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from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: 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

Delegations will find attached Commission document COM(2008) 840 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.12.2008
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**REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

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(Text with EEA relevance)

1. INTRODUCTION

The purpose of this Report is to present a comprehensive overview of how Directive 2004/38/EC¹ is transposed into national law and how it is applied in everyday life. With this report, the Commission is discharging its obligation under Article 39(1) of the Directive to draw up a report on the application of the Directive and to submit it to the European Parliament and the Council².

The Commission will keep this matter under constant review and will issue further reports and guidelines in due course.

Free movement of persons constitutes one of the fundamental freedoms of the internal market, to the benefit of EU citizens, of the Member States and of the competitiveness of European economy. It is one of the rights mentioned in the Charter of Fundamental Rights of the European Union (*Article 45*). In the first days of the European project, only workers benefited from free movement (*Article 39 of the EC Treaty*). Over time, this right was extended to all EU citizens. Citizenship of the Union confers on every EU citizen a primary and individual right to move and reside freely on the territory of the Union, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect (*Article 18 of the EC Treaty*). Such limitations and conditions are to be found in Directive 2004/38/EC. The Directive codified the existing legislation and case-law in the area of free movement, and simplified it in the interest of reader-friendliness and clarity.

Citizens from Member States that joined the EU recently enjoy unrestricted right of free movement. Transitional arrangements apply only to access to labour markets.

The Directive is fundamental not only for more than 8 million³ EU citizens who reside in another Member State and their family members, but also for the millions of EU citizens travelling every year inside the EU.

¹ Directive 2004/38/EC of the European Parliament and of the Council of 29.4.2004 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/EC (OJ L 158, 30.4.2004, p. 77).

² See also the European Parliament resolution of 15 November 2007 on application of Directive 2004/38/EC - P6_TA(2007)0534.

³ Fifth Report on Citizenship of the Union (1 May 2004 – 30 June 2007) - COM(2008) 85.

The significance of the right of free movement is underlined by the expectations of EU citizens. A recent survey⁴ has shown that 88% of respondents know of this right⁵, an increase of 4% since the last such survey in 2002.

This Report has been drawn up on the basis of many sources, including a study⁶ analysing the conformity of national provisions with the Directive, a questionnaire on practical implementation of the Directive answered by the Member States, the Commission's own investigations, individual complaints, co-operation with the European Parliament, Parliamentary resolutions, questions and petitions and discussions with Member States on practical issues arising from application of the Directive.

2. MONITORING OF TRANSPOSITION OF THE DIRECTIVE

As stipulated in Article 40(1) of the Directive, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 April 2006.

The Commission organised two meetings with Member States to answer questions concerning the interpretation of the Directive in June 2005 and January 2006.

Communication by Member States of national implementing measures was incomplete and late in a large number of cases. Between June 2006 and February 2007 the Commission initiated infringement proceedings under Article 226 of the EC Treaty against 19 Member States⁷ for their failure to communicate the text of the provisions of national law adopted to transpose the Directive. Since then, as all Member States have gradually adopted the transposition measures, the infringement proceedings for non-communication have been closed.

The Directive has been already incorporated⁸ into the EEA Agreement but it is not applicable yet in the non-EU EEA countries, as the fulfilment of the national constitutional requirements is still pending in Norway.

3. COMPLIANCE OF THE TRANSPOSITION MEASURES

The 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.

⁴ Flash Eurobarometer survey No 213, with over 27000 randomly selected EU citizens interviewed in November 2007.

⁵ According to the latest Quarterly Activity Report covering the period between January to March 2008 (ec.europa.eu/europedirect/call_us/statistics/index_en.htm), the biggest share of enquiries submitted to the EUROPE DIRECT Service concerned cross border issues (*to travel, work, live or study in another Member State*) – 22%. Between January and October 2006, 84% of enquiries replied by the Citizens Signpost Service concerned those rights (Feedback report What the Database Tells us - ec.europa.eu/citizensrights/front_end/about/index_en.htm).

⁶ The study reflects the state of transposition on 1 August 2008.

⁷ All Member States except DK, IE, NL, AT, SI, SK, BG and RO.

⁸ Decision of the EEA Joint Committee N° 158/2007 of 7 December 2007.

On the other hand, Member States in some areas adopted transposition measures that are more favourable to EU citizens and their family members than required by the Directive itself⁹.

Although in Cyprus, Greece, Finland, Luxembourg, Malta, Portugal and Spain the problems of compliance are linked only to some provisions of the Directive, considerable parts and crucial provisions of the Directive have been incorrectly transposed in most Member States.

This part of the Report sets out issues of compliance following the structure of the Directive.

3.1. Family members

Generally speaking, the transposition of the definition of family members under Article 2(2) is satisfactory.

Transposition with regard to the rights of other family members under Article 3(2) is less satisfactory. Thirteen¹⁰ Member States have failed to transpose Article 3(2) correctly. On the other hand, ten Member States¹¹ transposed it in a more favourable way by extending the automatic right to reside with the EU citizen also to this category of family members.

Same-sex couples enjoy full rights of free movement and residence in thirteen Member States¹² which consider registered partners as family members.

Following a judgment of the Court of Justice on 23 September 2003¹³, Denmark, Ireland, Finland and the UK made the right of residence of third country family members conditional upon their prior lawful residence in another Member State. Seven Member States¹⁴ adopted the same interpretation through administrative guidelines.

The application of this additional requirement, not provided for in the Directive, resulted in a high number of complaints.

On 25 July 2008 in case C-127/08 *Metock*, the Court of Justice ruled that the requirement of lawful prior residence is contrary to the Directive. It is important to underline that, according to the referring national court, none of the marriages in the *Metock* case was a marriage of convenience. The Court of Justice recalled that the Directive does not prevent Member States from fighting against abuse of Community rights, including marriages of convenience, as stipulated in Article 35.

This judgment caused considerable controversy in some Member States, notably in Denmark, where it was suggested that a loophole in immigration law had been created that could make it easier for third country nationals to “regularise” their situation by means of marriage to an EU citizen (*see point 3.8.3 below*).

⁹ For more details, please see graphs in the Annex.

¹⁰ AT, BE, DE, ES, FR, IT, LT, LU, HU, PL, SI, SE and the UK.

¹¹ BG, CZ, DK, EE, FI, LV, MT, NL, RO and SK.

¹² BE, BG, CZ, DK, FI, IT, LT, LU, PT, NL, ES, SE and the UK.

¹³ Case C-109/01 *Akrich*.

¹⁴ AT, CZ, DE, EL, CY, MT and NL.

3.2. Right of entry

The transposition of Article 5(2) is often incorrect and/or incomplete, and the legislative shortcomings result in frequent violations of the rights of family members, notably those who are third country nationals.

Only seven Member States¹⁵ have introduced specific facilities for family members to acquire an entry visa in their legislation. Bulgaria and Germany seem to ensure the facilitation in practice. Five Member States¹⁶ do not provide for the visa exemption for family members holding a residence card issued by another Member State.

Additional practical problems encountered by third country family members are caused by the failure to differentiate between third country nationals and third country family members of EU citizens, who enjoy certain rights under the Directive. The latter are still often required to submit a range of documents with their application for an entry visa, such as a proof of accommodation, sufficient resources, an invitation letter or return ticket.

Article 5(4) providing for the right of entry for EU citizens and their family members arriving at the border without the necessary travel documents or, if required, entry visas is often transposed and applied incorrectly. It was incorrectly transposed in Belgium, Latvia and Sweden. Six Member States¹⁷ have not transposed the provision at all.

3.3. Right of residence for up to three months

Most Member States have transposed Article 6 correctly. However, there are some compliance problems. Italy, Hungary, Slovenia and Spain make the right of residence conditional upon the third country family member's entering the country lawfully. Greece, Luxembourg and Slovenia link the right of residence to the duration of the entry visa. According to Community law, as confirmed by the case-law¹⁸, the residence rights cannot be denied on the sole ground that the family member has entered the Member State unlawfully or that their entry visa has expired.

Only Denmark, Finland, Malta and Sweden correctly provide for a more favourable treatment of jobseekers without formalities in relation to the right of residence under Article 6 in the light of Recital 9.

3.4. Right of residence for more than three months

3.4.1. Conditions attached to this right

Most Member States have transposed Article 7(1) correctly. Estonia and Spain do not even require EU citizens to meet any of the conditions set out in Article 7(1), and the right of residence is given solely on the basis of having citizenship of the Union.

The Czech Republic recognises the right of residence only when the family has satisfactory accommodation. Malta requires EU citizens to obtain a work licence in order to have the right

¹⁵ CY, CZ, EL, PL, PT, RO and ES.

¹⁶ AT, DK, ES, IE and the UK.

¹⁷ AT, DK, EE, IT, LT and DE.

¹⁸ Case C-459/99 *MRAX*.

of residence as workers¹⁹. Such requirements are contrary to Community law. There is no right for EU citizens to reside in Slovenia and Slovakia as family members of another EU citizen, making it more difficult for them to acquire the right of residence there.

Concerning family members of students, twelve Member States²⁰ have not made use of the option of Article 7(4) to restrict the scope only to the spouse and dependent children. Other Member States have made use of the option, but eight²¹ of them have not correctly transposed the obligation to facilitate entry and residence for the student's direct ascendants and descendants.

Article 7(3), which provides for the retention of the status of worker, is not correctly transposed in seventeen Member States²², mostly due to the fact that the law provides for the retention of the right of residence, but not of the status of worker, which is a wider concept. Retention of a status of a worker has impact not only on the right of residence but also confers additional protection against expulsion, the possibility to acquire the right of permanent residence on favourable conditions and an unrestricted right of equal treatment.

3.4.2. *Administrative formalities for EU citizens*

Under Article 8(1), Member States may require EU citizens to register. Ireland is the only Member State without a registration system.

The Czech Republic, Slovakia and the UK provide for an optional registration scheme. Other Member States oblige EU citizens to register and generally speaking their legislation transposes the Directive correctly.

However, twelve Member States²³ have transposed the notion of 'sufficient resources' incorrectly or ambiguously. Problems relate mostly to setting a minimum amount regarded as sufficient and failure to take the decision on the basis of personal circumstances.

Belgium, Hungary, the Netherlands and Sweden adopted detailed guidelines concerning the evaluation of sufficient resources. Latvia and the Czech Republic have detailed guidelines on how to assess the notion of "unreasonable burden".

3.4.3. *Administrative formalities for third country family members*

Most of the transposition concerns here relate to the residence card issued to third country family members, their validity and supporting documents to be submitted with an application.

A serious problem is that in a number of Member States the residence card is not called "Residence card of a family member of a Union citizen", as required by Article 10. Family members concerned may find it difficult to prove that their situation falls under the Directive, and not under the more restrictive national rules on aliens.

¹⁹ Requirement to obtain a work licence before being permitted to work is not an automatic issuing of work permits that would be allowed under the transitional arrangements on free movement of workers.

²⁰ AT, BG, DK, EE, ES, IE, IT, LT, LV, PT, SI and SK.

²¹ CZ, DE, FI, FR, LU, PL, RO and SE.

²² AT, BE, CZ, DE, FR, HU, IE, IT, LT, LV, NL, PL, RO, SK, SI, SE and the UK.

²³ BG, DE, EL, FI, IE, IT, LU, LV, NL, RO, SE and SI.

3.5. Retention of the right to reside in the event of death, departure or divorce

Regarding retention of the right of residence by family members who are EU citizens themselves, transposition is satisfactory. This is not the case for third country family members where transposition is often problematic.

Austria, Denmark, Ireland, Latvia, Slovenia and Slovakia have not fully transposed Articles 12(2) and 13(2), omitting the possibility to retain the right of residence for family members of a person satisfying the requirements to retain this right. Poland, on the other hand, adopted more favourable rules, allowing family members to retain the right of residence without the need to prove that the family member is a worker, self-employed or self-sufficient person.

3.6. Retention of the right to reside – Article 14

Only ten Member States²⁴ have explicitly transposed the provision prohibiting systematic verification of the conditions attached to the right of residence.

Thirteen Member States²⁵ do not exclude expulsion as an automatic consequence of recourse to the social assistance system.

3.7. Right of permanent residence

In addition to a number of minor problems with transposition of the right of permanent residence under Article 16, the most serious problems relate to acquisition of the right of permanent residence after five years of continuous residence. Hungary makes this right incorrectly conditional upon conditions related to the right of residence. Belgium and the UK incorrectly take no account of periods of residence acquired by EU citizens before their countries acceded to the EU.

A large number of Member States²⁶ had problems with the transposition of Article 17, which provides for more favourable rules for acquiring the right of permanent residence for persons that are no longer working.

3.8. Restrictions of the right of entry and residence on grounds of public policy, public security or public health

Chapter VI of the Directive provides for the right of Member States to deny entry or expel EU citizens and their family members but makes this subject to rigorous material and procedural safeguards that ensure that there is a fair balance between the interests of Member States and EU citizens. This is one of the chapters of the Directive where transposition is more often insufficient or incomplete.

Those enjoying the right of free movement have obligations to their host Member State, the first of which is to obey its laws. The Directive allows Member States to expel criminals. It ensures that there is always a case-by-case assessment and provides that the measures taken on grounds of public policy or security must respect the principle of proportionality and must be based exclusively on the personal conduct of the individual concerned which must

²⁴ BE, CY, DE, EL, FI, LU, MT, NL, PL and PT.

²⁵ AT, BE, BG, DE, DK, EE, FR, HU, IE, IT, LV, RO and SK.

²⁶ AT, BE, BG, DE, DK, EE, HU, IE, LV, SE, SI and SK.

represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Previous criminal convictions may not in themselves constitute grounds for taking such measures. The national authorities must also take account of how long EU citizens have resided on its territory, their age, state of health, family and economic situation, social and cultural integration and the extent of their links with the country of origin.

Italy and Finland²⁷ provide for automatic expulsions when EU citizens have committed a crime of certain gravity.

Italy has also introduced a scheme that increases the length of detention for offenders who are staying illegally at the moment in which they have committed a crime. The Court of Justice has ruled several times that the failure by an EU citizen to comply with administrative procedures concerning residence can only be sanctioned in a proportionate and non discriminatory way.

3.8.1. *Material safeguards (Articles 27 - 28)*

Given the importance of the safeguards that lay down the conditions on which Member States may restrict the right of free movement, it is disappointing to note that only four Member States²⁸ have transposed these safeguards correctly.

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. The extent of unsatisfactory transposition is mitigated by the fact that the safeguards seem to be correctly applied by the national courts and authorities, despite the absence of clear and strict guidelines for the exercise of judicial and administrative discretion. This is one of the major shortcomings in the transposition.

Regardless of the practical application of the safeguards, it is essential that they be explicitly transposed, if only to provide EU citizens with a clear and comprehensive description of their rights. Member States should also make more efforts to simplify their transposition measures, as often only an expert can understand their effect.

As an expression of the underlying principle of proportionality, the Directive strengthens the protection against expulsion for those EU citizens who have resided in the host Member State for a longer period of time. While EU citizens having a right of residence can be expelled on grounds of public policy or public security, those having a right of permanent residence can be expelled only on serious grounds of public policy or public security (*Article 28(2)*). Those having resided in the host Member State for the previous ten years can be expelled only on imperative grounds of public security. The same protection is granted to minors, except if the expulsion is necessary for their best interests, as provided for in the Convention on the Rights of the Child (*Article 28(3)*).

Member States remain competent to define and modify the notions of public policy and public security. However, implementation may not trivialise the difference between the scope of Articles 28(2) and Article 28(3), or extend the concept of public security to measures that should be covered by public policy.

²⁷ FI provides for automatic expulsion on imperative grounds of public security.

²⁸ CY, EL, MT and PT.

3.8.2. Procedural safeguards (Articles 30 - 31)

The transposition of the procedural safeguards is not satisfactory. Only four Member States²⁹ have transposed the safeguards correctly. Most problems in this area seem to stem from inaccurate transposition.

In cases of absolute urgency, no procedural safeguards apply in France. The EU citizen receives no written notification of the expulsion decision, is not informed of the grounds on which the decision was taken and has no right of appeal before the decision is enforced.

More than half of Member States have not correctly transposed the time allowed to leave the territory in the event of expulsion.

Transposition relating to access to judicial and administrative redress is generally correct. In the UK, the right to appeal is granted only to those EU citizens and their family members who produce evidence that they have the right of free movement. Those with regard to whom the UK authorities consider that no evidence was produced are not informed about the right of redress. The Directive requires all decisions to be open to redress.

3.8.3. Abuse and fraud (Article 35)

Community law should not be abused. According to Article 35, Member States may adopt measures to prevent abuse, such as marriages of convenience, as confirmed by the Court of Justice in the *Metock* judgment. Where there are doubts that the marriage is not genuine, Member States can investigate to determine whether the rights granted by the Directive are being abused' for example to circumvent national rules on immigration, and can refuse or withdraw the rights of entry or residence if abuse is proven. The Directive requires the respect of the principle of proportionality and of the procedural safeguards laid down in Articles 30 and 31.

Despite its importance, Article 35 was not transposed by all Member States.

4. ASSESSMENT OF PRACTICAL APPLICATION

In the thirty months since the Directive has been applicable, the Commission has received more than 1800 individual complaints, 40 questions from the Parliament and 33 petitions on its application. It has registered 115 complaints³⁰ and opened five infringement cases for incorrect application of the Directive.

The problems raised by complainants with the Commission, the Parliament, and SOLVIT³¹ correspond with the findings of this Report.

The problems revealing persistent violation of the core rights of EU citizens are mostly related to:

²⁹ CY, LT, ES and PT.

³⁰ 106 complaints still remain open.

³¹ SOLVIT, an on-line problem-solving network in which EU Member States work together to deal with problems arising from the misapplication of Internal Market law by public authorities, resolved 133 of 199 cases related to residence permits and 43 of 65 cases related to visas. In 2007, free movement of persons was the third biggest problem area in the SOLVIT case volume (15%).

- the right of entry and residence of third country family members (*problems with entry visas or when crossing the border, conditions attached to the right of residence not foreseen in the Directive and delayed issue of residence cards*),
- the requirement for EU citizens to submit with the applications for residence additional documents not foreseen in the Directive.

5. STEPS TO BE TAKEN

The responsibility for ensuring that the Directive is transposed and implemented correctly and that EU citizens are informed of their rights lies with the Member States. The failure to transpose certain provisions at all or in part is producing situations of legal uncertainty which may result in the adoption of legislative or administrative solutions that could impair the rights of EU citizens and their family members.

The Commission will step up its efforts to ensure that the Directive is correctly transposed and implemented across the EU. In order to achieve this result, the Commission will use fully its powers under the Treaty and launch infringement proceedings when necessary. Priority will be given to the most serious problems identified in Chapter 4 of this Report.

The Commission will also continue working at technical level with the Member States. In September 2008 the Commission created a group of experts from Member States to identify difficulties and clarify issues of interpretation of the Directive. Two meetings of the group of experts identified a number of issues that require further discussion and clarification, especially as regards the issues of criminality and abuse. A questionnaire was prepared to understand the concerns of the Member States on the ground, and to collect statistical data and best practice. The group will continue to meet on a regular basis.

The Commission intends to offer information and assistance to both Member States and EU citizens by issuing guidelines in the first half of 2009 on a number of issues identified as problematic in transposition or application, such as expulsions and fight against abuse, in order to offer guidance as to how those may be resolved.

Member States and the European Parliament are not the only stakeholders with whom the Commission must work intensively. EU citizens must continue to be informed about their rights under the Directive. To this end, the Commission will continue to treat provision of information on the Directive as a priority and will continue to distribute a simplified guide for EU citizens³², making the best use of the Internet, mainly through Your Europe portal, the creation of an article on Wikipedia on the right of free movement and simple ‘factsheets’ explaining citizens’ rights.

The Commission will encourage and support Member States to launch awareness-raising campaigns to inform EU citizens of their rights under the Directive, as required under Article 34. The group of experts will examine and disseminate best practice to this effect.

³² Guide on how to get the best out of Directive 2004/38/EC, available at http://ec.europa.eu/commission_barroso/barrot/policies

6. CONCLUSIONS

At this stage, it is not necessary to propose amendments to the Directive. The Directive must be implemented by Member States more effectively. The difficult issues of interpretation which have arisen so far can be addressed satisfactorily by issuing guidelines following further discussion and clarification.

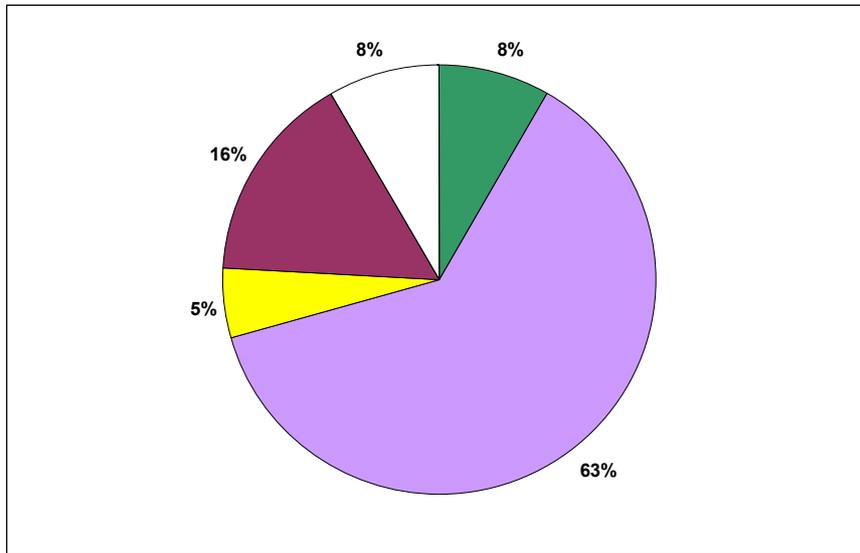
A second report on the application of the Directive will be issued in due course.

ANNEX

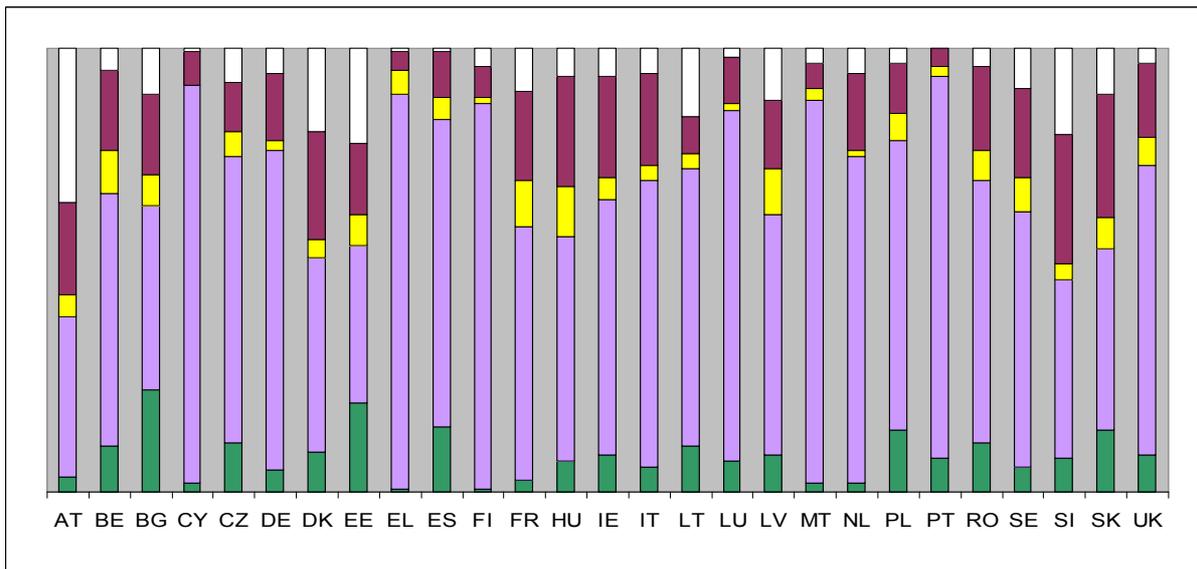
STATE OF PLAY OF TRANSPOSITION OF DIRECTIVE 2004/38

Legend	
	More favourable treatment
	Correct and complete
	Ambiguous
	Incorrect and/or incomplete
	Not transposed at all

1. Overall figures of transposition of Directive 2004/38



2. Situation by Member State



3. Overview by Article

