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COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

**TO THE COUNCIL AND THE EUROPEAN PARLIAMENT  
ON THE SPECIAL MEASURES CONCERNING THE  
MOVEMENT AND RESIDENCE OF CITIZENS OF THE  
UNION WHICH ARE JUSTIFIED ON GROUNDS OF  
PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC  
HEALTH**

(Directive 64/221/EEC)

**SEMDOC**

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## 1. INTRODUCTION

### 1.1. Background

Free movement of persons is one of the fundamental rights guaranteed by Community law. According to Article 18(1) of the Treaty establishing the European Community every citizen of the Union shall have the right to move and reside freely within the territory of the Member States. However, this right remains subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.<sup>1</sup>

In particular, according to Articles 39(3), 46(1) and 55 of the EC Treaty, the Member States may impose restrictions upon the right to free movement where this is justified for reasons of public policy, public security or public health. Such measures must comply with the terms and conditions of Council Directive 64/221/EEC of 25 February 1964<sup>2</sup>. The objective of the Directive is to offer to its beneficiaries specified safeguards and guarantees when the Member States resort to measures on grounds of public policy, public security or public health, as these grounds are derogations from the fundamental freedoms provided for by the Treaty and should therefore be interpreted strictly and in the light of all the provisions of the Treaty. The proper application and interpretation of this Directive is the subject matter of the present Communication.

### 1.2. Why a Communication?

Directive 64/221/EEC dates from 1964. Over the years, its provisions have been extensively interpreted and developed in a series of judgements from the European Court of Justice, culminating in the recent case of Donatella Calfa<sup>3</sup>. Developments in European integration, and particularly the introduction of the concept of citizenship of the Union in Article 18 of the EC Treaty, have also changed the context in which the Directive falls to be interpreted.

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<sup>1</sup> Article 18 confers upon Union citizens a fundamental and personal right, which may be exercised outside the context of an economic activity. Article 18(2) specifies that the Council may adopt new provisions to facilitate the exercise of this right. The Resolution of the European Parliament on the second Commission report on citizenship of the Union (C4-00291/97, OJ C 226, 20.7.1998, p. 61, the Report COM (97) 230 final, 27.5.1997) and the Action Plan for the Single Market (CSE(98)1 final, 4.6.1997) endorsed by the Amsterdam European Council, have already called for new provisions to this effect.

<sup>2</sup> OJ No. 56, 4.4.1964, p. 850-857. The legal basis of the Directive is Article 46(2) of the EC Treaty.

<sup>3</sup> Case C-348/96, in which the Court of Justice gave its judgement on 19 January 1999. Note: the Annex to this Communication contains a table of the most relevant jurisprudence of the Court of Justice.

At the same time, the Commission has been receiving an ever-increasing number of complaints concerning the application of the Directive. Further, these suggest that the interpretation and implementation of some of its basic principles differ widely amongst the Member States.

The Commission therefore considers that the time has come to draw attention to some of the main difficulties which arise in the implementation of the Directive, and to offer guidance as to how these may be resolved. In offering information and assistance to both Member States and citizens of the Union, it is hoped that this Communication will also serve to reduce the number of future infringement cases.

The present Communication must also be seen in the light of the Commission's commitment to ensure correct application of Community law, to bring the Union closer to its citizens, in particular through better information about citizens' rights under the Treaties. In the same spirit, the Commission is developing mechanisms to allow a real Dialogue with Citizens, through which the Commission is collecting feedback on the day-to-day application of Community law.

**The following specific problems will be addressed in the present Communication:**

*Entry and residence:*

- Undue delay in examining residence permit applications (Article 5).

*Expulsions and other measures:*

- The role played by previous convictions in assessing the threat to public order or public security (Article 3(2)).
- General prevention: where all persons belonging to a certain group are considered to constitute a threat to public order or public security without any individual assessment (Article 3(1)).
- Defects in informing the person concerned of the measure taken or the grounds and/or the consequences of such a measure (Article 6).
- The storage of personal data collected about the persons concerned e.g. in the Schengen Information System or in national systems (Article 6).

*Position of specific groups:*

- The expulsion of second-generation migrants or long-term residents.
- The position of those third-country national family members of Union citizens, who are beneficiaries of Community law (Article 1).

- The position of third-country nationals who did not benefit from the protection of Community law at the time when the measure was taken, but have later become beneficiaries either as Union citizens or as their family members (Article 1).

*Remedies:*

- Defects in re-examination of the cases.

## 2. BASIS FOR INTERPRETATION

### 2.1. The Scope of Directive 64/221/EEC

#### *Personal Scope of the Directive*

The Court of Justice has stated that the right of nationals of one Member State to enter the territory of another Member State and to reside there is conferred directly on any person falling within the scope of Community law.<sup>4</sup>

The Directive applies to all nationals of Member States who travel to another Member State as workers, self-employed persons or recipients of services<sup>5</sup>. Its scope has subsequently been extended to cover former workers and self-employed persons who remain in another Member State having terminated their activity<sup>6</sup>. The Directive applies also in the European Economic Area with the exception of Article 4(3)<sup>7</sup>. It derives from Article 2(2) of Directives 90/364/EEC<sup>8</sup> (general right of residence), 90/365/EEC<sup>9</sup> (retired persons) and 93/96/EEC<sup>10</sup> (students) that Directive 64/221/EEC is applicable within the scope of those Directives. The Directive applies to the spouse and other members of the family in the meaning of its Article 1, paragraph 2, whatever their nationality.

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<sup>4</sup> Case 48/75 *Royer*, para. 31. Whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national legislation of the Member State concerned (see the EC Treaty, Declaration (No 2) on nationality of a Member State). The same principle is applied in the European Convention on Nationality of 6.11.1997 of the Council of Europe (ETS. No. 166). See also the Court of Justice jurisprudence in Cases C-369/90 *Micheletti* (ECR[1992] I-4239) and 292/86 *Gullung* (ECR[1988] p. 111) concerning dual nationality and freedom of establishment.

<sup>5</sup> See Articles 39, 43 and 49 of the EC Treaty respectively. Also Regulation (EEC) No 1612/68, OJ L 257, 19.10.1968, p. 2, as last amended by Regulation (EEC) 2434/92, OJ L 245, 26.8.1992, p. 1, Directive 68/360/EEC, OJ L 257, 19.10.1968, p. 13, and Directive 73/148/EEC, OJ L 172, 28.6.1973, p. 14. In Joined cases 286/82 and 26/83 *Luisi & Carbone* the Court of Justice has specified (para. 16) which groups are to be regarded as recipients of services.

<sup>6</sup> Directive 72/194/EEC, OJ L 121, 26.5.1972, p. 32 and Directive 75/35/EEC, OJ L 14, 20.1.1975, p. 14.

<sup>7</sup> Agreement on the European Economic Area, Annex V, Free movement of workers – list provided for in Article 28, OJ L 1, 3.1.1994, p. 325.

<sup>8</sup> OJ L 180, 13.7.1990, p. 26.

<sup>9</sup> OJ L 180, 13.7.1990, p. 28.

<sup>10</sup> OJ L 317, 18.12.1993, p. 59.

### *Measures within the Scope of the Directive*

The Court has specified in Case 30/77 *Bouchereau*<sup>11</sup> that for the purposes of the directive, a 'measure' is any action which affects the right of persons coming within the field of application of Article 39 of the Treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host State. Community law<sup>12</sup> also confers on nationals a right to leave the territory of their Member State of origin in order to enter the territory of another Member State and for this purpose the Member State of origin should issue or renew the identity card or passport of such nationals. However, the Member State may refuse to do so or restrict this right for reasons of public policy, for example in the case of persons due to start their military service or in case of objectors of conscience, while respecting the principle of proportionality.

### *Non-applicability to Purely Internal Situations*

The Directive does not apply to situations purely internal to a Member State. Case C-297/88 *Dzodzi* concerned the situation of a national of a third country who, solely on the basis as the spouse of a national of a Member State, claimed a right to reside or to remain in the territory of that Member State. However, the national of the Member State had never exercised his right to free movement by working or residing in another Member State with that member of the family and therefore Community law was inapplicable.

## 2.2. Fundamental Principles and Rights

The Directive shall be interpreted in the light of the basic principle of free movement. Any restriction of individual freedom of movement must be assessed against the background of the fundamental principles and rights.

The European Union is based on the respect of liberty, democratic principles, respect for human rights and fundamental freedoms and the rule of law and, more particularly, on the respect of the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 of the Treaty on European Union). This basis of the Union has been further reinforced by the Treaty of Amsterdam with a provision enabling suspension of rights of any Member State for having seriously and persistently infringed these principles (Article 7 of the Treaty on European Union).

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<sup>11</sup> Para. 21.

<sup>12</sup> Directive 68/360/EEC, OJ L 257, 19.10.1968, p. 13, Article 2, which is *mutatis mutandis* applicable to the other right of residence Directives.

Moreover, although the Community as such cannot become a Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>13</sup>, all the Member States are parties to the Convention. The major institutions of the Community have declared already in 1977 that they will respect the principles of this Convention<sup>14</sup> and the Court of Justice has ruled that it will ensure the respect for the fundamental rights of the Convention in its interpretation and application of Community law.<sup>15</sup>

This means that the Member States take any measures on refusal of entry or expulsion of Community citizens against a common background of respect for human rights and democratic principles. This implies that any application of the notions of public policy and public security by the Member States will not only be subject to strict scrutiny so that their scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community<sup>16</sup>, but also that such Community law scrutiny will be inspired by the basic human rights as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>17</sup>. Moreover, because of this common background (and the possibility of suspension of a Member State by which it is now underpinned), any recourse to the right of refusal of entry or of expulsion is unlikely to place the citizen of the Union concerned in jeopardy as to the enjoyment of his basic rights in another Member State.

Furthermore, the measures adopted for the protection of public policy, public security or public health must be applied in accordance with the *principle of proportionality*. As the consequences of an expulsion or a refusal of re-entry are often extremely serious for the person concerned and his family, the Member States should ensure that the measures taken are in proportion to the justified interests which they try to protect by these measures. Proportionality requires justified grounds for a measure, justified balance between the measure and the objective, and justified balance of interests of the individual and the State concerned.

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<sup>13</sup> Opinion 2/94 of the Court of 28 March 1996, 1996 ECR, I 759, paras. 34-36.

<sup>14</sup> Joint Declaration of the European Parliament, the Council and the Commission, 5 April 1977 (OJ No. C 103, 27.4.1977, p. 1).

<sup>15</sup> Opinion 2/94, *ibid.*, para. 33.

<sup>16</sup> Case 36/75 *Rutili*, para. 27.

<sup>17</sup> Obviously the right to family life, as laid down in Article 8 of the ECHR is of particular importance. But even the limitations placed on the powers of the Member States in respect of the control of aliens are merely a specific manifestation of the rule, laid down in the exception to Articles 8, 9, 10 and 11, and to Article 2 of Protocol 4 of the ECHR, that these fundamental freedoms shall only be restricted 'as far as necessary' for the protection of national security or public safety 'in a democratic society', see Case 36/75 *Rutili*, para. 32.

The one fundamental right that, for obvious reasons, cannot be applied in the normal way in the case of refusal of entry or expulsion, is the prohibition of discrimination on the basis of nationality. Pursuant to international law a State cannot refuse entry to or expel its own citizens.<sup>18</sup> On the other hand a State cannot discriminate between its own nationals and other citizens of the Union where it concerns conduct which is deemed to be a threat to public policy or public security. If such conduct on the part of its own nationals is not subject to serious repressive measures, it cannot be a cause for expulsion of other citizens of the Union.<sup>19</sup>

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<sup>18</sup> Case C-171/96 *Roque v. Jersey* and Case C-348/96 *Donatella Calfa*.

<sup>19</sup> Joined Cases 115 and 116/81 *Adoui and Cornuaille*, para. 8.

### 3. GUIDELINES FOR APPLICATION

#### 3.1. The Grounds in the light of the Citizenship of the Union

##### 3.1.1. Public Policy

Neither the Treaty nor the secondary legislation define the concepts of public policy, public security or public health. This leaves it to the discretionary powers of the Member States to determine the scope of these concepts pursuant to national legislation and jurisprudence. Directive 64/221/EEC does not concern these concepts, but rather *measures justified on grounds of public policy, public security or public health*. The concepts existed in national legislation and practice before the creation of the European Community and have evolved over time. No precise definitions of these concepts are used in the national legislation, and moreover, these concepts at least partially overlap.

The scope of the concepts of public policy, public security and public health should not be artificially limited by trying to give them an exact and exhausting definition. This would be extremely difficult and would not serve any real purpose. However, this does not mean that the Member States have powers, when justifying measures on these grounds, to freely define and interpret these concepts according to their own practices and traditions.

A clear distinction should be made between the actual violation of public policy, public security or public health, which does not necessarily lead the Member State to take any measure, and the examination and decision by the Member State whether actually to take a measure. When deciding whether to take a measure or not, the Member State is limited by the whole framework of Community law, especially the fundamental principles and rights and the citizenship of the Union.

The Member States have discretionary powers for interpretation, and the national legislation and practices of the Member States may be applied, only within this Community framework. Discretionary powers conferred on the Member States do not justify arbitrary use of these powers, for example taking measures solely on the basis of the racial or religious background of the person. Nevertheless, the national concepts of public policy, public security and public health may gradually approach each other as European integration advances. Consequently the national interpretation and practices in applying these concepts may change accordingly. National legislation and practice are still applicable in the case of those third-country nationals who are not beneficiaries of Community law as family members<sup>20</sup>.

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<sup>20</sup> See COM (1999) 3 final, 27.1.1999. Proposal for a Council directive extending the freedom to provide cross-border services to third-country nationals established within the Community and Proposal for a directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services. See also Decision No 1/80 of the EEC-Turkey Association Council of 19 September 1980 as regards the free movement of Turkish workers.

The new concept of citizenship of the Union should play a role in the overall assessment of the position of a Union citizen in case national authorities consider his/her expulsion or non-admission for reasons of public order, public security or public health. Article 18 of the EC Treaty should be accorded its full weight by national authorities when they contemplate the application of Directive 64/221/EEC to a Union citizen. This is especially true for specific categories of Union citizens: nationals of other Member States who were either born, or have lived since childhood, in the Member State of residence and who have virtually all their cultural, social and family ties to that Member State, as well as other long-term residents and minors (see e.g. para. 3.4.1 below).<sup>21</sup>

Grounds of public policy, public security or public health may not be used to serve economic ends and the economic ends cannot constitute such grounds.<sup>22</sup> This has been expressly prohibited in Directive 64/221/EEC, Article 2(2). On this point, Community law is broader in scope than the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which permit measures which are deemed necessary for the economic well-being of the country. Furthermore, lack of sufficient resources alone does not justify measures taken on grounds of public policy upon the entry into the country as the Member States are not even permitted upon the entry to pose questions concerning the purpose and duration of the journey and the financial means at a person's disposal at the point of entry.<sup>23</sup>

### 3.1.2. *Public Security*

The Commission fully recognises the need for Member States to protect their security. The criterion of public security offers Member States a rather wide power of discretion. Nevertheless, even in very sensitive matters the power of discretion is not unlimited and some transparency is necessary. On the basis of the grounds given by the State concerned, the Community institutions should be able to estimate, at a minimum, whether a person is actually a threat to public security and whether such a threat is sufficiently serious to justify the measure taken on grounds of public security.

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<sup>21</sup> See the Second Report from the Commission on Citizenship of the Union (COM (97) 230 final, 27.5.1997) for the concept of citizenship of the Union.

<sup>22</sup> See Case 352/85 *Bond van Adverteerders*, para. 34.

<sup>23</sup> The Court has stated in Case 68/89 *Commission v Netherlands*, para 13, that the obligation to answer questions put by frontier officials cannot be a precondition for the entry of a national of one Member State into the territory of another. The judgement confirms that this prohibition covers questions concerning the purpose and duration of the journey and the financial means at a person's disposal. Furthermore, Article 2(2) of the Directive prohibits the use of public policy, public security and public health grounds for economic ends and is one of the explicit limitations on the discretionary powers of Member States included in the Directive.

Moreover, the person concerned should be informed of the grounds as far as possible without endangering the security of the state. In cases concerning security of the state the interests of the individual and the state are in conflict. There are situations where the Member States are obliged to take measures to protect the fundamental interests of the society, but they should apply the security of the state criterion as narrowly as possible.<sup>24</sup>

### 3.1.3. Public Health

Article 4 of the Directive imposes limitations on the use of the public health grounds and the Annex of the Directive contains the list of the diseases or groups of diseases, which come within the scope of public health criteria.<sup>25</sup> The Annex specifies that drug addiction and mental illnesses might threaten public policy or public security, but not public health.

The Directive allows the Member States to refuse a first residence permit to persons with one of the illnesses or medical conditions scheduled in the Annex. It must be noted that a refusal to renew a residence permit or an expulsion of a residence permit holder is not permitted on grounds of public health. The right to refuse a first residence permit gives the Member States a possibility to request a person to provide a medical certificate if this has been provided for by national law and if the purpose of such a certificate is to establish that the person is not suffering from one of the diseases mentioned in the Annex. However, the Member States may not set any general requirement that before entry into the country citizens of another Member State need to provide proof that they are not suffering from any illness mentioned in the Annex.

The public health grounds are somewhat outdated given the current level of integration of the European Union and the development of new means to handle public health problems. Therefore, restrictions of free movement can no longer be considered as necessary and effective means of solving public health problems. The situation has changed radically from what it was in 1964, even though the concept of public health still forms part of Community law.<sup>26</sup>

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<sup>24</sup> The Court of Justice has interpreted the 'security of the state' grounds in Joined cases 115 and 116/81 *Adoui and Cornuaille*. Para. 13 of the judgement states "it is clear for the purpose of the directive that the notification of the grounds must be sufficiently detailed and precise to enable the person concerned to defend his interests," and further: "It is sufficient in any event if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof."

<sup>25</sup> No diseases or groups of diseases have been added to the list so far.

<sup>26</sup> As the concept of public health still exists in Community law, the free movement of persons suffering from HIV/AIDS is worth mentioning. In the documents adopted by the Community institutions, it has been clearly stated that the full respect of free movement of persons and equality of treatment must be guaranteed for persons affected by HIV/AIDS. The Commission rejects the use of any measures, which could lead to social exclusion, discrimination or stigmatisation of persons with HIV/AIDS. See inter alia Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 15 May 1987 concerning AIDS (OJ C 178, 7.7.1987, p.1).

### 3.2. Entry and Residence

#### *Formalities*

The Court of Justice has pointed out that the mere failure by a national of a Member State to complete the legal formalities concerning access, movement and residence of aliens does not justify a decision ordering expulsion.<sup>27</sup> The Court has also confirmed this as regards the person's failure to notify her presence and to make a declaration of residence.<sup>28</sup>

Article 3(3) of Directive 64/221/EEC provides that expiry of an identity card or passport does not justify expulsion, even if turning back at the border is possible in the absence of valid identity card or passport. The Commission considers that no threat of expulsion should be linked to the renewal procedure of the residence permit and that such a threat would be considered contrary to the Directive. Failure to apply for the extension of the residence permit would not justify an expulsion order, even if an administrative sanction e.g. a fine, which is in proportion to such a failure and non-discriminatory, would be acceptable.

The Court of Justice has stated that restrictions on grounds of public policy, public security or public health must be regarded not as imposing a condition precedent to the acquisition of the right of entry and residence but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty.<sup>29</sup>

Article 5(2) of the Directive allows the host Member State to request the Member State of origin to provide information concerning any previous police record of the residence permit applicant in cases where this is considered essential. The Article specifies that such enquiries shall not be made as a matter of routine.

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Conclusions of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 31 May 1988 concerning AIDS (OJ C 197, 27.7.1988, p.8), Resolution of the Council and the Ministers for Health of the Member States, meeting within the Council of 22 December 1989 on the fight against AIDS (OJ C 10, 16.1.1990, p.3) and Decision No 647/96/EC of the European Parliament and of the Council of 29 March 1996 adopting a programme of Community action on the prevention of AIDS and certain other communicable diseases within the framework for action in the field of public health (1996 to 2000), (OJ L 95, 16.4.1996, p. 16).

<sup>27</sup> Case 48/75 *Royer*, para. 38. See also Case C-363/89 *Roux*, para. 11 and the Report of the High Level Panel on the free movement of persons, chaired by Mrs Simone Veil, presented to the Commission on 18 March 1997 and the follow-up of that Report (COM(98) 403 final, 1.7.1998). The High Level Panel expressed special concern that contrary to what tends to be the case in the Member States concerned, non-possession of a valid residence permit should never *per se* lead to a threat of expulsion.

<sup>28</sup> Case 118/75 *Watson and Belmann*, para. 20.

<sup>29</sup> Case 321/87 *Commission v. Belgium*, para. 10.

The same principles apply also as regards the visas of third-country national family members. Consequently, no threat of expulsion should follow a failure to apply for the prolongation of visas. Visa policy should not be used as a means to prevent genuine family members from enjoying the rights conferred on them under Community law.

#### *Time-limit for Handling the Application*

The Commission would like to recall the importance of respecting the deadline contained in Article 5 of the Directive. If this deadline is not respected, a Member State is in violation of one of the basic rights and guarantees offered by the Directive. It should be stressed that in normal cases, once the applicant has provided all the necessary proof as required by the relevant right of residence directive, the residence permit should be issued without unnecessary delay<sup>30</sup>, for example in the same time as the national identity card or passport is usually issued. The six-month deadline is exceptional and only relevant in cases in which there are some specific reasons to examine whether grounds of public policy, public security or public health exist. A stand-still situation caused by any delay in issuing the residence permit may cause the person concerned various problems. It should be recalled that the residence permit has only declaratory and probative force.<sup>31</sup> It constitutes solely proof of the right of residence and is not a pre-condition for other rights to which the person residing in another Member State is entitled.

### **3.3. Expulsion and other Measures**

#### *3.3.1. Evaluation of the Threat posed*

##### *Overall Evaluation*

The Commission wishes to emphasise *the importance of comprehensive evaluation of all the relevant factors* when determining whether a person is a genuine and sufficiently serious threat affecting one of the fundamental interests of the society. This may involve taking into consideration *inter alia* the following factors: the nature and severity of the crimes committed, the time which has elapsed since the crimes were committed and the overall situation of the person concerned.<sup>32</sup> The manner in which the situation of the person has evolved has particular importance in cases where the evaluation of threat is made long time after the acts threatening public order were committed, where there is a long lapse of time between the original decision and its implementation and when the person uses his right of re-application.

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<sup>30</sup> Case C-344/95 *Commission v. Belgium* and especially paras. 9-11 of the Opinion of Advocate General Lenz delivered on 14 November 1996.

<sup>31</sup> See Case C-85/96 *Alartinez Sala*, para. 53. This concept is based on Case 48/75 *Rover*, para. 50, which confirms that the right of nationals of one Member State to enter the territory of another Member and reside there is conferred directly on any person falling within the scope of Community law.

<sup>32</sup> As regards personal conduct, see also Case 41/74 *Van Duyn*, para. 24, and Joined cases 115 and 116/81 *Adoui and Cornuaille*, para. 8.

When grounds for an expulsion of a prisoner or a former prisoner who is a national of another Member State are examined, the good behaviour in prison should have the same relevance as in the case of nationals when for instance grounds for their release on parole is examined.

After the actual evaluation of threat, there must be a further examination as to whether the measure is proportional taking into consideration all the relevant factors and the present personal circumstances of the person. *The present personal circumstances* of the person may involve the length of time the person has resided in the country and his social, cultural and family ties to that country as well as his present integration in the host society. The fact that a person was born and educated in the country of residence or has resided there from an early age strengthens considerably his ties to that country. Furthermore, in such circumstances the person's behaviour reflects, both in its good and bad aspects, and can be evaluated against the behaviour of his peers who are nationals of the country of residence and are shaped by the same society. The family ties of the person may involve the situation of parents and siblings, but the existence of a spouse and children who are nationals of the country of residence or long-term residents is of particular relevance. The overall evaluation may also include the strength of ties, or the lack of ties, to the country of origin (relatives, visits and language skills).

In Case 30/77 *Bouchereau* the Court has limited the discretionary powers of Member States to justify public policy measures on grounds of previous criminal convictions by stating: "*The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy*"<sup>33</sup>. Recourse by a national authority to the concept of public policy presupposes in any event the existence of "*a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society*"<sup>34</sup>. This question is to be considered by national authorities in each individual case in the light of Community law.<sup>35</sup>

#### *General Prevention in Specific Circumstances*

In certain situations other justified concerns of the Member States must be balanced with the guarantees and safeguards offered by Directive 64/221/EEC. Such specific situations are *gatherings attended by large numbers of people*, possibly from

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<sup>33</sup> Para. 28. However, in *Bouchereau*, para. 29, the Court indicated that it is possible that past conduct alone may constitute such a threat to the requirements of public policy in exceptional cases.

<sup>34</sup> Para. 35.

<sup>35</sup> In the recent Case C-348/96 *Donatella Calfa* the Court specified this principle by stating that an expulsion order could be made against a Community national if, *besides* her having committed an offence under drugs laws, her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

different Member States, for example large sports events, rock concerts, political demonstrations and other organised protests.<sup>36</sup>

The Member States have discretionary powers to apply public policy and public security measures to prevent violence and hooliganism at sports events. However, the extensive use of these grounds may lead to detentions and expulsions, which are not based on any individual grounds. The measures should be targeted at individuals – or sometimes on justified grounds to a specific group of individuals - whose personal behaviour may cause a threat to public policy or public security.<sup>37</sup> The general principle is that any security measures should be applied in a non-discriminatory basis to own nationals and nationals of another Member State.

The use of ‘fast-track’ procedures should be limited and targeted at persons who arrive in the country for a short period of time in order to attend a specific event. Such a system and any measures involved should be well specified by the Member States. The threat caused by a person also depends upon whether a person belonging to a specific group is entering the country to attend a certain event involving security risks or whether he is entering the country at another time of the year clearly for other purposes (business, holiday with the family etc.).

### 3.3.2. *Decision on a Measure*

#### *Ordering a Measure*

The Court of Justice has ruled that Directive 64/221/EEC is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals<sup>38</sup>.

In some countries the criminal court may on the same occasion make a decision concerning the criminal conviction and an administrative decision concerning subsequent expulsion. More often than provided by law, such an ‘automatic’ link is created through practice, in particular in relation to drug offences. National legislation may quite correctly provide that the national authorities or national court may make an expulsion order after taking into consideration all the relevant factors,

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<sup>36</sup> The eruption of violence at football matches has led the Member States to take strict measures to ensure safety and public order at large scale events, which is incontestably within their competence. The most recent documents related to this topic include *inter alia* Council Recommendation of 22 April 1996 on guidelines for preventing and restraining disorder connected with football matches, OJ C 131, 3.5.1996, p. 1; Resolution of the European Parliament on hooliganism and the free movement of football supporters, OJ C 166, 10.6.1996, p. 40; Joint Action of 26 May 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union with regard to co-operation on law and order and security, OJ L 147, 5.6.1997, p. 1; Council Resolution of 9 June 1997 on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy, OJ C 193, 24.6.1997, p. 1. See also the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches of 19.8.1985 of the Council of Europe (ETS No. 120).

<sup>37</sup> The Member States cooperate in criminal matters under Title VI of the Treaty on European Union.

<sup>38</sup> Case 41/74 *Van Duyn*, para. 13. The Court further stated in para. 15 that the directive confers on individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.

but the provision is applied automatically in individual cases with sole reference to the criminal conviction and without any individual or specified reasoning. The Commission finds this kind of practice incorrect from the point of view of Community law. Article 3(1) of the Directive imposes on the Member States an obligation to examine each case individually.

Consequently, the legislation of the Member States should not include any provision which establishes *a systematic and automatic link* between a criminal conviction and subsequent expulsion. Neither should the competent national authorities automatically take any such decision. An 'automatic' system means any national provision the wording of which leaves the national authorities or the national court no margin for appreciation or for taking into consideration any individual circumstances.<sup>39</sup> However, nothing should prevent the Member States from linking a criminal conviction with an examination of the circumstances in order to ascertain whether there are reasons to take measures on grounds of public order or public security. The national court may order a criminal conviction and an expulsion on the same occasion or the court or the administrative authorities may order an expulsion at a later stage either while the person is still in prison or upon release from prison.

In Case 36/75 *Rutili* the Court of Justice ruled that a Member State cannot impose on nationals of other Member States restrictions which are territorially limited except in circumstances where such prohibitions may be imposed on its own nationals<sup>40</sup>.

In certain circumstances *the use of an urgency procedure* may be problematic, for example if a person, who has been convicted of a crime, serves a prison sentence and is deported directly upon release from prison. Questions arise as to whether the person actually has effectively had any possibility to avail himself of the safeguards and guarantees provided by the Directive, especially in the case of long-term residents, as an expulsion may seriously affect their personal and family situation. A real justification for following an urgency procedure should always exist and it is for the Member State to prove that urgency. A systematic reference to urgency is not acceptable.

#### *Information about a Measure*

The persons concerned should always be *informed of the exact nature and the consequences of any measure* taken in the scope of the Directive. The Commission would like to underline the importance of informing the complainants properly of the contents of any documents issued to them, of the procedure and of the remedies available. This also concerns cases where measures are initiated and executed urgently, sometimes in relation to groups of persons of a certain nationality.

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<sup>39</sup> Automatism in this sense has sometimes been introduced in cases where the individual commits severe crimes and receives a certain minimum sentence (see Case C-348/96 *Donatella Calfa*).

<sup>40</sup> Para. 50. In this case an Italian national residing in France was subjected to a prohibition on residence in certain parts of France.

The Court has held that the person concerned should be given a "*precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence*".<sup>41</sup> This provision applies to all the relevant decisions and it applies equally in favour of the members of the family of the Union citizens, due also to decisions regarding the issuing of their visas.

### *Consequences of a Measure*

The Commission may examine any measure within the scope of the Directive as well as its *administrative consequences*. For instance when a standing expulsion order prevents a person from re-entering the country, a decision refusing re-entry cannot be considered a mere consequence of the original expulsion.

### *Data protection*

There are certain concerns about *personal data* collected in relation to measures taken on grounds of public policy, public security, or public health. Sometimes such data are used for control upon entry i.e. to refuse an individual access to a Member State. In certain cases such data are transferred from one Member State to another and subsequently used for control upon entry by the second Member State.

In this context there are two aspects, which deserve particular attention.

Firstly, in some cases the personal data collected concerns suspicion of a threat to public policy, public security or public health. The Member States are allowed to collect and store such data for the purpose of protection of public policy, public security or public health concerning measures within the scope of Directive 64/221/EEC provided the requirements laid down in Directive 95/46/EC<sup>42</sup> are met. Among other things that means that the personal data should be adequate and accurate, necessary and only collected for a specified, explicit and legitimate purpose.

However, it does occur that persons are refused entry into a Member State on the basis of such data. Such personal data can only be stored as long as a threat to public policy, public security or public health exists. If the validity of a measure within the scope of Directive 64/221/EEC has expired or a measure has been annulled, personal data concerning such a measure should no longer be stored.

By virtue of Article 6(1) b of Directive 95/46/EC personal data must be collected for specified, explicit and legitimate purposes and not further processed in any way incompatible with that purpose. This applies also to the personal data initially collected for the purposes of controlling public policy, public security or public health.

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<sup>41</sup> Case 36/75 *Ruili*, para 39.

<sup>42</sup> OJ L 281, 23.11.1995, p. 31.

Secondly, there is a specific problem with the Schengen Information System (SIS) when it maintains on its list of persons not to be admitted to the Schengen area persons who are or have become Union citizens, e.g. through accession or naturalization. This was already incompatible with Community law before integration of the Schengen acquis into the EU and the EC and it is even more so now that the integration and allocation to specific legal bases in the EC Treaty has occurred. Such information should be removed from the database on the basis of a simple request from the person concerned. Moreover, should a Member State become aware of the existence of such data, it should take the appropriate initiative for its removal.<sup>43</sup>

The Member States should not automatically pass information about a measure taken in the framework of Directive 64/221/EEC to other Member States nor should such information be entered in the common list.

### 3.4. Rights of Specific Groups

#### 3.4.1. Long-term Residents

In the light of the citizenship of the Union and the principle of proportionality, *higher safeguards and guarantees should be offered to secure the rights of long-term residents* rather than those of tourists, for example. Long-term residence is one of the relevant factors in the overall evaluation of the situation of the person concerned. For instance in a situation where a tourist and a long-term resident have committed similar type of crimes in the country of residence, the expulsion of a tourist might be justified but not that of a long-term resident. The grounds are always examined individually in each case, but as a general rule, and in the light of principle of proportionality, long-term residents should have better safeguards against public policy measures. In the case of long-term residents, a much stricter burden of proof is required of the Member State to justify the proportionality of the measure. In a case where the expulsion of a tourist coming into another Member State to a sports event and committing acts of hooliganism would be justified, the expulsion of a person born in that Member State and committing similar acts would not.<sup>44</sup>

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<sup>43</sup> The Executive Committee of Schengen has adopted a Declaration defining the concept of "alien" (SCH/Com-ex(96) decl 5 corr) within the meaning of the Convention. This Declaration provides that persons who are covered by Community law should not in principle be placed on the joint list of persons to be refused entry. Persons who are covered by Community law may only be included in the SIS list if this is compatible with EC law. A Commission statement included in the minutes of the Executive Committee asserts that inclusion of a beneficiary of Community law in the SIS list will only be compatible with EC law if the data concern a person who presents an actual, genuine and serious threat to public policy and public security in each Schengen State.

<sup>44</sup> The High Level Panel on the free movement of persons, mentioned in footnote 27, has recommended that the question of expulsion of Member States' citizens should be examined in the light of the concept of European citizenship, especially in the case of migrants who have become culturally integrated within the host state, and in the light of Article 8 of the European Convention of Human Rights, this being particularly relevant for migrants' children born and educated in the Host State.

In this context the European Convention for the Protection of Human Rights and Fundamental Freedoms and the interpretation given thereto by the European Court of Human Rights should be recalled. The interpretation given by the Court to Article 8 of the Convention does not definitively exclude long-term residents from the threat of expulsion.<sup>45</sup> In certain circumstances the Court has accepted the expulsion of long-term residents (see Cases *El Boujaidi* and *Dalia*<sup>46</sup>). Of importance is the overall evaluation of the personal circumstances (length of residence, family situation and social integration in the host society, links to the country of origin) and the nature of the crimes committed. In the cases where the expulsion of long-term residents has been accepted, there has not been any single reason for this, but rather a combination of several factors (e.g. in the case of *Mr El Boujaidi* the seriousness of his offences, his subsequent conduct, the development of his family life only after the expulsion order became final, his existing links to the country of origin, poor integration in the host country and the fact that he had never applied for the citizenship in the host country).

This case law offers valuable guidelines on which factors are relevant to a decision on the lawful expulsion of long-term residents and on how to balance these factors. It should not be applied as such, however, to the expulsion of Union citizens who are long-term residents, since it relates primarily to third-state nationals and does not take into account the basic right to freedom of movement and establishment of persons existing within the Community. Therefore the authorities of Member States should grant citizens of the Union who are long-term residents in a Member State greater protection against expulsion on the basis of the principles laid down in Directive 64/221/EEC than is granted to long term residents under the European Convention on Human Rights.

This specific concern about long-term residents applies also to minors, whose rights, including the right to the protection of family life, should be protected following the same principles.

#### 3.4.2. *Members of the Family*

Member States display at times a tendency to neglect to ensure in practice the rights of the members of the family, especially of those who are not themselves nationals of any Member State. Community law applies to the following family members: spouse, descendants who are under the age of 21 or are dependants and dependent relatives in the ascending line of the citizen or his or her spouse. This latter category (essentially parents) does not apply in the case of students.

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<sup>45</sup> *Berrehab v Netherlands* (3/1987/126/177), judgement 21.6.88, Series A No 138; *Moustaquim v Belgium* (26/1989/186/246), judgement 18.2.91; Series A no 193; *Beldjoudi v France* (55/1990/246/317), judgement 26.3.92, Series A no 234; *Boujlifa v France* (122/1996/741/440), judgement 21.10.97 (Reports 1997-Vi).

<sup>46</sup> *El Boujaidi v France* (123/1996/742/941), judgement 26.9.97 (Reports 1997-Vi); *Dalia v France* (154/1996/773/974), judgement 19.2.1998 (Reports 1998-i).

It is equally important to ensure the rights of family members as to ensure the rights of Union citizens themselves. Any guarantees and safeguards offered by the Directive apply *mutatis mutandis* to the family members, as has been previously stated concerning the formalities (especially visas), giving the grounds for a measure and the non-application of the Schengen Information System. The jurisprudence of the European Court of Human Rights, especially that concerning Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ensuring the protection of private and family life, is here equally valid.

### 3.5. Means of Redress

#### 3.5.1. Remedies and Safeguards

##### *Article 8*

Article 8 of the Directive implies that any person covered by the Directive who is subject to a decision concerning entry or expulsion, or to a refusal to issue or renew a residence permit, has the right to the same legal remedies as nationals of the Member State concerned. This does not impose on the Member States any obligation to offer legal remedies in cases where legal remedies are not available to their own nationals, but it guarantees equality of treatment.<sup>47</sup>

Legal remedies may include *suspension of the measure*, although according to the Court of Justice Article 8 does not contain any specific obligation to this effect<sup>48</sup>. However a decision ordering expulsion may not be carried out – save in cases of urgency – before the person is able to complete the formalities necessary to avail himself of the remedy.<sup>49</sup> This does not mean that a person is necessarily entitled to remain in the territory of the State concerned throughout the duration of the proceedings initiated by him. In the light of the principle of proportionality, a measure with suspensory effect should be more readily available to those already resident in the country rather than to persons who have recently entered the country. In the case of residents immediate implementation of an expulsion order should be exceptional and there should be particularly strong grounds for that decision.

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<sup>47</sup> See Joined Cases C-65/95 and C-111/95 *Shingara and Radion*, para. 20. See also Cases 297/88 *Dzodzi*, para. 60, and 98/79 *Pecastaing*, especially paras. 10 and 11.

<sup>48</sup> Case 98/79 *Pecastaing*, paras. 12 and 13, and Case C-175/94 *Gallagher*.

<sup>49</sup> Case 48/75 *Royer*, para. 60.

## Article 9

Article 9 of the Directive seeks to complement the protection offered to the person concerned in cases where Article 8 does not apply.<sup>50</sup> Article 9 offers the minimum procedural guarantees to a person who has been issued an expulsion order or a decision refusing renewal of a residence permit. Article 9(1) concerns persons already holding a residence permit and 9(2) persons who have not yet been issued with a first residence permit.<sup>51</sup>

The Court has specified the applicability of both paragraphs of Article 9. They apply if 1) there is no right of appeal to a court of law; 2) such appeal may be only in respect of the legal validity of the decision; 3) the appeal cannot have suspensory effect and provides for the intervention of a competent authority other than the authority empowered to take the decision.<sup>52</sup>

Article 9(1) prohibits the national administrative authority from issuing an expulsion order to a Community national lawfully resident in the territory before a competent authority has given its opinion<sup>53</sup>. Article 9(2) provides for the person the right to request an opinion in the sense of Article 9(1) and to submit a defence in person (i.e. to remain until the final decision has been taken) save in cases of national security.

The Court stated that the opinion of the competent authority must be sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors to be taken into consideration<sup>54</sup>. The Court has underlined the importance of assessing the social danger resulting from a foreigner's presence at the time when the expulsion order is given, since the facts to be taken into account, particularly those concerning the person's conduct, are likely to change in the course of time.<sup>55</sup>

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<sup>50</sup> The Court has held the provisions of Article 9 to be complementary to those of Article 8. A Member State cannot apply the provisions of Article 9 in such a way that the practical effect is to restrict or render ineffective the legal remedies made available under Article 8 (Case 98/79 *Pecastaing*, paras. 15 and 16).

<sup>51</sup> The Court of Justice has considered the provisions of Article 9 to be sufficiently well defined and specific to enable them to be relied upon by any person concerned and capable, as such, of being applied by any court (Case 131/79 *Santillo*, para. 13).

<sup>52</sup> In Joined Cases *Shingara and Radion* the Court stated that the three cases mentioned in Article 9(1) apply equally as regards Article 9(2).

<sup>53</sup> The Court has also noted that the Directive does not define the expression 'a competent authority' (Case 131/79 *Santillo*, para. 15). See also Joined cases 115 and 116/81 *Adoui and Cornuaille*, especially para. 18.

<sup>54</sup> Case 131/79 *Santillo*, paras. 18 and 19.

<sup>55</sup> Case 297/88 *Dzodzi*, para. 69. According to Case 98/79 *Pecastaing*, para. 18, it follows from Article 9 that as soon as the opinion in question has been obtained and notified to the person concerned an expulsion order may be carried out immediately, subject always to the right of that person to stay on the territory for the time necessary to avail himself of the remedies accorded to him under Article 8.

### 3.5.2. *Right of re-application*

The Court has confirmed the *right to re-apply after a reasonable time has elapsed* since the last decision prohibiting a person from entering the country.<sup>56</sup>

The Commission has encountered this problem in a number of cases where a Member State refuses re-entry or the reversal of the expulsion order by citing as grounds for refusal the existence of an earlier expulsion order, which had been issued a number of years previously. For example the cases of third-country national family members of Union citizens, who at the time of the previous decision were not beneficiaries of Community law, deserve re-examination solely on the basis of the change of status, which is indeed a new factor to be taken into consideration in the re-evaluation.

Any set time-limit for the validity of a measure, e.g. ten years, may be problematic from the point of view of the person's right to re-apply. Such a time-limit cannot prevent the person from re-applying before its expiry if the conditions for re-evaluation exist and his situation has already changed.

The Court has also pointed out that, since decisions prohibiting entry into a Member State of a national of another Member State constitute derogations from the fundamental principle of freedom of movement, such a decision cannot be of unlimited duration.<sup>57</sup>

The Commission considers that the same rights are by analogy conferred to all other categories of beneficiaries of Community law whatever their status.

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In Joined cases 115 and 116/81 *Adoui and Cornuaille*, para. 18, the Court recalls that the opinion of the competent authority must be duly notified to the person concerned.

<sup>56</sup> Joined Cases C-65/95 and C-111/95 *Shingara and Radoni*. The Court has emphasised that any national of a member State who wishes to seek employment in another Member State may re-apply for a residence permit after the expulsion. This does not, however, confer on the person concerned any right to enter the territory of the Host State during the examination of his further application (Joined cases 115 and 116/81 *Adoui and Cornuaille*, para. 12, in which the Court stated that such an application, when submitted after a reasonable period has elapsed, must be examined. The competent authority must take into account the arguments purporting to establish that there has been a material change in the circumstances)

<sup>57</sup> Joined cases C-65/95 and C-111/95 *Shingara and Radoni*, para. 40.

#### 4. CONCLUSIONS

- The applicability of national provisions on the grounds of public policy, public security or public health is enshrined in the Treaty establishing the European Community and guarantees to the Member States some discretionary powers.
- The application of the national definition and criteria to any measure taken on grounds of public policy, public security or public health are nevertheless subject to the basic principles and limitations provided by Community law. In particular the personal, fundamental right to free movement of the citizens of the Union (Article 18 of the Treaty) combined with the principle of proportionality should guide the national authorities when they take any decision concerning such a measure.
- Any measure taken on grounds of public policy, public security or public health should be strongly motivated by a genuine and sufficiently serious threat affecting one of the fundamental interests of society and be in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- Any safeguards, guarantees and remedies conferred by Directive 64/221/EEC as interpreted by the Court of Justice must be strictly respected, including the right to re-examination and the right to be informed of the grounds of any measures taken together with their consequences.
- Emphasis is put on the overall evaluation of personal circumstances (family, social and cultural circumstances) individually, on a case-by-case basis, avoiding the use of grounds of general prevention; previous criminal convictions are only part of this overall evaluation and do not, alone, justify any measure taken on grounds of public policy or public security.
- Special attention should be attached to securing the rights, including the protection of family life, of non-national long-term residents and minors who are Union citizens and the most vulnerable group of beneficiaries - third-country national family members of Union citizens, irrespective of their country of origin.
- It is the Commission's intention to widely publicise the contents of this Communication, making use of the new instruments put in place for the Dialogue with Citizens. Raising awareness with citizens and Member States alike of the rights that citizens enjoy under the Treaties will contribute to better implementation of these rights and is ultimately expected to reduce the number of infringements. Further actions to effectively ensure these rights might be necessary, including the continuation of the Commission's interventions with Member States based on the principles outlined in the present Communication.

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