(2).

[94] Article 10(1).

[95] Article 7(3) gives workers and the self-employed whose occupational activity has ended a right to retain their status in a number of different circumstances. In addition Case C-507/12 *St Prix* [2014] ECLI:EU:C:2014:2007 (judgment of 19 June 2014), para 47, the Court also recognised that a woman who temporarily gives up work to take care of her new born child retains the status of 'worker' under Article 45 TFEU if she returns to work within a reasonable period of time.

[96] Article 12.

[97] Artice 13.

Member States can only impose restrictions residence beyond three months on grounds of public policy, public order or public health[98] as well as fraud or abuse.[99]

The Directive specifies that EU citizens and their family members have a right of residence as long as they fulfil the conditions found in Article 7.[100] This essentially means that, until they have acquired a right to permanent residence, the Directive requires EU citizens to be able to support themselves and their family members: they must either work, or, in the event they do not work, they must have sufficient resources so as not to become an unreasonable burden on the social assistance system in the host Member State.[101] In this regard, a Member State may take action against EU citizens and their family members in the event they become an unreasonable burden on social assistance.[102]

Transposition Outcomes: Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
6	*Residence (up to three months)*			
6(1)	EU citizens	Substantive	No	
6(2)	TCN family members	Substantive	No	
7	*Residence (more than three months)*			
7(1)(a)	workers or self-employed persons	Substantive	No	
7(1)(b)	sufficient resources and comprehensive sickness insurance cover	Substantive	No	
7(1)(c)	study (comprehensive sickness insurance +assurance of sufficient resources)	Substantive	No	
7(1)(d)	Family member	Substantive	No	
7(2)	TCN family members	Substantive	No	
7(3)(a)	retention in case of illness or accident	Substantive	No	
7(3)(b)	involuntary unemployment after 1 year of employment	Substantive	No	
7(3)(c)	involuntary unemployment after fixed-term contract (less than 1 year)	Substantive	No	
7(3)(d)	vocational training (after previous employment)	Substantive	No	

98 Articles 27-28.

99 Article 35.

100 Article 14(2).

101 See further, Section 6.9 (Restrictions on Entry and Residence) and Section 6.10 (Procedural Safeguards and Rights of Appeal).

102 Article 14(2) read in combination with recital (16). See further, Section 6.9 (Restrictions on Entry and Residence).

Transposition Outcomes: Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
7(4)	special rules concerning family members of students	Substantive	No	
8	*Administrative formalities for EU citizens*			
8(1)	option: register	Substantive	Yes	
8(2)	deadline to register	Substantive	No	
8(2)	immediate issue of registration certificate	Substantive	No	Yes – immediate issue of reg. certificate
8(2)	Sanctions	Substantive	Yes	
8(3)	documents required from workers or self-employed persons	Substantive	No	Yes – no other documents can be requested
8(3)	documents required from self-sufficient persons	Substantive	No	Yes – no other documents can be requested
8(3)	documents required from students	Substantive	No	Yes – no other documents can be requested
8(4)	no fixed amount with regard to 'sufficient resources'	Substantive	No	Yes – no min. limit can be fixed
8(5)	documents required from EU family members	Substantive	No	Yes – no other documents can be requested
9	*Administrative formalities for family members who are not EU citizens*			
9(1)	issue a residence card	Substantive	No	
9(2)	deadline for submission	Substantive	No	
9(3)	Sanctions	Substantive	Yes	
10	*Issue of residence cards*			
10(1)	title of the residence card	Substantive	No	
10(1)	issue deadline of six months	Substantive	No	Yes – issue of res. card within six months
10(1)	certificate of application	Substantive	No	Yes – immediate issue of cert. of application
10(2)	documents required from TCN family members	Substantive	No	Yes – no other documents can be requested
11	*Validity of the residence card*			
11(1)	period of validity	Substantive	No	
11(2)	temporary absences	Substantive	No	
12	*Retention of the right of residence in the event of death or departure of the EU citizen*			
12(1)	retention of residence of EU family members - death/departure	Substantive	No	
12(1)	conditions for the right of permanent residence	Substantive	No	
12(2)	retention of residence of TCN family members - death of the EU citizen	Substantive	No	
12(3)	child in education and parent having custody - departure of the EU citizen	Substantive	No	
13	*Retention of the right of residence in the event of divorce, annulment of the marriage or termination of registered partnership*			
13(1)	EU family members	Substantive	No	

Transposition Outcomes: Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
13(1)	conditions for the right of permanent residence	Substantive	No	
13(2)	TCN family members	Substantive	No	
13(2)(a)	3 years of marriage, including 1 year in the host MS	Substantive	No	
13(2)(b)	custody of the EU citizen's children	Substantive	No	
13(2)(c)	domestic violence	Substantive	No	
13(2)(d)	right of access to a minor child in the host MS	Substantive	No	
13(2)	conditions for the right of permanent residence	Substantive	No	
13(2)	exclusively on personal basis	Substantive	No	
14	*Retention of the right of residence*			
14(1)	retention of the right of residence under Art. 6	Substantive	No	
14(2)	retention of the right of residence under Art. 7, 12, 13	Substantive	No	

Table 6.6: Transposition obligations for residence (Article 6-14 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.7 The Right of Permanent Residence

One of the notable innovations of the Directive was that it created a right of permanent residence for the benefit of all EU citizens, not just for former workers or the self-employed as was previously the case.[103] Recital (17) explains the basis for such a novelty:

> 'Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance

[103] The right of permanent residence was previously only granted under EU law to workers and the self employed under Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ English special edition: Series I Chapter 1970 (II), 402, art 3(2), and Council Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] OJ L14/10, art 3(2). These provisions have now been incorporated into Article 17 of Directive 2004/38.

with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.'

In order to claim permanent residence under the Directive, EU citizens[104] and their non-EU family members[105] must have been 'legally' residing in the host Member State for at least five years. During this time, they must not have been absent from the host for more than 6 months, or for a longer period in the event of compulsory military service.[106] A permitted absence of a maximum of twelve consecutive months is also allowed for important reasons.[107]

While family members of an EU citizen who are not EU citizens must demonstrate that they have resided with the EU citizen in the host Member State, this does not necessarily mean that the family members must have resided under the same roof as the EU citizen.[108]

Following the submission of an application, EU citizens must be issued with a document attesting to permanent residence as soon as possible,[109] whereas non-EU family members must be issued with a permanent residence card within six months.[110]

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[104] Article 16(1).

[105] Article 16(2).

[106] Article 16(3).

[107] Ibid. This would include such as pregnancy and childbirth, serious illness, study or vocational training, or a posting as a worker in another Member State or a third country. It is also clear from the travaux préparatoires that such temporary absences should not affect continuity of residence under Article 21 from the Commission's original proposal (n 11) 17: 'The duration of permitted absences not affecting continuity of residence has been extended to six months or more than six months where there are special reasons, such as compulsory military service, pregnancy and childbirth, study or work away.'

[108] Case 267/83 *Diatta* [1985] ECR 567, paras 18 and 22, where the Court held that '[a] requirement that the family must live under the same roof permanently cannot be implied' and that family members 'are not necessarily required to live permanently with [the EU citizen] in order to qualify for a right of residence'. See also Case C-244/13 *Ogieriakhi* [2014] ECLI:EU:C:2014:2068 (judgment of 10 July 2014), paras 37 and 47.

[109] Article 19(2).

[110] Article 20(1).

The Directive also foresees circumstances where workers or the self-employed are able to acquire permanent residence before having resided in the host Member State for a continuous period of five years, for example upon reaching retirement age.[111] Once acquired permanent residence can only be lost after absence from the host Member State of more than two years.[112]

Transposition Obligations: Permanent Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
16	*General rule for EU citizens and their family members*			
16(1)	legal residence during 5 years	Substantive	No	
16(1)	not subject to the Chapter III conditions	Substantive	No	
16(2)	TCN family members	Substantive	No	
16(3)	temporary absences	Substantive	No	
16(4)	only lost through absences exceeding 2 years	Substantive	No	
17	*Exemptions for persons no longer working in the host Member State*			
17(1)(a)	worker who reaches retirement age after working at least a year	Substantive	No	
17(1)(a)(2)	retirement age (60) in case national law is silent	Substantive	No	
17(1)(b)	worker permanently incapable of working (min. 2 prior years of residence)	Substantive	No	
17(1)(c)	worker who has worked at least three years but then becomes cross-border worker	Substantive	No	
17(1)(c)(1)	periods of employment under (a) and (b)	Substantive	No	
17(1)(c)(2)	periods of involuntary unemployment etc. count as employment	Substantive	No	
17(2)	exemption from periods under (a) or (b) if citizen's spouse or partner is national or ex-national	Substantive	No	
17(3)	right of permanent residence of family members	Substantive	No	
17(4)(a)	family members acquire PR upon death of worker (if worker resided for min. 2 years)	Substantive	No	
17(4)(b)	family members acquire PR upon death of worker (if of worker's death result accident at work)	Substantive	No	

[111] Article 17. These incorporate the former provisions of Regulation 1251/70 (n 103) and Directive 75/34/EEC (n 103).

[112] Article 16(4).

Transposition Obligations: Permanent Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
17(4)(c)	family members acquire PR upon death of worker (if worker spouse is ex-national)	Substantive	No	
18	*Acquisition of the right of permanent residence by certain family members who are not EU citizens*			
18	permanent residence of family members having retained right of residence under Art. 12 or 13	Substantive	No	
19	*Document certifying permanent residence for EU citizens*			
19(1)	Document certifying permanent residence for EU citizens	Substantive	No	
19(2)	Document certifying permanent residence to be issued as soon as possible	Substantive	No	Yes – doc to be issued as soon as possible
20	*Permanent residence card for family members who are not nationals of a Member State*			
20(1)	issue deadline six months; automatic renewability	Substantive	No	Yes – issue of res. card within six months
20(2)(1)	submission before expiration of the residence card	Substantive	No	
20(2)(2)	Sanctions	Substantive	Yes	
20(3)	temporary absences	Substantive	No	
21	*Continuity of residence*			
21	continuity of residence can be proved by any means; expulsion breaks continuity	Substantive	No	

Table 6.7: Transposition obligations for permanent residence (Article 16-21 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.8 Equality of Treatment

EU citizens and their family members who reside in a host Member State must enjoy equal treatment with nationals of that Member State under the Directive.[113] This right is derived from art 18 TFEU that prohibits 'any discrimination on grounds of nationality'. In addition, the Directive grants a

[113] Article 24(1).

right to work (in an employed or self-employed capacity) to family members who have a right of residence irrespective of their nationality.[114]

For example, these rights would allow family members who are not EU citizens to rely on the Professional Qualifications Directive[115] in order to gain entry to a regulated profession in the host Member State.[116]

However, the possibility of 'other family members' whose residence is facilitated under Article 3(2) to claim equality of treatment is unclear and has not been the subject of any ruling from the Court of Justice at present.

The right to equal treatment under the Directive is not absolute. The Directive explicitly limits the scope of the right of equal treatment in relation to 'social assistance' according to the nature of the citizen's activity and the length of residence and in the host Member State.[117]

As a result, a distinction needs to be made according to the circumstances surrounding the nature and duration of residence. During the first three months of their residence, Member States are not obliged to grant social assistance to EU citizens and their family members except for workers and the self-employed.[118] During the time they are looking for a job, Member States are not obliged to grant social assistance to job-seekers and their family members.[119] Workers, the self-employed and those having retained the status

[114] Article 23.

[115] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2006] OJ L255/22.

[116] See to that effect, Case C-229/07 *Mayeur* [2008] ECR I-8 (Order of the Court of 21 January 2008), para 20 *a contrario*; Commission, 'FAQs on Directive 2005/36, D/3418/5/2006' (2008), part 8.

[117] Article 24(2).

[118] Article 24(2) read in conjunction with Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

[119] Article 24(2) read in conjunction with Article 14(4)(b).

of worker, together with their family members, have a right to social assistance after three months of residence, including financial assistance for studies.[120]

However, until such time as they have acquired permanent residence, students and self-sufficient persons, together with their family members, can obtain social assistance depending on their degree of integration in the host Member State but only to the extent that they do not become an unreasonable burden on the social assistance system of the host Member State.[121] Moreover, Member States are not obliged to grant 'maintenance aid for studies, including vocational training, consisting in student grants or student loans' to students or self-sufficient persons and their family members until they have acquired permanent residence.[122] Once permanent residence is acquired, equal treatment is absolute and therefore permanent residents whatever the nature of their activity have an absolute right to social assistance under the same conditions as nationals of the host Member State.[123]

Transposition Obligations: Equal Treatment				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
23	*Related rights*			
23	right to work	Substantive	No	
24	*Equal treatment*			
24(1)	equal treatment	Substantive	No	
24(2)	derogation with regard to social assistance	Substantive	Yes	
24(2)	derogation with regard to maintenance aid for studies	Substantive	Yes	
25	*General provision concerning residence documents*			
25(1)	possession of residence docs cannot be made precondition for exercise of rights	Substantive	No	
25(2)	charge for residence docs not to exceed charge for issuing nationals with similar documents	Substantive	No	

Table 6.8: Transposition obligations for equality of treatment (Article 23-25 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

[120] Article 24(2) read in conjunction with Article 7 of Regulation 492/2011 (n 118).

[121] Article 24(1) read in conjunction with Article 14(3) .

[122] Article 24(2). See further Case C-158/07 *Förster* [2008] ECR I-8507.

[123] Article 24(2) read in conjunction with Article 16(1).

6.9 Restrictions on Entry and Residence

Member states are entitled to take measures to remove EU citizens from their territory where their presence constitutes a threat to the public interest or they engage in abuse.

Under the Directive, Member States may take measures to restrict the free movement and residence of EU citizens and their family members on grounds of public order or public security, where their conduct represents a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[124]

Member States may only take measures in the first three months on grounds of public health if the individual is infected with a contagious disease as defined by the World Health Organisation.[125]

Under Article 28 of the Directive before a Member State can proceed to deport an EU citizen (or his family member) as a result of his personal conduct, the national authorities must make an individual assessment of the person's situation including 'how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin'.[126] A citizen who is the subject of an expulsion must be provided with extensive procedural safeguards contained, including a right of appeal.[127]

The mere fact that a person commits a criminal offence cannot of itself justify deportation of that person.[128] The Court has previously held that a 'previous criminal conviction can therefore be taken into account only in so far

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[124] Articles 27.

[125] Article 29.

[126] Article 28(1).

[127] Articles 30-31. See further Section 6.10 (Procedural Safeguards and Rights of Appeal).

[128] Case C-50/06 *Commission v Netherlands* [2007] ECR I-4383 at para 41. See also Article 33(1).

as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy'.[129]

In *Jipa*,[130] the Court also added that 'measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned, and justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.' In all cases, the national authorities will need to ensure that 'the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it'.[131]

The Directive foresees escalating levels of protection according to the level of integration of EU citizens and their family members in the host Member State. Thus, those who enjoy a permanent right of residence can only be deported on 'serious grounds of public policy or public security'.[132] EU minors cannot be deported except on 'imperative grounds of public security or public policy' and only when it is in the best interests of the child to do so (art 28(3)(b)). Likewise, EU citizens who have resided in the host Member State for over ten years can only be deported on 'imperative grounds of public security or public policy'. The Court has explained what such 'imperative grounds' might be in and how the national authorities should go about determining when the deportation of a permanent resident may be justified *Tsakouridis*.[133]

As has already been mentioned, Member States may take action against EU citizens and their family members if they become an unreasonable burden on social assistance. This requires the host authorities to make an individual

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[129] ibid, para 43. See also Article 33(1).

[130] Case C-33/07 *Jipa* [2008] ECR I-5157, para 24.

[131] Ibid, para 30.

[132] Article 28(2).

[133] Case C-145/09 *Tsakouridis* [2010] ECR I-11979, at paras 49-53

assessment of a person's situation to determine whether or not they have become an unreasonable burden on the state's social assistance system.[134]

Member States are also permitted to '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.'[135] Any such measures must be proportionate and subject to the procedural safeguards and rights of appeal.[136]

Any sanctions which Member States impose for breaching the national implementing measures adopted to give effect to the Directive must be proportionate and effective.[137]

Transposition Obligations: Restrictions on Entry and Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
22	*Territorial scope*			
22	right of residence extends to entire MS; territorial restrictions must be same as for nationals	Substantive	No	
26	*Checks*			
26(2)	sanctions			
27	*General principles*			
27(1)(1)	restriction based on grounds of public policy, public security or public health	Substantive	No	
27(1)(2)	not for economic ends	Substantive	No	
27(2)(1)	principle of proportionality	Substantive	No	
27(2)(1)	based on the personal conduct	Substantive	No	
27(2)(2)	serious threat to one of the fundamental interests of the society	Substantive	No	
27(2)(2)	no considerations of general prevention	Substantive	No	
27(3)	host MS may request police record from MS of origin before issuing residence docs	Substantive	Yes	
27(4)	right of re-entry of expelled citizens in home MS	Substantive	No	
28	*Protection against expulsion*			
28(1)	obligation to take account of considerations relating to citizen's situation	Substantive	No	
28(2)	persons who have permanent residence (only fpr serious grounds of public policy or public security)	Substantive	No	
28(3)(a)	persons having resided for 10 years (only for imperative grounds of public security)	Substantive	No	

[134] Article 14(1) during the first three months of residence and thereafter under Article 14(2) read in combination with recital (16). See further, Section 6.10 (Procedural Safeguards and Residence Rights).

[135] Article 35.

[136] ibid.

[137] Article 36.

Transposition Obligations: Restrictions on Entry and Residence				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
28(3)(b)	minors (only for imperative grounds of public security) unless expulsion is in best interests of the child	Substantive	No	
29	*Public health*			
29(1)	definition of diseases with epidemic potential	Substantive	No	
29(2)	no expulsion based on diseases occuring after 3 months of residence	Substantive	No	
29(3)	option: require of a medical examination	Substantive	Yes	
35	*Abuse of rights*			
35(1)	Option: measure against abuse of rights	Substantive	Yes	
35(2)	principle of proportionality + procedural safeguards	Substantive	No	
36	*Sanctions*			
36	Effective and proportionate sanctions	Substantive	Yes	

Table 6.9: Transposition obligations for restrictions on entry and residence (Article 22, 27-29, 35-36 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.10 Procedural Safeguards and Rights of Appeal

Whenever a Member State takes action to restrict the free movement of EU citizens and their family members, the latter are entitled to a certain number of procedural rights in all cases.

The Directive provides that EU citizens and their family members who are the subject of a decision that restricts their rights on grounds of public policy, public security or public health are 'to be notified in writing … in such a way that they are able to comprehend its content and the implications for them.'[138] This notice must set out the precise reasons for the measure in full[139] and must 'specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State'[140] which cannot be less than a month except 'in duly substantiated cases

[138] Article 30(1).

[139] Article 30(2).

[140] Article 30(3).

of urgency'.[141] The Directive also provides for specific protections as regards expulsion[142] and exclusion orders.[143]

Furthermore, Article 15 further specifies that these safeguards 'shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health'.[144] The Directive does not provide for any cases where EU citizens or their family members may be denied a right of appeal.[145]

This would be the case where a Member State takes action against EU citizens or their family members in the event they become an unreasonable burden on social assistance.[146] However, mere recourse to social assistance should not automatically result in expulsion.[147] Instead, the 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'[148] before proceeding to expel an EU citizen or family member. Article 15 requires that in such cases the person is entitled to the procedural safeguards contained in Article 30 (notification) and Article 31 (appeal rights). Moreover, in such cases the person

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[141] ibid.

[142] Article 33.

[143] Article 32.

[144] This would include decisions taken on the basis of Article 14, where the person has become an unreasonable burden on social assistance and Article 35 in case of abuse of rights or fraud. It would also cover decisions refusing an application for a residence document or withdrawing the recognition of a right of residence on the basis of Article 14(2) where the person no longer fulfils the conditions for having a right of residence under Article 7.

[145] Recital (26).

[146] Article 14(2) read in combination with recital (16).

[147] Article 14(3).

[148] Recital (16). See for example, Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565 (judgment of 19 September 2013), para 69

concerned cannot be subject to a ban on entry.[149] Workers and jobseekers benefit from enhanced protection against expulsion.[150]

However, the Directive is silent on how to deal with the situation of an EU citizen who ceases to have a right to reside in the UK because he no longer fulfils the requirements of the Directive,[151] but who cannot be expelled by the UK authorities unless and until he becomes an unreasonable burden on the social assistance system[152] or his personal conduct constitutes a 'genuine, present and sufficiently serious threat' to public order or public security.[153] The Court of Justice has yet to rule on this issue.

Transposition Outcomes: Procedural safeguards and rights of appeal				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
14	*Retention of right of residence*			
14(2)	verification of residence rights	Substantive	No	
14(3)	no automatic expulsion in case of recourse to social assistance	Substantive	No	
14(4)(a)	no expulsion of workers or self-employed persons	Substantive	No	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Substantive	No	
14(4)(a)	no expulsion of workers or self-employed persons	Substantive	No	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Substantive	No	
14(4)(a)	no expulsion of workers or self-employed persons	Substantive	No	
15	*Procedural safeguards*			
15(1)	procedures provided for by Art. 30, 31 shall apply by analogy	Substantive	No	
15(2)	no expulsion in case of expiry of ID or passport	Substantive	No	
15(3)	no ban on entry for expulsion decision taken on other grounds	Substantive	No	
26	*Checks*			
26(1)	option to carry out checks	Substantive	YesT	

[149] Article 15(3).

[150] Article 14(4).

[151] Namely the conditions set out in Article 7.

[152] Article 14(3) read in conjunction with recital (14).

[153] Article 27(2).

Transposition Outcomes: Procedural safeguards and rights of appeal				
Article	Content	Nature	Transposition Discretion?	Specific Factual outcome?
30	*Notification of decisions*			
30(1)	notification in writing	Substantive	No	
30(2)	full and precise information of the public policy, public security, public health grounds			
30(3)	advising of legal remedies	Substantive	No	
30(3)	citizen must be allowed one month for leaving MS, except if duly substantiated urgency	Substantive	No	
31	*Procedural safeguards*			
31(1)	right to judicial review or appeal	Substantive	No	
31(2)	interim order suspends removal	Substantive	No	
31(3)	redress procedure (legality and facts; proportionality)	Substantive	No	
31(4)	right to submit defence in person (fair trial)	Substantive	No	
32	*Duration of exclusion orders*			
32(1)	right to submit an application for lifting exclusion order within three years	Substantive	No	
32(1)	decision within six months of the submission	Substantive	No	
32(2)	no obligation for MS to allow entry during consideration of application	Substantive	No	
33	*Expulsion as a penalty or legal consequence*			
33(1)	Expulsion may not be imposed as penalty unless Art. 27, 2 8, 29 are respected	Substantive	No	
33(2)	Right to re-evaluation of expulsion order after 2 years	Substantive	No	
35	*Abuse of rights*			
35(2)	principle of proportionality + procedural safeguards	Substantive	No	

Table 6.10: Transposition obligations for procedural safeguards and rights of appeal (Article 14-15, 30-33, 35 of Directive 2004/38)

Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

6.11 Ancillary Provisions

The Directive also contains a number of ancillary provisions, some of which impose obligations on the Member States.

These include provisions relating to transposition. Member States were required to have transposed the Directive into national law by 30 April 2006 and communicate details of the national implementing measures.

Member States are also under an obligation to 'disseminate information concerning the rights and obligations' arising under the Directive.[154] This presupposes that such information is accurate, consistent and available in different formats.

[154] Article 34.

Lastly, the Directive also permits Member States to adopt rules that provide for more favourable treatment that what is prescribed by its provisions.[155]

Ancillary Provisions				
Article	Content	Nature	Transposition required?	Specific action required?
1	*Subject*			
1(a)	right of residence	Ancillary	No	No
1(b)	permanent residence	Ancillary	No	No
1(c)	Limitations	Ancillary	No	No
34	*Publicity*			
34	MS obligation to disseminate information on rights and obligations contained in Directive	Ancillary	No	Yes – MS to inform public of contents of Directive
38	*Repeals*			
38(1)	[Repeal of Art Reg 1612/68]	Ancillary	No	No
38(2)	Repeal of directives	Ancillary	No	No
38(3)	References to repealed directives to be read as ref to Directive	Ancillary	No	No
39	*Reporting*			
39	Report by Commission to EP and Council	Ancillary	No	Not from MS
40	*Transposition*			
40(1)	Deadline for transposition 30 April 2006	Ancillary	No	Yes – MS to adopt NIMs by deadline
40(2)	Communication of NIMs and correlation table	Ancillary	No	Yes – MS to notify NIMs by deadline
41	*Entry into force*			
41	Entry into force on day of publication in OJ	Ancillary	No	No
42	*Addressees*			
42	Directive addressed to MS	Ancillary	No	No

Table 6.11: Ancillary provisions (Articles 1, 38-42 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

[155] Article 37.

CHAPTER 7. THE IMPLEMENTATION OF THE DIRECTIVE IN BELGIUM

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7.1 Transposition in Belgium

7.1.1 Overview

Belgium has implemented the Directive primarily on the basis of the Law of 25 April 2007[1] which amends Belgium's law relating to the entry, residence, settlement and removal of foreigners.[2] The amendments came into force on 1 June 2008. This is further complemented by an implementing Royal Decree[3] which was amended in 2008.[4] These instruments have been amended on several occasions.[5] At the same time, a second further implementing Royal Decree was adopted concerning registered partnerships recognised as equivalent to marriage, proof of durable relationship and registration

[1] *Loi du 25 avril 2007 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 10-05-2007, p 25752)* (Law of 25 April 2007 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners).

[2] *Loi du 15 décembre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 31-12-1980, p 14584)* (Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the 'Immigration Law' or the 'Law').

[3] *Arrêté royal du 8 octobre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 27-10-1981, p 13740)* (Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the 'Royal Decree (1980 amended)').

[4] *Arrêté royal du 7 mai 2008 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 13-05-2008, p 25092)* (Royal Decree of 7 May 2008 amending the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the 'Royal Decree (2008/I)').

[5] The relevant modifications affecting the transposition of the Directive will be subsequently referred to where appropriate.

formalities for EU citizens.[6] Several Ministerial circulars have been published,[7] and some guidance has been made public.[8]

Overall, the original transposition of the Directive can be categorised as passable when compared to other Member States, although it was slightly below the average across Member States as table 7.1.1 illustrates. Belgium's transposition outcome have been assessed as 'satisfactory in both quantitative and qualitative terms. However, some relevant provisions have been implemented in Belgian law by making reference to the existing practices of the administration which is not an appropriate implementation of the Directive ***per se.***'[9]

Compared to other Member States,[10] Belgium's transposition resulted in several provisions of the Directive being drafted on more favourable terms than provided the Directive, as permitted by Article 37.

This was notably the case as regards the acquisition of permanent residence, which could be acquired after three years in the case of workers and

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[6] ***Arrêté royal du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 13-05-2008, p 25090)*** (Royal Decree of 7 May 2008 implementing certain measures relating to Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the 'Royal Decree (2008/II)').

[7] These are available on the website of the Belgian Immigration Office <https://dofi.ibz.be/sites/dvzoe/FR/Pages/Circulaires.aspx> accessed 1 July 2015.

[8] This is available on the website of the Belgian Immigration Office <https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures/Pages/default.aspx> accessed 1 July 2015. In addition, unofficial guidance in use by municipal administrations is published, see F Duterme, ***Collection Orange, Sous-collection*** Etrangers (Vanden Broele 2014); idem Guide du Guichetier – Etrangers (Vanden Broele 2015).

[9] European Citizen Action Service, 'Comparative study 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' (PE 410.650, European Parliament 2009) (hereafter 'ECAS comparative study') 51.

[10] Member States transposed on average 12 provisions on more favourable terms than what is provided by the Directive, see Information from Commission dated 10 March 2015 (GestDem 2015/1508)

self-sufficient persons.[11] However this provision was subsequently amended[12] and the period of residence relating to the acquisition of permanent residence was aligned with the Directive.[13]

The approach that Belgium has chosen to transpose the Directive consists in the parliamentary enactment of consolidating legislation that amends the unitary law governing the entry and residence of non-nationals on Belgian territory. The drafting tends to follow an elaborative approach to transposition.[14]

Transposition Outcomes Belgium			
	BE (2008)	**BE (2015)**	**EU average**
Total provisions of Directive to be transposed			*144*
Provisions correctly transposed	82	94	90
Provisions subject to more favourable transposition	15	14	12
Provisions subject of compliant transposition	*97*	*108*	*102*
Level of compliance of transposition	**67%**	**75%**	**71%**
Provisions that are transposed ambiguously	14	5	8
Provisions that are transposed incorrectly or incompletely	26	22	23
Provisions not transposed (failure to transpose)	7	9	12
Provisions subject of non-compliant transposition	*38*	*36*	*43*
Level of non-compliance of transposition	**33%**	**25%**	**29%**

Table 7.1.1 Transposition outcomes (Belgium)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

The European Commission opened infringement proceedings against Belgium for incorrect transposition of the Directive in 2011.[15] As a result, several

[11] Art 42quinquies, §1, para 1.

[12] *Loi-programme du 28 juin 2013 (MB 01-07-2013, p 41480)* (Framework Law of 28 June 2013), art 18.

[13] Article 16 provides for the acquisition of permanent residence after five years of continuous lawful residence in the host Member State.

[14] See Chapter 3, Section 3.4 (Implications for the Drafting of National Implementing Measures). Only twelve provisions were identified as following a literal approach to transposition, namely Articles 2(2)(a), 7(1)(a), 7(3)(c), 7(3)(d), 16(3), 16(4), 17(1)(c), second sentence, 27(2) (four provisions) and 29(2).

[15] Commission, Case 2011/2033 concerning Belgium's incorrect transposition of Directive 2004. The infringement action was initiated on 29 September 2011 by the sending of a Letter of Formal Notice. A Reasoned Opinion was issued on 21 February 2013. The case has not been closed.

amendments have been made which overall has led to improvements in the outcome of transposition of the Directive in Belgium. However, the infringement case officially remains open.

7.1.2 Legislative history

Belgium is a federal state[16] in which specific competences relating to persons may be attributed to the federated level.[17] Matters relating to the entry, residence, settlement and removal of foreigners are only attributed to the federated level insofar as integration policies are concerned.[18] As a result, the competence to enact other measures relating to the entry, residence, settlement and removal of foreigners remains within the competence of the federal government.[19] The Belgian legislative framework relating to immigration is contained in a unified law governing the situation of both EU citizens and non-EU citizens.[20]

A draft bill from the government is subject to mandatory review by the Belgian Council of State.[21] The bill is then finalised and submitted by the government exercising the Royal prerogative[22] to the Chamber of Representatives[23] in matters relating to the fulfilment of Belgium's EU

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[16] Article 1 of the Belgian Constitution.

[17] Article 128 of the Belgian Constitution.

[18] *Loi spéciale du 8 août 1980 de réformes institutionnelles (MB 15-08-1980, p 9434)* (Special Law on Institutional Reforms of 8 August 1980), art 5 §1, II, 3°.

[19] Serge Gutwirth, Paul de Hert and Pieter Paepe, 'Conformity Study for Belgium' 18, Annex to Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008) (hereafter 'Conformity Study for Belgium').

[20] Immigration Law (n 2).

[21] *Lois coordonnées du 12 janvier 1973 sur le Conseil D'État (MB 21-03-1973, p 3461)* (Consolidated Law of 12 January 1973 on the Council of State), art 3.

[22] Note that according to art 37 of the Belgian Constitution, the King is vested with federal executive powers. Under art 36 the King exercises federal legislative powers jointly with the House of Representatives and the Senate. However, under art, no act may be taken by the King without being countersigned by a minister.

[23] Belgian Constitution, art 75, para 2, 78 §1, 3°.

obligations.[24] Once the bill has been adopted by the Chamber of Representatives, it must be sent to the Senate.[25] Approval of the bill from both Chambers of the Belgian Federal Parliament is required[26] and must be sanctioned by the government in exercise of the Royal prerogative.[27]

Belgium was late in transposing the Directive.[28] Two months after receiving a letter of formal notice from the Commission[29] concerning the failure to notify its national implementing measures under Article 40 of the Directive,[30] a draft proposal[31] was submitted by the Belgian Ministry of the Interior for review by the Belgian Council of State,[32] which rendered its opinion in late September 2006.[33]

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[24] ibid, art 169. See also *Sénat et Chambre des Représentants, 'Etat des lieux de la transposition des directives européennes en droit belge – 8 décembre 2011'* 5-13691/1, 53/1966/001 (Senate and House of Representatives, 'State of play of the transposition of European Directives in Belgian law – 8 December 2011').

[25] ibid, art 75, para 2, 78 §1, 3°.

[26] ibid, arts 36 and 77.

[27] ibid, art 109; on the Royal prerogative, see n 22.

[28] The Belgian Immigration Office issued a circular to the municipal authorities explaining the administrative consequences of this delay on residence formalities, see *Office des Étrangers,* ***'Circulaire relative au dépassement du délai de transposition de la Directive 2004/38 relative au séjour des ressortissants UE et des membres de leur famille (MB 26-05-2006, p 26809)*** **(Immigration Office, Circular relating to the expiry of the deadline for transposition of Directive 2004/38 relating to residence of EU citizens and their family members)**

[29] See further Chapter 5, Section 5.2.2 (Infringement action by the Commission).

[30] Commission, Letter of Formal Notice, Case 2006/0371 (1 June 2006). See further Commission, 'Staff Working Document – Annex to the 24th Annual Report on Monitoring the Application of Community Law (2006) - COM(2007) 398 final', SEC(2007) 976, Annex IV, Part 2, 219-220.

[31] *Avant-projet de loi du 26 août 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (Draft bill of 26 August 2008 to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners).

[32] *Lois coordonnées du 12 janvier 1973 sur le Conseil D'État (MB 21-03-1973, p 3461)* (Consolidated Law of 12 January 1973 on the Council of State), art 3.

[33] *Conseil d'État, avis N° 41.220/4, 25/09/2006* (Council of State, Opinion No 41.220 of 25 September 2006)

A bill to amend the law for the transposition of the Directive was sent to the Chamber of Representatives on 11 January 2007.[34] This followed on from the receipt of a reasoned opinion from the Commission[35] in December 2006.[36] The bill sought to transpose both Directive 2004/38 and the Long Term Residence Directive.[37,38] The bill was approved Chamber of Representatives on 22 March 2007[39] and by the Senate on 12 April 2007.[40] The bill received Royal approval and became law on 23 April 2007.[41] However, it required an enabling decree to bring it into force.[42]

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[34] *Chambre des Représentants de Belgique, 'Projet de loi modifiant la loi du 15 decembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers - 11 janvier 2007', Doc 51 2845/001* (House of Representatives, 'Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners', 11 January 2007).

[35]See further Chapter 5, Section 5.2.2 (Infringement action by the Commission).

[36] Commission, Reasoned Opinion, Case 2006/0371 (12 December 2006) concerning Belgium's non-communication of national implementing measures. The case was reportedly referred to the Court of Justice on 17 October 2007 but withdrawn on 5 June 2008. See further Commission, 'Staff Working Document – Annex to the 26th Annual Report on Monitoring the Application of Community Law (2008) – COM(2009), SEC (2009), Annex IV, Part 2, 172-173; Royal Decree (2008/I) (n 4), first recital.

[37] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

[38] The bill also sought to exercise the option under Article 11(2)(d) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 to search asylum applicants and the items they carry.

[39] *Chambre des Représentants de Belgique, 'Projet de loi modifiant la loi du 15 decembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers – Texte adopté en séance plénière et transmis au Sénat, 22 mars 2007'*, Doc 51 2845/006 (House of Representatives, 'Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners – Text adopted in plenary session and transmitted to the Senate, 22 March 2007')

[40] *Sénat de Belgique, 'Projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers – Décision de ne pas amender, 12 avril 2007', Doc 3-2345 - 2006/2007* (Belgian Senate, 'Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners – Decision not to amend, 12 April 2007').

[41] Law of 25 April 2007 (n 1).

[42] ibid, art 48.

This was delayed due to the inability to form a government following the holding of elections in June 2007.[43] An implementing decree was finally adopted on 7 May 2008,[44] following a final warning from the Commission that a formal application would be made to the Court of Justice unless the Directive was transposed by 13 May 2008.[45] The decree entered into force on 1 June 2008.[46] As a result, the transposition of the Directive suffered a delay of 763 days and Belgium became the last Member State to adopt the necessary measures to give it effect in its national legal order.[47]

7.1.3 Beneficiaries

The provisions on direct family members are adequately transposed.[48]

Belgium recognises registered partnerships.[49] Royal Decree (II)[50] establishes which registered partnerships are considered as equivalent to marriage,[51] according to the country in they were celebrated.[52] However, for those in a partnership registered in Belgium or other countries,[53] the Immigration Law imposes additional conditions inserted by legislative

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[43] See further, Peter Van Aelst and Tom Louwerse, 'Parliament without Government: The Belgian Parliament and the Government Formation Processes of 2007–2011' (2014) 37 West European Politics, 475-496. It took Belgium 194 days to form a government following the federal elections held on 10 June 2007, ibid, 476.

[44] Royal Decree (2008/I) (n 4).

[45] ibid, third recital.

[46] ibid, art 40.

[47] For a comparison of transposition delay, see further, Chapter 10 (Implementation of Directive 2004/38 Compared).

[48] Conformity Study for Belgium (n 19) 20-22.

[49] Civil Code, arts 1475-1479.

[50] Royal Decree (2008/II) (n 6).

[51] ibid, art 4.

[52] ibid; these countries are Denmark, Germany, Finland, Iceland, Norway, Sweden and the UK.

[53] For example, a *pacte civil de solidarité* under French pursuant to *Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarité, Journal Officiel 265, 16959* (Law on registered partnerships, 15 November 1999).

amendment designed to fight abuse[54] which must be met by registered partners, which are not foreseen by the Directive.[55] The requirement that the partners must be aged over 21 years of age[56] has previously been declared unconstitutional,[57] but the Law has yet to be amended.

There is a further requirement that the registered partners should have cohabited for at least a year either in Belgium or abroad, or alternatively that they have known each other for at least two years and that during this time they have been together at least 45 days.[58] In this respect, the Belgian Constitutional Court has recently held[59] the imposition of such a requirement pursues a

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[54] *Loi du 8 juillet 2011 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 12-09-2011, p 58915)* (Law of 8 July 2011 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners) amended art 40bis to incorporate the conditions previously found in Royal Decree (2008/II) (n 6), art 3. The original proposal was designed to combat abuse relating to family reunification by non-EU citizens, see *Chambre des Représentants de Belgique, 'Proposition de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial', Doc 53 0443/001* (House of Representatives, 'Parliamentary Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners') 1. However, it was extended to cover the situation of EU citizens and their family members following an amendment to the proposal; see *Chambre des Représentants de Belgique, 'Proposition de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en ce qui concerne les conditions dont est assorti le regroupement familial – Amendements, 4 mai 2011') , Doc 53 0443/016* (House of Representatives, 'Parliamentary Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners – Amendments, 4 May 2011'), Amendment No 168 and commentary, 23-26, 32-36 respectively.

[55] Article 2(2)(b) provides that 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State'.

[56] 40bis, § 2, 2°, c).

[57] *Cour Constitutionnelle, Arrêt n° 121/2013 du 26 septembre 2013* (Constitutional Court, 26 March 2015).

[58] Art 40bis, § 2, 2°, para 2, a).

[59] *Cour Constitutionnelle, Arrêt n° 43/2015 du 26 mars 2015* (Constitutional Court, 26 March 2015).

legitimate aim of combating abuse.[60] However, such conditions appear questionable in light of the Court of Justice's ruling in *McCarthy*[61] in which it held that 'measures adopted by the national authorities, on the basis of Article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that directive must be based on an individual examination of the particular case.' The Belgian law must therefore be considered as non-compliant in this respect.[62]

The Belgian Immigration Law initially failed to transpose the provisions of the Directive relating to 'other family members'[63] in a correct and complete fashion.[64] However, the Law was amended in this respect[65] with the insertion of a new chapter to cover 'other family members'.[66] This followed the issue of a reasoned opinion by the Commission in 2011.[67] This appears to have addressed issues of non-compliance in this respect.[68]

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[60] ibid, para B.16.2.

[61] Case C-202/13 *McCarthy* [2014] ECLI:EU:C:2014:2450 (judgment of 18 December 2014), para 52.

[62] This issue was identified in the conformity study as 'durable relationships' under Article 3(2)(b); see Conformity Study for Belgium (n 19), 23, but it also affects registered partnerships more broadly.

[63] Article 3(2).

[64] Conformity Study for Belgium (n 19) 23-25; Serge Gutwirth, Paul de Hert and Pieter Paepe, 'Correspondence Table, Belgium', 13, Annex to Milieu and Edinburgh University, Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union - Final Report' (December 2008) (hereafter 'Correspondence Table for Belgium').

[65] *Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 05-05-2014, p 36137)* (Law of 19 March 2014 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners).

[66] 'Chapitre Ibis. 1 - Autres membres de la famille d'un citoyen de l'Union' consisting in arts 47/1-47/3.

[67] Commission, Reasoned Opinion, Case 2011/2033 (21 February 2013) concerning Belgium's incorrect transposition of Directive 2004. See also *Chambre des Représentants de Belgique, 'Projet de loi modifiant la loi du 15 decembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers', Doc 53 3239/001* (House of Representatives, 'Bill to amend the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners') 7.

[68] Immigration Law, arts 47/1, 1° and 47/3 §1 transpose Article 3(2)(b) relating to partners in a durable relationship; arts 47/1, 2° and 47/3 §2 transpose Article 3(2)(a) relating to other dependants; arts 47/1, 3° and and 47/3 §3 transpose Article 3(2)(a) relating to dependants on serious health grounds; art 47/2

The Belgian authorities have made use of Article 37 of the Directive to extend the scope of its provisions to the family members of Belgian citizens as a way to avoid so-called 'reverse discrimination'.[69]

The transposition outcomes in respect of the provisions dealing with beneficiaries can be summarised as follows:

Transposition Outcomes: Beneficiaries			
Article	Content	Transposition outcome	Subsequent amendment
2	*Definitions*		
2(1)	EU citizen	Correct	
	Family member		
2(2)(a)	Spouse	Correct	
2(2)(b)	registered partnership (equivalent to marriage)	Correct	Incorrect
2(2)(c)	direct descendants (under the age of 21)	Correct	
2(2)(c)	direct descendants (dependants)	Correct	
2(2)(d)	direct relatives in the ascending line (dependants)	Correct	
3	*Beneficiaries*		
3(1)	EU citizens and family members in terms of Art. 2	Correct	
3(2)(1)(a)	facilitation for dependants in the country of origin	Ambiguous	Correct
3(2)(1)(a)	facilitation for members of the household	Ambiguous	Correct
3(2)(1)(a)	facilitation for family members on serious health grounds	Ambiguous	Correct
3(2)(1)(b)	facilitation for partners (durable relationship duly attested)	Ambiguous	Correct
3(2)(2)	procedure (extensive examination, justification)	Incorrect	Correct

Table 7.1.3: Transposition outcomes for beneficiaries (Articles 2-3 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

applies the residence formalities applicable to direct family members. The obligation to 'undertake an extensive examination of the personal circumstances' under the last sentence of Article 3(2) is given effect by the Royal Decree (1980 amended) (n 3), art 58 as inserted by *Arrêté royal du 13 février 2015 modifiant l'arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 26-02-2015, p 14396)* (Royal Decree of 13 February 2015 amending the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners). The amending law of Law of 19 March 2014 (n 65) also seeks to give effect to the rights of primary carers of EU children laid down by the Court of Justice in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 by amending art 40bis of the Immigration Law.

[69] Art 40ter.

7.1.4 Entry and exit

The provisions of entry and exit have been correctly transposed and potential problems addressed, except as regards the obligation to grant all facilities to the right of family members to obtain a visa. However, the obligation to issue such a visa free of charge under an accelerated procedure has now been transposed.[70] The Law has also been amended to correct the incomplete transposition[71] on the obligation to grant all opportunities to EU citizens and family members to enter without adequate travel documents.[72] The law of 1974[73] that could have potentially interfered with the right of exit[74] has been repealed.

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[70] Royal Decree (1980 amended) (n 3), art 45 was amended by Royal Decree of 13 February 2015 amending the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners (n 68).

[71] Conformity Study for Belgium (n 19) 27; Correspondence Table for Belgium (n 64) 20-21. Art 41 has now been amended by Law of 19 March 2014 (n 65).

[72] Article 5(4).

[73] *Loi du 14 août 1974 relative à la délivrance des passeports (MB 21-12-1974, p 15313)* (Law of 14 August 1974 on the issue of passports) repealed by *Loi du 21 décembre 2013 portant le Code consulaire (MB 21-01-2014, p 4987)* (Law of 21 December 2013 instituting the consular code).

[74] Conformity Study for Belgium (n 19) 25; Correspondence Table for Belgium (n 64) 16.

Transposition Outcomes: Entry and Exit			
Article	Content	Transposition outcome	Subsequent amendment
4	*Right of exit*		
4(1)	right of exit for EU citizens (ID or passport)	Incorrect	Correct
4(1)	right of exit for TCN family members (passport)	Incorrect	Correct
4(2)	no visa or equivalent formality	Not transposed – compliant	Correct
4(3)	ID or passport stating the nationality of the holder	Correct	
4(4)	territorial validity of the passport (5 years if MS do not issue ID cards	Correct	
5	*Right of entry*		
5(1)(1)	right of entry for EU citizens (ID or passport)	Correct	
5(1)(1)	right of entry for TCN family members (passport)	Correct	
5(1)(2)	no visa or equivalent formality	Correct	
5(2)(1)	obligation to hold entry visa for TCN members (Reg. No. 539/2001)	Correct	
5(2)(2)	residence card exemption	Correct	
5(2)(3)	facilitation to obtain entry visa	Not transposed – non-compliant	
5(2)(4)	accelerated procedure for issuing visa, free of charge	Not transposed – non-compliant	
5(3)	entry or exit stamp (passport TCN family member carrying residence card)	Not transposed	
5(4)	all opportunities to enter without valid travel documents	Incorrect	
5(5)	presence report (optional)	Correct	

Table 7.1.4: Transposition outcomes for entry and exit (Articles 4 and 5 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.1.5 The right of residence

The right of residence is on the whole correctly transposed. However, some non-compliance issues persist.

Firstly, there is continuing ambiguity over the use of the words 'salaried' and 'non-salaried' in the definition of 'worker'[75] appears to suggest it refers to the Belgian notion of worker[76] and could affect the application of the Law by officials of the Immigration Office and local municipalities.

[75] Art 40, § 4

[76] Conformity Study for Belgium (n 19) 8; Correspondence Table for Belgium (n 64) 26.

Secondly, the situation of self-sufficient persons is also ambiguous since a Circular of 23 May 2008[77] suggests that the level of resources indicated therein is a fixed amount which must be met in all cases,[78] even though the Directive provides that no fixed amount can be imposed in this regard.[79]

Thirdly, the incorrect transposition as relating to jobseekers also remains.[80]

Fourthly, the administrative formalities are also the source of non-compliance. The Immigration Law does not provide for EU citizens to be issued a registration certificate immediately[81] as required by the Directive.[82] The Royal Decree is also incorrect in this respect.[83] However, previous problems[84] relating to the six-month deadline[85] for the issue of residence cards to non-EU family members appear to have been adequately addressed.[86] The instances of non-

[77] *Office des Étrangers*, '*Circulaire officieuse du 23 mai 2008 relative aux citoyens de l'Union et aux membres de leur famille'* (Circular (unpublished) of 23 May 2008 on EU citizens and their family members) (not currently available on the website of the Immigration Office. This has not been replaced and still appears to be in use.

[78] Ibid, para C.1, 1°. See further, Conformity Study for Belgium (n 19) 32; Correspondence Table for Belgium (n 64) 28.

[79] Article 8(4).

[80] See further Conformity Study for Belgium (n 19) 40; Correspondence Table for Belgium (n 64) 79-81. The Belgian law is incorrect in not allowing jobseekers an unconditional right of residence in the second three months of their residence in Belgium under art 40 §4, para 1, 1° of the Law.

[81] Art 42 §1 provides for a six-month deadline.

[82] Article 8(2).

[83] Royal Decree (1980 amended) (n 3), art 50. See further, Conformity Study for Belgium (n 19) 29-30; Correspondence Table for Belgium (n 64) 34-39.

[84] Conformity Study for Belgium (n 19) 33-34; Correspondence Table for Belgium (n 64) 48-52.

[85] Article 10(1).

[86] *Royal Decree (1980 amended) (n 3), art 52 as amended by Arrêté royal du 21 septembre 2011 modifiant les arrêtés royaux du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, du 17 mai 2007 fixant les modalités d'exécution de la loi du 15 septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers et du 7 mai 2008 fixant certaines modalités d'exécution de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 10-10-2011, p 62211)* (Royal Decree of 13 21 September 2011 amending the amending the Royal Decrees

compliance in respect of the provisions on retention of the right of residence have now been addressed.[87]

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
6	*Residence (up to three months)*		
6(1)	EU citizens	Correct	
6(2)	TCN family members	Correct	
7	*Residence (more than three months)*		
7(1)(a)	workers or self-employed persons	Ambiguous	
7(1)(b)	sufficient resources and comprehensive sickness insurance cover	Ambiguous	
7(1)(c)	study (comprehensive sickness insurance +assurance of sufficient resources)	Correct	
7(1)(d)	Family member	Correct	
7(2)	TCN family members	Correct	
7(3)(a)	retention in case of illness or accident	Correct	
7(3)(b)	involuntary unemployment after 1 year of employment	Correct	
7(3)(c)	involuntary unemployment after fixed-term contract (less than 1 year)	Correct	
7(3)(d)	vocational training (after previous employment)	Correct	
7(4)	special rules concerning family members of students	Correct	
8	*Administrative formalities for EU citizens*		
8(1)	option: register	Correct	
8(2)	deadline to register	Correct	
8(2)	immediate issue	Not transposed	
8(2)	Sanctions	Correct	
8(3)	documents required from workers or self-employed persons	Correct	
8(3)	documents required from self-sufficient persons	Correct	
8(3)	documents required from students	Correct	
8(4)	no fixed amount with regard to 'sufficient resources'	Ambiguous	
8(5)	documents required from EU family members	Correct	

of 8 October 1981 on the entry, residence, settlement and removal of foreigners, of 17 May 2007 implementing certain measures relating to the Law of 15 September 2006 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, and of 7 May 2008 implementing certain measures relating to Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners).

[87] Arts 42ter and 42quater were amended by Law of 8 July 2011 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners (n 54) and Framework Law of 28 June 2013 (n 12).

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
9	*Administrative formalities for family members who are not EU citizens*		
9(1)	issue a residence card	Correct	
9(2)	deadline for submission	Correct	
9(3)	Sanctions	Correct	
10	*Issue of residence cards*		
10(1)	title of the residence card	Correct[88]	
10(1)	issue deadline of six months	Ambiguous	Correct
10(1)	certificate of application	Correct	
10(2)	documents required from TCN family members	Correct	
11	*Validity of the residence card*		
11(1)	period of validity	Correct	
11(2)	temporary absences	Not transposed	
12	*Retention of the right of residence in the event of death or departure of the EU citizen*		
12(1)	retention of residence of EU family members - death/departure	Ambiguous	Correct
12(1)	conditions for the right of permanent residence	Ambiguous	Correct
12(2)	retention of residence of TCN family members - death of the EU citizen	Correct	
12(3)	child in education and parent having custody - departure of the EU citizen	Correct	
13	*Retention of the right of residence in the event of divorce, annulment of the marriage or termination of registered partnership*		
13(1)	EU family members	Correct	
13(1)	conditions for the right of permanent residence	Ambiguous	Correct
13(2)	TCN family members	Correct	
13(2)(a)	3 years of marriage, including 1 year in the host MS	Correct	
13(2)(b)	custody of the EU citizen's children	Correct	
13(2)(c)	domestic violence	Correct	
13(2)(d)	right of access to a minor child in the host MS	Correct	
13(2)	conditions for the right of permanent residence	Correct	
13(2)	exclusively on personal basis	Not transposed – compliant	

[88] This provision was identified as ambiguously transposed by the Commission; see Information from Commission dated 10 March 2015 (GestDem 2015/1508). However, no such problem in transposition could be identified. The Belgian authorities issue a residence card labelled '*carte de séjour de membre de la famille d'un citoyen de l'Union*' or '*verblijfskaart van een familielid van een burger van de Unie*' in accordance with Article 10(1) of the Directive.

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
14	*Retention of the right of residence*		
14(1)	retention of the right of residence under Art. 6	Correct	
14(2)	retention of the right of residence under Art. 7, 12, 13	Correct	

Table 7.1.5: Transposition outcomes for residence (Article 6-14 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.1.6 The right of permanent residence

The ambiguity in the definition in the right of permanent residence[89] have been addressed,[90] but there is still no specific confirmation that a person who has acquired permanent residence is no subject to the need to meet the conditions of Chapter III of the Directive.

The Immigration law also requires family members to have been living together[91] with their EU relative. Although this requirement is no contained in the Directive,[92] it is also not in accordance with the Court's case law,[93] the provision has yet to be amended.

Although the Law is correctly drafted as regards the issue of permanent residence documents, the Circular instructs officials that the relevant date to be taken into account for calculating permanent residence is the date on which the citizen or his family member first registered their presence with the municipality.[94] This creates ambiguity. The deadline for the issue of

[89] Conformity Study for Belgium (n 19) 41; Correspondence Table for Belgium (n 64) 86-89.

[90] Art 42quinquies was amended by Law of 19 March 2014 (n 65).

[91] This is by reference to the concept of *'installation commune'* in art 42quinquies, §1, para 2. See further Conformity Study for Belgium (n 19) 43; Correspondence Table for Belgium (n 64) 93-94. This affects the correctness of transposition of Article 18.

[92] Conformity Study for Belgium (n 19) 43; Correspondence Table for Belgium (n 64) 93-94.

[93] Case 267/83 *Diatta* [1985] ECR 0567, at para 20; Case C-244/13 *Ogieriakhi* [2014] ECLI:EU:C:2014:2068 (judgment of 10 July 2014), paras 37 and 45.

[94] Circular of 23 May 2008 (n 77), para D.1. This affects the correctness of transposition of Articles 19(1) and 20(1). See further, Conformity Study for Belgium (n 19) 44; Correspondence Table for Belgium (n 64) 94-98.

documents[95] is also a problem,[96] as is their period of validity.[97] The transposition of the provisions on continuity of residence[98] and loss of permanent residence[99] also have not been addressed.

The minor problems noted[100] in transposition of the provisions giving workers the right in certain circumstances to acquire permanent residence before a period of residence of five years has been accumulated[101] have not been addressed.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
16	*General rule for EU citizens and their family members*		
16(1)	legal residence during 5 years	Ambiguous	Correct
16(1)	not subject to the Chapter III conditions	Incorrect	Correct
16(2)	TCN family members	Ambiguous	Correct
16(3)	temporary absences	Correct	
16(4)	only lost through absences exceeding 2 years	Correct	
17	*Exemptions for persons no longer working in the host Member State*		
17(1)(a)	worker who reaches retirement age after working at least a year	Ambiguous	
17(1)(a)(2)	retirement age (60) in case national law is silent	Correct	
17(1)(b)	worker permanently incapable of working (min. 2 prior years of residence)	Correct	
17(1)(c)	worker who has worked at least three years but then becomes cross-border worker	Correct	
17(1)(c)(1)	periods of employment under (a) and (b)	Not transposed – not compliant	
17(1)(c)(2)	periods of involuntary unemployment etc. count as employment	Correct	
17(2)	exemption from periods under (a) or (b) if citizen's spouse or partner is national or ex-national	Correct	

[95] Article 19(2) as regards EU citizens and Article 20(1) as regards non-EU family members.

[96] Conformity Study for Belgium (n 19) 44; Correspondence Table for Belgium (n 64) 96.

[97] Conformity Study for Belgium (n 19) 44; Correspondence Table for Belgium (n 64) 98.

[98] Conformity Study for Belgium (n 19) 45; Correspondence Table for Belgium (n 64) 101.

[99] Correspondence Table for Belgium (n 64) 100.

[100] Conformity Study for Belgium (n 19) 41-43; Correspondence Table for Belgium (n 64) 90-93.

[101] Article 17 of the Directive.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
17(3)	right of permanent residence of family members	Correct	
17(4)(a)	family members acquire PR upon death of worker (if worker resided for min. 2 years)	Correct	
17(4)(b)	family members acquire PR upon death of worker (if of worker's death result accident at work)	Correct	
17(4)(c)	family members acquire PR upon death of worker (if worker spouse is ex-national)	Correct	
18	*Acquisition of the right of permanent residence by certain family members who are not EU citizens*		
18	permanent residence of family members having retained right of residence under Art. 12 or 13	Incorrect	
19	*Document certifying permanent residence for EU citizens*		
19(1)	Document certifying permanent residence for EU citizens	Ambiguous	
19(2)	Document certifying permanent residence to be issued as soon as possible	Incorrect	
20	*Permanent residence card for family members who are not nationals of a Member State*		
20(1)	issue deadline six months; automatic renewability	Incorrect	
20(2)(1)	submission before expiration of the residence card	Correct	
20(2)(2)	Sanctions	Correct	
20(3)	temporary absences	Incorrect	
21	*Continuity of residence*		
21	continuity of residence can be proved by any means; expulsion breaks continuity	Not transposed – not compliant	

Table 7.1.6: Transposition outcomes for permanent residence (Article 16-21 of Directive 2004/38)

Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.1.7 Equality of treatment

The provisions on equality of treatment have been correctly transposed.[102] The right to work, while initially not compliant because it excluded certain family members,[103] is now compliant as it applies to all family members.[104] However, the right to work is conditional upon the family member holding a residence card in breach of Article 25 of the Directive which provides that the exercise of a right is not conditional upon holding a residence document,[105] and which has not been transposed.

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[102] See further Conformity Study for Belgium (n 19) 46-47; Correspondence Table for Belgium (n 64) 104-106. As regards access to social assistance, see *SPF Intégration Sociale, Lutte contre la Pauvreté et Économie Sociale, 'Circulaire du 5 août 2014 relative à l'interprétation de l'article 3, 3°, 2 e tiret, de la loi du 26 mai 2002 concernant le droit à l'intégration sociale et de l'article 57quinquies de la loi du 8 juillet 1976 organique des centres publics d'action sociale' (MB 08-08-2014, p 58165)* (Ministry of Social Integration, Circular of 5 August 2014 relating to the interpretation of Article 3, 3°, second sentence, of the Law of 26 May 2002 relating to social assistance and Article 57 of the Law of 8 July 1976 on public social welfare centres).

[103] Conformity Study for Belgium (n 19) 47-49; Correspondence Table for Belgium (n 64) 106-111.

[104] *Arrêté royal du 9 Juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers (MB 26-06-1999, p 24162)* (Royal Decree of 1999 implementing measures relating to the Law of 30 April 1999 on the employment of foreign workers), art 2.

[105] Article 25 provides that '[p]ossession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof'.

Transposition Outcomes: Equal Treatment			
Article	Content	Transposition outcome	Subsequent amendment
23	*Related rights*		
23	right to work	Incorrect	Correct
24	*Equal treatment*		
24(1)	equal treatment	Correct	
24(2)	derogation with regard to social assistance	Correct	
24(2)	derogation with regard to maintenance aid for studies	Correct	
25	*General provision concerning residence documents*		
25(1)	possession of residence docs cannot be made precondition for exercise of rights	Not transposed – not correct[106]	Not transposed – not correct
25(2)	charge for residence docs not to exceed charge for issuing nationals with similar documents	Correct	

Table 7.1.7: Transposition outcomes for equality of treatment (Article 23-25 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.1.8 Restrictions on entry and residence

The provisions relating to the restrictions which Member States can take to restrict rights of entry and residence on grounds of public interest have been satisfactorily transposed.

The only major shortcoming is the incomplete transposition of the factors that must be taken into account when proceeding to the expulsion of an EU citizen and their family members.[107]

There are a few minor problems relating to the right of the duty of Member States to admit their returning nationals where they have been

[106] Article 25(1) was assessed as not transposed but correct, see Information from Commission dated 10 March 2015 (GestDem 2015/1508); Conformity Study for Belgium (n 19) 49; Correspondence Table for Belgium (n 64) 111. This was because, at that time, the Belgian authorities did not explicitly subject the exercise of a right to possession of a residence card. However, the Belgian authorities have now done so as regards the right of family members to work, thereby demonstrating that the failure to transpose this provision was a potential source of non-compliance.

[107] Article 28(1) of the Directive; see Conformity Study for Belgium (n 19) 52; Correspondence Table for Belgium (n 64) 118.

expelled from other Member States[108] and the incomplete transposition of measures on restrictions on public health.[109] The provision relating to the possibility to request information from other Member States following receipt of an application for residence documentation is also incomplete.[110]

Transposition Outcomes: Restrictions on Entry and Residence			
Article	Content	Transposition outcome	Subsequent amendment
22	*Territorial scope*		
22	right of residence extends to entire MS; territorial restrictions must be same as for nationals	Correct	
26			
26(2)	sanctions		
27	*General principles*		
27(1)(1)	restriction based on grounds of public policy, public security or public health	Correct	
27(1)(2)	not for economic ends	Correct	
27(2)(1)	principle of proportionality	Correct	
27(2)(1)	based on the personal conduct	Correct	
27(2)(2)	serious threat to one of the fundamental interests of the society	Correct	
27(2)(2)	no considerations of general prevention	Correct	
27(3)	host MS may request police record from MS of origin before issuing residence docs	Incomplete	
27(4)	right of re-entry of expelled citizens in home MS	Not transposed – not compliant	
28	*Protection against expulsion*		
28(1)	obligation to take account of considerations relating to citizen's situation	Incorrect	
28(2)	persons who have permanent residence (only for serious grounds of public policy or public security)	Correct	
28(3)(a)	persons having resided for 10 years (only for imperative grounds of public security)	Correct	
28(3)(b)	minors (only for imperative grounds of public security) unless expulsion is in best interests of the child	Correct	
29	*Public health*		
29(1)	definition of diseases with epidemic potential	Correct	
29(2)	no expulsion based on diseases occurring after 3 months of residence	Correct	
29(3)	option: require of a medical examination	Incomplete	
35	*Abuse of rights*		
35(1)	Option: measure against abuse of rights	Correct	

[108] Article 27(4) of the Directive; see Conformity Study for Belgium (n 19) 51; Correspondence Table for Belgium (n 64) 117.

[109] Article 29(3) of the Directive; see Conformity Study for Belgium (n 19) 53; Correspondence Table for Belgium (n 64) 120.

[110] Article 27(3) of the Directive; see Conformity Study for Belgium (n 19) 51; Correspondence Table for Belgium (n 64) 117.

Transposition Outcomes: Restrictions on Entry and Residence			
Article	Content	Transposition outcome	Subsequent amendment
36	*Sanctions*		
36	Effective and proportionate sanctions	Correct	

Table 7.1.8: Transposition outcomes for restrictions on entry and residence (Article 22, 27-29, 35-36 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.1.9 Procedural safeguards and rights of appeal

This is the aspect of non-compliance in transposition which is most notable in the case of Belgium.

Firstly, the Immigration Law[111] still does not provide protection against systematic verification of the right of residence,[112] nor does it explicitly provide that 'expulsion ... shall not be the automatic consequence of ... recourse to the social assistance system'.[113]

This instance of non-compliance appears deliberate. The Belgian authorities have put in place an automated system to check residence entitlements of EU citizens and their family members who claim benefits in Belgium. For example, details of those who have claimed unemployment benefits are routinely passed on by the Belgian National Employment Office to the Immigration Office,[114] which then proceeds to determine if action can be taken to put an end to their right of residence.

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[111] Conformity Study for Belgium (n 19) 39; Correspondence Table for Belgium (n 64) 74. Although this requirement is contained in the Circular of 23 May 2008 (n 77), para E.2, this cannot be considered complaint because a circular is not legally binding; see further Chapter 3, Section 3.1 (Obligations Relating to the Form of Transposition).

[112] Article 14(2) provides that 'where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.'

[113] Article 14(3). See further Conformity Study for Belgium (n 19) 39; Correspondence Table for Belgium (n 64) 75.

[114] *Comité sectoriel de la sécurité sociale et de la santé, 'Délibération N° 13/051 du 7 mai 2013 concernant la communication de données à caractère personnel relatives à des citoyens de l'Union européenne par L'Office national de l'emploi à l'Office Des Étrangers' CSSS/13/117* (Sectorial

Although a Member State is entitled to take action against EU citizens and their family members in the event they become an unreasonable burden on social assistance, [115] the Immigration Law originally was silent on the factors that should be taken into account to determine if a person has become an unreasonable burden on the Belgian social assistance system.[116] This has now been rectified[117] following the infraction proceedings initiated by the Commission in 2011.[118]

Committee for Social Security and Healthcare, 'Deliberation No 13/051 of 7 May 2013 concerning the transmission of personal data relating to EU citizens from the National Employment Agency to the Immigration Office')
<https://www.privacycommission.be/sites/privacycommission/files/documents/d%C3%A9lib%C3%A9ration_SSS_051_2013.pdf> accessed 4 December 2015. In this regard the Minister for Immigration explained the purpose of this information exchange: *'On a croisé les banques de données du SPF Intégration Sociale et de l'Office des Étrangers. Nous avons pu remarquer qui étaient ici pour profiter de notre système social. Il y a aussi des Français, des Hollandais, des Espagnols, mais aussi des Roumains et des Bulgares. C'est très important, car il faut éviter qu'il y ait des gens qui profitent de notre système social.' ('We cross referred the databases of the Ministry of Social Integration and the Immigration Office. We were able to notice who was here to take advantage of our welfare system. There are also French, Dutch, Spanish, but also Romanians and Bulgarians. It's very important, because we have to avoid that people can take advantage of our welfare system.') (author's translation); see* 'Il faut éviter qu'il y ait des gens qui profitent de notre système social', *RTL*, 8 December 2013 <http://www.rtl.be/info/belgique/politique/maggie-de-block-il-faut-eviter-que-des-gens-profitent-de-notre-systeme-social-video--396658.aspx> accessed 10 December 2015.

[115] Article 14(2) read in combination with recital (16). See further, Section 6.9 (Restrictions on Entry and Residence).

[116] Recital (16) of the Directive specifies that:

> 'As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.'

[117] Art 42bis as amended by Law of 19 March 2014 (n 65).

[118] Commission, Reasoned Opinion, Case 2011/2033 (n 67).

Secondly, the Immigration Law does not appear to meet the standards of the directive as regards rights of appeal.

It should be observed that the right to request an administrative review of decisions[119] was removed in 2006 as part of wider reforms in the field of immigration[120] and the establishment of an Immigration Appeals Council[121] to judicially review decisions of the Immigration Office.

The Immigration Appeals Council only has the power to review the legality of decisions taken by the Immigration Office.[122] However, it has no power to remake decisions unlike, for example, the case of asylum decisions.[123]

However, the Directive requires that judicial review should extend to 'an examination of the legality of the decision, as well as the facts and circumstances on which [a] measure [to restrict free movement rights] is based'.[124] Moreover, it will also be recalled that principle of effective judicial protection under EU law requires that judicial review of administrative decisions relating to individual EU rights must address both the facts and the law.[125]

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[119] Former arts 64-66.

[120] *Loi du 15 septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 06-10-2006, p 53533)* (Law of 15 September 2006 amending the Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners).

[121] *Conseil du Contentieux des Étrangers* established by arts 39/1-39/85 of the Immigration Law.

[122] Arts 39/2, § 2, 39/81

[123] Art 39/2, § 1.

[124] Article 31(3) of the Directive.

[125] See to that effect Joined Case C-65/95 and 111/95 *Shingara and Radiom* [1997] ECR I-3343, paras 34-35 (national remedies against an administrative decision refusing entry or residence must entail either an appeal before a court that involves a review of the substance and an exhaustive examination of all the facts and circumstances, or, where such an appeal is limited to the legality of the national decision or there is no appeal, the intervention of an independent review authority that engages in an exhaustive examination of all the facts and circumstances before a final administrative decision is taken); Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para 82 (incompatibility of German system of judicial review which did not allow national courts to consider new facts that have arisen after an administrative decision was taken to deport an EU citizen on public policy grounds); ibid, paras 106 and 110-111 (incompatibility of German system of judicial review which

Even though the Belgian Council of State has ruled that Belgian law complies in this respect,[126] the Immigration Appeals Council's practice does not appear to meet the standards of judicial review set by EU law in this respect. For example, in reviewing the legality of administrative decisions of the Immigration office, the Immigration Appeals Council bases its review as at the date when the decision was taken[127] and does not take into account any pertinent facts that may have arisen after a decision was taken.[128] There is therefore lingering doubt as to whether the Immigration Law complies with the provisions of the Directive on this issue.

The prohibition on the imposition of a ban on entry on persons against whom a decision has been taken on grounds other than public policy, public security or public health[129] is not transposed. The specific protections

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only provided for the control of legality of an administrative decision to deport an EU citizen on public policy grounds); Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paras 47 and 57 (incompatibility of Austrian system of judicial review which only provided for the control of legality of an administrative decision ending a right of residence on public policy grounds); Case C-506/04 *Wilson* [2006] ECR I-8613, para 60 (appeal against a refusal to allow lawyer registered in the UK to be admitted to practice in Luxembourg); Case C-69/10 *Diouf* [2011] ECR I-7151, para 57 (appeal against a refusal to grant refugee status under accelerated procedure). See further Nina Półtorak, *European Union Rights in National Courts* (Kluwer 2015) 199-201.

[126] *Conseil d'État, arrêt no 216.419 du 23 novembre 2011* (Council of State, 23 November 2011).

[127] See for example, *Conseil du Contentieux des Étrangers, no 105.657 du 24 juin 2013* (Immigration Appeals Council, 24 June 2013), citing *Conseil d'État, arrêt no 110.548 du 23 septembre 2002* (Council of State, 23 September 2002); *Conseil du Contentieux des Étrangers* no 140.965 du 13 mars 2015, (Immigration Appeals Council, 13 March 2015)

[128] This would be contrary to Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* (n 125), para 82, in which the Court held that 'Article 3 of Directive 64/221 [corresponding to Article 27(2) of Directive 2004/38] precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court'.

[129] Article 15(3). Conformity Study for Belgium (n 19) 40; Correspondence Table for Belgium (n 64) 83.

concerning expulsion[130] and exclusion orders[131] are no adequately transposed.[132]

The provisions which have also been incompletely transposed include those requiring the Belgian authorities to give full and precise reasons.[133]

Transposition Outcomes: Procedural safeguards and rights of appeal			
Article	Content	Transposition outcome	Subsequent amendment
14	*Retention of right of residence*		
14(2)	verification of residence rights	Not transposed – non compliant	
14(3)	no automatic expulsion in case of recourse to social assistance	Incomplete	
14(4)(a)	no expulsion of workers or self-employed persons	Correct	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Incorrect	
15	*Procedural safeguards*		
15(1)	procedures provided for by Art. 30, 31 shall apply by analogy	Incomplete	
15(2)	no expulsion in case of expiry of ID or passport	Correct	
15(3)	no ban on entry for expulsion decision taken on other grounds	Incorrect	
26	*Checks*		
26(1)	option to carry out checks	Correct	
30	*Notification of decisions*		
30(1)	notification in writing	Incorrect	
30(2)	full and precise information of the public policy, public security, public health grounds	Incorrect	
30(3)	advising of legal remedies	Correct	
30(3)	citizen must be allowed one month for leaving MS, except if duly substantiated urgency	Correct	
31	*Procedural safeguards*		
31(1)	right to judicial review or appeal	Correct	
31(2)	interim order suspends removal	Correct	
31(3)	redress procedure (legality and facts; proportionality)	Incomplete	
31(4)	right to submit defence in person (fair trial)	Correct	
32	*Duration of exclusion orders*		
32(1)	right to submit an application for lifting exclusion order within three years	Incorrect	
32(1)	decision within six months of the submission	Correct	

[130] Article 33.

[131] Article 32.

[132] Conformity Study for Belgium (n 19) 53-56; Correspondence Table for Belgium (n 64) 124-137.

[133] Article 30(2); Conformity Study for Belgium (n 19) 55; Correspondence Table for Belgium (n 64) 120. This also affects the transposition of Art 15(1).

Transposition Outcomes: Procedural safeguards and rights of appeal			
Article	Content	Transposition outcome	Subsequent amendment
32(2)	no obligation for MS to allow entry during consideration of application	Correct	
33	*Expulsion as a penalty or legal consequence*		
33(1)	Expulsion may not be imposed as penalty unless Art. 27, 2 8, 29 are respected		
33(2)	Right to re-evaluation of expulsion order after 2 years		
35	*Abuse of rights*		
35(2)	principle of proportionality + procedural safeguards	Correct	

Table 7.1.9: Transposition outcomes for procedural safeguards and rights of appeal (Article 14-15, 30-33, 35 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

7.2 Application in Belgium

Responsibility for the application of the Immigration Law in respect of EU citizens and their family members is shared between the municipalities and the Immigration Office.[134] Municipalities will handle straightforward cases such as EU citizens who can show proof of work, self-employment or enrolment on a course of study.[135] More complicated cases such as jobseekers, self-sufficient persons who rely on another for their means of support[136] will be handled by the Immigration Office, as well as all applications for a residence card by non-EU family members.[137]

As a result, the application of the rules on EU residence by the municipalities can vary from one region to another. In this respect the ECAS comparative study found that 'in Flanders the quality of administrative services ranges from 'poor' to 'satisfactory' depending on the service in question. In general in Wallonia, the administrative service provided to Union citizens is

[134] Conformity Study for Belgium (n 19) 19-20.

[135] Royal Decree (1980 amended) (n 3), art 51, §3; Circular of 23 May 2008 (n 77), para C.1, 1°.

[136] Circular of 23 May 2008 (n 77), para C.1, 2°.

[137] Circular of 23 May 2008 (n 77), para C.2, A)

poor.'[138] Moreover, the report found that publicity about the Directive[139] is 'directed more at the administration than the public'.[140]

7.2.1 Application process

Belgium has chosen to make registration compulsory for both EU citizens[141] and their non-EU family members.[142]

The available literature[143] suggest that the formalities are not being consistently applied by municipalities.[144] As regards non-EU family members, complaints include a lack of information, delays and excessive requests for documents[145] in support of their applications. A petition has also been lodged before the European Parliament concerning Belgium's expulsion policy.[146]

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[138] ECAS comparative study (n 9) ix.

[139] Article 34 requires that Member States should 'disseminate information concerning the rights and obligations' arising under the Directive.

[140] ibid, ix.

[141] Article 8(1) of the Directive corresponding to art 42 §1.

[142] Article 9(1) of the Directive corresponding to art 42 §3.

[143] Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services' (Report for Commission, Ramboll 2011) <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed 26 May 2015, who draw on information from information on cases handled by SOLVIT and Your Europe Advice; see further Annual reports for SOLVIT (2004-2011) <http://ec.europa.eu/solvit/documents/index_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (SOLVIT governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015; Annual reports for Your Europe Advice (2007-2010) <http://europa.eu/youreurope/advice/about_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (Your Europe Advice governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015.

[144] ECAS

[145] See European Parliament, Notice to Members 'Petition 1065/2010 by Dominik Kohlhagen (German) on the non-compliance with the provisions of Directive 2004/38/EC of the European Parliament and of the Council, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, by the Belgian authorities', 28 September 2012.

[146] 'Petition No 0884/2014 by Sara Lafuente Hernández (Spanish) with five signatures, on the Belgian Government's violation of the right to move and reside freely within the territory of the Member States', 29 September 2015.

The application process has been the subject of a comparative study that assesses outcomes in the application process.[147] The results for Belgium are summarised in the table that follows.

[147] Astrid Henningsen, Maylis Labayle, Camino Mortera and Rossella Nicoletti 'Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation' (Report for Commission, ICF-GHK/Milieu 2013).

Application of the Directive in Belgium				
Factual outcome	**Criteria**			
	Provision of information	*Rating (max)*	**BE**	***EU average***
Art 34: information dissemination – consistency	Consistency of information provision (all sources provide the same information, there is a natural link from general to specific information)	2.5	0.5	*2*
Art 34: information dissemination to EU citizens – accuracy	Quality and comprehensiveness of the information related to EU citizens (main sources)	5	2	*3*
Art 34: information dissemination to family members – accuracy	Quality and comprehensiveness of the information related to non-EU family members of EU citizens (main sources)	5	2	*3*
Art 34: information dissemination – availability	Availability of different sources of information (web, print, hotline)	5	3	*3*
	Overall rating information provision	**17.5**	**7.5**	***11***
Factual outcome	**Preparation of applications**	*Rating (max)*	**BE**	***EU average***
Art 8(3) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS– EU citizens	5	2	*3*
Art 9(2) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS – TCN family members of EU citizens	5	2	*3*
	Overall rating preparation of applications	**10**	**4**	***5***
Factual outcome	**Lodging of the application**	*Rating (max)*	**BE**	***EU average***
Art 8(2) and recital (14): undue administrative burden to be avoided	Nature of the lodging system. Ease of lodging and requirements for leaving of documents with the competent authority	5	2	*3*
Case C-424/98: proof by any appropriate means	Flexibility in terms of acceptance of alternative appropriate means of proof	5	2	*3*
Art 25(2): charge not exceeding that imposed on nationals for similar documents	Application fees	5	3	*3*
	Overall rating submission of applications	**15**	**7**	***9***
	Issuance of the residence document	*Rating (max)*	**BE**	***EU Average***
Art.8(2): immediate issue of registration certificate	Time needed from the successful lodging to effectively receiving the residence documents – EU citizens	10	2	*6*
Art.10(1): issue of residence card no later than six months from date of application	Time needed from the successful lodging to effectively receiving the residence documents – family members	10	2	*6*
	Overall rating issuance of the residence document	**20**	**4**	***13***
	Total rating	**62.5**	**22.5**	**39**
			36%	***62%***
			BE	***EU average***

Table 7.2.1 Application outcomes (Belgium)

Sources: Information from Commission dated 12 November 2013 (GestDem 2013/5460); ICF-GHK/Milieu Evaluation Report

The above would tend to confirm that application of the EU residence rules by the Belgian authorities is beset by problems in practice despite the relatively satisfactory transposition of the Directive.

7.2.2 Refusal rates

Regrettably, no information was provided by the Immigration Office despite specific requests for information.[148]

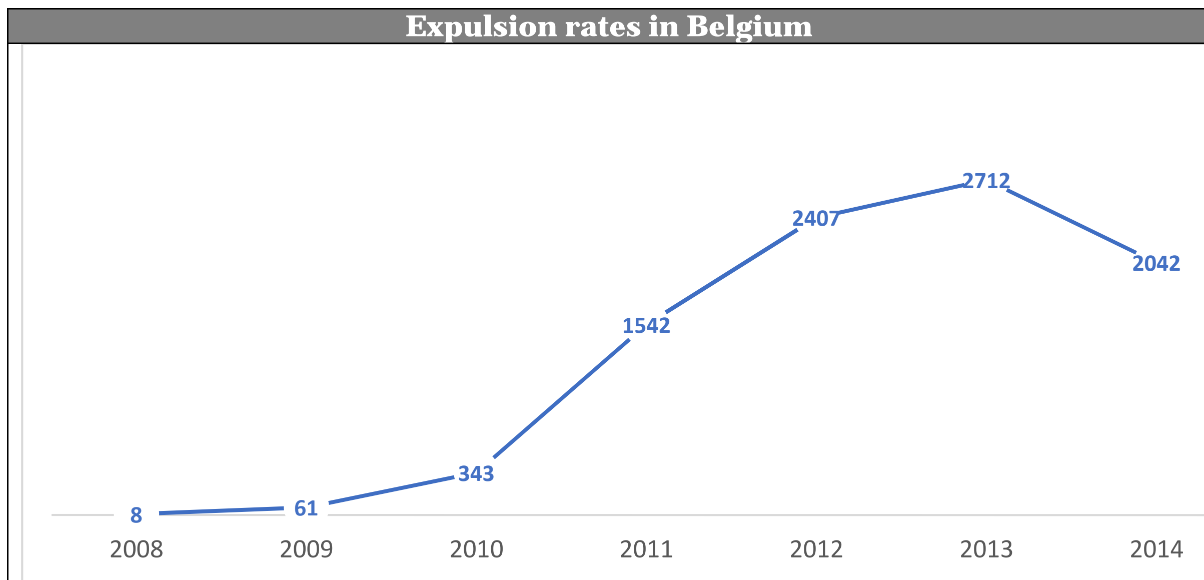
7.2.3 Expulsion rates

As the graph below shows, the number of EU citizens and their family members who are being ordered to leave the Belgian territory by the Immigration Office has been rising steadily.

The drop in expulsion orders in 2014 may be attributable to a change in practice of the Belgian authorities in April of that year. Prior to that date the Immigration Office refused to recognise the status of a 'worker' to EU citizens working in Belgium under cover of a measure to facilitate access to employment.[149]

[148] Information requests dated 3 December 2014 and 4 August 2015.

[149] Belgian Immigration Office used to refuse to recognise the status of a 'worker' to EU citizens working in Belgium under cover of a measure to facilitate access to employment under Article 60 of the law on social assistance centres (*Loi organique des centres publics d'action sociale du 8 juillet 1978, MB 05-08-1976, p 9876*) on the basis that such work created a 'burden on social assistance' under Directive 2004/38. Following the opening of an investigation by the Commission, the Belgian authorities amended their practice from the end of April 2014 so that persons working under such a measure are now considered workers under the Directive, see *Chambre des Représentants de Belgique, 'Note de Politique Générale – Asile et Migration', Doc 54 0588/026* (House of Representatives, 'General Policy Note – Asylum and Migration), 28 November 2014, 27-28 <http://www.lachambre.be/flwb/pdf/54/0588/54K0588026.pdf> accessed 29 December 2015. For background, see Marco Martiniello et al, 'Les expulsions de citoyens et citoyennes européens. Un phénomène qui nous alarme, et nous mobilise' (*Université de Liège*, 26 May 2014) <http://blogs.ulg.ac.be/marcomartiniello/2014/05/26/les-expulsions-citoyens-citoyennes-europeens/> accessed 29 December 2015.



Graph 7.2.3(a) Number of expulsions orders served on EU citizens and family members in Belgium (2008-2014)
Source Belgian Immigration Office

The fourfold increase in expulsions in 2011 compared to the previous year can be attributed to the fact that the Belgian authorities started having recourse to systematic verification of the right of residence of EU citizens and their family members using data collated from the Belgian social security institutions.[150]

[150] *Office des Étrangers, Rapport Annuel 2011 (2012)* (Immigration Office, Annual Report 2011) which reports that '[i]l a ainsi été mis fin à 989 autorisations de séjour grâce aux informations fournies par la Banque Carrefour de la Sécurité sociale' (residence rights were withdrawn in 989 cases as a result of information provided by the social security information exchange) (author's translation) representing 64% of 1,542 expulsion orders served that year. For background to information exchange see also n 114. See further, *Centre Fédéral Migration, '2015 - La Migration en Chiffres et en Lettres'* (Federal Migration Centre, '2015 – Migration in Numbers and Words') 128-129.

Those affected include citizens from all Member States, although the most affected have been Romanian and Bulgarian citizens, as is the case in other Member States.[151]

Top 5 Nationalities Affected									
2014		2013		2012		2011		2010	
Romania	21%	Romania	30%	Romania	17%	Bulgaria	17%	Slovakia	26%
Bulgaria	6%	Bulgaria	14%	Bulgaria	10%	Slovakia	7%	Spain	21%
Spain	5%	Spain	12%	Spain	9%	Netherlands	7%	Netherlands	17%
Italy	4%	Netherlands	11%	Netherlands	7%	Spain	6%	Romania	12%
Netherlands	4%	Italy	10%	France	5%	Romania	6%	Bulgaria	9%

Graph 7.2.3(b) Main nationalities affected by expulsions orders served on EU citizens and family members in Belgium (2010-2014)
Source Belgian Immigration Office

This systemic verification practice could arguably amount to a 'general and consistent practice' capable of constituting a failure to fulfil Treaty obligations.[152]

It should be noted however that very few expulsion orders have been enforced by the Belgian authorities.[153] Nonetheless, the Court of Justice has already held in a previous infringement case relating to Belgium that 'it is of no relevance that there is in practice no immediate enforcement of orders for deportation'.[154]

7.3 Enforcement in Belgium

EU citizens and their family members may avail themselves of either administrative or judicial redress mechanisms in order to enforce their rights under the Immigration Law or under the directly effective provisions of Directive 2004/38 as the case may be.

[151] See further, Chapter 10 (Implementation of Directive 2004/38 Compared).

[152] See further, Chapter 4, Section 4.3 (Outcomes in Application).

[153] Correspondence from the Belgian Immigration Office dated 1 June 2015.

[154] Case C-408/03 *Commission v Belgium* [2006] ECR I-2663, para 70.

7.3.1 Alternatives to judicial proceedings

As previously mentioned, the former procedure to request reconsideration of an administrative decision was repealed in 2006.[155]

Nonetheless, it is possible to address complaints to the Federal Ombudsman,[156] which is empowered to receive complaints from the public concerning instances of maladministration by the Belgian federal authorities.[157] It reports annually to the Chamber of Representatives.[158]

Complaints can also be made to the Federal Migration Centre,[159] which has the mandate to provide advice to foreigners on how they can exercise their rights.[160] It submits annual reports to the Prime Minister[161] drawing its attention to possible breaches of the law by the Belgian authorities.[162]

Alternatives to court		
Mechanism	*Availability*	*Power to overturn administrative decision*
Request for reconsideration	No	No
Ombudsman	Yes	No

Table 7.3.1 Alternatives to judicial proceedings

155 See further, Section 7.1.9 (Procedural safeguards and rights of appeal).

156 *Médiateur Fédéral* established by *Loi du 22 mars 1995 instaurant des médiateurs fédéraux* (MB 07-04-1995, p 8741) (Law of 22 March 1995 creating the Federal Ombudsmen).

157 Law of 22 March 1995 (n 153), art 8.

158 ibid, art 15.

159 *Centre Fédéral Migration (Myria)* established by *Loi du 15 février 1993 créant un Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (MB 19-02-1993, p 3764)* (Law of 15 February 1993 creating a Federal Centre for the study of migration flows, the protection of fundamental rights of foreigners and the fight against human trafficking).

160 Law of 15 February 1993 (n 156), arts 2 and 4, 2°.

161 ibid, art 6.

162 See for its report '2015 - Migration in Numbers and Words' (n 147) 128-129.

7.3.2 Access to justice

The various factors that influence access to the courts in Belgium such as legal representation, costs of procedure and the availability of legal aid is summarised in the following table:

Access to justice		
Factor	*Nature*	*Comment*
Legal representation	Not mandatory	Formalistic procedures means lawyer is needed in practice
Appeal filing fee	€186.00[163]	8.3% of average net earnings[164]
Availability of legal aid	Yes	available to : -persons with net monthly income < €952.02[165] (42.6% of average net earnings)[166] -vulnerable persons regardless of income[167]

Table 7.3.2 Access to justice

[163] Immigration Law 1980, art 39/68-1 § 1; Arrêté royal du 19 juin 2015 adaptant les montants fixés à l'article 39/68-1, § 1er, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers en fonction de l'évolution de l'indice des prix à la consommation (MB 29-06-2015, p 37236) (Royal Decree of 19 June 2015 concerning the increase of court fees contained in art 39/68-1 § 1 of Immigration Law 1980 in relation to the evolution of the consumer prices index), art 1.

[164] This is calculated on the basis of 100% of the average monthly net earnings of a single adult in Belgium for 2014 (€2,232.85) as indicated in Eurostat dataset 'Annual Net Earnings' (net_nt_net) (indicator A1_100, NET): <http://ec.europa.eu/eurostat/web/labour-market/earnings/database> accessed on 5 December 2015.

[165] Arrêté royal du 18 décembre 2003 déterminant les conditions de la gratuité totale ou partielle du bénéfice de l'aide juridique de deuxième ligne et de l'assistance judiciaire (MB 24-12-2003, p 60559) (Royal Decree of 18 December 2003 on eligibility conditions for free or partially free second-level legal laid), art 1 §1; Service Public Fédéral Justice, Avis 'Aide juridique de deuxième ligne et assistance judiciaire - Adaptation des montants' (MB 18-08-2015, p 53899) (Justice Ministry, Notice 'Eligibility conditions for second-level legal aid – Amendment of thresholds'). The threshold is amended to take account of dependants. The rules also provide for partially free legal aid for those with net monthly of €1.212,15, with an uplift in case of dependants, ibid, art 1 §2. See further Commission d'Aide Juridique de Bruxelles, 'Conditions d'accès à l'aide juridique de deuxième ligne' (Brussels Legal Aid Commission, 'Eligibility conditions for second-level legal aid'): <http://www.aidejuridiquebruxelles.be/index.php/conditions-d-acces-a-l-aide-juridique-de-deuxieme-ligne> accessed 3 December 2015.

[166] Idem, n 161.

[167] Royal Decree of 18 December 2003 on eligibility conditions for free or partially free second-level legal laid, n 162, art 1 §2.

7.3.3 Nature of first instance judicial review

In Belgium, the judicial enforcement of EU residence rights is entrusted to a specialised court, the Immigration Appeals Council, with a further appeal on points of law only to the Council of State, Belgium's Supreme Administrative Court.

The Immigration Appeals Council only has a limited mandate to control the legality of the decisions of the administrative authorities.[168]

Judicial review of decisions				
Nature of judicial review	*Review of proportionality*	*Review of facts*	*Admissibility of facts not presented at time of administrative decisions*	*Admissibility of new facts occurring after administrative decision*
Control of legality	Yes	No	No	No

Table 7.3.3 Scope of judicial review of decisions on EU residence rights

7.3.4 Preliminary rulings

Since the Directive came into force, the Belgian courts have made no references to the Court of Justice under Article 267 TFEU seeking clarification on its provisions. This compares with 32 references made in the period 1968-2005 when other instruments governed the right of free movement of EU citizens.[169]

Belgian Immigration Appeals Council has never made a reference for a preliminary ruling since it was established in 2006,[170] even though it is called on almost daily to interpret the Free Movement Directive and other EU legal instruments relating to migration and asylum. The reasons it has given include

[168] See Section 7.1.9 (Procedural Safeguards and Rights of Appeal).

[169] Alec Stone Sweet and Thomas L. Brunell, 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234) 1961-2006' (2007) <http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26> accessed 30 December 2015.

[170] Luc Leboeuf and Sylvie Saroléa, 'L'invocation du droit de l'Union européenne devant le Conseil du contentieux des étrangers' in Nicolas Cariat et Janek Nowak, Le droit de l'Union européenne et le juge belge' 309-340, 328-330.

the fact that as a court of first instance, it has no obligation to make references under Article 267 TFEU[171] or by reference to the *acte clair* and *acte éclairé* doctrines.[172][173]

This appears surprising as the Belgian Courts have been considered receptive to EU law and therefore would not be expected to refrain from making references to the Court of Justice.[174]

Preliminary rulings			
Court level	*Nature*	*References made?*	*Comment*
Immigration Appeals Council	Discretionary	No	Self-imposed refusal to make preliminary rulings
Council of State	Mandatory	Yes	Admissibility test used to bypass requests for preliminary rulings

Table 7.3.4 Attitudes towards preliminary rulings

7.3.5 Publicity of decisions

The publicity of cases relating to the enforcement of the EU free movement rules is important in view of the fact that individuals a bearing a greater burden in enforcing the Directive before the national courts, given the Commission's preferred strategy to negotiate compliance rather than pursue an enforcement policy revolving around infringement proceedings.

Judicial decisions of the Immigration Appeals Council and the Council of State are published on their respective websites.[175] However, these are not presented in such a way that would make it easy for individuals or lawyers to

[171] *Conseil du Contentieux des Étrangers, no 120.360 du 12 mars 2014* (Immigration Appeals Council, 12 March 2014).

[172] *Conseil du Contentieux des Étrangers, no 86.212 du 24 août 2012* (Immigration Appeals Council, *24 August 2012*).

[173] See further, Chapter 5, Section 5.3.4 (Reference for a preliminary ruling).

[174] See to that effect, Arthur Dyevre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?' (2013) 9 European Constitutional Law Review 139-168.

[175] <http://www.rvv-cce.be/> accessed 1 July 2015 ; <http://www.raadvst-consetat.be/> accessed 1 July 2015.

identify cases enforcing the national implementing measures. This is made more difficult by the fact that Belgium chose to amend its unitary Immigration Law rather than create a separate legal instrument.

Publicity of judicial decisions			
Court level	*Availability of reports*	*Visibility of EU residence cases*	*Availability of statistics on EU residence cases*
Immigration Appeals Council	Yes	Low	No
Council of State	Yes	Low	No

Table 7.3.5 Publicity given to judicial rulings on EU residence rights

7.4 Conclusions on Implementation in Belgium

Belgium has chosen to transpose the Directive through the parliamentary enactment of consolidating legislation that amends the unitary law governing the entry and residence of non-nationals on Belgian territory. Only twelve provisions and sub-provisions were identified as following a literal approach to transposition.[176] Belgium can therefore be said to have followed an elaborative approach to the drafting of the Free Movement Directive.

Overall, Belgium's transposition of the Directive was satisfactory in comparison to other Member States, although it was slightly below the average across Member States. The level of compliance in transposition was 67% compared to the EU average of 71%. This has improved with compliance reaching 75%, notably as a result of the Commission's infringement action. The weakest part of transposition relates to procedural safeguards and rights of appeal.

Owing to its constitutional structure, responsibility for the application of the rules is shared between the municipalities, which handle simple cases of registration of EU citizens and the federal Immigration Office which handles more complicated cases and all applications by non-EU family members. However, the inconsistent application of the rules in Belgium and the lack of information for EU citizens and their family members has led to the correctness in the practical application of the rules being rated very poorly at 33%, compared to an average of 62% across all Member States. This is despite improvements in the transposition of the Directive. Moreover, the exchange of information on EU benefits claimants established between the Belgian authorities has enabled the Immigration Office to undertake systematic verification of residence rights leading to expulsion orders being served on an

[176] Article 2(2)(a), Article 7(1)(a), Article 7(3)(c), Article 7(3)(d), Article 16(3), Article 16(4), Article 17(1)(c) (second sentence), Article 27(2) (four sub-provisions), and Article 29(2); see Correspondence Table for Belgium (n 64). This represents 8% of the total 144 provisions and sub-provisions that needed to be transposed.

increasing number of EU citizens. This is likely to constitute a 'general and consistent practice' capable of constituting a failure to fulfil Treaty obligations.

The weakness of Belgium's transposition of the Directive's provisions on rights of appeal is reflected by the restricted of judicial review. Although judicial enforcement is entrusted to a specialised court, the Immigration Appeals Council has only been endowed with a limited mandate to control the legality of the decisions of the administrative authorities. This may be the source of procedural obstacle to the enforcement of rights under the Directive, but this would require further in-depth study.

In Belgium, the free movement of persons is of medium political importance because it is associated with a wider political aim of achieving budgetary discipline and control over the country's expenditures, as reflected by the considerations that have motivated the establishment of a system to verify the residence rights of EU citizens who claim benefits from the Belgian social assistance system.

The motivation of the Belgian authorities towards compliance can be characterised as evasive non-compliance in view of the fact that it sought to address the allegations of non-compliance made by the European Commission after it issued its reasoned opinion, thereby avoiding the initiation of infringement proceedings before the Court of Justice for failure to fulfil treaty obligations under Article 258 TFEU.

CHAPTER 8. THE IMPLEMENTATION OF THE DIRECTIVE IN ITALY

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8.1 Transposition in Italy

8.1.1 Overview

The Directive was transposed into Italian law by Legislative Decree No 30/2007,[1] which came into force on 11 April 2007. The Legislative Decree has been amended on several occasions.[2] It is also complemented by a number of circulars.[3]

Italy's original transposition of the Directive can be considered satisfactory when compared to other Member States and was only slightly better than the EU average (29%) as table 8.1.1 illustrates.

[1] *Decreto Legislativo del 6 febbraio 2007, n 30 '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', GU n 72 del 27-03-2007*, (Legislative Decree No 30/2007 of 6 February 2007 on implementation of Directive 2004/38, hereafter, the 'Legislative Decree' or 'Legislative Decree No 30/2007'). For further commentary see, Alessandra Lang and Bruno Nascimbene 'L'attuazione in Italia della Direttiva 2004/38/CE sulla libera circolazione dei cittadini dell'Unione europea' (2007) 9 Diritto, immigrazione e cittadinanza 43-63; Marcello Di Filippo, 'La libera circolazione dei cittadini comunitari e l'ordinamento italiano : (poche) luci e (molte) ombre nell'attuazione della Direttiva 2004/38/CE' (2008) 91 Rivista di diritto internazionale 420-448; Lorenzo D'Ascia, Diritto degli stranieri e immigrazione (Giuffrè Editore 2009) 421-458.

[2] The relevant modifications to the Legislative Decree will be subsequently referred to where appropriate.

[3] *Ministero dell'Interno, 'Circolari Cittadini Unione Europea'* (2007-2015) (Ministry of the Interior, 'Circulars on EU Citizens) <http://servizidemografici.interno.it/it/cittadini-ue/circolari> accessed 7 March 2015.

Transposition Outcomes Italy			
	IT (2008)	IT (2015)	EU average
Total provisions of Directive to be transposed			*144*
Provisions correctly transposed	93	102	90
Provisions subject to more favourable transposition	8	8	12
Provisions subject of compliant transposition	*101*	*110*	*102*
Level of compliance of transposition	**70%**	**76%**	**71%**
Provisions that are transposed ambiguously	5	8	8
Provisions that are transposed incorrectly or incompletely	30	18	23
Provisions not transposed (failure to transpose)	8	8	12
Provisions subject of non-compliant transposition	*43*		*43*
Level of non-compliance of transposition	**30%**		**29%**

Table 8.1.1 Transposition outcomes (Italy)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

The European Commission opened infringement proceedings against Italy for incorrect transposition of the Directive in 2011.[4] As a result, several amendments have been made which overall has led to improvements in the outcome of transposition of the Directive in Italy.

In many cases transposition has been literal and the drafting of the Legislative Decree has adopted a replicative approach to drafting using the same wording as the provisions of the Directive.

8.1.2 Legislative history

Italy is a parliamentary republic[5] and consists in the State and autonomous agencies.[6] The Italian Constitution of the Italian Republic provides that the State has exclusive legislative power in matters relating to the European

[4] Commission, Case 2011/2053 concerning Italy's incorrect transposition of Directive 2004. The infringement action was initiated on 27 October 2011 by the sending of a Letter of Formal Notice. Following official correspondence on the matter and amendments made to the Legislative Decree, the case was officially closed on 10 December 2013.

[5] *Costituzione della Repubblica Italiana, Roma, 27 diccembre 1947* (Constitution of the Italian Republic, Rome, 27 December 1947, hereafter the 'Italian Constitution' or the 'Constitution'), arts 1 and 55.

[6] ibid, art 114.

Union.[7] The Parliament adopts laws[8] on the basis of proposals from the Government among others.[9]

The practice which has evolved in respect of the transposition of EU directives in Italy is for the Parliament to enact a '*Legge comunitaria*' (Community law) that delegates specific powers to the Government by way of legislative decree.[10] A legislative decree is an instrument enacted by the Government which has the force of law on the basis of a delegation from the Parliament.[11] In 2oo5, the Parliament adopted such a law to delegate powers to the Government for the transposition of Directive 2004/38.[12]

Italy was late in transposing the Directive. In June 2006, the European Commission opened infringement proceedings against Italy for failure to

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[7] ibid, art 117.

[8] ibid, art 70.

[9] Ibid, art 71.

[10] Anselmo Barone, 'Rapport Italien' in XVIII FIDE Congress Report, Volume 1, 'Les Directives Communautaires: Effets, Efficacité, Justiciabilité' (Stockholm, 3-6 June 1998) 314-331, 314-319; Luigi Daniele, *Diritto dell'Unione europea* (2007) 172-179; Giuseppe Tesauro, *Diritto Comunitario* (5th ed, CEDAM 2008) 168-169; Ugo Villani, *Istituzioni di Diritto dell'Unione europea* (Cacucci Editore 2008) 336-342. See also David Hine, 'European Policy-Making and the Machinery of Italian Government' (2000) 5 South European Society and Politics 25-46; Sergio Fabbrini and Alessia Donà 'Europeanisation as Strengthening of Domestic Executive Power? The Italian Experience and the Case of the "Legge Comunitaria"' (2003) 25 Journal of European Integration 31-50.

[11] Article 76 of the Constitution which provides that: 'The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes' (official translation, Italian Senate, *Constitution of the Italian Republic* (*Senato della Repubblica* undated). See further, Angelo Antonio Cervati, 'Les sources et catégories des aces juridiques – l'Italie' in Gerd Winter (ed), *Sources and Categories of European Union Law* (Nomos 1996) 219-234, 223-224.

[12] *Legge del 18 aprile 2005, n 62, 'Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunita' europee. Legge comunitaria 2004' (GU n 96 del 27-04-2005 - Suppl. Ordinario n. 76)* (Law No 62 of 18 April 2005 on the fulfilment of obligations resulting from Italy's membership of the European Community, hereafter 'Legge comunitaria 2004'), art 1, paras 1 and 2, and annex B.

transpose the Directive.[13] This was followed by a further reasoned opinion sent by the Commission[14] at the end of that year.[15] It was not until February 2007 that the Legislative Decree was adopted. The law came into force on 11 April 2007[16] resulting in a delay of 346 days as regards the transposition of the Directive in Italy.[17]

However, the infringement proceedings were only closed on the 27 November 2008.[18] During this time, in the aftermath of the murder of a woman in Rome perpetrated by a Romanian citizen,[19] the Government sought to pass emergency legislation to strengthen measures in respect of the expulsion of foreign citizens from Italy. However, the measures in the form of decree-laws[20]

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[13] Commission, Letter of Formal Notice, Case 2006/0461 (1 June 2006). See further Commission, 'Staff Working Document – Annex to the 24th Annual Report on Monitoring the Application of Community Law (2006) - COM(2007) 398 final', SEC(2007) 976, Annex IV, Part 2, 219-220.

[14]See further Chapter 5, Section 5.2.2 (Infringement action by the Commission).

[15] Commission, Reasoned Opinion, Case 2006/0461 (12 December 2006) concerning Italy's non-communication of national implementing measures. The case was reportedly referred to the Court of Justice on 17 October 2007 but withdrawn on 5 June 2008. See further Commission, 'Staff Working Document – Annex to the 26th Annual Report on Monitoring the Application of Community Law (2008) – COM(2009), SEC (2009), Annex IV, Part 2, 172-173.

[16] Constitution, art 73 provides that laws come into force fifteen days after their publication in the *Gazzetta Ufficiale della Repubblica* (Official Journal of the Italian Republic, hereafter the 'GU'). Legislative Decree 30/2007 was published in the GU on 27 March 2006.

[17] For a comparison of transposition delay, see further, Chapter 10 (Implementation of Directive 2004/38 Compared).

[18] Commission, 'Staff Working Document – Annex to the 26th Annual Report on Monitoring the Application of Community Law (2008) – COM(2009), SEC (2009), Annex IV, Part 2, 172-173.

[19] Michaela Latini, 'Conformity Study for Italy' 6, Annex to Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008) (hereafter 'Conformity Study for Italy') 21-22. See further, 'Italian woman's murder prompts expulsion threat to Romanians', *The Guardian* (London, 2 November 2007) <http://www.theguardian.com/world/2007/nov/02/italy.international> accessed 18 July 2015.

[20] *Decreto-Legge del 1 novembre 2007, n 181 'Disposizioni urgenti in materia di allontanamento dal territorio nazionale per esigenze di pubblica sicurezza' (GU n 255 del 2-11-2007) (decaduto GU n 1 del 02-01-2008)* (Decree Law 181/2007 of 1 November 2007 on urgent measures relating to the removal of

lapsed due to the Parliament not converting them into law within sixty days of their adoption.[21]

However, the Government using its delegated powers under the *Legge comunitaria 2004*[22] amended the Legislative Decree in February 2008[23] as regards the grounds for expulsion[24] among other matters. The Government then sought to introduce further measures before Parliament known as the 'Pachetto sicurezza' (security package),[25] which would have led to further amendment of the Legislative Decree in a way that contravened several of the Directive's provisions.[26] However, in the face of mounting criticism from European Parliament and the Commission among others, the security package

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foreigners from the national territory on grounds of public security) (lapsed); *Decreto-Legge del 29 dicembre 2007, n 249 'Misure urgenti in materia di espulsioni e di allontanamenti per terrorismo e per motivi imperativi di pubblica sicurezza' (GU n 1 del 02-01-2008) (decaduto GU n 53 del 03-03-2008)* (Decree Law 249/2007 of 29 December 2007 on urgent measures relating to the expulsion and removal of foreigners on for reasons of terrorism and on grounds of public security) (lapsed).

[21] A Decree-Law is an act of primary legislation which the Government can adopt, of its own motion, in cases of necessity and urgency, according to Article 77 of the Constitution. It has the same force as a law and constitutes a temporary measure that the Government presents to the Parliament for conversion into law. Such a measure lapses retroactively if it is not converted into law by the Parliament within sixty days of its publication. In case the deadline is missed, a decree-law loses its validity retrospectively. In any event, the Parliament may by means of law regulate the effects of any legal relations that have arisen from unconverted decrees.

[22] Legge comunitaria 2004 (n 12).

[23] *Decreto Legislativo del 28 febbraio 2008, n 32 'Modifiche e integrazioni al decreto legislativo 6 febbraio 2007, n 30, recante attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri', GU n 52 del 01-03-2008*, (Legislative Decree No 32/2008 amending Legislative Decree 30/2007 of 6 February 2007 on implementation of Directive 2004/38, hereafter, 'Legislative Decree No 32/2008'), which inserted a new art 5bis and modified art 20.

[24] See further Section 8.1.8 (Restrictions on entry and residence).

[25] See further Massimo Merlino, 'The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU' (2009) CEPS Challenge Research Paper No 14.

[26] ibid, 16-21.

was withdrawn insofar as the measures related to EU citizens and their family members.[27]

8.1.3 Beneficiaries

The provisions on direct family members have been correctly transposed. It should also be noted that Ministerial Circular No 39/2007[28] extends the benefit of the Legislative Decree to citizens of Iceland, Norway, Liechtenstein and Switzerland.

However, the transposition of provisions relating to partners in a 'durable relationship' was initially problematic because it required that the partner's Member State of origin should have attested to the durability of the relationship.[29] This issue has now been resolved following several amendments of the Legislative Decree[30] which were made following the initiation of infringement proceedings by the Commission for incorrect transposition.[31]

[27] European Citizen Action Service, 'Comparative study 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' (PE 410.650, European Parliament 2009) (hereafter 'ECAS comparative study') 42, 121-123.

[28] Ministero dell'Interno, Circolare del 18 luglio 2007, n 39, 'Decreto Legislativo 6 febbraio 2007. Diritto di libera circolazione e soggiorno dei cittadini dell'Unione e dei loro familiari' (Ministry of Interior, Circular No 39 of 18 July 2007 'Legislative Decree of 6 February 2007 n. 30. Right of free movement and residence of Union citizens and their family members, hereafter 'Circular No 39/2007') 2.

[29] Conformity Study for Italy (n 19) 24; Michaela Latini, 'Correspondence Table, Italy', Annex to Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008) (hereafter 'Correspondence Table for Italy') 6.

[30] art 3, para 2, b) amended by *Legge del 6 agosto 2013, n 97 'Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013', GU n 194 del 20-08-2013)* (Law No 97 of 6 August 2013 on the fulfilment of obligations resulting from Italy's membership of the European Community, hereafter 'Law 97/2013'), art 1, para 1, a); new art 10, para 3, d-bis inserted by art 1, para 1, d) of 'Law 97/2013.

[31] Commission, Letter of formal notice sent to Italy, SG(2011)D/18350, C(2011)7523, 28 October 2011 (Information from Commission dated 3 August 2015 (GestDem 2015/2901)).

It should also be noted that, for the purposes of the Legislative Decree, the Italian courts have displayed a progressive interpretation of the concept of 'spouse' that would also encompass the parties to a same-sex marriage, regardless of the fact that Italy does not recognise same-sex unions.[32] It therefore follows that since Italy does not recognise registered partnerships as equivalent to marriage, such unions fall to be examined under the provisions relating to 'other family members'.[33]

Italy has also made use of Article 37 of the Directive to extend the scope of its provisions to the family members of Italian citizens.[34]

[32] *Tribunale di Reggio Emilia, decreto 13-02-2012* (Tribunal of Reggio Emilia, judgment of 13 February 2012) The case concerned a same-sex Italian and Uruguayan couple who sought to move to Italy after getting married in Spain. The appeal concerned the rejection of an application for a residence card by the Italian authorities (*Questura*). The Tribunal first noted that Legislative Decree 30/2007 governs not only the situation of EU citizens and their family members wishing to live in Italy, but that it also specifically applies to the situation of Italian citizens and their family members (art 23). After noting that neither the Directive nor the Legislative Decree specify whether the term 'spouse' should be interpreted according to the legislation of the host Member State - as it does in the case of the term 'partner' under Article 2(2)(b) of the Directive – the Tribunal went on to decide that the term 'spouse' should be examined from the point of view of the legislation of the Member State where the marriage was lawfully celebrated, in this case Spain. For this purpose, the Tribunal noted it should be sufficient for the applicant to produce a document from the country of nationality or origin attesting to the existence of a family relationship (for example, a marriage certificate). However, the Tribunal specified that this would only serve the purpose of ensuring compliance with the right to residence of family members of EU citizens as required under the Directive and the Legislative Decree. For commentary see, Massimo Fichera and Helen Hartnell, 'All you need is law: Italian courts break new ground in the treatment of same-sex marriage' (2012) Helsinki Legal Studies Research Paper Series Paper No 22

[33] Article 3(2)(b) of the Directive.

[34] Article 23 of the Legislative Decree.

Transposition Outcomes: Beneficiaries			
Article	Content	Transposition outcome	Subsequent amendment
2	*Definitions*		
2(1)	EU citizen	Correct	
	Family member		
2(2)(a)	Spouse	Correct	
2(2)(b)	registered partnership (equivalent to marriage)	Correct	
2(2)(c)	direct descendants (under the age of 21)	Correct	
2(2)(c)	direct descendants (dependants)	Correct	
2(2)(d)	direct relatives in the ascending line (dependants)	Correct	
3	*Beneficiaries*		
3(1)	EU citizens and family members in terms of Art. 2	Correct	
3(2)(1)(a)	facilitation for dependants in the country of origin	Correct	
3(2)(1)(a)	facilitation for members of the household	Correct	
3(2)(1)(a)	facilitation for family members on serious health grounds	Correct	
3(2)(1)(b)	facilitation for partners (durable relationship duly attested)	Incorrect	Correct
3(2)(2)	procedure (extensive examination, justification)	Correct	

Table 8.1.3: Transposition outcomes for beneficiaries (Articles 2-3 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

8.1.4 Entry and exit

The rights of entry and exit have been correctly implemented and the initial problems in non-compliance[35] have been addressed[36] as part of the measures taken to address the infringement action pursued by the Commission for incorrect transposition.[37]

The only element of non-compliance relates to the option of Member States to require EU citizens and their family members to declare their presence within ‘a reasonable and non-discriminatory period of time’.[38] The Legislative Decree was amended in this respect,[39] but this required the Ministry of the

[35] Conformity Study for Italy (n 19) 26; Correspondence Table for Italy (n 28) 10-12.

[36] Art 6, para 2 was amended by Law 97/2013, art 1, para 1, b).

[37] Commission, Letter of formal notice sent to Italy, 28 October 2011 (n 31).

[38] Article 5(5) of the Directive.

[39] A new art 5bis was inserted by Legislative Decree No 32/2008 (n 22).

Interior to adopt an implementing decree to specify the deadline. This has yet to be adopted. However, a form is available for the purposes of making a declaration to the Italian police force.[40] The effect of not making declaration is that a person is presumed to be residing in Italy for more than three months, unless proof to the contrary is shown. This is incorrect because this presumption effectively adds requirements not foreseen by the Directive.

Transposition Outcomes: Entry and Exit			
Article	Content	Transposition outcome	Subsequent amendment
4	*Right of exit*		
4(1)	right of exit for EU citizens (ID or passport)	Correct	
4(1)	right of exit for TCN family members (passport)	Correct	
4(2)	no visa or equivalent formality	Correct	
4(3)	ID or passport stating the nationality of the holder	Correct	
4(4)	territorial validity of the passport (5 years if MS do not issue ID cards	Correct	
5	*Right of entry*		
5(1)(1)	right of entry for EU citizens (ID or passport)	Correct	
5(1)(1)	right of entry for TCN family members (passport)	Correct	
5(1)(2)	no visa or equivalent formality	Correct	
5(2)(1)	obligation to hold entry visa for TCN members (Reg. No. 539/2001)	Correct	
5(2)(2)	residence card exemption	Correct	
5(2)(3)	facilitation to obtain entry visa	Correct	
5(2)(4)	accelerated procedure for issuing visa, free of charge	Correct	
5(3)	entry or exit stamp (passport TCN family member carrying residence card)	Correct	
5(4)	all opportunities to enter without valid travel documents	Incorrect	Correct
5(5)	presence report (optional)	Incorrect	Incorrect

Table 8.1.4: Transposition outcomes for entry and exit (Articles 4 and 5 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

[40] Minisro dell'Interno, 'Formulario: Dichiarazione di presenza/Déclaration de Présence/Declaration of presence/ Declaration de entrada/Aufenthaltserklarung' (Ministry of the Interior, 'Declaration of presence form' <http://img.poliziadistato.it/docs/moduldich.pdf> accessed 15 August 2015.

8.1.5 The right of residence

The provisions on the right of residence are on the whole correctly transposed by the Legislative Decree. Certain problems have been addressed as part of the Commission's infringement action.[41] This concerned the right of residence of non-EU family members for up to three months,[42] the requirement that non-EU family members should produce a visa when applying for a residence card,[43] and the documents needed in support of applications.[44]

Nonetheless various problems remain that not yet been fully addressed. Crucially, the Legislative Decree still fails to transpose the six-month deadline[45] that applies to the issue of a residence card to non-EU family members.[46]

In connection with residence formalities, the Legislative Decree imposes obligations that go beyond those contained in the Directive. The Italian rules require self-sufficient persons and students to hold resources in line with the Italian immigration rules that apply to non-EU citizens.[47] Moreover Circular No

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[41] Commission, Letter of formal notice sent to Italy, 28 October 2011 (n 31).

[42] Article 6(2) of the Directive. *Decreto-Legge 23 giugno 2011, n 89 'Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari' (GU n 144 del 23-06-2011)* (Decree Law 89/2011 of 29 December 2007 on urgent measures relating to the additional implementation of Directive 2004/38 on the free movement of EU citizens and for the transposition of Directive 2008/115 on the return of third country nationals unlawfully present, hereafter 'Decree Law 89/2011') amended art 6, para 2 of the Legislative Decree.

[43] Art 10, para 3, a) as amended by Decree Law 89/2011 (n 41), art 1, para 1, d), 1).

[44] Art 10, para 3, b) was amended by Decree Law 89/2011 (n 41), art 1, para 1, d), 1) in connection with applications made by 'other family members'.

[45] Article 10(1) provides that a residence card is to be issued to non-EU family members 'no later than six months from the date on which they submit the application'.

[46] Art 10, para 1 of the Legislative Decree fails to transpose the six-month deadline.

[47] Art 9, para 3, b) and c) and art 9, para 4 of the Legislative Decree which requires that self-sufficient persons and students should have sufficient resources by reference to the criteria set out in art 29, para 3, b) of Legislative Decree 286/1998 of 25 July 1998 containing the consolidated law on immigration (*Decreto Legislativo del 25 luglio 1998, n 286, 'Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero' GU n 191 del 18-*

19/2007[48] appears to impose minimum financial requirements which would be in breach of the Directive.[49] Although the Legislative Decree has been amended to require the assessment of the sufficiency of resources must be based on the personal circumstances of the applicant,[50] the fact remains that these are additional requirements create ambiguity.

The right to retain the status of a worker in various circumstances[51] has been incorrectly transposed[52] as relating only to the retention of the right of residence. This matters because retaining the status of a worker (as opposed to a right of residence) triggers additional rights under Regulation 492/2011,[53] such as the right to equal treatment in respect of social and tax advantages.[54]

The Legislative Decree contains an additional condition that must be fulfilled in the case of a non-EU family member who claims a right to remain in Italy on the basis of domestic violence by requiring that formal legal

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08-1998 - Supplemento Ordinario n 139). See further Conformity Study for Italy (n 19) 28-29; Correspondence Table for Italy (n 28) 23-30.

[48] Ministero dell'Interno, 'Circolare n 19 del 6 aprile 2007: Attuazione della Direttiva 2004/38/CE del Parlamento Europeo e del Consiglio del 29 Aprile 2004 relativa al diritto dei cittadini dell'unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati Membri, che modifica il regolamento CEE 1612/68 ed abroga le Direttive 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/194/CEE, 75/34/CEE, 75/35 (CE), 90/364/CEE, 90/365/CEE e 93/96/CEE' (Ministry of the Interior, Circular No 19 of 6 April 2007 on the transposition of Directive 2004/38/EU of the European Parliament and of the Council of 29 April 2004 concerning the right of Union citizens and their family member to move and reside freely within the territory of the Member States, that modifies Regulation EEC n. 1612/68 and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/194/EEC, 75/34/EEC; 75/34 (EC), 90/364/EEC, 90/365/EEC and 93/96/EEC, hereafter 'Circular No 19/2007') 4-5.

[49] Article 8(4) provides that no fixed amount can be imposed in this regard.

[50] Art 10, 3bis as inserted by Decree Law 89/2011 (n 41), art 1, para 1, e).

[51] Article 7(3) of the Directive.

[52] Art 7(3) of the Legislative Decree. See further, Conformity Study for Italy (n 19) 27; Correspondence Table for Italy (n 28) 16-18.

[53] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[54] ibid.

proceedings are on-going or have resulted in a conviction.[55] The existence of formal legal proceedings is not specified the Directive.[56]

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
6	*Residence (up to three months)*		
6(1)	EU citizens	Correct	
6(2)	TCN family members	Incorrect	Correct
7	*Residence (more than three months)*		
7(1)(a)	workers or self-employed persons	Correct	
7(1)(b)	sufficient resources and comprehensive sickness insurance cover	Correct	
7(1)(c)	study (comprehensive sickness insurance +assurance of sufficient resources)	Correct	
7(1)(d)	Family member	Correct	
7(2)	TCN family members	Correct	
7(3)(a)	retention in case of illness or accident	Incorrect	
7(3)(b)	involuntary unemployment after 1 year of employment	Incorrect	
7(3)(c)	involuntary unemployment after fixed-term contract (less than 1 year)	Incorrect	
7(3)(d)	vocational training (after previous employment)	Incorrect	
7(4)	special rules concerning family members of students	Correct	
8	*Administrative formalities for EU citizens*		
8(1)	option: register	Correct	
8(2)	deadline to register	Correct	
8(2)	immediate issue	Correct	
8(2)	Sanctions	Correct	
8(3)	documents required from workers or self-employed persons	Correct[57]	
8(3)	documents required from self-sufficient persons	Incorrect	Ambiguity
8(3)	documents required from students	Incorrect	Ambiguity
8(4)	no fixed amount with regard to 'sufficient resources'	Incorrect	Ambiguity
8(5)	documents required from EU family members	Correct	
9	*Administrative formalities for family members who are not EU citizens*		
9(1)	issue a residence card	Correct	

[55] Art 12, para 2, c) of the Legislative Decree.

[56] Article 13(2)(c) of the Directive.

[57] This provision was identified as ambiguously transposed by the Commission; see Information from Commission dated 10 March 2015 (GestDem 2015/1508). However, no such problem in transposition could be identified. Moreover, no such ambiguity is identified by the Conformity Study for Italy (n 19) 28 or the Correspondence Table for Italy (n 28) 22.

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
9(2)	deadline for submission	Correct	
9(3)	Sanctions	Correct	
10	*Issue of residence cards*		
10(1)	title of the residence card	Incorrect	Correct
10(1)	issue deadline of six months	Not transposed – non compliant	
10(1)	certificate of application	Correct	
10(2)	documents required from TCN family members	Incorrect	Correct
11	*Validity of the residence card*		
11(1)	period of validity	Correct	
11(2)	temporary absences	Correct	
12	*Retention of the right of residence in the event of death or departure of the EU citizen*		
12(1)	retention of residence of EU family members - death/departure	Correct	
12(1)	conditions for the right of permanent residence	Correct	
12(2)	retention of residence of TCN family members - death of the EU citizen	Correct	
12(3)	child in education and parent having custody - departure of the EU citizen	Correct	
13	*Retention of the right of residence in the event of divorce, annulment of the marriage or termination of registered partnership*		
13(1)	EU family members	Correct	
13(1)	conditions for the right of permanent residence	Correct	
13(2)	TCN family members	Correct	
13(2)(a)	3 years of marriage, including 1 year in the host MS	Correct	
13(2)(b)	custody of the EU citizen's children	Correct	
13(2)(c)	domestic violence	Incorrect	
13(2)(d)	right of access to a minor child in the host MS	Correct	
13(2)	conditions for the right of permanent residence	Correct	
13(2)	exclusively on personal basis	Not transposed – compliant	
14	*Retention of the right of residence*		
14(1)	retention of the right of residence under Art. 6	Correct	
14(2)	retention of the right of residence under Art. 7, 12, 13	Correct	
14(2)	verification of residence rights	Not transposed – non compliant	
14(3)	no automatic expulsion in case of recourse to social assistance	Not transposed – non compliant	
14(4)(a)	no expulsion of workers or self-employed persons	Correct	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Correct	

Table 8.1.5: Transposition outcomes for residence (Article 6-14 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

8.1.6 The right of permanent residence

The provisions on the right of permanent residence has been almost all correctly transposed. The notable exceptions are the omission of the reference to the automatic renewability of permanent residence cards issued to non-EU citizens,[58] the ambiguity concerning worker who have worked at least three years in Italy but then become a cross-border worker in another Member State,[59] and incorrect drafting on the provisions relating to loss of permanent residence[60] and continuity of residence.[61]

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
16	*General rule for EU citizens and their family members*		
16(1)	legal residence during 5 years	Correct	
16(1)	not subject to the Chapter III conditions	Correct	
16(2)	TCN family members	Correct	
16(3)	temporary absences	Correct	
16(4)	only lost through absences exceeding 2 years	Correct	
17	*Exemptions for persons no longer working in the host Member State*		
17(1)(a)	worker who reaches retirement age after working at least a year	Correct	
17(1)(a)(2)	retirement age (60) in case national law is silent	Correct	
17(1)(b)	worker permanently incapable of working (min. 2 prior years of residence)	Correct	
17(1)(c)	worker who has worked at least three years but then becomes cross-border worker	Ambiguous	
17(1)(c)(1)	periods of employment under (a) and (b)	Correct	
17(1)(c)(2)	periods of involuntary unemployment etc. count as employment	Correct	

[58] Article 20(1) of the Directive corresponding to art 17, paras 1) and 2) of the Legislative Decree. See further, Conformity Study for Italy (n 19) 36; Correspondence Table for Italy (n 28) 62.

[59] Article 17(1)(c) of the Directive corresponding to art 15, para 1, c) of the Legislative Decree. See further, Conformity Study for Italy (n 19) 35; Correspondence Table for Italy (n 28) 55-56.

[60] Article 20(3) of the Directive corresponding to art 17, para 4 of the Legislative Decree. See further, Conformity Study for Italy (n 19) 36; Correspondence Table for Italy (n 28) 63.

[61] Article 21 of the Directive corresponding to art 18 of the Legislative Decree. See further, Conformity Study for Italy (n 19) 36; Correspondence Table for Italy (n 28) 62.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
17(2)	exemption from periods under (a) or (b) if citizen's spouse or partner is national or ex-national	Correct	
17(3)	right of permanent residence of family members	Correct	
17(4)(a)	family members acquire PR upon death of worker (if worker resided for min. 2 years)	Correct	
17(4)(b)	family members acquire PR upon death of worker (if of worker's death result accident at work)	Correct	
17(4)(c)	family members acquire PR upon death of worker (if worker spouse is ex-national)	Correct	
18	*Acquisition of the right of permanent residence by certain family members who are not EU citizens*		
18	permanent residence of family members having retained right of residence under Art. 12 or 13	Correct	
19	*Document certifying permanent residence for EU citizens*		
19(1)	Document certifying permanent residence for EU citizens	Correct	
19(2)	Document certifying permanent residence to be issued as soon as possible	Correct	
20	*Permanent residence card for family members who are not nationals of a Member State*		
20(1)	issue deadline six months; automatic renewability	Incorrect	
20(2)(1)	submission before expiration of the residence card	Correct	
20(2)(2)	Sanctions	Correct	
20(3)	temporary absences	Incorrect	
21	*Continuity of residence*		
21	continuity of residence can be proved by any means; expulsion breaks continuity	Incorrect	

Table 8.1.6: Transposition outcomes for permanent residence (Article 16-21 of Directive 2004/38)

Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

8.1.7 Equality of treatment

The drafting of the provisions of the Legislative Decree on equality of treatment has been reported as incorrect.[62]

There are additional problems generated by other measures running into conflict with these provisions. One example relates to healthcare.[63] In theory, equal treatment should enable EU citizens to be able to access the Italian national health service ('Servizio Sanitario Nazionale' or SSN) under the same conditions that apply to Italian citizens.[64] However, the existing rules guaranteeing access to healthcare for non-nationals[65] do not extend non-EU citizens.[66] The conditions under which EU citizens have instead been the subject of a Circular from the Health Ministry.[67] These only allow EU citizens who work, study or produce proof of social security coverage in another Member State to access SSN services. Alternatively, they must hold a permanent residence card. This requirement represents a breach of Article 25 of the Directive, which provides that the exercise of a right is not conditional upon holding a residence document,[68] which has not been correctly transposed.

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[62] Conformity Study for Italy (n 19) 37-38; Correspondence Table for Italy (n 28) 65-68.

[63] Problems with access to healthcare have been reported in Neva Cocchi, Dana Gavril, Nicola Grigion, Carlos Guimaraes, Celia Mayer, Nuria Sanchez, Anna Sibley, Libor Studený, 'Citizens Without Borders: Free movement and residence in the European Union a challenge for European citizenship' (2013) 37-42.

[64] Article 32 of the Constitution recognises 'health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the persons in need'.

[65] *Legge 6 marzo 1998, n 40 'Disciplina dell'immigrazione e norme sulla condizione dello straniero' (GU n 59 del 12-3-1998 - Suppl Ordinario n 40)* (Law of 6 March 1998 regulating immigration and the status of foreigners), art 32.

[66] ibid, art 1, 2).

[67] *Ministero della Salute, Circolare del 3 agusto 2007 'Diritto di soggiorno per i cittadini comunitari'* (Ministry of Health, Circular of 3 August 2007 'Right of residence for EU citizens').

[68] Article 25 provides that '[p]ossession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no

The rules also create a further potential problem of discrimination, because EU citizens who do not work or study are prevented from accessing SSN services under the same conditions as Italians who do not work or study. While there has not been any case law on this issue,[69] it is doubtful that Italy could claim that healthcare amounts to social assistance which could be denied to EU citizens and their family members under Article 24(2) of the Directive.[70]

Transposition Outcomes: Equal Treatment			
Article	Content	Transposition outcome	Subsequent amendment
23	*Related rights*		
23	right to work	Ambiguous	
24	*Equal treatment*		
24(1)	equal treatment	Correct	
24(2)	derogation with regard to social assistance	Ambiguous	
24(2)	derogation with regard to maintenance aid for studies	Ambiguous	
25	*General provision concerning residence documents*		
25(1)	possession of residence docs cannot be made precondition for exercise of rights	Not transposed – non compliant	
25(2)	charge for residence docs not to exceed charge for issuing nationals with similar documents	Correct	

Table 8.1.7: Transposition outcomes for equality of treatment (Article 23-25 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof'.

[69] However see European Parliament, Notice to Members 'Petition 1225/2012 by A. d. A. (Italian) concerning refusal to allow registration with the Italian health service', 27 June 2014.

[70] See to that effect, Case C-578/08 *Chakroun* [2010] ECR I-1839, para 49, in which the Court held that '[t]he concept of 'social assistance' in Article 7(1)(c) of the Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed'; Case C-140/12 *Brey* [2013] ECLI:EU:C:2013:565 (judgment of 19 September 2013), para 61, where the Court confirmed that the concept of social assistance system 'must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State'.

8.1.8 Restrictions on entry and residence

In Italy, the transposition of the provisions of the Directive relating to restrictions on EU citizens have proved to be the most controversial.

The original Legislative Decree was not at all compliant in respect of the limits placed by the Directive on the ability of the host Member State to restrict the free movement rights of EU citizens or their family members on grounds of public order or public security.[71] One aspect of problem has been the very wide scope of the relevant provision of the Legislative Decree[72] meant that 'in practice the expulsion measure set out in Article 20 (3) of Decree 30/2007 could be applied when there is simply a risk of harm'.[73]

However, following the Commission's infringement action, it appears that the Legislative Decree has addressed some areas of non-compliance with the Directive[74] although some issues remain. The most notable improvement has been the inclusion of a reference to expulsion measures requiring the personal conduct of the individual to represent a 'sufficiently serious threat' as required by the Directive.

Transposition Outcomes: Restrictions on Entry and Residence			
Article	Content	Transposition outcome	Subsequent amendment
22	*Territorial scope*		
22	right of residence extends to entire MS; territorial restrictions must be same as for nationals	Correct	
26	*Checks*		
26(2)	Sanctions	Correct	
27	*General principles*		

[71] Conformity Study for Italy (n 19) 38-46; Correspondence Table for Italy (n 28) 69-106. See also Bruno Nascimbene and Alessia Di Pascale, 'Italy' in 'XXVI FIDE Congress Report, Volume 2: Union Citizenship: Development, Impact and Challenges' (Copenhagen, 28-31 May 2014) 669-681, 673-677.

[72] Art 20.

[73] ECAS comparative study (n 27) 120.

[74] Art 20 as amended by Decree Law 89/2011 (n 41) and Legislative Decree No 32/2008 (n 22); arts 20-bis and 20-ter inserted by Legislative Decree No 32/2008 (n 22).

Transposition Outcomes: Restrictions on Entry and Residence			
Article	Content	Transposition outcome	Subsequent amendment
27(1)(1)	restriction based on grounds of public policy, public security or public health	Incorrect	Correct
27(1)(2)	not for economic ends	Correct	
27(2)(1)	principle of proportionality	Correct	
27(2)(1)	based on the personal conduct	Incorrect	Correct
27(2)(2)	serious threat to one of the fundamental interests of the society	Incorrect	Correct
27(2)(2)	no considerations of general prevention	Not transposed – non compliant	
27(3)	host MS may request police record from MS of origin before issuing residence docs	Not transposed – non compliant	
27(4)	right of re-entry of expelled citizens in home MS	Not transposed – compliant	
28	*Protection against expulsion*		
28(1)	obligation to take account of considerations relating to citizen's situation	Correct	
28(2)	persons who have permanent residence (only for serious grounds of public policy or public security)	Incorrect	
28(3)(a)	persons having resided for 10 years (only for imperative grounds of public security)	Incorrect	
28(3)(b)	minors (only for imperative grounds of public security) unless expulsion is in best interests of the child	Incorrect	
29	*Public health*		
29(1)	definition of diseases with epidemic potential	Correct	
29(2)	no expulsion based on diseases occurring after 3 months of residence	Correct	
29(3)	option: require of a medical examination	Correct	
35	*Abuse of rights*		
35(1)	Option: measure against abuse of rights	Correct	
36	*Sanctions*		
36	Effective and proportionate sanctions	Correct	

Table 8.1.8: Transposition outcomes for restrictions on entry and residence (Article 22, 27-29, 35-36 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

8.1.9 Procedural safeguards and rights of appeal

The Legislative Decree also presents several instances of non-compliance in connection with procedural safeguards and rights of appeal.

Firstly, although the Legislative Decree still does not provide protection against systematic verification of the right of residence,[75] the absence of

[75] Article 14(2) provides that 'where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.' See further Conformity Study for Italy (n 19) 32; Correspondence Table for Italy (n 28) 47.

transposition of the protection against automatic expulsion in case of recourse to social assistance has now been addressed.[76]

Secondly, the obligation on the host Member State to provide full and precise statement of the reasons[77] for taking a measure to restrict the entry or residence rights of EU citizens and family members is incorrectly transposed by the Legislative Decree.[78] There is also an absence of the requirement to specify the time limit for an appeal[79] The requirement that a person subject to an expulsion should be given at least a month to leave the national territory in non-urgent cases is also missing from the Legislative Decree.[80]

Thirdly, as regards the rights of appeal, the Legislative Decree also fails to transpose the obligation to ensure that judicial review of decisions extends to 'an examination of the legality of the decision as well as of the facts and circumstances' on which an administrative measure that withdraws or restricts free movement rights is based.[81] While it could be considered that the general principles applied by the courts fulfil this requirement,[82] Article 31(3) consists in a precise and detailed provisions that arguably requires specific transposition.[83]

Finally, it should also be noted that the various protections relating to expulsions[84] are not adequately transposed.

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[76] Art 21, para 1 of the Legislative Decree as amended by Decree Law 89/2011 (n 41), art 1, para 1, h).

[77] Articles 15(1) and 30(2) of the Directive. See further, Conformity Study for Italy (n 19) 47; Correspondence Table for Italy (n 28) 108-109.

[78] Art 20, para 10 of the Legislative Decree.

[79] Art 20, para 10 of the Legislative Decree as amended by Legislative Decree No 32/2008 (n 22). See further, Conformity Study for Italy (n 19) 47; Correspondence Table for Italy (n 28) 109. The obligation to specify the time limit for an appeal is required by Article 30(3) of the Directive.

[80] This requirement is contained in Article 30(3) of the Directive. See further, Conformity Study for Italy (n 19) 47; Correspondence Table for Italy (n 28) 109-110.

[81] Article 31(3) of the Directive.

[82] See for example, Conformity Study for Italy (n 19) 48; Correspondence Table for Italy (n 28) 121.

[83] See to that effect, Case 29/84 *Commission v Germany*, [1985] ECR 1661, para 31.

[84] Article 33 of the Directive.

Transposition Outcomes: Procedural safeguards and rights of appeal			
Article	Content	Transposition outcome	Subsequent amendment
14	*Retention of right of residence*		
14(2)	verification of residence rights	Not transposed – non compliant	
14(3)	no automatic expulsion in case of recourse to social assistance	Not transposed – non compliant	Correct
14(4)(a)	no expulsion of workers or self-employed persons	Correct	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Correct	
15	*Procedural safeguards*		
15(1)	procedures provided for by Art. 30, 31 shall apply by analogy	Incorrect	
15(2)	no expulsion in case of expiry of ID or passport	Incorrect	
15(3)	no ban on entry for expulsion decision taken on other grounds	Correct	
26	*Checks*		
26(1)	option to carry out checks	Correct	
30	*Notification of decisions*		
30(1)	notification in writing	Correct	
30(2)	full and precise information of the public policy, public security, public health grounds	Incorrect	
30(3)	advising of legal remedies	Incorrect	
30(3)	citizen must be allowed one month for leaving MS, except if duly substantiated urgency	Incorrect	
31	*Procedural safeguards*		
31(1)	right to judicial review or appeal	Correct	
31(2)	interim order suspends removal	Incorrect	
31(3)	redress procedure (legality and facts; proportionality)	Not transposed – non compliant	
31(4)	right to submit defence in person (fair trial)	Correct	
32	*Duration of exclusion orders*		
32(1)	right to submit an application for lifting exclusion order within three years	Incorrect	
32(1)	decision within six months of the submission	Correct	
32(2)	no obligation for MS to allow entry during consideration of application	Correct	
33	*Expulsion as a penalty or legal consequence*		
33(1)	Expulsion may not be imposed as penalty unless Art. 27, 2 8, 29 are respected	Not transposed – non compliant	
33(2)	Right to re-evaluation of expulsion order after 2 years	Not transposed – non compliant	
35	*Abuse of rights*		
35(2)	principle of proportionality + procedural safeguards	Correct	

Table: Transposition outcomes for procedural safeguards and rights of appeal (Article 14-15, 30-33, 35 of Directive 2004/38)

Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburg conformity studies; ECAS comparative study

8.2 Application in Italy

In Italy registration is compulsory for both EU citizens[85] and their non-EU family members.[86]

The responsibility for processing of applications is shared between the municipalities as regards EU citizens[87] and the police *questura* as regards non-EU family members.[88]

8.2.1 Application process

The available literature[89] suggest that there are practical problems with the application of the rules. As regards non-EU family members, complaints

[85] Article 8(1) of the Directive corresponding to art 9, para 2 of the Legislative Decree.

[86] Article 9(1) of the Directive corresponding to art 10, para 1 of the Legislative Decree.

[87] Article 8(1) of the Directive corresponding to art 9, para 1 of the Legislative Decree.

[88] Article 9(1) of the Directive corresponding to art 10, para 1 of the Legislative Decree.

[89] Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services' (Report for Commission, Ramboll 2011) <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed 26 May 2015, who draw on information from information on cases handled by SOLVIT and Your Europe Advice; see further Annual reports for SOLVIT (2004-2011) <http://ec.europa.eu/solvit/documents/index_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (SOLVIT governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015; Annual reports for Your Europe Advice (2007-2010) <http://europa.eu/youreurope/advice/about_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (Your Europe Advice governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015.

include refusals to issue residence cards,[90] delays and excessive administrative burdens.[91]

The application process has been the subject of a comparative study that assesses outcomes in the application process.[92] The results for Belgium are summarised in the table that follows.

[90] See European Parliament, Notice to Members 'Petition 1136/2009 by Ecaterina & Alexandru Stirbu (Romanian & Moldavian), on the refusal by the Italian authorities to grand Alexandru Stribu a residence permit in accordance with Directive 2004/38/EC', 6 September 2011.

[91] See European Parliament, Notice to Members 'Petition 1325/2009 by Martin Formosa (Maltese), on the excessive administrative burdens encountered by citizens of the EU Member States seeking to obtain a residence permit in Italy', 25 March 2010.

[92] Astrid Henningsen, Maylis Labayle, Camino Mortera and Rossella Nicoletti 'Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation' (Report for Commission, ICF-GHK/Milieu 2013).

Application of the Directive in Italy				
Factual outcome	**Criteria**			
	Provision of information	*Rating (max)*	**IT**	***EU average***
Art 34: information dissemination – consistency	Consistency of information provision (all sources provide the same information, there is a natural link from general to specific information)	2.5	0.5	*2*
Art 34: information dissemination to EU citizens – accuracy	Quality and comprehensiveness of the information related to EU citizens (main sources)	5	2	*3*
Art 34: information dissemination to family members – accuracy	Quality and comprehensiveness of the information related to non-EU family members of EU citizens (main sources)	5	1	*3*
Art 34: information dissemination – availability	Availability of different sources of information (web, print, hotline)	5	1	*3*
	Overall rating information provision	**17.5**	**7.5**	***11***
Factual outcome	**Preparation of applications**	*Rating (max)*	**IT**	***EU average***
Art 8(3) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS– EU citizens	5	3	*3*
Art 9(2) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS – TCN family members of EU citizens	5	2	*3*
	Overall rating preparation of applications	**10**	**5**	***5***
Factual outcome	**Lodging of the application**	*Rating (max)*	**IT**	***EU average***
Art 8(2) and recital (14): undue administrative burden to be avoided	Nature of the lodging system. Ease of lodging and requirements for leaving of documents with the competent authority	5	3	*3*
Case C-424/98: proof by any appropriate means	Flexibility in terms of acceptance of alternative appropriate means of proof	5	2	*3*
Art 25(2): charge not exceeding that imposed on nationals for similar documents	Application fees	5	2	*3*
	Overall rating submission of applications	**15**	**7**	***9***
	Issuance of the residence document	*Rating (max)*	**IT**	***EU Average***
Art.8(2): immediate issue of registration certificate	Time needed from the successful lodging to effectively receiving the residence documents – EU citizens	10	2	*6*
Art.10(1): issue of residence card no later than six months from date of application	Time needed from the successful lodging to effectively receiving the residence documents – family members	10	2	*6*
	Overall rating issuance of the residence document	**20**	**4**	***13***
	Total rating	**62.5**	**20.5**	**39**
			33%	***62%***
			IT	***EU average***

Table 8.2.1 Application outcomes (Italy)
Sources: Information from Commission dated 12 November 2013 (GestDem 2013/5460); ICF-GHK/Milieu Evaluation Report

The above would tend to confirm that EU citizens and their family members face considerable difficulties when applying to the Italian authorities for residence documents despite the relatively satisfactory transposition of the Directive.

8.2.2 Refusal rates

Regrettably, no information was provided by the Italian Ministry of the Interior or the Italian Statistical Agency (ISTAT) despite specific requests for information. [93]

8.2.3 Expulsion rates

Likewise, unfortunately no information could be obtained from the Italian Ministry of the Interior or the Italian Statistical Agency (ISTAT) despite specific requests for information. [94]

[93] Information requests dated 19 May 2015 and 9 July 2015.

[94] Information requests dated 19 May 2015 and 9 July 2015.

8.3 Enforcement in Italy

In order to enforce their rights under the Legislative Decree or under the directly effective provisions of Directive 2004/38 as the case may be, EU citizens and their family members may have recourse to administrative or judicial redress mechanisms.

8.3.1 Alternatives to judicial proceedings

The law on administrative proceedings allows for the possibility to request reconsideration of an administrative decision where new facts or circumstances come to light.[95]

It is also possible to complain to the regional ombudsmen concerning instances of maladministration.[96]

Alternatives to court		
Mechanism	*Availability*	*Power to overturn administrative decision*
Request for reconsideration	Yes	Yes
Ombudsman	Yes	No

Table 8.3.1 Alternatives to judicial proceedings

[95] *Legge del 7 agosto 1990, n 241, 'Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi' (GU n 192 del 18-08-1990)* (Law No 241/1990 on new rules relating to administrative procedures and administrative documents), art 21-quinquies.

[96] See for example, 'Roma: un difensore civico per gli immigrati' (*Stranieri in Italia*, 29 November 2007) <http://www.stranieriinitalia.it/attualita/attualita/attualita-sp-754/roma-un-difensore-civico-per-gli-immigrati.html> accessed 31 December 2015.

8.3.2 Access to justice

The various factors that influence access to the courts in Italy such as legal representation, costs of procedure and the availability of legal aid is summarised in the following table:

Access to justice	*Nature*	*Comment*
Legal representation	Not mandatory	Formalistic procedures means lawyer is needed in practice
Appeal filing fee	€98[97]+€27[98]	7.2% of average net earnings[99]
Availability of legal aid	Yes	available to: -persons with monthly taxable income of €960.70[100] (55.3% of average net earnings)[101] -victims of sexual violence regardless of income [check]

Table 8.3.2 Access to justice

[97] *Decreto del Presidente della Repubblica 30 maggio 2002, n. 115, Testo Unico delle disposizioni legislative e regolamentari in materia di spese di giustizia* (Presidential Decree No 115/2002 containing the consolidated law relating to court costs) (GU n. 139, 15 June 2002, Suppl. Ordinario n. 126), n. 115), art 13(1)(b).

[98] Italian revenue stamp (*marca di bollo*) payable on official act.

[99] This is calculated on the basis of 100% of the average monthly net earnings of a single adult in Italy for 2014 (€1,736.18) as indicated in Eurostat dataset 'Annual Net Earnings' (net_nt_net) (indicator: A1_100, NET): <http://ec.europa.eu/eurostat/web/labour-market/earnings/database> accessed on 5 December 2015.

[100] Presidential Decree No 115/2002 containing the consolidated law relating to court costs, n 31, art 76(1); *Decreto del 7 maggio 2015, Adeguamento dei limiti di reddito per l'ammissione al patrocinio a spese dello Stato (GU n 186, 12-08-2015)* (*Decree of 7 May 2015 updating of thresholds for access to legal aid funded by the State*).

[101] Idem, n 32.

8.3.3 Nature of first instance judicial review

Judicial appeals against administrative decisions taken in application of the Legislative Decree are handled by the ordinary courts which review the legality and proportionality of decisions.[102]

Nature of judicial review	*Review of proportionality*	*Review of facts*	*Admissibility of facts not presented at time of administrative decisions*	*Admissibility of new facts occurring after administrative decision*
Full review	Yes	Yes	Yes	Yes

Table 8.3.3 Scope of judicial review of decisions on EU residence rights

8.3.4 Preliminary rulings

Since the Directive came into force, the Italian courts have made no references to the Court of Justice under Article 267 TFEU seeking clarification on its provisions. This compares with 22 references made in the period 1968-2005 when other instruments governed the right of free movement of EU citizens.[103]

Preliminary rulings			
Court level	*Nature*	*References made?*	*Comment*
Ordinary courts	Discretionary	Yes	Courts are open to making requests for preliminary rulings
Supreme Court	Mandatory	Yes	Courts are open to making requests for preliminary rulings

Table 8.3.4 Attitudes towards preliminary rulings

[102] Article 8 of the Legislative Decree.

[103] Alec Stone Sweet and Thomas L. Brunell, 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234) 1961-2006' (2007) <http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26> accessed 30 December 2015.

8.3.5 Publicity of decisions

The decisions of the lower courts and the appeal courts are not systematically reported. The decisions of the Supreme Court are reported on its website.[104]

Publicity of judicial decisions			
Court level	*Availability of reports*	*Visibility of EU residence cases*	*Availability of statistics on EU residence cases*
Ordinary courts	No	Low	No
Supreme Court	Yes	Low	No

Table 7.3.5 Publicity given to judicial rulings on EU residence rights

8.4 Conclusions on Implementation in Italy

Italy chose to transpose the Directive through delegated legislation in the form of 'bolt-on' legislation that is distinct from its immigration law that governs non-EU nationals. Almost fifty provisions and sub-provisions were identified as following a literal approach to transposition. Italy can therefore be said to have followed a mixed approach to the drafting of the Free Movement Directive that combines both replicative and elaborative techniques.

The level of transposition of the Directive in Italy was satisfactory, although it was a fraction below the average when compared to other Member States. The level of compliance in transposition was 70% compared to the EU average of 71%. This has improved to a level of compliance of 76%, notably as a result of the Commission's infringement action, which has since been closed. The weakest part of transposition relates to the safeguards surrounding restrictive measures such as expulsions.

In Italy responsibility for the application of the rules as been shared between the municipalities, which handle the registration of EU citizens and the police *questura* which handles applications by non-EU family members and is answerable to the Ministry of the Interior.

[104] <http://www.cortedicassazione.it/corte-di-cassazione/> accessed 23 September 2015.

However, problems in the practical application of the rules by EU citizens and their family members in Italy has led to the correctness in the practical application of the rules being rated very poorly at 33%, compared to an average of 62% across all Member States. This is in spite of the notable improvements in the transposition of the Directive in Italy. Regrettably there is insufficient data about the practical application of the rules to be able to measure the scale of the problem or identify other areas of concern

Despite the apparent weakness of Italy's application of the rules, it appears that citizens are able to effectively enforce their rights. Enforcement has been entrusted to the ordinary courts, with a mandate that enables to control the legality of the decisions of the administrative authorities and remake decisions where need be. No procedural obstacles were identified despite the incomplete transposition of the provisions on appeal rights under the Directive. Nonetheless this warrants more investigation.

In Italy, the free movement of persons is of relatively low importance, but overall the issue of immigration has high saliency with public sentiment becoming more polarised in Italy.

The motivation of the Italian authorities towards compliance can be characterised as evasive non-compliance in view of the fact that it sought advice on the compatibility of its 'security package' from the European Commission and also strove to address allegations of non-compliance made by the European Commission and was able to settle the case without it reaching the second-stage reasoned opinion.

CHAPTER 9 THE IMPLEMENTATION OF THE DIRECTIVE IN THE UK[1]

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9.1 Transposition in the UK

9.1.1 Overview

In the UK, Directive 2004/38[2] has been transposed by the Immigration (European Economic Area) Regulations 2006.[3,4] The EEA Regulations came into force on 30 April 2006 thereby meeting the deadline for transposition.[5] The

[1] This chapter incorporates content previously published by the author in 'Five Years of the Citizens Directive - Part 1' (2011) 25 Journal of Immigration, Asylum and Nationality Law 217-244, and 'Five Years of the Citizens Directive - Part 2' (2011) 25 Journal of Immigration, Asylum and Nationality Law 331-357.

[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 [2004] OJ L 158/77 (hereafter the Free Movement Directive, Directive 2004/38 and the Directive).

[3] Immigration (European Economic Area) Regulations 2006, Statutory Instrument 2006/1003 (hereafter the 'EEA Regulations' or the 'Regulations'). The EEA Regulations apply to the United Kingdom. However, separate legislation exists for Gibraltar, through the Immigration Control (Amendment) Act 2008, which came into force on 26 June 2008. The rules relating to Gibraltar have not been reviewed here. The EEA Regulations do not apply to the Isle of Man or the Channel Islands.

[4] A consolidated version of the EEA Regulations can be consulted on the UK's official legislation database <http://www.legislation.gov.uk/uksi/2006/1003/pdfs/uksi_20061003_310515_en.pdf> accessed 31 December 2015.

[5] However, it appears that the UK authorities failed to notify the measures for quite some time given that the Commission lodged formal proceedings before the Court of Justice on 19 March 2008, although the proceedings were withdrawn on 17 December 2008; see Case C-122/08 *Commission v UK* [2008] OJ C 116/18.

Regulations have been amended on several occasions.[6] The Regulations are supplemented by operational guidelines called 'Modernised Guidance'[7] and internal guidance called 'European Operational Policy Team notices'.[8]

Transposition in the UK originally performed slightly above the EU average, as table 9.1.1 would show. However, this belies 'substantial conformity problems'[9] in transposition, which 'stem from the UK's attempt to assert, or re-

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[6] The EEA Regulations have been amended by the following instruments: the Immigration (European Economic Area) (Amendment) Regulations 2009, SI 2009/1117; the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010, SI 2010/21; the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011, SI 2011/544; the Immigration (European Economic Area) (Amendment) Regulations 2011, SI 2011/1247; the Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012/1547; Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012, SI 2012/2560; Immigration (European Economic Area) (Amendment) Regulations 2013, SI 2013/1391; Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032; Immigration (European Economic Area) (Amendment) Regulations 2014, SI 2014/1451; Immigration (European Economic Area) (Amendment) (No 2) Regulations 2014, SI 2014/1976; Immigration (European Economic Area) (Amendment) (No 3) Regulations 2014, SI 2014/2761; the Immigration (European Economic Area) (Amendment) Regulations 2015, SI 2015/694.

[7] Home Office, 'EEA, Swiss nationals and EC association agreements (modernised guidance)' (2015) <https://www.gov.uk/government/collections/eea-swiss-nationals-and-ec-association-agreements-modernised-guidance> accessed 15 December 2015.

[8] These are not systematically published. Some have been released under the Freedom of Information Act 2000 on the website of the Home Office, see for example <https://www.gov.uk/government/publications/home-office-staff-guidance-issued-by-european-policy-team-from-2013> accessed 31 December 2015.

[9] Jo Shaw, 'Conformity Study for the United Kingdom' 6, Annex to Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008) (hereafter 'Conformity Study for the UK'). See further, Jo Shaw and Nina Miller, 'When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law' (2012) 38 European Law Review 137-166; Jo Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 Cambridge Yearbook of European Legal Studies, 247-286.

assert, greater traditional immigration control in areas where EU law no longer allows this.'[10]

Transposition Outcomes in the UK			
	UK (2008)	**UK (2015)**	**EU average**
Total provisions of Directive to be transposed			*144*
Provisions correctly transposed	94	93	90
Provisions subject to more favourable transposition	12	12	12
Provisions subject of compliant transposition	*106*	*105*	*102*
Level of compliance of transposition	**74%**	**74%**	**71%**
Provisions that are transposed ambiguously	9	11	8
Provisions that are transposed incorrectly or incompletely	24	23	23
Provisions not transposed (failure to transpose)	5	5	12
Provisions subject of non-compliant transposition	*38*	*39*	*43*
Level of non-compliance of transposition	**26%**	**26%**	**29%**

Table 9.1.1 Transposition outcomes (UK)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

The approach taken to transposition in the UK is decidedly different to the scheme of the Directive.[11] Under the EEA Regulations, the right of residence is conditional upon being a 'qualified person'[12] or their family member. This domestic concept[13] is used to encapsulate the various categories of residence rights set out in Article 7 of the Directive.[14]

As a result, the drafting of the Regulations can be said to follow an elaborative approach[15] to the method of transposition of the Directive by

[10] ibid.

[11] Conformity Study for the UK (n 9) 13.

[12] Reg 6.

[13] This finds it origins in the Immigration (European Economic Area) Order 1994, SI 1994/1895 and was carried over into the Immigration (European Economic Area) Regulations 2000, SI 2000/2326.

[14] Helen Toner, 'New Regulations implementing Directive 2004/38' (2006) 20 Journal of Immigration, Asylum and Nationality Law 158-178, 162.

[15] See Chapter 3, Section 3.4 (Implications for the Drafting of National Implementing Measures). Only six provisions were identified as following a literal approach to transposition, namely Articles 16(4), 27(2) (four provisions) and 28.

choosing the form of 'bolt-on transposition'[16] that stands apart from national legislation governing immigration.[17]

The European Commission opened infringement proceedings against the UK for incorrect transposition of the Directive in 2011, [18] but the UK has so far refrained from amending the Regulations to address the Commission's concerns. The case remains open.

Nonetheless, several amendments have been made since 2008 to address some deficiencies in transposition, notably following judgments of the Court of Justice handed down in preliminary rulings.[19] Despite these amendments to the EEA Regulations, the overall level of compliance in transposition of the Directive has not improved.[20]

9.1.2 Legislative history

The United Kingdom is a unitary state with some powers devolved to its constituent nations.[21] However, matters relating to the UK's membership of the EU is reserved to the national Parliament in Westminster,[22] as are matters relating to the control of immigration.[23] The European Communities Act 1972 was adopted to give effect to the EU Treaties in the UK upon the UK's accession

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[16] See Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

[17] The Immigration Rules Immigration Rules, HC 395 <https://www.gov.uk/guidance/immigration-rules> accessed 30 December 2015

[18] Commission, Case 2011/2054 concerning the UK's incorrect transposition of Directive 2004. The infringement action was initiated on 16 June 2011 2009 by the sending of a Letter of Formal Notice. A Reasoned Opinion was issued on 26 April 2013. The case has not been closed.

[19] See n 6.

[20] These changes are discussed in the text below.

[21] Conformity Study for the UK (n 9) 13. See further, Anthony Wilfred Bradley and Keith Ewing, *Constitutional and Administrative Law* (14th ed, Pearson/Longman 2007) 42-43.

[22] Conformity Study for the UK (n 9) 15. See also Bradley and Ewing (n 20) 44, who specify that matters reserved for the Westminster Parliament include foreign affairs. This would include matters relating to UK membership of the European Union, see Andrew Scott, 'The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously?' (2000) Harvard Jean Monnet Working Paper 8/00, 3-4.

[23] Conformity Study for the UK (n 9) 15; Bradley and Ewing (n 20) 44.

to the EEC.[24] Under section 2(2) of this Act, powers may be delegated to a designated Minister to implement EU obligations by way of regulations.[25] The Secretary of State for the Home Department has been designated[26] for the purpose of adopting 'measures relating to rights of entry into, and residence in, the United Kingdom'.[27] Such measures take the form of statutory instruments,[28] and may be the subject of annulment[29] under the so-called 'negative resolution procedure'.[30] Under this procedure, a statutory instrument will take effect unless either House passes a resolution to object within forty days of the draft being laid before Parliament.[31] In practice, once the draft statutory instrument is laid before Parliament, it will be reviewed by the Joint Committee on Statutory Instruments to determine whether special attention needs to be drawn to it for reasons set out in the committee's terms of reference,[32] such as defective drafting or where it appears *ultra vires*.[33]

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[24] Stephen Weatherill, 'Rapport Britannique' in XVIII FIDE Congress Report, Volume 1, 'Les Directives Communautaires: Effets, Efficacité, Justiciabilité' (Stockholm, 3-6 June 1998) 124-172, 124. See further Bradley and Ewing (n 20), 140-143.

[25] Weatherill (n 23) 125.

[26] The European Communities (Designation) (No. 2) Order 2000, SI 2000/1813.

[27] ibid, art 2 and Schedule 1.

[28] The European Communities Act 1972, Schedule 2, para 2(1).

[29] ibid, Schedule 2, para 2(2).

[30] House of Commons Information Office, 'Statutory Instruments - Factsheet L7' (2008), 4 which explains that statutory instruments subject to the negative resolution procedure 'become law on the date stated on them but will be annulled if either House (or the Commons only, in the case of instruments dealing with financial matters) passes a motion calling for their annulment within a certain time. This time period is usually 40 days including the day on which it was laid.'

[31] Statutory Instruments Act 1946, section 5(1).

[32] Standing Orders of the House of Commons Relating to Public Business, No 151; <http://www.publications.parliament.uk/pa/cm/cmstords.htm> accessed 31 December 2015; Standing Orders of the House of Lords Relating to Public Business, No 73 <http://www.parliament.uk/business/publications/house-of-lords-publications/rules-and-guides-for-business/the-standing-orders-of-the-house-of-lords-relating-to-public-business/> accessed 31 December 2015.

[33] See further, Richard Macrory, 'Sources and categories of legal acts – Britain' in Gerd Winter (ed), *Sources and Categories of European Union Law* (Nomos 1996) 69-93, 83-84.

Following the adoption of Directive 2004/38, a draft of the Regulations was made by the Home Office on 30 March 2006 and subsequently laid before Parliament on 4 April 2006.[34] It was considered by the Joint Committee on Statutory Instruments, which determined that special attention need not be drawn to them.[35] The Regulations subsequently came into force on 30 April 2006.

9.1.3 Beneficiaries

The EEA Regulations apply to all EEA nationals (EU nationals and nationals from Norway, Iceland and Lichtenstein).[36] The Regulations have broadened the scope of the Directive to include nationals of Switzerland,[37] even though Swiss nationals do not benefit from the Directive and are instead covered by the EU-Swiss Agreement of Free Movement of Persons.[38]

The definition of EEA nationals was amended[39] to address the situation of dual nationals following the Court of Justice's ruling in *McCarthy*.[40] The

[34] Note that Parliament also scrutinises Commission proposals before their adoption; see Digby Jones, *UK Parliamentary Scrutiny of EU Legislation* (Foreign Policy Centre 2005), 3-4. The revised proposal for the Directive (COM(2003) 199) was considered by the European scrutiny committees of both Houses and was cleared in the House of Commons on 7 September 2003 and in the House of Lords in 17 September 2003; see further European Scrutiny Committee, *Thirty-second Report* (2002-03, HC 42) 90; House of Lords, European Union Committee, *Progress of Scrutiny Thirteenth Report* (2002-03) <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeucom/013/01310.htm> accessed 31 December 2015.

[35] Joint Committee on Statutory Instruments, *Twenty-fifth Report* (2005-06, HL 181, HC 35) 11.

[36] Reg 2(1).

[37] The EEA Regulations achieve this by including Switzerland in the definition of an 'EEA State', reg 2(1).

[38] Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

[39] SI 2012/1547 (n 6), Sched 1, para 1(d).

[40] Case C-434/09 *McCarthy* [2011] ECR I-3375, in which the Court held that 'directive [2004/38] is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State', ibid, para 43.

result of this change is to exclude from the definition of 'EEA national'[41] any person who also holds British citizenship, even if they have previously exercised free movement rights, which would appear to go beyond what the Court held in *McCarthy*.[42] This amendment now makes the UK's transposition of Article 2(1) of the Directive non-compliant.

Another problem in transposition was the incorporation of an additional requirement not foreseen by the Directive[43] that required non-EU family members to demonstrate they had previously lawfully resided in another Member State prior to moving to the UK in order to benefit from the rights of the Directive.[44] This was highlighted as a serious problem of conformity'.[45]

This requirement was eventually challenged before the Court of Justice in *Metock*[46] on a reference for a preliminary ruling from the Irish High Court.

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[41] Reg 2(1).

[42] See further Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive - A Commentary* (Oxford University Press 2014) 49-54, who note that *McCarthy* (n 39) 'does no exclude *all* dual citizens of two Member States from the scope of the Directive' (emphasis in original), ibid 49.

[43] Case C-127/08 *Metock* [2008] ECR I-6241, paras 49-54. See further Guild, Peers and Tomkin (n 41) 54-58.

[44] The effect of regs 8(2)(a) and 10(1)(b) was to require 'family members' and 'extended family members' covered by Articles 2(2) and 3(2) of the Directive respectively to have been lawfully resident in another EEA State before moving to the UK to join their EEA relative. Reg 8(2) had the effect of requiring extended family members to be lawfully resident in an EEA State in order to be able to invoke the right to the 'facilitation' of entry and reside in the UK. Reg 12(1) contained a similar restriction on the ability of all family members to apply for an EEA family permit, which is a special visa that enables family members of EEA national to join their EEA relative in the UK or accompany them there.

[45] Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union - Final Report' (December 2008) (hereafter 'Conformity studies horizontal report') 15. This requirement featured in the national implementing measures of Denmark, Ireland, Finland and the UK and was the subject of administrative practices to that effect in Austria, the Czech Republic, Germany, Greece, Malta and the Netherlands, ibid 14-15.

[46] Case C-127/08 *Metock* (n 42). The case concerned several judicial appeals against a refusal by the Irish Minister of Justice to issue residence cards to the family members of EU citizens residing in Ireland on the basis that the family members had not been resident in a Member State prior to their move to Ireland, ibid, paras 21, 26, 30 and 35. The Irish authorities had incorrectly transposed the Directive by

The Court of Justice found that 'Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive'.[47]

While Ireland complied with the Court of Justice's ruling in eight days,[48] it took almost three years from the date of the judgment for the UK to remove this requirement from the EEA Regulations, and hen only as regards close family members.[49] This delay was due to 'heel dragging'[50] by the Home Office which indicated that it considered that the ruling in *Metock* was limited to immediate family members covered by Article 2(2) of the Directive, but did not apply to 'other family members'[51] under Article 3(2) and therefore did not consider that the offending provisions[52] required amendment.[53] At the same time, the UK was trying to rally support within the Council to bypass the Court's

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way of the European Communities (Free Movement of Persons) (No 2) Regulations 2006 SI 2006/626, whose regulation 3(2), at the time these cases were brought, provided that the transposing measures 'shall not apply to a family member unless the family member is lawfully resident in another Member State', ibid, para 16.

[47] Case C-127/08 *Metock* (n 42), para 80.

[48] On 31 July 2008, Ireland adopted European Communities (Free Movement of Persons) Regulations 2008, SI 2008/310 to bring its national implementing measures into line with the ruling. The Minister of Justice also reviewed all decisions which were refused on the basis that the family member was not lawfully resident in another Member State before moving to Ireland, see Irish Naturalisation and Immigration Service, Press release, August 2008 <http://www.inis.gov.ie/en/INIS/print/PR08000027> accessed 23 December 2015.

[49] SI 2011/1247 (n 6), reg 2(3) and (4). See further Home Office, 'Explanatory Memorandum to the Immigration (European Economic Area) (Amendment) Regulations 2011' (2011) para 4.2 <http://www.legislation.gov.uk/uksi/2011/1247/pdfs/uksiem_20111247_en.pdf> accessed 23 December 2015

[50] Shaw (n 9) 270.

[51] The UK legislation defines these as 'extended family members' under regs 2(1) and 8.

[52] Regs 8(2) and 10(1)(b).

[53] Correspondence between the Home Office and the European Citizen Action Service quoted in EP Study, supra at 150.

ruling through legislative amendment of the Directive.[54] This was despite the fact that during this period, the UK courts handed down several judgments confirming the Regulations were non-compliant in this respect.[55] The Regulations were eventually amended in respect of direct family members in 2011,[56] but it took another year for the changes to be made in respect of 'other family members'[57] following the judgment in *Rahman*.[58] The EEA Regulations are now finally compliant in this respect.

[54] In a worrying development, the UK was reported to have circulated proposals to restrict the scope of the Directive in preparation for the EU Council meeting held in Brussels on 27-28 November 2008; see 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. Although the UK's efforts proved ultimately unsuccessful this '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', see Sergio Carrera and Anaïs Faure Atger 'Implementation of Directive 2004/38 in the context of EU Enlargement - A proliferation of different forms of citizenship?' (2009) Centre for European Studies Special Report 17; see further Steve Peers, 'The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms' (2008) Statewatch Analysis No 72.

[55] The *Metock* ruling was notably followed by the High Court in *R (on the application of Yaw Owusu) v Secretary of State for the Home Department* [2009] EWHC 593 (Admin) (21 January 2009), where Blake J held, at [4], that reg 12(1)(b) was 'a failure to transpose the requirements of the Directive'. The Court of Appeal followed suit in *Bigia and Others v Entry Clearance Officer* [2009] EWCA Civ 79 (19 February 2009). In his judgment, para [41], Justice Kay LJ held that '[i]t follows that the provisions in Regulations 8 and 12 of the 2006 Regulations, to the extent that they require an OFM [other family member] to establish prior lawful residence in another Member State, do not accord with the Directive'. See also *ZH (Afghanistan) v Entry clearance Officer* [2009] EWCA Civ 1060 (15 October 2009)*; SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426 (25 November 2009); *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358 (14 December 2009).

[56] See n 48.

[57] SI 2012/2560 (n 6), Sched, para 5, which removed 'the requirement that a person must have been living in the same country as an EEA national prior to arriving in the UK in order to argue that their dependency on that EEA national entitles them to rely on the provisions of the 2006 Regulations concerning extended family members', see further Home Office, 'Explanatory Memorandum to the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2012' (2012), para 7.7 <http://www.legislation.gov.uk/uksi/2012/2560/pdfs/uksiem_20122560_en.pdf> accessed

[58] Case C-83/11 *Rahman* [2012] ECLI:EU:C:2012:519 (judgment of 5 September 2012), para 33. See further Guild, Peers and Tomkin (n 41) 77.

The definitions of 'spouse' and 'registered partner' exclude relationships of convenience.[59] While at first glance this might be allowed by Article 35 of the Directive,[60] this definition has been interpreted by the UK courts[61] in such a way as to exclude from the scope of the regulations family members who are suspected of sham relationships, thereby denying them the benefit of appeal rights under Articles 15 and 31, which as recital (26) makes clear should be available 'in all events'. This judicial interpretation[62] therefore leads to non-

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[59] Reg 2(1).

[60] Jo Shaw, 'Correspondence Table, United Kingdom', Annex to Milieu and Edinburgh University, 'Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union' (Report for Commission, 2008) (hereafter 'Correspondence Table for the UK'), 2.

[61] *R (on the application of Bilal Ahmed) v Secretary of State for the Home Department (EEA/s 10 appeal rights: effect)* IJR [2015] UKUT 436 (IAC) (24 July 2015). For commentary, see Eslpeth Guild, 'Reflecting EU law faithfully? R (Bilal Ahmed) v SSHD IJR [2015] UKUT 00436 (IAC)' (*Free Movement*, 14 September 2015) <https://www.freemovement.org.uk/reflecting-eu-law-faithfully-r-bilal-ahmed-v-sshd-ijr-2015-ukut-00436-iac/> accessed 23 December 2015, who comments 'Judges Storey and Lane, both senior and experienced members of the Upper Tribunal, came to a rather odd decision: where the Secretary of State claims a reasonable suspicion that the third country national spouse of an EEA national (exercising Treaty rights in the UK) has entered into a sham marriage he or she is no longer a spouse under the EEA regulations and thus gets no in country appeal right. The exclusion is apparently based on Reg 2 EEA Regulations which states that a 'spouse' does not include a party to a marriage of convenience. … This is clearly mistaken. Someone who is appealing against a decision by the Home Office refusing his or her status as a spouse is obviously covered by the appeal right[s] [provided by Articles 15 and 31 of Directive 2004/38]. … The correct course of action for the UT if it was in doubt about the in country appeal right for someone whom the Home Office held was only the spouse of an EEA national as a result of a marriage of convenience … would have been to refer the question to the Court of Justice.' It is also reported that permission to appeal against the judgment has been granted, ibid.

[62] As previously discussed, an assessment of the conformity of national implementing measures must have due regard to their interpretation given to them by the national courts, see for example, Case C-490/04 *Commission v Germany* [2007] ECR I-6095, para 49. See further Chapter 3, Section 3.2 (Obligations Relating to the Form of Transposition).

compliance of the EEA Regulations which was not identified in previous assessment reports.[63]

Moreover, the definitions of 'durable partner', 'registered partner' and 'spouse' have been further amended[64] to exclude the possibility of a person being considered a family member where their EU relative was in a former relationship with another person where that relationship has not yet been dissolved. The effect may be to exclude the possibility for a non-EU partner to claim a right of residence when he (or his EU partner) is separated from a former partner or spouse, even though the partnership or marriage has not been dissolved. This appears contrary to EU case law in respect of separated spouses.[65] The ambiguity which these amendments create should also be considered forms of non-compliance.

The situation of unmarried partners in a 'durable relationship'[66] is a continuing source of problems. Under the Directive in order to benefit from the facilitation of their entry and residence,[67] unmarried partners need to demonstrate that they are in 'a durable relationship, duly attested'. The UK authorities require unmarried partners to be able to demonstrate that they have been in a relationship for at least two years[68] by referring back to the national

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[63] Conformity studies horizontal report (n 44); Commission, '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 final (hereafter 2008 Implementation Report); European Citizen Action Service,'Comparative study 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' (PE 410.650, European Parliament 2009) (hereafter 'ECAS comparative study').

[64] SI 2012/1547 (n 6), Sched 1, para 1(a), (b) and (e) respectively.

[65] Case 267/83 *Diatta* [1985] ECR 0567, at para 20; Case C-244/13 *Ogieriakhi* [2014] ECLI:EU:C:2014:2068 (judgment of 10 July 2014), paras 37 and 47.

[66] Article 3(2) of the Directive, corresponding to reg 8(5), which uses the same term.

[67] ibid.

[68] Home Office, 'Modernised Guidance: Extended family members of EEA nationals' (2015) 6 and 23 <https://www.gov.uk/government/publications/extended-family-members-of-eea-nationals> accessed 15 December 2015.

immigration rules.[69] Moreover, as a result of the UK authorities only recognising same-sex registered partnerships,[70] the same requirement would apply in connection to heterosexual registered partners.[71]

The UK's the two-year requirement has been previously criticised as being too restrictive and inflexible[72]. The European Commission has issued guidance[73] in this connection in which it takes the view that:

> 'National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects (such as for example a joint mortgage to buy a home) are also taken into account.'

As a result, the two-year requirement should not be the sole criteria by which to judge the durability of a relationship and, in the event this requirement is not met, the Directive still requires the UK authorities to undertake 'an extensive examination of the personal circumstances' of unmarried partners.

While initially the Asylum and Immigration Tribunal took a narrow view that national immigration governed the content of relationships falling within

[69] Immigration Rules (n 17), Part 8, paras 295A and 295D.

[70] See ECAS comparative study (n 62) 149-150 citing correspondence received from the Home Office, 5 December 2008: '[t]he meaning of "civil partners" is given by Schedule 1 to the Interpretation Act 1978 as amended by paragraph 59 of Schedule 27 to the Civil Partnership Act 2004 ('the 2004 Act'). Schedule 27 of the 2004 Act defines a civil partnership as one which exists under or by virtue of the 2004 Act. There is no provision in UK law for heterosexual unmarried partners to register their relationship under the 2004 Act as a civil partnership and the UK consequently does not recognise registered partnerships of heterosexual couples.'

[71] See further, 'Five Years of the Citizens Directive - Part 1' (n 1) 224-225.

[72] Alison Hunter, 'Family members: an analysis of the implementation of the Citizens Directive in UK law' (2007) 21 Journal of Immigration, Asylum and Nationality Law 191-200, 197-198.

[73] Commission, 'Communication on guidance for better transposition and 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(2009) 313, part 2.1.1.

the scope of Article 3(2),[74] the UK's Upper Tribunal has shown some evolution in this regard by recognising that the concept of 'durable relationship' is a concept of EU law.[75] It has as a result been is prepared to accept relationships that have lasted less than two years can still be considered 'durable'.[76] However despite these judicial pronouncements, the Home Office's administrative policy still remains unchanged[77] and therefore not compliant.

The Regulations also cover certain situations that are not governed by the Directive but reflect legal obligations set out by case law of the European Court of Justice. For example, the Regulations also cover the situation of family members of British citizens returning home after exercising their free movement rights in another EEA country[78] in accordance with the judgment in

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[74] See for example, *AP and FP (Citizens Directive Article 3(2), discretion, dependance) India* [2007] UKIAT 00048, paras [18] and [21], where the Tribunal ruled that 'we do not accept that Article 3(2) gives, or is intended to give, or has to be read as giving, any right of free movement or residence to those who have no such right apart from it. Any such rights will be dependent on national law … these rights under the Directive are procedural only and the Directive does not itself give any such family member a right of movement to or residence in a Member State. The latter rights depend on national legislation.'

[75] The Upper Tribunal in *Dauhoo* (*EEA Regulations – reg 8(2)*) [2012] UKUT 79 (IAC), para [21], where it held that 'it is accepted by the Tribunal in reported decisions that despite the reference in UKBA European Casework Instructions to proof of a durable relationship requiring evidence that the relationship has lasted two years, the concept of a durable relationship is a term of EU law and as such it does not impose a fixed time period' relying on *YB (EEA reg 17(4) – proper approach) Ivory Coast* [2008] UKAIT 00062.

[76] See for example, *Gemuh v Secretary of State for the Home Department* IA/20342/2012 (unreported 15 July 2013); *Entry Clearance Officer v Keller & Keller* OA/06767/2013 & OA/06770/2013 (unreported 11 August 2014).

[77] The former policy was set out in European casework instructions, Chapter 2, section 2.4, now replaced by 'Modernised Guidance: Extended family members of EEA nationals' (n 67).

[78] EEA Regulations, reg 9, as amended by SI 2013/3032 (n 6), Sched 1, para 5. However, it should be noted that there is uncertainty as to whether reg 9 complies with the *Singh* ruling given that reg 9 excludes the ability of those who have resided but not worked in another EU Member State from claiming the benefit. This is particularly the case since the Court has recently confirmed that the *Singh* ruling would also apply to anyone - not only workers - making use of their free movement rights; see Case C-456/12 *O and B* [2014] ECLI:EU:C:2014:135 (judgment of 14 March 2014), para 61. See further implementation in the UK, see Shaw (n 9) 268-270.

Singh[79] and *O and B*[80] However, this right is not formerly addressed in the Directive and is therefore not subject to a transposition obligation as a matter of Article 288 TFEU and so will not be further assessed here. Nonetheless, the judgment is binding on the Member States[81] and does require to be given effect.[82]

Likewise, the EEA Regulations have also since been amended[83] to cover the primary carers of minors who benefit from residence rights under Regulation 492/2011[84] or who derive residence rights in accordance with the rulings of the Court of Justice in *Ruiz Zambrano*[85] and *Zhu & Chen*.[86] Again,

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[79] Case C-370/90 *Singh* [1992] ECR I-4265, paras 23 and 25.

[80] Case C-456/12 *O and B* (n 77), para 61. For commentary on this judgment, see further Eslpeth Guild, 'S v Minister voor Immigratie, Integratie en Asiel (C-457/12) / O v Minister voor Immigratie, Integratie en Asiel (C-456/12)' (2014) 28 Journal of Immigration, Asylum and Nationality Law 284-288; Eleanor Spaventa, 'Family rights for circular migrants and frontier workers: O and B, and S and G' (2015) 52 Common Market Law Review 753-777.

[81] See Chapter 4, Section 4.4.5 (Reference for a preliminary ruling).

[82] On the situation of returnees and Case C-370/90 *Singh* (n 78), see further Guild, Peers and Tomkin (n 41) 58-60.

[83] SI 2012/1547 (n 6), Sched 1, para 9, which inserted a new reg 15A on 'derivative rights of residence'.

[84] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1. See further Case C-310/08 *Ibrahim* [2010] ECR I-1065; Case C-480/08 *Teixeira* [2010] ECR I-01107.

[85] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177. For a discussion of these provisions, see Shaw (n 9) 263-265.

[86] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925. It should be noted that, prior to the amendment of the EEA Regulations (see n 82), the method used by the UK to comply with the *Zhu and Chen* ruling was highly questionable. Instead of considering that the primary carer of an EU minor fell within the scope of the EU law – given that Directive 90/364 was used as the basis for the ruling in *Zhu and Chen* – the UK authorities required such a person to apply for leave to enter or remain on the basis of para 257C of the Immigration Rules (n 17) instead of the EEA Regulations. Furthermore, it is arguable that para 257C did not comply with the *Zhu and Chen* ruling insofar as it precluded the primary carer from benefiting from a right to work in the UK; see for example, *MA & Others (EU national: self-sufficiency; lawful employment) Bangladesh* [2006] UKAIT 90, para [48], where the Tribunal held that the non-EU primary carer 'cannot derive a right to reside as a "family member" of an EU national because that income cannot be taken into account in order to establish the EU national's right of residence on a self-sufficient basis'. Following the incorporation of the *Zhu and Chen* cases in the EEA Regulations, the

these family members fall outside the scope of the Directive,[87] so their situation will not be further contemplated.

Transposition of Directive 2004/38: Beneficiaries			
Article	Content	Transposition outcome	Subsequent amendment
2	*Definitions*		
2(1)	EU citizen	Correct	Incorrect
	Family member		
2(2)(a)	Spouse	Correct	Incorrect + Ambiguous
2(2)(b)	registered partnership (equivalent to marriage)	Correct	Incorrect + Ambiguous
2(2)(c)	direct descendants (under the age of 21)	Correct	
2(2)(c)	direct descendants (dependants)	Correct	
2(2)(d)	direct relatives in the ascending line (dependants)	Correct	
3	*Beneficiaries*		
3(1)	EU citizens and family members in terms of Art. 2	Incorrect	Correct
3(2)(1)(a)	facilitation for dependants in the country of origin	Incorrect	Correct
3(2)(1)(a)	facilitation for members of the household	Incorrect	Correct
3(2)(1)(a)	facilitation for family members on serious health grounds	Correct	
3(2)(1)(b)	facilitation for partners (durable relationship duly attested)	Ambiguous	Ambiguous
3(2)(2)	procedure (extensive examination, justification)	Correct	

Table 9.1.3: Transposition outcomes for beneficiaries (Articles 2-3 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

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right of the primary carer to work still appears to be a problem as demonstrated by the case of *Seye (Chen children; employment) France* [2013] UKUT 178 (IAC) (28 March 2013), paras [35]-[51]. This case law arguably needs to be reconsidered in view of Case C-218/14 *Singh* [2015] ECLI:EU:C:2015:476 (judgment of 16 July 2015), para 76, where the Court held that 'the fact that some part of the resources available to the Union citizen derives from resources obtained by the spouse who is a third-country national from his activity in the host Member State does not preclude the condition concerning the sufficiency of resources in Article 7(1)(b) of Directive 2004/38 from being regarded as satisfied.'

[87] See to that effect, Case C-529/11 *Alarape and Tijani* [2013] ECLI:EU:C:2013:290 (judgment of 8 May 2013), para 48 where the Court held that 'periods of residence in a host Member State which are completed by family members of a Union citizen who are not nationals of a Member State solely on the basis of Article 12 of Regulation No 1612/68, as amended by Directive 2004/38, where the conditions laid down for entitlement to a right of residence under that directive are not satisfied, may not be taken into consideration for the purposes of acquisition by those family members of a right of permanent residence under that directive.'

9.1.4 Entry and exit

The main issue of non-compliance as regards entry rights has been the UK's non recognition of residence cards issued by other Member States to non-EU nationals who are family members of EU citizens seeking to accompany or join their EU relative. The issue was first identified in the ECAS comparative study.[88]

Under Article 5(2) of Directive 2004/38, the possession of a residence card issued under Article 10 should exempt a non-EU family member from the need to obtain a visa when they travel to an EU country with their EU relative or join them EU there. [89]

However, the UK initially refused to recognise this visa exemption.[90] The effect was that family members of EEA nationals residing in another EU country needed to obtain a visa[91] in order to enter the UK even when travelling with their EEA relative. The issue was finally settled by the Court of Justice in its judgment in a reference from the High Court in *McCarthy*,[92] in which it confirmed that

[88] ECAS comparative study (n 62) 152-153.

[89] The UK should have been exempting family members who hold a family member residence card from the need to obtain a visa.

[90] The problem lay in the definition of 'residence card' under reg 2(1) of the EEA Regulations as being one issued by the UK authorities. As a result, although a 'residence card' would permit admission to the UK under reg 11, this visa exemption was first limited to holders of residence cards or permanent residence cards issued by the UK. While the UK amended its rules with effect from 1 January 2014 to include a new definition of 'qualifying EEA State residence card', it initially limited the visa exemption to holders of recognised cards issued by Germany and Estonia, but not those issued by other Member States; see SI 2013/ 3032 (n 6), Sched 1, para 1. Apparently, according to the views of several UK lawyers, this limited recognition was justified on the basis of the practice of these two countries to issue residence cards containing the biometric data of family members. Following the changes made by SI 2015/694 (n 6), Sched 1, para 1(b), a 'qualifying EEA State residence card' is now defined as a residence card issued under Article 10 of Directive 2004/38 by an EEA State except Switzerland, which exempts its holder from the need to hold an entry visa under reg 11(2)(a). Note that the consolidated version of the EEA Regulations (n 4), reg 2(1) is missing the text of this exclusion for Switzerland.

[91] This took the form of an EEA family permit under reg 12.

[92] Case C-202/13 *McCarthy* [2014] ECLI:EU:C:2014:2450 (judgment of 18 December 2014), para 53.

'Member States are, in principle, required to recognise a residence card issued under Article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa'.[93] The UK amended the Regulations four months later to correct its non-compliance.[94]

The right of entry for family members remains subject to an effective obligation to hold a visa or residence document issued by the UK authorities[95] and excessive questioning at border controls[96] which would go beyond what the is permitted under the Directive[97] and previous case law[98,99].

While on the face of it the obligation to issue an 'EEA Family Permit' to family members as soon as possible appears compliant, the UK's consular guidelines[100] are not compliant as they require the submission of significant

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[93] ibid, para 62.

[94] SI 2015/694 (n 6), Sched 1, para 1. For a discussion of the UK's response, see Shaw (n 9) 272-276.

[95] Reg 11(2).

[96] ECAS comparative study (n 62) 146-147; 'Five Years of the Citizens Directive - Part 1' (n 1), 230.

[97] Article 5(1).

[98] As regards entry without visas, in Case C-459/99 *MRAX* [2002] ECR I-6591, paras 61-62, the Court held 'it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148 [now replaced by Directive 2004/38]. … a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.'

[99] As regards border control formalities, the Court held in Case 321/87 *Commission v Belgium* Case [1989] ECR 997, para 11, 'the only precondition which Member States may impose on the right of entry into their territory of the persons covered by [the Directive] is the production of a valid identity document or passport.'

[100] UK Visas & Immigration, 'EEA family permit: EUN02' <https://www.gov.uk/government/publications/eea-family-permits-eun02> accessed 1 December 2015.

documentation.[101] The process is therefore more burdensome than allowed under the Directive, which require Member States to 'grant … every facility' to family members and issue them with a visas under 'accelerated procedure'.[102]

The ambiguity concerning the transposition of the exemption from the need to stamp the passports of family members who hold a residence card[103] has now been addressed.[104]

The UK has not transposed Article 4 of the Directive on the basis that national law was already in conformity with its provisions.[105]

Transposition Outcomes: Entry and Exit			
Article	Content	Transposition outcome	Subsequent amendment
4	*Right of exit*		
4(1)	right of exit for EU citizens (ID or passport)	Not transposed – compliant	
4(1)	right of exit for TCN family members (passport)	Not transposed – compliant	
4(2)	no visa or equivalent formality	Not transposed – compliant	
4(3)	ID or passport stating the nationality of the holder	Correct	
4(4)	territorial validity of the passport (5 years if MS do not issue ID cards	Correct	
5	*Right of entry*		
5(1)(1)	right of entry for EU citizens (ID or passport)	Correct	
5(1)(1)	right of entry for TCN family members (passport)	Incorrect	
5(1)(2)	no visa or equivalent formality	Correct	

[101] Conformity Study for the UK (n 9) 28; ECAS comparative study (n 62) 153; 'Five Years of the Citizens Directive - Part 1' (n 1) 228-229. See further UK Visas & Immigration, 'Application for EEA family permit: form VAF5' <https://www.gov.uk/government/publications/application-for-eea-family-permit-form-vaf5> accessed 1 December 2015.

[102] Article 5(2).

[103] Article 5(3) provides that this applies all residence cards issued by any Member State under Article 10. The UK's transposition was incorrect because it only applied to those holding a residence card issued by the UK authorities.

[104] SI 2013/3032 (n 16), Sched 1, para 6(b).

[105] Home Office, 'Explanatory Memorandum to the Immigration (European Economic Area) Regulations 2006' (2008) 7 <http://www.legislation.gov.uk/uksi/2006/1003/pdfs/uksiem_20061003_en.pdf > accessed 1 October 2015; Conformity Study for the UK (n 9) 26; Correspondence Table for the UK (n 59) 7.

Transposition Outcomes: Entry and Exit			
Article	Content	Transposition outcome	Subsequent amendment
5(2)(1)	obligation to hold entry visa for TCN members (Reg. No. 539/2001)	Correct	
5(2)(2)	residence card exemption	Incomplete	Correct
5(2)(3)	facilitation to obtain entry visa	Incorrect	
5(2)(4)	accelerated procedure for issuing visa, free of charge	Incorrect	
5(3)	entry or exit stamp (passport TCN family member carrying residence card)	Ambiguous	Correct
5(4)	all opportunities to enter without valid travel documents	Correct	
5(5)	presence report (optional)	Not transposed – compliant	

Table 9.1.4: Transposition outcomes for entry and exit (Articles 4 and 5 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

9.1.5 The Right of residence

The provisions on the right of residence cannot be said to have been satisfactorily transposed by the UK. There are notable problems in transposition relating to the right of residence in excess of three months.

Firstly, the provisions of the Directive on administrative formalities relating to the issue of residence documentation are incomplete. While the Directive makes it clear that the Member States should not require documents beyond those listed,[106] this is not adequately reflected in the Regulations.[107] As a result, as reflected in the administrative guidance,[108] the UK authorities will

[106] See for example, Article 8(3) which states that 'Member States may only require' the documents listed therein. Member States should therefore not be requiring other documents not listed in the Directive, as confirmed by recital (14), which further explains that '[t]he supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.' This problem affects Article 8(3) and (5) as regards applications by EU citizens and family members who are themselves EU citizens, as well as

[107] See regs 16 (issue of registration certificate), 17 (issue of residence card),

[108] Home Office, 'Modernised Guidance: EEA nationals qualified persons' (2015) <https://www.gov.uk/government/publications/european-economic-area-nationals-qualified-persons> accessed 1 October 2015; idem, 'Modernised Guidance: Direct family members of EEA nationals' (2015) <https://www.gov.uk/government/publications/direct-family-members-of-

require extensive documentation in respect of both EU citizens and family members beyond what is allowed by the Directive.[109]

Moreover, while the Regulations have correctly transposed the requirement for those who do not work to have 'comprehensive sickness insurance',[110] the UK's administrative guidance instructs caseworkers that 'access to the UK's National Health Service' does not meet this condition. The policy reason is that reliance on the NHS creates a burden on the UK's social assistance system.[111] This is despite the fact that as a matter of UK law, any person ordinarily resident in the UK is entitled to NHS treatment.[112] The Court of Appeal had upheld the legitimacy of this policy.[113] As a result, EEA nationals who legitimately rely on the NHS for their healthcare needs while residing in the UK will effectively be penalised if they seek to obtain recognition of their

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european-economic-area-eea-nationals> accessed 1 October 2015; idem, 'Modernised Guidance: Extended family members of EEA nationals' (2015) <https://www.gov.uk/government/publications/extended-family-members-of-eea-nationals> accessed 1 October 2015; idem, 'Modernised Guidance: Family members of EEA nationals who have retained the right of residence' (2015) <https://www.gov.uk/government/publications/family-members-of-eea-nationals-who-have-retained-the-right-of-residence>.

[109] See further Conformity Study for the UK (n 9) 31; Correspondence Table for the UK (n 59) 19; ECAS comparative study (n 62) 151.

[110] Reg 4(1)(c)(ii) as regards 'self-sufficient persons' and reg 4(1)(d)(ii) as regards students.

[111] *W (China) v X (China)* [2006] EWCA Civ 1494 (9 November 2006).

[112] The UK operates a universal residency-based healthcare system which is free at the point of use for persons who are ordinarily resident in the UK. Under section 1(3) of the National Health Service Act 2006, treatment on the NHS is free for all residents of the UK. Moreover the NHS (Charges to Overseas Visitors) Regulations 2011 exempts certain categories of EEA nationals (including workers, students and pensioners) who are temporarily in the UK from the payment of overseas charges for treatment provided by the NHS. Similar conditions apply in Wales, under the National Health Service (Wales) Act 2006 and the National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306; Scotland by virtue of the National Health Service (Scotland) Act 1978 and the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989, SI 1989/364; and Northern Ireland according to the Health and Personal Social Services (Northern Ireland) Order 1972 SI 1972/1265 and The Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2005, SI 2005/55.

[113] *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988 (16 July 2014).

residence rights by the UK authorities.[114] The issue is currently the subject of on-going infringement proceedings by the Commission,[115] which has issued a reasoned opinion against the UK.[116]

It should also be noted that the residence card that is issued by the UK authorities is labelled 'residence card of a family member of an EEA family member'[117] instead of '… a Union citizen'.[118]

Secondly, as regards the issue of residence documentation to 'other family members',[119] this is subject to the proviso that 'in all the circumstances it appears … appropriate to issue the residence card'. Although at first glance this might appear in line with the discretion to facilitate entry and residence under Article 3(2),[120] it has been used by the UK authorities to reject applications on the basis of considerations not listed in the Directive. This is the case as regards refusals based on the previous immigration history of 'other family members' –

[114] See further 'Five Years of the Citizens Directive - Part 1' (n 1) 342-345; Sylvia de Mars, 'Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links?' (2014) 39 European Law Review 770-789.

[115] For an overview of infringement proceedings, see Chapter 4, Section 4.3.3 (Infringement action by the Commission).

[116] Commission 'Free movement: Commission asks the UK to uphold EU citizens' rights', Press release IP/12/417, 26 April 2012.

[117] Reg 17(6).

[118] Article 10(1).

[119] The 'other family members' falling within the scope of Article 3(2) are referred to as 'extended family members' under reg 8.

[120] Case C-83/11 *Rahman* (n 57), para 18, where the Court held that 'Directive 2004/38 does not oblige the Member States to grant every application for entry or residence submitted by persons'.

a practice upheld by the British courts [121] – which would appear excessive in light of the Court of Justice's case law.[122]

Thirdly, the EEA Regulations have been amended several times in respect of the right to retain the status of a worker following unemployment.[123] The effect is that a person who becomes involuntarily unemployed after working for less than a year cannot retain the status of a worker for more than six months,[124] even if the Directive provides that six months should be a minimum.[125] In a similar way, even though the Directive prescribes no limitation in time on the ability to retain the status of a worker for those who have become involuntarily

[121] See for example, *Moneke (EEA – OFMs) Nigeria* [2011] UKUT 00341(IAC) (22 August 2011), in which the official headnote, para ix, states 'In deciding whether a person falls within the material scope of regulation 8 of the 2006 Regulations, policy considerations relating to such matters as the appellant's immigration history, the impact of an adverse decision on the exercise by the EEA national of his or her Treaty rights, etc are irrelevant. Such policy considerations are relevant, however, to the exercise of regulation 17(4) discretion.' See also *YB (EEA reg 17(4), proper approach) Ivory Coast* [2008] UKAIT 62, para [39]; MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 61.

[122] See for example, Case 48/75 *Royer* [1976] ECR 497, para 51, where the Court of Justice held that 'mere failure by a national of a Member State to comply with the formalities concerning entry, movement and residence of aliens is not of such a nature as to constitute in itself conduct threatening public policy and public security and cannot therefore by itself justify a measure ordering expulsion or temporary imprisonment for that purpose'; C-118/75 *Watson and Belmann* [1976] ECR 1185, para 20, where the Court emphasised that 'the penalties attaching to a failure to comply with the prescribed declaration and registration formalities, deportation, in relation to persons protected by Community law, is certainly incompatible with the provisions of the Treaty'; Case C-459/99 *MRAX* (n 97), para 80, where the Court ruled that 'a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully'.

[123] SI 2013/3032 (n 6), Sched 1, para 3; SI 2014/1451 (n 6), reg 3 ; SI 2014/2761 (n 6), reg 3(2).

[124] Reg 6(2)(ba) and (2A).

[125] Article 7(3)(c) specifies that 'the status of a worker shall be retained for *no less than six months*' (emphasis added). The recent judgment in Case C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597 (15 September 2015) does not call this into question the possibility for a person to retain the status of a worker beyond six months for residence purposes, since this case concerned a different question, namely the possibility to refuse payment of social assistance to persons after six months of unemployment, see ibid, para 61.

unemployed after having worked for at least a year,[126] the EEA Regulations restrict this right to six months,[127] unless the persons concerned can provide 'compelling evidence' that they are looking for work and have genuine chances of being engaged. The requirement to provide 'compelling evidence'[128] also applies to the right of residence of jobseekers[129] which adds conditions not foreseen by Article 14(4)(b)[130] or by the Court's ruling in *Antonissen.*[131] These amendments have increased instances of non-compliant transposition of the EEA Regulations.

Lastly, ambiguity in the Regulations has been noted in respect of the rules on family members of students,[132] the validity of residence cards,[133] the

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[126] Article 7(3)(b) only requires the person to register 'as a jobseeker with the relevant employment office'.

[127] Reg 6(2)(b), (7) and (8)(a).

[128] This is known as the 'Genuine Prospect of Work Test', see for example, Department for Work and Pensions, 'Decision Maker's Guide' (n 180), paras 073092-073102. What constitutes 'compelling evidence' appears unduly restrictive as the only examples given are 'a definite job offer' or evidence the claimant 'will receive a job offer imminently', ibid, para 073100. See further Martin Williams, 'Kapow to the GPOW' (2015) Child Poverty Action Group special report: <http://www.cpag.org.uk/sites/default/files/CPAG-Kapow-GPOW-APR2015_0.pdf> accessed 7 July 2015.

[129] Reg 6(1)(a), (7) and 8(b).

[130] This provides that 'an expulsion measure may in no case be adopted against Union citizens or their family members if: … (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

[131] Case C-292/89 *Antonissen* [1991] ECR I-745, para 21, where the Court it made clear that 'if after the expiry of that period [of six months] the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State'.

[132] Article 7(4) corresponding to reg 7(2); see Correspondence for the UK (n 59) 17 identifies uncertainty in reg 7(2) and suggests 'it would be desirable if the Regulation[s] were to clarify the status of those family members of students who are consigned to the status of what the Regulation[s] calls 'extended family members' under the facilitation provisions of Article 3(2), as suggested by the Directive.'

[133] Article Art 11(2) not transposed; see Correspondence Table for the UK (n 59) 26 notes that there are 'no measures in the UK regulations specifying the need for continuity of residence specifically for the

retention of residence for family members who are EU citizens following the death or departure of their EU sponsor[134] or following divorce or termination of a registered partnership.[135]

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
6	*Residence (up to three months)*		
6(1)	EU citizens	Correct	
6(2)	TCN family members	Correct	
7	*Residence (more than three months)*		
7(1)(a)	workers or self-employed persons	Correct	
7(1)(b)	sufficient resources and comprehensive sickness insurance cover	Correct	
7(1)(c)	study (comprehensive sickness insurance +assurance of sufficient resources)	Correct	
7(1)(d)	Family member	Correct	
7(2)	TCN family members	Correct	
7(3)(a)	retention in case of illness or accident	Correct	
7(3)(b)	involuntary unemployment after 1 year of employment	Correct	Incorrect
7(3)(c)	involuntary unemployment after fixed-term contract (less than 1 year)	Incorrect	Incorrect
7(3)(d)	vocational training (after previous employment)	Correct	
7(4)	special rules concerning family members of students	Ambiguous	
8	*Administrative formalities for EU citizens*		
8(1)	option: register	Correct – optional	
8(2)	deadline to register	Not transposed – compliant	
8(2)	immediate issue	Correct	
8(2)	Sanctions	Not transposed – compliant	
8(3)	documents required from workers or self-employed persons	Incorrect	
8(3)	documents required from self-sufficient persons	Incorrect	
8(3)	documents required from students	Incorrect	
8(4)	no fixed amount with regard to 'sufficient resources'	Correct	
8(5)	documents required from EU family members	Incorrect	

purposes of the validity of the residence card, which may cast doubt upon the effectiveness of the transposition.'

[134] Article 12(1) corresponding to reg 14(3) and reg 10(1)-(3) and (6). Conformity Study for the UK (n 9) 35 notes 'the lack of transparency in its [reg 10] drafting' and expresses concern 'whether it incorrectly applies a qualifying period of one year to EU citizen family members covered by Article 12(1)'.

[135] Article 13(1) corresponding to reg 10(1) and (5)-(6); see Correspondence Table for the UK (n 59) 30 which notes the same concerns as n 133.

Transposition Outcomes: Residence			
Article	Content	Transposition outcome	Subsequent amendment
9	*Administrative formalities for family members who are not EU citizens*		
9(1)	issue a residence card	Correct	
9(2)	deadline for submission	Not transposed – compliant	
9(3)	Sanctions	Not transposed – compliant	
10	*Issue of residence cards*		
10(1)	title of the residence card	Incorrect	
10(1)	issue deadline of six months	Correct	
10(1)	certificate of application	Correct	
10(2)	documents required from TCN family members	Incomplete	
11	*Validity of the residence card*		
11(1)	period of validity	Correct	
11(2)	temporary absences	Not transposed – ambiguous	
12	*Retention of the right of residence in the event of death or departure of the EU citizen*		
12(1)	retention of residence of EU family members - death/departure	Ambiguous	
12(1)	conditions for the right of permanent residence	Correct	
12(2)	retention of residence of TCN family members - death of the EU citizen	Correct	
12(3)	child in education and parent having custody - departure of the EU citizen	Correct	
13	*Retention of the right of residence in the event of divorce, annulment of the marriage or termination of registered partnership*		
13(1)	EU family members	Ambiguous	
13(1)	conditions for the right of permanent residence	Correct	
13(2)	TCN family members	Correct	
13(2)(a)	3 years of marriage, including 1 year in the host MS	Correct	
13(2)(b)	custody of the EU citizen's children	Correct	
13(2)(c)	domestic violence	Correct	
13(2)(d)	right of access to a minor child in the host MS	Correct	
13(2)	conditions for the right of permanent residence	Correct	
13(2)	exclusively on personal basis	Correct	
14	*Retention of the right of residence*[136]		
14(1)	retention of the right of residence under Art. 6	Correct	
14(2)	retention of the right of residence under Art. 7, 12, 13	Correct	

Table 9.1.5: Transposition outcomes for residence (Articles 6-14 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

[136] The provisions of Article 14(3) and (4), as well as Article 15, are examined under Section 10.1.9 (Procedural safeguards and rights of appeal).

9.1.6 The Right of permanent residence

It should be noted that prior to the entry into force of the Directive, EU citizens and their family members who had resided in the UK for four years or more were entitled to apply for indefinite leave to remain.[137] Indeed, it appears that the UK's rules influenced the Commission's original proposal for the Directive,[138] which originally provided for the acquisition of permanent residence after four years of continuous residence, although the final text of the Directive provides for the acquisition of five years of lawful residence.[139]

While Article 37 the Directive does permit Member States to adopt rules which are more favourable than the Directive, it does not regrettably contain a 'standstill' provision that would have had the effect of obliging the UK to maintain the former rules in force. As a result, the UK's transposition provides for the acquisition of permanent residence after five years of continuous lawful residence in the UK.[140]

The EEA Regulations contain the proviso that residence during the five-year period should have been 'in accordance with these Regulations',[141] for which there is no corresponding provision in the Directive.

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[137] The relevant parts of the Immigration Rules were examined by the CJEU in *Kaba* Case C-356/98 [2000] ECR I-2623 and *Kaba II* Case C-466/00 [2003] ECR I-2219. The European casework instructions, Chapter 6 explain the rules prior to 30 April 2006:

> 'Under paragraph 255 of the Immigration Rules (HC 395 (as amended by Cm 4851)) an EEA national (other than a student) and non-EEA family members may have been eligible to apply for permanent residence. This was not provided for in EC law, only in the United Kingdom immigration rules. To qualify under paragraph 255 a person had to have been issued with a residence permit or a residence document valid for 5 years, to have remained in the UK in accordance with the 2000 EEA Regulations for 4 years and to continue to do so.'

[138] Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2001] OJ C270 E 150, COM(2001) 257 15-16.

[139] Article 16.

[140] Reg 17.

[141] Reg 17(1), reg 17(2), reg 18 as regards EEA nationals, EU family members and non-EU family members respectively.

This led to several cases related to the refusal of the UK authorities to recognise periods of residence under previous legal instruments.[142] A preliminary ruling from the Court of Appeal in *Lassal*[143] led the Court to confirm that periods of residence completed prior to the entry into force of the Directive should count towards the acquisition of permanent residence.[144] A further case on a reference from the German courts[145] clarified that periods of residence completed prior to accession could also count, provided the conditions of Article 7 of the Directive were met.[146] These judgments have led to amendment of the EEA Regulations that address these aspects of non-compliance.[147]

However, the EEA Regulations were amended[148] so that an application for permanent residence can be refused on the basis that a decision has been taken against the applicant on grounds of abuse in the last twelve months,[149]

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[142] For example, periods of residence completed under the Immigration (European Economic Area) Regulations 2000, SI 2000/2326.

[143] Case C-162/09 *Lassal* [2010] ECR I-9217.

[144] In Case C-162/09 *Lassal* (n 142), the Court held that periods of residence that were completed prior to the date entry into force of the Directive on 30 April 2006 must be taken into account in accordance with earlier EU law instruments, ibid, paras 35, 37 and 40. In addition, the Court held that a period of absence of less than two years prior to 30 April 2006 that might have taken place following the completion of five years' legal residence will not affect the acquisition of the right to permanent residence, ibid para 57.

[145] Joined cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECLI:EU:C:2011:866 (judgment 21 December 2011).

[146] ibid, para 63, in which the Court held that 'periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive.'

[147] SI 2012/1547 (n 6), Sched 1, para 25 which amended the EEA Regulations, Sched 4 para 6 (periods of residence prior to the entry into force of these Regulations).

[148] SI 2013/ 3032 (n 6), Sched 1, para 10 and SI 2015/694 (n 6), Sched 1, para 6.

[149] Reg 15(3).

which is contrary to the provision on continuity of residence,[150] which still has not been explicitly transposed.

The other problems in transposition relates to the exclusion of any period of residence completed by a worker from a new Member State who was not registered under the Worker Registration Scheme during the transitional period (2004-2011),[151] given that a policy to deny recognition of that right is likely to breach existing case law.[152] Moreover, the Regulations is no specific confirmation that a person who has acquired permanent residence is no subject to the need to meet the conditions of Chapter III of the Directive.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
16	*General rule for EU citizens and their family members (right of permanent residence)*		
16(1)	legal residence during 5 years	Incorrect	Incorrect
16(1)	not subject to the Chapter III conditions	Not transposed – incomplete	Not transposed – incomplete
16(2)	TCN family members	Incorrect	Correct
16(3)	temporary absences	Correct	
16(4)	only lost through absences exceeding 2 years	Correct	
17	*Exemptions for persons no longer working in the host Member State*		
17(1)(a)	worker who reaches retirement age after working at least a year	Correct	
17(1)(a)(2)	retirement age (60) in case national law is silent	Correct	
17(1)(b)	worker permanently incapable of working (min. 2 prior years of residence)	Correct	
17(1)(c)	worker who has worked at least three years but then becomes cross-border worker	Correct	
17(1)(c)(1)	periods of employment under (a) and (b)	Correct	

[150] Article 21 provides that 'continuity of residence may be attested by any means of proof in use in the host Member State'.

[151] Reg 7A and 7B as inserted by SI 2011/544 (n 6), Sched 2, para 4, and SI 2013/3032 (n 6), Sched 1, para 4, respectively.

[152] See case law cited at n 121, where the Court has ruled that breach of residence formalities cannot justify the refusal to issue residence documentation.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
17(1)(c)(2)	periods of involuntary unemployment etc. count as employment	Correct	
17(2)	exemption from periods under (a) or (b) if citizen's spouse or partner is national or ex-national	Correct	
17(3)	right of permanent residence of family members	Correct	
17(4)(a)	family members acquire PR upon death of worker (if worker resided for min. 2 years)	Correct	
17(4)(b)	family members acquire PR upon death of worker (if worker's death result of accident at work)	Correct	
17(4)(c)	family members acquire PR upon death of worker (if worker spouse is ex-national)	Correct	
18	*Acquisition of the right of permanent residence by certain family members who are not EU citizens*		
18	permanent residence of family members having retained right of residence under Art. 12 or 13	Incorrect	Correct
19	*Document certifying permanent residence for EU citizens*		
19(1)	Document certifying permanent residence for EU citizens	Correct	
19(2)	Document certifying permanent residence to be issued as soon as possible	Correct[153]	
20	*Permanent residence card for family members who are not nationals of a Member State*		
20(1)	issue deadline six months; automatic renewability	Correct	
20(2)(1)	submission before expiration of the residence card	Not transposed – correct	
20(2)(2)	Sanctions	Not transposed – correct	
20(3)	temporary absences	Correct	

[153] This provision was identified as incorrectly transposed by the Commission in that it contained additional requirements not contained in the Directive; see Information from Commission dated 10 March 2015 (GestDem 2015/1508). However, no such problem in transposition could be identified. The problems identified in the conformity study relate to application not transposition, which was assessed as correct; see Conformity Study for the UK (n 9) 39 and Correspondence Table for the UK (n 59) 43-44.

Transposition Outcomes: Permanent Residence			
Article	Content	Transposition outcome	Subsequent amendment
21	*Continuity of residence*		
21	continuity of residence can be proved by any means; expulsion breaks continuity	Incomplete	

Table 9.1.6: Transposition outcomes for residence (Articles 16-21 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

9.1.7 Equality of treatment

The UK has not transposed the provisions of the directive on related rights. Instead, these are contained in piecemeal instruments, which leads to non-compliant transposition.[154]

Firstly, concerning the right to work of non-EU family members,[155] the effect of UK legislation is that family members will be unable to secure work unless they hold some kind of documentation from the Home Office proving their right to work in the UK.[156] This is contrary to Article 25 of the Directive

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[154] Conformity Study for the UK (n 9) 40-42; Correspondence Table for the UK (n 59) 43-44; ECAS comparative study (n 62) 154-155; 'Five Years of the Citizens Directive - Part 2' (n 1) 338-346.

[155] Article 23 provides that family members who have a right of residence or permanent residence are entitled to take up employment or self-employment, regardless of their nationality.

[156] In order to ensure that they are not liable for a fine under Section 15 of the Immigration, Asylum and Nationality Act 2006 (hereafter 'IANA') for employing workers illegally, employers will want to see certain documents that establish an employee is lawfully residing in the UK. The documentary requirements for UK employers as to acceptable methods of proof a right to reside in the UK are laid down by the Immigration (Restrictions on Employment) Order 2007, SI 2007/3290, as last amended by the Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014, SI 2014/1183. Under article 3 of the Order, an employer will escape liability indefinitely under IANA, if the employer is able to produce when requested documents described in list A in the Schedule. Documents in list A include a European Economic Area national's passport or identify card, or a permanent residence card issued to the non-EEA family member of an EEA national. These provide proof of a right of residence without limitation. Under article 4, an employer will escape liability under IANA if the employer is able to produce when requested documents described in part 1 of list B in the Schedule. However, this document provides protection only for the duration of the validity of the document. Documents on list B include a current residence card issued by the Home Office to a non-EEA national who is a family member of an EEA national. Article 5 of the Order further provides that the above documents should be produced before employment is started and article 6 further provides that the

which provides that the exercise of a right is not conditional upon holding a residence document.[157]

Secondly, the provision on equal treatment is not transposed by the EEA Regulations.[158] the right of EU citizens and their family members to be treated on the same terms as British citizens residing in the UK, this is the subject of diverse legislation covering social security,[159] access to education[160] and

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employer should retain a copy of the document in "a format which cannot subsequently be altered", namely a photocopy or scanned electronic copy.

[157] Article 25 provides that '[p]ossession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof'.

[158] Article 24 of the Directive.

[159] EEA nationals seeking to access non-contributory benefits in the UK are required to demonstrate they have a right of residence in the UK, which is known as the 'right to reside' test. This is currently the subject of a case pending before the Court of Justice in C-308/14 *Commission v UK* [2014] OJ C329/2. The l is unclear at present as Advocate General Cruz Villalón has concluded the case should be dismissed in his Opinion of 6 October 2015 (unreported). For background to case, see Commission, 'Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards', Press release IP/13/475, 30 May 2013; Charlotte O'Brien, 'An insubstantial pageant fading: a vision of EU citizenship under the AG's Opinion in C-308/14 Commission v UK' (*EU Law Analysis*, 7 October 2015) <http://eulawanalysis.blogspot.it/2015/10/an-insubstantial-pageant-fading-vision.html> accessed 8 October 2015. On the 'right to reside' test, see further Steven Kennedy, 'EEA nationals: the 'right to reside' requirement for benefits' (2011) Commons Briefing papers SN05972 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05972> accessed 11 November 2015; idem, 'People from abroad: what benefits can they claim?' (2015) Commons Briefing papers SN06847 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06847> accessed 11 November 2015

[160] Article 24(2) of the Directive should have no impact on the ability of students to enjoy equal treatment as regards tuition fees which has been recognised by the Court of Justice since Case 293/83 *Gravier* [1985] ECR 593. Nonetheless, the UK imposes a condition of prior residence in the EEA for a minimum of three years in order for students who are EEA nationals and their family members to be categorized as 'home students' for the purposes of university tuition fees under the Education (Fees and Awards) (Scotland) Regulations 2007 SI 2007/152, the Education (Fees and Awards) (England) Regulations 2007 SI 2007/779 and the Education (Fees and Awards) (Wales) Regulations 2007 SI 2007/2310. Such a condition leads to some EU citizens being charged higher fees than home students, by sole virtue of the fact that they may have been studying or living outside the EU prior to starting their

financial support for studies[161] among other matters. None of these instruments adequately provide for equality of treatment for all family members who are beneficiaries under Directive 2004/38.[162]

Since the UK has been charging fees for the issue of residence documentation,[163] as allowed by Article 25(2) of the Directive.[164] The amount does not appear excessive.[165]

course of study in the UK. See further 'Five Years of the Citizens Directive - Part 2' (n 1) 346. For an overview of the legal framework, see Milieu/ICF-GHK, 'Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation - Module 2 National Report for the United Kingdom' (2014).

[161] Access to student loans and grants for EEA nationals and their family members is also conditional upon prior residence in the EEA for a minimum of three years under the Education (Student Loans) Regulations 1998 SI 1998/211, the Education (Student Support) Regulations 2011 SI 2011/1986, the Students' Allowances (Scotland) Regulations 2007 SI 2007/153 and the Education (Student Loans) (Scotland) Regulations 2007 SI 2007/154. This is an additional requirement not foreseen by Article 24(2) of Directive 2004/38.

[162] See further, ECAS comparative study (n 62) 154-155; 'Five Years of the Citizens Directive - Part 2' (n 1) 338-346.

[163] SI 2013/1391 (n 6) reg 2.

[164] Article 25(2) provides that a registration certificate, a document certifying permanent residence, a certificate of application, a residence card or a permanent residence card 'shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents'.

[165] The current fee is £65.00. By way of comparison, when the Home Office used to issue identity cards to British citizens under the Identity Cards Act 2006 (now repealed), the Home Office charged £30 to issue a British ID card with a 10-year validity period. The UK authorities no longer issue identity cards, so this comparison is no longer possible. However, 'similar documents' for the purposes of the Directive may include a passport or driving licence. A standard adult passport costs between £72.50 and £95.25 when issued in the UK. The fee for the issue of a driving licence in the UK is £43.00. It should be noted that the fee for the issue of a Schengen visa to non-EU nationals is €60.00.

Transposition Outcomes: Equal Treatment			
Article	Content	Transposition outcome	Subsequent amendment
23	*Related rights*		
23	right to work	Not transposed – incorrect	
24	*Equal treatment*		
24(1)	equal treatment	Not transposed – ambiguous	Incorrect
24(2)	derogation with regard to social assistance	Correct[166]	Ambiguous[167]
24(2)	derogation with regard to maintenance aid for studies	Correct[168]	Incorrect[169]
25	*General provision concerning residence documents*		
25(1)	possession of residence docs cannot be made precondition for exercise of rights	Ambiguous	
25(2)	charge for residence docs not to exceed charge for issuing nationals with similar documents	Correct	Correct

Table 9.1.7: Transposition outcomes for equality of treatment (Articles 22-25 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

9.1.8 Restrictions on entry and residence

The UK has for the most part transposed these provisions correctly, save for two provisions which are the subject of incomplete transposition. These relate to the possibility to request information from other Member States when an application for residence documentation is made,[170] and the duty to admit returning nationals who have been expelled from other Member States.[171]

[166] This provision was initially assessed as correct; see Correspondence Table for the UK (n 59) 48-49.

[167] See n 158.

[168] This provision was initially assessed as correct; see Correspondence Table for the UK (n 59) 48-49.

[169] See n 159-160.

[170] Article 27(3) of the Directive; see Conformity Study for the UK (n 9) 44; Correspondence Table for the UK (n 59) 53.

[171] Article 27(4) of the Directive; see Conformity Study for the UK (n 9) 44; Correspondence Table for the UK (n 59) 53. However, the absence of transposition is partly mitigated by the fact that British citizens have a right of abode in the UK by virtue of section 2(1)(a) of the Immigration Act 1971. See further Home Office, 'Guidance: Right of abode' <https://www.gov.uk/government/publications/right-of-abode-roa/right-of-abode-roa> accessed 31 December 2015.

The EEA Regulations have also been amended to strengthen the powers to take action to combat abuse of rights[172] and take action to restrict free movement rights on grounds other than public policy, public security or public health.[173] These amendments appear compliant, with one notable exception discussed below in respect of procedural safeguards.

Transposition Outcomes: Restrictions on Entry and Residence			
Article	Content	Transposition outcome	Subsequent amendment
22	*Territorial scope*		
22	right of residence extends to entire MS; territorial restrictions must be same as for nationals	Correct	
26	*Checks*		
26(2)	sanctions		
27	*General principles*		
27(1)(1)	restriction based on grounds of public policy, public security or public health	Correct	
27(1)(2)	not for economic ends	Correct	
27(2)(1)	principle of proportionality	Correct	
27(2)(2)	based on the personal conduct	Correct	
27(2)(2)	serious threat to one of the fundamental interests of the society	Correct	
27(2)(2)	no considerations of general prevention	Correct	
27(3)	host MS may request police record from MS of origin before issuing residence docs	Not transposed – incomplete	
27(4)	right of re-entry of expelled citizens in home MS	Not transposed – incomplete	
28	*Protection against expulsion*		
28(1)	obligation to take account of considerations relating to citizen's situation	Correct	
28(2)	persons who have permanent residence (only for serious grounds of public policy or public security)	Correct	
28(3)(a)	persons having resided for 10 years (only for imperative grounds of public security)	Correct	

[172] Article 35 of the Directive. The EEA Regulations were modified by SI 2013/3032 (n 6), Sched 1, para 18, which added a new reg 21B (abuse of rights or fraud). Other amendments were made to reg 19 (exclusion and removal from the United Kingdom). See further Home Office, 'Modernised Guidance: Removals and revocations of EEA nationals' (2015) <https://www.gov.uk/government/publications/removals-and-revocations-of-european-economic-area-eea-nationals> accessed 31 December 2015; idem, 'Modernised Guidance: Excluding EEA nationals and their families from the UK' (2015) <https://www.gov.uk/government/publications/excluding-eea-nationals-and-their-families-from-the-uk> accessed 31 December 2015.

[173] Article 15(1) of the Directive. Reg 20A (cancellation of a right of residence) was added by SI 2012/1547 (n 6), Sched 1, para 13.

28(3)(b)	minors (only for imperative grounds of public security) unless expulsion is in best interests of the child	Correct	
29	*Public health*		
29(1)	definition of diseases with epidemic potential	Correct	
29(2)	no expulsion based on diseases occurring after 3 months of residence	Correct	
29(3)	option: require of a medical examination	Not transposed correct	
35	*Abuse of rights*[174]		
35(1)	Option: measure against abuse of rights	Correct	Correct
36	*Sanctions*		
36	Effective and proportionate sanctions	Correct	

Table 9.1.8: Transposition outcomes for restrictions on entry and residence (Article 22, 27-29, 35-36 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

9.1.9 Procedural safeguards and rights of appeal

The original EEA Regulations presented some difficulties in transposition of the Directive's provisions that aim 'to ensure a high level of protection Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State'.[175]

The original EEA Regulations[176] did not provide protection against systematic verification of the right of residence.[177] The possibilities for the UK

[174] The provisions of Article 35(2) are examined under Section 10.1.9 (Procedural safeguards and rights of appeal).

[175] Recital (25) of the Directive.

[176] Regs 19(3) and 20. See further Conformity Study for the UK (n 9) 37; Correspondence Table for the UK (n 59) 34.

[177] Article 14(2) provides that 'where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.' The transposition of the protections against expulsion contained in the paragraphs (3) and (4) of Article 14 will be examined below in the context of restrictions on the right of free movement. See Section 10.1.8 (Restrictions on entry and residence).

authorities to verify the rights of residence has since been enhanced[178] and have now transposed this provision.[179]

Moreover, the UK authorities have instituted a minimum income threshold for EEA workers who claim social assistance in the UK.[180] As a result, a person who earns less than the threshold at which social security contributions becomes due on earnings will be subjected to a test to verify that they engage in genuine and effective work.[181] This test appears to be systematically applied whenever a person makes a claim to determine whether they are workers and therefore meet the 'right to reside' test.[182]

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[178] Reg 20B (verification of a right of residence) was inserted by SI 2013/3032 (n 6), Sched 1, para 16. Home Office, 'Explanatory Memorandum to the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013' (2013) <http://www.legislation.gov.uk/uksi/2013/3032/pdfs/uksiem_20133032_en.pdf> accessed 2 October 2015, which explains that 'a new regulation 20B ... applies when the Secretary of State has reasonable doubt as to whether a person has a right to reside under the Regulations, or wants to verify the eligibility of a person to apply for documentation ... ' and 'will allow the Secretary of State to invite a person to whom the regulation applies to provide evidence or to attend an interview to support an application for documentation under the 2006 Regulations, or to support the existence of a right to reside they purport to have. If a person purports to be entitled to a right to reside on the basis of their relationship with another person, such as their spouse, the Secretary of State may invite that other person to attend an interview. If, without good reason, the information requested is not supplied, or, on at least two occasions, that person fails to attend an interview, the Secretary of State may draw such factual inferences about that person's right to reside as appear appropriate in the circumstances. Following such an inference, the Secretary of State may decide that the person in question does not have a right to reside, but may not take such a decision on the sole basis that that person failed to comply with the request to attend interview or to provide further information. The power may not be used systematically', ibid, paras 7.13-7.14

[179] Reg 20B(7).

[180] Department for Work and Pensions, 'Minimum earnings threshold for EEA migrants introduced', Press release, 21 February 2014 <www.gov.uk/government/news/minimum-earnings-threshold-for-eea-migrants-introduced> accessed 22 December 2015

[181] See further, Department for Work and Pensions, 'Decision Maker's Guide' (2015), paras 073031-073052 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470826/dmgch0703.pdf> accessed 7 July 2015.

[182] See further, Section 10.1.7 (Equality of treatment) n 158 and accompanying text.

The Directive does not provide for any cases where EU citizens or their family members may be denied a right of appeal since this should be available in all cases.[183] This is in contrast to the EEA Regulations[184] which deny the right of appeal to EU citizens and their family members who are unable (in the opinion of the Home Office) to provide evidence of their EU citizenship or relationship to an EU citizen as the case may be. Moreover, it goes against the Court's case law on means of proof.[185] This can lead to particular problems in practice for family members claiming a right to retain residence following a divorce or termination of a registered partnership where the Home Office deems they were not able to demonstrate the nationality of their former spouse or partner. While the EEA Regulations now allow[186] for the UK authorities to 'accept alternative evidence of identity and nationality', the relevant guidelines state recourse to such alternatives can only be made in exceptional circumstances.[187] The Regulations therefore remain non-compliant in this respect.

[183] Recital (26) of the Directive.

[184] Reg 26(2), (2A), (3) concerning EU citizens, durable partners and family members. Reg 26(3A) contains a similar restriction on family members covered by Reg 15A; see further n 82-85 and accompanying text.

[185] Case C-215/03 *Oulane* [2005] ECR I-1215, paras 25 and 53, where the Court held that where 'the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents' and 'where it is not specified which means of evidence are admissible for the person concerned to establish that he comes within one of the categories referred to in Articles 1 and 4 of Directive 73/148, it must be concluded that evidence may be adduced by any appropriate means'.

[186] Reg 29A as inserted by SI 2012/2560 (n 6), Sched, para 6. This change was made to comply with the Upper Tribunal's ruling *Barnett and Others (EEA Regulations: rights and documentation) Jamaica* [2012] UKUT 142 (IAC) (5 May 2012), para [29] where it was held 'it is unlawful to refuse applications merely because such documentation is not forthcoming'.

[187] Home Office, 'Modernised Guidance: Processes and procedures: for EEA documentation applications' (2015) 34 <https://www.gov.uk/government/publications/processes-and-procedures-for-eea-documentation-applications> accessed 31 December 2015.

Furthermore, the EEA Regulations[188] denies the right to EU citizens to make an appeal whilst still in the UK in a number of circumstances including a refusal to be admitted to the UK, a refusal to revoke an exclusion or deportation order, or a refusal to issue an EEA family permit, or wherever a decision has been taken when that person was outside the UK. This is likely to be contrary to the Court's previous ruling in *Yiadom*.[189] Moreover, the effect is that appellants must first leave the UK in order to have a right to appeal against such a decision, which will necessarily affect this person's ability to access legal advice and by extension their ability to appeal. [190]

As mentioned above, the powers of the UK authorities to take action to combat abuse of rights has been strengthened.[191] However the amendments

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[188] Reg 27 as amended on several occasions.

[189] Case C-357/98 *Yiadom* [2000] ECR I-9265, para 43, where the Court held that 'Articles 8 and 9 of the Directive [64/221] of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1963-1964] OJ Spec Ed 117] must be interpreted as meaning that a decision adopted by the authorities of a Member State refusing a Community national, not in possession of a residence permit, leave to enter its territory cannot be classified as a decision concerning entry within the meaning of Article 8 thereof in a case such as that at issue in the main proceedings where the person concerned was temporarily admitted to the territory of that Member State, pending a decision following the enquiries required for the investigation of her case, and therefore resided for almost seven months in that territory before that decision was notified to her, since such a national must be entitled to the procedural safeguards referred to in Article 9 of the Directive.' The Court also added that 'if that State has accepted the physical presence of that national in its territory for a period which is manifestly longer than is required for such an investigation, it can also accept that national's presence during the time needed for him to exercise the rights of appeal referred to in Article 9 of the Directive. … All that must be taken into account is the time which elapsed between the physical entry into the territory and the competent authority's decision refusing admission', ibid, paras 41 and 42. In this respect, reg 29(2)(b) effectively provides that a person whose entry has been denied will be deemed not to have been admitted to the UK for a period of three months, which could be considered 'a period which is manifestly longer than is required' for revoking a person's admission to the UK.

[190] For a discussion on how this could constitute a measure that is contrary to the right to an effective remedy, see 'Five Years of the Citizens Directive - Part 2' (n 1) 354-355.

[191] See n 171 and accompanying text.

made allow for the imposition of an exclusion order in case of abuse,[192] which is not permitted under the Directive.[193] Moreover, it would appear that appeal rights are not being effectively observed given the Upper Tribunal's recent the benefit of appeal rights under the EEA Regulations in respect of a person accused of abuse marriage of convenience.[194] Hence, there is ambiguity as to whether the EEA Regulations currently achieve the 'high level of protection' demanded by the Directive in cases of abuse.[195] This creates a new instance of non-compliance.

The initial absence of a provision allowing a person to submit an appeal in person has now been addressed,[196] as has the lack of transposition of provisions relating to the possibility to request a lifting of an exclusion order.[197]

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[192] Reg 19 (exclusion and removal from the United Kingdom) was amended by SI 2009/ 1117 (n 6), Sched 1, para 6, with the insertion of sub-para (1AB) which provides that '[a] person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if the Secretary of State considers there to be reasonable grounds to suspect that his admission would lead to the abuse of a right to reside in accordance with regulation 21B(1).'

[193] Article 15(3) provides that 'The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies', namely 'on grounds other than public policy, public security or public health'.

[194] *R (on the application of Bilal Ahmed) v Secretary of State for the Home Department* (n 60) in which (for commentary, see n 60).

[195] Case C-202/13 *McCarthy* (n 91), para 50, where the Court has emphasised 'measures adopted on the basis of that article [Article 35] are subject to the procedural safeguards provided for in Articles 30 and 31 of the directive. As is clear from recital 25 in the preamble to the directive, those procedural safeguards are intended, in particular, to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State.'

[196] Article 31(4) of the Directive; see Conformity Study for the UK (n 9) 47; Correspondence Table for the UK (n 59) 66. See further n 197. The EEA Regs were amended by 2014/1976 (6), Sched, para 8, and inserted a new reg 29AA (temporary admission in order to submit case in person).

[197] Article 32(1) of the Directive; see Conformity Study for the UK (n 9) 47; Correspondence Table for the UK (n 59) 67-68.

Transposition Outcomes: Procedural safeguards and rights of appeal			
Article	Content	Transposition outcome	Subsequent amendment
14	*Retention of right of residence*		
14(2)	verification of residence rights	Incomplete	Incorrect
14(3)	no automatic expulsion in case of recourse to social assistance	Incomplete	
14(4)(a)	no expulsion of workers or self-employed persons	Correct	
14(4)(b)	no expulsion of jobseekers looking for work who have genuine chances of being engaged	Correct	
14(4)(a)	no expulsion of workers or self-employed persons	Correct	
15	*Procedural safeguards*		
15(1)	procedures provided for by Art. 30, 31 shall apply by analogy	Correct	
15(2)	no expulsion in case of expiry of ID or passport	Not transposed – incomplete	Not transposed - incomplete
15(3)	no ban on entry for expulsion decision taken on other grounds	Not transposed – incomplete	Incorrect
26	*Checks*		
26(1)	option to carry out checks	Not transposed - compliant	
30	*Notification of decisions*		
30(1)	notification in writing	Correct	
30(2)	full and precise information of the public policy, public security, public health grounds	Correct	
30(3)	advising of legal remedies	Correct	
30(3)	citizen must be allowed one month for leaving MS, except if duly substantiated urgency	Correct	
31	*Procedural safeguards*		
31(1)	right to judicial review or appeal	Incorrect	Incorrect
31(2)	interim order suspends removal	Correct	
31(3)	redress procedure (legality and facts; proportionality)	Correct	
31(4)	right to submit defence in person (fair trial)	Incorrect[198]	Correct
32	*Duration of exclusion orders*		
32(1)	right to submit an application for lifting exclusion order within three years	Incorrect	Correct
32(1)	decision within six months of the submission	Incorrect	Correct
32(2)	no obligation for MS to allow entry during consideration of application	Correct	
33	*Expulsion as a penalty or legal consequence*		
33(1)	Expulsion may not be imposed as penalty unless Art. 27, 28, 29 are respected	Correct	
33(2)	Right to re-evaluation of expulsion order after 2 years	Correct	

[198] This provision was identified as correctly transposed by the Commission; see Information from Commission dated 10 March 2015 (GestDem 2015/1508). However, the Conformity Study for the UK (n 9) 47 and the Correspondence Table for the UK (n 59) 66 make clear it is considered incorrect.

Transposition Outcomes: Procedural safeguards and rights of appeal			
Article	Content	Transposition outcome	Subsequent amendment
35	*Abuse of rights*		
35(2)	principle of proportionality + procedural safeguards	Correct	Ambiguous

Table 9.1.9: Transposition outcomes for procedural safeguards and rights of appeal (Article 14-15, 30-33, 35 of Directive 2004/38)
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508); Milieu/Edinburgh conformity studies; ECAS comparative study

9.2 Application in UK

UK Visas and Immigration, part of the Home Office has prime responsibility for the application of the EEA Regulations in the UK.[199] There is a dedicated European casework team based in Liverpool that handles all applications for residence documents.[200]

9.2.1 Application process

It should be observed from the outset that, in theory, it is not compulsory for EEA nationals or their family members residing in the UK to register with the Home Office or obtain residence documentation.[201]

However, they may choose to do so if they wish since this may help them to demonstrate that they have a right of residence in the UK in their dealings with local authorities and service providers which require proof of residence (such as banking institutions when opening a bank account). In practice, non-EU family members will certainly need to apply.[202] Furthermore, EEA nationals

[199] Conformity Study for the UK (n 9) 15. This was formerly the UK Border Agency, ibid, 15-16.

[200] Independent Chief Inspector of Borders and Immigration, 'The Rights of European Citizens and their Spouses to Come to the UK: Inspecting the Application Process and the Tackling of Abuse' (2014) 15.

[201] Regs 16 and 17 do not make registration compulsory for EEA nationals or their family members. See further Explanatory Memorandum (n 104) 10-11. The Home Office's website also states that such documentation is not mandatory, see 'Prove your right to live in the UK as an EU citizen' <https://www.gov.uk/eea-registration-certificate> accessed 31 December 2015; 'Apply for a UK residence card' <https://www.gov.uk/apply-for-a-uk-residence-card/overview> accessed 31 December 2015.

[202] This is particularly the case if they wish to obtain employment, see further Section 10.1.7 (Equality of treatment).

and their family members with an eye on naturalisation will also need to first obtain a permanent residence card.[203]

The available literature[204] suggests that the processing of applications under the EEA Regulations by the UK authorities is fraught with delays and suspicion – if not outright hostility – particularly in connection with the processing of applications submitted by family members who are not EU citizens.

The application process in the UK is considered particularly burdensome.[205] A notable example is provided by the size of the standard application forms used for applications for residence documents: Form

[203] The British Nationality (General) (Amendment No 3) Regulations 2015, SI 2015/1806, reg 7 effectively make it compulsory for EEA nationals and their family members to hold a permanent residence document as part of the requirements for applying for naturalisation as a British citizen. See further Colin Yeo, 'EU nationals must apply for permanent residence card for British nationality applications' (*Free Movement*, 9 November 2015 <https://www.freemovement.org.uk/eu-nationals-must-apply-for-permanent-residence-card-for-british-nationality-applications/> accessed 8 December 2015.

[204] Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services' (Report for Commission, Ramboll 2011) <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed 26 May 2015, who draw on information from information on cases handled by SOLVIT and Your Europe Advice; see further Annual reports for SOLVIT (2004-2011) <http://ec.europa.eu/solvit/documents/index_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (SOLVIT governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015; Annual reports for Your Europe Advice (2007-2010) <http://europa.eu/youreurope/advice/about_en.htm> accessed on 9 May 2015; Commission, Single Market Scoreboard (Your Europe Advice governance tool) <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015. See also, 'Five Years of the Citizens Directive - Part 2' (n 1) 332-336, drawing on Your Europe Advice.

[205] Shaw (n 9) 276-277.

EEA(PR)[206] relating to permanent residence runs to 85 pages, while the application form for family members EEA (FM) includes 91 pages.[207]

Another extensive source of problems has been delays in processing applications.[208]

The application process has been the subject of a comparative study that assesses outcomes in the application process as it relates to the issuance of residence documents and dissemination of information.[209] The results for the UK are summarised in the table that follows.

[206] Home Office 'Apply for a document certifying permanent residence or permanent residence card: form EEA (PR)' (2015) <https://www.gov.uk/government/publications/apply-for-a-document-certifying-permanent-residence-or-permanent-residence-card-form-eea-pr> accessed 28 August 2015; idem, 'Apply for a registration certificate or residence card for a family member: form EEA (FM) (2015) <https://www.gov.uk/government/publications/apply-for-a-registration-certificate-or-residence-card-for-a-family-member-form-eea-fm> accessed 28 August 2015.

[207] See further Colin Yeo, 'UK blatantly obstructing EU free movement rights with red tape' (Free Movement, 18 February 2015) <https://www.freemovement.org.uk/uk-blatantly-obstructing-eu-free-movement-rights-with-red-tape/> accessed 16 June 2015, who has remarked: 'The UK is now blatantly obstructing EU free movement rights. As of 30 January 2015, a new Form EEA(FM) has been introduced for family members of EU nationals and of British citizens exercising Surinder Singh free movement rights. It is 129 pages long. The old version, called the EEA2, was 37 pages long. By comparison, the paper versions of forms for non EEA nationals applying as family members under UK domestic immigration rules are a grand total of 35 pages, and that includes all the interminable detail required for Appendix FM applications (VAF4A and VAF4A Appendix 2).' The 129-page long form was reduced to 91 pages in July 2015.

[208]

[209] Astrid Henningsen, Maylis Labayle, Camino Mortera and Rossella Nicoletti 'Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation' (Report for Commission, ICF-GHK/Milieu 2013).

Application of the Directive in UK				
Factual outcome	**Criteria**			
	Provision of information	*Rating (max)*	**UK**	***EU average***
Art 34: information dissemination – consistency	Consistency of information provision (all sources provide the same information, there is a natural link from general to specific information)	2.5	2.5	*2*
Art 34: information dissemination to EU citizens – accuracy	Quality and comprehensiveness of the information related to EU citizens (main sources)	5	4	*3*
Art 34: information dissemination to family members – accuracy	Quality and comprehensiveness of the information related to non-EU family members of EU citizens (main sources)	5	4	*3*
Art 34: information dissemination – availability	Availability of different sources of information (web, print, hotline)	5	3	*3*
	Overall rating information provision	**17.5**	**13.5**	***11***
Factual outcome	**Preparation of applications**	*Rating (max)*	**UK**	***EU average***
Art 8(3) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS– EU citizens	5	2	*3*
Art 9(2) and recital (14): documents comprehensively listed	Supporting documentation requested by hosting MS – TCN family members of EU citizens	5	2	*3*
	Overall rating preparation of applications	**10**	**4**	***5***
Factual outcome	**Lodging of the application**	*Rating (max)*	**UK**	***EU average***
Art 8(2) and recital (14): undue administrative burden to be avoided	Nature of the lodging system. Ease of lodging and requirements for leaving of documents with the competent authority	5	1	*3*
Case C-424/98: proof by any appropriate means	Flexibility in terms of acceptance of alternative appropriate means of proof	5	4	*3*
Art 25(2): charge not exceeding that imposed on nationals for similar documents	Application fees	5	1	*3*
	Overall rating submission of applications	**15**	**6**	***9***
	Issuance of the residence document	*Rating (max)*	**UK**	***EU Average***
Art.8(2): immediate issue of registration certificate	Time needed from the successful lodging to effectively receiving the residence documents – EU citizens	10	2	*6*
Art.10(1): issue of residence card no later than six months from date of application	Time needed from the successful lodging to effectively receiving the residence documents – family members	10	2	*6*
	Overall rating issuance of the residence document	**20**	**4**	***13***
	Total rating	**62.5**	**27.5**	**39**
			44%	***62%***
			UK	***EU average***

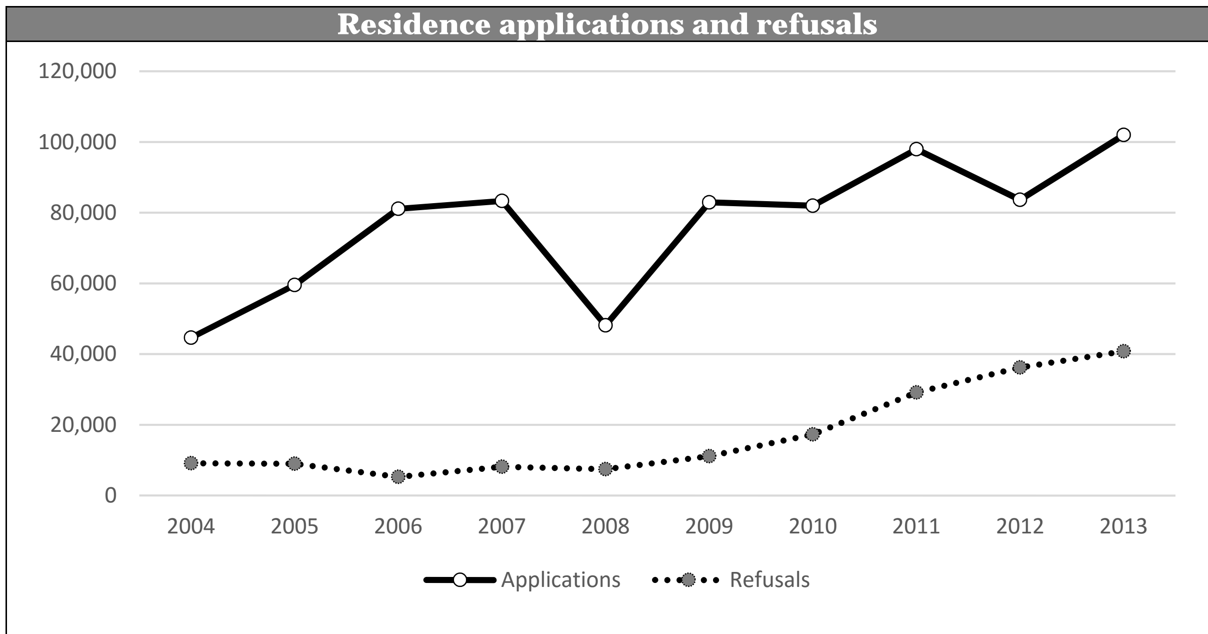
Table 9.2.1 Application outcomes (UK)
Sources: Information from Commission dated 12 November 2013 (GestDem 2013/5460); ICF-GHK/Milieu Evaluation Report

The above would tend to confirm that in practice the UK's application of the Directive is beset by problems despite the relatively satisfactory transposition of the EU residence rules.

Refusal rates

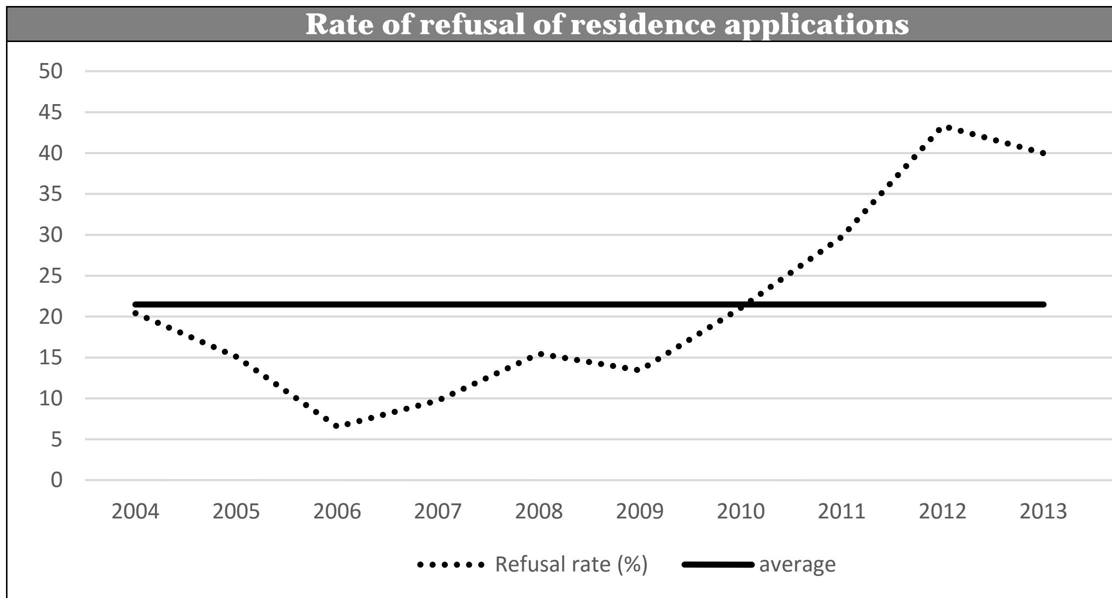
It should be noted with some concern that the Home Office has been refusing applications for residence documents with increasing regularity since the Directive came into force in 2006, with a slight dip in 2013. The average of refusal for applications for residence documentation by EU citizens and their family members in the period 2004-2013 has been 21%, which is significantly above the EU average of 5%.

According to the Home Office's control of immigration statistics, in 2005, before the EEA Regulations came into effect, it issued residence documents to a total of 35,531 EEA citizens and their family members out of a total of 44,652 applications representing a 20.43% refusal rate. By comparison, in 2013, a total of 102,006 applications for residence documents was received by the Home Office, of which 40,807 were rejected, representing a 40%. This is down from 2013 when the rate of refusal was 43.32%.



Graph 9.2.2 (a) Residence card applications and refusals (2004-2013)
Source: Home Office statistics

The graph below shows that in 2010 the actual annual refusal rate of applications (represented a dashed line) has overtaken the average refusal rate for applications for the period 204-2013. This coincides with the election of the coalition government in 2010.

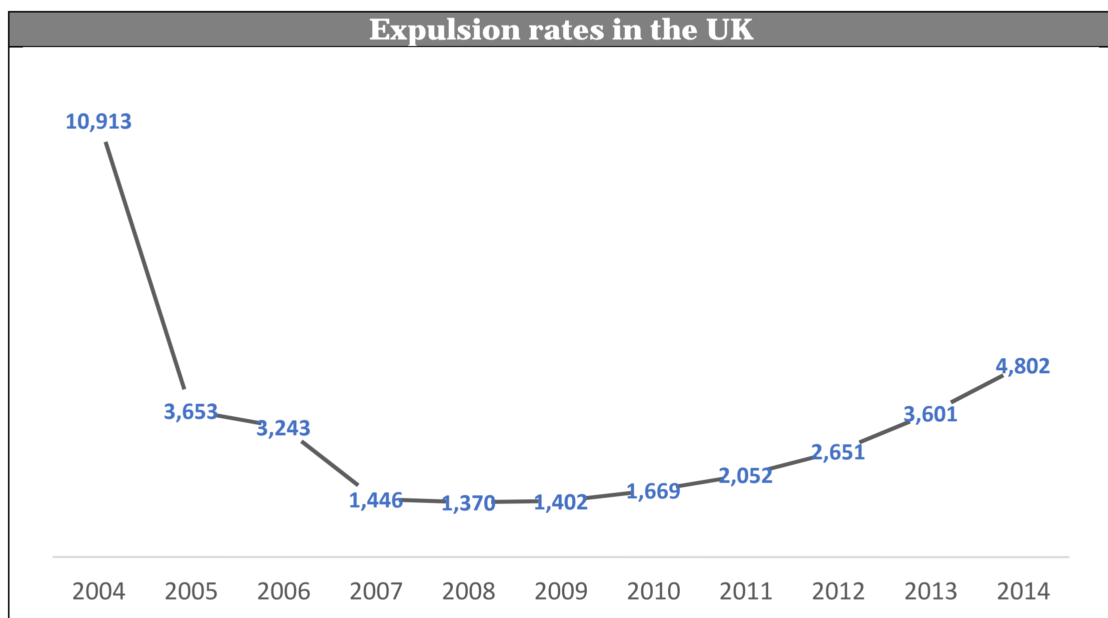


Graph 9.2.2 (b) Rate of refusal of applications for residence documents made by EU citizens and family members in the UK (2004-2013)
Source: UK Home Office statistics

Given that the average refusal rate for all Member States is 5% this would tend to indicates that decision-making in the UK may be indicative of systematic non-compliant application. This may be indicative of a 'general and consistent practice' capable of constituting a failure to fulfil Treaty obligations.[210] However, further research would need to be conducted as the Home Office does not collate statistics on the reasons for such refusals.[211]

9.2.2 Expulsion rates

The UK also publishes statistics on expulsions. This would tend to suggest that the incidence of the expulsion is on the increase since 2010, which coincides with the election of the coalition government in 2010.



Graph 9.2.2 Number of expulsions measures taken against EU citizens and family members in the UK (2004-2014)
Source: UK Home Office statistics

The above data on the refusal of applications and rates of expulsion of EEA nationals would tend to indicate that the application of the EEA Regulations in the UK is influenced by political factors.

[210] See further, Chapter 4, Section 4.3 (Outcomes in Application).

[211] Correspondence with the Home Office, FOIA request 35185, 3 August 2015 and FOIA request 37354, dated 24 November 2015.

9.3 Enforcement in UK

In order to enforce their rights under the EEA Regulations (or under the directly effective provisions of Directive 2004/38 as the case may be), EU citizens and their family members are able to avail themselves of either administrative or judicial redress mechanisms.

9.3.1 Alternatives to judicial proceedings

Where EEA nationals or their family members have had their application for residence document rejected by the Home Office, they have the possibility to request administrative reconsideration of the decision by a senior caseworker.[212] This is not available in case an appeal is lodged against the decision before the First-Tier Tribunal.

The Parliamentary and Health Service Ombudsman can in theory investigate complaints against UK Visas & Immigration,[213] but it appears this is used in less than 1% of refusals in EEA cases.[214] This process requires a complainant to have exhausted internal complains procedures within the Home Office,[215] and is not available in case an appeal is lodged.[216] The Ombudsman does not have the power to overturn decisions, although it can make recommendations for compensation as part of its report to Parliament.[217]

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[212] European Operational Policy Team notices (n 8), 'Reconsidering Decisions in European Applications', Notice 03/2011, March 2011.

[213] Parliamentary Commissioner Act 1967, section 5 and Schedule 2.

[214] Ombudsman, 'UK Visas and Immigration investigation outcomes' (2015) <http://www.ombudsman.org.uk/about-us/being-open-and-transparent/disclosure-log/2015/march/information-request-relating-to-complaints-about-uk-visas-and-immigration-and-their-outcomes-in-the-last-three-business-years> accessed 9 November 2015.

[215] Ombudsman, Annual Report and Accounts 2014-15 (2015) <http://www.ombudsman.org.uk/ar2015/governance-statement/1.-statutory-position-and-scope-of-responsibilities> accessed 9 November 2015.

[216] Parliamentary Commissioner Act 1967, section 5(2).

[217] Parliamentary Commissioner Act 1967, section 10.

Alternatives to court		
Mechanism	*Availability*	*Power to overturn administrative decision*
Request for reconsideration	Yes	Yes
Ombudsman	Yes	No

Table 9.3.1 Alternatives to judicial proceedings

9.3.2 Access to justice

The various factors that influence access to the courts in the UK such as legal representation, costs of procedure and the availability of legal aid can be summarised as follows:

Access to justice		
Factor	*Nature*	*Comment*
Legal representation	Not mandatory	Relatively flexible procedures means litigants in person can represent themselves
Appeal filing fee	£140[218]	6.2% of average net earnings[219]
Availability of legal aid	No	Legal aid has been withdrawn in EU residence cases,[220] except for victims of domestic violence[221] and appeals against deportation.[222]

Table 9.3.2 Access to justice

[218] First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011, SI 2011/2841, art 3(2)(b). The fee is payable upon an appeal with a hearing. The fee payable for an appeal without a hearing solely based on papers is £80, ibid, art 3(2)(a).

[219]This is calculated on the basis of 100% of the average monthly net earnings of a single adult in the UK for 2014 (£2265.41) as indicated in Eurostat dataset 'Annual Net Earnings' (net_nt_net) (indicator: A1_100, NET): <http://ec.europa.eu/eurostat/web/labour-market/earnings/database> accessed on 5 December 2015..

[220] The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 9. This provides that legal aid is available only for civil legal services listed in Schedule 1, Part 1. Appeals against decisions issued under the EEA Regulations are not included with the effect that they are not eligible for legal aid.

[221] Ibid, Schedule 1, Part 1, para 29.

[222] Ibid, Schedule 1, Part 1, para 19, read in conjunction with the EEA Regulations, reg 24(3) and the Immigration Act 1971, ss 3(5) and 5(5) and Schedule 3, and the Immigration Act, s 10. There are some exceptions contained in para 19(5) and (6).

9.3.3 Nature of first instance judicial review

The EEA Regulations provide for a right of appeal before the First-Tier Tribunal (Immigration and Asylum Chamber).[223] Judicial enforcement is entrusted to specialised courts in the UK with three possible levels of appeal.

The allows for full judicial review of decisions and allows the tribunal to substitute its own decision instead of the Home Office.[224] The rules permit the presentation of evidence and facts that have occurred after the decision was made. Decisions of the First-Tier Tribunal are not usually reported and are of limited precedential value.

Decisions of the First-Tier Tribunal maybe appealed to the Upper Tribunal (Asylum and Immigration Chamber) which had full powers to remake the lower court's decision.[225]

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[223] Regs 26-27.

[224] *FD (EEA discretion: basis of appeal) Algeria* [2007] UKAIT 49, para [12], in which the Tribunal held that 'it is open to a person in the appellant's situation to claim that a discretion under the Regulations should have been exercised differently, and that the Tribunal has jurisdiction to substitute its own view of how the discretion should have been exercised.' The head note states: 'The Tribunal has jurisdiction to review the exercise of the Secretary of State's discretion under the EEA Regulations applying to "extended family members". In such cases the Tribunal is not, therefore, confined to considering whether the decision was a lawful one.' Although the decision was partly reversed by the Court of Appeal, the Tribunal held in *MO (reg 17(4) EEA Regs) Iraq* [2008] UKAIT 61, para [3] (a case involving spouses) that 'We record here our understanding that the Tribunal's decision in principle in FD that it has power to review the exercise of a discretion exercised within the EEA Regulations has not been the subject of judicial doubt.' The headnote states: 'The decision by the Tribunal in FD (Algeria) [2007] UKAIT 00049 that it has power to review the exercise of discretion exercised within the EEA Regulations remains correct, despite the reversal of that determination on other grounds by the Court of Appeal'. This was also confirmed by the Tribunal in *YB (EEA reg 17(4) –proper approach) Ivory Coast* [2008] UKAIT 62, at para [38]

[225] Tribunals, Courts and Enforcement Act 2007, section 12.

A further appeal lies to the Court of Appeal, which also has the power to remake the decision of Upper Tribunal.[226] Final appeal to the Supreme Court[227] may be possible on points of law.

Judicial review of decisions				
Nature of judicial review	*Review of proportionality*	*Review of facts*	*Admissibility of facts not presented at time of administrative decisions*	*Admissibility of new facts occurring after administrative decision*
Full review	Yes	Yes	Yes	Yes

Table 9.3.3 Scope of judicial review of decisions on EU residence rights

9.3.4 Statistical data on appeals

There is scant data on the quality of decision-making by the national authorities in EU free movement cases. A useful proxy to measure the quality of national decisions would be to look at the outcome of appeals filed against decisions relating to EU residence rights. The UK is the only Member State for which data on appeals is available as shown in the following table.

Appeals in EEA decisions before UK Tribunals								
Year	**Total EEA residence applications**	**Total EEA residence refusals**	**Rate of refusal of EEA residence applicat-ions**	**Appeals as % of applicat-ions**	**Appeals as % of refused applications**	**Successful appeals before First Tier Tribunal (FTT)**	**Appeals refused by FTT, but appealed to Upper Tribunal (UT)**	**Successful appeals before UT of appeals refused by FTT**
2010	81,984	17,288	20.89	7%	33%	38%	7%	31%
2011	97,982	29,170	29.77	6%	20%	37%	6%	30%
2012	83,644	36,232	43.32	9%	21%	33%	6%	21%
2013	102,088	40,807	40.00	11%	28%	31%	4%	19%
2014	100,667	38,280	38.03	9%	24%	14%	1%	7%
five-year average			**34.04%**	**8%**	**25%**	**31%**	**5%**	**22%**

Table 9.3.4 Appeals against EU residence decisions in the UK and appeal outcomes (2010-2014)
Source: Information from Home Office dated 6 June 2015 (FOI 35697)

[226] Tribunals, Courts and Enforcement Act 2007, section 13.

[227] Formerly, the judicial chamber of the House of Lords.

The data casts doubt on the quality of decision-making by the UK Home Office in EEA residence cases. Over the period 2010-2014, the average rate of refusal in EEA residence cases by the UK authorities reached 34%.[228] During this time, roughly a quarter of refusal decisions have been appealed to the First Tier Tribunal. In 31% of cases, EU citizens and their family members obtained a successful outcome to their appeal. In 5% of cases where the first-level appeal failed, a further appeal was lodged before the Upper Tribunal. In these second-level appeals, a further 22% of cases were resolved in favour of EU citizens and their family members. This would seem to suggest that roughly 10% of decisions are decided wrongly by the UK administrative authorities and subsequently overturned by the courts. The proportion of wrongly decided cases might be even higher, given that the withdrawal of legal aid in immigration cases in 2013[229] may have deterred EU citizens and their family members from appealing against a refusal by the UK authorities to issue them residence documents.

9.3.5 Preliminary rulings

Since 2006, when the Directive came into force, the UK courts have made references to the Court of Justice under Article 267 TFEU seeking an interpretation of its provisions.[230] This compares favourably with the 28

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[228] This compares with an average rate of refusal of EU residence applications by the UK authorities in the period 2004-2014 of 21.09%. The increase in refusal rates above this average witnessed since 2010 coincides with the change in UK government.

[229] For a discussion, see Sheona York, 'The End of Legal Aid in Immigration - A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013), 27 *Journal of Immigration, Asylum and Nationality Law*, 106-138.

[230] Case C-507/12 *St Prix* [2014] ECLI:EU:C:2014:2007 (judgment of 19 June 2014)

references that were made in the period 1968-2005 when other instruments governed the right of free movement of EU citizens.[231]

Based on the available literature,[232] the attitudes of the UK courts to making a reference for a preliminary ruling to the Court of Justice in free movement cases is progressive at the lower level (namely at the level of the Upper Tribunal and the High Court) and more conservative at appellate level (Court of Appeal).[233] The Supreme Court sits somewhere in between and will be hesitant before sending references to Luxembourg,[234] unless these relate to issues of high salience such as, for example, access to UK social welfare by EEA nationals.[235] This is summarised in the following table.

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[231] Alec Stone Sweet and Thomas L. Brunell, 'The European Court and National Courts: Data Set on Preliminary References in EC Law (Art. 234) 1961-2006' (2007) <http://www.eu-newgov.org/EU-Law/deliverables_detail2.asp?Project_ID=26> accessed 30 December 2015.

[232] See for example, John Usher, 'The Impact of EEC Legislation on the United Kingdom Courts' (1989) 10 Statute Law Review 95-109; Karen Alter, 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' (2000) 54 International Organization 489-518; Damian Chalmers, 'The Application of Community Law in the United Kingdom 1994-1998' (2000) 37 Common Market Law Review 83-128; idem, 'The Much Ado about Judicial Politics in the United Kingdom' (2000) Harvard Jean Monnet Working Paper 1/00; idem, 'The positioning of EU judicial politics within the United Kingdom' (2000) 23 West European Politics 169-210; Danny Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press 2001); Stacy Nyikos, 'The European Court of Justice and National Courts' (2001) (Paper presented at the Comparative Courts Conference in Washington St Louis, 1-3 November 2001); Anthony Arnull, 'Keeping their Heads Above Water? European Law in the House of Lords' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing 2011) 129-148; Jennifer Sigafoos 'What is driving rates of social policy preliminary references to the CJEU? Evidence from the United Kingdom and France' (2012) 34 Journal of Social Welfare and Family Law, 489-508; Arthur Dyevre, 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?' (2013) 9 European Constitutional Law Review 139-168.

[233] See for example the Court of Appeal's refusal in *Ahmad* (n 112) to refer a question as to the interpretation of the concept of 'comprehensive sickness insurance' contained in the Directive, even though the Court of Justice has never ruled on it.

[234] See to that effect Arnull (n 229) 147-148

[235] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

Preliminary rulings			
Court level	*Nature*	*References made?*	*Comment*
Immigration tribunals, High Court	Discretionary	Yes	Lower courts are open to making requests for preliminary rulings
Court of Appeal	Discretionary	Yes	Appellate court is reluctant to make references for preliminary ruling
Supreme Court	Mandatory	Yes	Higher courts is open to make references for preliminary ruling, less so on issue with high salience

Table 9.3.5 Attitudes towards preliminary rulings

9.3.6 Publicity of decisions

Given the importance that individuals play in the indirect enforcement of the Directive, it is necessary that that individuals and their lawyers are able to obtain information on cases relating to the enforcement of the national implementing measures. This section therefore reviews the publicity given to such decisions.

The judicial rulings of the Upper Tribunal involving the enforcement of the EEA Regulations are made available on the Upper Tribunal's website dedicated to decisions of the Immigration and Asylum Chamber.[236] Important cases usually tend to be reported and their visibility is heightened by the inclusion of the term 'EEA' in the case citation, if not the head note. This is not the case of the decisions of the higher courts. Important cases and all cases of the higher courts will be reported on the British and Irish Legal Institute's website as well.[237]

[236] <https://tribunalsdecisions.service.gov.uk/utiac> accessed 30 December 2015.

[237] <http://www.bailii.org/> accessed 30 December 2015.

Publicity of judicial decisions			
Court level	*Availability of reports*	*Visibility of EU residence cases*	*Availability of statistics on EU residence cases*
Immigration tribunals, High Court	Yes	High	Yes
Court of Appeal	Yes	Low	No
Supreme Court	Yes	Low	No

Table 9.3.5 Publicity given to judicial rulings on EU residence rights

9.4 Conclusions on Implementation in UK

The UK's transposition model followed by the Government can be described as 'bolt-on legislation' under delegated powers which displays an elaborative approach to drafting techniques. Only six provisions or sub-provisions were identified as following a literal approach to transposition.[238]

The level of compliance of transposition was 74% in 2008, slightly above the EU average of 71%. Transposition has not improved despite all the amendments made by the UK authorities to its national implementing measures. Indeed, the positive actions taken by the UK authorities to correct non-compliance in the EEA Regulations following judgments of the Court of Justice have been fully counterbalanced by other non-compliant amendments seeking to take advantage of ambiguities in the Court's case law.

The UK's application model consists in centralised application involving a single administrative entity that applies the rules for EU and non-EU family members. This is the same entity that applies the national immigration rules. The correctness in the practical application of the rules achieves 44%, compared to an average of 62% across all Member States. The high rates of refusal of application of residence applications may be indicative of a 'general and

[238] Article 16(4), Article 27(2) (four sub-provisions), and Article 28; see Correspondence Table for the UK (n 59) 39, 52, 54. This represents 4% of the total 144 provisions and sub-provisions that needed to be transposed.

consistent practice' capable of constituting a failure to fulfil Treaty obligations, but this would require further investigation.

The enforcement model allows for full judicial review of decisions. There is insufficient data to determine whether enforcement is compliant in the UK, although based on the reviewed evidence, it would appear that the UK courts do provide a possibility for EU citizens and family members to enforce their EU rights in such a way that meets the requirements of EU law.

The free movement rules in the UK are considered politically important and therefore free movement rules can accordingly be considered of high saliency. The evidence that has been reviewed appears to indicate a correlation between both transposition and application outcomes and political factors, rather than any legal factors, as suggested by the influence that a change of government in 2010 has had on both transposition and application outcomes.

The UK's motivation towards compliance can be characterised as selective non-compliance in view of its responses to judgments handed down by the Court of Justice and the fact that the UK has not sought to address the allegations of non-compliance made by the European Commission even after it issued its reasoned opinion.

CHAPTER 10. THE IMPLEMENTATION OF DIRECTIVE 2004/38 COMPARED[1]

Contents:

10.1 Transposition Compared – 376
10.2 Application Compared – 380
10.3 Conclusions – 400

10.1 Transposition Compared

The data which is available[2] enables a comparison between Member States as to the timeliness of transposition and its correctness.

10.1.1 Delay in transposition of Directive 2004/38

Only ten Member States were able to transpose the Directive on time. The extent of transposition delay is shown in the following chart. The delay calculated by reference to the number of days between expiry of the deadline for transposition on 30 April 2006 and the date of entry into force of the national implementing measures. The average transposition delay was 223 days.

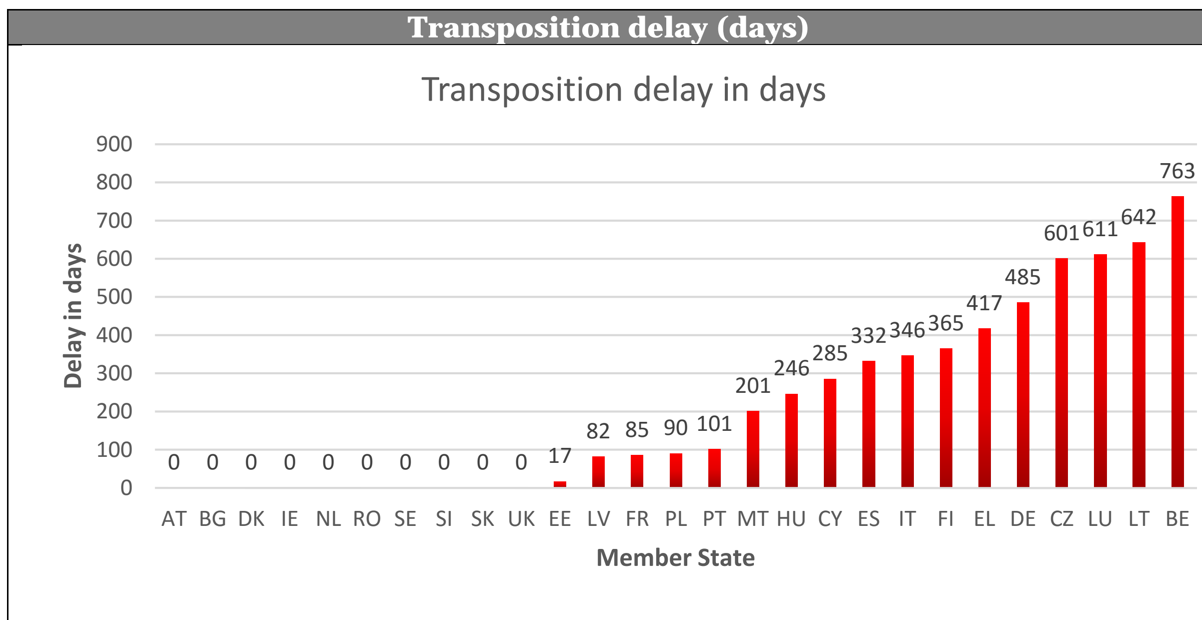

Chart 10.1.1 Delay in transposition of Directive 2004/38
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

[1] This Chapter reproduces content to be published by the author in 'Who does not belong here anymore? A statistical snapshot of Member States' practices' in Herwig Verschueren (ed), *Where do I belong? EU law and adjudication on the link between individuals and Member States* (Intersentia, 2016) (forthcoming).

[2] Information from Commission dated 10 March 2015 (GestDem 2015/1508).

10.1.2 Level of compliance in transposition of Directive 2004/38

In its 2008 implementation report, the Commission remarked that '[t]he 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.'[3]

The Commission did not make national comparisons in its report, instead examining horizontal issues of non-compliance and reporting on trends by reference to specific concepts of the Directive. Using this same data, it has been possible to compare the transposition outcome for each Member States, as presented in the following graph.

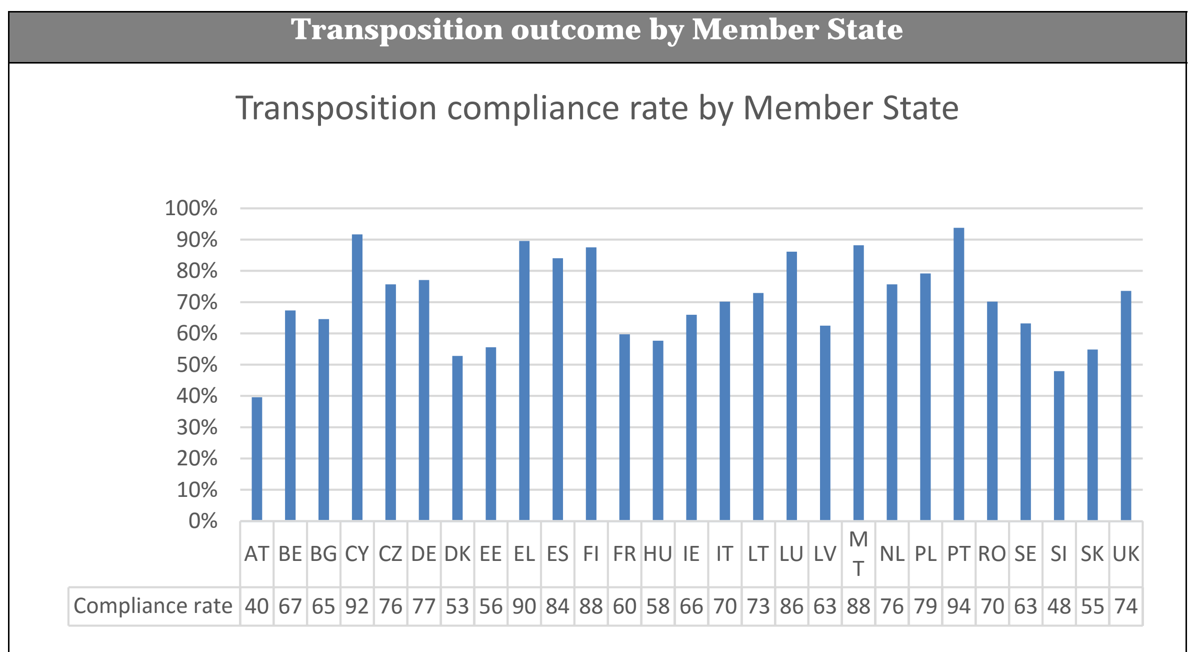

Chart 10.1.12(a) Outcomes in the transposition of Directive 2004/38
Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508)

The above data shows that Austria achieved the worst transposition outcome (40% correct), followed by Slovenia (48%) and

[3] Commission, '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 final (hereafter 2008 Implementation Report), 1.

Denmark (53%). The best performers were Portugal (94%), Cyprus (92%) and Greece (90%). This puts to rest the stereotype that Southern Member States achieve less well when it comes to the transposition of directives, at least when it comes to Directive 2004/38. The average transposition outcome across Member States was 71% complaint.

The next chart also tries to examine whether there is any correlation between the Commission's infringement proceedings initiated under Article 258 TFEU and the transposition outcome.

Member States which were the subject of infringement proceedings in 2011 have been identified by a black dot on the graph below.

It can be seen that there is no apparent correlation between the transposition outcome and the initiation of proceedings. Cyprus whose transposition outcome was 92% suffered the same fate as Austria which achieved the worst transposition outcome (40%).

The Commission's infringement policy decisions also probably factors in other elements besides non-compliant transposition such as the size of the resident EU population.

Germany, Italy, Spain and the UK all have large resident EU migrant populations in absolute numbers, each hosting more than a million EU citizens in heir territory. Belgium and Cyprus also have sizeable numbers of EU citizens residing in their countries in proportion to their own nationals (7% and 12% respectively).

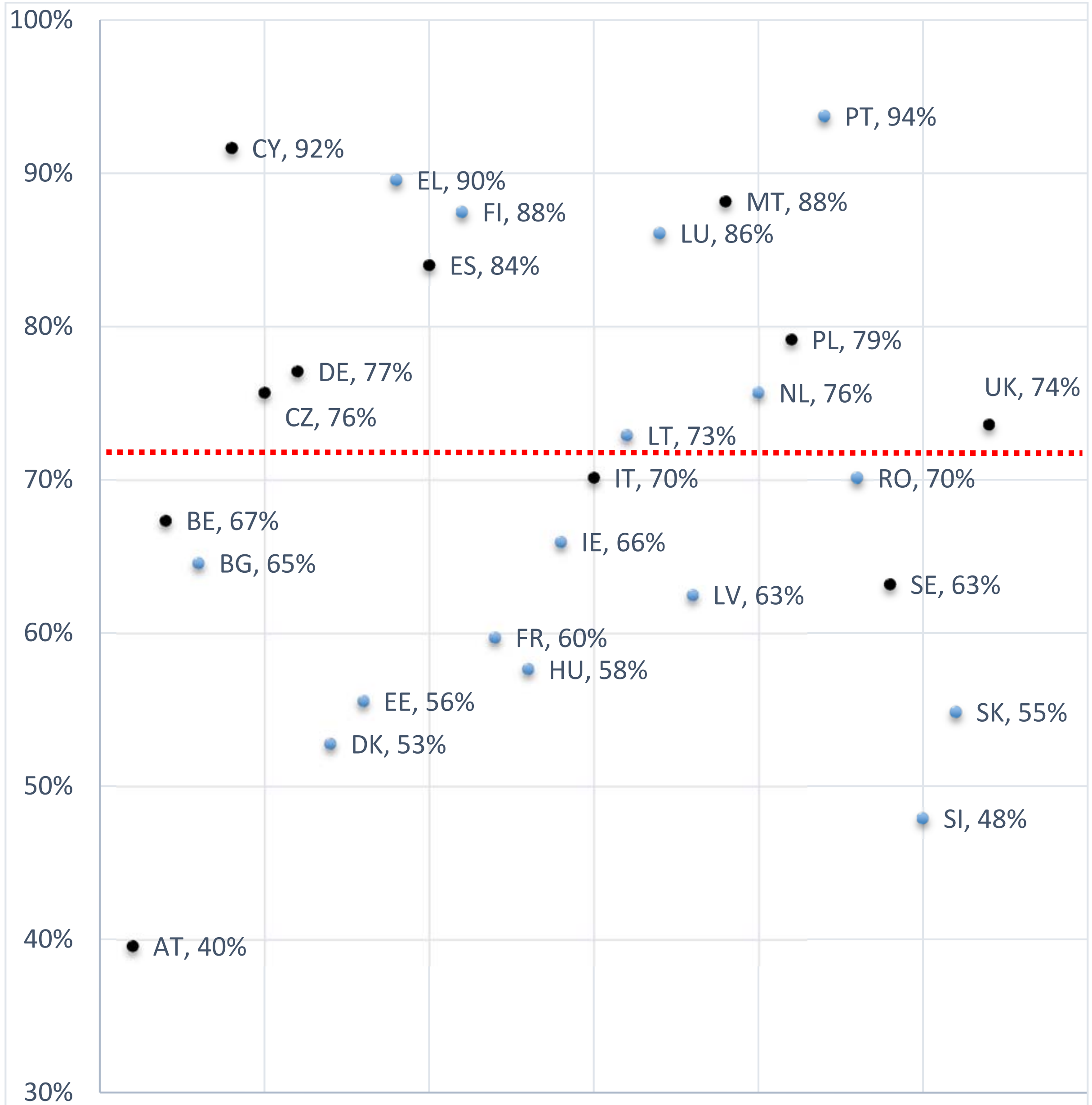

Chart 10.1.2(b) Outcomes in the transposition of Directive 2004/38 compared to infringements

Source: Information from Commission dated 10 March 2015 (GestDem 2015/1508), Member

10.2 Application Compared

The data collated in respect of the application of the Directive by the administrative authorities of the Member States will also now be reviewed.

10.2.1 Level of compliance in application of Directive 2004/38

The next chart examines whether there might be any correlation between the Commission's infringement proceedings initiated under Article 258 TFEU and the transposition outcome.

Member States which were the subject of infringement proceedings in 2011 have again been identified by a black dot on the graph below.

Here the results are much more interesting. There does appear to be stronger correlation between the application outcomes of the Member States and those cases in which the Commission initiated infringement action. The cluster of Member States with significant non-compliant application include Belgium, Italy, Malta and the UK. Germany, Spain and Sweden also have lower than average application outcomes. The Commission is likely to have based its decision to initiate infringement action on complaints received from individuals affected by non-compliant application.

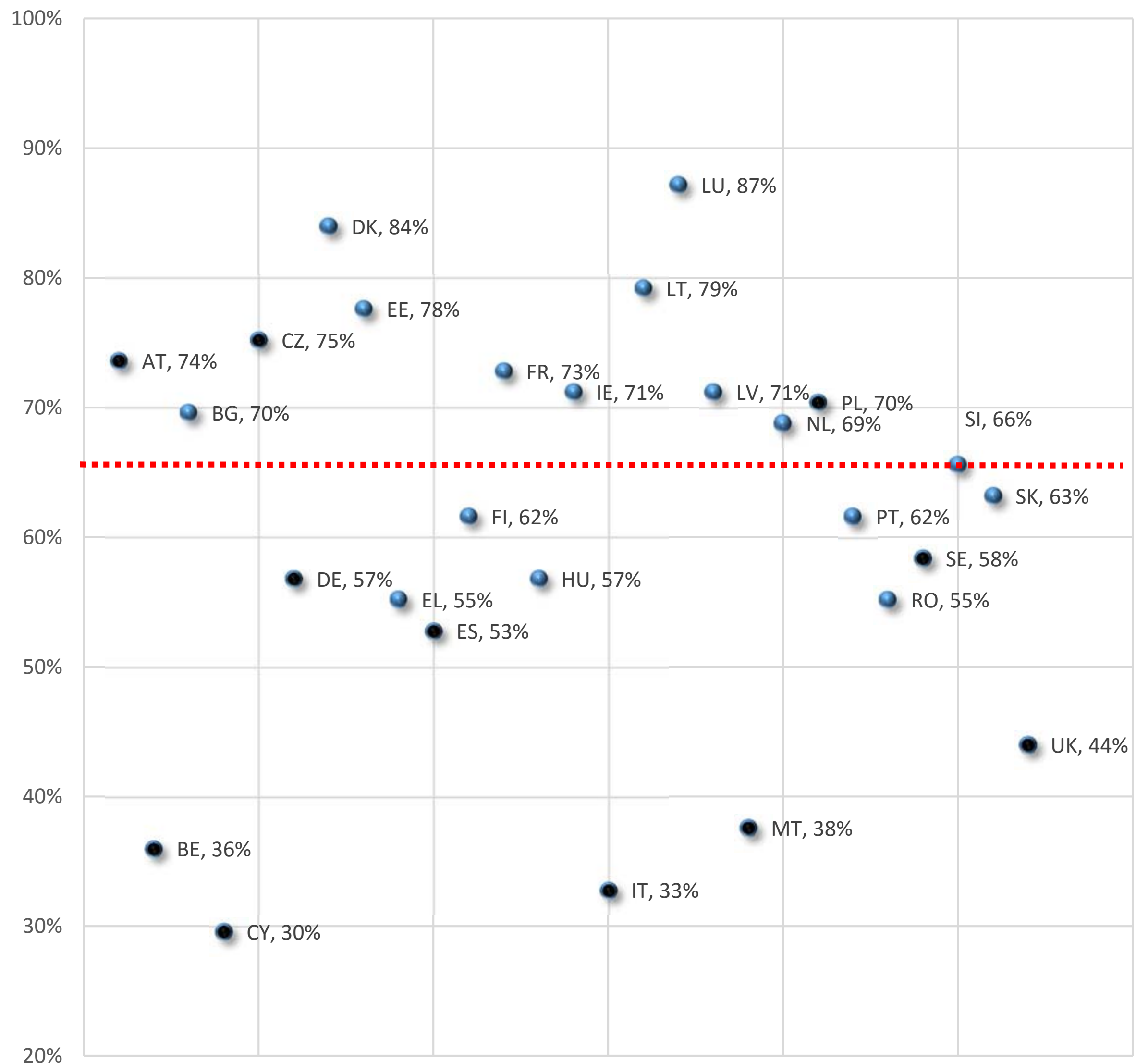

Chart 10.3.1 Outcomes in the application of Directive 2004/38 compared to infringements
Source: Information from Commission dated 12 November 2013 (GestDem 2013/5460); ICF-GHK/Milieu Evaluation Report

This leads us to review the other available data on the application of the Directive.

10.2.2 Empirical data on the application of Directive 2004/38

Unlike the situation of third-country nationals covered by the EU's common visa and migration policies,[4] Member States are not required to publish detailed statistical information regarding the application of Directive 2004/38. At present, Member States are only required to furnish data on the overall number of EU migrants having their usual residence in their territory, annual migration flows into and out of their territory, as well as the number of EU citizens who have acquired the nationality of the host Member State.[5] It is therefore up to each Member State to determine what – if any – data to collate on the application of Directive 2004/38. They also determine whether to make such data available to the public in accordance with the legal framework governing access to such information.

Nonetheless, Member States do not have an absolute discretion in this regard. The Court of Justice has had an opportunity to examine the limitations that EU law places on the collection of information by Member States in connection with EU citizens who reside on their territory. In *Huber*,[6] the Court found that the storing of personalised (as opposed to anonymised) information relating to EU citizens for statistical purposes on a central register kept by the German immigration office (*Bundesamt für Migration und Flüchtlinge*) could

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[4] Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (2007) OJ L 199/23 (hereafter 'Regulation 862/2007'). This instrument requires the Member States to collate detailed statistical information on persons having applied for international protection including levels of applications and rejections. The regulation also requires Member States to furnish information on the situation of third-country nationals present on their national territory, including covering the issue of residence permits, measures taken to prevent illegal entry and stay, as well as measures taken to return illegal migrants. Member States are also required to provide statistics on the number of Schengen visas issued under Article 46 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (2009) OJ L243/1.

[5] Regulation No 862/2007, supra, Article 3.

[6] Case C-524/06 *Huber* [2008] ECR I-9705.

not be considered necessary within the meaning of the EU Data Protection Directive.[7] The Court did not however call into question the power of Member States to store personalised data that is necessary for the practical application of Directive 2004/38 by the competent national authorities,[8] nor the ability of Member States to keep anonymous information on EU citizens for statistical purposes.[9]

In view of the scarcity of harmonising EU legislation on the matter, it is not surprising to find significant divergence between Member States in terms of the availability and the level of detail of statistical information on the entry and residence of EU citizens and their family members. According to a 2013 study on residence formalities undertaken for the European Commission,[10] information on the issue of residence documents is available in most Member States. However, statistical data on rejection rates of residence applications is only available from sixteen Member States. Furthermore, no data exists on entry bans and the data on expulsions is only publicly available in four Member States, even though these constitute some of the most restrictive measures that Member States can take against EU citizens and their family members. Moreover, the UK is the only Member State that has published data on appeals brought against administrative decisions that restrict the free movement rights of EU citizens and their family members. Several EU officials have unofficially expressed the view that the absence of publicly available statistical data on an EU-wide basis restricts the ability of the Commission to monitor and enforce of the EU free movement rules in a way that goes beyond transposition of Directive 2004/38.

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[7] ibid, para 68.

[8] ibid, paras 57-62, 66.

[9] ibid, paras 63-65

[10] ICF GHK and Milieu, 'Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation' (Report for the Commission, 2013) <http://ec.europa.eu/justice/citizen/document/files/evaluation_of_eu_rules_on_free_movement-final_report.pdf> accessed 31 July 2015.

The following table provides an overview of the availability of data on EU residence rights across the Member States.

Member State	*Issue of documents*	*Refusals*	*Abuse **	*Expulsions*	*Administrative appeals*	*Judicial appeals*	*Source of data*
Austria	√	√	n/a	n/a	n/a	n/a	Ministry of the Interior
Belgium	√	n/a	√	√	n/a	n/a	Immigration Office
Bulgaria	√	√	√	n/a	n/a	n/a	Ministry of the Interior
Croatia *(1)*	n/a	n/a	n/a	n/a	n/a	n/a	Ministry of the Interior
Cyprus	√	√	√	n/a	n/a	n/a	Ministry of the Interior
Czech Republic	√	√	√	n/a	n/a	n/a	Ministry of the Interior
Denmark	√	√	√	n/a	√	n/a	Immigration Service
Estonia	√	√	√	n/a	n/a	n/a	Ministry of the Interior
Finland	√	√	√	n/a	n/a	n/a	National Police Board
France	√	n/a	n/a	√	n/a	n/a	Ministry of the Interior
Germany	√	n/a	√	n/a	n/a	n/a	Ministry of the Interior
Greece	√	√	n/a	n/a	n/a	n/a	Ministry of the Interior
Ireland	√	√	√	n/a	n/a	n/a	Irish Naturalisation & Immigration Service
Italy *(2)*	n/a	n/a	n/a	n/a	n/a	n/a	-
Latvia	√	n/a	√	n/a	n/a	n/a	Office of Citizenship and Migration Affairs
Lithuania	√	√	n/a	n/a	n/a	n/a	Ministry of the Interior
Luxembourg	√	n/a	n/a	n/a	n/a	n/a	Ministry of Foreign Affairs
Malta	n/a	n/a	n/a	n/a	n/a	n/a	-
Netherlands *(3)*	√	√	√	√	n/a	n/a	Immigration and Naturalisation Service
Poland	√	√	√	n/a	n/a	n/a	Migration Authority
Portugal	√	n/a	√	n/a	n/a	n/a	Immigration & Border Service
Romania	√	n/a	n/a	n/a	n/a	n/a	Ministry of the Interior
Slovakia	√	n/a	n/a	n/a	n/a	n/a	Alien Police Department Office
Slovenia	√	√	n/a	n/a	n/a	n/a	Ministry of the Interior
Spain	√	√	n/a	n/a	n/a	n/a	Ministry of Interior
Sweden	√	√	√	n/a	n/a	n/a	Migration Board
UK	√	√	√	√	√	√	UK Visas & Immigration

Sources: ICF GHK/Milieu 2013 Evaluation Report, national authorities

Notes:
* Abuse cases include marriages and partnerships of convenience; data on such cases are not systematically published but are in the public domain
(1): Croatia was not included in 2013 survey; no statistics could be found on Ministry of Interior's website
(2): Italy ceased the publication of statistics relating to EU citizens in 2008; no response was received from the Ministry of Interior or the Italian Statistical Authority following author's official request for access to information
(3): The IND does not publish these statistics, but expulsion figures have been disclosed in parliament.

Table 10.2.2 – Availability of statistical information on residence rights of EU citizens and their family members

Further examination of this data reveals some important trends in connection with the practical implementation of the EU free movement rights in the Member States.

10.2.3 Data on residence applications by EU citizens and their family members

Most Member States publish data on the issue of residence documentation, with the exception of Croatia, Italy and Malta. However, such data is of limited value when analysing the implementation of Directive 2004/38 because such figures tend only to concern applications by EU citizens and their family members that have been successful.

Data on the rates of rejection of such applications provides a much more useful indication of the existence of problems in the practical implementation of Directive 2004/38. The data reveals a wide range of variation across the Member States as the following table shows.

Data on Residence Applications				
Member State	***Number of applications received***	***Refusal rate * (all applications)***	***Refusal rate ** (TCN family members)***	***Refusal rate *** (Singh cases)***
Austria	48,422	3%	3%	n/a
Belgium	64,871	n/a	n/a	n/a
Bulgaria	7,685	0%	0%	n/a
Cyprus	23,058	4%	30%	n/a
Czech Republic	14,676	8%	15%	n/a
Denmark (1)	30,059	1%	1%	64%
Estonia	3,768	0%	0%	n/a
Finland	16,033	3%	3%	n/a
France (2) (3) (4)	13,531	n/a	n/a	n/a
Germany (5)	11,500	n/a	n/a	n/a
Greece	22,400	0.2%	n/a	n/a
Hungary	19,210	0.1%	31%	n/a
Ireland (5) (6)	2,338	n/a	37%	96%
Italy	n/a	n/a	n/a	n/a
Latvia (2) (3)	1,584	n/a	n/a	n/a
Lithuania (3)	1,343	0.4%	4%	n/a
Luxembourg (2)	23,347	n/a	n/a	n/a
Malt	n/a	n/a	n/a	n/a
Netherlands (7)	10,980	n/a	n/a	n/a
Poland	8,446	2%	3%	n/a
Portugal (2)	15,765	n/a	n/a	n/a
Romania (2)	52,501	n/a	n/a	n/a
Slovakia (2)	4,459	n/a	n/a	n/a
Slovenia (6) (8)	14,365	3%	n/a	n/a
Spain	116,016	13%	34%	n/a
Sweden	34,074	22%	29%	n/a
UK	83,644	43%	65%	n/a
	EU average	**7%**	**20%**	-

Sources: ICF GHK/Milieu 2013 Evaluation Report, national authorities

Notes:
* Refusal rate refers to rejection of applications submitted by EU citizens and non-EU family members for residence and permanent residence documents. It includes applications which have been the subject of a formal refusal decision and applications rejected as being invalid.
** Refusal rate refers to rejection of applications submitted by third country family members for residence and permanent residence documents. It includes applications which have been the subject of a formal refusal decision and applications rejected as being invalid.
*** Refusal rate refers to rejection of applications submitted by non-EU family members for residence documents in cases claiming the benefit of family reunification under the *Surinder Singh* ruling (C-370/90) following the exercise of free movement rights by the EU relative.
(1): data on refusal rate in *Singh* cases relates to applications made in first half of 2012
(2): data only refers to number of successful applications
(3): data only available for 2011
(4): low number of applications may be explained by voluntary registration system for EU citizens
(5): data only relates to application made by third country national family members
(6): yearly average based on applications lodged in period 2007-2013
(7): data only relates to number of successful applications made by EU citizens
(8): refusal data only relates to applications by EU citizens

Table 10.2.3 Issue and refusal of residence documentation in 2012 (unless otherwise indicated)

While the average rate of rejection of applications for residence documents by EU citizens and their family members is around 7% across the EU, the statistics indicates the existence of significantly high rates of rejection in several Member States. The rejection rates for all EU residence applications are considerably higher in Spain (13%), Sweden (22%) and the UK (43%).[11] In absolute terms, this means that in 2012 over 7,000 residence applications were turned down in Sweden, 15,000 applications were refused in Spain and 36,000 residence applications were rejected in the UK.

The situation of third-country national family members is even bleaker. A detailed examination of applications by non-EU family members reveals that rejection rates are even higher in a significant number of Member States: Cyprus (30%), Hungary (31%), Ireland (37%), Spain (34%), Sweden (29%) and the UK (65%).[12] This compares with an average refusal rate of 20% in respect of applications for residence documents submitted by non-EU family members across the Member States.

These high refusal rates are of serious concern. Given that the EU free movement rules provide 'a largely rights-based legal framework', a relatively high rate of rejection of applications in a Member State is likely to indicate that 'something is lacking, namely either the quality of information provided to applicants or the quality of decision-making in the first instance.'[13] Indeed, the Commission's Single Market Scoreboard confirms that EU citizens and their

[11] Refusal rates refer to the rates of rejection of applications submitted by EU citizens and non-EU family members for residence and permanent residence documents. The rates includes applications which have been the subject of a formal refusal decision and applications rejected as being invalid.

[12] Refusal rates refer to the rate of rejection of applications submitted by third-country family members for residence and permanent residence documents. These include applications which have been the subject of a formal refusal decision and applications rejected as being invalid.

[13] Jo Shaw and Nina Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law Meets UK Immigration Law' (2013) 38 European Law Review 137-166, 164.

family members encounter significant problems with residence formalities in all Member States with high refusal rates.[14]

There is little data to determine the quality of decision-making by the national authorities in EU free movement cases. A useful proxy to measure the quality of national decisions would be to look at the outcome of appeals filed against decisions relating to EU residence rights. Regrettably, the UK is the only Member State for which data on appeals is available.[15]

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[14] Single Market Scoreboard, Feedback and Concerns: <http://ec.europa.eu/internal_market/scoreboard/feedback/concerns/index_en.htm> accessed on 31 July 2015. The following concerns are noted:

Cyprus: 'Third-country nationals who are family members of EU citizens report serious delays in obtaining residence cards'; Hungary: 'EU citizens complain that official foreign documents are not always accepted by Hungarian authorities'; Ireland: 'EU citizens report about delays regarding their application for residence cards. Difficulties are reported by some citizens whose application for a permanent residence card was refused without any grounds'; Spain: 'Citizens frequently face delays and administrative burdens when trying to obtain a residence card in Spain'; Sweden: 'EU citizens report as a problem the refusal of a "personal number" if they cannot show the S1 form. No other portable form is accepted nor is proof of private insurance. Without a personal number, a citizen cannot undertake important activities like opening a bank account, renting property, attending Swedish courses, filing with the unemployment agency, entering an agreement with an employer, subscribing to a fixed telephone or mobile phone or television. A personal identity number is also the key to basic health care in Sweden. Students, retired persons (EU citizens and even Swedes having lived abroad) and their family members report that health insurance is refused; UK: 'EU citizens complain about excessive delays and formalities in processing residence cards for their family members from third countries. Problems are reported concerning the acquisition of the right to permanent residence in the UK. Problems are reported stating that the authorities often retain key personal documents including passports or original documents for long periods (sometimes over six months). This creates additional problems for both, the third-country national and the EU spouse, to lead a normal life, to proof their right to reside in the UK and to work and to travel to the home country of the EU citizen. Students and inactive EU citizens and their spouses complain that they are required to have Comprehensive Sickness Insurance (CSI). This is a breach of Directive 2004/38 and Regulation 883/04 and means that social security benefit is refused on the grounds that the inactive EU citizen (or family member) does not have the right to reside, given that he/she does not have CSI'. For a closer examination of the situation in the UK, see Anthony Valcke, 'Five Years of the Citizens Directive in the UK', (2011) 25 Journal of Immigration, Asylum and Nationality Law 217-244 and 331-357.

[15] See Chapter 9 (Implementation in the UK).

As regards the situation of family members of EU citizens returning home after exercising free movement rights, Denmark and Ireland are the only countries to provide information on refusal rates in so-called *Surinder Singh* cases.[16] These cases concern applications for family reunification by non-EU family members of EU citizens returning home after exercising free movement in another Member State. The data suggest almost two-thirds of applications by non-EU family members were refused in Denmark, while Ireland refused such applications in 96% of cases.

10.2.4 Application of provisions on abuse of rights by EU citizens and their family members

Under Article 35 of Directive 2004/38, Member States retain the power to refuse or withdraw residence documentation to EU citizens who engage in fraud or abuse of rights. Recital (28) of the Directive specifically cites 'marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence' as an example of such abuse. This power has been confirmed by the Court of Justice on several occasions,[17] although so far there has been no case in which a Member State has been able to successfully invoke it as a justification for restricting the free movement rights of EU citizens and their family members.

One of the abuses that is often cited by EU Member States as justifying a call for imposing further restrictions on the free movement of EU citizens concerns marriages of convenience,[18] whereby an EU citizen enters into a sham

[16] In the Netherlands these are called 'the Belgian route' cases and in Norway 'the Swedish route' cases due to the preference of destination of the EU citizens to exercise their free movement rights in those Member States.

[17] Case C-370/90 *Singh* [1992] ECR I-4265, para 24; Case C-109/01 *Akrich* [2003] ECR I-9607, paras 55-57; Case C-456/12, *O and B* [2014] EU:C:2014:135 (judgment of 12 March 2014), para 58; Case C-202/13, *McCarthy* [2014] ECLI:EU:C:2014:2450 (judgment of 18 December 2014), paras 43-58.

[18] It will be recalled that in April 2013, the Ministers of four EU Member States - the UK, Austria, Germany and the Netherlands - wrote to the Irish Presidency of the European Council on the matter of free movement of persons within the Union. The letter specifically concerned the issue of "benefits tourism" but also fraud, such

marriage with a non-EU national for the sole purpose of enabling the latter to benefit from the free movement rules.

In the recent *McCarthy* case,[19] the UK government referred to its powers under Article 35 of the Directive in seeking to justify their long-standing policy not to recognise family residence cards issued by the Member States under Article 10 of Directive 2004/38 that exempts non-EU family members from the need for a visa when entering a Member State under Article 5(2) of the Directive. The UK authorities argued that the '"systemic problem" of abuse of rights and fraud by third-country nationals' and the 'palpable risk that a significant proportion of those engaged in the 'business of sham marriages' will use fake residence cards for the purpose of gaining illegal access to the United Kingdom' justified a blanket policy to refuse entry to the UK to family members holding a residence card issued by another Member State. However, the Court did not agree with the UK's contention and ruled that Article 35 could not be used to adopt general measures of prevention without engaging in a specific assessment in each individual case.[20]

Despite such claims of 'systematic abuse',[21] few EU countries routinely collate statistics on cases of fraud or abuse in connection with the free movement rules. According to the European Migration Network, [22] only six

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as marriages of convenience <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 31 July 201.

[19] Case C-202/13, *McCarthy* (n 17), paras 26-27.

[20] ibid, paras 55-57.

[21] This is the term used in by the Austrian, British, Dutch and German Ministers in their letter to the Irish Presidency of the European Council (n 18) 2-3.

[22] European Migration Network, 'Study on Misuse of Family Reunification Study' (2012) <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/family-reunification/0a_emn_misuse_family_reunification_study_final_june_2012_en.pdf> accessed 31 July 2015. See also European Migration Network, Ad Hoc Query on Marriages of Convenience, 18 May 2011 <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/303_emn_ad-

Member States systematically collate data on suspected marriages of convenience.[23] In addition, following a request from the Council, a number of other Member States have provided data to the Commission on suspected cases of marriages of convenience.[24] The following table provides an overview of published data on EU residence cases involving a marriage or registered partnership of convenience.

hoc_query_marriage_of_convenience_18mar2011_wider_dissemination_en.pdf> accessed 31 July 2015; European Migration Network, Ad Hoc Query on Marriages of Convenience, 27 August 2013 <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/491_emn_ahq_marriage_of_convenience_8jul2013_en.pdf> accessed 31 July 2015.

[23] The Member States concerned are Belgium, Bulgaria, Cyprus, Estonia, Finland, Latvia, Poland and the UK.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Free movement of EU citizens and their families: Five actions to make a difference', COM(2013) 837.

Data on Marriages of Convenience					
Member State	***Suspected cases***	***Identified case***	***Total FM applications***	***% suspected cases***	***% identified cases***
Belgium	990	n/a	8,561	11.6%	n/a
Bulgaria	3	n/a	857	0.4%	n/a
Cyprus(1)	n/a	58	1,004	n/a	5.8%
Czech	n/a	51	2,402	n/a	2.1%
Denmark	n/a	8	3,939	n/a	0.2%
Estonia	38	0	342	11.1%	0.0%
Finland (visas)(2)	n/a	10	650	n/a	1.5%
Finland (residence) (3)	250	n/a	2,910	8.6%	n/a
Germany	250	n/a	7,700	3.2%	n/a
Ireland(4)	n/a	9	2,338	n/a	1.4%
Latvia(5)	5	n/a	319	1.6%	n/a
Netherlands(6)	92	61	n/a	n/a	n/a
Poland	145	2	153	94.8%	1.3%
Portugal(1)	n/a	48	5,616	n/a	0.9%
Sweden	n/a	30	26,546	n/a	0.1%
UK (EEA Family Permits)	256	176	12,800	2.0%	1.4%
UK (residence cards)	1,891	n/a	32,192	5.9%	5.9%(7)
			EU average	**15.5%**	**1.9%**

Sources: COM(2013) 837, EMN ad hoc query 27 Aug. 2013, ICF GHK/Milieu 2013 study, EMN Report June 2012, national authorities

Notes:
(1) Yearly average based on total cases reported 2010-2012
(2) Identified cases are in connection with 'visa applications'
(3) Suspected cases are in connection with application for documentation submitted by all third-country nationals, including EU residence applications
(4) Identified cases reported in 2010; residence applications based on yearly average 2006-2013
(5) Cases reported in 2011
(6) Yearly average based on total cases reported 2010-2012
(7) Figure is an estimate based upon the findings of the Independent Chief Inspector's sample of 60 cases in which a residence card was refused in Oct. 2013 - Jan. 2014. This figure was calculated by multiplying the percentage of sampled refused residence card applications involving an identified marriage of convenience (20%) with the refusal rate for residence card applications in 2012 (32.5%). The resulting estimate has been reduced from 6.5% to 5.9% to ensure identified cases do not exceed suspected cases.

Table 10.2.4 – Data on marriages of convenience (data for 2012 unless otherwise stated)

Based on the information provided by the Member States, it would appear that across the EU approximately three out of twenty residence applications are suspected of involving a relationship of convenience. However, the number of cases in which a finding of a marriage of convenience is made by the national administrative authorities is much lower. Cases in which residence

documentation is refused or withdrawn on the basis of a marriage of convenience account for less than 2% of EU residence applications.

Nonetheless, there are shortcomings in this data that prevents it from being considered as conclusive evidence of the prevalence of marriages of convenience in the Member States concerned. Firstly, often the data on suspected marriages is not sufficiently disaggregated to distinguish suspected sham marriages which involve EU citizens from those involving nationals and resident non-EU citizens. As a result, it is by no means certain that all or even a majority of these cases necessarily involved EU citizens. Some of these cases may involve nationals of the country concerned particularly where family reunification rules for own nationals are not unduly restrictive. For example, this is the case in Belgium, where the published data on identified cases of marriages of convenience is not fully disaggregated by nationality.[25] The official data does not identify any cases in which EU citizens might have been involved.

Secondly, the data often only concerns cases in which the administrative authorities have a suspicion that a marriage is one of convenience ('% suspected cases' in table 3). The data also indicates that only a fraction of suspected cases turn out to be confirmed following an administrative investigation (column '% identified cases' in table 3). Indeed, the data would suggest that only about one in eight suspected cases of marriage of convenience result in an administrative decision to refuse or withdraw residence rights on the grounds that the non-EU family member's relationship with an EU citizen is not genuine. The only notable exception is the UK, where it would appear that most cases in which a relationship is suspected of being a sham usually result in an administrative finding that the relationship is fraudulent.[26]

[25] The Belgian Immigration Office's annual reports only identify the top two nationalities involved in marriages of convenience, namely Turkish and Moroccan nationals in the period 2009-2013. In 2013, the annual report reveals that no EU citizens were involved in identified cases of marriages of convenience.

[26] This is based upon an estimate of applications refused on the basis of being a marriage of convenience reported in Independent Chief Inspector of Border and Immigration 'The Rights of European Citizens and their

In addition, no data is available to confirm whether any of these decisions were appealed and, if so, whether they were upheld by the judicial authorities. This represents a significant gap in trying to obtain an accurate picture of the prevalence of marriages of convenience and other sham relationships in EU residence cases.

Moreover, there is some anecdotal evidence[27] that suggests the national authorities may be misusing the powers of Article 35 by requiring non-EU family members who apply for a residence card to prove they are in a genuine relationship, thereby reversing the burden of proof contrary to the Commission's guidance on investigating marriages of convenience.[28] The data would suggest that in Poland almost all residence applications submitted by non-EU spouses are suspected of being fraudulent. In addition, the practice of the Cypriot and the UK authorities is also questionable. Both Member States have noticeably higher rates of decisions to refuse the issue of residence documentation based on the existence of marriages of convenience (5.8% and

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Spouses to Come to the UK: Inspecting the Application Process and the Tackling of Abuse - October 2013 – January 2014', (June 2014), 19 and 23 <http://icinspector.independent.gov.uk/wp-content/uploads/2014/06/European-Casework-Report-Final.pdf> accessed on 31 July 2015. The estimate is based upon the findings of the Independent Chief Inspector's sample of 60 refusal cases decided in Oct. 2013 - Jan. 2014, which found that 20% of cases involved an identified marriage of convenience, multiplied by the rate of refusal in EU residence applications for 2012 (32.5% - this does not include refusals in permanent residence applications or applications rejected as invalid). The resulting estimate has been reduced from 6.5% to 5.9% to ensure identified cases do not exceed suspected cases.

[27] See for example, Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services', (Report for the Commission, Ramboll 2011), <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed on 31 July 2015. The study mentions the '[n]on-recognition of marriages due to presumption of abuse or fraud' as constituting a specific example of Member States applying the law incorrectly: 'The authorities suspect sham marriages and therefore do not grant the family right sought. These cases concern marriages with third-country nationals, most of which have taken place outside the EU' ibid, 34.

[28] European Commission, Staff Working Document 'Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens', SWD(2014) 284 final.

5.9%[29] respectively) which are significantly higher than the EU average (1.9%). Furthermore, the reliability of the UK's data has been questioned by the House of Lords and the House of Commons Joint Committee on Human Rights.[30]

Aside from fraudulent marriages and other unions, Belgium is the only country that regularly identifies cases in which persons have fraudulently claimed to be EU citizens using false identity cards or passports. This concerned on average 0.1% of applications during the period 2010-2014. Some information is also available for the UK. In a sample of 120 refusal cases relating to applications by EEA nationals and their family members, a report by the UK's Independent Chief Inspector of Borders and Immigration[31] found that fraudulent identity documents had been used in four applications for residence documentation.[32] If this holds true across all EU residence applications, it would mean around 0.5%[33] of EU residence applications involve attempts to use fraudulent evidence of EEA nationality in the UK.

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[29] See n 26.

[30] When the recent Immigration Act 2014 proceeded through Parliament, the Committee on Human Rights drew attention to 'the questionable strength of the evidence relied on by the Government to demonstrate the necessity for legislating to supplement the powers that already exist to combat sham marriages … Asked about the criteria the Government proposes to use to identify suspect marriages or civil partnerships, the Government says that the referral [of a suspect marriage or civil partnership for investigation] will be assessed against intelligence/evidence based risk profiles and factors to identify whether it is at high risk of being a sham marriage or civil partnership, e.g. that one or both parties 'is of a nationality at high risk of involvement in a sham, on the basis of objective information and intelligence about sham cases'; see Joint Committee on Human Rights, 'Legislative Scrutiny: Immigration Bill (eighth report)' (2013-14, HL 102, HC 935) 117 and 122.

[31] Independent Chief Inspector of Border and Immigration (n 26).

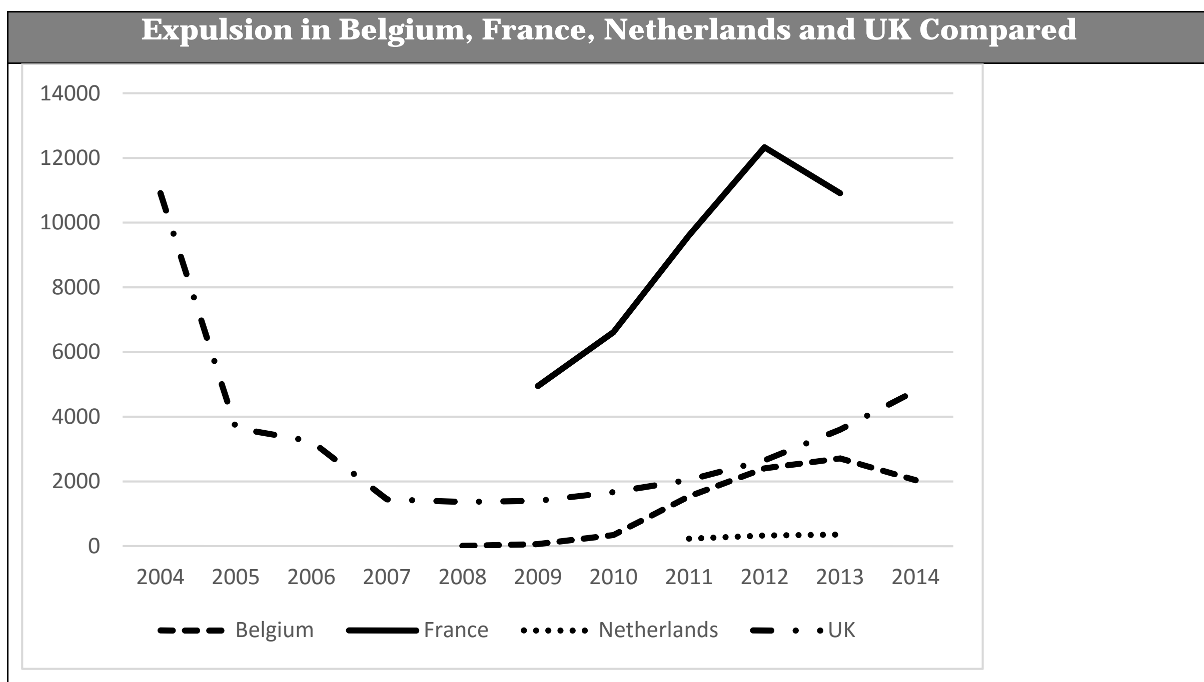
[32] Three cases concerned applications by a family member for a residence card and one case concerned an application for a registration certificate.

[33] This is an estimate based upon the findings of the Independent Chief Inspector's sample of 90 refusal cases decided in Oct. 2013 - Jan. 2014. The estimate was calculated by multiplying the percentage of sampled refusal cases involving applications by both EEA nationals and non-EEA family members which involved an attempt to use fraudulent travel document (3%) with the total refusal rate for residence documentation in 2012 (16.9% - this does not include refusals in permanent residence applications or applications rejected as invalid).

10.2.5 Expulsion of EU citizens and their family members

Belgium, France and the UK are the only Member States that regularly publish statistics on the expulsion of EU citizens and their family members. In addition, some limited official data is also available for the Netherlands, as a result of information released in parliament.[34]

The graph below provides a comparison of the number of EU citizens and their family members who received an order to leave the national territory in the four Member States concerned, irrespective of whether the expulsion was enforced. For the UK, the figures also include refusals at the border.



Graph 10.2.5 - Expulsion of EU citizens and their family members (2004-2014)

These expulsions should be seen in context. To put these figures into perspective, it is therefore more useful to compare these expulsion rates by reference to the size of the resident EU population. The table below provides a

[34] The figures are quoted in S. BRAAKSMA and T. WESTRA, 'De sociale zekerheid van MOE-landers in Nederland' in C. HUINDER, A. ODÉ, K. DE VRIES, S. BONJOUR, L. COELLO EERTINK and J. DAGEVOS (eds), *Open grenzen, nieuwe uitdagingen: arbeidsmigratie uit Midden- en Oost-Europa* (Amsterdam: Amsterdam University Press, 2015), 105-124 (with thanks to Gijsbert Vonk).

comparison of number of expulsions affecting EU citizens and their family members as a proportion of the resident EU population.

Member State	2011			2012			2013		
	Total expulsions	*Proportion of EU resident population*	*Most affected nationality*	*Total expulsions*	*Proportion of EU resident population*	*Most affected nationality*	*Total expulsions*	*Proportion of EU resident population*	*Most affected nationality*
Belgium	1,542	**0.21%**	Bulgaria (16%)	2,407	**0.31%**	Romania (16%)	2,712	**0.34%**	Romania (30%)
France	9,608	**0.71%**	Romania	12,331	**0.89%**	Romania	10,915	**0.77%**	n/a
Nether-lands	230	**0.04%**	n/a	330	**0.06%**	n/a	360[1]	**0.06%**	n/a
UK	2,052	**0.08%**	Romania (21%)	2,651	**0.10%**	Romania (24%)	3,601	**0.13%**	Romania (32%)
Notes: (1) Estimate based on number of expulsions Jan.-Jun. 2013									

Table 7.7.4 - Expulsion of EU citizens (2011-2013)
Sources: Belgian Immigration Office, Belgian Ministry of the Interior, French Ministry of the Interior, Institut national de la statistique et des études économiques, Centraal Bureau voor de Statistiek, Braaksma & Westra (2015, n 31), UK Home Office, Office of National Statistics, with additional research by the author

This shows that over the period 2011-2013, the French authorities served expulsion orders on more EU citizens as a proportion of the resident EU population than Belgium, the Netherlands and the UK combined. By calculating the ratio of expulsions in the Netherlands, Belgium, the UK and France over this three-year period (1:2:6:16), this cancels out differences between the size of each country's EU resident population. This exercise illustrates that for each EU citizen whose expulsion was ordered by the Netherlands, the UK expelled two EU citizens, Belgium ordered the expulsion of six EU citizens and France served expulsion orders on 16 EU citizens.

Throughout this period, Romanian nationals were the most affected by expulsion measures in Belgium and the UK and comprised about one third of EU citizens affected by expulsion orders. In the case of France, the proportion is likely to be even higher, since 29.7% of all foreigners (EU and non-EU) expelled from France were from Romania. The French Ministry of the Interior has reported that in the period 2009-2012, Romanian citizens held the unenviable title of being the most prominent national group to be expelled from

France.[35] According to a consortium of non-governmental organisations, a substantial proportion of Romanian citizens who were expelled from the French state during this period identified themselves as belonging to the Roma community.[36]

The sheer scale of expulsions from France and the questionable circumstances in which these took place have generated much controversy.[37] The European Commission launched an investigation into the actions of the French authorities for suspected breaches of Directive 2004/38,[38] spurred by the filing of complaints by migrants' rights organisations,[39] The case was closed

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[35] *Ministère de l'Intérieur, 'Les Etrangers en France : Dixième rapport établi en application de l'article L 111-10 du Code de l'entrée et du séjour des étrangers et du droit d'asile'* (2012) 73 (Ministry of the Interior, 'Foreigners in France : Tenth report submitted pursuant to Article L 111-10 of the Immigration Code).

[36] La Cimade and others, '*Rapport Annuel - Centres et locaux de rétention administrative*' (2011) (Annual report - Administrative detention centres), 8 <http://www.lacimade.org/publications?category=Rapports+sur+la+r%C3%A9tention+administrative> accessed 31 July 2015.

[37] See for example, Sergio Carrera and Anaïs Faure Atger, 'L'Affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice' (2010) CEPS Papers in Liberty and Security in Europe; Sergio Carrera, 'Shifting Responsibilities for EU Roma Citizens: The 2010 French Affair on Roma Evictions and Expulsions Continued' (2013) CEPS Papers in Liberty and Security in Europe No 55; Jacqueline Gehring 'Roma and the Limits of Free Movement in the European Union' in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff Publishers 2013) 143-174; Julia Markham-Cameron, 'The EU and the Rights of the Roma: How Could the EU have Changed the French Repatriation Program of 2010?' (2013) Claremont-UC Undergraduate Research Conference on the European Union; Sergio Carrera, 'The Framing of the Roma as Abnormal EU Citizens in Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopolou, *The Reconceptualization of European Union Citizenship* (Brill Nijhoff, 2014), 33-63; Ayse Çağlar and Sebastian Mehling, 'Sites and Scales of the Law: Third-Country Nationals and EU Roma Citizens' in Engin Isin and Michael Saward, *Enacting European Citizenship* (Cambridge University Press 2014) 155-177.

[38] European Commission, 'European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens', Press release IP/10/1027, 29 September 2010.

[39] European Roma Rights Centre, 'Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of Roma in France' (27 August 2010) <http://www.errc.org/cms/upload/file/france-ec-legalbrief-27-august-2010.pdf> accessed 31 July 2015; Groupe d'information et de soutien des immigrés and others, 'Plainte contre la France pour violation du droit communautaire en matière de libre circulation des

at the informal stage of the investigation[40] following concessions made by the French government that supposedly ''led to the full incorporation in the French legislation of the safeguards established by EU law".[41] Despite these commitments, expulsions from France almost doubled between 2010 (6,620) and 2012 (12,331). In 2013, expulsion measures taken against EU citizens by the French authorities (10,915) were still 65% higher than in 2010. Given the concerns that remain about the circumstances in which these expulsions continue to be carried out against EU citizens and their family members by the French authorities, the matter has now been brought before the European Parliament following the lodging of a petition by the same rights organisations that had originally complained to the Commission in 2010.[42]

Likewise, the questionable nature of the expulsion of EU citizens by the Belgian authorities has also been the subject of a complaint by civil society organisations[43] alleging breaches of Directive 2004/38 and Regulation

personnes' (22 October 2010) <http://www.gisti.org/IMG/pdf/cedh_plainte-roms_2010-10-22.pdf> accessed 31 July 2015.

[40] European Commission, 'Statement by Viviane Reding, Vice-President of the European Commission, EU Commissioner for Justice, Fundamental Rights and Citizenship, on the recent developments concerning the respect for EU law as regards the situation of Roma in France', Press Release MEMO 10/502, 19 October 2010.

[41] European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: On progress towards effective EU Citizenship 2011-2013' COM(2013) 270 final, 5.

[42] European Roma Rights Centre, GISTI and others, 'Pétition au Parlement européen relative à l'éloignement et à l'enfermement des citoyens européens' (25 February 2015) <http://www.gisti.org/IMG/pdf/saisine_pe_2015-02-25_fr.pdf> accessed 31 July 2015.

[43] INCA CGIL, ABVV-FGTB, EU Rights Clinic and Bruxelles Laïque, 'Expulsions de citoyens européens de Belgique. Violation des articles 7 et 14 de la Directive 2004/38 sur le droit de séjour des citoyens UE et des articles 4 et 61 du Règlement n° 883/2004 sur la coordination de la sécurité sociale' (4 November 2014) <http://www.osservatorioinca.org/section/image/attach/Lettre_CE_2014_11_04.pdf> accessed 31 July 2015.

883/2004.[44] This is the subject of an on-going investigation by the European Commission.[45]

10.3 Explaining implementation and its outcomes

The purpose was, firstly, to identify the constitutive elements of implementation and how these should be taken into account to assess the implementation of the Free Movement Directive and, secondly, to explore the existence of any correlation between, on the one hand, the policy choices that were made by the Member States as part of the implementation process, and on the other hand, how correctly the Directive has been implemented by the Member States.

As was shown in Chapter 3, implementation consists of three distinct stages namely its transposition into the national legal order by the adoption of an instrument containing legally binding rules, the practical application of these rules by the administrative authorities and their enforcement by the national courts. Each stage of implementation comprises distinct legal obligation flowing from the Treaties.

The purpose of Chapter 4 was to examine how different outcomes in the three stages of implementation can generate their own source of non-compliance. It also showed that Member States can adopt different attitudes towards non-compliance and may wilfully test the resolve of the Commission to prosecute its infringement action all the way to the Court of Justice. It also reviewed some of the available empirical findings in the field of compliance

[44] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, O.J. 2004, L 200/1.

[45] It will be recalled that this is not the first time that the expulsion of EU citizens by the Belgian authorities has been the subject of investigation by the EU institutions. In Case C-408/03, *Commission v Belgium*, EU:C:2006:192, paras. 68-72, the Court of Justice found that the Belgian practice to serve expulsion orders automatically on EU citizens who had failed to provide documentary proof of their right to reside in Belgium within the prescribed time period breached the EU free movement rules.

research as to the various factors that might influence implementation outcomes.

Having identified the various obligations arising from Directive 2004/38 in Chapter 6, the purpose of the following three Chapters was to examine how Belgium, Italy and the UK had complied with the obligations arising under the Directive.

As to transposition, it was seen that each of the three Member States chose different approaches to transposition in terms of the forms and methods used. Each Member State used various forms of transposition, not so much out of free will, but rather within the constraints of their constitutional and legislative frameworks. Although each Member State used different techniques in drafting their national implementing measures, there was no clear correlation between those choices and the outcomes in transposition. The choice of form of transposition makes no difference as long as it is legally binding. Moreover, the choice of methods of transposition can cut both ways, it might make transposition appear correct while acting as a smoke screen for non-compliant application. Legal factors therefore do not go very far to explain implementation outcomes.

Instead it became apparent that the different techniques used in drafting were being used as tools to pursue political goals as illustrated by the various motivations that the Member States display when they implement EU law. The UK seems to pursue a policy of selective non-compliance by exploiting the ambiguities in EU instruments and case law of the EU Court of Justice to its maximum advantage and will not blink if threatened with infringement action.

On the other hand, Belgium's prime motivation seems to be the protection of public sector expenditure by seeking to reduce its social welfare bill. As a result, its efforts have been to establish as many controls and restrictions on the ability of EU citizens to claim benefits indefinitely.

The motivations of these two Member States also pervades their application efforts, which appear to be designed to interrupt continuity of

residence of EU citizens and their family members. By preventing EU citizens and their family members from acquiring permanent residence, the Member States can therefore control access to benefits.

Italy's preoccupations seem to be somewhat different and more concerned with security issues that feed into preoccupations about immigration in general. Free movement is not in and of itself politically contentious as it has become in the UK and is becoming in Belgium albeit to a lesser extent. Free movement only becomes contentious in Italy if events involving the exercise of free movement triggers events with wider concerns about security and immigration.

The review of empirical evidence also shows that implementation is not just about transposition. Application of the rules in practice is just as important if not more so. Wherever a satisfactory level of compliance in transposition might be reached this does not guarantee that application will also be relatively compliant. As a result, any research into implementation must therefore necessarily take into account both application and transposition.

Enforcement also matters, but the lack of information on this front prevents from making any findings. Effective research on this front aiming to detect non-compliance would need to look for evidence of systematic misinterpretation of the national implementing measures contrary to the objectives pursued by the Directive and at the same time conduct an examination of what factors may be preventing effective legal protection.

CHAPTER 11. CONCLUSIONS AND RECOMMENDATIONS[1]

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11.1 Enhancing the Supervision of Implementation

This study has highlighted the importance of giving due consideration to all three stages of implementation when considering whether Member States are complying with their obligations to give effect to Directive 2004/38.

The Commission generally has at its disposal the tools necessary to supervise the timely and correct transposition of the Directive. However, given the difficulties in effectively monitoring application and enforcement by the Member States, attention should be turned to what measures could be taken in future for the Commission to collate empirical evidence of non-compliance by the Member States that can be used to successfully prosecute infringement cases before the Court of Justice.

At the same time, in light of the significant problems being encountered by EU citizens on the ground, there is also a need to ensure that the residence rules can be more effectively enforced by EU citizens and their family members.

[1] This Chapter is based on a presentation by the author in 'Seven Strategies to Improve Free Movement' at the occasion of the conference 'Basic European rights to free movement under threat' organised by the European Economic and Social Committee, Brussels, 27 January 2015.

11.2 Recasting Directive 2004/38 as a Regulation

The detailed rules that govern the free movement of persons in the EU are – for the most part – contained in Directive 2004/38[2].

Although this Directive has the objective of simplifying and strengthening residence formalities for EU citizens and their family members[3], it would appear that the Directive has had quite the opposite effect[4]. Some Member States have used the Directive as a pretext to tighten up their national rules governing EU rights of residence, particularly as regards healthcare insurance[5].

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[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 [2004] OJ L 158/77 (hereafter the Free Movement Directive, Directive 2004/38 and the Directive).

[3] Recital 3 of Directive 2004/38 explains that it is intended 'to simplify and strengthen the right of free movement and residence of all Union citizens'. In Case C-127/08 *Metock* [2008] ECR I-6241, para 68, where the Court of Justice observed that '[e]stablishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. '

[4] Commission, 'EU Citizenship Report 2010 Dismantling the obstacles to EU citizens' rights', COM (2010) 603 final, 14-15. See also Sir David Edwards et al, 'Mind the Gap: Towards a Better Enforcement of European Citizens' Rights of Free Movement' (2nd ed, ECAS 2013) and Neva Cocchi, Dana Gavril, Nicola Grigion, Carlos Guimaraes, Celia Mayer, Nuria Sanchez, Anna Sibley, Libor Studený, 'Citizens Without Borders: Free movement and residence in the European Union a challenge for European citizenship' (2013).

[5] Problems in this connection are being reported in Finland, Sweden, and the UK; see Commission, 'Single Market Scoreboard, Your Europe Advice governance tool' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/youreurope_advice/index_en.htm> accessed on 9 May 2015. As regards France, the decision of the French authorities to withdraw the coverage of EU citizens from the '*couverture maladie universelle*' was the subject of several complaints; see Commission, '29th Annual Report on Monitoring the Application of EU Law (2011), COM(2012) 714 final 25.

Instead of facing a harmonised approach to residence formalities in the EU[6], EU citizens and their family members are confronted with completely different visa and residence formalities depending on where they choose to reside[7], even when differences in legal traditions are factored in. As a result, EU citizens and their family members continue to face significant obstacles when trying to comply with residence and visa formalities[8]. Such cases continue to represent about a quarter of cases handled by SOLVIT[9].

To address these problems, when the time comes for Directive 2004 to be recast to reflect developments in the case law of the EU Court of Justice since 2004[10], the EU institutions should be encouraged to opt for a Regulation rather

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[6] The harmonisation of residence formalities is an inherent aim of the Directive: Articles 8 and 10 provide that Member States can only request the documents listed in the Directive in respect of applications for visas and residence documents. This is further confirmed by recital (14) which explains that '[t]he supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members'. See further, Commission, 'Communication from the Commission to the European Parliament and the Council on guidance for better transposition and 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 (2009) 313 final, 8.

[7] See ICF-GHK and Milieu, '*Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation*' (Report for the Commission, 2013).

[8] This is clear from the latest Commission, 'Single Market Scoreboard, Your Europe Advice governance tool' (n 5). A more detailed analysis of such problems can be found in Xavier Le Den and Janne Sylvest, 'Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services', (Report for the Commission, Ramboll 2011), <http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf> accessed on 31 July 2015..

[9] Commission, 'Single Market Scoreboard, SOLVIT governance tool' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm> accessed on 9 May 2015; Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU, On progress towards effective EU Citizenship 2011-2013' COM (2013) 270 final 4.

[10] These would include the judgments in Case C-127/08 *Metock* (n 3) in which the Court recognised that the benefit of the Directive is not contingent upon prior lawful residence in the EU; Case C-162/09

than a Directive. The legislative basis for the rules on the free movement of persons[11] does not preclude this choice of legal instrument. Opting for a Regulation is desirable for a number of reasons.

Firstly, a Regulation is directly applicable[12]. This means it is a free-standing law which does not require the national authorities to adopt further measures to give legal effect to the Regulation. On the contrary, a Directive requires 'transposition' – the adoption of national measures, laws or regulations – in order to give it effect in the national legal order.[13] This leaves the national authorities a discretion in how the objectives of the Directive are to be achieved. It is the improper use of this margin of discretion which has resulted in Directive 2004/38 not having been correctly implemented by any of the 28 EU Member State[14]. The choice of a Regulation as a legal instrument would have the effect of promoting a more harmonised approach to residence formalities throughout the EU and serve as a more effective tool in ensuring the same rules apply to all

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Lassal [2010] ECR I-09217 and Case C-325/09 *Dias* [2011] ECR I-06387 which concerned the conditions relating to permanent residence; Case C-456/12 *O & B* [2014] ECLI:EU:C:2014:135 which extended the principle established in Case C-370/90 *Singh* [1992] ECR I-04265 to the Free Movement Directive; Case C-507/12 *Saint Prix* [2014] ECLI:EU:C:2014:2007 which extended the circumstances in which a person retains the status of a worker beyond those enumerated in Article 7(3) of the Directive. Moreover, the Directive would also benefit from being updated to reflect case law developments prior to the Directive such as Case C-200/02 *Chen* 2004 I-09925 regarding the residence rights of carers of EU minors residing in a Member State other than their country of nationality.

[11] Article 21 TFEU.

[12] Article 288(2) TFEU.

[13] Article 288(3) TFEU

[14] Commission, '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, the Commission observed that '[t]he 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 problems of transposition are often related to failure to transpose the rules limiting the margin of administrative discretion, e.g. that the restrictions should not be invoked to serve economic ends.'

EU citizens and their family members regardless of where they choose to live in the EU.

Secondly, a Regulation is binding in its entirety[15]. The Court has explained that a Regulation has the effect of rendering automatically inapplicable any conflicting provision of national law. As a result, it is relatively simple for citizens to have recourse to an EU Regulation and invoke its precedence over conflicting provisions of national law: its binding nature is spelled out by the Treaty on the Functioning of the EU (TFEU) and national law often explicitly provides for the binding effect of the EU Treaties[16]. For a Directive, such an exercise is more difficult in practice. It first requires demonstrating the provision at issue lays down a clear and unconditional right which individuals can rely upon, which is not always immediately apparent as regards Directive 2004/38[17]. In practice, it also means having to cite domestic case law that reflects national acceptance of the EU Court of Justice's case law on the direct effect of Directives[18]. Recourse to a Regulation instead of a Directive would arguably make it easier for citizens to rely on its provisions

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[15] Article 288(2) TFEU.

[16] For example, section 2 of the European Communities Act 1972 explicitly provides for this in the UK, as does section 2 of the European Communities Act 1972 in Ireland (as amended by the European Union Act 2009) See also, section 3 of the European Union Act 2003 in Malta; and Articles 55 and 88-1 of the Constitution of the French Republic in France. In Italy, the situation is more complicated because each treaty has been the subject of an individual ratifying law, starting with the enactment of Law No 1203 of 14 October 1957 as regards the EEC Treaty and more recently with adoption of Law No 130 of 2 August 2008 as regards the Lisbon Treaty.

[17] In C-83/11 *Rahman* [2013] ECLI:EU:C:2012:519, para 25 the Court held that Article 3(2) of the Directive, which concerns the right of other family members to have their entry and residence facilitated, does not have direct effect. However, it went on to rule that individuals may rely upon that provision 'in order to ensure [that] an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive', ibid, para 25.

[18] See for example, the CJEU's rulings in Case 8/81 *Becker* [1982] ECR 53; Case C-271/91 *Marshall* [1993] ECR I-4367*;* Case 103/88 *Fratelli Costanzo* [1989] ECR 1839; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357; Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

before the national authorities and ensure that conflicting rules of national law are set aside.

Moreover, where a provision of a Regulation confers rights on individuals, it will usually have both vertical and horizontal direct effect[19]. This means the provision can be relied upon by citizens against both the authorities of the Member States (vertical direct effect) and also private bodies (horizontal direct effect). This is particularly significant given the privatisation of visa formalities through the increasing use of processing agents by Member States[20] and the over-zealous application of carrier liability rules[21] which often neutralises the ability of many non-EU family members to make use of the right to enter a Member State even if they do not have a valid visa[22]. The choice of a Regulation to replace Directive 2004/38 would therefore limit the possibilities not just for Member States but also private entities[23] – whether visa processing agents or transport companies – to circumvent the free movement rules.

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[19] See to that effect the Court of Justice of the EU's ruling in Case C-253/00 *Muñoz* [2002] ECR I-7289 and the Opinion of Advocate General Geelhoed in that case at paras 45-47.

[20] For Member States that form part of the Schengen area, this is provided by Article 43 of the Visa Code, Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas [2009] OJ L 243/1.

[21] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/9, Article 26 establishes the liability of carriers for transporting into the EU non-EU nationals without adequate travel documents as further given effect by Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L 187/45.

[22] Article 3(4) of Directive 2004/38. In Case C-459/99 *MRAX* [2002] ECR I-6591, para 61, the Court of Justice ruled further that '*it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health*'.

[23] The EU Court of Justice has consistently held that 'the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community …, would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or

11.3 Enhancing the Commission's Powers of Supervision

The Commission's power to enforce the EU rules on the free movement of persons is limited to launching formal infringement proceedings against Member States[24]. These proceedings are cumbersome as it can take several years between the time when a letter of formal is sent by the Commission until the case is referred to the Court of Justice[25]. It then takes a further two years on average to obtain a judgment from the Court[26].

Citizens cannot initiate infringement proceedings because the Commission is under no obligation to launch infringement actions in respect of every complaint it receives and has a discretion as to which infringements it decides to pursue[27]. Moreover, infringement proceedings can only target Member States not private entities. As a result, the Commission is effectively powerless to take court action to compel private entities such as visa processing agents or transport companies to respect the rules contained in Directive 2004/38.

Before initiating infringement proceedings against Member States, the Commission will usually try to resolve the problem by making use of the so-

organisations which do not come under public law', for example in Case 36/74 *Walrave & Koch* [1974] ECR 1405, para 18 and C-309/99 *Wouters* [2002] ECR I-01577, para 120.

[24] Proceedings under Article 258 TFEU.

[25] According to the Commission, the average duration of infringement proceedings is 29 months from the time the letter of formal notice is sent; see Commission, 'Single Market Scoreboard, Infringement governance tool' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm> accessed on 9 May 2015. This does not factor in the time taken for compliance talks to be held within the context of the EU Pilot scheme – the current target is 20 weeks; see 'Single Market Scoreboard, EU Pilot tool' <http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm#maincontentSec2> accessed on 9 May 2015.

[26] Court of Justice of the European Union, Annual Report 2014 (2015), 66.

[27] See to that effect Case 247/87 *Fruit Company v Commission* [1989] 291, para 11.

called 'EU Pilot' scheme[28] which allows the Commission to resolve problems in compliance with EU law by engaging in dialogue with the Member State concerned[29]. The Commission claims this approach resolved over 90% of free movement cases in 2011[30]. The Commission currently has infringement ongoing procedures against seven Member States[31] and reported the closure of a further five infringement cases in 2013 following commitments by Member States to amend their legislation giving effect to the Directive[32].

However, several recent high profile cases – namely, the expulsion of Roma from France[33], the short-lived reintroduction of border controls in

[28] Further information on the EU Pilot scheme see n 25.

[29] The European Commission has also set up services such as Your Europe Advice (n 5) and SOLVIT (n 9) to help inform, advise and assist EU citizens who face difficulties in exercising their free movement rights. These measures help to overcome a great number of problems, but sometimes the only possibility to ensure compliance with EU law is for the Commission to take formal action against a recalcitrant Member State. For a discussion of the limitations of the SOLVIT network, Jacques Pelkmans and Anabela Correia de Brito, *Enforcement in the EU Single Market* (2012 CEPS).

[30] See Commission, 'Free movement: Determined Commission action has helped resolve 90% of open free movement cases', Press release IP/11/981, 25 August 2011.

[31] Austria, Belgium, Cyprus, Czech Republic, Germany, Lithuania, Sweden and the UK; See Commission, 'Free movement: Commission upholds EU citizens' rights', Press release IP/12/75, 26 January 2012; idem, 'Free movement: Commission asks the UK to uphold EU citizens' rights
Brussels, 26 April 2012 – The European Commission has given the United Kingdom two months to comply with European Union rules', Press release IP/12/417, 26 April 2012; idem, 'Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights', Press release IP/12/646, 21 June 2012; idem, 'February infringements package: main decisions - Free movement: Commission asks Belgium to comply with EU rules', Press release MEMO/13/122, 21 February 2013;

[32] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: On progress towards effective EU Citizenship 2011-2013' (n 9) 4, which reported the closure of infringement proceedings against Italy, Malta, Poland, Sweden and Spain.

[33] See Commission, 'European Commission assesses recent developments in France, discusses overall situation of the Roma and EU law on free movement of EU citizens, Press release IP/10/1027, 29 September 2010.

Denmark[34] and delays at the Gibraltar/Spain border[35] – have shown the Commission's powers of investigation are limited when it comes to upholding free movement rights. Unlike the situation under the EU competition rules[36] or the EU air transport safety rules[37], the Commission does not have the power to undertake unannounced inspections to investigate suspected infringements of the free movement rules. It has no power take witness statements, take copies of documents or collect other forms of evidence, nor can it take preventive action by way of a binding decision imposing interim measures. It cannot force the Member States to provide statistics.

Given that the free movement of persons is one of the cornerstones of the Single Market, the Commission needs to have such stronger powers to investigate infringements. There is no justifiable reason why the free movement rules should remain the poorer cousin of the EU rules in the field of competition or air transport. Citizens deserve no less than a Commission equipped with a modern arsenal of measures that enables it to fulfil its mandate as 'guardian of the Treaties' in an effective manner.

11.4 Collating Statistics on the Free Movement of Persons

It will be recalled that in April 2013, the Ministers of four EU Member States - the UK, Austria, Germany and the Netherlands - wrote to the Irish Presidency of the European Council on the matter of free movement of persons

[34] See Commission, 'Statement by Cecilia Malmström, EU Commissioner for Home Affairs, on the announced permanent customs controls in Denmark', Press release MEMO/11/296, 13 May 2011.

[35] See Commission, 'Commission reports on the border situation in La Línea (Spain) and Gibraltar (UK)', Press release IP/13/1086, 15 November 2013.

[36] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 provides the Commission with extensive powers to investigate suspected breaches of the EU competition rules contained in Articles 101 and 102 TFEU.

[37] Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002 [2008] OJ L 97/72 lays down common EU-wide legal requirements for the performance of security checks at airports and empower the Commission to make unannounced inspections.

within the Union[38]. The letter specifically concerned the issue of "benefits tourism", namely the abuse of national welfare systems, and fraud, such as marriages of convenience. The measures proposed by the quartet include curtailing the right of newly arrived migrants to claim benefits and introducing bans on re-entry for those found to be abusing or defrauding the system.

However, the letter offered no concrete evidence to back up the claims of systemic abuse and fraud that would justify the specific measures advocated[39]. While the letter decried the systemic abuse of free movement through marriages of convenience, only one of its Member State authors, namely the UK, systematically collates statistics on suspected sham marriages[40]. Aside from this sole exception, none of these countries collates any kind of reliable data on other forms of abuse of free movement rules.

Indeed the Commission's open challenge[41] to the quartet to produce evidence of the extent and scale of benefits tourism has been met with silence. The UK's attempt to generate such evidence through its Balance of Competences Review[42] ended in ignominy amid allegations that the Government was withholding the final report[43] because it was too "pro-European"[44] until it was eventually leaked to the BBC[45].

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[38] Letter from the Ministers of Austria, Germany, the Netherlands and the UK to the Irish Presidency of the European Council (undated) <http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf> accessed 15 June 2015.

[39] 'Benefit tourism warnings by Theresa May get short shrift from Europe', *The Guardian*, (London, 29 April 2013).

[40] See further European Migration Network, 'Misuse of the right to family reunification' (2012).

[41] 'Benefit tourism claims: European Commission urges UK to provide evidence', *BBC*, (London, 14 October 2013).

[42] Home Office, Consultation 'Free movement of persons: review of the balance of competences' (2013).

[43] 'David Cameron shelves migration report amid lack of evidence', *Financial Times*, (London, 14 January 2014).

[44] 'Immigration report changed for being too "pro-European"", *Daily Telegraph*, (London, 18 July 2014).

[45] 'Immigration report "too pro-European", Tories complain', *BBC*, (London, 18 July 2014).

What this saga illustrates is the absence of reliable data on the scope of free movement which can be used to inform policy decisions. While *ad hoc* studies have been published to show the impact that EU migration has had on welfare benefits in the EU as a whole[46] and public finances in some Member States[47] as well as at the local level[48], data needs to be collated in a more systematic way.

At present, the availability of data on the practical application of Directive 2004/38 by the Member States is mostly left to the discretion of the Member States. Aside from the collection of annual statistics on EU residents, migration flows and the acquisition of citizenship, [49] there is presently no harmonised approach on the compilation of statistics on the residence rights of EU citizens and their family members across Member States.

On the contrary, EU law imposes an obligation on the Member States to collate much more detailed data on the migration of non-EU citizens.[50] As a

[46] See ICF-GHK and Milieu, '*A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*' (Report for the Commission, 2013)

[47] As regards the UK, see Christian Dustmann, Tommaso Frattini and Caroline Halls, '*Assessing the Fiscal Costs and Benefits of A8 Migration to the UK*' (Centre for Research and Analysis of Migration 2013); Christian Dustmann and Tommaso Frattini, '*The Fiscal Effects of Immigration to the UK*' (Centre for Research and Analysis of Migration 2013); as regards Sweden, see Joakim Ruist, '*The fiscal consequences of unrestricted immigration from Romania and Bulgaria*', (Centre for the University of Gothenburg 2013); as regards Germany, see Herbert Brücker, Andreas Hauptmann and Ehsan Vallizadeh '*Zuwanderer aus Bulgarien und Rumänien: Arbeitsmigration oder Armutsmigration?*' (German Institute for Employment Research 2013).

[48] Ernst & Young, '*Evaluation of the impact of the free movement of EU citizens at local level*' (Report for the Commission 2014).

[49] Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (2007) OJ L 199/23, Article 3

[50] Ibid, Articles 4 requires the collation of statistics on persons having applied for or benefiting from on international protection; Article 5 covers statistics on illegal entry and stay; Article 6 concerns the issue of residence permits to third-country nationals; Article 7 relates to statistics on return; Article 8 and 9 provide for further details on the compilation of statistics.

result, this leads to the paradoxical situation in which statistical information is much more readily available concerning the migration of non-EU nationals in the EU than the free movement of EU citizens.

Serious consideration should therefore be given to impose obligations on the Member States to collate comprehensive data on the EU citizens and non-EU family members. [51] This could be achieved relatively easily by amending Regulation 862/2007, which applies to all 28 Member States. This should allow for the more accurate monitoring of the application of Directive 2004/38 by the national authorities.

The obligation to collate data on EU citizens and non-EU family members should therefore be extended so as to allow for monitoring Member States' compliance with Directive 2004/38. The obligation to collate data should therefore extend to the numbers of registration certificates and residence card issued annually, rates of applications rejected as incomplete, the average time taken to process applications, the rates of refusals, revocations and deportations disaggregated by category[52], and appeal rates including outcomes. Member States should also be obliged to keep data on the nationality of claimants of social security and welfare benefits. As a final point, Member States should also be encouraged to extend oversight mechanisms that apply to migration affairs

[51] The obligation to collate data should ideally extend to the numbers of registration certificates and residence card issued annually, rates of applications rejected as incomplete or invalid, the average time taken to process applications, the rates of refusals, revocations and deportations disaggregated by category. These would include refusals, revocations, deportations and entry bans based on public policy, public security and public order, as well as those based on other grounds, such as citizens being a burden on the social assistance system and the abuse of free movement rights, including relationships of convenience and the use of false travel documents. Finally, the obligation should also extend to judicial appeals against decisions restricting free movement rights, including outcomes.

[52] These would include refusals, revocations and deportations based on public policy, public security and public order, as well as those based on other grounds, such as citizens being a burden on the social assistance system and the abuse of free movement rights.

which already exist in the Member States so that they also cover free movement[53].

The collection of data on the free movement of EU citizens and their family members would encourage better evidence-based policy-making by the Member States as well as the EU, rather than engaging in reactionary politics that panders to populist rhetoric about unsubstantiated claims of "benefits tourism" and "poverty migration"[54].

Until such time as the collation of such information becomes obligatory and standardised across the EU, the availability of quantitative data concerning the application of the free movement rules will remain contingent upon the good graces of the Member States.

11.5 Encouraging Decentralised Enforcement Further

A significant proportion of non-governmental organisations that work on the rights of migrants tend to focus exclusively on non-EU citizens. In part, this is understandable because they make up about two-thirds of migrants living in EU countries, as compared to the remainder that consists in EU citizens living in a Member State other than their country of nationality[55]. As a result, many migrant rights organisations lack sufficient knowledge or expertise to be able to assist EU free movers who face problems in enforcing their free movement rights. There is therefore a need to develop further the capacity of civil society to assist EU citizen to overcome obstacles that they may face when moving within the EU.

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[53] For example, in the UK, the detailed regular reports into the workings of the Home Office's Immigration Directorates produced by the parliamentary Home Affairs Committee of the House of Commons should be extended to cover EU residence cases.

[54] See further Elaine Chase and Martin Seeleib-Kaiser, 'Migration, EU Citizenship, and Social Europe', (Social Europe Journal, 14 January 2014) <http://www.social-europe.eu/2014/01/eu-citizenship-social-europe/> accessed 23 December 2015.

[55] Eurostat, 'Nearly two-thirds of the foreigners living in EU Member States are citizens of countries outside the EU-27', Statistics in Focus 31/2012 (2013).

Empowering civil society will assist in meeting the legal needs of EU citizens[56]. Despite a significant majority of EU citizens being aware that they have a right to move within the EU, almost two-thirds of them feel they do not have a sufficient awareness of their EU rights[57]. Less than a quarter of citizens feel sufficiently well informed about what to do if their EU rights are not respected[58] and about a fifth of the problems were the result of citizens' own lack of awareness of their rights[59].

The problems are not limited to awareness of rights. EU citizens who make use of their right to free movement continue to face significant obstacles

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[56] These needs are likely to grow in light of budgetary cuts which are affecting the availability of legal aid in a number of EU Member States. As a result of legal aid cuts in the UK, EU migrants and their family members are unable to obtain legal aid in order to obtain advice on immigration or social welfare issues: see Sheona York, 'The End of Legal Aid in Immigration - A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' (2013), 27 *Journal of Immigration, Asylum and Nationality Law*, 106-138; Pat Feast and James Hand, 'Impact of legal aid cuts on the Citizens Advice Bureau' (*Halsbury's Law Exchange*, 15 July 2014)<http://www.halsburyslawexchange.co.uk/impact-of-legal-aid-cuts-on-the-citizens-advice-bureau/> accessed 15 July 2014; Desmond Rutledge '*What legal aid is still available for work undertaken on welfare benefits post-LASPO?*' (*Garden Court Chambers*, 30 May 2014) <http://gclaw.wordpress.com/2014/05/30/what-legal-aid-is-still-available-for-work-undertaken-on-welfare-benefits-post-laspo/> accessed 30 May 2014. As regards legal aid cuts in Belgium, the issue has been raised in a letter addressed by the Council of Bars and Law Societies in Europe to the Belgian Minister of Justice (3 July 2012) < <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/030712_Ministre_de_l2_1341318815.pdf> accessed 3 November 2014. For an overview of the availability of legal aid in the EU in immigration cases pre-dating these reforms, see European Migration Network, '*Ad-Hoc Query on organisation and management of legal assistance provided to foreigners in the EU Member States*' (2012).

[57] Commission, 'Flash Eurobarometer 365 on European Union Citizenship' (2013) 21.

[58] Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU: EU Citizenship Report 2013 EU citizens: your rights, your future' COM(2013) 269 final, 5; Flash Eurobarometer 365 7.

[59] Commission, 'The EU Citizens' Agenda: Europeans have their say' (2012) 8.

in the exercise of their EU rights[60] with more than 25% of citizens reporting that they encountered problems in moving within the EU[61].

In light of these circumstances, it is therefore to be welcomed that in its Decision[62] implementing the Equality and Citizenship Programme for the period 2014 to 2020[63] the Commission will continue to support activities aiming to promote the free movement of persons as has been the case in previous years[64]. However, further resources need to be dedicated to supporting civil society groups that deliver direct assistance to EU citizens and their family members[65]. It should also review its opposition to funding "actions consisting in legal actions"[66]: supporting civil society groups to litigate strategic issues relating to free movement in the national courts will reduce the Commission's substantial enforcement burden[67].

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[60] Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU, On progress towards effective EU Citizenship 2007-2010' COM(2010) 602 final 5-8; idem, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU, On progress towards effective EU Citizenship 2011-2013' (n 9) 4-5, Single Market Scoreboard, Your Europe Advice governance tool (n 8) and Le Den and Janne Sylvest (n 8).

[61] Commission, 'The EU Citizens' Agenda: Europeans have their say' (n 59) 8.

[62] Commission Decision C(2014) 2257.

[63] Regulation (EU) No 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020 [2013] OJ L354/62.

[64] See further the Commission's annual work programmes for implementation of Council Decision 2007/252 establishing for the period 2007-2013 the specific programme Fundamental Rights and Citizenship as part of the General programme Fundamental Rights and Justice.

[65] Following the 2013 call of the Fundamental Rights and Citizenship programme, only one out of thirty funded projects will be supported by the European Commission in respect of the free movement of persons. This will fund local welcome policies for EU migrants by the Municipality of Amsterdam.

[66] See for example, Commission 'Guide for Applicants – Action grants JUST/2013/AG' (2013).

[67] According to the Commission '1566 individual queries on free movement and residence issues were submitted to the Commission [between 1 January 2011 and 31 March 2013], of which 581 were registered as formal complaints. The Commission also replied to 147 European Parliament questions and 137 petitions'; see Commission, 'Report from the Commission to the European Parliament, the

While the newly-adopted Directive on the free movement of workers[68] will hopefully assist EU citizens assert their rights to equal working conditions, its impact is likely to be limited. The Directive only applies to workers, it does not relate to residence formalities and, although Member States will be required to ensure that civil society organisations are allowed to "engage ... in any judicial and/or administrative procedure provided for the enforcement of [EU workers'] rights" this is subject to compliance with national rules of procedures such as those relating to legal representation. The Directive does not provide for concrete remedies or regulate evidence[69]. Regrettably, the Directive fails to contain any provision that guarantees that access to justice should be "expeditious and either free of charge or inexpensive"[70] to give further substance to the right to an effective remedy that is guaranteed by the EU Charter of Fundamental Rights[71].

The Court of Justice has previously observed that citizens have a full role to play in the enforcement of EU law[72]. Empowering civil society groups to inform and assist mobile citizens will ensure that citizens can make effective

Council, the European Economic and Social Committee and the Committee of the Regions under Article 25 TFEU, On progress towards effective EU Citizenship 2011-2013' (n 9) 4

[68] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ 128/8.

[69] See further Steve Peers, 'The new Directive on discrimination against EU citizen workers: spitting into the wind?' (*EU Law Analysis,* 14 March 2014) <http://eulawanalysis.blogspot.it/2014/03/the-new-directive-on-discrimination.html> accessed 14 March 2014.

[70] To borrow the terminology of Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26.

[71] Article 47 of the Charter of Fundamental Rights of the European Union.

[72] In Case 26/62 *Van Gend & Loos* [1963] ECR 1, para, the Court remarked that '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by [Articles 258 and 259] to the diligence of the Commission and of the Member States.'

use of their fundamental right of free movement[73] and overcome obstacles that may come their way.

11.6 Closing Remarks

This study has sought to explore the implementation of directives and engage with literature in the fields of law, social science and political science. In so doing it is hoped that this study will make a modest but meaningful contribution to the field of compliance study.

[73] The right of free movement is guaranteed by Article 45 of the Charter of Fundamental Rights of the European Union.

BIBLIOGRAPHY

ACOSTA ARCARAZO D., *Is Free Movement in Europe an Anomaly? The New Open Borders Policy in South America,* in EU Law Analysis, 14 November 2014, http://eulawanalysis.blogspot.be/2014/11/is-free-movement-in-europe-anomaly-new.html;

AFILALO A., *Towards a "Common Law" of Europe: Effective Judicial Protection, National Procedural Autonomy, and Standing to Litigate Diffuse Interests in the European Union,* (1999) *22* Suffolk Transnational Law Review, pp. 349-404;

AG TOTH, *The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects*, in Yearbook of European Law, (1984) 4, pp. 1-77;

ALBORS-LLORENS A., Judicial protection before the Court of Justice of the European Union in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014);

ALLEN W., BLINDER S., *Migration in the News: Portrayals of Immigrants, Migrants, Asylum Seekers and Refugees in National British Newspapers, 2010 to 2012,* Migration Observatory report, COMPAS, (2013), University of Oxford;

ALLIO L., FANDEL M., *Making Europe Work: Improving the Transposition, Implementation and Enforcement of EU Legislation,* in European Policy Centre Working Paper 25, (2006), pp. 10-11;

ALTER K., *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003);

ALTER K., *The European Union's Legal System and Domestic Policy: Spillover or Backlash?,* in *International Organization*, (2000) 54, pp. 489-518;

ANDERSEN S., *The Enforcement of EU Law: The Role of the European Commission* Oxford University Press 2012;

ANDERSON A. AND DEMETRIOU M., *References to the European Court*, 2nd ed, Sweet & Maxwell 2002, pp. 331-334;

ANGELOVA M., DANNWOLF T. and KÖNIG T., *How Robust Are Compliance Findings? A Research Synthesis*, in Journal of European Public Policy, (2012) 19, pp. 1269-1291;

APPLETON J., *The Indirect-Direct Effect of European Community Directives*, (2000) 5 UCLA Journal of International Law and Foreign Affairs, pp. 59-100;

ARADAU C., HUYSMANS J. AND SQUIRE V., Acts of European Citizenship: A Political Sociology of Mobility, in Journal of Common Market Studies, (2010) 48, pp. 945–965;

ARADAU C., HUYSMANS J., MACIOTI PG AND SQUIRE V., Mobility Interrogating Free Movement: Roma Acts of European Citizenship, in ISIN E. and SAWARD M. (eds), *Enacting European Citizenship*, Cambridge University Press 2013, pp. 132-154;

ARNULL A., *The Principle of Effective Judicial Protection in EU law: An Unruly Horse?,* European Law Review, (2011) 36, pp. 51-75;

BALASSA B., *The Theory of Economic Integration*, George Allen & Unwin, 1961 / Routledge 2011;

BALDWIN R. AND WYPLOSZ C., *The Economics of European Integration* , 5th ed, McGraw-Hill, 2015;

BAILEY I., National Adaptation to European Integration: Institutional Vetoes and Goodness-of-Fit, in *Journal of European Public Policy*, (2002) 9, pp. 791–811;

BARATTA R., *National Courts as "Guardians" and "Ordinary Courts" of EU Law : Opinion 1/09 of the ECJ'*, in Legal Issues of Economic Integration, (2011) 38, pp. 297-320.

BARNARD C. AND PEERS S. (eds), *European Union Law*, Oxford University Press, 2014;

BARNARD C., *The Substantive Law of the EU: The Four Freedoms*, 4th ed, Oxford University Press 2014;

BARONE A., *'Rapport Italien' in XVIII FIDE Congress Report, Volume 1, 'Les Directives Communautaires: Effets, Efficacité, Justiciabilité'* (Stockholm, 3-6 June 1998) 314-331, 314-319;

BATTA D., *Comparative Study on the Transposition of EC Law in the Member States*, (PE378.294, European Parliament, 2009);

BATES J., The Conversion of EEC Legislation into UK Legislation, in Statute Law Review, (1989) 10, pp. 110-123;

BELLAMY R., *Evaluating Union Citizenship: Belonging, Rights and Participation within the EU*, Citizenship Studies, (2008) 12, pp. 597-611;

BELL J., *Comparative Law*, in CANE P. AND CONAGHAN J. (eds), *The New Oxford Companion to Law*, Oxford University Press, 2008;

BELL S., ETHERINGTON L., *Out of sight, Out of Mind : A Study of the Transposition and Implementation of the Groundwater Directive in the United Kingdom*, in Environmental Law Review, (2007), pp. 96-24;

BENGOETXEA F., *A Case of Multidirectional Constitutional Transplant in the EU: Infra-state Law and Regionalism*, in PRECHAL S. and VAN ROERMUND BERT (eds), *The Coherence of EU Law*, Oxford University Press 2008, pp. 423-447;

BERMANN G., *Comparative Law in the New European Community*, in Hastings International and Comparative Law Review, (1997-1998), pp. 865-869;

BETLEM G., *The Principle of Indirect Effect of Community Law*, in European Review of Private Law, (1995) 3, pp. 1-19;

BETLEM G., *The Doctrine of Consistent Interpretation - Managing Legal Uncertainty*, Oxford Journal of Legal Studies, (2002) 22, pp. 397-418;

BIONDI A. AND FARLEY M., *The Right to Damages in European Law*, Kluwer 2010;

BLAUBERGER M., *National Responses to European Court Jurisprudence*, West European Politics (2014) 37, pp. 457-474;

BLINDER S., ALLEN W., *Constructing Immigrants: Portrayals of Migrant Groups in British National Newspapers, 2010–2012,* in International Migration Review, (2016) 50;

BLUMANN C., *Citoyenneté européenne et champ d'application personnel du droit communautaire*, in Revue des affaires européennes, (2003/2004), pp. 73-82;

BOBEK M., *Thou Shalt Have Two Masters: The Application of European Law by Administrative Authorities in the New Member* States, Review of European Administrative Law, [2008] 1, pp. 51-63;

BOSWELL C. AND GEDDES A., *Migration and Mobility in the European Union,* Palgrave Macmillan, 2010;

BRADLEY A.W. ANd Ewing K., *Constitutional and Administrative Law*, 14th ed, Pearson/Longman 2007;

BREARLEY M. AND HOSKINS M., *Remedies in EC Law*, (2nd ed, Sweet & Maxwell 1998);

BRENT R., *Directives: Rights and Remedies in English and Community Law*, Informa Law/Routledge, 2001;

BROBERG M., *The Preliminary Reference Procedure and Questions of International and National Law*, Yearbook of European Law, 2009;

BROBERG M., FENGER N., *Preliminary References to the European Court of Justice*, 2nd ed, Oxford University Press, 2014;

BROWN N. AND KENNEDY T., *The Court of Justice of the European Communities*, 5th edition, Sweet & Maxwell, 2000;

BÖRZEL T., *Non-compliance in the European Union: pathology or statistical artefact?*, inJournal of European Public Policy, (2001) 8, pp. 803–824, 804-806;

BÖRZEL T., HOFMANN T., PANKE D., SPRUNGK C., *Obstinate and Inefficient: Why Member States Do Not Comply With European Law*, in Comparative Political Studies, (2010) 43, pp. 1363-1390;

BÖRZEL T., *Environmental Leaders and Laggards in Europe. Why there is (not) a “Southern Problem”*, Ashgate, 2003;

BÖRZEL T., *Why There Is No “Southern Problem”: On Environmental Leaders and Laggards in the European Union*, in Journal of European Public Policy, (2000) 7, pp. 141-162;

BÖRZEL T., *Participation Through Law Enforcement: The Case of the European Union*, in Comparative Political Studies, (2006) 39 , 128-152;

BUGDAHN S., *Of Europeanization and Domestication: The Implementation of the Enviromental Information Directive in Ireland, Great Britain and Germany*, in Journal of European Public Policy, (2005) 12, pp. 177-199;

BUSSANI M., MATEI U. (eds), *The Cambridge Companion to Comparative Law*, Cambridge University Press, 2012;

CARTABIA M., *The Italian Constitutional Court and the Relationship between the Italian Legal System and the European Community*, in Michigan Journal of International Law, (1990) 12, pp. 173-203;

CHALMERS D., *Judicial Preferences and the Community Legal Order*, in Modern Law Review, (1997) 60, pp. 167-199;

CHALMERS D., *The Application of Community Law in the United Kingdom, 1994–1998,* in Common Market Law Review, (2000) 37, pp. 83–128;

CHALMERS D., *The Much Ado about Judicial Politics in the United Kingdom*, (2000), in Harvard Jean Monnet Working Paper No 1/00, 25-27;

CHALMERS D., *The positioning of EU judicial politics within the United Kingdom*, (2000) 23(4), in West European Politics, pp. 169-210;

CAMBIEN N., *Union Citizenship and Immigration: Rethinking the Classics?,* in European Journal of Legal Studies, (2012) 5, pp. 8-31;

CAPOTORTI F., *Legal Problems of Directives, Regulations and their Implementation*, in SIEDENTOPF H. and ZILLER J. (eds), *Making European Policies Work, Volume 1: Comparative Syntheses* (Sage 1988), pp. 151-168;

CARRERA S., ATGER ANAÏS FAURE, *L’Affaire des Roms: A Challenge to the EU’s Area of Freedom, Security and Justice*, Papers in Liberty and Security in Europe, (2010) CEPS, September 2010;

CARRERA S., ATGER ANAÏS FAURE, *Implementation of Directive 2004/38 in the context of EU Enlargement - A proliferation of different forms of citizenship?,* (2009) Centre for European Studies Special Report 17;

CARRERA S., *Shifting Responsibilities for EU Roma Citizens: The 2010 French Affair on Roma Evictions and Expulsions Continued*, Papers in Liberty and Security in Europe, (2013) CEPS No 55, June 2013;
CERVATI A. A., *Les sources et catégories des aces juridiques – l'Italie,* in G. Winter (ed), *Sources and Categories of European Union Law*, Nomos 1996, pp. 219-234;
CLAROS E., DI TELLA A., *Briefing: Tourism in the EU Economy*, European Parliament Research Service, July 2014 available at http://www.europarl.europa.eu/EPRS/140843REV1-tourism-in-the-EU-economy-FINAL.pdf;
COLGAN D., 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives' (2002) 8 European Public Law 545-568;
COLLINS K. AND EARNSHAW D., *The Implementation and Enforcement of European Community Environmental Legislation*, in Environmental Politics, (1992) 1(4), pp. 213-249;
CONANT L., *Compliance and What EU Member States Make of It*, in Cremona M. (ed.), *Compliance and the Enforcement of EU Law*, Oxford University Press 2012;
CONANT L., *Justice Contained: Law and Politics in the European Union*, Cornell University Pres 2002;
COTTERRELL R., *Comparative Law and Legal Culture*, in REIMANN M. and ZIMMERMANN R. (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 709-737;
CRAIG P., *Development of the EU*, in BARNARD C. AND PEERS S. (eds), in *European Union Law*, in Oxford University Press 2014), pp. 9-35;
CRAIG P., *The Legal Effect of Directives: Policy, Rules and Exceptions,* in European Law Review, (2009) 34, pp. 349-377;
CRAIG P. AND DE BÚRCA G., *EU Law: Text, Cases and Materials*, 6th ed, Oxford University Press, 2015;
CRAIG P. , *Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law*, in Oxford Journal of Legal Studies, (1992) 12, pp. 453-479;
CURRIE S., *"Free" movers? The post-accession experience of accession-8 migrant workers in the UK,* in European Law Review, (2006) 31, pp. 207-229;
CURRY D., VAN DE WALLE S. AND GADELLAA S., *On Public Administration as an Academic Discipline: Trends and Changes in the COCOPS Academic Survey of European Public*

Administration Scholars (2014), Coordinating for Cohesion in the Public Sector of the Future Report Work Package 8;

CURTIN D., *Directives: The Effectiveness of Judicial Protection of Individual Rights*, in Common Market Law Review, (1990) 27;

CURTIN D., *The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context*, in European Law Review, (1990) 15, pp. 195-223;

DANIELE L., *Diritto dell'Unione europea* (2007); DANNEMANN G., *Similiarities or Differences*, in REIMANN M. and ZIMMERMANN R. (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press 2006, pp. 383-419;

DASHWOOD A., *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity*, in Cambridge Yearbook of European Legal Studies, (2006-7) 9, pp. 81-109;

D'ASCIA L., *Diritto degli stranieri e immigrazione*, Giuffrè Editore 2009;

DE CRUZ P., *Comparative Law in a Changing World*, 3d ed, 2008, Routledge-Cavendish;

DEHOUSSE R., Comparing National and EC Law: The Problem of the Level of Analysis, in American Journal of Comparative Law, (1994) 42, pp. 761-781;

DE PASQUALE T., *Problemi interpretativi della nozione giuridica di cittadinanza: un concetto "europeizzato" di diritto pubblico interno? La controversa relazione tra cittadinanza dell'Unione europea e cittadinanze nazionali degli Stati Membri*, in Rivista Italiana di Diritto Pubblico Comunitario, (2012) 22, pp. 445-479;

DI FILIPPO M., *La libera circolazione dei cittadini comunitari e l'ordinamento italiano : (poche) luci e (molte) ombre nell'attuazione della Direttiva 2004/38/CE*, in Rivista di diritto internazionale, (2008) 91, pp. 420-448;

DIMITRAKOPOULOS D., *The Transposition of EU Law: "Post-Decisional Politics" and Institutional Economy*, in European Law Journal, (2001) 7, pp. 442-458;

DIMITROVA A. E TOSHKOV, *Post-accession Compliance between Administrative Co-ordination and Political Bargaining*, European Integration online Papers, Special Issue 2 No. 19, (2009) 13 <http://eiop.or.at/eiop/pdf/2009-019.pdf > accessed on 29 June 2015.

DOLLAT P., *La Citoyenneté Européenne: Théorie et Statuts*, Bruylant 2008;

DONELAN E., *The Role of the Office of the Parliamentary Draftsman in the Implementation of European Union Directives in Ireland*, in *Statute Law Review*, (1997) 18, pp. 1-20;

DOUGAN M., *National Remedies Before the Court of Justice*, Hart Publishing, 2004;

DOUGAN M., *When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy*, in Common Market Law Review, (2007) 44, pp. 931-963;

DORAN E., *Direct Effect: Need Lawyers Read EC Directives?,* in International Company and Commercial Law Review, (1993) 4, pp. 174-178;

DRAKE S. *Twenty Years after Von Colson - The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights,*in European Law Review, (2005) 30, pp. 329-348;

DUBOS O., *Les juridictions nationales, juge communautaire*, Dalloz, 2001;

DUINA F., *Explaining legal implementation in the European Union*, in *International Journal of the Sociology of Law*, (1997) 25, pp. 155-179;

DUINA F. AND BLITHE FRANK, *Nation-states and common markets: the institutional conditions for acceptance*, in Review of International Political Economy, (1999) 6, 6(4), pp. 494–530;

DUTERME F., *Collection Orange, Sous-collection Etrangers*, Vanden Broele, 2014;

EILSTRUP-SANGIOVANNI M. AND VERDIER D., European Integration as a Solution to War, in European Journal of International Relations, (2005) 11, 99–135;

ELMORE M. AND STARUP P., *Union Citizenship – Background, Jurisprudence, and Perspective: the Past, Present, and Future of Law and Policy*, Yearbook of European Law, (2007) 26, pp. 57-113;

ELSUWEGE P.V. AND KOCHENOV D., *On The Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, in European Journal of Migration and Law, (2011) 13, pp. 443-466;

EVERSON M, *The Legacy of the Market Citizen,* in SHAW J. AND MORE (eds) *New Legal Dynamics of European Union*, Clarendon Press 1995, pp. 73-90;

ENGSTRÖM J., *National Courts' Obligation to Apply Community Law Ex Officio – The Court Showing new Respect for Party Autonomy and National Procedural Autonomy?*, in Review of European Administrative Law, (2008) 1, pp. 67-89;

ENGSTRÖM J., *The Principle of Effective Judicial Protection after the Lisbon Treaty - Reflection in the light of case C-279/09*, (2011) 4, in Review of European Administrative Law, pp. 53-68;

EVANS A., *European Citizenship*, in Modern Law Review, (1982) 45, pp. 497-515;

FABBRINI S. AND DONÀ A., *Europeanisation as Strengthening of Domestic Executive Power? The Italian Experience and the Case of the "Legge Comunitaria"*, in Journal of European Integration, (2003) 25, pp. 31-50;

FALKNER G., HARTLAPP M. , LEIBER S. & TREIB O., *Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?,* in West European Politics, (2004) 27, pp. 452-473;
FALKNER G., TREIB O., HARTLAPP M., LEIBER S., *Complying with Europe - EU Harmonisation and Soft Law in the Member States*, Cambridge University Press, 2005;
FALKNER G., TREIB O., *Three Worlds of Compliance or Four? The EU15 Compared to New Member States*, in Journal of Common Market Studies, (2008) 46, pp. 293-313.
GAJA G., *Constitutional Court (Italy), Decison No. 176 of 26 October 1981, S.p.a. Comavicola v. Amministrazione delle finanze dello Stato*, in Common Market Law Review, (1982) 19, pp. 455-461;
GAJA G., *New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law*, in Common Market Law Review, (1990) 27, pp. 83-95;
GESTEL R. and MICKLITZ H., *Comparative Law and EU Legislation,* in ADAMS M. AND HEIRBAUT D. (eds), *The Method and Culture of Comparative Law*, Hart Publishing 2014, pp. 301-317;
GIBSON J. AND CALDEIRA G., *The Legal Cultures of Europe,* in Law and Society Review, (1996) 30 55-85;
GIL IBAÑEZ A., *The Administrative Supervision & Enforcement of EC Law*, Hart, 1999;
GIL IBAÑEZ A., The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228, in Law and Contemporary Problems, (2004) 68, pp. 135-159;
GOLUB J., *Sovereignty and Subsidiarity in EU Environmental Policy*, in Political Studies, (1996) 44, pp. 686-703;
GROENENDIJK K., Forty Years of Free Movement of Workers: Has it been a Success and Why?, in MINDERHOUD P. AND TRIMIKLINIOTIS N. (eds) *Rethinking the Free Movement of Workers: The European Challenges Ahead*, Wolf Legal Publishers, 2009;
GROHS S., *Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases*, in CREMONA M. (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) pp. 57-73;
GROSSWALD CURRAN V., *Comparative Law and Language* in REIMANN M. AND ZIMMERMANN R. (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2006, pp. 675-707;
GUILD E., *The Legal Elements of European Identity: EU Citizenship and EU Migration Law*; Kluwer 2004;

GUILD. E., GORTÁZAR ROTAECHE C. AND KOSTAKOPOULO D., *The Reconceptualization of European Union Citizenship*, Brill/Nijhoff, 2014, pp. 343-360;

GUILD. E., CARRERA S., *Introduction,* in BIGO D., CARRERA S. and GUILD E., *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas*, Ashgate, 2012, pp. 1-20;

GUILD. E., *Reflecting EU law faithfully? R (Bilal Ahmed) v SSHD IJR [2015] UKUT 00436 (IAC)* (*Free Movement*, 14 September 2015), https://www.freemovement.org.uk/reflecting-eu-law-faithfully-r-bilal-ahmed-v-sshd-ijr-2015-ukut-00436-iac/;

GUILD. E., PEERS S. AND TOMKIN J., *The EU Citizenship Directive - A Commentary*, Oxford University Press 2014;

GUTWIRTH S., DE HERT P., PAEPE P., *Correspondence Table, Belgium*, 1 and 74, Annex to Milieu and Edinburgh University, *Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union* (December 2008).

HAAG M., *C-67/14 Alimanovic: the not so fundamental status of Union citizenship?*, in *Durham European Law Institute law blog*, 29 September 2015, https://delilawblog.wordpress.com/2015/09/29/maria-haag-c%E2%80%916714-alimanovic-the-not-so-fundamental-status-of-union-citizenship/;

HALL S., *Nationality, Migration Rights and Citizenship of the Union*, Nijhoff, 1995;

HANSEN P., *Undermining Free Movement – Migration in an Age of Austerity*, *Eurozone*, 6 February 2015, http://www.eurozine.com/articles/2015-02-06-hansenp-en.html;

HANFT J., *Francovich* and *Bonifaci v. Italy*; *EEC Member State Liability for Failure to Implement Community Directives*, in Fordham International Law Journal, (1991) 15, pp. 1237-1274;

HARTLAPP M. AND FALKNER G., *Problems of Operationalization and Data in EU Compliance Research*, in European Union Politics, (2009) 10, pp. 281-304;

HARTLAPP M., *Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe*, in West European Politics, (2014), pp. 805-824;

HARTLAPP M.,*Implementation of EU Social Policy Directives in Belgium: What Matters in Domestic Politics?*, in Journal of European Integration, (2009) 31, pp. 467–488;

HAVERLAND M, *National Adaptation to European Integration: The Importance of Institutional Veto Points*, in *Journal of Public Policy*, (2000) 20, pp. 83-103;

HEPWORTH K., *Abject citizens: Italian “Nomad Emergencies” and the Deportability of Romanian Roma*, in Citizenship Studies, (2012) 16, pp. 431-449;

HILLE P. AND KNILL C., *"It’s the Bureaucracy, Stupid”: The Implementation of the Acquis Communautaire in EU Candidate Countries, 1999–2003*, (2006) 7, in European Union Politics, pp. 531-552.

HILF M., *Comparative Law and European Law,* in Encyclopaedia of International Law, Rudolf Bernhardt, Volume 10, 1997, pp. 45-49;

HILSON C. AND DOWNES A., *Making Sense of Rights: Community Rights in EC Law*, in European Law Review, (1999), 24, pp. 121-138;

HINE D., *European Policy-Making and the Machinery of Italian Government*, in South European Society and Politics, (2000) 5 , pp. 25-46;

HOBOLTH M. AND SINDBJERG MARTINSEN D., *Transgovernmental networks in the European Union: improving compliance effectively?*, in Journal of European Public Policy, (2013) 20, pp. 1406-1424;

HOOGENBOOM A., *Mobility of Students and the Financial Sustainability of Higher Education Systems in the EU: A Union of Harmony or Irreconcilable Differences?*, in Croatian Yearbook of European Law and Policy, (2013) 9, pp. 15-59;

HUNTER A., *Family members: an analysis of the implementation of the Citizens Directive in UK law*, in Journal of Immigration, Asylum and Nationality Law, (2007) 21, pp. 191-200;

JACOBS F., *Citizenship of the EU - A Legal Analysis,* in European Law Journal, (2007) 13, pp. 591-610;

JACQUESON C., *Union Citizenship and the Court of Justice: Something New under the Sun? Towards Social Citizenship,* European Law Review, (2002) 27, pp. 260-281;

JALUZOT B., *Méthodologie du Droit Comparé: Bilan et prospective*, in Revue Internationale de Droit Comparé, (2005) 57, pp. 29-48;

JENSEN C., *Implementing Europe: A Question of Oversight*, in European Union Politics, (2007) 8, pp. 451-477;

KADELBACH S., *European Administrative Law and the Law of a Europeanized Administration*, in JOERGES C. AND DEHOUSSE R. (eds), *Good Governance in Europe's Integrated Market,* Oxford University Press, 2002, pp. 167-206;

KAEDING M., *Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives across Member States*, Leiden University Press 2007;

KAEDING M., *Legal Borders in the EU? : Transposition of European Transport Directives in France, Germany, Greece, Italy and the United Kingdom*, in European Journal of Law Reform (2007) 9, pp. 619-639;

KAPTEYN PAUL AND VAN THEMAAT P., *Introduction to the Law of the European Communities* (Lawrence Gormley (ed), 3rd edition, Kluwer Law 1998);

KLAMERT M., *Judicial Implementation of Directives and Anticipatory Indirect Effect*, Common Market Law Review, (2005) 43, pp. 1251-1275;

KNILL C., *Implementing European Policies: The Impact of National Administrative Traditions,* in EUI Working Paper 97/56, (1997),

KOVAR R. AND SIMON D., *La citoyenneté européenne*, in Cahier de droit européen (1993) 29, pp. 285-315;

KOCHENOV D. AND PLENDER R., *EU Citizenship: from an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in European Law Review, (2012) 37, pp. 369-396;

KOCHENOV D., *A real European Citizenship. A new jurisdiction test*, Columbia Journal of European Law, (2011) 18 , pp. 55-109;

KOCHENOV D., (ed) *EU Citizenship and Federalism: the Role of Rights,* Cambridge University Press 2015, forthcoming;

KÖNIG T., MÄDER L., *Non-conformable, Partial and Conformable Transposition: A Competing Risk Analysis of the Transposition Process of Directives in the EU15*, in European Union Politics, 2013, pp. 46-69;

KOOPMANS T., *The Birth of European Law at the Crossroads of Legal Traditions,* in American Journal of Comparative Law (1991), 39, pp. 493-507;

KOSTAKOPOULOU D., *European Union Citizenship. Writing the Future,* European Law Journal, (2007) 13, pp. 623-646;

KRÁL R., *Questioning the Limits of Invocability of EU Directives in Triangular Situations,* European Public Law, (2010) 16, pp. 239-247;

KRAMER S., *Had they only worked one month longer! An Analysis of the Alimanovic Case [2015] C-67/14, European Law*, 29 September 2015, http://europeanlawblog.eu/?tag=c-6714-alimanovic;

KRISLOV S., EHLERMANN C. AND WEILER J., *The Political Organs and the Decision-Making Process in the United States and the European Community*, in CAPPELLETTI M., SECCOMBE M, WEILER J. (eds.), *Integration Through Law, Volume 1: Methods, Tools and Institutions*

Book: Political Organs, Integration Techniques and Judicial Process, de Gruyter, 1986, pp. 3-112;

LEBOEUF L. AND SAROLÉA S., *L'invocation du droit de l'Union européenne devant le Conseil du contentieux des étrangers*, in N. CARIAT ET J. NOWAK, *Le droit de l'Union européenne et le juge belge*;

LACKHOFF K. AND NYSSENS H., *Direct Effect of Directives in Triangular Situations,* in European Law Review, (1998) 23, pp. 397-413;

LAFARGE F., *Administrative Cooperation between Member States and the Implementation of EU Law,* in European Public Law, (2010) 16, pp. 597-616;

LANG A. AND NASCIMBENE B., *L'attuazione in Italia della Direttiva 2004/38/CE sulla libera circolazione dei cittadini dell'Unione europea*, in Diritto, immigrazione e cittadinanza, (2007) 9, pp. 43-63;

NASCIMBENE B. AND DI PASCALE A., *Italy,* in XXVI FIDE Congress Report, Volume 2: Union Citizenship: Development, Impact and Challenges' (Copenhagen, 28-31 May 2014) 669-681, 673-677;

LATINI M., *Conformity Study for Italy*, Annex to Milieu and Edinburgh University, *Conformity studies of Member States' national implementation measures transposing Community instruments in the area of citizenship of the Union*, Report for Commission, 2008;

LE DEN X., SYLVEST D., *Understanding Citizens' and Businesses' Concerns with the Single Market: a View from the Assistance Services'*, (Report for Commission, Ramboll 2011) 8, 10, 26-28 http://ec.europa.eu/internal_market/strategy/docs/20concerns/feedback_report_en.pdf;

LENAERTS K., *Le Droit Comparé dans le Travail du Juge Communautaire,* in VAN DER MENSBRUGGHE F., *L'Utilisation de la Méthode Comparative en Droit Européen*, Presses Universitaires de Namur 2003, pp. 111-168;

LENAERTS K. AND VAN NUFFEL P., *European Union Law* (Robert Bray and Nathan Cambien (eds), 3rd edition, Sweet and Maxwell, 2011;

LENAERTS K., ARTS D., MASELIS I., *Procedural Law of the European Union*, Robert Bray ed, Sweet & Maxwell, 2006;

LENAERTS K., MASELIS I. AND GUTMAN K., *EU Procedural Law,* JANEK TOMASZ NOWAK ed, Oxford University Press 2014;

LENZ M., *Horizontal What? Back to basics,* in European Law Review, (2000) 25, pp. 502-522;

LEMMENS K., *Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship,* in ADAMS M. AND BOMHOFF J. (EDS.), *Practice and Theory in Comparative Law*, Cambridge University Press 2014, pp. 302-325;

LIPSEY R. AND HARBURY C., *First Principles of Economics*, Weidenfeld and Nicolson, 1988;

LORD STEYN, *The Challenge of Comparative Law*, in European Journal of Law Reform, (2006) 8, pp. 3-12;

LOCK T., *Is Private Enforcement of EU Law through State Liability a Myth? – An Assessment 20 Years after Francovich,* in Common Market Law Review, (2012) 49, pp. 1675-1702;

LOTTINI M., *From "Administrative Cooperation" in the Application of European Union Law to "Administrative Cooperation" in the Protection of European Rights and Liberties,* in European Public Law, (2012) 18, pp. 127-147;

MACRORY R., *Sources and categories of legal acts – Britain*, in WINTER G. (ed), *Sources and Categories of European Union Law* (Nomos 1996) 69-93;

MAAS M., *Equality and the Free Movement of People: Citizenship and Internal Migration*, in MAAS W. (ed), *Democratic Citizenship and the Free Movement of People*, Nijhoff, 2013, pp. 9-30;

MAAS W., *The Genesis of European Rights*, in Journal of Common Market Studies, (2005) 43, pp. 1009-1025;

MAAS W., *Migrants, states, and EU citizenship's unfulfilled promise,* in Citizenship Studies, (2008) 12 , pp. 583-596;

MAAS W., *Unrespected, Unequal, Hollow: Contingent Citizenship and Reversible Rights in the European Union,* in Columbia Journal of European Law, (2009) 15, pp. 265-280;

MACLENNAN J., *Decentralized Enforcement of EC Law: Is the European Commission Still the Guardian of the Treaties?,* in Proceedings of the Annual Meeting of the American Society of International Law, (1997) 91, pp. 165-172;

MAILLARD S., *L'émergence de la citoyenneté sociale européenne*, Presses Universitaires d'Aix-Marseille, 2008;

MARTINICO G., *The interpretative rulings of the ECJ as a legal source in the EC law,* St Anna Legal Studies Research Paper 2/2008.

MARTINIELLO MARCO ET AL, *Les expulsions de citoyens et citoyennes européens. Un phénomène qui nous alarme, et nous mobilise, Université de Liège*, 26 May 2014; http://blogs.ulg.ac.be/marcomartiniello/2014/05/26/les-expulsions-citoyens-citoyennes-europeens/, accessed 29 December 2015;

MASTENBROEK E., *EU Compliance: Still a "Black Hole"?*, in Journal of European Public Policy, (2005) 12, pp. 1103-1120;

MASTENBROEK E. AND KAEDING M., *Europeanization Beyond the Goodness of Fit: Domestic Politics in the Forefront*, in *Comparative European* Politics, (2006) 4, pp. 331-354;

MATHER J.D., *The Court of Justice and the Union Citizen*, in European Law Journal, (2005) 11, pp. 722-743;

MBAYE H., *Assessing Competing Explanations for Compliance and Non-Compliance with European Union Policies*, Midsouth Political Science Review, (2009) 10, pp. 63-82;

MCCUBBINS M. AND SCHWARTZ T., *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, in *American Journal of Political Science*, pp. 165-179;

MELLAR B., *Transposition, implementation and enforcement of consumer law,* PE416.221 (European Parliament 2009) 2;

MERLINO M., *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CEPS Challenge Research Paper No 14/2009;

MILLNS S., *European Comparative Legal Studies in Public Law* in ADAMS M. and HEIRBAUT D. (eds), *The Method and Culture of Comparative Law*, Hart Publishing 2014, pp. 283-300;

MILIO S. (ed), *From Policy to Implementation in the European Union*, IB Tauris, 2010;

MOYSE F., *La Libre Circulation des Étudiants : Les Bourses d'Études*, in CARLIER J. and CHENEVIÈRE C. (eds), *La Libre Circulation des Travailleurs et des Citoyens*, (2013) CeDIE Working Papers 2013/7, pp. 12-20;

MONATERI P., *Critique et différence: le droit comparé en Italie,* in Revue Internationale de Droit Comparé, (1999) 51, pp. 989-1002;

NASCIMBENE B., *Rom, rumeni e bulgari: una diversa applicazione delle norme dell'Unione europea sulla libera circolazione?,* in Corriere giuridico, (2010), pp. 1545-1550;

NASCIMBENE BRUNO, *La disputa sui Rom e i diritti dei cittadini dell'UE,* Istituto Affari Internazionali Documenti, (2010), IAI, pp. 10-19;

NELKEN D., *Legal Culture*, in SMITS J. (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2012), 480-490.

NICOL D., *EC Membership and the Judicialization of British Politics*, Oxford University Press 2001;

O'KEEFFE D., *Union Citizenship*, in O'KEEFFE D. and TWOMEY P. (eds), *Legal Issues of the Maastricht Treaty*, Chancery Law, 1994, pp. 87-108;

O'LEARY S., *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, Kluwer, 1996;

O'LEARY S., *The curious case of frontier workers and study finance: Giersch,* Common Market Law Review, (2014) 51, 601-622;

OLSEN E., *The Origins of European Citizenship in the First Two Decades of European Integration*, in Journal of European Public Policy, (2008) 15, pp. 40-57;

ÖRÜCÜ E., *Methodological Aspects of Comparative Law*, in European Journal of Law Reform, (2006) 8, pp. 29-42;

ÖRÜCÜ E., *Methodology of Comparative Law,* in SMITS J. (ed), *Elgar Encyclopaedia of Comparative Law*, Edward Elgar 2012, pp. 560-576;

OPESKIN B., PERRUCHOUD R. AND REDPATH-CROSS R. (eds), *Foundations of International Migration Law*, Cambridge University Press 2012;

ORŠOLIĆ DALESSIO T., *The Social Dimension of EU Citizenship – A Castle in the Air or Construction Gone Wrong?,* in German Law Journal, (2013), pp. 869-888;

O'BRIEN C., *An insubstantial pageant fading: a vision of EU citizenship under the AG's Opinion in C-308/14 Commission v UK* (*EU Law Analysis*, 7 October 2015), <http://eulawanalysis.blogspot.it/2015/10/an-insubstantial-pageant-fading-vision.html> accessed 8 October 2015;

PANKE D., *The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law*, in Journal of European Public Policy, (2007) 14, pp. 847-866;

PASCOUAU Y., *Strong attack against the freedom of movement of EU citizens: turning back the clock*, in European Policy Centre Commentary (30 April 2013): http://www.epc.eu/documents/uploads/pub_3491_strong_attack_against_the_freedom_of_movement_of_eu_citizens.pdf;

PELKMANS J., *Economic Integration: Methods and Economic Analysis*, Pearson Education, 2006;

PEERS S., *Free Movement, Immigration Control and constitutional conflict*, in European Constitutional Law Review, (2009) 5, pp. 173-196;

PEERS S., *Benefit Tourism by EU citizens: the CJEU just says No*, *EU Law Analysis*, 11 November 2014, http://eulawanalysis.blogspot.be/2014/11/benefit-tourism-by-eu-citizens-cjeu.html;

PEERS S., *EU citizens' access to benefits: the CJEU clarifies the position of former workers*, (*EU Law Analysis*, 15 September 2015, http://eulawanalysis.blogspot.co.uk/2015/09/eu-citizens-access-to-benefits-cjeu.html;

PEERS S., *Leaked document reveals EU plans to suspend Schengen for two years,* (*EU Law Analysis*, 2 December 2015), http://eulawanalysis.blogspot.co.uk/2015/12/exclusive-leaked-document-reveals-eu.html;
PEERS S., *Cameron's Chatham House speech: Full speed ahead for the renegotiation of the UK's EU membership?*, (*EU Law Analysis*, 10 December 2015) http://eulawanalysis.blogspot.it/2015/11/camerons-chatham-house-speech-full.html;
PEERS S., *The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms*, Statewatch Analysis No 72(2008).

PESCATORE P., *Le recours, dans la jurisprudence de la Cour de Justice des Communautés Européennes, à des normes déduites de la comparaison des droits des États Membres*, in Revue Internationale de Droit Comparé, 1980, pp. 337-346;
PESCATORE P., *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, European Law Review, (1983) 8, pp. 155-177 (reprinted (2015) 40 European Law Review, 135-153);
PÓLTORAK N., *European Union Rights in National Courts*, Kluwer, 2015;
PLATSAS A., *The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks,* in Electronic Journal of Comparative Law, (2008) 12(3), http://www.ejcl.org/123/art123-3.pdf, accessed on 10 July 2015;
PÓŁTORAK N., *European Union Rights in National Courts*, Kluwer 2015;
POZZO B., *The Implementation of the Seveso Directives in an Enlarged Europe*, Wolters Kluwer 2009);
PRECHAL S., *Directives in EC Law* (2nd edition), Oxford University Press, 2005;
PRECHAL S., *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in BARNARD C. (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford University Press 2007, pp. 35-69;
SACHA PRECHAL, *Does Direct Effect Still Matter?*, in Common Market Law Review, (2000) 37, pp. 1047-1069;
PRECHAL S., *Community Law in National Court: The Lessons from Van Schijndel*, in Common Market Law Review, (1998) 35, pp. 681-706;
PRECHAL S., WIDDERSHOVEN R., *Redefining the Relationship Between "Rewe-effectiveness" and Effective Judicial Protection*, in Review of European Administrative Law, (2011) 4, pp. 31-50;

PRECHAL S., DE VRIES S., *Seamless Web of Judicial Protection in the Internal Market?*, European Law Review, (2009) 34, pp. 5-24;

RAUSTIALA K., SLAUGHTER A., *International Law, International Relations and Compliance,* in CARLSNAES W., RISSE T. and SIMMONS B. (eds), *Handbook of International Relations* (Sage 2002);

RAMSEY L., *The Copy Out Technique: More of a 'Cop-Out' than a Solution*, in Statute Law Review, (1996) 17, p. 218-228;

RAY L., *Measuring Party Orientation Towards European Integration: Results from an Expert*

Survey, in European Journal of Political Research, (1999) 36, pp. 283-306;

RECCHI E., *Cross-State Mobility in the EU: Trends, puzzles and consequences*, in European Societies, (2008) 10, pp. 197-224;

REIMANN M., *Beyond National Systems: A Comparative Law for the International Age*, Tulane Law Review, (2000-2001), pp. 1103-112;

REIMANN M, *Comparative Law and Neighbouring Disciplines* in BUSSANI M. and MATEI U. (eds), *The Cambridge Companion to Comparative Law*, Cambridge University Press 2012, p. 21;

REITZ J., *How to Do Comparative Law,* in American Journal of Comparative Law, (1998) 46, pp. 617-636;

RILES A., *Wigmore's Treasure Box: Comparative Law in the Era of Information,* Harvard International Law Journal, (1999) 40, pp. 221-283;

RENAUDIÈRE G., *Free movement and social benefits for economically inactive EU citizens: The Dano judgment in historical context*, *EU Law Analysis*, 12 November 2014, http://eulawanalysis.blogspot.co.uk/2014/11/free-movement-and-social-benefits-for.html;

RIECHENBERG K., *Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration*, in Fordham International Law Journal, (1999) 22, pp. 696-767;

ROSAS A., *Ensuring Uniform Application of EU Law in a Union of 27: The Role of National Courts and Authorities*, in DELEVOYE J. AND NIKIFOROS DIAMANDOUROS P. (eds), *Rethinking Good Administration in the European Union – Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries*, Office for Official Publications of the European Communities 2008, pp. 16-20;

ROSE R., *Representing Europeans: A Pragmatic Approach*, Oxford University Press, 2013;

ROSS M., *Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?*, in European Law Review, (2006) 31, pp.476-498;

SALTER M., *Rights of passage. The Passport in International Relations*, Lynne Reiner, 2003;

SÁNCHEZ S. I., *Free Movement of Persons and Regional International Organisations*, in PLENDER R. (ed), *Issues in International Migration Law*, Brill/Nijhoff 2015, pp. 231-235;

SCARCIGLIA R., *Introduzione al Diritto Pubblico Comparato*, Il Mulino, 2006;

SCHMIDT S., *Beyond Compliance. Europeanization through Negative Integration and Legal Uncertainty*, in Journal of Comparative Policy Analysis: Research and Practice, (2008) 10, pp. 299-308;

SCHMIDT S., *Judicial Europeanisation: The Case of Zambrano in Ireland*, in West European Politics, (2014) 37, pp. 769-785;

SCOTT A., *The Role of Concordats in the New Governance of Britain: Taking Subsidiarity Seriously?*, Harvard Jean Monnet Working Paper 8/00;

SEDELMEIER U., *Post-accession Compliance with EU Gender Equality Legislation in Postcommunist New Member States,* in European Integration online Papers No 23, (2009) 13, http://eiop.or.at/eiop/texte/2009-023a.htm accessed 4 July 2015;

SEFTON-GREEN R., *Compare and Contrast: Monstre à deux têtes,* in Revue Internationale de Droit Comparé, (2002) 54, pp. 85-95;

SHAW J., *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, EUI Working Paper RSCAS 2010/60,

SHAW J., *Citizenship of the Union: First Steps in the European Court of Justice, European Public Law*, (1998) 4, pp. 533-559;

SHAW J., *The Interpretation of European Union Citizenship*, Modern Law Review, (1998) 61, pp. 293-337;

SHAW J., *Citizenship of the Union: Towards Post National Membership?* in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, vol VI(1), Kluwer 1998, pp. 237-347;

SHAW J., *Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law,* Cambridge Yearbook of European Legal Studies, (2015) 17, pp. 247-286;

SHAW J. AND MILLER N., *When Legal Worlds Collide: An Exploration of What Happens When EU Free Movement Law Meets UK Immigration Law*, in European Law Review, (2012) 38, pp. 137-166;

SHUIBHNE N. , *The Resilience of EU Market Citizenship*, in Common Market Law Review, (2010) 47, pp. 1597–1628;

SHUIBNHE N.N., *The Coherence of EU Free Movement Law*, Oxford University Press, 2014;

SHUIBHNE N. N., SHAW J., *General Report* in *XXVI FIDE Congress Report, Volume 2: Union Citizenship: Development, Impact and Challenges* (Copenhagen, 28-31 May 2014);

SIEDENTOPF H. AND HAUSCHILD C., *Phases of Implementation,* in SIEDENTOPF H. AND ZILLER J. (eds), *Making European Policies Work, Volume 1: Comparative Syntheses*, Sage, 1988, p. 26-72;

SIEMS M., *Comparative Law*, Cambridge University Press, 2014, pp. 13-40;

SIKORA A., *Administrative Practice as a Failure of a Member State to Fulfil its Obligations under Community Law*, in Review of European Administrative Law, (2009) 2, pp. 5-27;

SKOURIS V., *Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives*, in European Business Law Review, (2006) 17, pp. 241–255;

SLAGTER T., *National Parliaments and the ECJ: A View from the Bundestag*, in Journal of Common Market Studies (2009) 47, pp. 175-197;

SLAUGHTER A., STONE SWEET A, AND WEILER J. (eds), *The European Court and National Courts—Doctrine and Jurisprudence,* Hart Publishing, 1998;

SLEPCEVIC R., *The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits,* in Journal of European Public Policy, (2009) 16, pp. 378-394;

SMITH M., *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge 2010);

SNYDER F., *The Effectiveness of European Community Law. Institutions, Processes, Tools and Techniques*, in Modern Law Review, (1993) 56, pp. 19-54;

SPAVENTA E., *Earned citizenship – understanding Union citizenship through its scope* in BLAUBERGER M. AND SCHMIDT S., *Welfare migration? Free movement of EU citizens and access to social benefits,* in Research and Politics, (2014) 1, pp. 1-7;

SPENDZHAROVA A. AND VERSLUIS E., *Issue Salience in the European Policy Process: What Impact on Transposition?*, in Journal of European Public Policy (2013), pp. 1499-1516;

STELKENS U., WEIß W., MIRSCHBERGER M. (eds), *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (TMC Asser 2012);

STEUNENBERG B., RHINARD M., *The Transposition of European Law in EU Member States: Between Process and Politics*, in European Political Science Review, (2010) 2, pp. 495–520;

SUTHERLAND P., *The Internal Market after 1992: Meeting the Challenge. Report presented to the Commission by the High Level Group on the functioning of the Internal Market*, (1992);

SVERDRUP U., *Implementation and European Integration: A Review Essay*, 2005, ARENA Working Paper 25/2005, p. 9;

TALLBERG J., *Paths to Compliance: Enforcement, Management, and the European Union*, in International Organization, (2002) 56, pp. 609-643;

TEMPLE LANG J., *The Duties of National Authorities under Community Constitutional Law*, European Law Review, (1998) 23, 109-131;

TEMPLE LANG J., *The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections*, European Law Review, (2001) 26, pp. 84-93;

TEMPLE LANG J., *The Duties of National Courts under Community Constitutional Law*, in European Law Review, (1997) 22;

TESAURO G., *Diritto Comunitario*, 5th ed, 2008, CEDAM;

THYM D., *The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens,* in Common Market Law Review, (2015) 52, pp. 17-50;

THOMSON R., *Opposition through the back door in the transposition of EU directives*, European Union Politics, (2010) 11, pp. 577-596;

THOMSON R., ARREGUI J., LEUFFEN D., COSTELLO R., CROSS J., HERTZ R. AND JENSEN T., *A New Dataset on Decision-Making in the European Union before and after the 2004 and 2007 Enlargements (DEUII),* in Journal of European Public Policy, (2012) 19, pp. 604-622;

THOMSON R., TORENVLIED R., ARREGUI J, *The Paradox of Compliance: Infringements and Delays in Transposing European Union Directives, in* British Journal of Political Science, (2007) 37, pp. 685-709;

TIMMERMANS C., *Rapport Communautaire*, in XVIII FIDE Congress Report, Volume 1, *Les Directives Communautaires: Effets, Efficacité, Justiciabilité*, (Stockholm, 3-6 June 1998) 15-37, 33,35;

TONER H., *New Regulations implementing Directive 2004/38*, in Journal of Immigration, Asylum and Nationality Law, (2006) 20, pp. 158-178:

TOSHKOV D., KNOLL M. AND WEWERKA L., *Connecting the Dots: Case Studies and EU Implementation Research*, in Institute for European Integration Research Working Paper 10/2010, 5;

TOSHKOV D., *The Quest for Relevance: Research on Compliance with EU Law*, (2011), online paper <http://www.dimiter.eu/articles/Compliance%20review.pdf> accessed on 30 May 2015;

TOSHKOV D., In search of the worlds of compliance - culture and transposition performance in the European Union, in Journal of European Public Policy, (2007) 14, 933-959;

TOSHKOV D., KORTENSK E., *Does immigration undermine public support for integration in the European Union?*, in Journal of Common Market Studies, (2015) 53, pp. 910-925;

TOUZENIS K., *Free Movement of Persons in the European Union and Economic Community of West African States,* in migration studies 4, (2012) UNESCO;

TRABUCCHI A., *L'effet erga omnes des décision préjudicelles rendues par la Cour de justice des Communautés européennes,* in Revue Trimestrielle de droit européen, (1974) 10, pp. 56-87;

TREIB O., *Implementing and Complying with EU Governance Outputs, in Living Reviews in European Governance*, (2014) 9(1), p. 6, http://www.europeangovernance-livingreviews.org/Articles/lreg-2014-1/, accessed on 2 June 2015;

TREIB O., *Implementing and Complying with EU Governance Outputs*, in Living Reviews in European Governance, (2014) 9(1), http://www.europeangovernance-livingreviews.org/Articles/lreg-2014-1/ accessed on 2 June 2015;

TRIDIMAS T., *General Principles of EC Law*, Oxford, 1999;

TRIDIMAS T., *Black, White and Shades of Grey: Horizontality of Directives Revisited*, Yearbook of European Law, (2001) 21, pp. 327-354;

TURNER T., CROSS C., *Do Attitudes to Immigrants Change in Hard Times? Ireland in a European Context,* European Societies, (2015) 17, pp. 372-379;

VALCKE A., EU Free Movement Rules Come Under Challenge, Europe Update Issue 10, American Bar Association Section of International Law, November 2014, pp. 15-17;

VALCKE A., *Five Years of the Citizens Directive - Part 1' (2011) 25 Journal of Immigration, Asylum and Nationality Law 217-244, and 'Five Years of the Citizens Directive - Part 2*, in Journal of Immigration, Asylum and Nationality Law, (2011) 25, pp. 331-357;

VAN AELST P. AND LOUWERSE T., *Parliament without Government: The Belgian Parliament and the Government Formation Processes of 2007–2011*, in West European Politics, (2014) 37, pp. 475-496.

VAN GERVEN W., *On Rights, Remedies and Procedures*, in Common Market Law Review, (2000) 37, pp. 501-536;

VERHOEVEN M., *The Costanzo Obligation, – The Obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law*, Intersentia 2011;

VERHOEVEN M., *The "Costanzo Obligation" and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?*, in Review of European Administrative Law, (2010) 3, pp. 23-64;

VERSCHUERENH., *Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?,* in Common Market Law Review, (2015) 52, pp. 363-390

VERSLUIS E., *Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action,* in West European Politics, (2007) 30, pp. 50-67;

VERSLUIS E., *Explaining Variations in Implementation of EU Directives,* (2004) 8, European Integration online Papers, No 19: <http://eiop.or.at/eiop/texte/2004-019.htm> accessed 2 July 2015;

VILLANI U., *Istituzioni di Diritto dell'Unione europea*, 2008, Cacucci Editore;

VINK M., *Limits of European Citizenship: European Integration and Domestic Immigration Policies,* Constitutionalism Webpapers No 4/2003, available at https://www.wiso.uni-hamburg.de/fileadmin/sowi/politik/governance/ConWeb_Papers/conweb4-2003.pdf

VINK M., *Negative and Positive Integration in European Immigration Policies*, in European Integration Online Papers No 13, (2002) 6, http://eiop.or.at/eiop/pdf/2002-013.pdf;

WAINWRIGHT R., *Techniques of Drafting European Community Legislation: Problems of Interpretation*, Statute Law Review, (1996), 7-14;

WATSON A., Legal Transplants and European Private Law, in Electronic Journal of Comparative Law: <http://www.ejcl.org/44/art44-2.html> accessed on 10 July 2015, (2000) 4(4);

WATTEL P., *Köbler*, *CILFIT* and *Welthgrove*: We Can't Go On Meeting Like This, in Common Market Law Review, (2004) 41, pp. 177-190;

WEISS F. AND WOOLDRIDGE F., *Free Movement of Persons within the European Community*, Kluwer 2007;

WEATHERILL S., *Constitutional Issues in the Implementation of EC Law: Addressing the Imbalance in Favour of Market Deregulation* - Biannual Meeting of the European Community Studies Association, 29 May -1 June 1997, Seattle- 1;

WEATHERILL S., *Breach of Directives and breach of contract*, in European Law Review, (2001) 26, pp. 177-186;

WEATHERILL S., BEAUMONT P., *EU Law*, 3rd edition, Penguin Books, 1999;

WEATHERILL S., *Rapport Britannique* in XVIII FIDE Congress Report, Volume 1, *Les Directives Communautaires: Effets, Efficacité, Justiciabilité,* Stockholm, 3-6 June 1998, pp. 124-172;

WASSERFALLEN F., *The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the EU,* pp. 1128-1146, (2010);

WHITE R., *Workers, Establishment, and Services in the European Union*, Oxford University Press 2004;

WHITE R., *Conflicting Competences: Free Movement Rules and Immigration Laws*, in European Law Review, (2004) 29, pp. 385-396;

WIND M., *The Nordics, the EU, and Reluctance towards Supranational Judicial Review*, in Journal of Common Market Studies, (2010) 48, pp. 1039-1063;

WINTER J.A., *Direct Applicability and Direct Effect – Two Distinct and Different Concepts in Community Law*, in Common Market Law Review, (1972) 9, pp. 425-438;

WOODS L. AND WATSON P., *Steiner & Woods EU Law,* 12th ed, Oxford University Press, 2014, 222-262;

WOLLENSCHLÄGER F., *Union Citizenship and its Dynamics for Integration Beyond the Market,* (EUSA Eleventh Biennial International Conference, Los Angeles, 23-25 April 2009), http://www.unc.edu/euce/eusa2009/papers/wollenschl%C3%A4ger_05E.pdf;

WOLLENSCHLÄGER F., *A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration*, in European Law Review, [2011] 17 , pp. 1-34;

WOLLENSCHLÄGER F., *The Judiciary, the Legislature and the Evolution of Union Citizenship* in SYRPIS P. (ed), *The Judiciary, The Legislature and the EU Internal Market*, Cambridge University Press 2012, pp 302-330;

WOODS L., WATSON P., *Steiner & Woods EU* Law, 12th ed, Oxford University Press 2014;

ZAGORIANAKOS E., *A qualitative evaluation of current Transposition and Implementation Practice of the SEA Directive in EU Member States*, in Journal for European Environmental and Planning Law, (2006), pp. 535-548.

ZALAR B., *Constitutionalisation of the Implementing Act of the Procedures Directive: The Slovenian Perspective*, in European Journal of Migration and Law, (2008) 10, pp. 187-217;

ZHELYAZKOVA A. *Complying with EU Directives' Requirements: The Link Between EU Decision-Making and the Correct Transposition of EU Provisions*, (2012);

ZHELYAZKOVA A. AND JORDANOVA N., *Signalling "Compliance": The Link Between Notified EU Directive Implementation and Infringement Cases,* in European Union Politics, pp. 408-428;

ZHELYAZKOVA A. AND TORENVLIED R., *The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive*, in Journal of European Public Policy, (2011) 18, pp. 690-708;

ZHELYAZKOVA A. AND TORENVLIED R., *The Time-Dependent Effect of Conflict in the Council on Delays in the Transposition of EU Directives*, in *European Union Politics*, (2009) 10, pp. 35-62;

ZWEIGERT K. AND KÖTZ H., *An Introduction to Comparative Law* (translation Tony Wier, 3rd ed, Oxford University Press 1998;

ZÜRN M., JOERGES C. (eds), *Law and Governance in Postnational Europe*, Cambridge University Press 2007;

ZÜRN M., *Introduction: Law and compliance at different levels* in ZÜRN M., Joerges C. (eds), *Law and Governance in Postnational Europe*, Cambridge University Press 2007.