SECOND COMMISSION REPORT TO THE COUNCIL AND PARLIAMENT

on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence)
SUMMARY

This is the second report on the implementation of the three Directives on the right of residence of Union citizens and their family members, of whatever nationality, who are not economically active in the host Member State, covering the period 1999-2002.

First of all, a series of judgments given by the Court of Justice have established or confirmed a number of very important principles for implementation of the three Directives, in particular:

– students do not have to prove that they have sufficient resources of a given amount; a mere statement to that effect is enough;

– Member States may not restrict the permissible forms of evidence of sufficient resources or sickness insurance, nor require certain documents to be delivered or countersigned by the authority of another Member State;

– beneficiaries of the three Directives are covered by the principle of non-discrimination and are entitled to non-contributory social assistance benefits such as minimum subsistence, except if expressly provided otherwise;

– where beneficiaries of the three Directives apply for social assistance in the host Member State, that State may not automatically terminate their right of residence but must show solidarity when they face temporary difficulties;

– irregular entry or failure to hold the valid visa required by Community law do not provide the Member States with grounds for refusing to issue a residence card to third-country nationals who are members of the family of a Union citizen within the meaning of Community law;

– Article 18 of the EC Treaty, which sanctions the freedom of movement and residence of Union citizens, has direct effect, but the limitations and conditions remain applicable;

– the provisions concerning free movement of persons must be interpreted in the light of the requirement of respect for family life provided for by Article 8 of the European Convention on Human Rights (ECHR); consequently, a parent, irrespective of nationality, who has custody of children enjoying the right of residence in the host country under Article 12 of Regulation 1612/68 also has the right of residence on this basis, even if the parents have meanwhile divorced or the parent who has Union citizen status is no longer a migrant worker in the host Member State.

The Commission has stepped up its efforts to secure proper implementation of the three Directives by commencing infringement proceedings against Member States on various issues, such as the origin of resources, the period of validity of the residence card, the documents which can be requested, etc. It will continue to ensure proper implementation of the three Directives on the basis of the implications of the Charter of Fundamental Rights of the European Union and of Union citizen status.

Lastly, the Commission proposal of 29 June 2001 for a new Council and Parliament Directive on the right of residence, which will replace the various legal instruments currently in force, if
the Council and the European parliament adopt it, demonstrates the Commission's political will to solve the problems resulting from the three Directives:

- by extending the right of residence without condition or formality from three to six months;
- for stays of more than six months, by replacing the residence card by a registration and proof of sufficient resources and health-care insurance by a simple declaration, as is currently the case for students with regard to sufficient resources; and
- by introducing a permanent residence right acquired after four years’ residence in the host Member State, which abolishes the conditions for the right of residence and means that beneficiaries are permanently treated in the same way as nationals for social security purposes.

INTRODUCTION


With this report, the Commission is discharging its obligation under Article 4 of Directives 90/364 and 90/365 and Article 5 of Directive 93/96 to report every three years to Parliament and the Council. The first report was presented on 17 March 1999, the second covers the period since then. And the third Commission report on Union citizenship, which covers the period 1997-2001, covers developments relating to Union citizenship, in particular freedom of movement, which is at the heart of the rights attaching to Union citizenship. In addition, the second paragraph of Article 5 of the Directive 93/96 on the right of residence for students calls on the Commission to pay close attention to any difficulties to which the implementation of Article 1 might give rise in the Member States and to submit proposals to the Council with the aim of remedying them. The Commission has not so far identified any such difficulties, nor have the Member States informed it of problems caused by an influx of students from other Member States or by unreasonable burdens on their public finance.

3 This Article provides: "In order to lay down conditions to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State".
The first report described in detail the slowness and difficulties of transposing the three Directives into the domestic law of the Member States, completed when Italy enacted Legislative Decree 358 on 2 August 1999, a few months before the Court of Justice gave judgment in Case C-424/98 Commission v Italy on 25 May 2000.

Despite transposal, there were still individual cases of incorrect application, discovered following complaints addressed to the Commission or petitions addressed to Parliament’s Petitions Committee.

During the report period the Commission intensified its efforts to initiate and complete infringement proceedings against Member States whose legislation, regulations, circulars, instructions or administrative practices were in breach of their obligations under the Directives; there were also major developments in the case-law of the Court of Justice which, proceeding from the concept of Union citizenship, interprets the conditions laid down by the Directives for recognising the right of residence more flexibly. There was also a major legislative initiative to facilitate and simplify the exercise of the right of Union citizens to move and reside freely in the territory of the Member States by means of a single instrument replacing the plethora of existing instruments.

Lastly, the signing and proclamation of the Charter of Fundamental Rights of the European Union by the Presidents of the Parliament, the Council and the Commission at Nice on 7 December 2000 is vitally important for the free movement of persons, not so much because its chapter on Citizenship, and in particular Article 45, sanctions the right of any Union citizen to move and reside freely in the territory of the Member States subject to the conditions and limits provided for by Community law,4 which makes no real change to Community law on the free movement of persons, but because the Charter codifies and presents in a visible and clear form fundamental rights, binding the three Union institutions, particularly the Commission, and giving them guidance for interpreting the current law and providing a basis for current or future legislative initiatives.

I. THE CONTRIBUTION OF THE CASE LAW OF THE COURT OF JUSTICE

Four judgments were given by the Court of Justice5 in the report period, the first of them in the Commission action against Italy for incorrect transposal of the three Directives.

Three lessons can be learnt from the judgment given by the Court in Case C-424/98.6

a) Regarding the incomes of family members of the beneficiaries of Directive 90/364, in comparison with the beneficiaries of Directive 90/365.

The Court of Justice, overruling the Commission, held that where a Member State granted more favourable treatment to the family members of persons who had previously been gainfully employed than to beneficiaries of Directive 90/364, this did not in itself constitute

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4 Article 52(2) of the Charter.
evidence that the higher amount required from the latter exceeded the Member States’ room for manoeuvre.\textsuperscript{7}

The Commission’s objection was to the specific differentiation provided for by the Italian legislation, and it is consequently difficult to deduce from the grounds for the judgment a general principle that Member States are free to fix different amounts of sufficient resources for the beneficiaries of the two Directives. The Court also reaffirms that Member States must exercise their powers in full respect for the fundamental freedoms guaranteed by the Treaty and to give full effect to the provisions of the Directives abolishing barriers to free movement of persons between them so as to facilitate the exercise of the right of residence of Union citizens and their family members in the territory of any Member State.

But the problem is purely theoretical, as the only Member State (Italy) which provided for differentiation abolished it before the Court of Justice gave judgment.

b) Regarding the documents that beneficiaries of Directives 90/364 and 90/365 are required to submit

On the basis of the same principle, the Court of Justice held that Member States must exploit the various possibilities offered by other rules of Community law with regard in particular to evidence, accepting certificates issued by national social security organisations at the request of the interested parties to the effect that they are covered by a given social security scheme and certificates as to the amount of pensions and incomes paid by these bodies; it further held that, by limiting the forms of evidence that may be relied upon, and in particular by providing that certain documents must be issued or certified by the authority of another Member State, the Italian Republic had failed to fulfil its obligations.

The Court thus confirms the flexibility of the methods for proving compliance with the conditions imposed by the two Directives and, indirectly, the freedom of choice of the interested party. It follows that beneficiaries of Directives 90/364 and 90/365 have a choice between several forms of evidence that they have sufficient resources and health-care insurance and cannot be asked to present only documents emanating from or countersigned by an authority of a Member State, and that a Member State cannot limit the forms of evidence by requiring, for example, in a restrictive way, a bank statement or a document emanating from another Member State or countersigned by its consular services. The Member State must leave the interested party free to choose between the forms of evidence that can be supplied, whether they be public or private documents.

c) Regarding the provisions on students’ resources

The Court of Justice upheld the Commission’s view that the system of Directive 93/96 on the right of residence for students differs from that of the two other Directives with regard to sufficient resources. Having noted that Directive 93/96 contains no requirement regarding a given amount or moreover the furnishing of evidence thereof in the form of specific documents, it concluded that a Member State could not require a student benefiting from this Directive to provide evidence or a guarantee of a given amount of resources but must be satisfied with a declaration or equivalent, at the choice of the interested party, even if he was accompanied by family members. In Case C-184/99 Grzelczyk (infra), the Court held that “…\textsuperscript{7}

\textsuperscript{7} The Italian legislation provides that the minimum amount of sufficient resources for a member of the family of a beneficiary of Directive 90/364 must be one third higher than the same amount required of a member of the family of a beneficiary of Directive 90/365.
a student's financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made” (paragraph 45).

It follows from these cases that, by requiring a student benefiting from Directive 93/96 to submit a specific document, such as an account statement, to prove that he meets the sufficient resources condition set out therein, a national authority is in breach of the Directive.

d) The right of residence of inactive persons after applying for social assistance

Article 3 of Directives 90/364 and 90/365 and Article 4 of Directive 93/96 stipulate that the right of residence remains as long as beneficiaries of the right fulfill the sufficient resources and health-care insurance conditions. On the basis of this provision, Member States automatically end the right of residence for beneficiaries of the three Directives when they apply for social assistance.

In Case C-184/99 Grzelczyk the Court of Justice limited the possibility for Member States under the above provisions of the three Directives to end the right of residence of beneficiaries if, in the absence of sufficient resources, they apply for social assistance.

Recognising that a Member State can consider that a student applying for social assistance no longer meets the conditions to which his right of residence was subject and can accordingly end his right of residence, the Court of Justice admits that this must have effect “within the limits imposed by Community law” (paragraph 42), implying the principle of proportionality, and that “in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system” (paragraph 43). The Court of Justice thus categorically excludes in all cases, without exception, any automatic link between recourse to social assistance and end of the right of residence.

The Court of Justice bases its appraisal on the sixth recital to Directive 93/96, according to which beneficiaries of the right of residence must not become an "unreasonable" burden on the public finances of the host Member State, from which it follows, according to the Court, that "Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary” (paragraph 44).

It is clear from the reference to Directives 90/364 and 90/365 and from the unity of the system set up by the three Directives that the Court’s ruling could be applied not only to students, chiefly concerned by the case, but also, by analogy, to the beneficiaries of Directives 90/364 and 90/365. In addition, the Court excludes the possibility for the Member States to end the right of residence of students and other inactive persons when they encounter temporary financial difficulties.

It follows from the foregoing that the Court excluded for students and other inactive persons, in all cases and without exception, any automatic link between recourse to social assistance and end of the right of residence, thus making incompatible with Community law all national

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provisions which envisage such an automatic link, and the possibility for Member States to end the right of residence when beneficiaries of the three Directives encounter temporary difficulties. The Commission will ensure that Member States take the measures necessary to this end.

e) Regarding the principle of the prohibition of discrimination on the ground of nationality and the recognition of Union citizen status

Confirming its decision in *Martinez Sala*, the Court of Justice repeats in *Grzelczyk* that a Union citizen can avail himself of the non-discrimination principle of Article 12 of the EC Treaty in all situations within the scope of Community law, which include those involving the exercise of freedom to move and remain on the territory of the Member States, conferred by Article 18 of the EC Treaty.

On the basis of Article 12, read with the Treaty provisions on Union citizenship, the Court of Justice held in *Grzelczyk* that "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" (paragraph 31).

It could be concluded that inactive Union citizens who reside legally in another Member State are eligible, by reason of their Union citizenship, for equal treatment with nationals. But the Court of Justice admits limitations to this rule when there are "such exceptions as are expressly provided for" by Community law. In *Grzelczyk* it implicitly admits the right of the host Member State not to pay maintenance grants to students enjoying the right of residence on the basis of Article 3 of Directive 93/96. Students are entitled to equal treatment in relation to all assistance in respect of access to education (registration and tuition fees). But the Court of Justice notes that "on the other hand, there are no provisions in the Directive that preclude those to whom it applies from receiving social security benefits” (paragraph 39) and concludes on the basis of Articles 12 and 17 of the EC Treaty that a Member State cannot exclude from a non-contributory social benefit, such as the minimum income, nationals of Member States other than the host Member State in whose territory such nationals legally reside on the simple ground that they are not within the scope of Regulation No 1612/68, when no such condition applies to its nationals.

It is clear, therefore, that the beneficiaries of Directives 90/364, 90/365 and 93/96 are entitled under Articles 12 and 17 of the EC Treaty to equal treatment with nationals and to non-contributory social benefits, unless otherwise provided by Community law. They are even entitled to social assistance, and the host Member State cannot automatically end their

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9 Following the judgment of the Court of Justice of 20 September 2001, the Commission has already sent a supplementary letter of formal notice to a Member State whose legislation provides for such an automatic link mentioned specifically on the residence card itself. The relevant Member State has undertaken to amend its legislation in line with the judgment.


11 In Case C-224/98 *De Hoop* [2002] ECR I-6191 (judgment given on 11 July 2002) the Court of Justice held that Union citizenship offers a guarantee of the same legal treatment in the exercise of freedom of movement (paragraph 35).

12 This Article provides: "This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefitting from the right of residence".

13 The seventh recital to Directive 93/96 states that "in the present state of Community law, as established by the case law of the Court of Justice, maintenance assistance granted to students does not fall within the scope of the Treaty within the meaning of Article 7 thereof". The English version omits by error the word "maintenance" before "assistance granted to students".
right of residence, in particular when their financial difficulties are temporary. But the right of residence enjoyed by the beneficiaries of Directives 90/364, 90/365\(^{14}\) and 93/96 remains subject to the limitation that they must not become an unreasonable burden on the public finances of the host Member State, and in such a case the host Member State can end their right of residence and, consequently, their right to social assistance, in compliance with Community law, and in particular the principle of proportionality.

f) Refusal to issue a residence card on grounds of irregular entry or expired visa

In its judgment of 25 July 2002 in *MRAX* the Court of Justice reaffirmed the importance of ensuring the protection of the family life of nationals of the Member States benefiting from Community legislation concerning freedom of movement. The Court held that the right of residence for the Community citizens’ spouses who are third-country nationals is conferred directly by Community rules and not by the issuing of a residence card by a Member State. The issuing of a residence card is designed to record the individual’s situation in relation to Community law.

But the Court of Justice also held that a Member State may make the issuing of this residence card conditional on presentation of the document under which the interested party entered its territory. The competent national authorities may impose penalties for failure to comply with measures concerning control of foreigners, provided they are proportionate. A Member State may also take measures which derogate from freedom of movement if there are grounds of public order, public security or public health, but they must be based exclusively on the personal conduct of the individual concerned.

On the other hand, refusal to issue a residence card and expulsion decisions based exclusively on failure to complete legal formalities for the control of foreigners - such as entering a Member State without a visa - are disproportionate and therefore contrary to Community rules, when the interested party can provide evidence of his identity and of his marital link with a Union citizen.

Where a residence card is applied for after expiry of the visa, the Court of Justice held that Community rules do not require a valid visa for the issuing of a residence card. In addition, an expulsion order based solely on the expiry of the visa would obviously be a disproportionate penalty in relation to the gravity of the offence against national regulations concerning control of foreigners.

g) The direct effect of Article 18 of the EC Treaty – Conditions and limitations to be applied in the light of the principles of proportionality and protection of family life

*Judgment of the Court of Justice of 17 September 2002 in Case C-413/99 Baumbast and R*

The Court of Justice recognised that the Treaty does not require Union citizens to be gainfully employed in order to enjoy the rights attaching to Union citizenship, in particular freedom of movement and residence on the territory of the Member States. It also recognised that Article

\(^{14}\) The English, Swedish and Finnish versions of Article 1 of the Directive 90/365 speak about burden «on the social security system of the host Member State (EN)», «ligga det sociala trygghetsystemet i värdmedlemsstaten (SV)» et «kuuluvan vastaanottavan jäsenvaltion sosiaaliturvajärjestelmään (FI)». This should be understood as a burden «on the social assistance system of the host Member State (EN)», «ligga det sociala bidragssystemet i värdmedlemsstaten (SV)» et «kuuluvan vastaanottavan jäsenvaltion sosiaalihuoltotjärjestelmään (FI)», in line with the other language versions of the same Directive and of Directives 90/364 and 93/96.
18(1) of the EC Treaty is a clear and precise provision, that application of the limitations and conditions accepted in this provision is subject to judicial review and recognises that this provision confers rights on private individuals that they can rely on in legal proceedings and that the national courts must therefore safeguard.

The Court of Justice admits that the limitations and conditions provided for by Article 18 of the EC Treaty and by Directive 90/364 remain applicable because exercise of the right of residence of Union citizens can be subordinated to protection of the legitimate interests of the Member States. But this must be done in compliance with the limits imposed by Community law and in accordance with the general principles of Community law, in particular the proportionality principle.

Applying the latter principle to the circumstances of the *Baumbast* case, the Court concludes that it is a disproportionate interference with the exercise of the right of residence for the host Member State to withhold the right of residence on the ground that the healthcare insurance of the person concerned does not cover the emergency treatment administered in this State when he and his family have comprehensive healthcare insurance in another Member State and Article 19(1)(a) of Regulation 1408/71 guarantees them the right to receive sickness benefits in kind provided by the institution of Member State of residence at the expense of the competent Member State.

*Protection of family life*

In *Baumbast and R* the Court of Justice also confirmed the principle declared in Case C-60/00 *Carpenter*, whereby the provisions of Community law concerning free movement of persons must be interpreted in the light of the requirement for respect for family life, provided for by Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), this respect being one of the basic rights recognised by Community law.

Applying this principle, the Court held that where children enjoy a right of residence in a Member State to follow courses of general education there in accordance with Article 12 of Regulation No 1612/68, this provision, if it is not to be deprived of its useful effect, must be interpreted as allowing the parent who has actual care of the children, irrespective of nationality, to remain with them so as to facilitate the exercise of that right, even if the parents are divorced or the parent who has Union citizenship is no longer a migrant worker in the host Member State.

It follows from this judgment that the parent, irrespective of nationality, who has actual care of the child, even if he or she is not gainfully employed in the host Member State, has the right of residence and cannot be obliged to prove that he or she has sufficient resources or healthcare insurance, because the right of residence is based not on Directive 90/364 but on Article 12 of Regulation No 1612/68, which does not impose such conditions.

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15 [2002] ECR I-6279 (judgment given on 11 July 2002). In this judgment, the Court of Justice, on the basis of Article 49 of the EC Treaty, read in the light of the fundamental right to respect for family life, held that the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States cannot refuse the right to reside in its territory to that provider's spouse, who is a national of a third country. After holding that "the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty" (paragraph 38), the Court went on to rule that "… the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life …" (paragraph 42).
II. THE ACTION OF THE COMMISSION AS GUARDIAN OF THE APPLICATION OF COMMUNITY LAW

Introduction

Following the rulings of the Court of Justice set out above, the Commission, in its role as guardian of Community law on the free movement of persons, will be guided and supported by two main principles: first Union citizenship, which, according to the formula used by the Court of Justice, is likely to become the fundamental status of nationals of the Member States; and second, the fundamental rights recognised by the Charter of Fundamental Rights of the European Union and international instruments, which, as general principles of law, are an integral part of Community law and protected by it.

Union citizenship means first, that the principle of the prohibition of direct or indirect national discrimination is fully applicable to nationals of other Member States who are not engaged in economic activity in the host Member State, though without prejudice to exceptions expressly provided for by Community law, and second that Member States must show a degree of solidarity with regard to these persons, provided they do not become an unreasonable burden on the public finances of the host Member State.

The protection of fundamental rights has become an important and decisive factor in the interpretation of Community law. Without wishing to anticipate the legal effects of the Charter of Fundamental Rights of the European Union and its future status, the Commission takes several provisions of the Charter, alongside those of the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), as the basis for interpreting Community provisions on the right of Union citizens and their family members, of whatever nationality, to move and reside freely in the territory of the Member States. In particular:

a) Articles 33 (protection of family life), 7 (respect for private and family life), 9 (right to marry and found a family) and 14 (right to education) in the context of the Community provisions concerning family reunification;

b) Articles 8 (protection of personal data) and 41 (right to good administration) for contacts between Union citizens and the national authorities responsible for applying the three Directives; and

c) Articles 20 (equality before the law), 21 (non-discrimination), 22 (cultural, religious and linguistic diversity), 25 (rights of the elderly), 34 (social security and social assistance), 35 (health care) and 36 (access to services of general economic interest), to ensure proper implementation of the principles of solidarity and non-discrimination in relation to nationals.

Infringement proceedings initiated by the Commission

Commission action during the three years covered by this report focused on the following subjects:
Source of the sufficient resources under Directive 90/364

Despite the fact that Directive 90/364 does not specify the source of the sufficient resources required of a Union citizen claiming the right of residence pursuant to it, certain Member States require him to have sufficient resources in his own right, and they do not accept resources originating from a person other than a spouse or child.

The Commission issued a number of reasoned opinions, considering that the requirement that the interested party must have sufficient resources of his own or originating only from the spouse or a child adds a supplementary condition to the Directive and that this is contrary to it, since the Directive does not exclude the possibility of sufficient resources coming from a third person such as a parent or unmarried partner.

Other Member States have also added the arbitrary requirement that the sufficient resources must be personal. Following intervention by the Commission, Sweden has removed this condition from the legislation applied since 10 April 2001.

Durability of resources and period of validity of the residence card

Certain Member States have made the duration of the residence card dependent on evidence of the durability of sufficient resources. Given the provision of Directives 90/364 and 90/365 that validity of the residence card may be limited to five years, renewable, and the possibility of revalidating the residence card after the first two years of stay, national authorities delivered a one-year or five-year residence card, depending on whether the interested party could prove sufficient resources for one year or five years. Complaints revealed that national authorities required resources sufficient for five years deposited on a bank account before issuing a five-year residence card.

Following intervention by the Commission, certain Member States, such as Sweden, amended their legislation to provide that beneficiaries of Directives 90/364 and 90/365 always receive a five-year card.

The Commission points out that the residence card must be issued for five years, even if the possibility of revalidating it after the first two years of stay is in conformity with Community law. This solution is in line with the general five-year rule for the validity of the Community residence card and in harmony with the system of freedom of movement for workers, which envisages a residence card valid for at least five years.

Documents required for the issuing of the residence card

The documents that the national authorities can require are listed exhaustively in the three Directives, as is clear from the Directives themselves ("For the purpose of issuing the residence card or document, the Member State may require only that the applicant present …").

The documents specified are the identity card or the passport and evidence of sufficient resources and of sickness insurance or, for students, a declaration of sufficient resources and evidence of sickness insurance.

The practice of Member States of requiring additional documents on top of those mentioned above is accordingly contrary to the three Directives and acts as a barrier to exercise of the right of residence by their beneficiaries. Certain Member States sometimes still require:
1) a birth certificate, sometimes with an official translation: but the main items on it (date and place of birth) are also on the identity card or passport; the result is that this requirement is unjustified and bureaucratic;

2) a certificate of nationality: the same applies to this document, and the requirement is unjustified since Community law requires Member States to issue their nationals with an identity card or a passport specifying in particular their nationality; in the event of doubt, a Member State may check the authenticity of the identity card or passport, but it may not in any circumstances require a certificate of nationality;

3) extract from criminal record or certificate of good conduct or similar: a Member State cannot require such a document, because it is not provided for by Community law; if a Member State wishes to exercise the public order or public security reservation, it must follow the procedure provided for in Article 5(2) of Directive 64/221 and apply to the other Member States for information.

In one Member State, all nationals of other Member States must state their previous convictions; those who refuse are systematically checked. This practice is contrary to Article 5(2) of Directive 64/221, which provides that consultation of other Member States may not be systematic.

The Commission has already warned Member States that the requirement of such documents is incompatible with Community law, and it will pursue the infringement proceedings already open against Member States which refuse to comply.

**Discriminatory penalties for failure to obtain or renew a residence card**

Under Spanish legislation, Union citizens who fail to obtain or renew their residence card are liable to penalties of up to €3 000, whereas nationals who fail to obtain or renew their identity card are liable to a penalty of up to €300. Several complaints revealed cases of penalty of €240 for a 14-month delay in renewing a card or €540 for failure to obtain a residence card over a period of four years.

The Commission sent Spain a reasoned opinion on this on 5 April 2002 and, in view of the answer received, it has decided to refer the case to the Court of Justice.

**Time taken to issue a residence card**

The Commission has received numerous complaints about the length of time taken to issue a residence card, often exceeding six months, or long queues, or the absence of a special queuing point for Union citizens, and the inappropriate conduct of the issuing offices.

With regard to the length of time taken, Article 5(1) of Directive 64/221 stipulates that the decision granting or refusing the first residence card must be taken as soon as possible and no later than six months after the application. It follows from this provision, which is contained in the Directive on measures justified on grounds of public order, public security or public health, that the residence card must be issued as soon as possible. In very exceptional cases, where public order considerations require consultation with other Member States, a

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Member State can make use of the maximum six-month period. But it may never exceed this six-month deadline.

With regard to the absence of a special queuing point for Union citizens, it should be remembered that such a measure is not provided for by Community law, as it is for border controls, though certain Member States and certain cities do have it. But the existence of a separate queuing point for Union citizens and their family members for contacts with the immigration police would be worthwhile in organisational terms for the administrative authorities facilitating the exercise of Union citizens’ right of residence, since it is much simpler to process their applications for residence cards than those of third-country nationals. This would not discriminate against third-country nationals, since the ground for the measure would be that the two categories of person do not have the same legal status. In the interests of speed, different treatment of applications from the two categories would therefore be desirable.

Lastly, with regard to the operation of the national administrative authorities and the conduct of national civil servants, it must be remembered that the organisation of national administrative authorities is, by virtue of the subsidiarity principle, a matter for the Member States alone. But the Member States must take all the necessary measures to discharge their obligations under Community law and cannot plead economic or financial grounds for failing to do so. The Commission intends to initiate proceedings for failure to act against Member States where poor administrative organisation or failure to allocate the proper staff to deal with applications from nationals of other Member States create barriers to the exercise of the right of residence of Union citizens and their family members irrespective of nationality.

Application of national rules to unmarried partners instead of Directive 90/364

The right of residence of Union citizens can be subject only to the system provided for by Community law. If a Union citizen is not covered by Directives 68/360, 73/148, 90/365 and 93/96 or Regulations Nos 1612/68 and 1251/70, the last resort open to him is to obtain the right of residence on the basis of Directive 90/364, which sanctions the general right of residence; but he must still meet the Directive’s sufficient resources and sickness insurance conditions. Only if he does not meet these two conditions will he be subject to national rules.

Member States must accordingly examine as last resort the possibility of recognising the right of residence on the basis of the Directive 90/364 and inform the applicant of the outcome; if the applicant does not meet the conditions of the Directive, national rules granting him the right of residence can be applied.

Certain Member States automatically apply their legislation governing unmarried partners despite the fact that the applicant is a Union citizen and meets the conditions of Directive 90/364. The Commission has drawn their attention to the fact that this is contrary to Community law. It takes the line that the applicant’s sufficient resources can come from a third person and that this third party can be an unmarried partner.

Residence visa

17 Often this legislation provides for conditions that can be regarded as undermining human dignity, such as the obligation to submit a certificate of good conduct.
Spanish legislation requires a third-country national who is the spouse or another family member of a Union citizen and settles with him in Spain to obtain a residence visa (*visado de residencia*). Exemption may be given in exceptional cases. According to the Spanish authorities, as a stay of more than three months is involved, a Member State has the right to require third-country nationals to hold a national visa.

On 5 April 2002 the Commission sent Spain a reasoned opinion, on the grounds that third-country nationals who are members of the family of a Union citizen and settle with him in the host Member State cannot be required to obtain a residence visa or any other type of national visa other than the Community Schengen visa if, under Community law, they are required to hold such a visa to enter a Member State. But Spain stands by its position.

The Commission position is strengthened by the Court judgment in *MRAX* (paragraphs 89 to 91), which holds that a Member State cannot make the issuing of a residence card to a third-country national who is the spouse of a Union citizen conditional on his or her visa being valid. A fortiori, the person in question cannot be subject to a national visa requirement. Article 18 of the Convention implementing the Schengen Agreement, which permits national visas for stays of more than three months, does not concern the beneficiaries of Community law and, if it did, it would be inapplicable as contrary to Community law (Article 134 of the Convention). The Commission has decided to refer the Spanish position to the Court of Justice.

**Permanent residence card – nationality discrimination**

French legislation provides for a permanent residence card — valid for ten years — to be issued when an EC national renews his/her residence card for the first time, provided that the country of origin gives French citizens the same advantage.

On 24 April 2002 the Commission sent France a reasoned opinion, as it regarded this as discrimination against nationals of the other Member States and the reciprocity condition as incompatible with Community law.

**III. THE COMMISSION’S LEGISLATIVE INITIATIVE**

On 29 June 2001 the Commission presented a proposal for a 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.\(^{18}\) The proposal is under discussion in the Council and Parliament and should be adopted in the beginning of 2004.\(^{19}\) The major innovations for economically inactive people are as follows.

a) Union citizens and their family members will be subject to no conditions or formalities for stays up to six months instead of the current three months. This will exempt pensioners who are accustomed to spend a few months in their holiday residence in another Member State from the administrative formalities and expense of obtaining a residence card. Similarly, students who move inside the Union under Community student exchange programmes will no longer have to obtain a residence card, as they currently do;

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\(^{19}\) Annex I to the Presidency conclusions of the Nice European Council of 7, 8 and 9 December 2000, Part I - *More and better jobs*, point h), states that to facilitate mobility for European citizens and encourage the free movement of persons, it is necessary to amend, by 2003, the directives on the right of residence and to encourage improvement of the rules on the free movement of workers.
b) For stays of more than six months, the requirement to apply for and obtain a residence card will be replaced by the possibility for Member States to require Union citizens to register with the competent authorities at their place of residence and obtain a certificate of registration. In addition, issuing this certificate may be made condition only on the interested party assuring the relevant authority, by means of a declaration or equivalent —such as he may choose— that he has sufficient resources and sickness insurance not to become a burden on the social assistance system of the host Member State.

In other words, the Commission proposal not only abolishes the residence card during an initial four-year period (except for third-country nationals who are members of the family of a Union citizen), but also extends the system provided for by the Directive on the right of residence for students with regard to sufficient resources to pensioners and other inactive people: exercise of the right of Union citizens to reside freely in the Member States will thus be facilitated by elimination of the difficulties connected with having to furnish documentary evidence of their resources;

c) The third major innovation of the Commission proposal is the introduction of a permanent right of residence, acquired after four years’ continuous residence in the host Member State. This right will be evidenced by a permanent residence card with unlimited duration, renewable automatically every ten years.

This solution will give Union citizens and their family members, irrespective of nationality, greater stability of resident status comparable to that enjoyed by a national since, once they acquire a permanent right of residence, such right of residence would no longer be conditional and beneficiaries would be totally protected from the risk of expulsion on grounds of public order or public security. In addition, with regard to social assistance, the permanent right of residence will align the status of beneficiaries on that of nationals.

If the Commission proposal is adopted by Parliament and the Council, exercise of the right of residence by the beneficiaries of the three Directives in question will be facilitated by the extension of the right from three to six months without conditions or formalities and by the substantial reduction in the administrative formalities and expenses for rights of residence of more than six months. In addition, replacement of the evidence of sufficient resources and sickness insurance by a statement will facilitate citizens’ mobility in the Union. Lastly, the permanent right of residence will not only consolidate the right of residence but also align it closely on that enjoyed by nationals.

However, in the context of ongoing debates in Parliament and the Council, the Commission will have to consider the advisability of amending the proposal in the light of recent developments in the case law of the Court of Justice, mentioned above.

IV. CONCLUSIONS

Twelve years after the adoption of the three Directives on the right of residence of those who are not economically active and a few years after their transposal into national law, their application is basically satisfactory, as the declining number of complaints received by the Commission shows. But there are still individual cases of incorrect application. They are due mainly to misinterpretation and to administrative practices based on such misinterpretations by national administrative authorities, in particular the immigration police, who are often short of personnel with training in Community law to implement the relevant provisions with the flexibility that the spirit of the Directives requires.
The Commission is available to provide both national authorities and Union citizens with the assistance and information they need. Any Union citizen can, by simple letter, ask the Commission to intervene if he has problems connected with application of the Directives. Intervention by the Commission has the advantage of being free for the citizen and effective because of the importance attached to it by the national authorities. But, in the absence of direct contact with the national authorities involved in an individual case and the constraints imposed by infringement proceedings, intervention by the Commission takes time, whereas the situation might need a rapid solution. However, there are systems such as the "SOLVIT" network\textsuperscript{20} to help Union citizens find a rapid solution to a specific problem, or the citizens’ advice service\textsuperscript{21} to provide useful information.

Adoption of the Commission proposal of 29 June 2001 would not only result in a single, simple legal instrument but would also reduce bureaucracy, facilitate the mobility of Union citizens and align the status of beneficiaries of the three Directives more closely on that of nationals after four years of residence in the host Member State.

\textsuperscript{20} "Effective problem solving in the internal market ("SOLVIT")", Commission Communication to the Council, Parliament, the Economic and Social Committee and the Committee of the Regions (COM(2001) 702, 27 November 2001), http://europa.eu.int/comm/internal_market/solvit/

\textsuperscript{21} http://europa.eu.int/abc/cit3_en.htm. Freephone number: 0800-67891011