

# **The Family Reunification Directive in EU Member States**

**the First Year of Implementation**

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Centre for Migration Law  
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# Content

<b>1</b>	<b>Introduction</b>	1
1.1	Purpose and Methodology	1
1.2	Short History of the Directive	2
1.3	Status of Transposition of the Directive	3
1.4	Case Law of National Courts	5
1.5	Political or Public Debate on the Transposition of the Directive	6
1.6	Court of Justice Judgment in the Case <i>Parliament v. Council</i> (Case C540/03)	8
<b>2</b>	<b>Personal Scope of the Directive</b>	11
2.1	Dual Nationals	11
2.2	Treatment of Nationals of the Member States	12
<b>3</b>	<b>Definition of the Nuclear Family</b>	15
3.1	Transposition of Article 4(1) Directive	15
3.2	Special Rules for Minor Children aged over 12 or 15	17
3.3	Unmarried Partners	18
3.4	Minimum Age of Spouses	20
<b>4</b>	<b>Formal Conditions</b>	21
4.1	Reasonable Prospects of Obtaining the Right of Permanent Residence	21
4.2	Waiting Period	23
<b>5</b>	<b>Material Conditions for Residence</b>	25
5.1	Housing Requirement	25
5.2	Requirement of Sufficient Income	25
5.3	Integration Measures	27
5.4	Public Policy Exception	28
5.5	Renewal or Withdrawal of a Residence Permit	29
5.6	Marriages of Convenience	31
<b>6</b>	<b>Legal Position of Family Members</b>	33
6.1	Access to (Self-) Employment	33
6.2	Autonomous Residence Permit for Family Members	35
<b>7</b>	<b>Special Provisions for Refugees</b>	41
7.1	Personal Scope of Chapter V	41
7.2	Family Reunification of Unaccompanied Minors	42
7.3	Documentary Evidence	43
7.4	Conditions for Family Reunification	44

<b>8 Procedural Rules</b>	47
8.1 Documents and Fees	47
8.2 Place of Application	48
8.3 Visa Facilitation	50
<b>9 Administrative Decisions</b>	53
9.1 Length of the Procedure	53
9.2 Interest of the Child	54
9.3 Relevant Considerations	54
<b>10 Judicial Review</b>	57
10.1 Article 18 Directive	57
10.2 Availability of (Publicly Funded) Legal Aid	58
<b>11 Conclusion</b>	59
11.1 Liberal or Restrictive Effect of the Directive?	59
11.2 Main Strengths and Weaknesses of the Directive	62
11.3 Other Interesting Information	63
11.4 Correct and Full Transposition?	65
Annexes	71

# 1 Introduction

## 1.1 Purpose and Methodology

In March 2006 a group of experts in European migration and asylum law decided to conduct a comparative study of the transposition and implementation of Directive 2003/86/EC on the right to family reunification one year after the end of the two years Member States were allowed for transposition of the Directive. The aim of the study was to stimulate public discussion on the transposition and implementation of the Directive, to obtain an initial impression of the effects of the Directive in Member States and to provide information that might be of use for the European Commission when preparing its first report on the application of the Directive, due by October 2007.<sup>1</sup> Since the Family Reunification Directive is the first major directive on legal migration adopted by the Council under Article 63 EC Treaty, experience with the implementation of this Directive might produce information relevant for the transposition or implementation of other directives on legal migration or for negotiations regarding proposals for future directives on legal migration.

The Centre for Migration Law of the Radboud University of Nijmegen drafted a questionnaire and distributed it in October 2006 to experts in migration law in the 25 Member States. The experts were asked to reply on the basis of the situation in November 2006. We asked the experts in the three Member States not bound by the Directive and in Member States where transposition had not yet begun or was not yet completed, to answer the question on the basis of national law as in force at the time. We received reports from all 25 Member States and we are grateful for the work performed by the national experts. Some replies were received early in 2007. Generally, however, the answers relate to the situation in the Member States at the end of 2006. The questionnaire was also distributed by a European NGO active in the field of family reunification. We received a completed questionnaire from one national NGO from Estonia only. We used the information from this questionnaire to supplement the information from the national expert.

While reading this report, the reader should bear in mind that there are three categories of Member State. The first and largest category comprises the Member States where some form of legislative or regulatory action aimed at transposing the Directive has occurred. The second smaller category is made up of Member States where no such activity was visible at the end of 2006 or where legislative proposals were still under discussion. Thirdly, there is a group of three Member States (Denmark, Ireland and the UK) which are not bound by the Directive.<sup>2</sup>

We gratefully acknowledge the financial contributions we received from FORUM, a centre of expertise for multicultural society in Utrecht (the Netherlands) and from

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1 See Article 19 of the Directive. The Commission reported that by 31 March 2006 no cases of non-compliance or incorrect application had been detected, SEC (2006) 814 of 20 June 2006, p. 15.

2 Preamble nos. 17 and 18 of the Directive.

the Churches' Commission for Migrants in Europe (CCME). The national experts received a small fee for the work on their reports. The Centre for Migration Law paid most of the costs of the analysis and the production of this report.

The names of the experts are listed in Annex I and relevant literature concerning the Directive can be found in annex II to this report. The questionnaire is reprinted as annex III. The national reports received are publicly accessible on the CD at the back of this book and on the web site of the Centre for Migration Law.<sup>3</sup>

## 1.2 Short History of the Directive

On 1 May 1999, the Amsterdam Treaty took effect, adding a new Title IV, 'Visa, asylum, immigration and other policies related to free movement of persons', to the EC Treaty.<sup>4</sup> The new Articles 61 to 69 of the EC Treaty are designed to progressively establish an area of freedom, security and justice. Article 63 (3) (a) of the EC Treaty provides that the Council, acting unanimously on a proposal by the Commission or at the initiative of a Member State and after consulting the European Parliament, within a period of five years from the entry into force of the Treaty of Amsterdam, shall adopt measures regarding conditions of entry and residence and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.

On 15 and 16 October 1999, the European Council – at a special meeting in Tampere on the establishment of an area of freedom, security and justice – stated: 'The European Union must ensure fair treatment of third-country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens.'<sup>5</sup> The Council also acknowledged the need for the harmonisation of national legislation on the conditions for admission and residence of third-country nationals and, to this end, requested rapid decisions by the Council, on the basis of proposals by the Commission.<sup>6</sup>

In December 1999, the European Commission presented a proposal for an EU directive on the right to family reunification.<sup>7</sup> The European Parliament, in its opinion of 6 September 2000, approved the Commission's proposal with eighteen amendments.<sup>8</sup> The Commission adopted eleven amendments in its second proposal, published in October 2000.<sup>9</sup> After two years of negotiations, the European Council concluded in December 2001 that little progress had been made and stressed the need for the rapid establishment of common rules on family reunification.<sup>10</sup> The Council asked the Commission to present an amended proposal before May 2002. The

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3 See [www.ru.nl/rechten/cmr/](http://www.ru.nl/rechten/cmr/) under <http://jurrit.jur.kun.nl/cmr/Qs/family/>

4 *OJ C* 340, 10 November 1997, pp. 173-306.

5 Tampere European Council, 15-16 October 1999, conclusion no. 18, SN 200/99.

6 Conclusion no. 20.

7 COM (1999) 638, *OJ C* 116 E, 26 April 2000, p. 66.

8 A5-0201/2000, *Pb C* 135, 7 May 2001, p. 174.

9 COM (2000) 624, 10 October 2000, *OJ C* 62 E, 27 February 2001, p. 99.

10 Laken European Council, 14 and 15 December 2001, SN 300/01, conclusion nos. 38 and 41.

Commission published this amended proposal on 2 May 2002.<sup>11</sup> The Commission explained that it had adopted the compromises the Member States had already agreed upon. Furthermore, the Commission stated that the harmonisation process should progress in different stages. The amended proposal, which should be the first step, contained some exceptional provisions. In order to prevent the general use of these exceptions by all Member States, the Commission introduced one general and some specific stand-still clauses. The Commission announced that two years after transposition of the Directive it would come up with a revised proposal as the second step in the harmonisation process.

This new proposal, after again having been substantially amended by the Council, became the subject of a political agreement in the EU Council of Ministers on 27 February 2003.<sup>12</sup> The European Parliament, more than a month after the political agreement in the Council, adopted its opinion on 9 April 2003, approving the Commission's proposal of May 2002 with 70 amendments.<sup>13</sup> It asked the Council to consult the Parliament again if it intended to amend the Commission's proposal substantially. The text agreed by the Council in February 2003 was finally adopted without further amendments by the Council on 22 September 2003.<sup>14</sup> The Directive entered into force on 3 October 2003 and Member States had to comply with it no later than 3 October 2005. Since that day, individuals may derive rights from the provisions of the Directive. The Commission is currently evaluating the compliance of national transposition measures with the Directive.

### 1.3 Status of Transposition of the Directive

In December 2006, i.e. more than fourteen months after the date by which the Directive should have been transposed according to its Article 20, in the vast majority of the 22 Member States bound by the Directive at least some legislative activity intended to transpose part or all of the relevant provisions of the Directive was underway or had been completed.

However, in Luxembourg, Malta and Spain no relevant legislative activity had occurred. In Spain the rules on family reunification in the national immigration act were amended in November 2003 without any explicit reference to the Directive. From the report on Malta, it appears that there are no published rules on family reunion at all.

According to our national rapporteur, so far no procedure for family reunification (legal or administrative) appears to have been formalised in Malta. Her description of the situation in Malta is:

‘Article 11 (2) of the Refugees Act makes a fleeting reference to dependent family members who may join a refugee, and this appears to be the only thing stated in this regard. Dependent members of the family of a recognised refugee are usually allowed to come to

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11 COM (2002) 225, 2 May 2002, OJ C 203 E, 27 August 2002, p. 136.

12 6912/03, 28 February 2003.

13 A5-0086/2003.

14 Pb L 251, 3 October 2003, p. 12.

Malta to join him/her. People with humanitarian protection face far more problems and their dependent family members are only allowed to come to Malta in very rare cases. There is no formal application procedure in place – no mandatory requirements and no established selection or approval criteria. Each ‘application’ or request currently appears to be decided on a case by case basis. The very responsibility of dealing with applications is also unclear, but requests (even a mere letter) are normally sent to the Ministry for Justice and Home Affairs which then proceeds to collect the necessary documentation and other evidence.’

The present situation in Malta may not be very different from the situations in some other Member States before the transposition of the Directive.

In four Member States, a relevant bill was pending before parliament (Cyprus, Lithuania) or was being prepared (Germany, Portugal). The German government published a draft bill in January 2006, proposing changes to the 2005 German Immigration Act with the aim of transposing a number of EC migration and asylum directives into national law. In March 2006, the Federal Ministry of the Interior organised a public hearing where public and private organisations had the opportunity to voice their opinions on the draft bill. By the end of 2006, the bill was still subject to discussions within the federal government and between the federal and the *Länder* governments. Finally, in March 2007 the government introduced the bill implementing ten EC directives in the *Bundestag*. Similarly, a draft bill was published by the government for public discussion in Portugal in May 2006, while a provisional form of transposition had occurred by means of government regulation.

The formal process of transposition had apparently been completed by the end of 2006 in Austria, Belgium, the Czech Republic, Estonia, Finland, France, Hungary, Italy, Latvia, the Netherlands, Poland, Slovakia and Sweden. In Greece, most of the provisions of the Directive had been transposed by July 2006, but the provisions of Chapter V on family reunification for refugees are covered by draft legislation also dealing with the transposition of the Reception Conditions Directive. It remains to be seen whether, in each of these Member States, transposition was full and correct.

Several EU-10 Member States had introduced rules on family reunification in their national law shortly before their accession to the EU in May 2004. Poland used the draft versions of the Directive while drafting its 2003 Aliens Act and had to amend that Act in 2005 in conformity with the final text of the Directive. Hungary had to amend its 2004 immigration law in 2006. In two of the EU15 Member States, early and sometimes selective amendments of national law occurred before or soon after adoption of the Directive. In France, in anticipation of adoption of the Directive, certain elements had already been introduced in the Immigration Act of 2003. In the Netherlands, three amendments to the Aliens Decree had already entered into force in 2004 with explicit reference to the Directive, while other changes to the national rules, bringing them more into line with the Directive, occurred in 2006.

In some Member States, the transposition was part of a more general revision of immigration legislation or of an effort by the government to transpose a series of EC migration and asylum instruments combined into one Bill or Act (Austria, Belgium, Germany and Poland). In other Member States, a separate instrument was drafted to transpose this Directive (the Netherlands and Sweden). Several rapporteurs point to the fact that the transposition of the Directive resulted in changes to a range of na-



tional legislative instruments: e.g. the Immigration Act, the Asylum Act and the Act on Employment of Aliens, or in legislation at different levels: the Act, a Decree and several Ministerial regulations. We will observe later in this study that in several Member States the transposition of the Directive was used by the government to introduce other amendments into the national law on family reunification that had already been planned earlier.

In most Member States where formal transposition occurred, the national rules intended to transpose the Directive have been codified in national legislation adopted with some form of participation by the parliament. Only in Greece, the Directive was transposed into a Presidential Decree and, in the Netherlands, partial transposition occurred in the Aliens Decree. Questions regarding that transposition were raised by MPs after the rules had entered into force, but did they not result in more legislative activity. In Portugal, provisional transposition occurred via a governmental regulation. In Slovakia, the main provisions are enacted in the Immigration Act of 2002, but they are supplemented by an unpublished Order of the Director of the Bureau of Borders and Foreigners Police.

Some national rapporteurs explicitly mention that, in the national legislation, no single explicit reference is made to the Directive, as required by Article 20 (2) of the Directive (France and Spain). The report on France contains a catalogue of changes in the national rules on family reunification at different regulatory levels. While many of those changes bear some relation to the Directive, this is not mentioned explicitly in any of these national instruments.

#### **1.4 Case Law of National Courts**

In six of the 22 Member States bound by the Directive as of December 2006, the national courts had by then already passed judgments making explicit reference to the Directive: Austria, France, Luxembourg, the Netherlands, Spain and Sweden. The absence of national case law in the other Member States was attributed by the national rapporteurs to various causes: the legislation transposing the Directive had not yet entered into force, the Directive was still unknown to lawyers or administrative authorities or, generally, little or no cases on family reunification were reaching the courts. In Latvia, the immigration authorities stated that not a single application for family reunification had been refused under the Directive.

Interestingly, two of the six Member States with early case law are Luxembourg and Spain, neither of which have national legislation (explicitly) transposing or referring to the Directive. The report on Luxembourg mentions two cases. In one case, the administrative tribunal held that the Directive had not yet been transposed and the lawyer for the applicant had not specified which provision of the Directive justified the annulment of the administrative decision. In the other judgment, the court annulled the refusal of family reunification with reference to Article 8 ECHR, without considering the arguments of the applicant based on the Directive. The report on Spain mentions six judgments in which the national courts, either in reaction to the arguments of the applicant or at their own initiative, mentioned the Directive as the current EC law on family reunification, but without interpreting the Directive or without basing their judgment on the Directive.

In Austria and Sweden, the first judgments concerned Article 5 (3) of the Directive. In both countries, the court held that since the Member State had not used the competence to allow for the application to be filed while the family member was already on the territory, the family member could be required to leave the country in order to make the application from abroad. In the Netherlands, District Courts interpreted the Directive in at least thirteen cases. In most judgments the courts held that the national rule that reunification for minor children was not allowed if the child and the parent had been separated for more than five years was incompatible with Article 16 (1) (b) of the Directive. Other judgments concerned the income requirement and the compatibility of the Directive with the Dutch system, where it is tested twice – once when deciding on the application for a temporary stay and once when deciding on the application of a residence permit, whether or not a person meets the conditions for family reunification. The Judicial Division of the State Council held that a Moroccan father could no longer base his claim to be reunited with his minor child on the Directive once he had acquired Dutch nationality by naturalisation while retaining his Moroccan nationality.

By the end of 2006, not a single national court had made a preliminary reference to the Court of Justice. This came as no surprise because, under Article 68 ECT, only the national courts against whose decision no judicial remedy exists have the competence and the obligation to refer questions of interpretation to the Court in Luxembourg. The first judgment of the Court of Justice of 27 June 2006 and its effect in Member States are discussed in paragraph 1.7.

## **1.5 Political or Public Debate on the Transposition of the Directive**

In most Member States, transposition of the Directive did not lead to much debate among politicians or in civil society. The respondents from Cyprus and Latvia remarked that the debate about the reform of their migration law was dominated by issues dealing with the transposition of the long-term residence Directive (2003/109/EC).

In Austria, Belgium, Cyprus and Finland, the transposition of the Directive was part of a more comprehensive reform of migration law. In the political and public debate on these reforms, the rules on family reunification attract only little attention.

With regard to family reunification, in Austria two proposals were controversial: the requirement for the family member to await the outcome of a decision on the application in the country of origin and the increased income requirement.

In France, Germany and Greece, the transposition of the family reunification Directive was indeed a topic of political and public debate. In Italy, the transposition of the family reunification Directive was not a topic of public debate. At political level, the discussions that took place within the competent parliamentary commissions during the transposition process clearly show the different positions of the majority and opposition parties. The text of the transposition was criticised by the opposition parties because, in their view, it could lead to increased immigration. In particular, these parties were worried about the vagueness of some of the provisions set forth in the draft National Reception Decree and the favourable status accorded to refugees.

On the other hand, the left-wing parties supported the proposals, which would in their view ensure family life and help the immigrant's integration process.

In France, the government proposed introducing more severe conditions for family reunification, by increasing the requirements on income, housing, waiting period and the integration of the applicant. Eventually, the legislation adopted by the French parliament was less severe compared to the original proposals. A group of MPs asked the *Conseil Constitutionnel* to examine the compatibility of certain provisions of the new immigration legislation with the French Constitution. The claim was rejected.

In Germany, since January 2006 political debate has been ongoing regarding a draft Bill on the transposition of a series of EC migration directives. One of the elements in the debate is the proposal to introduce an integration requirement for family reunification. In a public hearing held by the Federal Ministry of Interior, this proposal was criticised by representatives of churches and NGOs. On the other hand, some *Länder* asked for stricter requirements, such as raising the minimum age for spouses and measures to combat forced marriage. The public debate in Germany was dominated by the issue of forced marriages.

In the Netherlands and Sweden, the transposition mainly led to objections from academics, which caused some discussion in the national parliaments.<sup>15</sup> There was no real public debate. In the Netherlands, two professors of immigration law sent letters to the parliament, commenting on the decision to raise the minimum age for spouses, to increase the income requirement and to introduce the integration requirement for spouses before entry into the Netherlands. Although these letters led to a number of critical questions from MPs, there was no real debate on those issues at that time.

In Sweden, a law faculty member commented on the transposition proposal by criticising the result that would produce three different systems of rules on the right to family reunification: for third-country nationals, for asylum seekers and for EU citizens. According to the critics, this could lead to reverse discrimination. The left-wing opposition parties criticised the requirements for the renewal of a residence permit and the introduction of the possibility of revoking a residence permit. The Swedish Children's Ombudsman, in a generally positive reaction to the proposals with reference to Article 2 of the UN Convention on the Rights of the Child, argued that unaccompanied minors under distressing circumstances should have the right to family reunification.

The transposition of the Family Reunification Directive and the Long-Term Residents' Directive discussed during a conference organised by the Greek Association for Human Rights and Centre for Research on Minority Groups in January 2005. The conference adopted concrete recommendations on the transposition of the Directives.

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15 See the answers of the Dutch government to the critical comments in a letter from the Minister for Alien Affairs and Integration of 23 February 2005, TK 19637, no. 901. The comments on the proposals by the Swedish government were made in a document by the Law Faculty of the University of Stockholm on 10 June 2005.

## 1.6 Court of Justice Judgment in the Case *Parliament v. Council* (Case C540/03)

Shortly after the Directive had been adopted by the Council, the European Parliament made use of its new competence for the first time to start legal action for annulment of a measure of secondary Community law. This new competence had been inserted by the Treaty of Nice into Article 230 EC Treaty. The Parliament asked the Court to annul three provisions of the Directive: the last sentence of Article 4 (1) on the admission of children over 12 years of age, Article 4 (5) on the admission of children over 15 years of age and Article 8 on the waiting period. The Parliament deemed those three provisions to be in violation of Articles 8 and 14 ECHR.

In its judgment of June 2006, the Court dismissed the action by the Parliament but used the opportunity to clarify several important issues regarding the meaning of key provisions of the Directive.<sup>16</sup> In so doing, the Court has laid down principles that will probably be of great importance for the interpretation and application of other directives on migration and asylum issues also adopted by the Council on the basis of Articles 62 and 63 EC Treaty. The Court affirms that the Directive grants a subjective right to family reunification to individuals and sets clear limits on the margin of appreciation of the Member States when making individual decisions concerning family reunification.

The judgment illustrates the importance of the power granted to the Parliament by Article 230 EC Treaty as a means of supporting the rights granted by Community law to individuals, of clarifying the obligations of Member States and of enhancing respect for human rights and Community law by the Council and by the authorities of the Member States. With this action before the Court, Parliament has to a certain extent compensated for the minimal influence on the content of the Directive which the Parliament was permitted by the Council during the negotiations on the proposal for this Directive.

The Court affirms that Article 4 (1) of the Directive:

‘imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor’s family, without being left a margin of appreciation’. (paragraph 60)

This illustrates the important additional rights granted by the Directive to the family members mentioned in Article 4 (1): the spouse and minor children. Those rights go far beyond what has been guaranteed under Article 8 ECHR. The margin of appreciation allowed to Member States under Article 8 ECHR is restricted by the Directive to those situations where the Directive explicitly preserves, ‘a *limited margin of appreciation for those States*’ (paragraph 62). The three clauses attacked by the Parliament in its action are examples of such exceptions (paragraph 97).

Furthermore, the Courts affirms that in those exceptional cases where the family members and their sponsor do not have the subjective right to family reunification

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16 ECJ 27 June 2006, case C-540/03 *Parliament v. Council* [2006] ECR, I-5769.

granted by Article 4 (1) and the Member States still have a margin of appreciation, the Member States must in each individual case, when making a decision on an application for family reunification, take due account of the interests and factors mentioned in Article 5 (5) and Article 17 of the Directive (paragraphs 63 and 64), the principles of Community law (paragraph 105) and the case law of the ECtHR on Article 8 ECHR.

The practical importance of the exceptions permitted in the final sentence of Article 4 (1), in Article 4 (6) and Article 8 (2) of the Directive is limited due to the standstill clauses in each of those provisions. Those exceptions can only be relied on by a Member State if, at the time of the adoption or on the final date for implementation (3 October 2005), a corresponding rule was in force in the national legislation of the Member State. In practice, those clauses will prohibit the introduction of new restrictions regarding those persons in most Member States.

Implicitly, the Court has rejected the position prevalent in some Member States that the Family Reunification Directive and other new migration directives adopted under Article 63 ECT are a special kind of directive that are less binding and allow for more discretion by Member States than ‘normal’ directives (paragraph 22).<sup>17</sup> The Court in its judgment indicates that the general principles recognised under the Community legal order are also binding upon Member States when applying this Directive (paragraph 105). In its judgment, the Court applies its normal methods of interpretation in order to clarify the meaning of the Directive.

The Court recognises for the first time that the Convention on the Rights of the Child has to be taken into account when applying the general principles of Community law (paragraph 37) and thus equally when applying the Directive. The Court held that Articles 9 and 10 of the Convention have a function in recognising the principle of respect for family life (paragraph 57). Moreover, the Court for the first time explicitly referred to the EU Charter of Fundamental Rights. The Court stresses that the Council explicitly referred to the Charter in the preambles to the Directive and that, ‘the principle aim of the Charter as apparent from its preamble is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States’ ...’ (paragraph 38).

In paragraph 107 of the judgment the Court reminds Member States bound by the European Social Charter or the European Convention on the legal status of migrant workers that the Directive is without prejudice to the more favourable provisions of these two instruments. This is relevant for six Member States that are party to the latter Convention (France, Italy, the Netherlands, Portugal, Spain and Sweden), since Article 12 of that Convention grants family reunification rights to migrant workers that are more favourable than the rights under the Directive and, considering the reciprocity principle in the Convention, in particular for workers from the two non-Member States that have ratified the Convention: Turkey and Moldavia.

Finally, the Court reaffirmed that the implementation of the Directive is subject to review by the national courts and reminds the national courts mentioned in Article

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<sup>17</sup> On the position of the German government before the Court in this respect, see point 36 of the conclusion of Advocate General Kokott.

68 EC Treaty of their obligation to refer questions to the Court for a preliminary ruling (paragraph 106).

### *Effect of the Judgment*

In answer to our explicit question about potential effects of this ECJ judgment on law or practice in the Member States, we received answers from twenty-four national rapporteurs. Only one state (the Netherlands) already gives some indication of a potential effect of the judgment. Three months after the judgment, the Minister informed the Dutch Parliament that the reunification requirement involving minor children that the parent and the child should not have lived apart for more than five years had been abolished. The letter did not make explicit reference to the judgment or to the Directive, possibly to avoid claims for damages by parents who had been denied reunification with their children.<sup>18</sup> The absence of visible effects in other Member States so far can be explained by lack of knowledge of the judgment, which has only been published in legal journals in a few Member States,<sup>19</sup> by the fact that only six months had elapsed between the judgment and the reports for this study, by the fact that ECJ judgments are usually implemented by the case law of the highest national court (Estonia) and by the lack of national rules making use of the exceptional discretion of Member States granted under the three clauses attacked by the Parliament. For example, in France, there are no age restrictions on the admission of children under 18 years of age and the waiting period is 18 months, in other words less than the two years allowed by Article 8 (1) of the Directive.

So far, the ECJ judgment has received attention in case notes or articles in at least five Member States: Austria,<sup>20</sup> France,<sup>21</sup> Germany,<sup>22</sup> Latvia,<sup>23</sup> the Netherlands<sup>24</sup> and Spain.<sup>25</sup>

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18 Letter of 25 September 2006, TK 19637, no. 1089; G. Lodder, De gezinsherenigingsrichtlijn: legitimering van of keerpunt voor het restrictieve Nederlandse beleid?, *Migrantenrecht* 2007, pp. 26-29, suggests that the fear of claims based on the Francovich judgment of the Court made the Minister avoid any reference to the Directive.

19 For Austria, see note 4 below. For Germany, in *Europäische Zeitschrift für Wirtschaftsrecht* 2006, 566 ff, *Neue Zeitschrift für Verwaltungsrecht* 2006, 1033 ff, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 2006, pp. 366/370, *Neue Juristischen Wochenschrift* 2006, p. 3266. For the Netherlands, in *Jurisprudentie Vreemdelingenrecht* 2006/311 with comments by P. Boeles, *Nederlands Tijdschrift voor Europees Recht* 2006, pp. 205-211 with comments by M. Bulterman, and in *NJCM Bulletin* 2006, pp. 1023/1041 with comments by M. den Heijer. For Spain, see note 8 below.

20 Huber, S. (2007), Richtlinie 2003/86/EG, Familienzusammenführung grundrechtskonform, EuGH 27.6.2006, C-540/03, EP/Rat, migralex 2007, 30.

21 Labayle, H. (2007), 'Le droit des étrangers au regroupement familial, regards croisés de droit interne et du droit européen', *Revue Française de Droit Administratif* 2007, no. 1, p. 1/36.

Bonnachère, M. (2006), *Droit ouvrier*, no. 700, p. 556.

Gautier, M. (2006), *Semaine juridique JCP, Administration et Collectivités territoriales*, no. 42, 16 octobre, 1238.

Kauff-Gazien, F. (2006), *Europe 2006*, no. 8-9-, commentaire no. 236, p. 13.

22 Thym, D. (2006), 'Europäischer Grundrechtsschutz und Familienzusammenführung', *Neue Juristische Wochenschrift* 2006, pp. 3249-3252.

## 2 Personal Scope of the Directive

### 2.1 Dual Nationals

Who is covered by Directive 2003/86? In Article 3 (3), the Directive confines its scope of application to family members of third-country nationals who are not Union citizens. The Directive does not contain rules regarding family reunification with third-country nationals who also hold the nationality of one of the Member States, nor was this question dealt with during the negotiation history of the Directive.<sup>26</sup> It is, however, an important question, since excluding dual nationals from the scope of the Directive implies that third-country nationals lose their right to family reunification under the Directive upon acquisition of the nationality of the Member State of residence. If the question of whether the Directive applies to third-country nationals who also hold the nationality of the EU Member State in which they reside is answered differently in each Member State, this will result in the Directive having a different personal scope in the various Member States.

In Cyprus, Finland and Sweden, third-country nationals who also hold the nationality of those countries are able to rely on the Directive. In Finland, there will be virtually no need for Finnish nationals to rely on the Directive, since the rules for family reunification for Finnish nationals are either similar to or more liberal than the rules provided for in the Directive. In Sweden, the same rules for family reunification apply to all persons with residence in Sweden, regardless of their citizenship.

In Estonia, Luxembourg and Latvia the question of whether dual nationals can rely on the Directive does not apply, since these countries do not allow for dual nationality. In Lithuania, dual nationality is only allowed in very limited situations. The Lithuanian Aliens Law defines an alien as any person not holding Lithuanian nationality. The few dual nationals in Lithuania will therefore not be able to rely on the Directive, neither will dual nationals in Austria, Belgium, Czech Republic, France, Germany, Greece, Hungary, Poland, Portugal, Slovakia, Slovenia or Spain. Although, in Belgium, third-country nationals who also hold Belgian nationality are considered Belgian and are not able to rely on the Directive when applying for family reunification, the family members of Belgian nationals do benefit from the free movement rights conferred upon the family members of EU nationals, since Article 40 para-

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23 Kruma, K. (2006), 'Eiropas Kopieniu tiesas spriedums migrācijas politika: Eiropas Kopienas kompetence iegust aprīses', *Likums un Tiesības*, September 2006, vol. 8, No. 9 (85), pp. 282-288.

24 Groenendijk, K., R. van Oers and T. Strik (2007), 'De betekenis van de Gezinsherenigingsrichtlijn voor vluchtelingen en andere migranten', *Nieuwsbrief Asiel- en Vluchtelingenrecht* 2007 (1), pp. 17-29. Reference to the Court judgment is made on pages 20 and 21.

Bulterman, M. (2006), 'Gezinsherenigingsrichtlijn houdt stand voor Hof van Justitie: Hof bindt gezinnen én lidstaten', *Nederlands Tijdschrift voor Europees Recht* 12(10): 205-211.

25 Fernández Colladas, B. (2006), 'Las controvertidas excepciones previstas en la Directiva 2003/86/CE de reagrupación de familiares de nacionales de países terceros, Comentario a la STSJCE de 27 junio de 2006', *Aranzadi Social* no. 11-2006.

26 K. Groenendijk, (2006), 'Family Reunification as a right under Community Law', *European Journal of Migration and Law* 8, pp. 215-230.

graph 6 of the Act of 15 December 1980 prohibits reverse discrimination of Belgian nationals. In Italy, the provisions of the Single Text on Immigration do not apply to family members of an Italian citizen or an EU citizen, who might also hold the nationality of a third country. However, persons (also) holding Italian nationality can rely on the provisions where they envisage more favourable conditions for family reunification.

In the Netherlands, since 2004 the Aliens Circular has contained a provision stating that the Directive would equally be applied to the family reunification of Dutch nationals.<sup>27</sup> This provision was, however, deleted in 2006. The question of whether dual nationals can rely on the Directive has been the subject of Court cases. The Dutch Council of State ruled that dual nationals are barred from relying on the provisions of the Directive using Article 3 (3) of the Directive. However, more recently, the District Court of Middelburg has answered the question of whether third-country nationals who also hold Dutch nationality may be treated less favourably than other third-country nationals under Directive 2003/86.<sup>28</sup> According to the Court, naturalisation would lead to a deterioration of the legal position in the field of family reunification if dual nationals are excluded from the scope of application of the Directive, since the Dutch rules on family reunification are less favourable than those provided for in the Directive. Consequently, this would constitute discrimination under Article 12 EC Treaty, which prohibits discrimination on nationality grounds. Furthermore, according to the Court of Middelburg, excluding dual nationals from the scope of application of the Directive would cause it to have a different effect in each Member State. The Middelburg Court therefore declared the Directive applicable to third-country nationals who also possess Dutch nationality.

## 2.2 Treatment of Nationals of the Member States

It appears that, in most Member States, dual nationals are not able to profit from the provisions of the Directive. In most cases, however, there will be no such need, since nationals are entitled to more privileged treatment than third-country nationals when it comes to family reunification. The legislation in Austria, Belgium, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Poland, Portugal, Slovakia and Spain contains more favourable rules concerning family reunification with those countries' own nationals. The Swedish law on family reunification applies to all persons with residence in Sweden and goes beyond the provisions of the Directive.

In Austria, a more favourable regime applies to Austrian nationals seeking family reunification with their third-country national family members. However, the most favourable regime in Austria applies to third-country national family members seeking reunification with an Austrian national who has made use of his/her free movement rights. These family members can benefit from the provisions of Directive 2004/38. In Portugal, the third-country national family members of a Portuguese

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<sup>27</sup> B2/1 Aliens Circular.

<sup>28</sup> District Court of Middelburg, 18 October 2006, LJN: AZ0506.



national can rely on Directive 2004/38 even if the Portuguese national has not made use of his free movement rights. The same regime applies in Slovenia and Spain. In the Czech Republic, family members of Czech nationals are treated in the same way as family members from other EU Member States.

Belgium goes one step further. In this country, third-country family members of Belgian nationals are treated as EU citizens.<sup>29</sup>

In countries where the treatment of family reunification between nationals and their third-country national family members is more favourable than provided for in the Directive, the more favourable treatment mainly involves:

- the possibility of applying for family reunification in the Member State (Austria,<sup>30</sup> Estonia,<sup>31</sup> Finland and Slovakia<sup>32</sup>);
- exemption from the obligation to hold a work or employment permit (Austria, Italy, Luxembourg);
- no requirement regarding sickness insurance (Germany,<sup>33</sup> Poland);
- no income requirement (Germany),<sup>34</sup> Finland, France, Hungary and Poland<sup>35</sup>);
- no housing requirement (France, Hungary and Poland<sup>36</sup>);
- no integration requirement (France);
- issue of a residence permit of unlimited duration (Hungary, Italy);
- issue of a residence permit of a longer duration (Greece);
- autonomous right of residence if a baby is born (Hungary);
- possibility of settlement permit after one year (Hungary<sup>37</sup>);
- less problems concerning the acceptance letter of invitation (Hungary);
- notion of family has broader scope (Greece, Hungary, Italy, Latvia and Spain);
- derived right from national (Italy);
- protection against expulsion (Latvia);
- residence permit of longer duration (Latvia and Slovakia);
- spouse does not have to prove stable long-term cohabitation (Spain);
- lower visa requirements (Spain);
- requirement of permanent residence does not apply (Estonia).

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29 Article 40 (6) Belgian Aliens Act of 1980.

30 Only for members of the nuclear family.

31 Spouses of Estonian citizens, spouses and minor children of ethnic Estonians.

32 Only if residence in Slovakia is legal.

33 Exceptions regarding the requirement of sickness insurance are discretionary. The draft bill provides for obligatory exception to apply the sickness insurance requirement in cases of family reunification with minor children of German nationals and parents of a minor German entitled to child care and for a discretionary exception in cases involving the spouse of a German national.

34 The draft bill which was published in March 2007 provides for a discretionary exception in cases involving the spouse of a German national.

35 Only in cases involving spouses of a Polish national. Other family members of Polish nationals are not included in categories of aliens eligible to be granted the residence permit on the basis of their family relationships.

36 Only for spouses.

37 Not for spouses.

In six Member States (Cyprus, Denmark, Ireland, Lithuania, Germany and the UK) the rules regarding family reunification with nationals are less favourable than those provided for family members of third-country nationals in Directive 2003/86. Of course, this does not apply in cases where there is a community connection and the rules on family reunification under Directive 2004/38 are applicable. In Cyprus, the Cypriot Aliens and Immigration Law does not regulate family reunification with Cypriot nationals. In practice, the third-country national family members of Cypriots are allowed to stay and work in Cyprus, but they will be completely dependent on the Cypriot national. This means that if the family relationship ends, for instance in the case of divorce, the end of cohabitation or death, the residence permit will be revoked. Cypriot nationality law, however, provides for the possibility of acquiring Cypriot citizenship after three years' residence in Cyprus.

Lithuanian legislation does not specify explicit differences between family reunification with third-country nationals and Lithuanians and other third-country nationals, except for the fact that, in the event of marriage between a Lithuanian national and a third-country national, checks are performed to ensure that the marriage is not a marriage of convenience.

In the Netherlands, the Dutch legislation on family reunification is the same for Dutch nationals and for third-country nationals. However, Dutch nationals cannot rely on the directly effective provisions of the Directive. Dutch legislation used to contain a more favourable clause regarding the public security exception for the family members of Dutch nationals. This rule was deleted on the occasion of the transposition of the family reunification Directive.

## 3 Definition of the Nuclear Family

### 3.1 Transposition of Article 4 (1) Directive

The Directive grants a subjective right to family reunification to the spouse and minor children of the sponsor who fulfil the conditions set by the Directive. Has this right to family reunification of members of the nuclear family been codified in the legislation of the Member States? Three types of Member State can be discerned: Member States that have codified the right to family reunification of spouses and minor children, Member States that have partially codified this right and Member States that have not codified the right.

Seventeen Member States have codified the right to family reunification for family members of the nuclear family: Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. As an extra condition, Belgium and Greece require that the spouse and children come to live with the sponsor. The right to family reunification for the spouse and the minor children has been codified in Spain. As an extra condition for minor children in custody, Spanish legislation requires that the children be dependent on the parent.

In Italy, Finland, Hungary, Poland and Sweden the rules regarding family reunification for members of the nuclear family were liberalised as a result of the Directive. The legislative Decree implementing the Directive in Italy did not enlarge the scope of the family members who can benefit from family reunification, but it eliminated some important barriers that made the exercise of the right to family reunification extremely difficult.<sup>38</sup> In Sweden, an amendment referring explicitly to the Directive provides that spouses (and cohabiting and registered partners) *shall* be granted a residence permit. Before the amendment came into force, the wording was that a residence permit ‘may’ be granted to a spouse, etc.<sup>39</sup>

In Hungary, spouses only have a right to family reunification if the sponsor has a settlement permit, not a residence permit. However, if the marriage takes place more than two years before the application for family reunification, a settlement permit will be issued without the requirement of previous residence in Hungary.

In four Member States (Cyprus, the Netherlands, Germany and the United Kingdom), the right to family reunification for members of the nuclear family has been codified only partially or partially incorrectly. In Cyprus, spouses only have a right to family reunification if the marriage took place at least one year before submission of

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38 For example, for spouses the condition of ‘not being legally separated’ was deleted. ‘Legally separated’ refers to a distinction in the marital status in the Italian legal system, unknown in most other legal systems. Also, it is no longer required that minor children be dependent on the sponsor. Children over 18 no longer need to be totally disabled in order to qualify for family reunification. Parents can apply for family reunification if they do not have adequate family support in the country of origin. This means that they have a right to family reunification even if they have other children in the country of origin.

39 Government’s proposition 2005/06:72, p. 31 ff, entered into force on 1 May 2006.

the application. Furthermore, minor children aged over 15 have to be dependent on the sponsor in order to apply for family reunification. If this is not the case, they will also be allowed entry into and residence in Cyprus. This right is however not codified in law. It is left to the discretion of the Migration Officer. In the Netherlands, spouses and minor children have codified rights to family reunification. However, important barriers to family reunification are in place in the form of high fees for visas and resident permits. Spouses and children aged sixteen and older who are no longer obliged to attend school are required to pass an integration exam abroad before they are allowed to enter the Netherlands. In cases of family formation, an income requirement of 120% of the minimum wage for 23-year-old workers is required.

In Germany, minor unmarried children of foreigners who are under sixteen years of age shall only be granted a residence permit if both parents or the parent with the sole right of care and custody holds a residence permit or settlement permit. Minor unmarried children of foreigners may otherwise be granted a residence permit only if necessary in order to prevent special hardship on account of the circumstances pertaining to the individual case concerned. The child's wellbeing and the family situation are to be taken into consideration in this connection. No changes are envisaged in this respect in the draft bill.

The United Kingdom is not bound by the Directive. A right to family reunification for family members is only partially codified in this Member State. The rules for family reunification with minor children depend on whether the child is joining or accompanying both parents or one parent with a settlement permit. The rules for one parent bringing a child to the United Kingdom hinge on whether that parent had 'sole responsibility' for the child which can be a very hard criterion to test. Children accompanying or joining parents who are in the UK with limited leave can also apply for family reunification if they are unmarried, have not formed an independent family unit, will be adequately maintained and accommodated without recourse to public funds and if they will not remain in the UK for longer than the leave given to their parents. Spouses can be admitted to the UK if the sponsor is settled. If not, the rules sometimes allow admission for limited periods.

Estonia, Ireland, Luxembourg and Malta all are in the third category of Member States that have not implemented the right to family reunification for members of the nuclear family.

In Estonia, there is also no obligation to grant a (temporary) residence permit to spouses and minor children. In the case of minor children, a temporary residence permit may be granted only if the parent is a long-term resident who permanently resides in Estonia. If children lead an independent life, they are not considered 'minor', even if they have not yet reached the age of 18 and are unmarried. Spouses are only granted a temporary residence permit if the sponsor has a residence permit and has lived in Estonia for at least two years. Furthermore, the spouse is required to share close economic ties and a psychological relationship with the sponsor, the family must be stable, the marriage must not be fictitious and the application for a residence permit must be justified.

Luxembourg's legislation does not contain special provisions for the third-country spouses of third-country nationals. In terms of family reunification, they will have to rely on the general law of 1972 regarding residence permits. The legislation also contains no right to family reunification for minor children either.

In Malta, no procedure for family reunification has been formalised. The Maltese Refugees Act makes a fleeting reference to dependent family members who might join a refugee. The definition of 'dependent family members' in the Refugees Act is slightly different from that in the EU Directive. In Article 2 of this Act, dependent members of the family are defined as '...the spouse of the refugee, provided the marriage is subsisting on the date of the refugee's application, and such children of the refugee who on the date of the refugee's application are under the age of eighteen years and are not married'.

Ireland is not bound by the Directive. This Member State has not codified the right to family reunification for spouses and minor children.

### **3.2 Special Rules for Minor Children aged over 12 or 15**

The Directive provides for the possibility of introducing restrictions on family reunification for children aged over 12 and over 15. Article 4 (1) last sentence provides the right for Member States to demand that children aged over 12 comply with integration conditions before they are authorised for entry and residence, whereas Article 4 (6) authorises Member States to require that applications concerning the family reunification of minor children be submitted before the minor reaches the age of 15. Both Articles contain standstill clauses, which means that the restrictions to the substantive right to family reunification for minor children have to be introduced in national law before the date of implementation of the Directive (3 October 2005) has passed.

It appears that special rules concerning the admission of children aged over 15 are envisaged in only two Member States, i.e. Denmark and Germany. The other Member States that are bound by the Directive are barred from introducing a restriction on the right to family reunification for children over 15 due to the standstill clause in Article 4 (6). In Denmark, the general age limit for children seeking family reunification is 15. In Germany, family reunification is only allowed up to the age of 16. The second sentence of Article 4 (6) of the Directive obliges Member States that make use of the exception for family reunification for children aged over 15 to authorise entry and residence for these children on grounds other than family reunification. In Denmark, which is not bound by the Directive, a residence permit may be granted on the grounds of family reunification under exceptional circumstances. In Germany, minor unmarried children who are 16 and older can only be granted a residence permit if they have a command of the German language or if it appears, on the basis of the child's education and way of life to date, that he/she will be able to integrate into the way of life which prevails in the Federal Republic of Germany and if both parents or the parent with the sole right of care and custody hold(s) a residence permit or settlement permit. Minor children aged 16 and over may otherwise be granted a residence permit only if necessary in order to prevent special hardship due to the circumstances pertaining to the individual case concerned. The child's wellbeing and the

family situation are to be taken into consideration in this connection. No changes are envisaged in the draft bill.

In Cyprus, children aged over 15 have to be dependent on the sponsor in order to be able to apply for family reunification. Otherwise, they may be allowed entry and residence in Cyprus on a basis not defined in law, at the discretion of the Migration Officer.

Before 3 October 2005, no Member States were making use of the possibility of providing special rules concerning the admission of children aged over 12. Article 4 (1) last sentence now serves as an explicit prohibition on the introduction of such rules.

### 3.3 Unmarried Partners

Article 4 (3) of the Directive provides for the right to family reunification for third-country national unmarried partners, who are in a duly attested stable long-term relationship with the sponsor, or to whom the sponsor is bound by a registered partnership. The Article is not of a mandatory nature. A minority of the Member States provide the right to family reunification for unmarried partners. This is the case in Belgium, Denmark, Finland, France, the Netherlands, Sweden and the UK.

Belgium, Denmark, Finland, the Netherlands, Sweden and the United Kingdom demand proof of a stable and long-term relationship. In Denmark, Finland and the UK, this means that the partners must prove that they have been sharing the same household for at least 1.5 (Denmark) to two years (Finland and the UK).<sup>40</sup> If the partners have a child in their joint custody, the requirement of a shared household is waived. In Belgium, the partners have to prove that they have been in a stable long-term relationship for at least one year. It is not necessary for the partners to have been living together. However, in order for the age criterion of 21 to be waived for both partners, the partners must have proof that they have been living together for at least one year before the sponsor arrived in Belgium. In the Netherlands, unmarried partners have a right to family reunification if the relationship is permanent and exclusive. Belgium also requires that the relationship between the partners be exclusive.

In Sweden, the previous examination of the seriousness of a cohabiting relationship with someone who is residing in or has been granted a residence permit in Sweden no longer applies.<sup>41</sup> A condition for family reunification for unmarried partners is that their relationship is serious and that there is no particular reason to think otherwise.<sup>42</sup>

In France, unmarried partners and other family members to whom the constitutional right to family life cannot be refused have a right to family reunification. When judging whether the refusal to admit an unmarried partner will constitute a disproportional

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40 In Denmark, the period can be changed if the partners can give good reasons why they have only been able to cohabit for a shorter period and/or other proof of a stable long-term relationship. In Finland, this requirement is waived if the partners have a child in their joint custody or if there is some other pressing reason.

41 The same examination used to be made regarding marriages.

42 The same applies to married couples who have not previously been living together.

tionate infringement of the right to family reunification, the nature of the personal and family ties in France are taken into account. Furthermore, the living conditions of the sponsor, his or her assimilation into French society and the nature of the ties with the sponsor's family (in this case, the partner), who has remained in the country of origin, are considered. The conclusion of a PACS (*pacte civil de solidarité*) can establish a personal tie in France in order for a residence permit to be granted on the grounds of 'private and family life'. The partners will have to prove the existence and stability of their ties on French territory.

In Belgium, Finland, Germany, Lithuania, Luxembourg and the Netherlands, registered partners have the same right to family reunification as married couples. Germany, Lithuania and Luxembourg do not grant a right to family reunification to unmarried partners who are not in a registered partnership. In Germany, the conclusion of a registered partnership is only possible between same-sex partners. The right to family reunification for registered partners is not codified in Luxembourg. It appears in practice.

In the majority of Member States, unmarried partners do not have a right to family reunification. This is true for Austria, Cyprus, the Czech Republic, Estonia, Greece,<sup>43</sup> Ireland, Hungary, Italy, Latvia, Poland, Portugal, Slovakia, Slovenia and Spain.

In Hungary, the Explanatory Note to the Alien Act used to state that,

'family unification for unmarried partners is not guaranteed by the Act. It is not required by the Directive and, due to the absence of control of partnerships, it would constitute a public order risk.'

The explanatory note to the new Alien Act states that,

'family reunification of unmarried partners continues to be unavailable. Their cohabitation is only possible on the basis of a residence permit issued for other purposes.'

Unmarried partners are not included in the definition of family members who qualify for family reunification, although registered partnership does exist in Hungary. In practice, however, a letter of invitation and a settlement permit can be issued to unmarried partners. In Spain, the jurisprudence has opened up the possibilities of family reunification for unmarried partners. In this Member State, the lower courts have acknowledged the situation of unmarried partners, which means that, under exceptional circumstances, they can be granted residence in Spain.<sup>44</sup>

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43 However, the Draft Presidential Decree (PD), that is yet to come into force, might introduce this right. The text of the Draft PD will almost certainly require clarification in the form of an accompanying Internal Memorandum.

44 In Spain, a new Royal Decree 240/2007, of 16 February, on the entry, free movement and residence in Spain of nationals of EU Member States and other States of the EEA<sup>44</sup> constitutes the transposition of the Directive 2004/38/EC and covers the family reunification of Spanish citizens, even if they have not exercised their right to free movement inside the EU. The Royal Decree provides for family reunification of unmarried partners with Spanish citizens.

### 3.4 Minimum Age of Spouses

Article 4 (5) provides:

'In order to ensure better integration and to prevent forced marriages Member States may require the spouse and his/her sponsor to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.'

Of the 25 Member States covered by this research, only six Member States (Belgium, Cyprus, Denmark, France, Lithuania and the Netherlands) actually require the spouse to be over 18 years of age. Denmark introduced an age requirement of 24 for spouses as long ago as 2002. It is able to continue to do so, since Denmark is not bound by the Directive. The 2002 coalition agreement by the short-lived Dutch government and List Pim Fortuyn provided for an increase in the minimum age from 18 to 21. In order to allow for the realisation of that aim, the Netherlands actively lobbied for the inclusion of Article 4 (5) in the Directive. In the last phase of the negotiations, Belgium openly supported this Dutch proposal. The age requirement of 21 was actually introduced in Dutch legislation back in 2004. In the political debate, the Dutch Minister did refer repeatedly to the Danish example. In Belgium, the age requirement of 21 was introduced more recently. Better integration was the main argument in the Netherlands. In Belgium, the rule should avoid marriages concluded under pressure from the parents. In both countries, this requirement only applies to marriages or partnerships that did not exist at the time the sponsor entered the Member State. In the Netherlands, the regulations stipulate that admission should always be refused to spouses or partners under the age of 21. In Belgium, the minister has the power to admit spouses under 21 in cases where there is no abuse; the existence of a joint child is an example of such a case. This rule allows the Belgian authorities to take into consideration the interests of the child, as provided for in Article 5 (5), and the circumstances and interests mentioned in Article 17 of the Directive.

In Lithuania, the introduction of an age requirement of 21 is under discussion. From draft legislation which was published in March 2007, the authors of this report noted that in Germany an age requirement of 18 is proposed. Germany currently does not impose a minimum age for the admission of spouses.



## 4 Formal Conditions

Formal conditions for residence are laid down in Article 3 and Article 8 of the Directive. According to Article 3 (1) the Directive shall apply when a third-country national who is residing lawfully in a Member State and applying for family reunification or whose family members apply for family reunification, holds a residence permit issued by a Member State for a period of at least one year and has reasonable prospects of obtaining a permanent right of residence, if the members of the applicant's family are third-country nationals of any status. Article 8 contains rules regarding a waiting period.

### 4.1 Reasonable Prospects of Obtaining the Right of Permanent Residence

It appears that only Cyprus has a provision explicitly referring to the clause, 'reasonable prospects of obtaining the right of permanent residence'. Cyprus literally copied the clause in the pending bill without defining which categories have reasonable prospects of obtaining the right to permanent residence. Based on existing practice and the provisions of the Bill regarding long-term residence status, it may be assumed that only those third-country nationals with the long-term residence status will be entitled to family reunification rights. Other categories would be persons employed in international companies and third-country nationals who benefit from the exception to the 4-year maximum residence rule. According to the rapporteur, in at least one case of a third-country national within the last category, a residence permit for 11 months was issued, instead of the 12 months that had been the practice so far. This meant that she was immediately excluded from the scope of the Directive.

It appears that, in most of the other Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Poland, Slovakia and Spain), the sponsor is deemed to have reasonable prospects if he or she has been granted a settlement permit or a residence permit. In most Member States, a temporary residence permit is sufficient (Austria, Belgium, Finland, France, Germany, Greece, Italy, the Netherlands, Poland, Slovakia and Spain). In Denmark, a sponsor is deemed to have reasonable prospects if he or she has been granted a permanent residence permit and has held this permit for at least three years. Furthermore, a sponsor is deemed to have reasonable prospects if he or she is a Danish national or a national of one of the other Nordic countries. Sponsors holding an asylum residence permit also have reasonable prospects of obtaining a right to permanent residence.

In Germany, a difference is made between family reunification and family formation. In the case of family reunification, a prospect of at least one year is sufficient while, in the case of family formation, the sponsor must have held a residence permit for five years at the time of application. The authors of this report learned that, in the recent proposal to transpose the Directive, this period has been reduced to two years.

In Austria, a sponsor is considered to have reasonable prospects if this person has a settlement permit ('permanent-residence-EC') or an unlimited settlement permit or

another settlement permit granting access to employment. The ‘permanent-residence-EC’ and ‘unlimited settlement permit’ are only granted after five years of legal settlement. If the sponsor has another settlement permit, family reunification depends on fulfilment of the ‘integration agreement’.

In Belgium, a sponsor is entitled to family reunification if the person has a permanent residence permit or a temporary residence permit. The main condition is that the right of residence may not be precarious. If the right of residence is precarious, the sponsor is not entitled to family reunification. This does not mean that the sponsor may not apply for family reunification. In that case, the minister has discretionary competence.

In Finland, a sponsor who resides in the country by virtue of a continuous residence permit is regarded as a person who has reasonable prospects of obtaining the right of permanent residence. A sponsor who has a continuous residence permit is entitled to family reunification but, in most cases, the residence permit on family grounds may also be issued if the sponsor resides in Finland by virtue of a temporary residence permit.

In France, a sponsor has ‘reasonable prospects’ if this person has a residence permit valid for a period of at least one year and if he or she has been in France for at least 18 months. In Germany, a sponsor has ‘reasonable prospects’ if he or she has a settlement permit or a residence permit.

According to the Greek rapporteur, reasonable prospects of obtaining the right of permanent residence refers to the possibility of subsequent renewals of the sponsor’s residence permit, not to the sponsor’s desire or eventual right to become a long-term resident.<sup>45</sup> In Italy, a sponsor is entitled to family reunification if he or she has been granted a permanent residence permit or a temporary permit for at least one year issued for work, asylum, study, religious or family reasons. A sponsor in Luxembourg needs a residence permit which allows him or her ‘to stay for a long period in Luxembourg’. In the Netherlands, the sponsor must have a residence permit issued for a non-temporary purpose. The temporary purposes are exhaustively defined in the Aliens Decree. In Poland, the sponsor must hold a permanent residence permit, refugee status or temporary residence permit. No direct references to the clause are provided for but the authorities take prospects for renewal of the sponsor’s residence permit into account in the decision process.

According to Slovak legislation, a sponsor is deemed to have reasonable prospects if he or she has a temporary residence permit and if this person does not fall under the scope of Article 3 (2).

In Spain, the sponsor may file a family reunification application when he or she has had legal residence in Spain for one year and has a residence permit for at least one additional year.

Since the last amendment to the Aliens Act, Lithuania requires sponsors to have been resident in Lithuania for two years, hold a residence permit valid for at least one further year and to have reasonable prospects of acquiring permanent residence in the country.

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45 Directive 2003/109/EC.

In Swedish law, there is no explicit provision but there is a well-established practice that if an alien intends to stay in Sweden and if he or she is to be granted a residence permit, the permit should be permanent. Slovenia makes no explicit provision either. According to the Slovenian report, some are of opinion that the clause is less relevant than the requirement of one year's residence envisaged in the Directive. Danish legislation distinguishes between family reunification for spouse or partner and family reunification for children. A sponsor has 'reasonable prospects of obtaining the right of permanent residence' if he or she has been granted a permanent residence permit for the preceding three years. Family reunification for a child only requires the sponsor to have a permanent residence permit or residence permit with the possibility of permanent residence.

In Ireland, there are roughly three categories of migrants with different entitlements to family reunification: a) EU citizens, b) refugees and c) other migrants. The other migrants have no legal entitlement to family reunification. An application from another migrant is a matter of administrative discretion. In practice, the residency status of the sponsor will be relevant when considering the application. An application from a migrant who is likely to remain will be considered favourably.

According to Article 3, paragraph 5, Member States are allowed to adopt or maintain more favourable provisions than provided for in the Directive. The Czech Republic, Estonia and Latvia used this opportunity and either adopted or maintained a more favourable provision. Family reunification in these Member States is possible even when there are no 'reasonable prospects of obtaining the right of permanent residence'. Portuguese law does not require 'reasonable prospects of obtaining the right of permanent residence' either. It is sufficient for the sponsor to have residence in Portugal for at least one year. According to the Spanish rapporteur, the conditions required by Spanish legislation could be considered more favourable than the clause of Article 3 (1) of the Directive.

## 4.2 Waiting Period

According to Article 8 of the Directive, 'Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members joining him/her'.

In Austria, Belgium, the Czech Republic, Finland, Germany, Hungary, Italy, Latvia, the Netherlands, Slovakia and Sweden, no formal waiting period applies before an application can be filed (or accepted) although, in Austria, a limited number of settlement permits may be granted (about 7,000). If the maximum has been reached, the authority has to suspend the proceedings. In reply to a Judgement of the Constitutional Court in 2003<sup>46</sup> and the Directive, since January 2006 the legislative has provided for a maximum period in which a settlement permit has to be granted. A settlement permit for the purpose of family reunification has to be granted after three years, regardless of the quota. According to the Dutch rapporteur, the requirements of the integration exam abroad and the age and income requirements for family for-

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46 VfGH G 119, 120/03, 8 October 2003.

mation in practice serve as an informal waiting period. In Germany, there has been some public debate on the issue of a waiting period but no waiting period has been introduced in the draft bill.

In Cyprus, Estonia, Greece, Ireland, Lithuania, Luxembourg, Poland, Portugal and Spain a formal waiting period applies. In Cyprus, Estonia (permanent residence) and Greece, an application can be filed when the sponsor has been resident in the Member State for two years. In Lithuania, at least two years of residence are required before an application can be filed. A sponsor must reside in Poland for at least two years before he or she is entitled to be reunited with his or her family. The Amendment Act of 2005 introduced an additional requirement; a sponsor has to reside in Poland by virtue of a residence permit issued for a minimum period of one year directly before submitting an application. A sponsor has to reside legally in Portugal for at least one year before he or she can file an application for family reunification. If the sponsor has worked in Portugal for at least three years or if the sponsor has a residence permit valid for five years, the waiting period does not apply. In Spain, the sponsor may also file an application after one year of legal residence.

Ireland and Luxembourg envisage a waiting period only for employed and self-employed persons. In Ireland, a sponsor who is a migrant worker with a work permit who does not work in specified skilled sectors must have been in employment for at least 12 months. The maximum waiting period provided for in the Directive is two years, unless the legislation of the Member State relating to family reunification in force on the date of adoption of the Directive takes into account its reception capacity. In that case, the maximum waiting period is three years. The rapporteur from Luxembourg did not explicitly mention that Luxembourg takes into account its reception capacity. In cases of self-employment in Luxembourg, the administrative rule is to grant a residence permit for the purpose of family reunification only after three years. Considering the capacity for reception, Lithuanian law used to provide a waiting period of no longer than three years, since submission of an application for family reunification may be established. This provision was repealed by the most recent amendments to the Aliens Law.

In the United Kingdom, the sponsor should have settled status before he can apply for family reunification, unless the sponsor falls within a limited leave category which allows family reunification.

## 5 Material Conditions for Residence

### 5.1 Housing Requirement

According to Article 7 (1) (a),

‘Member States may require the applicant to provide evidence that he/she has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the member state concerned.’

Most of the Member States have set forth housing requirements for the right to family reunification: Austria, Belgium, the Czech Republic, Denmark, Estonia, Germany (except for German nationals), Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain and the United Kingdom. However, the exact rules vary between Member States. In the United Kingdom, for example, the housing requirement is based on the number of rooms, in Estonia and Hungary on the number of square meters. Most of the relevant national rules do not specify the housing requirement.

Ireland, Slovenia, Sweden and the Netherlands do not have housing requirements. Cyprus and Finland also do not have requirements, but the national rapporteurs stated that the income requirements have taken the need for housing into account. In France, the powers to control the fulfilment of the housing conditions were laid down by the municipalities in 2003.<sup>47</sup> This could lead to more subjective elements in the assessment.

### 5.2 Requirement of Sufficient Income

According to Article 7 (1), under c,

‘the Member States may require the applicant to provide evidence that he/she has stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members’.

With the exception of two Member States (Belgium and Sweden), all Member States require that the applicant and his family are able to maintain and accommodate them-

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<sup>47</sup> Julia Margarethe Schmidt, *Family Reunification, analysis of the Directive 2003/86/EC on the Right to Family Reunion in the Context of the European Immigration Policy*, Thesis, Centre International de Formation Européenne, Nice, 30 May 2006, p. 70.

selves without recourse to public funds. Five Member States (Cyprus, Finland,<sup>48</sup> Germany, Spain and the United Kingdom) do not specify in their legislation what level of income is required. In the United Kingdom, for instance, the level set by income support is considered an acceptable minimum standard of support, but each case is judged individually, depending on the individual needs. In Germany, the requirement is geared towards the level of social assistance benefits, but the specified amount of income is dependent on the individual circumstances and is determined by the *Länder*.

Other Member States require a specific minimum level of income. In this respect, there are two groups. The first group has set the minimum standard at a level comparable to the minimum wage (France, Greece, Hungary, Latvia, Lithuania, Luxembourg and Slovakia). In Hungary, the income requirement is not applied to Hungarian nationals. The other group consists of the Member States that require a minimum level comparable to social security benefits (Austria, the Czech Republic, Denmark, Estonia, Italy, Ireland and Poland).

A number of Member States take the number of children into account in determining the required level of income (Austria, the Czech Republic, Denmark, Estonia, Greece, Italy and Portugal). In Italy, the required level of social assistance is doubled if the family includes two or more children below the age of 14. As an additional requirement, the Danish authorities require a sum of 7,000 euros as caution money.

Belgium and Sweden are the only two Member States that do not require a certain level of income for the right to family reunification. Belgium, however, does require a certain level of income in cases involving adult children who are dependent on their parents because they are handicapped.

The Member State that requires the highest level of income is the Netherlands. This Member State requires 120% of the legal minimum wage for a worker aged 23 or older, irrespective of the age of the sponsor, while the statutory minimum wage of workers younger than 23 is considerably lower. The effect of this requirement is that a sponsor who is 18 years old has to earn almost 280% and a sponsor aged 21 has to earn more than 160% of the minimum wage for workers of his age. Besides a certain level of income, the Netherlands requires the sponsor to have an employment contract for at least one year from the date of application or, alternatively, an employment record of three years. This additional condition makes it even harder for young people to meet all the requirements.

Denmark, Estonia, Lithuania and Luxembourg also demand a proof that the income is sustainable. In Finland and Spain, the requirement of sustainability is not laid down in national legislation but, in practice, an employment contract is required, although not necessarily a permanent one.

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48 The level of income is, however, specified in administrative guidelines that are not legally binding but are followed in practice.

### 5.3 Integration Measures

Article 7 (2) stipulates that Member States may require family members to comply with integration measures, in accordance with national law. The second sentence of this Article states that the family members of refugees may only be required to comply with such measures once family reunion has been granted.

The Netherlands requires the migrant to fulfil integration conditions before admission to the territory. In the country of origin, the migrant has to pass a language test and a test with questions about Dutch society before he/she obtains a visa for entry into the Netherlands. This integration exam has to be taken during a telephone conversation at a Dutch embassy or consulate with a computer in the USA. After admission, the migrants are required to pass another integration test (language and society) at a higher level within five years. Otherwise, the migrant may face a reduction of his benefits, fines can be imposed on the migrant and a permanent residence permit will be refused.

The authors of this report found that one of the disputed elements of the German draft bill on the transposition of the Directive is a proposal to require spouses to have knowledge of the German language before admission to Germany is granted. In a memorandum published by the Federal Minister of Justice in January 2007, it is claimed that requiring the spouse to acquire a knowledge of the German language before being granted admission to Germany is hardly compatible with the right to family life guaranteed in the German *Grundgesetz*.<sup>49</sup>

The Danish government, in November 2006, proposed requiring that spouses/partners pass an ‘immigration test’ before admission to Denmark. The Danish authorities already apply integration conditions before admission to children over 12 if they have lived with one of the parents outside Denmark. This condition is not applied if the application is submitted within the first two years of the sponsor having satisfied the conditions for family reunification, or if exceptional circumstances make it inappropriate.<sup>50</sup>

However, most Member States do not require compliance with integration measures as a condition for admission. Austria, Cyprus, Denmark, Germany and the Netherlands require new immigrants to participate in integration courses after admission. In Cyprus, the residence permit may be revoked by the Migration Officer if the migrants do not participate. In Austria, the migrant may be expelled if the ‘integration agreement’ is not fulfilled within five years of admission. In practice, the authorities do not seem to make use of this possibility. In the same case, the authorities can also impose a fine on the migrant up to a maximum of 200 euros.

In Denmark, participation in an introductory programme is also a requirement for the receipt of cash benefits. In Germany, the benefits can be reduced by 10 percent if the migrant fails to participate in the course. From draft legislation which was published in March 2007, the authors of this report learned that a residence permit will not be renewed if the immigrant does not take part in the integration course or fails

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49 Press reports summarised on [www.migration-asyl.de](http://www.migration-asyl.de), visited on 3 March 2007.

50 In March 2007, similar proposals for the introduction of an integration test abroad were announced in France and the UK.

to pass the exam. Furthermore, the obligation to take part in an integration course has been extended to immigrants who are insufficiently capable of expressing themselves in writing in German.

In France, according to a provision introduced in 2006, all immigrants have to sign a contract on 'reception and integration', in which they declare that they will respect the values of the French Republic.

Greece and the aforementioned Member States require successful participation in such courses as a condition for the granting of a permanent resident permit. In Lithuania, passing a language exam is grounds for the issue of a permanent residence permit one year earlier. Finland and Sweden offer new immigrants language courses and integration courses, but participation is not compulsory.

## 5.4 Public Policy Exception

Article 6 of the Directive states that Member States may reject an application for family reunification, or withdraw or refuse to renew the residence permit of family members on the grounds of public policy or public security. When taking the decision, the Member State is obliged to consider the severity or type of offence against public policy or public security committed by the family member, or the dangers that are presented by such person.

The practice of Member States is hard to establish on the basis of laws and regulations, as their formulations are rather vague and open (France, Luxembourg and the United Kingdom). In Cyprus, Estonia, Greece and Lithuania, the formulation of Article 6 has more or less been copied. Therefore, case law will have to make clear how to interpret the rules and criteria.

In Latvia, there is a blacklist of cases in which the family member can be refused a residence permit or entry or be expelled. One of the grounds that is mentioned is the case in which the applicant for a residence permit has assisted other persons to enter Latvia illegally or provided shelter to illegal residents.

In Poland, the third-country national will be refused entry if he is listed in the register of aliens who are not entitled to enter Poland. There is a wide range of grounds for being listed, such as illegal residence or an attempt to enter Poland illegally, illegal employment, lack of sufficient financial means necessary for subsistence in Poland.

Spanish law requires a family member who wants to obtain a visa for family reunification to prove that he/she has not been sentenced for having committed a crime. Therefore, he/she must hand over a criminal record, issued by the country of residence for the previous five years. In several Member States, membership of an organisation which has 'anti-constitutional' elements or 'extreme ideas' or which supports terrorism is one of the grounds for refusal (Austria, Belgium, Germany and Latvia). According to the explanatory report to the draft of the Austrian Settlement and Residence Act, entry by a third-country national also constitutes a threat to public order when 'there are reasons to assume that the person concerned is opposed to the fundamental values common to democratic states and their societies and will try to convince other people of these opinions'. In Ireland, there are no statutory rules on public policy and public security because this is left entirely to the discretionary competence of the authorities.



From the national reports, it appears that there were three more restrictive changes in the legislation transposing the Directive. In Sweden, transposition led to the introduction of the possibility of rejecting an application if the family member constitutes a threat to public order or security. This provision did not previously exist. In the Netherlands, a rule that established more favourable standards for the public order exception for the family members of Dutch nationals was deleted. In France, a new provision enables the authorities to automatically refuse the application of a family member if he or she constitutes a threat to the public order.

In some Member States however, transposition of the Directive has also led to more safeguards for third-country nationals and their family members with regard to the public policy and public security exceptions. According to the new rules, the decisions have to be better motivated, and personal circumstances have to be taken into account more explicitly than before (Italy and the Netherlands). In Finland, the grounds for refusal which state that the family member constitutes a danger to Finland's international relations has been deleted.

In all Member States, EU citizens still occupy a stronger position than third-country nationals in this regard. Different rules apply to refusal grounds relating to public policy or public security for EU citizens and for third-country nationals.

In most Member States, the rules are stricter on decisions regarding EU citizens when it comes to the obligation to take personal circumstances into account (Belgium and Latvia), with regard to the required seriousness of the crime (Austria, Denmark, Germany, Netherlands and Poland), the stricter relationship between personal behaviour and the danger the person constitutes (Finland, Netherlands and Spain) and with regard to the period for which they can be expelled (Latvia).

## **5.5 Renewal or Withdrawal of a Residence Permit**

### *Resources*

Article 16 (1) (a) states that Member States may reject an application for family reunification, or withdraw or refuse to renew a family member's residence permit, if the conditions laid down by this Directive are not or are no longer satisfied. When deciding on renewal, Member States shall take into account the contributions of the family members to the household income, if the sponsor does not have sufficient resources.

All Member States that require a certain level of income (Belgium and Sweden do not), take the income of all family members in account when calculating sufficient resources at the time of the renewal of the permit.

### *Real Family Relationship*

According to Article 16 (1) (b), Member States may reject an application for family reunification, or withdraw or refuse to renew a family member's residence permit, if the sponsor and his/her family member(s) do not live or no longer live in a real marital or family relationship.

All Member States require a real marital or family relationship with spouses or partners who apply for reunification. Most Member States require evidence; in France the required evidence of the relationship was made more severe in 2006.

The Netherlands requires a real family relationship between the child and his parent(s). According to the Dutch rules, this relationship needs to be 'actual'. Until 25 September 2006, it was stipulated in the Alien's Circular that a real family relationship was deemed to have ceased to exist if parent and child had been separated for more than five years, the so-called 'period of reference'. The Dutch government deemed this policy in accordance with the grounds for refusal of an application for entry and residence in Article 16 (1) (b) of the Directive. Various courts, however, judged that the Dutch policy went much further than the flexibility provided by Article 16 (1) (b).<sup>51</sup> In a letter of 25 September 2006, the Minister of Alien Affairs and Integration abolished the policy that a real family relationship was deemed to have ceased to exist in cases of separation of parent and child of more than five years. In the letter, she stated that for the interpretation of the requirement of a 'real family relationship', more connection needed to be made with Article 8 EVRM and that, consequently, the period of reference will no longer be applied. The Minister did not refer to the Directive. However, the fact that the period of reference was abolished can be ascribed to the Directive.

Member States react differently to the termination of a real marital or family relationship after a person's admission. In all Member States, an important criterion for a real marital or family relationship is the fact that the family members live together. In Finland, Hungary, Slovakia, Spain, Sweden and the United Kingdom, cohabitation will be checked at the time of renewal but no checks are performed on cohabitation in the intervening period. Therefore, withdrawal will take place only occasionally. In the other Member States, it is clear that if the authorities notice that the family members no longer live in a real marital or family relationship, their residence permit will be withdrawn. In Lithuania, legislation does not provide for situations in which the family members no longer live together, but are still officially married. At the moment, an amendment to the Alien Law is proposed with the provision that the issue or renewal of a residence permit may be refused if the family member is not or is no longer living in a real family or marital relationship.

The consequences of the separation are heavily dependent on the national requirements for an independent residence permit. In Sweden, for instance, a residence permit may be granted even for a two-year period. On the other hand, in Germany, the family member is required to have stayed lawfully in Germany for five years before he/she has a right to a permanent residence permit.<sup>52</sup> However, if the marital cohabitation ends, the spouse's residence permit shall be extended by one year as an independent right of residence, on condition that the marital cohabitation existed lawfully in the federal territory for at least two years or if the foreigner died during the marital cohabitation. In France, in 2006, the required period of residence for an

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51 Court of The Hague, 16 November 2005, *JV* 2006/28; Court of The Hague, 21 December 2005, (LJN AU8416); Court of Middelburg 14 March 2006, *JV* 2006/177.

52 See paragraph 6.2 regarding the implementation of Article 15: the granting of an autonomous residence permit.

autonomous residence permit in the event of marriage breakdown has been raised from two to three years, unless children are born after admission into France.

In Cyprus and Ireland, the consequences of the separation are decided on discretionary basis by the administration, which places the family member(s) in a precarious situation after the separation.

With regard to children who no longer live in a real family relationship, the national legislation of Estonia, Finland, Latvia and the United Kingdom does not contain any provisions. In Austria, the child is not obliged to live in a common household with his or her parents: the marriage of the child is the only grounds for concluding that the family relationship has ceased. In Cyprus, Denmark, Germany, Lithuania and Spain, the legislation contains the same rules for children who no longer live with the family and for spouses. However, some respondents explain that, in cases involving of children, a decision to withdraw or to refuse to renew is not easily made. The authorities will weigh up different humanitarian circumstances and will take the best interests of the children into account (Denmark, Latvia, Slovakia and Sweden).

Sometimes, special regulations exist for divorced spouses who have children. In Hungary, a spouse who is divorced within five years of admission for family reunification will have to leave the country unless a child is born from the marriage and the spouse has custody of the child. In Italy, third-country nationals who stayed lawfully in Italy on other grounds before they obtained a residence permit on the grounds of marriage will lose their permit immediately if there appears to be no real cohabitation, unless children were born after the marriage.

In many cases, the period of time that the child has resided in the Member State is an important criterion. In Denmark, after approximately a year of residence, the residence permit of a child will no longer be withdrawn. It also depends on the criteria in the national legislation for granting an independent residence permit to children. In Germany, a child can obtain an independent residence permit after five years of residence when he reaches the age of 16. In the Netherlands, a child can obtain an independent residence permit after residence of one year.<sup>53</sup>

## 5.6 Marriages of Convenience

According to Article 16 (4):

‘Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks may also be undertaken on the occasion of the renewal of family members’ residence permit.’

In all Member States, the residence permit is refused or withdrawn if the marriage was concluded for the sole purpose of obtaining a residence permit. According to the

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<sup>53</sup> See paragraph 6.2 regarding the implementation of Article 15: the granting of an autonomous residence permit.

national legislation of the Member States, the authorities are competent to assess whether the marriage for which a residence permit is requested or issued is a marriage of convenience. How and on which criteria this assessment is carried out or what powers the authorities have is usually not specified.

In some Member States, the authorities have broader powers to check when the marriage was concluded after the sponsor was admitted to the Member State (Germany and Ireland). In some other Member States, the situation where a divorced third-country national marries again within a short period of divorce is grounds for a thorough assessment (Finland). Cyprus has an advisory committee, consisting of representatives of various authorities, which has to examine all the elements in order to advise the Migration Officer whether the marriage is one of convenience or not. However, in practice, this committee is often not consulted at all and the Migration Officer decides on the basis of information from the Aliens and Immigration Police.

In Belgium, for the first three years after admission on the grounds of family reunification, the authorities have the power to check at any moment whether the marriage is a marriage of convenience. Some suspicion must exist, but there are no defined criteria. The police acts when there is an 'indication' that fraud could be present. The checks are carried out by a police officer, usually the officer who works in the neighbourhood of the couple. After three years, the authorities decide whether to grant a permanent residence permit.

In the United Kingdom, Immigration Officers have wide-ranging powers to carry out checks with regard to marriages of convenience, especially if some suspicion exists. Marriage registrars are obliged to report to the Home Office any suspicions of a sham marriage. These are defined as a marriage, 'for the purposes of avoiding the effect of (...) United Kingdom immigration law'.

In Austria, the registry offices have to submit information about every marriage involving a third-country national to the aliens police authority, irrespective of any actual suspicion. The courts have to inform the aliens police authority of every application for adoption of an alien. In all these cases, the aliens police authorities have to investigate this information and the legislation does not provide any guidelines on the selection of the cases where further investigations have to be conducted.

While this Austrian national practice almost reflects a general suspicion, according to Swedish law, on the other hand, the State authority carries the burden of proof. The starting point for the Swedish Migration Board is controlling whether the information concerning a marriage is correct. If it suspects that a marriage could be a marriage of convenience, a closer examination should be carried out.

## 6 Legal Position of Family Members

### 6.1 Access to (Self-)Employment

Under Article 14 of the Directive, the admitted family members of the sponsor are entitled ‘*in the same way as the sponsor*’ to access to education, to employment and self-employed activity and to vocational training. In this study we focus on access to employment. Access to education and vocational training are not covered.

Article 14 provides for two exceptions to this equal treatment. Firstly, Article 14 (2) allows Member States to decide:

‘the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity’.<sup>54</sup>

Secondly, Article 14 (3) allows Member States to restrict access to (self-) employment by ascendants or unmarried older children admitted under Article 4 (2) of the Directive. We studied the transposition of the first exception, but did not cover the latter.

The rule on equal access to employment in Article 14 has been transposed into the legislation of the majority (14 of the 22) of Member States bound by the Directive. However, the Portuguese report mentions that the right to employment of admitted family members is not mentioned explicitly in the national law, but can only be deduced on the basis of *a contrario* interpretation of several clauses in different laws. In Estonia and Latvia, the right to employment may in practice be hampered by cumbersome procedures for obtaining the required work permit, the obligation to pay monthly fees for the work permit, or the national law granting only the right to apply for a work permit. In Estonia, family members with a residence permit are allowed to work, but they have to apply for a work permit. Persons who have a long-term residence permit are exempt from the work permit requirement.

In three Member States (Germany, Hungary and Slovakia), the transposition appears to be partial or not fully correct. In two Member States (Cyprus and Lithuania), the effect of the transposition is not clear. In three other Member States (Belgium, Germany and Slovenia), the transposition of the Directive is still under discussion. In Slovenia it has been proposed that the Employment and Work of Aliens Act be amended in order to authorise family members to exercise (self-)employed activities before other aliens. The proposal also stipulates the conditions under which a personal work permit valid for three years shall be issued to family members. Finally, in

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54 On the negotiations and the meaning of this clause, see Groenendijk, C. (2005), ‘Access of Third-Country Nationals to Employment under the New EC Migration Law, in: F. Julien-Laferrière, H. Labayle and O. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, 141-174. Brussels: Bruylant.

two Member States (Luxembourg and Malta), there has been no visible action aimed at the transposition of this provision of the Directive.

Article 14 (1) provides for equal access in the same way as the sponsor. This is a relative form of equal treatment: if the sponsor does not have access to employment, nor does the family member on the basis of the Directive. The effect of this provision is that family members, depending on the status of their sponsor, may be in four different positions regarding their access to employment: (1) no access at all, (2) access only with a work permit issued only after a labour market test, (3) access with a work permit without a labour market test and, (4) free access to employment. Some Member States (e.g. Austria and the Netherlands) have limited the access of family members to exactly what is required by the Directive: if the sponsor had free access to employment, the family member has free access as well; if the sponsor needs a work permit, his family members are required to have that permit and if the sponsor is not entitled to work, the family member is not entitled to either. Several Member States do go beyond the minimum required by the Directive and provide admitted family members with more liberal or free access. In Poland and the UK, admitted family members may have a more favourable position with regard to access to employment than their sponsors.

The exception to Article 14 (2) that grants access to employment to family members conditional upon a labour market test during the first 12 months has been used by six Member States (Austria, Cyprus, Germany, Greece, Hungary and Slovenia). In three of those Member States (Germany, Hungary and Slovenia), the use of the exception exceeds what is permitted by the Directive, since national law allows the complete exclusion of certain categories of family members from employment during the first year after admission, whilst the Directive only allows exclusion on the basis of a labour market test.<sup>55</sup>

From the reports from ten Member States, it appears that there are no national rules restricting access by admitted family members to *self-employment*, the national rules explicitly provide for the same access to self-employment as nationals or the national rules on access to self-employment are similar to those regarding access to employment. The Member States concerned are: Austria, the Czech Republic, Finland, France, Hungary, Italy, Poland, Portugal, Spain and the UK. The report on Luxembourg explicitly mentions the severe obstacles to access to self-employment for admitted family members, even applicable to third-country national family members of EU citizens. Generally, it appears that the transposition of the Directive has resulted in national legislation allowing more liberal access by admitted family members to employment. This trend is confirmed in the reports from Austria and Finland. There are no indications that the Directive has resulted in stricter rules regarding access to employment.

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55 See Dienelt, K. (2006), Die Auswirkungen der Familienzusammenführungsrichtlinie auf die Möglichkeit der Aufnahme einer Erwerbstätigkeit, *Informationsbrief Ausländerrecht* 2006: 1-3.

## 6.2 Autonomous Residence Permit for Family Members

Article 15 of the Directive provides for the granting of an autonomous residence permit to family members, independent of the sponsor's permit, after a period of no more than five years of residence. In several Member States, family members can be issued with an autonomous residence permit after a certain number of years. Other Member States provide for the issue of a permanent residence permit to family members. A permanent residence permit, like an autonomous residence permit, will protect the family member against withdrawal in the event of expulsion of the sponsor or the end of the family relationship. A few Member States provide neither for an autonomous nor for a permanent residence permit for family members.

### *No Rules*

In Estonia, Germany, Hungary, Ireland and Luxembourg, no rules apply concerning the granting of an autonomous or permanent residence permit to the family members of a sponsor after a certain number of years as provided for by the Directive. However, Germany and Hungary do provide for the issue of a permit under special circumstances (see below). In Germany, no changes are envisaged in the draft bill.

In Estonia, there is no special treatment for applications based on family reunification.

The third-country national becomes a long-term resident within the meaning of the EU Directive on long-term residents after five years of residence, if the following conditions are met: a valid temporary residence permit, sufficient legal income to subsist in Estonia, health insurance, fulfilment of an integration requirement (knowledge of a minimum of the Estonian language), no reason to reject the application.

### *Autonomous Residence Permit*

Austria, Cyprus, Greece, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden provide the possibility for family members to be granted an autonomous residence permit independently of that of the sponsor after two (Portugal), three (spouses and unmarried partners in the Netherlands) or five years (Austria, Cyprus, Greece, Poland, Slovenia, Spain and Sweden). In Italy, an autonomous residence permit is granted upon renewal of the permit granted on the basis of family reunification, which will have the same validity as the sponsor's residence permit. The period of residence after which an autonomous residence permit will be granted therefore varies according to the period of validity of the residence permit of the sponsor.

In terms of conditions for the autonomous residence permit to be granted, Austria requires that spouses and children meet the conditions for an autonomous settlement permit and that they fulfil the 'integration agreement', which means in particular that the person concerned has to provide evidence of sufficient income, accommodation and sickness insurance. In the Netherlands, family members will have to comply with the integration requirement. In Portugal, it is a requirement that the family tie must still exist. Family members of the sponsor with minor children in Portugal can obtain an autonomous residence permit without application of the condition that they reside in Portugal for two years or the condition that family ties must

exist. Spain requires that family ties be maintained between spouses. Spanish children must be of legal age (18 years) if they want to acquire an autonomous residence permit. If a spouse or child of legal age or a minor who is under the legal representation of the sponsor has obtained a work permit, this person is entitled to an autonomous residence permit before completion of the five-year period. An additional condition is that the salary perceived must not be lower than the professional minimum wage on a full-time annual basis. After five years of residence in Slovenia on the basis of temporary residence permit, a spouse or unmarried partner and children are entitled to an autonomous residence permit.

### *Permanent Residence Permit*

In Belgium, the Czech Republic, Denmark, Finland, France, Latvia, Slovakia and the United Kingdom, a permanent residence permit will be issued to family members who have been reunited with the sponsor on the basis of family reunification after a certain number of years.

Sweden does not require a certain period of residence on its territory before a permanent residence permit may be issued to a family member wishing to join a sponsor on Swedish territory. A permanent residence permit may, in principle, be issued directly if it is the alien's intention to settle in Sweden. This depends on whether the parties have been living together beforehand or not. If they have not, a permanent residence permit will still be granted at the first decision if the relationship is considered serious and stable.

In the UK, spouses and unmarried partners are granted a two-year probationary period. A permanent residence permit will be issued to the spouse or unmarried partner of a sponsor if they are still married, living together and able to maintain and house themselves after the probationary period. However, if the sponsor is on limited leave to remain, spouses and partners will be granted leave in line with the sponsor. Children will usually be granted leave in line with their parents.

France requires three years of continuous regular residence in France before family members, who have been allowed to reside in France on the basis of family reunification with a sponsor who holds a *carte de résident*, can obtain a *carte de résident* themselves. Furthermore, the family members are required to fulfil the condition of *intégration républicaine*. If the sponsor does not have a *carte de résident* the family members who have a temporary residence permit for the purpose of *vie privée et familiale* can obtain a *carte de résident* after five years of residence.

Belgium also requires three years of residence in Belgium before a permanent residence permit can be issued.

In Finland, aliens who have legally resided in Finland for a continuous period of four years will be issued with a permanent residence permit.<sup>56</sup> Further conditions are that the alien must have resided in Finland for at least half of the period of validity of the residence permit and that the conditions for the issue of the residence permit

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<sup>56</sup> According to the Government Proposal, this permanent residence permit is regarded as an autonomous residence permit within the meaning of the Directive since it may be issued even in cases where the sponsor would not be issued with a permanent permit.



must still be fulfilled. The four-year period commences when the person concerned was issued with a continuous residence permit. This means that the 5-year period in the Directive will be exceeded in some cases. The Finnish Government does not regard this as problematic because the Directive would not apply to temporary residence.<sup>57</sup> When implementing the Directive, a new Article was added in the Finnish Aliens Act, stating that the family member can be issued with an autonomous permanent residence permit even if the sponsor does not meet the requirements for issuing a permanent permit and can therefore not be issued with this permit.

In Slovakia, spouses and children are entitled to a permanent residence permit for an indefinite period after five years of continuous temporary residence in cases where the sponsor was issued with a permanent residence permit or with a temporary residence permit for the purpose of employment or business.

In Latvia, a family member who has resided on the basis of a temporary residence permit for at least five years has the right to apply for permanent residence permit.

In Denmark, a permanent residence permit will be normally issued after seven years of lawful residence on the same legal basis. A permanent residence permit may be issued after five years of lawful residence if the alien has had permanent ties with the labour market as an employee or self-employed person for the past 3 years and must be assumed to continue to have such ties, has not received cash benefits on an ongoing basis for maintenance purposes (apart from pension-like benefits) for the past 3 years and has forged essential ties with Danish society.

Furthermore, applicants may not have committed criminal offences (exclusion of entitlement to permanent residence permit in cases of serious criminal offence, suspension for periods of between 2 and 15 years after conviction for a less serious criminal offence), must have followed an integration programme, have passed a Danish language test and may not have outstanding debts to public authorities.

### *Minors Reaching the Age of 18*

According to Article 15 (1), a child who has reached majority age shall be entitled to an autonomous residence permit, independent of the sponsor's permit, after no more than after five years of residence. Cyprus, Greece, Italy, the Netherlands and Portugal provide for the issue of an independent permit for minors before the period of time normally required under national law if the minor turns 18. In Cyprus, Greece, Italy and Portugal, a minor will be granted an autonomous residence permit when he reaches majority age. In the Netherlands, when minor children reach the age of majority an autonomous residence permit will be granted after one year. Although, in Hungary and Estonia, there is no such concept as an autonomous residence permit, a minor who reaches the age of majority can obtain a residence permit. In Hungary, the maximum period of five years of residence is required but if all the conditions for a residence permit are met independently, a minor who has reached the age of majority can also obtain an independent residence permit. According to the NGO in Estonia, minor children are entitled to a residence permit when they reach the age of majority.

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<sup>57</sup> Government Bill 28/2003.

### *Special Circumstances*

Article 15 paragraph 3 of the Directive allows for the granting of an autonomous residence permit in the event of widowhood, divorce, separation or the death of first-degree relatives in the direct ascending or descending line. This means that an independent residence permit may be issued before the period of time normally required. Most Member States provide for the issue of an autonomous residence permit under such circumstances.

In France and Slovakia, it is not possible to obtain an autonomous residence permit before the period of time normally required. However, France makes an exception for the family members of Algerians, Moroccans, Tunisians and Sub-Saharaners. They will receive a residence permit for the same duration as the sponsor. Family members of other third-country nationals will be issued a residence permit for one year initially.

### *Death of a Family Member*

Family members can be granted an autonomous residence permit if the sponsor dies in Austria, the Czech Republic, Cyprus, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Spain and the United Kingdom. In the Czech Republic, the family member must have resided in the Czech Republic for at least two years continuously before the date of death of the sponsor. The two-year period will not be required if the death of the sponsor was caused by a work-related accident or occupational disease or if the family member lost his or her Czech citizenship because he/she married the sponsor. In order for an autonomous residence permit to be granted to the family members of a deceased sponsor in Greece, they must have been resident in Greece for at least one year prior to the death of the sponsor. In order for spouses whose sponsor has died, Germany requires the marital cohabitation to have existed in Germany. Spouses in the United Kingdom can apply for indefinite leave if the sponsor has died. They will have to prove that the relationship was still in existence at the time of death and that the parties would have continued to live together. There is no requirement of sufficient income or housing. The possibility of applying for indefinite leave is not open to dependants of sponsors with limited leave. In Poland, an independent residence permit will only be granted to a family member if a special interest exists.

In Germany, Portugal and the United Kingdom, only a spouse's and/or unmarried partner's rights to a residence permit are mentioned.

### *Divorce*

Austria, the Czech Republic, Germany, Greece, Hungary, Italy, the Netherlands, Poland (always conditional on the special interest of the alien concerned), Portugal and Spain provide for the possibility of being granted a residence permit in the event of divorce. In the Czech Republic, Greece, Germany, Hungary, and Spain, the marriage must have lasted for a certain number of years. In the Czech Republic, the marriage must have lasted for at least five years prior to the day of the divorce and the family member must have had at least two years of continuous residence in the Czech

Republic during those five years. The condition of continuous residence does not apply if the foreigner has lost his citizenship as a result of marriage to a sponsor. In Greece, the marriage must have lasted at least three years prior to initiation of divorce proceedings, at least one year of which must have been in Greece. In Germany, spouses can be granted an independent residence permit valid for one year if the marriage ends and if it existed in Germany for at least two years. The two-year period can be waived in cases of particular hardship. Particular hardship exists, for instance, if the marital cohabitation is unreasonable, for example because the welfare of a child is at stake. Spain requires two years of marital cohabitation in Spain.

In Hungary, if the marriage ends within five years, the ex-spouse can obtain an autonomous residence permit if there is a child and the person concerned has parental supervision over the minor or in case he/she meets the conditions for a residence permit alone. If the spouse is not the sponsor and is issued with a settlement permit, this permit will not be withdrawn in the event of divorce if the marriage has lasted for three years. Neither will such a permit be withdrawn if the parental supervision ceased after four years.

In Austria, an autonomous residence permit in the event of divorce will only be granted if the divorce is the sponsor's fault. This requirement gives rise to practical problems since the assessment of fault of one of the spouses in a divorce is not known in all legislations.

### *Particularly Difficult Circumstances*

According to Article 15 (3), Member States should lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances within the normal period of time. Several Member States did not provide such a provision (Estonia, France, Ireland, Italy, Luxembourg, Poland, Slovakia, Slovenia, Spain and the United Kingdom).

In the most recent amendments to the Aliens Law, Lithuania introduced an autonomous residence permit for family members under *particularly difficult circumstances* related to divorce, separation or death of the sponsor.

Most Member States did not copy the clause 'particularly difficult circumstances' but used different appellations. Cyprus did copy the wording in its national rules. In cases of *particularly difficult circumstances*, the Migration Officer may grant an autonomous residence permit before the five-year period. Cyprus regards the death of the sponsor, or cases where family members are victims of domestic violence or victims of (sexual) exploitation as particularly difficult circumstances. When a sponsor in Austria loses his settlement permit following conviction for an intentionally committed offence, *special circumstances* apply which provide for the issue of an autonomous residence permit to the sponsor's family members.

In Denmark, a permanent residence permit may be issued after three years if *exceptional reasons make it appropriate*. These exceptional reasons are not specified. If considerations *conclusively make it appropriate*, a permanent residence permit may be issued irrespective of the period of residence. In all the cases mentioned here, applicants may not have committed criminal offences (exclusion of entitlement to permanent residence permit in cases of serious criminal offence, suspension for periods of between 2 and 15 years after conviction for a less serious criminal

offence), must have completed an integration programme, have passed a Danish language test and have no outstanding debts to public authorities.

In Finland, a family member can be issued with autonomous residence permit, 'if refusing a residence permit would be manifestly *unreasonable* with regard to their health or ties to Finland *or another compassionate ground*, particularly in consideration of the circumstances they would face in their home country or of their vulnerable position.'<sup>58</sup>

In Greece, a family member may apply for an autonomous residence permit within the normal period of five years under *particularly harsh circumstances*, such as conjugal violence.

In the Netherlands, a family member can obtain an autonomous residence permit on family grounds within the normal period of three years in *exceptional humanitarian circumstances*. The decision is at the discretion of the Minister. In Portugal, a family member may also be issued with an autonomous permit under *particularly difficult circumstances*. In Sweden, a permanent residence permit should be granted if other strong reasons exist for granting a continued residence permit.<sup>59</sup>

Although Spain and the United Kingdom do not have an explicit provision regarding particularly difficult circumstances, an autonomous residence permit will be granted in the event of domestic violence. Austria, the Netherlands and Sweden also grant an autonomous residence permit in the event of domestic violence.

In Latvia, no rules apply to the granting of an autonomous residence permit, but there is a general provision. In cases not envisaged by law a temporary residence permit can be granted by the Minister of the Interior if required by the norms of international law, the interests of Latvia or *humanitarian considerations*.

### *Close Ties to the Member State*

In some Member States, an autonomous residence permit will be granted within the normal period in the event of close ties to the Member States. This is the case in Denmark, Finland and Sweden. In Denmark, as mentioned above, a permanent residence permit may be issued irrespective of the period of residence if this is conclusively appropriate. In practice, this will be the case if the foreigner has *particularly strong affiliations* to Danish society or to other persons living in Denmark. In Finland, if family ties are broken, an alien may be issued with a permanent residence permit before the end of the four-year period normally required in cases where *close ties* to Finland exist. If the foreigner has a *particular connection* to Sweden, a continuous residence permit should be granted even if the family relationship has ceased.

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58 52 (1) Aliens Act 301/2004.

59 In addition to the strong reasons, the foreigner has a particular connection to Sweden or the relationship has ceased because the foreigner or the foreigner's child has been subject to violence or insulting behaviour in the relationship.

## 7 Special Provisions for Refugees

### 7.1 Personal Scope of Chapter V

#### *Family Formation of Refugees*

According to Article 9 (2), Member States may confine the application of Chapter V regarding the family reunification of refugees to refugees whose family reunification predates their entry.

From the national reports it appears that, besides Malta, which has no (draft) legislation to transpose the Directive, Cyprus did not transpose the Chapter on family reunification. Initially, the Cypriot transposition bill included provisions on family reunification; however, they were taken out after the intervention of UNHCR, which insisted on regulating this issue in the Refugee Law. However, the existing provisions on family reunification in the Refugee Law have not been amended as yet for transposition purposes. In Greece, a draft Presidential Decree transposes both Directive 2003/9/EC on Minimum Reception Conditions for Asylum Seekers and Chapter V of the Family Reunification Directive.

From the answers to the questionnaire, it appears that all Member States apply specific provisions concerning the family reunification of refugees. In several Member States, these specific provisions apply irrespective of whether the family relationship predated the entry of the refugee: Germany, Finland, Ireland, Italy, Luxembourg, Poland, Portugal and Slovakia. In Greece, only the parents must have been cohabitating and supported by the sponsoring refugee prior to his entry into Greece.

Most Member States, however, limit the application of privileged provisions to family relationships that predate the entry of the refugee: Austria, Belgium, Estonia, France, Hungary, Latvia, Lithuania, the Netherlands, Slovenia, Spain, the United Kingdom and Sweden.

Latvian legislation does not envisage any situation in which a refugee may apply for family reunification with family members, which does not predate the entry of the refugee.

Although Denmark is not bound by Directive 2003/86/EC, the privileges were generally limited to family relationships predating the entry of the refugee. Nevertheless, Denmark extended the privileges in 2005 so as to include family relationships established subsequent to the entry under certain, rather narrow conditions. Notably, it is generally required that the refugee's actual risk of persecution must be tested at the time of processing the application for family reunification.

#### *Family Reunification of Protected Persons other than Convention Refugees*

Do protected persons other than Convention refugees benefit from the provisions of Chapter V of the Directive?

This question was answered in the negative by Belgium, Greece, Ireland, Lithuania, Poland, Slovakia, Spain and the United Kingdom.

Other Member States apply privileged provisions according to their national law not only to Convention refugees but also to persons who have been granted subsidiary protection: Austria, the Czech Republic, Denmark, Estonia, Finland, Germany, Luxembourg, the Netherlands, Portugal and Sweden.

France applies privileged provisions to Convention refugees, persons who enjoy subsidiary protection and stateless persons. Latvia extends privileges to persons who fear violation of Article 3 ECHR. Internally displaced persons and stateless persons face a waiting period of two years.

Subsidiary protection has not been incorporated into Hungarian law; temporarily protected persons may act as sponsors in respect of spouses, unmarried partners and dependent minor children. The precondition is that the family was dispersed as a consequence of the conditions of mass flight.

## 7.2 Family Reunification of Unaccompanied Minors

According to Article 10 (3) of the Directive, Member States *shall* authorise the entry and residence of the parents of an unaccompanied minor (sub a) and *may* authorise the entry and residence of his legal guardian or any other member of the family, in cases where the minor has no parents or his parents cannot be traced (sub b).

From the national reports, it appears that several Member States have limited the transposition of the Directive in this respect to Article 10 (3), sub a, therefore to the parents of unaccompanied minors only: Austria, Belgium, France, Italy, Lithuania, the Netherlands, Poland, Slovakia and Sweden. In Ireland also, only the parents of an unaccompanied minor are entitled to family reunification.

Although the Belgian legislation contains an explicit provision only concerning the family reunification of the parents of an unaccompanied minor, according to the explanatory memorandum, the legislator in Belgium recognises the discretionary power of the Minister of Justice to authorise the residence of the legal guardian or other family members if the minor has no parents or his parents cannot be traced.

Polish legislation extends the right of family reunification to all relatives in the direct ascending line and is therefore more liberal than the Directive, which limits extension to relatives in the direct ascending line of the first degree. The same seems true for Slovakia.

Transposition of Article 10 (3) sub a and the optional provision sub b (therefore including the legal guardian or any other family member) has taken place in the Czech Republic, Estonia, Finland, Greece, Hungary, Portugal and Slovenia.

As above, Estonia applies the additional condition that the parents or – where there are no parents – the legal guardian or any other family member are entitled to family reunification if their application is submitted within three months of the decision on granting protection to the unaccompanied minor. After three months, they can be asked to fulfil further requirements while, at the same time, the best interests of the child have to be respected.

In Finland, the Aliens Act contains the following provision: ‘.....If a person residing in Finland is a minor, his or her guardian is considered a family member...’. The provision is based on the idea that the child’s parent is normally his guardian. But if the parent is, for some reason, no longer the guardian, the guardian shall be consid-

ered the family member and is therefore entitled to a residence permit. Although the wording of the Aliens Act is unclear, the Act should be interpreted and applied in the light of the Directive, while it is argued in the transposition legislation, that no discrepancy exists between the national legislation and the Directive in this respect. Nevertheless, the legal position of other family members in this respect is unclear. The Hungarian legislation also seems to treat only guardians on an equal footing with parents.

Specific provisions in this respect are lacking in Denmark, Germany, Latvia, Luxembourg, Spain and the United Kingdom.

Nevertheless, in Denmark, family reunification with an unaccompanied minor may be permitted on a discretionary basis under very restrictive criteria. In Germany, the general clauses apply which means that parents, legal guardians or other family members are only entitled to a residence permit for family reunification if necessary in order to avoid particular hardship. The authors of this report noted that draft legislation provides for the family reunification of parents of unaccompanied minors without the requirements of sufficient income or sickness insurance. Spanish legislation does not make any specific reference to the family of a refugee who is an unaccompanied minor. The general provisions apply which allow family reunification of refugees with first-degree relatives in the ascending line who are dependent on the refugee. It is expected that this will not apply to minors, where the dependence of the relative in the ascending line in relation to the refugee would not be examined in the light of the 'best interest of the child' principle.

The United Kingdom explicitly denies family reunification. The current Asylum Policy Instructions state: 'The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion'. There must be compelling compassionate circumstances in order for the family to be granted entry to the UK.

### 7.3 Documentary Evidence

If a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law (Article 11).

From the answers to the questionnaires it appears that, in the national laws of the following Member States, the possibility of alternative evidence is explicitly envisaged: Austria, Belgium, Finland, Hungary, Ireland, Italy, Latvia, Lithuania,<sup>60</sup> Netherlands, Slovakia, Slovenia and Sweden. In most instances, the provision only states that the application shall not be rejected solely on the grounds of lack of documentary evidence, but the alternative evidence is not specified (the Czech Republic, Greece, Hungary, Ireland, Italy, Latvia and Slovakia). In Austria, Belgium, Finland, Lithuania, the Netherlands and Sweden, DNA tests are mentioned (and regulated) in this respect.

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<sup>60</sup> Transposition took place in the Order on Issuance of Temporary Residence Permits, not in the Law on Legal Status of Aliens of the Republic of Lithuania.

Specific rules are lacking in Denmark, Germany, Estonia, France, Luxembourg, Poland, Portugal, Spain and the United Kingdom.

In Denmark, complementary evidence is allowed in practice. In Germany, it is up to the administration to examine whether a refugee can provide sufficient evidence. The UK mentions a rather lenient practice; sometimes DNA test are required. Spanish legislation does not contain any specific rule on the required documentation, nor on the possible alternatives. Therefore, we may infer that Spanish legislation is permissive but, at the same time, this lack of regulation implies a wide margin of appreciation by the public authorities.

In the Netherlands, the provision that the application shall not be rejected solely on the grounds of lack of documentary evidence is not transposed into national law. The refugee must prove that the fact that he cannot submit the documents is not his fault. If the applicant fails to show that the lack of documents cannot be ascribed to him, the application for family reunification can be turned down. If the applicant is able to show that the lack of documentary evidence cannot be ascribed to him, he or she can revert to the possibility of a DNA investigation.

Estonia also mentions that the absence of official documents may result in a refusal.

#### **7.4 Conditions for Family Reunification**

According to Article 12 of the Directive, for the purposes of family reunification, refugees are not required to provide evidence concerning accommodation, sickness insurance or stable and regular resources.

Nevertheless, Member State may require the refugee to meet these conditions if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.

Member States shall not apply a waiting period for the family reunification of a refugee.

From the national reports, it appears that exemptions from the requirements concerning accommodation, sickness insurance, income and waiting period are explicitly envisaged in the national legislations of Austria, Belgium, Estonia, Finland, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal and Slovakia. Ireland and the United Kingdom also apply comparable exemptions. In Denmark, refugees will normally fall under the dispensation criteria and will thus, in practice, be exempt from income and housing requirements. A waiting period is explicitly excluded.

In the Czech Republic, it depends on the type of residence permit for which the family member applies. If he applies for refugee status, nothing is required. If he requests a permanent residence permit, then – contrary to the Directive – evidence concerning accommodation must be presented.

In Poland, refugees or their family members are only explicitly exempted from requirements concerning a regular income and sickness insurance. Documents confirming the costs of housing should be presented. In this respect, the standards of the Directive are not met.

Contrary to the Directive, in Greece the draft Presidential Degree calls for evidence that the refugee fulfils the requirements set out in Article 7 of the Directive.



Specific transposition provisions are lacking in Germany, Spain and Sweden.

In Sweden, requirements concerning accommodation, sickness insurance, income and waiting period are generally lacking. In Spain, if family reunification within the meaning of the Directive is covered by the provisions concerning ‘family extension of asylum’ (which is unclear), then refugees are exempt from the requirements. If the general regime for family reunification applies, then Spanish legislation does not comply with the Directive.

In accordance with Article 12 of the Directive, some Member States limit the application of privileged provisions for family reunification to a certain period of time after the person’s recognition as a refugee. In Belgium, the privileges (concerning accommodation and sickness insurance) only apply if the request for family reunification is submitted within one year of the recognition as a refugee. Therefore, Belgium applies a more liberal standard than Article 12 of the Directive while, according to the Directive, the Member States *may* require the refugee to submit his application for family reunification within a period of three months in order to be exempted from the conditions concerning accommodation, sickness insurance and resources. A strict three-month period is applied in Hungary. Only in cases where the refugee submits his application for family reunification within three month of his recognition is he not obliged to provide evidence concerning accommodation and sickness insurance. After this three-month period, an application can be submitted within a further six months if evidence of accommodation and health insurance is provided. After nine months, an application can no longer be submitted with reference to family reunification. In Poland, exceptions concerning a regular income and health insurance only apply if the application for family reunification is submitted within a period of three months after the granting of refugee status. Estonia, the Czech Republic, Lithuania, the Netherlands and Slovakia also apply a time limit of three months. From the German draft bill, the authors of this report learned that it provides for compulsory exemption from material conditions for the family reunification of refugees and asylum seekers who qualify for protection (*Asylberechtigten*), whereas currently it is merely a possibility. However, the bill also sets a strict time limit of three months for this exemption. The sponsor will be allowed to make the application for family reunification in Germany.



## 8 Procedural Rules

The Directive prescribes some procedural rules concerning the submission of documents and the examination of the application in Article 5 (2) and (3) and in Article 13.

### 8.1 Documents and Fees

#### *Documents*

According to Article 5 (2), the application for family reunification should be accompanied by documentary evidence of the family relationship and evidence of compliance with the conditions laid down in Articles 4, 6, 7 and 8, as well as certified copies of family members' travel documents.

The list of required documents varies among the various Member States. Some Member States have an extremely detailed list (Cyprus and Ireland), while others only have a list of 'general requirements' (Germany). Finnish law does not specify what kind of documents should be presented. According to the national report, administrative practice normally requires the submission of identity and travel documents including the family member's documents and other documents to prove the family relationship, such as marriage, birth or death certificates. From the national reports we gather that, generally, the following documents are required: a copy of a valid passport, a document proving the family ties, a document proving (legal title to) accommodation, a certificate of current health insurance and evidence of stable and regular resources. Almost all Member States require these documents. Cyprus and the United Kingdom require that the passport still be valid for a certain period (two years and six months respectively). Several Member States require a photograph of the applicant (Austria, the Czech Republic, Denmark, Estonia, Latvia, Slovakia, Spain and the United Kingdom). Some Member States require an extract from the judicial record concerning the applicant (Austria, Belgium, Cyprus and the Czech Republic<sup>61</sup>). Cyprus requires tax statements for every year that the sponsor resided in the country and a certificate that no taxes are due, a social security and VAT. statement for every year he or she resided in Cyprus and telephone, electricity and water bills should also be submitted. Cyprus also requires medical examination results to identify diseases or conditions. In the Czech Republic, confirmation that the applicant does not have a serious illness must be presented upon request from the officials.

In Estonia, an applicant has to submit a written explanation of why this person and his or her spouse or partner cannot live in the country of citizenship of the spouse or another country if the permit is being requested for the first time. This is a remarkable requirement because the possibility of living together in another country is not grounds for refusal of family reunification under the Directive. In Denmark, a

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61 Only upon request from the officials.

statement of actual or intended cohabitation and ‘integration declarations’ signed by the sponsor and his/her spouse/partner has to be submitted. Spain requires a statement by the sponsor that no other spouse or partner is living with him or her in Spain. In the Netherlands, an applicant has to pass a civic integration exam abroad. A copy of proof that the spouse or partner has passed the exam has to be submitted with the request for the issue of an authorisation for temporary stay. According to the rapporteur, with respect to nationals of specific states of origin, Germany requires proof of authenticity of the documents. An expert may be consulted. The consultation costs (up to 250 euros) will be paid by the applicant.

### *Fees*

In all Member States except Denmark, Italy and Portugal, applicants have to pay fees. The amounts of the fees vary. It is not always clear whether the fees are for a visa or for the application itself. The total amount varies from a symbolic amount for administrative costs in Belgium and Spain and a 35-euro fee in the Czech Republic and Estonia to 1,616 euros in the Netherlands. In most Member States, the fee is between 50 and 150 euros. See the appendix for the various fees. In Cyprus, the fee is approximately 180 euros. The fee for a family reunification application is the second highest fee imposed in Cyprus.<sup>62</sup> In Lithuania, the fee is approximately 73 euros while the usual fee for temporary residence is approximately 131 euros. In the Czech Republic, Estonia, Finland and Sweden, lower fees apply to children of certain ages. In Greece and Slovakia, children under the ages of 16 and 14 respectively are exempt from the obligation to pay fees. In Sweden, some categories are exempt from the obligation to pay fees. The exception includes the family members of a sponsor who has been granted a residence permit based on the provisions concerning aliens in need of protection and in particularly distressing circumstances. In Hungary, aliens who have been granted a personal exception on the grounds of poor living conditions or on the basis of an international (bilateral) treaty or obtaining a scholarship from the state also enjoy this exception.

In the Netherlands, an application for the issue of a visa for family reunification costs 830 euros. For the integration examination abroad, the applicant has to pay 350 euros each time he or she takes the exam and the legalisation of documents costs 248 euros. The issue of a residence permit for a temporary stay costs 188 euros. In the United Kingdom, the fee at an embassy is 390 euros. If the application is submitted from within the UK, the fee is approximately 500 euros for a postal application and 750 euros if the applicant wants a decision the same day at the Home Office.

## **8.2 Place of Application**

According to Article 5 (3), an application for family reunification shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides. By way of derogation, a Member State

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<sup>62</sup> Highest fee is the fee for a long-term residence application (about 580 euros).

may, under appropriate circumstances, accept an application submitted when the family members are already on its territory.

All Member States, except Ireland and Poland, in principle require the application to be submitted before entry. In Ireland and Poland, the application may be submitted when the family members are already residing in the Member State. There are no special conditions. However, in all Member States except Cyprus exceptions exist to the general rule that the application may not be submitted when the family members are already residing in the country. In Austria, five groups may file their applications in Austria. These groups are: 1) aliens who have been granted permission to reside in Austria; 2) aliens who have been Austrian citizens or citizens of a Member State of the EU but have lost their citizenship; 3) newborn children under the age of six months; 4) aliens who may enter Austria without a visa (only during their authorised stay) and 5) aliens who apply for the special settlement permit reserved for scientists. In practice, the exception is relevant to foreigners who have not needed a settlement permit so far or who want to change the type of their settlement permit. If there are humanitarian reasons justifying further stay in Austria, the authority may accept an application filed in Austria, but only under exceptional circumstances. According to the case law, this is especially the case when a right to family reunification can be derived from Article 8 ECHR.<sup>63</sup> In Belgium, an application may be submitted when the family member is resident in the country if the alien has a visa or does not need a visa or if exceptional circumstances exist. The exceptional circumstances are defined in case law.<sup>64</sup> In Denmark, a foreigner can obtain dispensation if an exceptional reason makes dispensation appropriate. In Estonia, the place of application depends on whether the applicant is a spouse or child of an Estonian citizen. Only these family members are allowed to submit an application in Estonia. In Finland, an alien may submit an application after entering the country if the requirements for issuing a residence permit abroad are met and if, before entering the country, the alien lived with his or her sponsor or has continuously lived with the sponsor for at least two years in the same household in a 'marriage-like relationship' or if refusal would be manifestly unreasonable. An application may be submitted in Germany after entering the country if the conditions qualifying an alien for the granting of a residence document are met or if special circumstances relating to the individual case render a subsequent visa application procedure unreasonable. Italy distinguishes between regular and irregular residence. Only if an alien resides regularly in Italy can an application be submitted when the family member is already resident in Italy. In that case, the family member's permit to stay will be converted into a permit for family reasons. This does not apply to third-country nationals who regularly reside on Italian territory for any form of subsidiary or temporary protection. In Latvia, the competent authority can allow the submission of documents in Latvia if this is in compliance with international legal norms, the interests of Latvia or based on humanitarian considerations. There are also three groups who are allowed to submit their application while they are already resident in Latvia. Firstly, aliens who reside in Latvia and possess a resi-

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63 Constitutional Court C 119, 120/03, 8 October 2003 and Administrative Court 2006/18/0158, 27 June 2006.

64 *Conseil d'Etat*, 84.571, 6 January 2000.

dence permit, as in Austria. The second group are aliens who possess a valid visa or who do not need a visa and whose sponsor falls under section 4 of the Cabinet of Ministers' Regulations.<sup>65</sup> The third group are aliens who do not need a visa because the sponsor falls within a category listed under section 5 of the Cabinet of Ministers' Regulations. In Lithuania, the family member may submit an application in a few cases, for instance when a visa is not needed, in the case of minors whose parent resides in Lithuania or when the family member is of Lithuanian origin. The sponsor may only submit an application if he or she acts as legal representative and the conditions for submitting an application within Lithuania are met. In the Netherlands, an application may be submitted while the family members are already resident in the country if the family members are exempt from the visa requirement. Categories exempt from the visa requirement are: immigrants from Australia, Canada, Japan or the United States of America, immigrants for whom it is unsafe to travel because of their health condition, victims of trafficking in women and immigrants who qualify for a residence permit under Decision 1/80. An application may be submitted in Portugal when the family members are already resident in Portugal if exceptional circumstances arise after their entry. As in Austria, Belgium, Latvia (if the sponsor falls within a certain category), Lithuania and the Netherlands, in Slovakia an application may be submitted while the family members are already resident in the country, if no visa is required. An application may also be submitted in cases involving minor children (under 18), immediate relatives of persons granted asylum younger than 18 or in the event of residence by the spouse of a person granted asylum. In Spain, an application may be submitted when the family members are already resident in Spain if it concerns minor or handicapped children of the sponsor, who have lived permanently in Spain for two years, or if it concerns family members who live with the sponsor at the time when his/her student residence permit is due to be converted into a residence and employment permit. In the United Kingdom, an application may be submitted while the family member is already resident in the country under a limited number of circumstances. An application may be submitted in Sweden after entry of the family members if the alien could be granted a residence permit as a refugee or person otherwise in need of protection, if there are particular distressing circumstances, if the application implies a renewal of a permit previously granted, if the foreigner has strong ties to a person residing in Sweden, if it is not reasonable to request the alien to submit an application from abroad or if there are other particular reasons.<sup>66</sup>

### 8.3 Visa Facilitation

Article 13 (1) of the Directive stipulates that, as soon as the application for family reunification has been accepted, the Member State shall authorise the entry of the family member(s). In that regard, the Member State 'shall grant that person every

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65 Cabinet of Ministers' Regulations No. 813 on Residence Permit. See the national report for specific case law on exceptional circumstances.

66 The national report refers to the Supreme Migration Court, Case UM317-06, 2006-11-02.

facility for obtaining the requisite visas.’ In our study, we have focused on the visa facilitation provided for in the second sentence of Article 13 (1).

It appears that only nine Member States (Cyprus, the Czech Republic, Estonia, Finland, Italy, Lithuania, Portugal, Slovakia and Spain) explicitly provide for a form of visa facilitation in their national legislation. This may be exemption from fees for visas for family members, shorter periods for decision-making or other forms of priority treatment. In Cyprus, the text of Article 13 has been copied in the domestic rules but, according to the rapporteur, it is unclear whether this rule has any effect in practice. In Estonia and Finland, the privilege is that family members who receive a residence permit abroad no longer need visas to enter the country. In the Czech Republic, one procedure exists, which grants the family member a visa and a residence permit. The visa is granted when the documents are presented, together with the application for the long-term or permanent residence permit. The holder of a visa who is to receive the long-term residence permit for family reunification reasons is not obliged to present certain documents upon request, which other aliens might be asked to present. In Lithuania also, only one procedure exists, which grants the family member a visa and a residence permit. The embassy issues a visa for entry and the family member has to appear in person before the authorities in Lithuania in order to obtain the actual residence permit, but no further tests regarding meeting the requirements are imposed.

In the other 15 Member States, the provision on visa facilitation has not been implemented in the national legislation. In Latvia, the competent authorities state that visa facilitation is possible in practice. This practice is confirmed by our rapporteur. The report on Sweden mentions an internal administrative instruction to deal with visa applications as quickly as possible.

The Dutch legislation provides clear examples of the opposite of visa facilitation. Applications for the required long-term residence visa may only be filed with a Dutch representative in the country of nationality of permanent residence of the applicant or a neighbouring country. The fee for an application for visas for family reunification is 830 euros. Moreover, an applicant for the visa has to pay 350 euros each time he has to take the compulsory language and integration test. Passing the test is a condition for being granted the visa. A Dutch court recently judged the Dutch system of double-checking whether the requirements for family reunification are met – once when deciding on the application for a temporary stay and again when deciding on the application for a residence permit – as incompatible with the Directive.<sup>67</sup> Similar practices involving a dual procedure, firstly an application for a visa and then a second application for the residence permit, appear to be in force in other Member States, e.g. in Austria and Spain. In Spain, the sponsor has to file the application in Spain first. Once the residence permit is granted, the family member must apply for the visa in his/her country of origin within two months of the notification.

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67 Court of The Hague 16 November 2006, LjN: AZ7350.





## 9 Administrative Decisions

### 9.1 Length of the Procedure

According to Article 5 (4), the decision on the application shall be given as soon as possible and in any event after no longer than nine months. In exceptional circumstances, the time limit may be extended due to the complexity of the application.

Reasons shall be given for a negative decision. The consequences of no decision by the end the nine-months period shall be determined by national law

A time limit of nine months is included in the legislation of Belgium, Cyprus, the Czech Republic, Finland, Greece and Portugal.

In Belgium, this time limit may be extended twice by three months. No decision within these time limits is regarded in Belgium as a positive decision. Cyprus and Greece allow one extension of up to three months. Under exceptional circumstances, Finland allows an indefinite extension.

France, Lithuania and the Netherlands apply a time limit of six months. This period can be extended in the Netherlands by a maximum of another six months, if advice from the public prosecutor or an investigation by a third party is necessary for the decision on the application.

Shorter time limits are set in Latvia (30 days for visa applications and another 30 days for temporary residence permits; a time limit of five or ten days applies if a higher fee is paid), Poland (one month for regular cases and two months in complex cases), Slovakia (90 days, which may be extend in particularly complex cases by a maximum of another 90 days) and Spain (one and a half months to three months). Estonia applies a time limit of three months, with the possibility of an extension if additional evidence or information is required. The time limit in Luxembourg is also three months.

Contrary to the Directive, the national legislation does not contain time limits in Austria, Germany, Italy or Sweden.

In Austria, the general provisions on time limits (six months) are not applicable in cases of family reunification, while family reunification in most cases depends on a quota. If the quota has already been exhausted, the application may not be rejected but the authority has to postpone the decision until a place in the quota is available in a subsequent year.

Although Swedish law does not yet contain a time limit, an amendment has been announced which will introduce the nine-month period in accordance with the Directive.

The legislations of Denmark, Ireland and the United Kingdom also do not contain a time limit.

## 9.2 Interest of the Child

According to Article 5 (5), Member States shall take into account the best interests of minor children.

This provision is explicitly included in the immigration legislation of Belgium, Cyprus, Estonia, Finland, Greece, Italy, Slovakia, Spain and Sweden.

The immigration legislation of the following Member States does not contain an explicit provision in this respect: Austria, the Czech Republic, Denmark, Germany, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and the United Kingdom.

Nevertheless, in Poland, the Constitution contains a provision concerning the rights of the child and, in Latvia, a Law on the Protection of the Rights of the Child has to be observed. In the Czech Republic, the provision features in the Family Act.

Although, in Denmark, an explicit provision is lacking, the *travaux préparatoires* for the immigration law contain various considerations concerning the best interests of the child. A general provision is lacking in Germany as well, but the exception clause regarding the family reunification of children aged over 16 recognises explicitly that, ‘the child’s wellbeing and the family’s situation are taken into consideration in this connection’.

In France, a general provision is not included in the law itself, but in a circular. Case law in the UK confirms that the UN Convention on the Rights of the Child is not directly applicable in immigration cases.

## 9.3 Relevant Considerations

According to Article 17, the Member States shall take into consideration:

- the nature and solidity of the family relationships;
- the duration of residence in the Member State; and
- the existence of family, cultural and social ties with the country of origin;

when deciding on the rejection of an application, withdrawal or refusal to renew or a removal order.

The criteria of Article 17 of the Directive are – more or less - literally transposed by Belgium, the Czech Republic, Cyprus, Finland, Italy, Lithuania (only in removal procedures), Slovenia and Sweden.

Denmark applies an even more extensive list of criteria. Moreover, according to the *travaux préparatoires*, any decision to expel should take into account Article 8 ECHR and other international obligations.

No explicit transposition in the national legislation took place in Austria, Belgium, Estonia, France, Germany, Greece, Hungary, Latvia,<sup>68</sup> Luxembourg, the Netherlands, Poland, Portugal, Slovakia or Spain. An explicit reference to these criteria is also lacking in Ireland and the United Kingdom.

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68 However, Article 17 is considered implemented as the result of a general principle binding upon institutions according to the Administrative Procedure Law.

In Austria, provisions concerning respect for private and family life already existed before Directive 2003/86/EC came into force. They are conditioned rather by Article 8 ECHR. It seems that the Austrian legislator did not see any incentive for particular implementation of Article 17 Directive 2003/86/EC. It is of the opinion that Article 17 does not contain any stricter requirements than Article 8 ECHR. More or less the same applies for Slovakia, while the legislation explicitly refers to respect for private and family life.

Although a literal incorporation is absent in France and Hungary, the nature and solidity of the family relationships and the duration of residence play an important role with regard to different categories of immigrants.

In the Netherlands, an explicit transposition only took place in the case of a rejection, withdrawal or refusal to renew a residence permit on public order grounds. The obligation to take the circumstances mentioned in Article 17 of the Directive into consideration in other decisions is laid down in the Aliens Circular. However, this obligation is limited to an interpretation of the jurisprudence on Article 8 ECHR.

In Germany, no specific provisions containing the principles of Article 17 are envisaged in the draft bill. However, principles as laid down in Article 17 are applied according to administrative regulations in accordance with the existing case law of the administrative courts. Also, Poland and Luxembourg mention the application of these principles in administrative practice which is, according to Luxembourg, sometimes far from lenient. By contrast, in the United Kingdom, none of the elements of Article 17 is currently taken into account other than to prove the genuineness of the relationship. In that sense, it could be argued that the 'nature and solidity of the person's family relationship' are considered when a decision is taken. The existence of family, cultural and social ties is not an element that is taken into consideration when a decision is taken.



## 10 Judicial Review

### 10.1 Article 18 Directive

According to Article 18, a Member State shall ensure that the sponsor and/or the members of his/her family have to mount a legal challenge when an application is rejected or a residence permit is either not renewed or is withdrawn or a removal is ordered.

The reports provide a picture of some variety, since the Member States are to a large extent free to decide on procedure and competence.

The sponsor is explicitly not a party to the administrative and judicial proceedings in Austria, the Netherlands or Slovenia. According to the national reports, both the applicants for family reunification as well as the sponsor are entitled to judicial review in Germany, Greece, Finland, Latvia and Lithuania, while in Italy only the sponsor is entitled to have a negative decision reviewed, although both the affected party and the public administration are entitled to take part in the proceedings. The issue is not specified in the remaining national reports.

In the Czech Republic, Germany, Hungary and Latvia, visas are explicitly excluded from judicial review. However, in Latvia, the decision to refuse the right of entry is subject to the complaints procedure.

In several Member States, court proceedings are preceded by administrative review proceedings within the administration: Austria (Minister of the Interior), France (Minister of Integration or the Minister of the Interior), Latvia (Head of OCMA), the Netherlands (Minister of Justice), Poland (Head of Repatriation and Aliens Office), Slovakia (Bureau of the Foreigners and the Border Police), Slovenia (Minister of the Interior) and Spain. In all instances, administrative review procedures imply a full review.

In Austria, an administrative review is excluded if an application for a residence permit is denied because the yearly quota has already been exhausted. The decision concerning the ranking in the register relating to the exhaustion of the quota may be directly appealed to the Administrative Court or the Constitutional Court. If a consulate rejects an application as manifestly inadmissible, the administrative review procedure is bypassed as well and only a direct appeal remains. In other instances, the consulate forwards the application to the competent authority in Austria.

Appeal procedures exist in all Member States, in most instances within the ordinary court system but, in some Member States, specialist tribunals are appointed to deal with immigration appeals. If the ordinary court system includes a separate administrative branch, the administrative courts are competent to deal with these appeals in Austria, Germany, Greece, Estonia, Finland, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia and Spain. The ordinary civil or 'common' courts are competent in the Czech Republic, Denmark, Hungary, Ireland, Italy, Portugal, Slovakia and the United Kingdom.

Specialist tribunals are established in Belgium (*Conseil du Contentieux des Etrangers*) and Sweden (Migration Courts and Supreme Migration Court).

The situation in Cyprus is questionable. There are no special provisions in the Aliens and Immigration Law concerning judicial review. However, according to the Constitution (Article 146), every person has the right to file an appeal with the Supreme Court against any negative decision by the administration, including decisions by the Migration Officer. The Supreme Court, however, does not examine the merits of the case, only the legality of the decision.

The scope of the judicial review varies from one Member State to another and often depends on the subject involved as well. From the national reports the following picture emerged. In Belgium, the *Conseil du Contentieux des Etrangers* conducts a full review in asylum cases and only a marginal legality control in other cases. In Denmark, the courts apply a full review in cases of family reunification involving children under 15; in all other cases the procedure implies only a review of legality.

In Germany and Finland, the administrative courts fully review the administrative decisions. Appeal to the Supreme Administrative Court depends on special leave. Full review of the facts and the law is also applied in Italy, Lithuania, Portugal, Spain and the United Kingdom.

The courts in Hungary review only legality. The same applies in Ireland, Latvia, Luxembourg, Poland and Slovakia. In the Netherlands, the establishment of the facts is only reviewed marginally by the courts.

In family reunification cases, Constitutional Courts may play a role in Austria and Spain while family life is involved and the ECHR is constitutional law in Austria and family life in Spain is protected by Article 18 of the Spanish Constitution.

## 10.2 Availability of (Publicly Funded) Legal Aid

Legal aid (under specific conditions) is available in Austria, Belgium, the Czech Republic, Denmark, Estonia, France, Finland, Hungary, Ireland (but rarely used), Lithuania (in practice), Luxembourg (if present in Luxembourg), the Netherlands, Portugal, Spain, the United Kingdom and Sweden

According to the national reports, legal aid in family reunification cases is not provided for in Cyprus, Germany, Greece, Italy, Latvia,<sup>69</sup> Poland or Slovakia.

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<sup>69</sup> However, based on an international treaty, legal aid shall be offered if the sponsor is requesting family reunification and holds a permanent residence permit and if the applicant is an asylum seeker, refugee or alternative protection status holder.

## 11 Conclusion

### 11.1 Liberal or Restrictive Effect of the Directive?

What have been the main changes to the national law or practice of the Member States as a result of the Directive? Did the Directive make the national law more liberal or more restrictive, seen from the perspective of third-country nationals and their family members?

From the national reports, it appears that in nine of the 25 Member States the Directive has produced no visible effect, either because the Member State was not bound by the Directive (Denmark, Ireland and the United Kingdom), or because transposition of the Directive had not yet started (Malta, Luxembourg and Spain) or was still under discussion (Germany and Portugal) or because the national authorities believed that there was no need to change the national legislation, which was regarded as more favourable (Latvia). In Cyprus, the practical effect of the transposition was minimal since, in that state, only third-country nationals with a permanent residence permit or a permit valid for five years or more are granted the right to family reunification by national law. Those affected are mainly employees of international companies or pensioners. Third-country nationals admitted for employment only receive residence and work permits for less than four years and are thus excluded from family reunification.

In most (14) of the Member States where the Directive produced visible changes in the national legislation, in general those changes made the national law more liberal. Several national rapporteurs warned that it was really too early to make a final judgment on the practical effects of the changes in the law.

From eight national reports it appears that the number and impact of liberal changes were far greater than the restrictive changes in the national law that could be attributed to the Directive. The transposition resulted predominantly in more liberal national rules in Austria, the Czech Republic, Estonia, Finland, Hungary, Italy, Slovakia and Sweden. In some of those states, before the transposition of the Directive, the national rules on family reunification were vague, giving broad discretion to the national authorities rather than a right codified in the law (the Czech Republic, Estonia, Greece, Hungary, Slovakia and Sweden). In Hungary, the rules on the family reunification of third-country nationals had already been introduced before the country's accession to the EU.

According to the reports on Belgium and Poland, the number of liberal changes was almost equal to the number of restrictive changes in the national law. In three Member States (France, Lithuania and the Netherlands) the restrictive changes clearly outweighed any liberal effects of the Directive. In all three countries, a minimum age for the reunification of spouses was introduced or raised. In France and the Netherlands, the provision on integration measures in Article 7 (2) of the Directive resulted in new rules in the national law. This also occurred in Cyprus. The French report mentions seven amendments introduced in 2006 into the national immigration law that were all clearly related to the Directive. All seven changes made the national law

less liberal, but the resulting national rules in most cases were still more favourable to third-country nationals than the relevant provisions of the Directive. The housing and income requirements were made more strict. A provision on respect for the fundamental principles of Republican law was introduced. The waiting period was raised from one year to 18 months and the residence requirement for an autonomous residence permit in the event of marriage breakdown was raised from two to three years. In the Netherlands, the Directive was used to justify the introduction of high income requirements, the requirement regarding passing an integration exam abroad and an almost absolute age requirement of 21 years for spouses.

### *Examples of More Favourable National Rules*

We give some examples of the changes described by our rapporteurs as major changes in favour of the position of third-country nationals. The rules on the admission of minor children were liberalised in Finland,<sup>70</sup> Italy and Sweden. Increased access by admitted family members to employment was granted in Austria, Finland and Italy. In several Member States, national rules on family reunification for refugees were lacking before the transposition of the Directive (Estonia, Greece, Hungary and Italy). In other states, the Directive resulted in more liberal conditions for the admission of family members of refugees. The reports on Belgium, Estonia and the Netherlands indicate that the rights to family reunification of refugees, as specified in the Directive, are also extended to the beneficiaries of subsidiary protection. The introduction of the right of unaccompanied minor refugees to be reunited with their parent(s) is mentioned as a major improvement in several reports (Belgium, Estonia, France and the Netherlands) and the introduction of a right to an autonomous residence permit created new rights in Austria and Finland. In Sweden, the Directive resulted in the abolition of systematic checks on the genuineness of marriages and relationships before the issue of a residence permit for family reunification. In Austria, the transposition of the Directive resulted in a clear reduction of the complexity of the national law: the right to family reunification no longer depended on the purpose of admission of the sponsor, with different rules for a variety of purposes, nor on the date of first admission of the sponsor.

### *Less Favourable National Rules*

In some respects, the Directive had contradictory effects in different Member States: e.g. the waiting period was reduced in Austria, but extended in France; the housing conditions was made more strict in Belgium and France, but less strict in Italy.

Rules on integration have been introduced with reference to the Directive in three Member States: Cyprus, France and the Netherlands. The income requirement has been raised in several Member States (Austria, Belgium, France and the Netherlands) although those changes may be related more to national policies aimed at restricting family reunification rather than to the Directive. In some cases, the rules of the Di-

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<sup>70</sup> The improvement concerns the minor children of the spouse. The legislation concerning other minors was not changed as it corresponded to the provisions of the Directive.



rective are the outcome of a Member State having successfully tried to introduce a provision in the Directive that could later be used as justification for introducing more restrictive rules at home, when this had already been planned beforehand. The minimum age limit of 21 for spouses in Article 4 (5) and the integration measures in Article 7 (2) are examples of this process.

### *Harmonisation Mechanisms*

Generally, it appears that the Directive had the effect of producing more harmonised national immigration rules. It reduced the differences between the national rules in at least four ways. Firstly, by introducing minimum standards on a wide range of issues. Several Member States, for the first time, have a clear and detailed set of rules on the right to family reunification in their national legislation. The minimum standards of the Directive also act as a barrier or an argument against more extreme policy measures. Secondly, the standstill clauses in certain provisions of the Directive further reduced the divergence: the exceptional clauses in the last sentence of Article 4 (1) (children over the age of 12) and Article 4 (6) (children aged 15-18) cannot be used by a single Member State, because relevant national rules were not in force on 3 October 2005.<sup>71</sup> The standstill clause in Article 8 (2) can only be relied upon by Austria. However, those three clauses prevent all other Member States from introducing more restrictive measures on those issues. Thirdly, the many clauses in the Directive allowing Member States to make specific exceptions have served as examples for lawmakers in several Member States. Thus, the national rule in one Member State that gave rise to the exception being introduced in the Directive during the negotiations, has now been copied by other Member States. Finally, the absence of a general standstill clause allowed some Member States to reduce their national standard to the minimum level (or lower) required by the Directive (the Netherlands) or to a lower level which is still above the minimum standards of the Directive (Belgium, France and Germany).

In general, the first and second mechanisms have produced a harmonisation of national laws at a higher level than before. The third and fourth mechanisms on the whole have resulted in a reduction in the differences between Member States, but also in a reduction in the level of rights granted by the national law, compared to the previous legislation. France and the Netherlands provide the main examples of this effect.

It is still too early to draw a general conclusion on the direction of the effects of the transposition and the implementation of the Directive in the Member States. Apparently, its effects vary widely in terms of direction, both within individual Member States and between Member States. Most reports on Member States where the Directive has been (partially) transposed mention predominantly liberalising effects. However, in one major Member State (France) the trend is clearly in the opposite direction and in two other large Member States (Germany and Spain) the effects of trans-

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<sup>71</sup> The only exception is the German rule on the admission of children aged 16 to 18 in §32 (2) *Aufenthaltsgesetz*.

position are still unknown, since the transposition is still the subject of political debate.

## 11.2 Main Strengths and Weaknesses of the Directive

### *Strengths*

The very fact of having adopted binding rules on (some aspects of) the right to family reunification is regarded in almost all the reports as the main strength of the Directive (Cyprus, Finland, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal and Spain). The Danish and UK rapporteurs also underline the importance of the Directive in this respect. In particular, reference is made to the entitlement of family members to access to education, employment and self-employed activity and to vocational guidance, initial and further training and retraining on the same footing as the sponsor (Cyprus and Finland) and the recognition of the special situation for refugees (Denmark and Finland) although, at the same time, the possibilities of limiting access to employment or self-employment contained in Article 14 (2) and (3) (Finland and France) and the exclusion of those receiving subsidiary protection (Denmark, Finland, Italy, Lithuania, Poland and Spain) are considered regrettable weaknesses. In terms of positive aspects, Luxembourg mentions in particular the clauses concerning the best interests of minor children and the facilitation of the issue of visas. In Austria, Poland, Slovakia and Sweden, the drafting of the Directive has unmistakably had a positive influence on the national legislation in this respect.

### *Weaknesses*

The ‘minimum standards’ approach and the rather wide margin of appreciation of the Member States (Estonia, Hungary, Italy, the Netherlands, Poland and Portugal) are considered the main weaknesses of the Directive. The Directive leaves many options open to the Member States and contains only a limited number of binding provisions and the wording of some of the provisions is rather vague (Austria, Cyprus, Denmark, Finland, France, Italy, Latvia, the Netherlands, Poland and Spain). The Dutch rapporteur considers the provision concerning judicial review (Article 18) so vague that it suggests that its level is below objective review. Finland and France refer in particular to the possibilities for limiting access to employment or self-employment of family members contained in Article 14 (2) and (3). In this respect, the reports on Cyprus and Latvia mention the requirement that the sponsor should have reasonable prospects of obtaining the right of permanent residence (Article 3 (1)). As a consequence, the Directive may not be implemented at all in Member States such as Cyprus, where immigration policies are very strict and based on a model of temporary migration only. The French rapporteur refers in this context to the unspecified grounds of public policy, public security or public health to reject an application, or to withdraw or refuse to renew a residence permit (Article 6).

Several national rapporteurs mention, as another weakness, the rather narrow definition of ‘family’ and the possibility of further narrowing this already narrow concept. Of particular concern is Article 4 (1) and (6) concerning the treatment of minor children. These provisions, under which minor children aged 12 and 15 can,

under specific circumstances, be excluded from the scope of application of the Directive, are problematic from the perspective of the principle of the best interests of child (Finland, France, Germany, Italy, Lithuania and Spain). Nevertheless, since these provisions are worded as standstill clauses, they actually prevent most Member States from introducing similar restrictions (see paras. 3.1 and 3.2).

Some reports refer to the difficult relationship with Article 8 ECHR, despite the ruling of the ECJ (C-540/03) that the Directive is not incompatible with the ECHR (Austria, Finland, Hungary, Latvia, Lithuania and Poland). From the perspective of Article 8 ECHR, certain aspects are problematic, such as the narrow definition of family members entitled to family reunification, the possibility of excluding family reunification if the spouse is under the age of 21 and the optional waiting period provided for in Article 8 of the Directive. The Latvian rapporteur points to the fact that, although the ECJ (in case C540/03) found no violation of the general principles of Community or international law by Article 4 (1), its text raises doubts as to compatibility with Articles 1 and 10 of the Convention on the Rights of the Child. The Court did not refer to any scientific data which confirms the view that respective age is crucial in the development of the child.

The French and Slovak rapporteurs regret that the Directive does not include an obligation for the Member States to extend the right to family reunification to unmarried and registered partners as well, although the Spanish rapporteur considers the very fact that unmarried partners are at least included in the personal scope of the Directive as a strength, even if it is not in a mandatory clause.

As mentioned above, the fact that the Directive does not apply to persons receiving subsidiary protection is considered in several reports a very regrettable weakness (Denmark, Finland, Italy, Lithuania, Poland and Spain). 'It is rather catastrophic that the Directive does not apply to persons in a refugee-like situation, most notably those who have been granted subsidiary forms of protection' (Denmark). 'There are no sufficient grounds to justify this limitation as the nature and duration of subsidiary protection is normally as permanent as that of refugee protection' (Finland).

Finally, the length of the procedure is considered a weakness (Italy, Spain and the United Kingdom). The nine-month limit for making the decision may be excessively long under certain circumstances.

### **11.3 Other Interesting Information**

Family reunification was in practice the only way for third-country nationals to obtain a residence permit in Austria; in recent years, the Austrian legislator seems to have tried to restrict family reunification even further. Nevertheless, the Directive had led to some improvements in the new asylum and immigration legislation which entered into force on 1 January 2006: abolishing the age limit of 15 years, introducing a fixed but maximum waiting period of 3 years, improving access to the labour market for family members and introducing the possibility of an autonomous residence permit under the circumstances as mentioned in Article 15 (3). The impact of the Directive in Austria therefore must not be underestimated, although the legislator still tries to restrict family reunification, at present by implementing new conditions in fields not covered by the Directive (such as the requirement to apply in the country of origin)

or by restricting conditions also envisaged by the Directive (e.g. increasing the income requirement). The rapid introduction of the new legislation has an impact on the legal quality. Unclear provisions and references to provisions which no longer exist lead to unreasonable consequences.

The complexity of the existing migration legislation following the many recent changes is also mentioned in the Czech report.

As above, Cyprus refers to its model of temporary migration with residence and employment permits for a maximum of 4 years, in a specific sector of the economy and only with a specific employer. This migration model in itself does not allow for the implementation of any integration policies, such as rights to family reunification or to long-term residence.

Although the Directive did not have a very significant impact on the national system in Finland, the changes caused by the Directive were of a more liberal nature. For example, the notion of 'family member' was amended also to cover unmarried children under 18 whose parent or guardian is the spouse of the person residing in Finland. Previously, the spouse's own children were not covered by the notion of 'family member'.

The Hungarian report offers an extensive overview of the activities of different NGOs and other national and international institutions in the field of family reunification in Hungary: the Hungarian Helsinki Committee, the Ombudsman, Habeas Corpus NGO, UN Committee on the Rights of the Child and the UNHCR Regional Representation in Hungary. In this context, UNHCR's urgent plea to extend the right to family reunification to those who enjoy subsidiary protection is worth noting.

In Italy, the right to family reunification not only concerns a sponsor who is already on the national territory, but also a sponsor who is seeking to enter the national territory in compliance with immigration law provisions. He/she may apply for family reunification and follow the procedure through an attorney in Italy.

Latvia has not opted for strict integration conditions in its Immigration law and has not introduced differentiation on the basis of the ages of children. Therefore, the situation in Latvia is peculiar; Immigration Law is liberal with regard to family reunification but other laws relating to language or access to work remain strict.

The Directive proved to be a barrier to the drafting of proposals to tighten the national rules on family reunification in the Netherlands on two occasions. In 2004, the leader of the Christian Democratic party in the Dutch Parliament proposed following the Danish example and allowing reunification with spouses only after both spouses had reached the age of 24.<sup>72</sup> There was no follow-up to this proposal, which was clearly incompatible with the Directive. In September 2006, the Lower House of the Dutch Parliament adopted a motion, proposed by the openly anti-immigration party, the PVV, asking the government to make it impossible for aliens to apply for a residence permit more than once.<sup>73</sup> The government refused to implement this motion. One of their arguments was that such a rule would be incompatible with the Family Reunification Directive.<sup>74</sup>

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72 *NRC-Handelsblad* 14 January 2004.

73 Dutch Lower House 2006-2007, 30308, no. 38 and 28 September 2006, p. 354.

74 Dutch Lower House 2006-2007, 19637, no. 1133.

## 11.4 Correct and Full Transposition?

In order to gain a first impression of the quality of the transposition of the Directive, we asked the national rapporteurs to give their evaluation of the transposition into the national law of each of their Member States of a selection of nine mandatory provisions of the Directive. The nine provisions are:

- Article 5 (5) consideration of the *interests of minor children*;
- Article 10 (3)(a) admission of *ascendants of unaccompanied minor refugees*;
- Article 11 *alternatives to documents* to be provided by refugees;
- Article 13 (1) *admission* of family members and *visa facilitation*;
- Article 14 (1) access to (self-) *employment, education and training*;
- Article 15 *autonomous residence permit*;
- Article 16 (1)(b) end of *real marital or family relationship* as grounds for refusal or withdrawal of residence permit;
- Article 17 *circumstances and interests to be taken into account*;
- Article 18 the right to mount a *legal challenge*.

We asked the rapporteurs to give each of those provisions one of the following four labels: correct transposition, no transposition, violation of the Directive or unclear transposition. If the rapporteur chose the labels ‘violation’ or ‘unclear’, (s)he was asked to give an explanation for that evaluation. These explanations are reproduced in the footnotes to this section. The full description of the (non-)transposition can be found in the national reports. The texts of those reports are available on the web site of the Centre for Migration Law.<sup>75</sup> In certain reports, partial transposition was used as a fifth category.

For the sake of clarity, our analysis we have combined the labels ‘violation’ and ‘no transposition’ into one category and the labels ‘unclear’ and ‘partial transposition’ into another category. We have evaluations available regarding transposition for 20 Member States. Three Member States are not bound by the Directive (Denmark, Ireland and the UK) and, for two other Member States, we do not have evaluations from the rapporteurs (Cyprus and Germany), because the transposition is still ongoing or the effect of the transposition is still unclear or this part of the national report is not available.

None of the nine mandatory provisions has been correctly transposed in any of the 19 Member States, simply because two Member States (Luxembourg and Malta) had not transposed any of the nine provisions by the end of 2006.

### *Transposition of Some Mandatory Provisions*

The transposition of five of our nine provisions appears not to have caused major problems in most Member States. The clause regarding the absence of real marital or family relationships as grounds for refusal or withdrawal of a residence permit in Article 16 (1)(b) was correctly implemented in 17 of the 20 Member States, although in one State (the Netherlands), this happened only after several courts had held the

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<sup>75</sup> <http://jurrit.jur.kun.nl/cmnr/Qs/family/>.

original transposition to be incorrect. The provisions regarding the autonomous residence permit (Article 15) and legal remedies (Article 18) were reported to be correctly transposed in 14 of the 20 Member States. The transposition of the clause on the admission of ascendants of unaccompanied minor refugees in Article 10 (3) (a) – a novelty for most Member States – was correct in 13 of the 20 Member States. The provision regarding access to employment, education and training in Article 14 (1) was, according to our rapporteurs, correct in 12 of the 20 Member States. Of course, the flipside of the coin is that four of these five provisions of the Directive were not correct and were only partially or not clearly implemented in six or seven Member States in each case.

The provision in Article 11 on the opportunity for refugees to provide other than official documentary evidence of their family relationship had been correctly transposed in ten of the 20 Member States and was not transposed or only partially transposed in ten other Member States.

The transposition of other provisions, apparently in the majority of Member States, has caused more problems or has been consciously or subconsciously neglected. Neither Article 17, which stipulates the circumstances and interests that Member States have to take into account in their decision-making in individual cases of family reunification, nor Article 13 on the issue of a residence permit and visa facilitation, has been transposed into national law in nine Member States, while the transposition of those two provisions is partial or unclear in five other Member States. Article 5 (5), obliging Member States to *'have due regard to the best interests of minor children'* when examining an application for family reunification, has not or has only partially been implemented in eleven of the 20 Member States. We agree with the rapporteurs who have stated that a general provision in administrative law that instructs national authorities to take into account all the relevant interests when making an administrative decision is not a correct transposition of Article 5 (5) or Article 17 of the Directive.<sup>76</sup>

### *Transposition by Member States*

None of the 19 Member States had fully and correctly transposed all nine of the mandatory provisions covered in this part of our analysis in their national laws. In seven Member States, only one or two of those mandatory provisions were not transposed or only partially transposed: the Czech Republic,<sup>77</sup> Finland,<sup>78</sup> Greece,<sup>79</sup>

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<sup>76</sup> The Dutch Council of State expressed the same view with regard to a similar clause in Article 28 (1) of Directive 2004/38EC on the free movement of Union citizens in its advice on the transposition of that Directive.

<sup>77</sup> It is unclear whether Articles 11 and 17 of the Directive have been transposed correctly in the Czech Republic. Regarding Article 11, it is only possible to prove the family relationship alternatively when applying for the long-term residence permit if the request is submitted by the family member of the recognised refugee. Czech law does not contain a provision on how to prove the relationship, it only says that the proof must be credible. Regarding Article 17, Czech law contains provisions which reflect the condition of adequate interference with the private and family life of the foreigner, so the question is whether cultural and social ties are taken into account.

Italy,<sup>80</sup> Slovenia,<sup>81</sup> Spain<sup>82</sup> and Sweden.<sup>83</sup> We specify the examples of incorrect or incomplete implementation in the footnotes. In Estonia,<sup>84</sup> Poland,<sup>85</sup> Portugal<sup>86</sup> and

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- 78 In Finland, it is unclear whether Article 10 (3) (a) has been transposed correctly. According to § 37 of the Aliens Act 301/2004: ‘... If a person residing in Finland is a minor, his or her guardian is considered a family member...’ This formulation of the Aliens Act appears not to be strictly in line with the Directive. The Aliens Act explicitly recognises a guardian’s rather than the parent’s right to a residence permit on the grounds of family ties. In practice, however, a child’s parent is normally also his or her guardian and thus, in practice, the parents are normally entitled to family reunification. Furthermore, in administrative practice, emphasis is laid on whether the relationship between the child and the adult is real, not only on the fact of legal guardianship. Thus, for example in cases where the child has both a parent and a legal guardian, the legal guardian is not automatically entitled to family reunification even though the wording of the Aliens Act would indicate this. Arguably, the formulation of the Aliens Act could be clearer in this respect.
- 79 In Greece, Article 13 (1) has not been transposed. There is no provision in the draft Presidential Decree, Presidential Decree 131, Law 3386/2005, or elsewhere regarding facilitation for family members wishing to obtain the requisite visas once an application for reunification is approved. On the contrary, Art. 26.b of the draft Presidential Decree requires, as one of the conditions for entry to Greece, that family members have official travel documents (if family members are also under persecution, the possession of such documents may not be possible).
- 80 In Italy, potential violation of Article 16 (1) (b) of the Directive exists. The Italian legislation offers no guarantees regarding the assessment of the relevant circumstance, taking into consideration the provision set forth under section 16 (4) of the Directive.
- 81 In Slovenia, it is unclear whether Article 5 (5) has been transposed correctly. As regards Article 5 (5) it was assessed by the legislator as unclear. It is stated (official from the Ministry of the Interior) that the entire Aliens Act has due regard for the best interests of minor children. Article 14 (1) has not yet been transposed.
- 82 In Spain, it is unclear whether Article 11 has been correctly transposed into national law. According to the Spanish report, *Real Decreto* 203/1995 does not contain specific rules on the documentation which must be filed by the refugee in relation to family extension of asylum, nor on the possible alternatives to those documents. Therefore, we may understand that Spanish legislation is permissive, allowing documents or evidence other than official documents to be filed but, at the same time, this lack of regulation implies a wide margin of appreciation by the public authorities. Article 17 has not been transposed formally.
- 83 In Sweden, it is unclear whether Articles 11 and 13 (1) have been transposed correctly, since Swedish legislation does not contain any explicit provisions in this area. However, from practice, one may conclude that Article 11 has been properly transposed.
- 84 In Estonia, it is unclear whether Article 11 has been correctly transposed. With regard to what should be done if the asylum seeker cannot present official evidence of the family reunification, no regulations exist. Article 15 of the Directive is violated. Family members cannot obtain an autonomous residence permit even after 5 years. However, there is a possibility of applying for a long-term residence permit after five years if the integration requirement, which involves a knowledge of the Estonian language, is fulfilled. Article 17 has not been transposed. It is not specifically stated in the law that, during the review of the residence permit application, the duration and cultural and social ties have to be considered. The law only states the grounds for rejection of an application.
- 85 In Poland, Article 11 has not been transposed. Article 13 (1) of the Directive is violated, since family members of refugees are not exempt from the consular fee for issuing the entry visa. Furthermore, it is unclear whether Article 17 of the Directive has been transposed, since there is a lack of direct implementation; however, the legal framework for family reunification as a whole seems to ensure due consideration for the aforementioned elements.
- 86 In Portugal, it is unclear whether Articles 5 (5) and 14 (1) have been transposed. Regarding Article 5 (5), only one article in Portuguese legislation can be mentioned in this respect, namely →

Slovakia,<sup>87</sup> three of the nine mandatory provisions were not implemented or only partially implemented. In six Member States, four or five of the nine mandatory provisions of the Directive were not correctly implemented: Austria,<sup>88</sup> Belgium,<sup>89</sup> France,<sup>90</sup> Lithuania<sup>91</sup> and the Netherlands.<sup>92</sup> In two Member States, the majority of

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Article 57, paragraph 2 *Decreto-Lei* no. 244/98, which provides for family reunification of minor children even if a parent does not have legal guardianship. Regarding Article 14 (1) of the Directive, Portuguese legislation only mentions equal access to employed or self-employed activities (Article 58, paragraphs 2 and 3 *Decreto Lei* no. 244/98). Article 17 has not been transposed.

87 In Slovakia, it is unclear whether Articles 13 (1) and 14 (1) of the Directive have been transposed. Regarding Article 13 (1), according to Article 14 (8) of the Foreigners Law, there is no legal claim to the granting of a visa, except for a certain group of family members of refugees. Therefore, there is no guarantee that, after acceptance of the application for family reunification, entry of a family member will be authorised. Regarding Article 14 (1), the time limit of 12 months applies in general, without the need to examine the situation on the labour market. There is a violation of Article 17. As regards expulsion and the ban on residence, Article 57 (7) of the Foreigners Law states that the police may reduce the length of a ban on residence or not administratively expel a foreigner who was granted a permanent residence permit if the consequences of expulsion and a ban on residence were incompatible with the foreigner's private and family life and the length of his/her stay. This means that, regarding foreigners with a temporary residence permit, when following the national legislation only, the police will always expel a foreigner who meets one of the criteria for expulsion, without considering the consequences of expulsion on the family life of the foreigner concerned.

88 In Austria, Articles 5 (5) and 17 of the Directive have not been transposed. There is a violation of Article 13 (1) of the Directive. If an application for family reunification is accepted, Austria authorises the entry of the family member, but in no way facilitates the issue of the required visa. It is unclear whether Austria has correctly transposed Articles 15 and 18 of the Directive. Regarding Article 15, with respect to termination of a marital relationship due to divorce, the former spouse is granted an autonomous settlement permit only in the event of divorce which is the sponsor's fault. Since many national legislations do not acknowledge a divorce as the fault of one of the spouses, it is unclear if an autonomous residence permit may also be granted in cases where no adjudication of fault is made by the court. Regarding Article 18, it seems problematic that there is no ordinary remedy against the rejection of an application for family reunification by the consulates.

89 In Belgium, Article 5 (5) has been partially transposed. According to Belgian legislation, the decision regarding the application for family reunification which has to be taken within 9 months can, including in cases involving minor children, be extended twice by three months. Article 13 (1) has not been transposed. Article 14 (1) has not been transposed for the time being. However, legislation to transpose this Article is under construction. It is not clear from the Belgian legislation whether Article 17 has been transposed correctly. This remains to be seen in practice. Article 18 has been transposed, but the review conducted by the *Conseil du Contentieux* only exercises marginal legality control in cases other than asylum cases.

90 In France, Articles 11, 13 (1) and 17 have not been transposed. It is unclear whether Article 5 (5) has been transposed correctly. French immigration legislation does not contain an explicit provision regarding the interests of the child.

91 It is unclear whether Lithuania has transposed Articles 5 (5), 13 (1) and 14 (1) of the Directive. Lithuanian legislation does not contain provisions regarding the best interests of the child (Article 5 (5) Directive), while the practice on how the principle of the best interests of the child is applied in practice remains unclear. Likewise, the legislation does not mention the need to provide every opportunity for obtaining the required visa (Article 13 (1) Directive) and, in practice, it is not clear whether any assistance is provided to all applicants. Regarding Article 14 (1), access to vocational guidance, initial training and retraining is not fully guaranteed. Article 11 has not been transposed.



the nine provisions (according to the evaluation by the national rapporteurs) had not been transposed properly: six provisions in Latvia<sup>93</sup> and seven of the nine provisions in Hungary.<sup>94</sup> As reported above, two Member States bound by the Directive (Lux-

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92 In the Netherlands, Articles 5 (5) and 13 (1) of the Directive are violated. Article 5 (5) has not been implemented in Dutch legislation. The Royal Decree claiming to implement the Directive refers to the general rule in the Dutch Administrative Act that requires the public authorities to take into account all relevant circumstances when making a decision. Furthermore, mention is made of Article 8 ECHR. The obligation to have due regard for the best interests of minor children when examining an application is mentioned nowhere in the Dutch Aliens Law. The fact that a visa has to be applied for in the country of origin or the country of permanent residence can be considered contrary to the obligation of Article 13 (1) to provide every opportunity for obtaining required visas. The Netherlands introduces an extra requirement for family reunification, since an application for a visa will be denied if it is applied for in a country other than the country of origin or permanent residence. Article 17 is partially violated in the Netherlands. The considerations of Article 17 were recently introduced in the articles concerning refusal of an application or the renewal of the residence permit on public order grounds. The obligation to take these circumstances into consideration in decisions on the application or the renewal of the residence permit on grounds other than public order is laid down in the Aliens Circular. However, this obligation is limited to an interpretation of the jurisprudence on article 8 ECHR. It is unclear whether Article 11 has been transposed correctly. If the refugee is unable to present the necessary documents proving the family relationship, the Dutch Aliens Circular stipulates that the refugee must demonstrate that the fact that he cannot submit the documents is not his fault. If the applicant fails to show that the lack of documents cannot be ascribed to him, the application for family reunification can be turned down. It is questionable whether the Dutch policy in this area is reconcilable with the Directive, which stipulates in Article 11 (2) that, 'a decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.'

93 It is unclear whether Articles 5 (5), 10 (3) (a), 13 (1), 15, 17 and 18 have been correctly transposed in Latvia. Latvian Immigration Law and the Law on the Protection of the Rights of the Child in the Law do not refer to Article 5 (5). However, officials state that they always pay due regard to the best interest of the child. Regarding Article 10 (3) (a), it is possible to establish a logical scheme of evaluation of the situation of minor children. However, neither relevant laws nor regulations refer to such situations specifically. Neither the Immigration Law nor the relevant regulations refer to facilitated procedures for the acquisition of a visa (Article 13 (1) Directive). However, in practice, facilitation is possible. Regarding Article 15, Latvian legislation does not provide for the possibility of obtaining an autonomous residence permit after 5 years for family members holding a temporary residence permit. The Latvian *Immigration Law* does not contain a norm transposing Article 17. However, in practice, officials rely on the *Administrative Procedure Law* which requires them to take into account the interests of individual (Article 5). Regarding Article 18, it is unclear to what extent family members can challenge a decision regarding a refusal to issue a residence permit because, as a rule, they need an invitation letter from the sponsor.

94 In Hungary, Articles 5 (5), 10 (3) (a), 14 (1), 15 and 18 are partially transposed. Regarding Article 5 (5), in the absence of a *sui generis* family unification process, the interests of the child are taken into account if there is specific reference to this in the institution in question (e.g. visa, residence permit via exceptions) or the child is unaccompanied. However, the interests of child are not a clear procedural component. Concerning Article 10 (3) (a), a visa and residence permit *can* be issued, discretionary power is not a proper guarantee for his/her first-degree relatives in the direct ascending line [AlienA 14/A.§, AlienD 4.§ (2)]. Regarding Article 14 (1), the Hungarian country report states that 'employment is accessed freely only for refugees and migrants in possession of a settlement permit. If a family member obtains only a residence permit, the waiting period is longer than 12 months.' The report mentions the following concerning Article 15: 'Registered partnership is not included. Furthermore, 5-year residence for autonomous right of →

embourg and Malta) had not transposed any of the nine mandatory provisions by the end of December 2006.

The reader should be aware that this analysis is limited to only nine provisions of the Directive. In several Member States, the transposition of other clauses of the Directive has been the subject of debate either in the literature or in the national courts or both. For example, in the Netherlands, compatibility with the Directive of national rules regarding the income requirement, the integration exam abroad and the high fees for residence permits, have been the subject of considerable debate. All three issues relate to provisions of the Directive other than the nine included in our analysis. Several other national rapporteurs have questioned the compatibility of national rules concerning required housing and income with Article 7 (1) (a) and (c) of the Directive.

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residence is provided but a long-term migrant status (settlement permit) can be obtained after a 1, 2 or 3-year period of residence, thus prolongation of the settlement permit is more relevant. Self-subsistence is the key requirement regarding the family member, and s/he obtains a residence or settlement permit without the Directive. Residence without self-subsistence can be allowed as an exception.' The comment on the state of the transposition of Article 18 is as follows: 'There is no decision on family unification, consequently appeal and judicial review is lacking. Appeal or/and judicial review is partly provided on negative decisions that are relevant to family members.' It is unclear whether Hungary has correctly transposed Article 13 (1). Submission of an application for a visa is allowed outside the competent embassy district and an application shall be evaluated within 5 days. The visa for the family member of a refugee can only be issued upon a proposal from the refugee authority. There is a violation of Article 17. The Hungarian report states the following: 'Only the existence of formal family relations in Hungary are investigated, but other aspects of personality and privacy and contacts with the community are neither regulated nor implemented. The ombudsman's investigations and complaints from NGOs stem from these facts. The Bill contains some provisions on expulsion decisions but not on other aspects.'

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## Annex II

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## **Annex III**

# **Questionnaire for the comparative study on the implementation of the Family Reunification Directive 2003/86/EC in Member States**

### **A. General questions**

**Please type your answers under each question in English or French**

- Has the Directive been implemented in your country? If so, please add the references and the texts of relevant legislative and administrative measures and the dates they entered into force.
- Has there been a political or public debate on the implementation of the Directive? If so, please summarize the main issues of the debate.
- What have been the main changes in the national law or practice due to the Directive. Please indicate for each change whether it improved or deteriorated the legal status of third country nationals and their family members? Did it make the national rules more strict or more liberal?
- Are there already judgments of national courts applying or interpreting the Directive? If so on which issues?
- Did the judgment of the Court of Justice of 27 June 2006 in the case Parliament v. Council (C-540/03) already have any effect on the implementation of the Directive, the national practice or case-law or the legal literature? If so, please specify the effects.
- In case the Directive has not yet been implemented in your country or your country is not bound by the Directive (Denmark, Ireland and the UK), please answer the following questions on the basis of the existing national legislation.

### **B. Questions on specific provisions**

Article 3(1)

- How is the clause “who has reasonable prospects of obtaining the right of permanent residence” implemented in the national law?

Article 3(3)

- Will a third country national also having the nationality of your country be able to rely on the Directive?
- Are nationals of your country and their third country national family members entitled to the same treatment, to a more privileged treatment or to less favourable treatment as provided in the Directive? Please specify the differences.

Article 4(1)

- Has the right to family reunification of spouses and minor children been codified in national law? If so, please mention the relevant provisions of national law.

Article 4(1) and 4(6) (children over 12 or 15 years)

- Does the national law of your country provide special rules concerning the admission of children aged over 12 or 15 years?
- If children over 15 are prevented from applying for family reunification under what conditions are they entitled to reside considering the obligation for Member States second sentence of Article 4(6)?
- Is your country barred from using the exceptions in Article 4(1) last sentence and Article 4(6) by the standstill-clauses in those two provisions?

Article 4(3) (unmarried partners)

- Has the provision on the admission of unmarried partners been implemented in national law? If so, under what conditions do they have a right to family reunification?

Article 4(5) (minimum age spouse)

- Does the national law require a minimum age for the admission of spouses that is higher than 18 years? If so what is the minimum age?

Article 5(2) (documents and fees)

- What kind of documentary evidence has to be presented with a family reunification application?
- Does the applicant have to pay any fees and, if so, what is the (total) amount of those fees?

Article 5(3) (place of application)

- May an application be submitted when the family members are already residing in the Member State?

Article 5(4) (length of the procedure)

- Is there any time limit for the decision on the application by the administration?

Article 5(5) (interest of the child)

- How is the provision that Member States “shall have due regard to the best interests of minor children” implemented in national law?

Article 6 (public policy exception)

- How has the public policy and public security exception been implemented and defined in the national law?
- What are the similarities and differences compared to the definitions of the same notions in the context of free movement of EU citizens?

Article 7(1)(a) and (c) (income and housing)

- How is the income requirement specified in the national law?
- What is the level of net monthly income required (in euros)?
- Is there a housing requirement in force, and if so, what is the minimum surface of the accommodation (in square meters)?

Article 7(2) (integration measures)

- Are family members required to comply with integration measures? If so, do they have to comply before or after admission and what are they actually required to do (follow a course, pass a test, etc.)
- Are there any positive or negative sanctions (privileges, subsidies, fines, residence rights or other) attached to the integration measures?
- Does the national law distinguish between the concepts 'integration conditions' and 'integration measures' (compare Article 4(1) last indent and 7(2))?

Article 8 (waiting period)

- Is there any waiting period before the family reunification application can be filed?

Article 9(2) (privileges for refugees)

- Which privileges granted by the Articles 10-12 are in the national law limited to family relationship that predate the entry of the refugees?
- Do other protected persons than Convention refugees benefit from the provisions of Chapter V of this Directive?

Article 10(3) (family members of unaccompanied minors)

- Are the parents, legal guardians or other family members of a refugee who is an unaccompanied minor, entitled to a residence permit under national law?

Article 11 (lack of documents)

- Which rules on alternatives to official documents in case of lack of official documents proving the family relationship are provided for in the national law?

Article 12 (exemption from requirements)

- From which requirements for family reunification, mentioned in Article 7 or Article 8, are refugees or their family members explicitly exempt by national law?

Article 13(1) (visa facilitation)

- How has the obligation to grant third country family members "every facility for obtaining the required visas" been implemented in national law?

Article 14 (equal treatment)

- How has the right of admitted family members to “access to employment and self-employment in the same way as the sponsor” been implemented in national law?
- Did your country make use of the exception to that equal treatment allowed under Article 14(2) of the Directive?

Article 15 (autonomous residence permit)

- After how many years are spouses, unmarried partners and children entitled to an autonomous residence permit under national law? What other conditions are they required to fulfil in order to obtain such a permit?
- Under what conditions can an autonomous residence permit be obtained before the period of time normally required under national law?

Article 16(1)(a) (resources)

- Is the income of family members taken into account for the calculation of the sufficient resources at the time of the renewal of the permit?

Article 16(1)(b) (real family relationship)

- Does the national law allow for refusal or withdrawal of a residence permit on the ground that the family member does no longer live in a real marital or family relationship? If so, which criteria have to be fulfilled under national law?
- Is the ground applicable to the relationship between parents and minor children?

Article 16(4) (marriage of convenience)

- Does the national law contain provisions on fraud or on marriages or partnerships of conveniences? If so are the definitions, checks and practices in conformity with Article 16(4)?

Article 17 (relevant considerations)

- How has this clause, requiring that certain specific elements are to be taken into consideration in the decision making on residence permits and removal orders, been implemented in the national law?

Article 18 (judicial review)

- Are the sponsor and his family members entitled to have a negative decision reviewed by a court or independent tribunal? If so, please specify the relevant provisions in the national law and the scope of the judicial review (full review, review on legality or marginal control only)?
- Is (publicly funded) legal aid available for an appeal against a decision to refuse family reunification or to withdraw the residence permit of a family member?



### C. Final questions

What are in your view the main strengths and weaknesses of the Directive?

Please add any other interesting information on the Directive or its implementation in your country that might be relevant for our study.

Please send us copies of the relevant laws and regulations, of any legal or other publications on the Directive or of judgments of national courts applying or interpreting the Directive, if possible in electronic form.

We prefer texts in English, French, German, Spanish or Dutch. We do appreciate (unofficial) translations, and we will do our best to understand texts in other languages.

### D. Table

This table refers only to mandatory provisions of the Directive. Please choose for each article one of the four alternative labels:

correct transposition/ no transposition/ violation of the Directive/ unclear.

If you choose the label “violation” or “unclear”, please add a footnote with a short explanation.

<b>ARTICLES OF THE DIRECTIVE</b>	<b>OPINION ABOUT TRANSPOSITION</b>
5 (5)	
10 (3) (a)	
11	
13 (1)	
14 (1)	
15	
16 (1) (b)	
17	
18	



**COUNCIL DIRECTIVE 2003/86/EC**  
**of 22 September 2003**  
**on the right to family reunification**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(a) thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the European Economic and Social Committee <sup>(3)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(4)</sup>,

Whereas:

- (1) With a view to the progressive establishment of an area of freedom, security and justice, the Treaty establishing the European Community provides both for the adoption of measures aimed at ensuring the free movement of persons, in conjunction with flanking measures relating to external border controls, asylum and immigration, and for the adoption of measures relating to asylum, immigration and safeguarding the rights of third country nationals.
- (2) Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.
- (3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third country nationals. In this context, it has in particular stated that the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union. The European Council accordingly asked the Council rapidly to adopt the legal instruments on the basis of Commission proposals. The need for achieving

the objectives defined at Tampere have been reaffirmed by the Laeken European Council on 14 and 15 December 2001.

- (4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.
- (5) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.
- (6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.
- (7) Member States should be able to apply this Directive also when the family enters together.
- (8) Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.
- (9) Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.
- (10) It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.

<sup>(1)</sup> OJ C 116 E, 26.4.2000, p. 66, and OJ C 62 E, 27.2.2001, p. 99.

<sup>(2)</sup> OJ C 135, 7.5.2001, p. 174.

<sup>(3)</sup> OJ C 204, 18.7.2000, p. 40.

<sup>(4)</sup> OJ C 73, 26.3.2003, p. 16.

- (11) The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.
- (12) The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.
- (13) A set of rules governing the procedure for examination of applications for family reunification and for entry and residence of family members should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned.
- (14) Family reunification may be refused on duly justified grounds. In particular, the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.
- (15) The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.
- (16) Since the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (17) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol these Member States are not participating in the adoption of this Directive and are not bound by or subject to its application.
- (18) In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application.

HAS ADOPTED THIS DIRECTIVE:

#### CHAPTER I

### General provisions

#### Article 1

The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

#### Article 2

For the purposes of this Directive:

- (a) 'third country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;
- (b) 'refugee' means any third country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967;
- (c) 'sponsor' means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her;
- (d) 'family reunification' means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;
- (e) 'residence permit' means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals<sup>(1)</sup>;

<sup>(1)</sup> OJ L 157, 15.6.2002, p. 1.

(f) 'unaccompanied minor' means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

### Article 3

1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

2. This Directive shall not apply where the sponsor is:

- (a) applying for recognition of refugee status whose application has not yet given rise to a final decision;
- (b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;
- (c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

3. This Directive shall not apply to members of the family of a Union citizen.

4. This Directive is without prejudice to more favourable provisions of:

- (a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;
- (b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.

5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.

## CHAPTER II

### Family members

#### Article 4

1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

- (a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.

By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

2. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

3. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.

Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

4. In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.

5. In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.

6. By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.

#### CHAPTER III

### Submission and examination of the application

#### Article 5

1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.

2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents.

If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.

When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.

3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.

By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.

In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.

Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.

5. When examining an application, the Member States shall have due regard to the best interests of minor children.

#### CHAPTER IV

### Requirements for the exercise of the right to family reunification

#### Article 6

1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.

2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.

When taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person.

3. Renewal of the residence permit may not be withheld and removal from the territory may not be ordered by the competent authority of the Member State concerned on the sole ground of illness or disability suffered after the issue of the residence permit.

#### Article 7

1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

- (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;
- (b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

2. Member States may require third country nationals to comply with integration measures, in accordance with national law.

With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

#### Article 8

Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

### CHAPTER V

#### Family reunification of refugees

##### Article 9

1. This Chapter shall apply to family reunification of refugees recognised by the Member States.

2. Member States may confine the application of this Chapter to refugees whose family relationships predate their entry.

3. This Chapter is without prejudice to any rules granting refugee status to family members.

##### Article 10

1. Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees.

2. The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.

3. If the refugee is an unaccompanied minor, the Member States:

(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);

(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

#### Article 11

1. Article 5 shall apply to the submission and examination of the application, subject to paragraph 2 of this Article.

2. Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

#### Article 12

1. By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7.

Without prejudice to international obligations, where family reunification is possible in a third country with which the sponsor and/or family member has special links, Member States may require provision of the evidence referred to in the first subparagraph.

Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.

2. By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her.

### CHAPTER VI

#### Entry and residence of family members

##### Article 13

1. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas.

2. The Member State concerned shall grant the family members a first residence permit of at least one year's duration. This residence permit shall be renewable.

3. The duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.

#### Article 14

1. The sponsor's family members shall be entitled, in the same way as the sponsor, to:

- (a) access to education;
- (b) access to employment and self-employed activity;
- (c) access to vocational guidance, initial and further training and retraining.

2. Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity.

3. Member States may restrict access to employment or self-employed activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies.

#### Article 15

1. Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.

Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship.

2. The Member States may issue an autonomous residence permit to adult children and to relatives in the direct ascending line to whom Article 4(2) applies.

3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.

### CHAPTER VII

#### Penalties and redress

#### Article 16

1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances:

- (a) where the conditions laid down by this Directive are not or are no longer satisfied.

When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income;

- (b) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship;
- (c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.

2. Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:

- (a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;
- (b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.

When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his/her residence permit.

3. The Member States may withdraw or refuse to renew the residence permit of a family member where the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence under Article 15.

4. Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permit.



*Article 17*

Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

*Article 18*

The Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered.

The procedure and the competence according to which the right referred to in the first subparagraph is exercised shall be established by the Member States concerned.

## CHAPTER VIII

**Final provisions***Article 19*

Periodically, and for the first time not later than 3 October 2007, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose such amendments as may appear necessary. These proposals for amendments shall be made by way of priority in relation to Articles 3, 4, 7, 8 and 13.

*Article 20*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 3 October 2005. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

*Article 21*

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

*Article 22*

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 September 2003.

*For the Council*

*The President*

F. FRATTINI

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