

## **P6\_TA(2009)0203**

### **Right of EU citizens and their family members to move and reside freely within the territory of the Member States**

#### **European Parliament resolution of 2 April 2009 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 (2008/2184(INI))**

*The European Parliament,*

- having regard to Article 18 of the EC Treaty and Article 45 of the Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights),
- having regard to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 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<sup>1</sup>,
- having regard to its resolution of 15 November 2007 on the application of Directive 2004/38/EC<sup>2</sup>, that called on the Commission, without delay, to submit a detailed assessment of the state of the implementation and of the correctness of transposition of the Directive by Member States, together with any necessary proposals, and charged the competent committee to make an assessment of the problems entailed in transposition of the Directive, highlighting best practices and measures that might lead to forms of discrimination among Union citizens and address the issue of freedom of movement,
- having regard to its resolution of 4 December 2003 on the adoption of measures concerning the repatriation of mortal remains<sup>3</sup>,
- having regard to the Working Document of its Committee on Civil Liberties, Justice and Home Affairs of 13 June 2008<sup>4</sup>, the questionnaire sent to national parliaments of the Member States and the feedback received,
- having regard to the report on the visit to closed detention centres for asylum seekers and immigrants in Belgium by a delegation from the Committee on Civil Liberties, Justice and Home Affairs<sup>5</sup>,
- having regard to its resolution of 5 February 2009 on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008<sup>6</sup>,
- having regard to its resolution of 10 July 2008 on the census of the Roma on the basis of

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<sup>1</sup> OJ L 158, 30.4.2004, p. 77.

<sup>2</sup> OJ C 282 E, 6.11.2008, p. 428.

<sup>3</sup> OJ C 89 E, 14.4.2004, p. 162.

<sup>4</sup> PE407.933v01-00

<sup>5</sup> PE404.465v02-00

<sup>6</sup> Texts adopted, P6\_TA(2009)0047.

- ethnicity in Italy<sup>1</sup>, the opinion of its Legal Service on the compatibility of aggravating circumstances for EU citizens irregularly staying in another Member State, and the report of its Committee on Civil Liberties, Justice and Home Affairs on delegation visit to Italy,
- having regard to the Report from the Commission of 15 February 2008 entitled "Fifth Report on Citizenship of the Union (1 May 2004 – 30 June 2007)" (COM(2008)0085),
  - having regard to the 25th Annual Report from the Commission of 18 November 2008 on monitoring the application of Community law (2007) (COM(2008)0777),
  - having regard to its resolution of 2 April 2009 on the problems and prospects concerning European citizenship<sup>2</sup>,
  - having regard to the report by the European Union Agency for Fundamental Rights entitled "Homophobia and Discrimination on Grounds of Sexual Orientation in the Member States",
  - having regard to the Report from the Commission of 10 December 2008 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2008)0840) (the Commission Report),
  - having regard to the Conclusions of the Justice and Home Affairs Council of 27. November 2008 on "Free movement of persons: abuses and misuses of the right to free movement",
  - having regard to European Court of Justice (ECJ) rulings relating to Union citizenship and free movement of persons, such as cases C-127/08 (Metock case), C-33/07 (Jipa case), and C-524/06 (Huber case),
  - having regard to the draft interim report entitled "Comparative study 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" requested by its Committee on Legal Affairs and delivered by the European Citizen Action Service (ECAS),
  - having regard to Rule 45 of its Rules of Procedure,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A6-0186/2009),
- A. whereas according to the above-mentioned Fifth Report on Citizenship of the Union, as of 1 January 2006 there were approximately 8.2 million Union citizens exercising their right to reside in another Member State and whereas millions of Union citizens travel every year inside the Union,
- B. whereas freedom of movement is inherent to the concepts of human rights and Union citizenship and represents one of the fundamental rights and freedoms recognized to Union citizens by the Treaties,

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<sup>1</sup> Texts adopted, P6\_TA(2008)0361.

<sup>2</sup> Texts adopted, P6\_TA(2009)0204.

- C. whereas Directive 2004/38/EC implements the principles enshrined in the Treaties by providing that Union citizens may move freely all over the Union, together with their family members, irrespective of where they come from,
- D. whereas Member States were required to transpose Directive 2004/38/EC by 30 April 2006, and whereas the Commission was due to issue its report on the application of the Directive by 30 April 2008,
- E. whereas after almost five years after the adoption of Directive 2004/38/EC, information on its transposition and practical application is finally becoming available, although with some delay in relation to the deadlines set in the Directive,
- F. whereas Parliament has repeatedly expressed concern on the way certain Member States implement freedom of movement,
- G. whereas a constructive dialogue was recently established between the Commission, Parliament and certain Member States,
- H. whereas such dialogue has enabled national legislation to be amended to a certain extent so as to become compliant with EC legislation,
- I. whereas according to the Commission Report, the overall transposition of Directive 2004/38/EC is disappointing, as not one Member State has transposed the Directive effectively and correctly in its entirety and, moreover, not one article of the Directive has been transposed effectively and correctly by all Member States,
- J. whereas the Commission Report identifies, among many others, two main persistent breaches of the core rights of Union citizens, and particularly the right of entry and residence of third-country family members and the requirement for Union citizens to submit with their applications for residence additional documents, such as work permits and evidence of satisfactory accommodation, not provided for in Directive 2004/38/EC,
- K. whereas the Commission has so far received more than 1 800 individual complaints, 40 questions from Parliament and 33 petitions, and on that basis it has registered 115 complaints and has brought 5 infringement proceedings for incorrect application of Directive 2004/38/EC,
- L. whereas the Commission takes the view in its Report that there is no need to amend Directive 2004/38/EC at this stage, but that every effort must be made to achieve its correct implementation, through the creation of an experts' group, the collection of information, data and best practices on the basis of a questionnaire, and the issuing of guidelines in 2009 on problematic issues to ensure its full and correct application,
- M. whereas a number of national parliaments have replied to the questionnaire of its Committee on Civil Liberties, Justice and Home Affairs<sup>1</sup> while in certain Member States both parliamentary chambers replied to the questionnaire<sup>2</sup>,

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<sup>1</sup> Austria, Belgium, Cyprus, Czech Republic, Greece, Spain, Italy, Lithuania, Poland, Romania, Slovenia, Slovakia.

<sup>2</sup> Belgium, Czech Republic and Romania.

- N. whereas representatives of national parliaments had the opportunity to further express their views at the Joint Committee Meeting on progress in the area of freedom, security and justice which took place on 19 and 20 January 2009,
- O. whereas its Legal Service, which was consulted by its Committee on Civil Liberties, Justice and Home Affairs on this subject, concluded that the relevant provisions of Community law preclude national legislation deeming it a general aggravating circumstance in relation to a crime or an offence for the person in question to be a citizen of one Member State illegally present on the territory of another Member State,
- P. whereas the rulings of the ECJ on the issue of freedom of movement, and particularly the Metock, Jipa and Huber cases, affirmed the following principles:
- a non-Community national who is the spouse of a Union citizen who accompanies or joins that citizen can benefit from the provisions of the Directive, irrespective of when and where their marriage took place and without the need for prior lawful residence<sup>1</sup>,
  - although Article 18 of the EC Treaty and Article 27 of Directive 2004/38/EC do not preclude national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his ‘illegal residence’ there, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it, and it is for the national court to establish whether that is so in the case before it<sup>2</sup>,
  - Article 12(1) of the EC Treaty must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State<sup>3</sup>,
- Q. whereas the above-mentioned report on a visit to closed detention centres for asylum seekers and immigrants in Belgium stated that "the detention of EU citizens at detention centres for third-country nationals who are illegal immigrants seems shocking and disproportionate, particularly if it is true that it can be imposed merely because a simple administrative violation has been committed. The figures provided by the Belgian authorities are worrying in this respect",
- R. whereas in its above-mentioned Conclusions of 27 November 2008 the Justice and Home Affairs Council requested the Commission to bring forward an interpretative statement providing guidelines on the operation of Directive 2004/38/EC in early 2009 and to consider all other appropriate and necessary measures,
- S. whereas, on the basis of the information gathered, notably through national parliaments' answers to Parliament's questionnaire, which is unfortunately not exhaustive and does not

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<sup>1</sup> Metock case.

<sup>2</sup> Jipa Case.

<sup>3</sup> Huber Case.

cover all the Member States, and in addition to the Commission Report, the following main issues were identified as problematic:

- restrictive interpretation by Member States of the notion of "family member" (Article 2), of "any other family member" and of "partner" (Article 3), particularly in relation to same sex partners, and their right to free movement under Directive 2004/38/EC<sup>1</sup>,
- unjustified administrative burdens are imposed in respect of the entry and residence of third-country family members<sup>2</sup>,
- the interpretation by Member States of "sufficient resources" under Article 7(1)(b) of Directive 2004/38/EC is often unclear, as most Member States require that evidence of sufficient resources be given; the notion of "unreasonable burden to the social assistance system of the host Member State" and if and in what cases the decision to expel a Union citizen who has become an unreasonable burden (Article 14, recital 10) is in many Member States uncertain as well<sup>3</sup>,
- the interpretation by Member States of the expression "serious/imperative grounds of public policy and public security" and in what cases and on what grounds it can justify an expulsion order (Articles 27 and 28) vary from one Member State to the other, are unclear and could lead to abuse (targeting of citizens of a certain Member State) or are of dubious conformity with Directive 2004/38/EC (for instance, automatic expulsion mechanisms)<sup>4</sup>,
- Union citizens are often required to submit to the authorities of the host Member State unjustified additional documents not provided for in Directive 2004/38/EC<sup>5</sup>,

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<sup>1</sup> CY, IT, PL and SK do not recognise same sex marriages as a reason to grant free movement rights, PL and SK do not recognise registered partnerships, even if certified in another Member States; information in this regard provided by the Commission, the FRA and NGOs further proves legal uncertainty on this issue.

<sup>2</sup> Several letters of complaint and petitions addressed to EU Institutions highlight the fact that some Member States are reluctant to fully recognise their rights to third countries family members; by way of example, UK, Lithuanian and Polish legislation preclude a non-EU family member from entering without a visa. Legal and administrative obstacles affecting third-country family members are extremely problematic; UK legislation precludes a non-EU family member who has a residence card issued by another country from entering the country without a visa, and UK administrative practices are such that lengthy delays and extensive documentation in the processing of applications for residence cards for family members who are third-country nationals also constitute significant obstacles to the exercise of free movement rights; in Estonia, third-country nationals face problems when attempting to enter the country with a residence card issued by another Member State, and third-country family members applying for visas have been also asked to pay the visa fee; in Italy, a third-country national citizen who applies for family reunification will be required to show the lawfulness of the origin of his/her economic resources, the amount of which may not be lower than the yearly social allowance.

<sup>3</sup> For example in relation to Italian legislation which requires EU citizens to give evidence of their sufficient resources.

<sup>4</sup> For instance, Article 235 of the Italian criminal code provides for the expulsion of non-nationals convicted of 2 or more years of imprisonment.

<sup>5</sup> In some cases (Greece) competent authorities are allowed by national law to ask for the criminal record of an EU citizen applying for registration, while in other Member States (for instance in Spain and Belgium) special ID cards and residence cards are issued for other Member States nationals; in some other Member States (ES) in addition to the registration certificate, EU citizens are given a Foreigner Identity Number which is necessary in order to work or register in the social security system; in Italy EU citizens are required to prove the "legality" of their resources.

- law and practice in relation to abuse of rights and marriages of convenience,
- T. Whereas in some Member States there are significant differences in identity documents between nationals of the country and Union citizens from another Member State, who find it difficult to prove that they are resident Union citizens, which in practice seriously hinders the exercise of their rights and their integration into social and business life,
- U. whereas the poor transposition of Directive 2004/38/EC implementing Article 18 of the EC Treaty by Member States should be condemned, and whereas such a situation results, if not in the effectiveness and necessity of the Directive itself being undermined, in the non-application of one of the key rights on which the EU is based and which are conferred on Union citizens by the Treaties,
- V. whereas according to the Commission Communication of 18 November 2008 on the impact of free movement of workers in the context of EU enlargement (COM(2008)0765) during the first phase (1 January 2007 – 31 December 2008) of the transitional arrangements mobile workers from the countries that joined the EU in 2004 and 2007 have had a positive impact on the economies of Member States,
- W. whereas four Member States of the EU-15 have not opened their labour markets for workers from the EU-8 Member States,
- X. whereas eleven Member States have notified the Commission of their decision to continue applying restrictions in their labour markets in respect of nationals of Romania and Bulgaria, as of 1 January 2009,

#### ***Application of Directive 2004/38/EC***

1. Calls on Member States to respect the spirit and the letter of Article 18 of the EC Treaty and Article 45 of the Charter of Fundamental Rights granting Union citizens the fundamental right to free movement, by implementing Directive 2004/38/EC fully and as a matter of urgency, reviewing and modifying without delay legislation and administrative practices that are contrary to EC law, particularly on the basis of the Commission Report and of the case-law of the ECJ; notes that several provisions in the legislation of most Member States run counter to the letter and the spirit of the Directive, undermining rights of free movement and Union citizenship, and that national administrative practices very often constitute significant obstacles to the exercise by citizens of their rights;
2. Calls on Member States to fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life; calls on Member States to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages; in this regard, calls on the Commission to issue strict guidelines, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report and to monitor these issues;
3. Calls on the Commission to issue appropriate proposals within the framework of the

Stockholm Programme to guarantee free movement without discrimination based on the grounds listed in Article 13 of the EC Treaty, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report;

4. Calls on Member States, while implementing the right to free movement and residence, not to place unjustified administrative burdens on Union citizens and their family members, including third-country family members, that are not expressly provided for in Directive 2004/38/EC, as these are contrary to EC law and an unjustified obstacle to the exercise of a freedom conferred directly by the EC Treaty, which is not dependent on their having completed administrative procedures; draws to the attention of Member States that it is their duty to facilitate administrative practices linked to the exercise of the right to free movement and calls on Member States to keep track of and report all administrative and court decisions based on Article 3(2) of the Directive; reminds Member States of their obligation to facilitate the entry of third-country family members of Union citizens, in order to allow them to lead a normal family life in the host Member State;
5. Calls on the Member States having such documents to adopt the same format for personal identity documents for their nationals and for Union citizens from other Member States, regardless of the differences which must be noted within the documents<sup>1</sup>;
6. Invites the Commission to assess carefully that the laws and practices of Member States do not infringe the rights conferred on Union citizens by the EC Treaty and the Directive and do not impose an unreasonable burden on Union citizens and their families indirectly restricting their right to free movement, particularly in relation to the notions of "sufficient resources", "unreasonable burden on the social assistance system of the host State", "(serious/imperative) grounds of public policy and public security", that material and procedural safeguards, protection and judicial redress against expulsions are properly in place and functioning; recalls that any limitation on the fundamental right to free movement must be interpreted strictly;
7. Notes that nationals of certain Member States and ethnic communities appear to be targeted in some Member States and stresses that they must implement Directive 2004/38/EC without discrimination between Union citizens and their family members on any of the grounds listed in Article 21 of the Charter of Fundamental Rights; calls on the Commission, the Council and all Member States to ensure and monitor in particular that discrimination based on nationality, race or ethnic origin, either in practice or in legislation, does not occur;
8. Notes that measures taken on grounds of public policy or public security should comply with the principle of proportionality and should be based exclusively on the personal conduct of the individual concerned; such personal conduct must represent a genuine,

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<sup>1</sup> Administrative practices which are not in conformity with EC law have a significant negative impact on citizens' rights. By way of example, the proliferation of different ID cards and residence cards within the Member States has rendered the exercise by EU citizens of their right of free movement confusing and irksome; in Spain, in addition to the registration certificate, EU citizens are issued with a Foreigner Identity Number which is necessary in order to work or register with the Spanish social security system, France has maintained an ambiguous voluntary residence title additional to the registration certificate issued to Union citizens and, in Member States such as the Czech Republic, Sweden and Belgium, authorities request additional documents in order to issue residence cards or impose conditions which are not listed in the Directive.

present and sufficiently serious threat affecting one of the fundamental interests of society; calls in this respect on Member States to review systematically national alerts for the purpose of refusing entry issued for Union citizens and their family members<sup>1</sup>; recalls that the public policy exceptions cannot be invoked to serve economic ends or to pursue general preventive aims;

9. Notes that not all Member States have implemented Article 35 of Directive 2004/38/EC, which allows them to adopt the necessary measures to refuse, terminate or withdraw free movement rights in cases of abuse of rights or fraud, such as marriages of convenience, provided that such measures are proportionate and non-discriminatory and that procedural safeguards are respected, and draws attention to the possibilities provided by that Article;
10. Calls on the Commission to monitor compliance in practice with Article 24 of Directive 2004/38/EC on equal treatment and the prohibition of discrimination on the basis of nationality, in connection with Recitals 20 and 31 of that Directive and Article 21 of the Charter of Fundamental Rights, that grant Union citizens and their family members who move to another Member State the right to equal treatment with nationals of that Member State in all matters falling within the scope of the EC Treaty, and calls on the Member States to take the necessary steps to overcome shortcomings as soon as possible and to put an end to breaches of EC law without delay;
11. Calls for the repeal or revision of the transitional arrangements, which currently still provide for restrictions on the free movement of workers, nationals of the Member States that joined the EU on 1 May 2004 and on 1 January 2007, which represent a substantial damaging discrimination between Union citizens; calls for the preference clause to be enforced for all Union citizens and the creation of the single market completed;
12. Calls on the Commission and Member States in the implementation of Directive 2004/38/EC to consider the potential discriminatory effects of social security regulations and access to services of general interest which could constitute barriers to free movement;
13. Calls on the Council to define a strategy to ensure the free movement of Union citizens and workers and their access to the labour market in host Member States, to publicise the positive achievements and effects of the free movement of citizens and workers for host Member States and for the EU, and calls on the Commission to launch a study in order to identify current and future labour shortages in the EU, and the potential contribution to sustained economic growth of workers from all Member States having full access to the EU labour market;
14. Calls on the Commission and the Member States to review the limitations, restrictions and current time periods provided for in Directive 2004/38/EC to enjoy freedom of movement rights along the lines of Article 39 thereof and to analyse the impact of removing current discrimination between Union citizens in terms of their full enjoyment of free movement rights and Union citizenship rights conferred by the Treaty;

### ***Methodology to ensure implementation***

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<sup>1</sup> Estonian and Hungarian legislation do not expressly provide for the exclusion of economic ends when imposing an expulsion order. In Hungarian and Romanian legislation there is no reference to the exclusion of previous criminal convictions and general preventive aims.

15. Notes that unsatisfactory transposition of Directive 2004/38/EC demonstrates that the Commission has been unable to secure coherent and timely compliance with the Directive by Member States and to handle the large number of complaints from citizens in relation to the application of the Directive;
16. Supports the approach proposed by the Commission based on continuous and comprehensive monitoring of the implementation of Directive 2004/38/EC, on assisting Member States in ensuring the full and correct application of the Directive through the drawing-up of guidelines in the first half of 2009 and on bringing proceedings against Member States where their national laws and/or practices conflict with the Directive; requests the Commission to develop and present to Parliament a consistent, effective and transparent enforcement policy ensuring the application of rights of free movement; considers that the lack of human and financial resources allocated within the Commission to deal with the transposition and application of the Directive represents a serious obstacle to the Commission's capacity to credibly monitor the application of the Directive in all Member States and therefore to the unity of law in such a matter, which is so crucial for Union citizens;
17. Calls on Member States to start procedures to implement the guidelines by the end of 2009 so to adapt their national legislation and practices, and calls on them to provide the guidelines to any competent authority and monitor their application;
18. Calls on the Commission to develop guidelines with common criteria in relation to the minimum amount regarded as "sufficient resources" and to clarify on which basis Member States should take into account "the personal situation of the person concerned" under Article 8(4) of Directive 2004/38/EC.
19. Calls on the Commission to develop in its guidelines a uniform interpretation mechanism of the normative categories of "public policy", "public security" and "public health", and to clarify how taking account of considerations such as residence period, age, state of health, family and economic situation, social and cultural integration, and links with the country of origin, are relevant for the expulsion decision provided for in Article 28(1) of Directive 2004/38/EC.
20. Recognises the restrictions on repatriation of mortal remains of Union citizens and calls on the Commission to bring forward a Code of Conduct to which Member States could adhere to, in order to ensure that it is a corollary to the freedom of movement of citizens.
21. Calls on the Commission to increase funds and to set up a specific budget line for supporting national and local projects aimed at the integration of Union citizens and their family members, as defined by Articles 2 and 3 of Directive 2004/38/EC residing in another Member State;
22. Asks the Commission to set a deadline for the implementation of the guidelines, after which proceedings would be brought, and asks to be fully involved and regularly informed of developments in the process;
23. Calls on the Commission to set, with regard to the free movement of people, a mutual evaluation system to be carried out by teams composed of experts designated by the Member States and by Parliament, assisted by the Commission and the General Secretariat

of the Council, based on on-the-spot visits and without encroaching on the powers with which the Commission is entrusted with by the Treaties;

24. Calls on the Commission to require from Member States periodic reports including statistical data in relation to freedom of movement, for instance on the number of occasions when entry and residence rights were denied and of expulsions carried out and for which reason;
25. Calls on the Member States to assist their nationals residing in other Member States by offering at their consular and diplomatic missions all necessary information on freedom of movement;
26. Calls on the Commission to verify the existence in Member States of systems for processing personal data specific to Union citizens who are not nationals of that Member State and whether they contain only those data necessary for applying Directive 2004/38/EC and national transposition legislation; calls on it also to verify whether similar systems exist for the purpose of fighting crime, and calls on those Member States which have such systems, to review them, in compliance with the Huber case;
27. Calls on those Member States which have laws that are not compatible with the Metock case to review them urgently and invites the Commission to bring proceedings against them if they do not comply;
28. Welcomes the Commission's intention to enhance Union citizens' awareness of their rights under Directive 2004/38/EC and to distribute a simplified guide for Union citizens, making the best use of the Internet, and reminds Member States of their duties under Article 34 of the Directive to inform citizens of their rights in relation to free movement; in this regard, calls on Member States to establish information and assistance offices in relation to free movement rights;

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29. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.