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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**ON THE APPLICATION OF DIRECTIVE 2003/86/EC ON THE RIGHT TO FAMILY  
REUNIFICATION**

# **REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

## **ON THE APPLICATION OF DIRECTIVE 2003/86/EC ON THE RIGHT TO FAMILY REUNIFICATION**

### **1. INTRODUCTION**

On 22 September 2003 the Council adopted Directive 2003/86/EC setting out common rules on the exercise of the right to family reunification by third-country nationals residing lawfully in Member States (hereinafter “the Directive”). It applies to all Member States except IE, DK and the UK<sup>1</sup>.

This report meets the Commission's obligation under Article 19 of the Directive and follows the Communication on "A Common Immigration Policy for Europe" of 17 June 2008<sup>2</sup>, where the Commission announced to assess the implementation. It summarises Member States' transposition of the Directive, identifies possible problems and gives recommendations on proper application.

The report is based on two Commission studies on the implementation of the Directive<sup>3</sup> and on information from other studies<sup>4</sup>. In accordance with Article 3(3) of the Directive, it does not deal with the situation of third-country nationals who are members of the family of a Union citizen.

### **2. HISTORICAL AND POLITICAL CONTEXT**

The Directive forms the first set of measures based on Article 63(3)(a) of the Treaty establishing the European Communities on third-country nationals' entry and residence conditions. As the adopted text underwent some substantial -often more restrictive- changes compared to the Commission's original proposal and came closer to the existing national rules, it was considered only as a first step harmonisation.

For the past 20 years family reunification has been one of the main sources of immigration to the EU. In many Member States today, family reunification accounts for a large (and still increasing) share of legal migration. Discussions on how to manage more effectively the large inflow of migrants under family reunification led to a number of policy changes, many restrictive in nature, in some Member States. These changes need to be in line with the right to family reunification as set out in the Directive.

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<sup>1</sup> In this report “Member States” means the Member States bound by the Directive.

<sup>2</sup> COM(2008) 359.

<sup>3</sup> Studies conducted by the Odysseus network (2007) and by the European Migration Network (2008).

<sup>4</sup> Centre for Migration Law, Nijmegen 2007, and a study requested by the EP, March 2008, C. Adam and A. Devillard, IOM. Other studies such as the first report published in June 2008 by the EU Agency for Fundamental Rights on Homophobia and Discrimination on grounds of sexual orientation refer to specific issues regarding family reunification.

## **2.1. Monitoring and state of transposition**

Member States had to complete transposition by 3 October 2005<sup>5</sup>. Commission officials assisted Member States in this process through regular meetings with national experts.

Following expiry of the transposition deadline, infringement procedures were started against 19 Member States for non-communication of their transposition measures. Subsequently, in accordance with Article 226 of the Treaty, the Commission addressed ten reasoned opinions. Decisions to bring cases before the European Court of Justice (ECJ) were taken for four Member States: three were withdrawn and a judgment was given for one<sup>6</sup>.

Out of the 24 Member States bound by the Directive, currently only one (LU) is still in process of transposition<sup>7</sup> and another (ES) has not yet included a formal explicit reference (harmonisation clause) in its national legislation.

## **2.2. ECJ Case C-540/03**

The European Parliament brought an action against the Council to annul some provisions in the Directive. It argued that the provisions enabling Member States to restrict in some cases the right to family reunification (Article 4(1) last indent, Article 4(6) and Article 8) are non-compliant with the right to respect for family life and the principle of non-discrimination enshrined in Articles 8 and 14 of the European Convention on Human Rights (ECHR).

In its judgment of 27 June 2006, the ECJ ruled that the Directive does not run counter to the fundamental right to respect for family life, the best interests of children or the principle of non-discrimination on age grounds. The ruling has implications for how Member States must implement the Directive. In particular, the Court stressed that fundamental rights are binding on Member States when they implement Community rules, and that they must apply the Directive's rules in a manner consistent with the requirements governing protection of fundamental rights, notably regarding family life and the principle of the best interests of minor children<sup>8</sup>.

## **3. GENERAL PROVISIONS**

### **3.1. Right to family reunification (Article 1)**

The Directive recognises the existence of a right to family reunification. Case 540/03<sup>9</sup> explicitly confirms the existence of this right, stating that the Directive imposes a precise positive obligation on Member States, requiring them in cases determined by the Directive to authorise family reunification of certain members of the sponsor's family and leaving them no leeway in this.

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<sup>5</sup> RO and BG had to implement the Directive's provisions as from their accession to the EU.

<sup>6</sup> C-57/07, judgment of 6.12.2007, *Commission v Luxembourg*.

<sup>7</sup> For Luxembourg, the draft legislation was taken as a basis for evaluation.

<sup>8</sup> Paras 60, 62, 101 and 105 of the judgment.

<sup>9</sup> Para 60 of the judgment.

This subjective right is recognised by all Member States, either explicitly by referring to the “right to family reunification” or by using formulations which leave administrations no room for manoeuvre in the cases covered by the Directive.

### **3.2. Scope of application (Article 3)**

- **Who can be a sponsor?**

For third-country nationals to be eligible as sponsors for family reunification they must legally reside in a Member State, have a residence permit valid for at least one year (irrespective of the title of residence) and have reasonable prospects of obtaining the right of permanent residence.

Member States’ approaches vary in applying this mandatory provision. Most allow for family reunification with a temporary residence permit but require a minimum period of residence (FR 18 months, ES renewal of the residence permit at least for another year), whilst CZ and SE require the permit to be permanent. Four Member States explicitly refer to having reasonable prospects of obtaining the right of permanent residence (CY, MT, LT, LU).

This is problematic in CY, where there is a general rule of four-year maximum residence after which permits are not renewed (except for a person employed by an international company), and thus third-country nationals seem to be excluded from the right to apply for family reunification.

- **Family members of Union citizens**

Both the sponsor and his/her family member need to be a third country national to fall under the scope of the Directive, so the family members of Union citizens are excluded from the Directive. They are covered by Directive 2004/38/EC<sup>10</sup>, which applies only to those Union citizens who move to or reside in a Member State other than that of which they are a national. Hence family reunification of Union citizens residing in the Member State of their nationality is not subject to Community law.

It is therefore up to a Member State to lay down rules on the right of third-country-national family members to join its own nationals. If a Member State applies rules for its own citizens that are less favourable than those of the Directive, the legal status of third-country nationals could deteriorate upon acquiring nationality in a Member State which has less favourable rules for its citizens on this. This is the case in four countries: CY, LT, DE, NL.

- **Asylum applicants and temporary or subsidiary protection**

The Directive also excludes from its scope third-country nationals under temporary or subsidiary protection and asylum applicants<sup>11</sup>. Thus, the national legislation of Member States varies on the right to family reunification of non-Convention refugees. AT, CZ, EE, FR, FI,

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<sup>10</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>11</sup> However, the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. Council Directive 2001/55/EC explicitly entitles beneficiaries of temporary protection to reunite with their family members.

LU, NL, PT, SE apply the Directive to beneficiaries of subsidiary protection despite the abovementioned exclusion.

The Commission is committed<sup>12</sup> to closing this gap in Community law. It will therefore examine possible amendments to the Qualification Directive to extend Community rules on family reunification to beneficiaries of subsidiary protection.

#### **4. SPECIFIC PROVISIONS**

##### **4.1. Eligible family members (Article 4(1))**

Family members entitled to join the sponsor are the “nuclear family” at least: the sponsor’s spouse and minor children of the sponsor or spouse, with the following permissible restrictions.

- **Spouse**

Firstly by the prohibition of polygamous marriage the reunification of only one spouse is permitted, and the entry of children of further spouses may be refused to join the sponsor. Secondly, Member States can fix a minimum age for both sponsor and spouse.

Most Member States made use of this optional clause, arguing that it can help prevent forced marriages. Five (BE, CY, LT, MT, NL) set the age at 21 years, the maximum threshold under the Directive. One (CY) has a further criterion, requiring that the marriage must have taken place one year before submission of the application.

The admissibility of such additional conditions in CY is questionable in the absence of such a restriction in the Directive and in the light of the ECJ ruling<sup>13</sup>.

- **Minor children**

Minor children are those below the nationally set age of majority (typically 18 years) and who are not married. The Directive allows two further restrictions provided they were already part of the Member State’s national legislation on the date of implementation. Firstly, children over 12 years arriving independently of the rest of their families may have to prove they meet integration conditions required under national legislation. Judgment C-540/03 said that despite such provisions Member States must still respect the best interests of the child<sup>14</sup>. Only 2 Member States apply this derogation (DE, CY, ).

CY adopted national provisions introducing these integration conditions after the Directive’s implementation deadline.

The second possible restriction concerns children older than 15 on the day of the application, who may be required to enter a Member State on grounds other than family reunification. No Member State has implemented this restriction. As the said Article is a standstill clause (could

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<sup>12</sup> See Policy Plan on Asylum, adopted on 17 June 2008 - COM(2008) 360.

<sup>13</sup> C-540/03 (para 60).

<sup>14</sup> Para 73.

only be introduced before the implementation date) such limitations in national legislation are now prohibited.

#### **4.2. Other family members (Article 4(2))**

In addition to the nuclear family, Member States may include, as family members, dependent parents and unmarried adult children of the sponsor or his/her spouse, and an unmarried partner (duly attested long-term relationship or registered partnership) of the sponsor.

Over half of Member States<sup>15</sup> authorise family reunification for parents of the sponsor and/or his/her spouse, whereas seven allow reunification of an unmarried partner (BE, DE, FI, NL, SE, PT, LT) either under a registered partnership or an evidence-based stable long-term relationship.

The Directive also says that when a minor is a recognised refugee, Member States are to authorise the entry and residence of the parents without the conditions of dependency and lack of proper family support. This mandatory provision is not implemented in BG.

Also, Article 4(2) and (3) permits Member States to authorise entry and residence of ‘other family members’ “*subject to compliance with the conditions laid down in Chapter IV*”. Consequently, once Member States decide to grant this possibility, the standard conditions laid down by the Directive apply.

#### **4.3. Requirements for exercising right to family reunification**

##### **4.3.1. Accommodation (Article 7(1)(a))**

Most Member States introduced and/or maintained accommodation conditions, apart from FI, NL, SI and SE. Practical arrangements vary, some just referring to the “normal” character of the accommodation, some using a more precise approach such as specifying required square metres per additional person.

The practice (AT, BE) of asking the sponsor to meet these requirements prior to the entry of his/her family members is questionable since the duration of the reunification procedure can impose a considerable financial burden on the sponsor.

According to Article 12 of the Directive, refugees are not required to provide evidence concerning accommodation. PL does not satisfy this provision as it imposes an accommodation condition on refugees too.

##### **4.3.2. Sickness insurance (Article 7(1)(b))**

This possibility is used by half of Member States<sup>16</sup>. HU uses an alternative system, stipulating that either healthcare insurance or sufficient financial resources are required, which is questionable as it might be seen as imposing an additional condition.

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<sup>15</sup> BG, CZ, HU, IT, LT, LU, NL, PT, RO, SI, SK, SE, ES.

<sup>16</sup> AT, BE, BG, CY, CZ, EE, ES, DE, EL, LV, LT, MT, PL, RO, SI.

#### 4.3.3. Stable and regular resources (Article 7(1)(c))

All Member States except SE make use of this criterion, but with different modalities: either without being more precise (CY), or by delegating such precision to local provisions (DE), or by referring to the minimum wage (FR, LU, RO, LT) or to the minimum income below which social allocations are granted (AT). The required approximate monthly income ranges from €120 (PL) to €1 484 (NL). Some Member States provide for thresholds which increase in proportion to the number of family members to be reunited with the sponsor.

The approaches of 3 Member States raise particular concerns: in EE the required amount is almost doubled by an additional family member, and in FI the increase is €450 for each reunited child. A specific provision in NL asking overall for the highest level of income may constitute discrimination on grounds of age<sup>17</sup>. For family formation<sup>18</sup>, 120% of the legal minimum wage of a 23-year-old worker is required from every sponsor irrespective of their age. In addition, an employment contract of at least one year or an employment record of three years is also required. All such conditions can hamper the right to family reunification, especially for younger people.

#### 4.3.4. Integration measures (Article 7(2))

This optional clause enables Member States to require that third-country nationals comply with integration measures, which in the case of family members of refugees can only be applied once family reunification is granted<sup>19</sup>.

A few Member States have introduced an integration measure into national legislation. Three of them (NL, DE, FR) use it as a condition before admission to the territory. DE requires with the exception of certain nationalities the spouse to have a basic knowledge of German before entry, to be demonstrated at a consulate. In FR the issuing of the visa is conditional on the assessment of knowledge of the language and where the language proficiency is insufficient, on the attendance of languages courses. Once the family member has been admitted to reside in France, he/she has to sign a "reception and integration" contract which obliges him/her to take civic courses and, when needed, linguistic courses. NL requires family members to pass a first<sup>20</sup> integration test covering language and knowledge of Dutch society which can only be taken in their country of origin. Certain nationalities, groups and highly skilled migrants are exempted. If a candidate fails the test, the decision cannot be challenged, but the test can be re-taken for the same cost. Other Member States (AT, CY, EL) require family members to participate in integration courses (mainly language courses) or to pass language exams after admission. Some make it a condition for permanent residence only (LT) or foresee the possibility to cut benefits (DE) in the event of non-compliance.

The objective of such measures is to facilitate the integration of family members. Their admissibility under the Directive depends on whether they serve this purpose and whether they respect the principle of proportionality. Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.), whether such measures or their impact serve purposes other than

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<sup>17</sup> Recital 5 of the Directive states that Member States should give effect to the Directive's provisions without discrimination, *inter alia* on the basis of age.

<sup>18</sup> When the family relationship arose after the sponsor's entry.

<sup>19</sup> Refugees are required to fulfil integration conditions for family formation in the NL.

<sup>20</sup> After arrival in NL family members are also subject to integration requirements.



integration (e.g. high fees excluding low-income families). The procedural safeguard to ensure the right to mount a legal challenge, should also be respected.

#### **4.3.5. Waiting period and reception capacity (Article 8(1))**

In addition to conditions set out in Article 3, this provision allows Member States to introduce a minimum period of lawful residence (not exceeding two years)<sup>21</sup> before reunification can take place.

This means the application may be filed, but Member States may delay granting family reunification until the period determined by their legislation expires. Implementation problems therefore arise with any Member State that stipulates this two-year residence condition to run at the moment of application only (CY, EE, EL and LT).

The second indent provides for a waiting period of three years counted as from the submission of an application, but only in those Member States who have already taken their reception capacity into account at a time of the adoption of the Directive. This standstill derogation was specifically requested by AT - the only Member State using it - as it had a quota system in its national legislation. Upon implementation of the Directive and following the ECJ ruling<sup>22</sup> Austria modified its provisions so that three years after an application is filed, a settlement permit for the purpose of family reunification has to be granted regardless of the quota.

This provision precludes the introduction of the notion of reception capacity as a condition in national law.

#### **4.3.6. Possible restriction on grounds of public order, public security and public health (Article 6)**

Member States have used various methods of implementing this provision, some referring to the relevant Schengen acquis provisions, some referring to a criminal offence with custodial sentence.

Recital 14 of the Directive gives some indication of what might constitute a threat to public policy and public security, but otherwise it is left to Member States to set their standards in line with the general principle of proportionality and the horizontal Article 17 obliging them to take account of the nature and solidity of the persons' relationship and duration of residence, weighing it against the severity and type of offence against public policy or security. The public health criterion can be applied as long as illness or disability is not the sole ground for withdrawal or non-renewal of a residence permit. 3 Member State do not comply with this (EE, SI, RO)<sup>23</sup>.

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<sup>21</sup> Article 12 of the European Convention on the Legal Status of Migrant Workers of 24 November 1977 provides for a maximum waiting period of just 12 months. The scope of application of this Convention is, however, limited because so far it has been ratified by only six Member States (FR, IT, NL, PT, ES, SE) and four third-countries (Albania, Moldova, Turkey, Ukraine).

<sup>22</sup> Paras 100 and 101 of C-540/03.

<sup>23</sup> EE uses a criterion ("*a threat to the interest of other persons*") that is even wider than that admissible under the Directive.

## **4.4. Procedural rules**

### **4.4.1. Application assessment procedure**

- **Specific procedure (Article 5(1))**

Most Member States have a specific procedure for family reunification. Only four (CZ, HU, LV, PL) do not deem it useful to have a specific procedure, but deal with family reunification within the general immigration rules.

- **The applicant (Article 5(1))**

Member States are also split on the question of whether the family member or the sponsor should be the applicant under the procedure.

It is the sponsor who introduces the family reunification request in CY, FR, EL, IT, LV, LU, MT, PL, RO, SI, ES. In the other Member States family members can also introduce the reunification request, except for AT and HU where the applicant can only be a family member. In PT the family member applies only if he/she is in Portugal, otherwise it is for the sponsor to file the application.

- **Place of application (Article 5(3))**

The Directive requires that the family member resides outside the territory of the Member State at the time of the application, and only allows for derogation in appropriate circumstances.

Five Member States (CZ, FI, HU, PL, PT) impede this provision as they do not even enact the primary rule of family members having to reside outside their territory. All other Member States, except CY, apply this derogation and permit an application even if the family member is already in the Member State, although the scope of the derogation varies substantially. Some make it possible only on humanitarian grounds (AT), some merely call for the family member to reside legally, and some accept it if the applicant's return to his/her country of origin is not reasonable (DE).

- **Documentary evidence (Article 5(3))**

The list of required documents varies among Member States: some have a very detailed list, while others just refer to general requirements (SE, DE, MT, ES, LT) and thereby leave authorities with considerable leeway.

The Directive sets specific provisions as regards refugees, saying that Member States should take into account other evidence where a refugee cannot provide an official document proving the family ties. EE does not comply with this provision: it states that the absence of an official document may result in refusal. The NL provision placing the burden of proof on the refugee to show that it is impossible for her/him to produce such a document is also questionable.

- **Interviews and investigations (Article 5(2))**

All Member States use the possibility to carry out interviews and to conduct other investigations if deemed necessary. Some Member States (AT, BE, DE, FI, FR, IT, ES, LT,

SE, NL) have introduced the possibility of DNA tests to prove family ties. It is a possibility only for the applicant and, in most cases, the authorities bear the costs (except in LT and BE, and in NL where it is refunded only if the test proved the family tie).

To be admissible under Community law these interviews and/or other investigations must be proportionate –thus not render the right to family reunification nugatory- and respect fundamental rights, in particular the right to privacy and family life.

- **Marriage, partnership or adoption of convenience (Article 16(4))**

This provision allows Member States to conduct specific checks and inspections where there is reason to suspect fraud or a marriage, partnership or adoption of convenience. Every national system contains rules to prevent family reunification if a relationship exists with the sole purpose of obtaining a residence permit.

AT's legislation is problematic as it reflects a general suspicion by systematically applying this provision, i.e. its registry offices have to submit information about every marriage involving a third-country national irrespective of any actual suspicion, which then needs to be followed up by the Alien Police. In a similar vein, in NL if one of the partners does not have Dutch nationality, prior to contracting a marriage or registered partnership the registrar must first request a declaration from the Chief of Police.

- **Fees**

In all Member States, except IT and PT, applicants have to pay fees. 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 BE and ES and a €35 fee in CZ and EE, to €368 in NL<sup>24</sup>. On average the fee is between €50 and €150.

The Directive does not regulate the issue of administrative fees payable in the procedure. However, Member States should not set fees in a way which may undermine the Directive's effect when the right of family reunification is exercised.

#### **4.4.2. Administrative decision**

- **Length of procedure (Article 5(4))**

A written notification of the decision is to be given to the applicant as soon as possible and in any event no later than nine months from the date on which the application was lodged.

Periods are set at an average of three months or the general rules are applied, these being within nine months. 14 Member States use the option in the Directive of extending the time limit in exceptional circumstances linked to the complexity of examining the application.

The situation is problematic in 2 Member States. BG provides only for a recommended time period of seven days. In ES there is no legal deadline either, but practice shows that the period required by this provision is met.

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<sup>24</sup> In NL an application for a visa for family reunification costs €30, the integration test €50. Issuance of a residence permit for a temporary stay costs €188.

- **Written and motivated decision (Article 5(4))**

All Member States comply with the criteria to have a written decision and to give reasons for rejecting an application. LV is the only Member State which does not specify the consequences of no decision being taken by the end of the maximum nine-month period. In most Member States the absence of a decision grants the possibility to seek remedy. In BE, IT and PT the absence of a decision is implicit authorisation, whereas in BG, FR, EL and LU it is the reverse constituting implicit rejection.

- **Best interest of the child (Article 5(5))**

Implementation of this horizontal mandatory clause i.e. paying due regard to the best interests of minor children when examining an application, apparently causes problems for several Member States. This obligation is not expressly mentioned in the national legislation of AT, EL<sup>25</sup> and PT. LT and NL only make reference to Article 8 of the ECHR which, given the ECJ's observations in C-540/03, does not seem to be sufficient to implement this particular provision<sup>26</sup>. HU only refers to guarantees offered by international agreements, without further details. The Member States that comply with this provision either do so by formally implementing this clause in their national legislation or by referring to the UN Convention on the Rights of the Child.

- **Horizontal clause on relevant consideration (Article 17)**

This obligation to take due account of the nature and solidity of the person's family relationships, the duration of his/her residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin and thereby apply a case-by-case approach was also specifically recalled by the ECJ in C-540/03. In accordance with that ruling, mere reference to Article 8 ECHR does not seem to constitute adequate implementation of Article 17, which could be problematic for AT, LU, SK.

The general problem in transposition appears to be that national requirements for family reunification are applied very strictly, and that the authorities are not obliged to assess the application on an individual basis. This strict application of the rules is evident in NL with regard to the age limit, income requirement, requirement to pass an integration exam abroad, three-month period for refugees and the requirement of an authorisation for temporary stay.

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<sup>25</sup> EL legislation only talks about family ties which are to be taken into account by the national authorities.

<sup>26</sup> The principle that the best interests of the child must be of primary consideration is enshrined in Article 24 of the Charter of Fundamental Rights and also in the UN Convention on the Rights of the Child.

- **Redress (Article 18)**

When it comes to the right to mount a legal challenge, Member States' rules vary considerably on the material and personal scope of such judicial reviews.

The sponsor cannot be a party to the administrative and judicial proceedings in AT, NL and SI, whereas in DE, EL, FI, LV, LT both family members (as applicants for family reunification) and sponsors are entitled to judicial review. Regarding what can be challenged within the judicial review, CZ, DE, HU and LV have excluded visas and AT quotas. Appeal procedures exist in all Member States, in most instances within the ordinary court system, but some Member States have specialist tribunals (BE, SE). The review arrangements also vary: LV, LU, PL and SK review only legality, whereas both the facts and the law are reviewed in IT, HU, LT, PT and ES. In NL facts are only reviewed marginally by the courts. Legal aid in family reunification cases is provided by most Member States, except CY, DE, EL, IT, LV, PL and SK.

This redress provision must be applied in conformity with the right to an effective remedy before a tribunal as set out in Article 47 of the Charter of Fundamental Rights which reflects ECJ case law on this.

#### **4.5. Rights**

##### **4.5.1. Entry and residence**

- **Visa facilitation (Article 13(1))**

As soon as a family reunification application has been accepted, Member States must authorise the entry of the family members and grant them every facility for obtaining the requisite visas.

Implementation of this mandatory provision creates difficulties for some Member States, on a legal and practical basis.

Some Member States (BE, BG, LU, NL, SI) did not implement this specific provision in national legislation, and one (NL) has rules running counter to visa facilitation by requiring a double-check on whether the family reunification requirements are met, first when applying for a visa to enter and then again when applying for a residence permit. Furthermore, an additional condition not provided for in the Directive is introduced, prescribing that the visa application can only be filed in the country of origin or of permanent residence.

- **Duration of residence (Article 13(2) and (3))**

Member States must grant family members a first residence permit of at least one year's duration. It is also stipulated that the duration of residence permits granted to family members shall in principle not go beyond the date of expiry of the sponsor's residence permit.

When implementing these provisions a problem may arise if the validity of the sponsor's residence permit is less than one year when the family member's residence permit is issued. Article 13(3) then seems to prevail over 13(2). Member States (EL, FI, CZ) that always align the duration of the family member's residence permit with that of the sponsor only impede the

Directive if applying this rule in bad faith so as to restrict the family member's residence (i.e.: if the sponsor's residence permit is already in the process of renewal.)

- **Autonomous residence permit (Article 15)**

At the latest after five years of lawful residence an autonomous residence permit must be granted for the spouse or unmarried partner and for a child who has reached majority.

Most Member States (20) use this maximum five years<sup>27</sup>. BE, CZ, NL, FR only require three years of prior residence. In HU the five years count from the first issue of a residence permit, which can be problematic if the family member was first holding a visa before obtaining a residence permit. FI implemented the provision as a "may" clause in a way not respecting the five-year rule. RO implemented this provision too restrictively, by including a closed list<sup>28</sup> defining when the autonomous residence permit should be issued.

If the family relationship breaks down Member States may limit the granting of the autonomous residence permit for the spouse or unmarried partner. 11 Member States do this. However, 16 Member States also use the optional provision of granting an autonomous residence permit in the event of widowhood, divorce or separation, sometimes stating established close ties or humanitarian grounds as the justification.

The mandatory provision to lay down the rules to ensure the granting of an autonomous residence permit was impeded by seven Member States (BU, EE, FI, HU, IT, RO, PL, SI) either by not laying down any rules<sup>29</sup> in this regard or by implementing the provisions in a way which gives the authorities an inadmissible amount of leeway.

#### **4.5.2. Access to education and employment (Article 14)**

A relative form of equal treatment is to be provided for the family member: if the sponsor does not have access to employment nor, under the Directive does the family member. Some Member States (AT, NL, MT, DE) have limited the access of family members to exactly what is required by the Directive, resulting in three different situations depending on the sponsor's status: no access at all, access only with a work permit (with or without a labour market test) or free access to the labour market. Others impose no restrictions on labour market access (EE, FI, FR, LT, LU).

Most Member States require a work permit which can in certain, albeit limited, cases impede the Directive (e.g. if the sponsor does not need one).

On the basis of the optional clause in paragraph (2) Member States can limit labour market access by making it conditional on a labour market test during the first 12 months. This is used by seven Member States (AT, CY, DE, EL, HU, SI, SK).

In three of these (DE, HU, SI), use of the exception exceeds what the Directive permits, since national law allows the complete exclusion of certain categories of family members from

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<sup>27</sup> Both AT and NL demand an additional compliance with integration requirements.

<sup>28</sup> Namely when the minor becomes an adult (18 years old); if the sponsor died (for any other person); or in cases of divorce (for the husband/wife).

<sup>29</sup> EE

employment during the first year after admission, whilst the Directive allows exclusion only on the basis of a labour market test.

Generally, it appears that transposition of the Directive has resulted in national legislation giving admitted family members easier access to employment.

No particular problem was reported regarding access to education, except that BE and RO did not explicitly implement the provision but applied it in practice; in RO through its general principle of law on equality and non-discrimination.

#### **4.6. Family reunification of refugees**

Chapter V of the Directive refers to a series of derogations creating more favourable provisions for the family reunification of refugees so as to take their particular situation into account.

There is a horizontal problem with two Member States (CY, MT) as they have not introduced these more favourable provisions and the latter do not distinguish between refugees and other third-country nationals. Specific problems regarding other Member States and concerning more favourable provisions for refugees are highlighted throughout the report.

### **5. CONCLUSIONS**

This report analyses national legalisation implementing the Directive 2003/86/EC on the right to family reunification. This is the first legislative instrument on legal migration at EU level and, as a result several Member States<sup>30</sup> for the first time have a detailed set of rules on the right to family reunification in their national legislation.

The report revealed a few cross-cutting issues of incorrect transposition or misapplication of the Directive which need to be highlighted, such as the provisions on visa facilitation, granting autonomous residence permits, taking into account the best interest of the child, legal redress and more favourable provisions for the family reunification of refugees. The Commission will examine all cases where application problems were identified and ensure that the provisions are correctly applied, in particular in conformity with fundamental rights such as respect for family life, the rights of the child and the right to an effective remedy. This will imply launching, during 2009, the necessary procedural steps for non-compliance, where appropriate in accordance with Article 226, in particular in cases where there are clear differences in interpretation of Community law between the Member States and the European Commission.

Furthermore the report showed that the impact of the Directive on harmonisation in the field of family reunification remains limited. The low-level binding character of the Directive leaves Member States much discretion and in some Member States the results has even been lowering the standards when applying “*may*” provisions of the Directive on certain requirements for the exercise of the right to family reunification in a too broad or excessive way. In this respect the possible waiting period, the minimum age of the sponsor, the income requirement and the possible integration measures should be mentioned in particular. The Commission will take forward these issues through all appropriate means, including the

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<sup>30</sup> EL, CY, MT, RO.

policy follow up that the Commission will give to the present report. In line with the Communication of 17 June 2008 as well as the upcoming European Pact on Immigration which identified family reunification as the key to successful immigration and an area where the European Union needs to develop further its policies, the Commission intends to launch a wider consultation – in the form of a Green Paper – on the future of the family reunification regime.