

Strategy 1: Directive 2004/38 should be recast into a Regulation

This would reduce divergence in administrative formalities in the EU and further facilitate the exercise of the right of free movement by EU citizens and their family members.

At present, the detailed rules that govern the free movement of persons in the EU are – for the most part – contained in Directive 2004/38¹. Although this Directive has the objective of simplifying and strengthening residence formalities for EU citizens and their family members², it would appear that the Directive has had quite the opposite effect³. Some Member States have used the Directive as a pretext to tighten up their national rules governing EU rights of residence, particularly as regards the conditions relating to healthcare insurance⁴.

Instead of facing a harmonised approach to residence formalities in the EU⁵, EU citizens and their family members are confronted with completely different visa and residence formalities depending on where they choose to reside⁶, 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 formalities⁷. Such cases continue to represent about a quarter of cases handled by SOLVIT⁸.

To address these problems, the EU Rights Clinic recommends that, when the time comes for Directive 2004 to be recast to reflect developments in the case law of the EU Court of Justice since

¹ [Directive 2004/38](#) on the rights of residence of EU citizens and their family members.

² Recital 3 of Directive 2004/38 explains that it is intended to “to simplify and strengthen the right of free movement and residence of all Union citizens”. In *Metock* ([Case C-127/08](#), the Court of Justice also remarked 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.”

³ EU Citizenship Report 2010 *Dismantling the obstacles to EU citizens’ rights* ([COM \(2010\) 603](#)). See further Sir David Edwards et al (for ECAS), *Mind the Gap: Towards a Better Enforcement of European Citizens’ Rights of Free Movement*, 2013 (2nd ed), and Citizens Without Borders, *Free Movement and Residence in the European Union - A challenge for European Citizenship*, 2013.

⁴ Problems in this connection are being reported in [Finland](#), [Sweden](#), and the [UK](#). 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 a formal complaint by ECAS, which was only partially resolved following the Commission’s intervention through the EU Pilot scheme.

⁵ 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 : “[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 guidance for better transposition and application of Directive 2004/38 ([COM \(2009\) 313](#)).

⁶ See ICF-GHK and Milieu (for the Commission), *Evaluation of EU rules on free movement of EU citizens and their family members and their practical implementation*, 2013.

⁷ This is clear from the latest [Single Market Scoreboard](#). A more detailed analysis of such problems can be found in Ramboll (for the Commission), *Understanding citizens’ and businesses’ concerns with the Single Market: A view from the assistance services*, 2011.

⁸ [SOLVIT facts and figures](#), Single Market Scoreboard; 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](#)). *Seven Strategies to Improve the Free Movement of Persons*

2004⁹, the EU institutions should opt for a Regulation rather than a Directive. The legislative basis for the rules on the free movement of persons¹⁰ does not preclude this choice of legal instrument. Opting for a Regulation is desirable for a number of reasons.

Firstly, a Regulation is directly applicable¹¹. 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. 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 State¹². 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 EU citizens and their family members regardless of where they choose to live in the EU.

“Not one Member State has transposed the Directive effectively and correctly”

Commission report on the application of Directive 2004/38/EC, COM(2008) 840

Secondly, a Regulation is binding in its entirety¹³. 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 Treaties¹⁴. For a Directive, such an exercise is more difficult in practice. It

⁹ These would include the judgments in *Metock* ([Case C-127/08](#)) in which the Court recognised that the benefit of the Directive is not contingent upon prior lawful residence in the EU; *Lassal* ([C-162/09](#)) and *Dias* ([C-325/09](#)) which concerned the conditions relating to permanent residence; *O & B* ([C-456/12](#)) which extended the *Surinder Singh* ([C-370/90](#)) case law to the Directive; and *Saint Prix* ([C-507/12](#)) 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 the *Chen* case ([C-200/02](#)) regarding the residence rights of carers of EU minors residing in a Member State other than their country of nationality.

¹⁰ [Article 21](#) of the [Treaty on the Functioning of the EU](#) (TFEU).

¹¹ [Article 288](#) TFEU.

¹² In its Report 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.”

¹³ [Article 288](#) TFEU.

¹⁴ For example, [s. 2](#) of the [European Communities Act 1972](#) provides for this in the UK, [s. 2](#) of the [European Communities Act, 1972](#) in Ireland (as amended by the European Union Act 2009), [s. 3](#) of the [European Union Act](#) 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.

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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 2004/38¹⁵. 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

Adopting a Regulation would help to ensure that free movement rights are equally respected by private companies and national administrations alike

Case study:

EU citizens denied boarding on ship

Andrei and Filip are Bulgarian citizens who work for the same company in Sweden. As part of a corporate retreat, the pair were invited with their colleagues on a trip by cruise ship from Sweden to Finland. However, they were refused boarding and were told that they needed a visa to travel to Finland. Despite pleading with the ship's captain that Bulgarians are EU citizens who enjoy visa-free travel, the pair were refused boarding. This was a humiliating experience for them as they were left on the quayside as the ship departed with their colleagues on board. With the help of the EU Rights Clinic, the pair received a letter of apology from the cruise ship company's CEO as well as compensation for their missed trip.

direct effect of Directives¹⁶. Recourse to a Regulation instead of a Directive would arguably make it easier for citizens to rely on its provisions 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 effect¹⁷. 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 States¹⁸ and the over-zealous application of carrier liability rules¹⁹ 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 visa²⁰.

¹⁵ In *Rahman* (C-83/11), 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" (at para. 25).

¹⁶ See for example, the CJEU's rulings in *Becker* (Case 8/81), *Marshall* (Case 152/84), *Fratelli Constanzo* (Case 103/88) and *Franovich* (C-6/90), as well as the more recent ruling in *Kücükdeveci* (C-555/07).

¹⁷ See to that effect the Court of Justice of the EU's ruling in *Muñoz* (C-253/00) and the Opinion of Advocate General Geelhoed in *Muñoz* (C-253/00) at paragraphs 45-47.

¹⁸ For Member States that form part of the Schengen area, this is provided by Article 43 of the Schengen Visa Code (Regulation 810/2009).

¹⁹ Article 26 of the [Convention implementing the Schengen Agreement](#) establishes the liability of carriers for transporting into the EU non-EU nationals without adequate travel documents as further given effect by [Directive 2001/51](#).

²⁰ Article 3(4) of Directive 2004/38. In *MRAX* (C-459/99), the EU 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".
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The choice of a Regulation to replace Directive 2004/38 would therefore limit the possibilities not just for Member States but also private entities²¹ – whether visa processing agents or transport companies – to circumvent the free movement rules.

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.

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²¹ 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 organisations which do not come under public law*”, for example in *Walrave & Koch* ([Case 36/74](#)) and *Wouters* ([C-309/99](#)).
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