

## Strategy 2: The Commission's powers of investigation should be strengthened

*The Commission needs to have a full range of measures at its disposal to investigate and enforce the free movement rules more efficiently and fulfil its mission as Guardian of the EU Treaties.*

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<sup>1</sup>. 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<sup>2</sup>. It then takes a further two years on average to obtain a judgment from the Court<sup>3</sup>.

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<sup>4</sup>. 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-called "EU Pilot" scheme<sup>5</sup> which allows the Commission to resolve problems in compliance with EU law by engaging in dialogue with the Member State concerned<sup>6</sup>. The Commission claims this approach resolved over 90% of free movement cases in 2011<sup>7</sup>. The Commission currently has infringement ongoing procedures against seven Member States<sup>8</sup> 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<sup>9</sup>.

---

<sup>1</sup> Proceedings under [Article 258 TFEU](#). Further information on infringement proceedings can be found in the [Single Market Scoreboard](#).

<sup>2</sup> According to the latest [Single Market Scoreboard](#), the average duration of infringement proceedings is 27 months from the time the letter of formal notice is sent. 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](#).

<sup>3</sup> Court of Justice of the European Union, [Annual Report 2013](#).

<sup>4</sup> See to that effect *Fruit Company v Commission* ([Case 247/87](#)), albeit in the field of competition law.

<sup>5</sup> Further information on the EU Pilot scheme can be found in the [Single Market Scoreboard](#).

<sup>6</sup> The European Commission has also set up services such as [Europe Direct](#), [Your Europe Advice](#) and [SOLVIT](#) 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 (for CEPS), [Enforcement in the EU Single Market](#), 2012.

<sup>7</sup> See Commission Press Release [IP/11/981](#).

<sup>8</sup> [Austria](#), [Belgium](#), [Cyprus](#), [Czech Republic](#), [Germany](#), [Lithuania](#), [Sweden](#) and [the UK](#).

<sup>9</sup> *Commission Report on progress towards effective EU Citizenship 2011-2013* ([COM\(2013\) 270](#)) which reported the closure of infringement proceedings against Italy, Malta, Poland, Sweden and Spain.

However, several recent high profile cases – namely, the expulsion of Roma from France<sup>10</sup>, the short-lived reintroduction of border controls in Denmark<sup>11</sup> and delays at the Gibraltar/Spain border<sup>12</sup> – 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<sup>13</sup> or the EU air transport safety rules<sup>14</sup>, the

### *Case study: La Línea de la Concepción / Gibraltar border delays*

*During the summer of 2013, the EU Rights Clinic received over 100 complaints from residents, frontier workers and tourists affected by delays of almost eight hours resulting from border control formalities imposed by the Spanish authorities when crossing the border between Spain and Gibraltar. The Clinic lodged an official complaint before the European Commission explaining how the delays breached the EU rules on free movement. As part of its investigation, the European Commission decided to undertake a fact-finding mission to the border area, which was announced several weeks in advance of the mission. On the days the fact-finding mission took place in September 2013, the duration of delays experienced by citizens crossing the border was reported to have dropped significantly. The Commission’s mission did not conduct face-to-face interviews of citizens affected by the delays due to a lack of specific powers to do so.*

Commission does not have the power to undertake unannounced inspections to investigate suspected infringements of the free movement rules. The problem has been partially addressed in circumstances where Member States seek to temporarily reintroduce internal border controls in the Schengen area through the introduction of new powers of the Commission to undertake border inspections from November 2013<sup>15</sup>.

Yet under the rules relating to the free movement of EU citizens, the Commission has no power to make unannounced on-site visits, 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 on the Member State concerned.

Given that the free movement of persons is one of the cornerstones of the Single Market and the speed of developments on the ground, the Commission needs to have such stronger powers to investigate infringements.

<sup>10</sup> See Commission Press Release [IP/10/1027](#), [MEMO-13-810](#) and [MEMO-14-458](#).

<sup>11</sup> See [blog entry](#) by EU Commissioner for Home Affairs Cecilia Malmström.

<sup>12</sup> See Commission Press Release [IP/13/1086](#).

<sup>13</sup> [Regulation 1/2003](#) provides the Commission with extensive powers to investigate suspected breaches of the EU competition rules contained in Articles [101](#) and [102](#) TFEU.

<sup>14</sup> [Regulation 300/2008](#) on common rules in the field of civil aviation security lay down common EU-wide legal requirements for the performance of security checks at airports and empower the Commission to make unannounced inspections.

<sup>15</sup> [Regulation 1053/2013](#) establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and [Regulation 1051/2013](#) on common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances amending the Schengen Borders Code Regulation 562/2006. The Commission’s powers of inspection are contained in the new Articles 26a and 37a of Regulation 562/2006 and Article 4 of Regulation 1053/2013.

There is no justifiable reason why the free movement rules should remain the poorer cousin of the EU rules relating to the Schengen area or even the competition or air transport rules for that matter. Citizens deserve no less than a Commission equipped with a modern arsenal of measures that enables it to fulfill its mandate as “Guardian of the Treaties” in an effective manner.

*These recommendations were formulated by the EU Rights Clinic’s Legal Supervisor, Anthony Valcke, at the occasion of the [2014 conference of the Fédération Internationale du Droit Européen](#) which focused on EU citizenship and the final conference of the [EUCROSS](#) project that examines the relationship between cross-border activities of EU residents and their collective identities.*

**© 2014 Anthony Valcke, Legal Supervisor, EU Rights Clinic – all rights reserved**