The implementation of the 2003/86/EC Directive on family reunification in Austria, Hungary, Romania and Slovenia

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I. INTRODUCTION

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 the large inflow of migrants under family reunification more effectively resulted in a number of policy changes, many restrictive in nature, in some Member States. These changes led to the adoption of the 2003/86/EC Directive on the right to family reunification. It was envisaged that a Directive on family reunification would significantly improve the situation of Third Country Nationals (TCNs) legally residing in one of the EU Member States by establishing EU-wide rules on the right to family reunification. The question arises whether this goal has been achieved.[1]

Member States had to complete transposition by 3 October 2005. According to the Commission Report on the application of the Directive in question following the 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 Decisions to bring cases before the European Court of Justice (ECJ) were taken for four Member States: three were withdrawn and a judgment was given for one.[2]

Apart from the deficiencies of national implementing measures, one can also raise the question whether the Directive itself is in accordance with the Tampere goal of treating third country nationals fairly. It can be said that the Tampere conclusions established the EU "fair and near equality" paradigm.[3] At the Tampere Council in 1999, the Commission pushed the Member States into declaring their agreement with the principle of equality between legally resident TCNs and Union citizens.[4]

Hence, an assessment of the Directive requires a detailed analysis of specific legal provisions of the Directive and, particularly, their transposition into national law. We will examine the implementation procedure in four Member States (Austria, Hungary, Slovenia, Romania), focusing mainly on the Central European Region.[5] I will assess to what extent the Member States have taken divergent approaches to the implementation of the Directives and whether the aim of approximating national legislation has been achieved. In the study I will put emphasis on examining the transposition procedure in Austria, as an old Member State which has been receiving a high number of migrants in recent decades in contrast to the ones who newly joined.

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[2] C-57/07, Judgment of 6.12.2007, Commission v Luxembourg, 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 /COM/2008/0610 final, 2.1

[3] CARRERA, S.:*In search of the perfect citizen? The intersection between integration, immigration and nationality in the EU*. 2008. Wolf Legal Publishers, Nijmegen, at 34-35.

[4] It declared the principle of granting fair treatment to TCNs who reside legally in the EU and that the legal status of TCNs should be approximated to that of Member States's nationals.

[5] The comprehension of the concept of *Central Europe* is an ongoing source of controversy. According to the majority of sources, the region includes Austria, Hungary, Slovenia. Some sources also add neighbouring countries such as Romania for historical, geographical and cultural reasons.

The methodological approach of this study was desk research. National legislation, scientific literature (books, reports and scientific articles), online resources, statistics and press releases were used as sources of information.

The following sections will first discuss in detail the community standards laid down by the Directive, followed by an assessment of the corresponding national provisions. For comparative purposes the study will also briefly present the relevant provision of Directive 2004/38/EC concerning the legal position of family members of EU citizens.

Before all, I would like to give a brief overview on the various national legislations transposing the Directive 2003/86/EC.

II. NATIONAL TRANSPOSITION

As a general rule, we can establish that, in most Member States, the transposition of the Directive did not lead to much debate among politicians or in civil society.[6]

In **Austria** the Directive was part of a more comprehensive reform of migration law. The transposition of Directive 2003/86/EC into national law in Austria, along with other EU Directives in the field of asylum and migration, was completed with the adoption of the new Aliens Law Package, comprising the Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz (NAG)), the new Aliens' Police Act (Fremdenpolizeigesetz, FPG) and the new Asylum Act (Asylgesetz, AsylG), which entered into force on 1st January 2006. However, the rules on family reunification attracted only a little attention in the political and public debate of these reforms. With regards to family reunification, as we will see below, two proposals were controversial: the requirement for the family member to await the decision on their application in the country of origin and the increased income requirement.

Most of the newly accessed EU Member States had introduced rules on family reunification in their national law shortly before their accession to the EU. In **Slovenia,** changes of the Aliens Act were presented in the Parliament as a result of the Country's obligation to implement the respective EC law.[7] According to the national report there was no special political debate on the implementation of the Directive.[8]

Hungary's Alien Act[9] was modified - partly before accession - just in relation to the Family Reunification Directive. However, Hungary had to amend its 2004 immigration law in 2006. In the parliamentary debate there were only three motions related to family reunification in the Bill concerned, partly in favour of family members of refugees, partly to curb the 'liberal' approach to family members of foreign labourers. Transposition was finally achieved by incorporating the Directive's provision in a wide array of legislative acts, of which the most important is Act No. II of 2007 on the Entry and Stay of Third Country Nationals (ThirdA).The executive rules to ThirdA also contain relevant provisions regarding its implementation (Government Decree 114 of 2007, 24 May) (GovDec).

Romanian migration policy has also been modelled to conform to European legislation. The concept of family reunification appeared into Romanian national legislation when transposing the Council Directive in question by Government Emergency Ordinance 194/2002 on the regime of aliens in Romania. The work on the transposition of the Directive started in 2002. As this took place in the period of EU accession negotiations, and given the relatively limited previous experience in EU asylum and migration acquis, some difficulties were experienced.

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[6] GROENENDIJK, K./ FERNHOUT,D./VAN DAM R./VAN OERS, R./STRIK, T. FERNHOUT,D./VAN DAM R./VAN OERS, R./STRIK, T..: *The Family Reunification Directive in EU Member States. The first year of implementation.* Centre for Migration Law. Nijmegen. 2007, at 6.

[7] The Act amending the Aliens Act from 29 September 2005 entered into force on 16 December 2005.

[8] http://cmr.jur.ru.nl/cmr/qs/family/Slovenia/#B36

[9] Act XXXIX of 2001 on entry and residence of foreigners in Hungary

Eventually, full implementation of the Directive into national legislation was finalised in 2007 through legal acts amending the Aliens' Act (also known as Government Emergency Ordinance 194/2002).

III. IMPLEMENTATION WITH REGARD TO SPECIFIC ARTICLES OF COUNCIL DIRECTIVE 2003/86/EC

1. Personal scope of the Directive: Sponsors eligible for family reunification - family members entitled to family reunification

Directive:

This section will analyse the question of who benefits from Directive 2003/86/EC. The eligibility criteria for the application of the family reunification Directive are contained in Articles 3 and 4. 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. 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.[10] The Directive excludes from its scope asylum applicants and third-country nationals who reside on the basis of temporary or subsidiary protection. [11]

According to Article 4 (1) of the relevant Directive, *persons who are eligible to be reunited* with the sponsor comprise the sponsor's spouse, and minor, unmarried children of the couple, as well as natural and adopted children of the applicant or the spouse if they have custody of them. Article 4(2) provides that it is at the discretion of the Members State concerned to grant entry and residence to direct relatives in the ascending line of the sponsor or the spouse and to adult, unmarried children of the sponsor or the spouse if these are dependent on them. Moreover, the Member States may decide to provide for the family reunification of the sponsor's unmarried partner if a long term relationship between the persons can be proven to exist. Furthermore, Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification. According to Article 4(5), 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. before the spouse joins him/her. Under Article 4(6) the entry of minor children whose application has not been submitted before the age of 15 may be refused, if such a restriction has existed in at the date of implementation.

National legislation:

Basically, there are two different kinds of residence titles in **Austria**: a settlement permit for those intending long-term settlement and a residence permit for temporary residence. The dependants of third country nationals holding a settlement permit are entitled to settlement, but their admission is subject to a quota. In special cases, family reunification for settlement permit holders is not subject to a quota. This is rather the exception than the rule. Although a residence permit does not entitle settlement,[12] family reunification is indeed possible to secure family community as stipulated in Article 8 of the European Convention on Human Rights, but restricted to certain groups such as students, artists, intra-corporate transferees or researchers. If the sponsor holds a residence permit, the family relationship with the

[10] Art. 3 (1) Directive
[11] The first two groups listed were excluded from the outset. TCNs residing on the basis of subsidiary protection, however, were initially not included in the list of persons not benefiting from the Directive.
[12] NAG Art. 2 (3)

spouse must predate the entry and admission of the sponsor.[13] This is a major difference compared to holders of a settlement permit, as for them this condition does not apply. In this respect, the Austrian law makes a difference between family formation and family reunification.

A sponsor is considered to have reasonable prospects if this person has a settlement permit ('permanent-residence-EC') or an unlimited settlement permit.[14] In these cases the sponsor is regarded as integrated and the refusal of a renewed settlement permit is possible only under restricted preconditions. If the sponsor has another settlement permit, family reunification depends on fulfilment of the '*integration agreement'*.

Persons holding Austrian nationality as well as the nationality of a third country are not deemed aliens or third country nationals under Austrian Aliens law.[15] As the provisions implementing the directive refer to aliens or third country nationals, persons who hold also Austrian nationality are not able to rely on the Directive.

According to the NAG, only members of the nuclear family, comprising the sponsor's spouse and the sponsor's unmarried minor children, as well as those of his/her spouse (including adopted children and stepchildren) can be admitted to Austria for the purpose of family reunification.[16] Partners, first-degree relatives in direct ascending line and adult married children are not entitled to be admitted for the above purpose. For the spouse, a *minimum age of 18 years* is required, for the reason of preventing forced marriages.[17] There are special provisions against marriages and adoptions of convenience, as we will see below.[18]

Children aged over 15 years are seen as minors without any special rules applicable. There is therefore no limitation of family reunification in respect of children aged over 15 years.

Recognised refugees and *persons with subsidiary protection* have a right to family reunification according to the Asylum Act 2005 (AsylG), if the family relationship existed prior to their entry into Austria.[19]In the case of subsidiary protection, family reunification can be realised only after the first temporary residence permit of the sponsor has been renewed, which usually occurs after one year of residence.[20]

In **Hungary**, ThirdA entitles sponsors who are holders of a long term visa, temporary residence permit, national or interim permanent residence permit or an EC long-term permit to benefit from family reunification.[21]In respect of the "reasonable prospect clause" in the ThirdA Act, there is no such requirement concerning the sponsor's status in national law. In the absence of a specific time limit, only the legal residence of the sponsor should be proven.

In respect of the nationality of the Sponsor, according to the relevant provisions of the Hungarian Nationality Act[22]and Law-Decree on Private International Law[23] a person possessing Hungarian nationality has to be treated as a national regardless of further nationalities. For this reason, dual nationals are not able to rely on the family reunification Directive. However, there will be no such need, since Hungarian nationals are entitled to

[13] Ibid Art. 69 (1)
[14] The 'permanent-residence- EC' and 'unlimited settlement permit' are only granted after five years of legal settlement.
[15] Under Article 2 (1) of the NAG Alien means a person not possessing Austrian nationality.
[16] NAG Art. 2 (1)(9)
[17] Spouses of Austrian and EEA citizens, spouses of Swiss citizens are exempt from this rule.
[18] NAG Art. 30
[19] Asylgesetz (AsylG) 2005 (Asylum Act), BGBl I 100/2005, amended version, BGBl. I 4/2008. In the case of recognised refugees, family reunification is confined to the nuclear family, if family relationships predate the entry of the sponsor.
[20] AsylG Art. 35(4)
[21] ThirdA Act Art. 19(1).
[22] Hungarian Nationality Act [LV of 1993] Art. 2(2)
[23] Law-Decree on Private International Law [No. 13 of 1979] 11(1)(2)

more privileged treatment than third-country nationals in many respects in the area of family reunification.[24]

Under the ThirdA Act, family members are understood as: the sponsor's spouse, minor children of the sponsor and his/her spouse; minor dependent children of the sponsor or his/her spouse where he or the spouse has parental custody and the child is dependent on him or her[25]; dependent parents of the sponsor or the spouse[26]; and the sponsor or the spouse's siblings and direct line relatives if they are unable to provide for themselves for health reasons.[27]Although registered partnership exists in Hungarian law, and social transfers are available for registered partners, the definition of family members for family reunification does not cover registered unmarried/registered partners. A foreign bride/groom can obtain a visa or residence permit as a visitor but not as a family member for unification. The Hungarian legislation does not define an age limit for the spouse nor does it make any difference between children based on their age.

Under **Romanian** law, the condition to be granted admission for family reunification is that the sponsor must have a residence permit valid for at least one year.[28] An exception occurs for scientific researchers. This category can apply for family reunification even if their residence permits are issued for less than one year.[29]

The Aliens Act defines the sponsor as being the legally staying alien who applies for family reunification, similar to the definition given by Directive 2003/86/EC.[30] The Romanian legal framework in the field of the regime of aliens grants the right to family reunification for the members of the sponsor's nuclear family (spouse; minor, unmarried children), first degree ascendant relatives of the sponsor or his/her spouse, if they cannot take care of themselves in the country of origin; adult unmarried children of the sponsor or his/her spouse, if they cannot take care of themselves for medical reasons.[31] Aliens with a right to stay for the purpose of studies may request family reunification with a spouse and minor children, provided that the marriage was concluded before the stay right was obtained.[32] A sponsor who is a refugee in Romania may also apply for family reunification. The condition is that the marriage predates his/her recognition as a refugee or person with subsidiary protection.

The Romanian Aliens Law does not provide any right for unmarried foreigners, except those who cohabit with unmarried Romanians, if they have at least one child.[33]

In Romanian law there is no special rule concerning the admission of children aged over 15 years either.

In **Slovenia** the right to family reunification is provided for immediate family members of third country nationals who have permission for permanent residence or temporary residence in Slovenia for the duration of at least one year if they have resided in Slovenia for the past

[24] The notion of family has a broader scope, issue of a residence permit of unlimited duration, no housing requirement, no income requirement.
[25] If the child is not the common child of the sponsor and his spouse, in order to qualify the child must be dependent and under the sponsor's guardianship.
[26] Art 19 (4) and the commentary to the Act makes clear that dependent parents may unite with their children.
[27] ThirdA, Art. 2 (d) and 19(4) for health reasons the person is unable to take care of herself/himself.
[28] Aliens Law Art. 46 (1): "The sponsor holding a temporary residence permit valid for one year, or a permanent residence permit or who has been granted refugee status or subsidiary protection, may request family reunification." However, spouses of refugees or persons with subsidiary protection hold the right only in cases where the marriage was concluded before being granted one of the protection forms;
[29] Ibid 46(6)
[30] Aliens Law Art. 2 (a)
[31] Ibid 46 (2), (a) and (b)
[32] Ibid 46(4)
[33] Ibid Art. 46 (16) (b) According to Article 46 (16) (b) of Government Emergency Ordinance No. 194/2002, unmarried foreigners who cohabit with unmarried Romanian citizens and have at least one child born out of the said cohabitation have the right to family reunification, after having applied for a visa. These persons are referred to as partners.

year. [34]In this regard the Act has become stricter as under the previous regulation family reunification was allowed as soon as the temporary residence permit has been issued to sponsor.

The Slovenian Act does not contain any reference to the "reasonable prospect clause". As regards dual citizenship, if a sponsor is of Slovenian nationality, he/she will not be able to rely on the Directive. The Citizenship Act of Slovenia declares, that "unless defined otherwise by an international agreement, a citizen of the Republic of Slovenia having also at the same time citizenship of a foreign country is considered a citizen of the Republic of Slovenia while on its territory."[35] Thus, in the case of dual nationality, the person concerned falls under the regime provided for EU citizens.

The Aliens Act lists the family members entitled to family reunification, which are the spouses; unmarried children of the sponsor or his/her spouse who are under 18 years of age; parents (in the case of the sponsor being a minor); and adult unmarried children or parents who are legally dependent on the sponsor or his/her spouse.[36] Other members of the sponsor's family may be considered as family members only exceptionally, if the circumstances so require.[37]The Slovenian law does not set a minimum age for the spouse to join the sponsor and there are no special limitations on the application for family reunification of children aged over 15 either.

Analysis:

Who can be a sponsor under Directive 2003/86? Despite the fact that the concepts of reasonable prospect and permanent residence are the keys to the right of family reunification, the Directive remains silent as to their meaning. From the commentary in the amended proposal, it follows that the right to family reunification would not be open to persons staying only temporarily without the possibility of renewal.[38] None of the Member States under consideration refers explicitly to having reasonable prospects of obtaining the right of permanent residence. All of them allow for family reunification with a temporary residence permit, while Slovenia requires the sponsor to have resided there for the past year. In Austria**,** family reunion is dependent not on the residence period and/or title but whether or not the sponsor has fulfilled the integration agreement.

In Article 3 (3), the Directive confines its scope of application to family members of third-country nationals who are not Union citizens. By not providing a right to family reunification for EU citizens who have not exercised a right to free movement, the Community legislator not only put the issue of reverse discrimination on the agenda, but has also fuelled a discussion as to the legal regime that has to be applied in cases of dual nationality. It is 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. It can be particularly problematic if a Member State applies rules for its own citizens that are less favourable than those of the Directive.[39]

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[34]Aliens Act, Art. 36(1) "Aliens who reside in the Republic of Slovenia on the basis of a permit for permanent residence and aliens who have resided for the past year in the Republic of Slovenia on the basis of a temporary residence permit which was issued for a period of at least one year shall be granted, under the conditions of and in accordance with this Act, the right to reunion, preservation and reintegration of the family with immediate family members who are aliens."

[35] Citizenship Act of Slovenia, Art. 2

[36] Aliens Act, Art. 36(3)

[37] Aliens Act, Art. 36(1)and Art. 93k (1)

[38] OOTEROM-STAPLES, H.: The family reunification Directive. In BALDACCINI, GUILD, TONER: *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*. 2007.Hart publishing,at 457. COM 2002 225 at 5.

[39] 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 favorable rules for its citizens on this. This is the case in Cyprus, Lithuania, Germany and the Netherlands.

In the Member States in question, TCNs who also hold the nationality of those countries are not able to rely on the Directive. However, in most Member States where dual nationals are not able to profit from the provisions of the Directive, nationals are entitled to more privileged treatment than TCNs in the field of family reunification. Nevertheless, we must keep in mind that 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 countries.[40]

The national legislation of Member States varies also on the right to family reunification of non-Convention refugees. Among the Member States under consideration only Austria applies the Directive to beneficiaries of subsidiary protection. According to the Commission Report, the Commission will examine possible amendments to the Qualification Directive to extend Community rules on family reunification to beneficiaries of subsidiary protection.[41]

In respect of family members, most Member States made use of the optional clause and fixed a minimum age for the spouse, arguing that it can help prevent forced marriages.[42] However, among the countries under consideration, only Austria requires the spouse to be over 18 years of age. Although minimum age requirements are basically in accordance with Article 4(5) of the Family Reunification Directive, they are problematic if there is no scope for derogations in particular cases on the basis of the nature and solidity of the persons' family relationship, the duration of residence in the Members States and the existence of family, cultural and social ties (in accordance with Article 17).[43] In addition, the minimum age requirement is problematic from a human rights aspect, as it presumes that marriages between TCNs under a certain age are forced marriages. Finally, distance in the first years of marriage can break down the marital relationship itself. It is also highly questionable whether the introduction of minimum age requirements is a suitable means of achieving the objective of preventing forced marriages.

I share Boeles and Lodder's concern when they raise the question of how a minimum age requirement, that serves the purpose of integration imposed on the spouse, relates to the special rules for the admission of children of 15 years and older found in Article 4 of the

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In the latter Members State the Dutch Council of State explicitly 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. 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 States. The Middelburg Court therefore declared the Directive applicable to third country nationals who also possess Dutch nationality.
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 event of divorce, the end of cohabitation or death), the residence permit will be revoked. GROENENDIJK K/FERNHOUT,D./VAN DAM R./VAN OERS, R./STRIK, T..: *The Family Reunification Directive in EU Member States. The first year of implementation*. Centre for Migration Law. 2007,Nijmegen at 14.

[40] Ibid at 11.

[41] Commission Report 3.2.

[42] Five Member States (Belgium, Cyprus, Lithuania, Malta, the Netherlands) 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. Commission Report 4.1.
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.

[43] The German authorities can abstain from applying the requirement in cases of particular hardship. The Dutch legislation is more problematic where only those marriages are exempted which were concluded outside the Netherlands, provided that both spouses have reached the age of fifteen.

same Directive.[44] As regards minor children, who are 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. However, none of the Member States under examination stipulates a maximum age for children when filing their application for family reunification.[45] 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 either. As the said Article is a standstill clause (could only be introduced before the implementation date) such limitations in national legislation are now prohibited.

In addition to the nuclear family (the sponsor's spouse and minor children of the sponsor or spouse), 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. 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.[46] Moreover, in Belgium, Finland, Germany, Lithuania, Luxembourg and the Netherlands, registered partners have the same right to family reunification as married couples. However, none of the countries under discussion have extended the right to family reunification to partners, even if "registered partnerships" as such exist in each of them, except Romania.[47] Hungary, Slovenia and Romania, on the other hand, authorise family reunification for parents of the sponsor and/or his/her spouse, while Austria did not make use of the option of opening opportunities for family reunification to a wider circle of persons (neither for unmarried partners nor for first-degree relatives in direct ascending line).

In comparison with the status of family members of the EU citizens it can be said that the personal scope of Directive 2003/86/EC is narrower than that of the Directive 2004/38 as the group of mandatory family members that can be reunified is smaller for third-country nationals than for EU citizens.

[44] BOELES, P. and LODDER,G:, *Commentaar Europees Migratierrecht. Riichtlijn 2003/86/EG Artikel 4* (The Hague, SDU, 2006)

[45] Only two Member States apply this derogation, Germany and Cyprus.

[46] 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).

[47] Romanian law does not recognise forms of registered partnerships between men and women.

2. Waiting period

Directive:

According to the Directive**,** Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years before having the family join him/her. The maximum period is fixed at three years, if Member States already had legislation in place before the Directive entered into force, which took into account its reception capacity (Article 8 2003/86/EC). This means the application may be filed, but Member States may delay granting family reunification until the period determined by their legislation expires.[48]

National legislation:

In **Hungary** and in **Romania** no formal waiting period applies before an application can be filed. In those countries it is not necessary for the sponsor to lawfully reside for a specific period before applying for family reunification. However, as mentioned earlier, in **Slovenia** the sponsor is entitled to family reunification only if he/she has stayed in the country for the past year.

In **Austria**, the law does not explicitly stipulate such a waiting period, however family reunification for dependants of legally resident third country nationals who hold a settlement permit is subject to a yearly quota.[49] Since the number of applications for family reunification is higher than the number of available quota places, the consequences are waiting periods. If the quota for family reunification is exhausted, the authority in charge must not reject the application, but keep it for consideration the following year. This system has been subject to harsh criticism by human rights groups. In particular it was pointed out that even those third country nationals who have a legal right to family reunification were confronted with waiting periods. In 2003 the Constitutional Court decided that the application of the system of fixed quotas in the field of family reunification was unconstitutional because it did not allow any exceptions if family reunification was indicated by Article 8 ECHR.[50]The Constitutional Court did not revoke the quota system for family reunification in general, but it did address the circumstances of how the provisions were applied, the lack of transparency on how quota places are to be distributed, the fact that there is no right to appeal against such a decision, and the circumstances that it is unclear for the applicants, how long they have to wait until their admission. Concerning the transparent distribution of quota places, the new NAG – contrary to the old FrG – stipulates that applications for settlement permits within the quota have to be strictly ranked according to the date when the applications were filed and have to be recorded in a specific register by the provincial authorities.[51] Under current regulations, the waiting periods for family reunification must not exceed three years. If then there is still no place available within the yearly quota, family reunification has to be granted quota-free.[52] This rule was introduced to comply with the Directive and only applies to family reunification and not to any other category of settlement permits.

[48] Implementation problems therefore arise with any Member State that stipulates this two-year residence condition to run at the moment of application only (Cyprus, Lithuania). Commission Report. 4.3.5.
[49] NAG Art. 46. There is a special quota for key professionals (employed and self-employed) including their dependants.
[50] VfGH G 119, 120/03, 8 October 2003
[51] NAG Art. 12. "If, by the time of submission of and the decision on the application, the number of available quota spaces in the year in question has been exhausted within the register pursuant to Art. 2, the application shall, *except in cases of family reunification* pursuant to Art. 46, paragraph 4, be rejected."
[52] NAG Art. 12 (7)

	Directive	Hungary	Slovenia	Romania	Austria
Spouse / minimum age	Mandatory, 21 years	No	No	No	18 years
Minor children	Mandatory	Yes	Yes	Yes	Yes
Adult children	Discretionary	Health Reasons	Legally dependent	Dependency	No
Parents	Discretionary	Dependency	Minor Sponsor or legally dependent Parents	Dependency Medical reasons	No
Partners	Discretionary	No	No	No	No
Other family members	Discretionary	Siblings in case of health reasons	Only exceptionally	No	No
Period of residence	Up to 2 years	No	1 year	No	Yearly quota, up to 3 years
Type of residence	Reasonable prospects of permanent residence	Long term visa / residence permit	Residence permit	Residence permit valid for one year	Residence/ permit to settle

Below is a comparison with other Member States' legislation:

	Directive	Germany	Netherlands	Sweden
Spouse / minimum age	Mandatory, 21 years	18 years	18/21 years	18 years
Minor children	Mandatory	Yes	Yes	Yes
Adult children	Discretionary	Particular hardship	Disproportionate hardship	Member of the same household and dependency
Parents	Discretionary	Particular hardship	+65 if no child in country of origin	Member of the same household and dependency
Partners	Discretionary	Same sex (registered) partners	Registered or long term partners	Cohabiting partners
Other family members	Discretionary	Particular hardship	Disproportionate hardship	Member of the same household and dependency
Period of residence	Up to 2 years	2 years if family formation	No	No
Type of residence	Reas. prospects of permanent residence	Secure residence status	Non-temporary	Residence/ residence permit to settle

3. Requirements for family reunification, integration conditions

Directive:

Article 7 of the Directive deals with the possible requirements to be imposed on TCNs in order to exercise the right to family reunification. Member States may require the sponsor to demonstrate that he/she can provide adequate accommodation and health insurance for the entire family and sufficient stable and regular resources to sustain him/herself and the other family members.

The optional clause provided in Article 7(2) 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.

National Legislation:

In **Austria**, there are general admission criteria for entry, residence and settlement, which apply to all third country nationals. Among the general requirements for residence titles (which include applications for family reunification) lies the obligation of an applicant that s/he must demonstrate appropriate accommodation "an accommodation in conformity with local accommodation for national residents",[53]and sickness insurance[54] in respect of all risks normally covered in the federal territory. The law also requires the TCN to provide proof of stable and regular resources sufficient to maintain the family without recourse to the social assistance system: Article 11(4) of the NAG explicitly states that the residence of non-nationals must not lead to financial burden for the respective local authorities. Article 11(5) of the Settlement and Residence Act contains a more precise definition of the income requirement. Accordingly a financial burden for Austria may not be expected when the alien 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' and which correspond to the amount mentioned in Article 293 General Social Insurance Act (Allgemeines Sozialversicherungsgesetz ASVG). [55]

In Austria, to receive a residence title according to the NAG, applicants are obliged to conclude and fulfil the so-called integration agreement.[56]The "Integrationsvereinbarung" ("integration agreement") is one of the central measures of Austrian Aliens Law. It is compulsory for all immigrants who were admitted after 1 January 2006.[57]The integration agreement applied is aimed to foster the integration of permanently or long-term settled third-country nationals. Its main object is the acquisition of basic knowledge of the German language, especially the ability to read and write and the ability to participate in social, economic and cultural life in Austria.[58]

The 'integration agreement' consists of two modules: Module 1 provides reading and writing skills. This alphabetisation course comprises 75 units (each of 45 minutes). Module 1 has to be completed within twelve months from entry into Austria. Completing this course is a precondition for taking part in Module 2. Module 2 aims at learning the German language and

[53] NAG Art.11(2)(2)
[54] NAG Art. 11(2)(3)
[55] According to Art. 293 General Social Insurance Act, the net monthly income has to amount to at least EUR 1055.90 for a married couple plus EUR 72.33 for each minor child. If the couple is not married, the income must reach the amount of EUR 690 per person. The costs of accommodation have to be added to this minimum income, but under deduction of a flat sum of EUR 231,45. If, for example, a married couple has to pay a monthly rent of EUR 500 for accommodation, a monthly net income of EUR 1.324,45 is required (1055.90 plus 500 for rent minus the flat sum of 231.45). If the couple has one minor child, the amount increases to EUR 1396.78. This sum of additional EUR 72.33 per child is also applicable with regard to major children who are not yet economically independent from their parents. Social assistance payments cannot be regarded as income.
[56] NAG Art. 11(2)(6)
[57] Ibid Art.14-16
[58] Ibid Art. 14(1)

also contains elements of political education. The course provided for comprises 300 units and ends with a written examination. This module has to be completed within five years.

The 'integration agreement' may not only be fulfilled by getting through the courses offered, but also by providing evidence for the knowledge and skills required. Therefore Module 1 may be regarded as completed when the person concerned proves that he/she can read and write (e.g. in form of school reports). The accomplishment of Module 2 can also be established by proving knowledge of the German language through other evidence, such as school reports showing a sufficient knowledge of German.[59] This provision aims at people who visited school at least in part in Austria or who learned German in school in their home country. Children under the age of nine at the moment of their entry into Austria as well as elderly or sick people, who may not be demanded to fulfill the agreement, are not obliged to fulfil the 'integration agreement'.[60] However, there are no specifications of how this knowledge should be proved or evaluated in practice. The Austrian government pays a subsidy for participation in such a course, covering 50% of the costs, up to a maximum of 182 Euro - provided that the course is completed successfully within 18 months. Those who do not pass these courses in time have to bear higher costs for the courses – at least 75% of the costs within 24 months and the total amount if they require longer than that time. In addition, the law provides sanctions if someone fails to attend or pass these courses: Fines of 100 Euro (after 2 years) or 200 Euro (after 3 years) have to be paid. After 4 years the permission of settlement will not be extended – with the consequence of deportation.

In **Hungary** there is neither a formal requirement nor substantial criteria for integration of migrants into Hungarian society and the economy. The sponsor must have sufficient means of subsistence and financial resources to cover their accommodation costs for the duration of their intended stay and for their return to their country of origin or transit to a third country. The minimum amount is not regulated, and there is only a vague provision calling for adequate, available and lawful financial cover on self-subsistence and maintenance of all dependent family members by the sponsor.[61] In addition, the sponsor must have accommodation, full healthcare insurance or sufficient financial resources for healthcare services.[62]

According to the **Romanian** Aliens law, in order to have a residence right/permit issued or renewed, the sponsor must prove that he/she can support the dependant from the financial point of view. The sponsor must demonstrate that he/she earns at least the minimum amount in the Romanian economy that is sufficient both for him/herself and all the other members of the family.[63] He/she also must prove enough accommodation space for the dependants as is considered to be normal for a Romanian family.[64] The dependants must also prove they have medical and health insurance. Additionally, the sponsor must give a written declaration certified by a public notary that his/her dependants will live together in his/her accommodation facilities.[65]

Family members in Romania are not required to comply with any integration measures under the national law.[66]

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[59] Ibid Art. 14(5)

[60] Ibid Art. 14 (4) Key employees (skilled specialists) who are not staying longer than 24 months – and for those who can present a language certificate or prove their language knowledge by other means are also exempt from the "integration agreement" and from attending "integration courses"

[61] ThirdA Act Art. 13(1)(f)

[62] ThirdA Act Art. 13(1)(e),(g)

[63] Aliens Law Art. 46 (9) (c) provides that „The applicant should possess means of subsistence, apart from those necessary for his own subsistence according to the law, to an amount corresponding to the minimum net wage at national level for each family member."

[64] Ibid Art. 46(9)(b)

[65] Country Report Romania EMN at 7.

[66] However, in order to ensure a proper integration of foreign citizens, Romanian state authorities provide opportunities for TCNs to take part in a wide range of cultural activities, such as: language courses, and other different courses which help family members become acquainted with Romanian history, culture and civilization as well as with its legal system.

According to the **Slovenian** law, in order for a family member to be granted a residence permit, the sponsor must submit evidence that he/she possesses sufficient financial resources to support the immediate family members who intend to reside in Slovenia.[67]The Aliens Act also declares that an alien who wishes to reside in the territory of Slovenia must be in possession of the appropriate health insurance and sufficient funds for livelihood during their residence in the country, or other guarantees that their livelihood will be provided during their residence.[68] In Slovenian law, however, there is no housing requirement in respect of family reunification.

	Directive	**Hungary**	**Slovenia**	**Romania**	**Austria**
Adequate accommodation	Yes	Yes	No	Yes	Yes, prior to entry
Sufficient resources	Yes	Yes	Yes	Yes	Yes
Health insurance	Yes	Yes	Yes	Yes	Yes
Integration conditions	Yes	No	No	No	Yes, integration agreement
Spec. int. con.	Minors above 12, arriving independently	No	No	No	No

	Directive	**Germany**	**Netherlands**	**Sweden**
Adequate accommodation	Yes	Yes	Yes	No
Sufficient resources	Yes	Yes	Yes, 120% min. wage (Chakroun case)	No
Health insurance	Yes	Yes	Yes	Yes
Integration conditions	Yes	Yes	Yes	No
Spec. int. con.	Minors above 12, arriving independently	Minors above 16, arriving independently	No	No

The above comparative chart also summarises other Member State legislation:

Analysis:

In respect of the housing requirement this met with little opposition during the negotiations of Directive 2003/86/EC, although 2004/38/EC does not impose a housing condition on EU citizens for family reunification. It was included in Article 10(3) of Regulation 1612/68 which was repealed when Directive 2004/38/EC entered into force. This article explicitly stated that, when determining whether accommodation is to be classed as normal, this should not

[67] Aliens Act, Art. 36(5)
[68] Ibid Art. 27(3)

amount to discrimination. The family reunification directive lacks such reference. This, however, does not mean that Members States have a free hand in determining whether housing is normal. In Peers' and Oosterom-Staples' view[69] the reference to health and safety standards, the social status of the family and the number of family members should serve as a guarantee against discriminatory application of the above requirement.[70]

Apart from Slovenia, all Member States under consideration introduced and/or maintained accommodation conditions.[71] The practice in Austria 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. Aliens who want to bring their family members to Austria are confronted with a practical problem. They are required to submit evidence of a legal title to accommodation suitable for the whole family already with the application for family reunification, although their family members often are allowed to enter Austria only after a considerable waiting period (presented above). That means the applicant has to enter into a tenancy agreement for a bigger and therefore more expensive flat months before the accommodation is in fact needed for the family.

All the Member States under examination make use of the health insurance criterion, as do more than half of the EU states. However, the Commission found the Hungarian system problematic since it 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.[72]

In respect of the financial resources requirement, the "stable and regular resources condition" is applied in all Member States except Sweden. However, this will change in the near future since, following the presentation of an interim report by a parliamentary committee in 2002 on this matter, it has been proposed to introduce such a financial and housing requirement as a precondition for family reunification in the near future.[73]

Other member states make use of this criterion with different modalities[74]either without being more precise (Hungary), or by delegating such precision to local provisions (Germany), or by referring to the minimum wage (Romania) or to the minimum income below which social allocations are granted (Austria).

The main purpose of applying an income and housing requirement is to promote the integration of the sponsor and the incoming family members. Many believe that income and housing requirements can solve the problems resulting from the segregation of immigrants as it gives new arrivals an incentive to enter into employment, earn their own living and settle in municipalities with good opportunities to find employment and normal accommodation.[75]

Laying down these conditions can be problematic only if their application is discriminatory or does not give any scope for individual examinations on the part of Member State authorities. Such a discriminatory application arose in the well-known Chakroun case.

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[69] OOTEROM-STAPLES, above n 37 at 472, PEERS, S.: Family Reunion and Community Law, in WALKER, N.: Europe's Area of Freedom, Security and Justice. 2004. Oxford University Press, at 184.

[70] COM 1999 (0638) 18. Criteria as to size, hygiene and safety may not be stricter than for accommodation occupied by a comparable family (in terms of number of members and social status) living in the same region.

[71] 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, Romania, Slovakia, Spain and the United Kingdom

[72] Commission Report 4.3.2.

[73] In 2008 December a committee report was submitted to the government: it contained an explicit reference to the Family Reunification Directive, which allows for the imposition of housing and income requirements.

[74] The required approximate monthly income ranges from €120 (Poland) to €1 484 (the Netherlands).

[75] OOSTEROM-STAPLES above n 37 at 472

In the Chakroun case[76] the CJEU had to provide an interpretation of two provisions of the Family Reunification Directive to determine whether the Dutch implementing measures were in compliance with EU law.

The case concerned a Moroccan national, Rhimou Chakroun, who wished to join her equally Moroccan husband Mohammed Chakroun in the Netherlands. Mohammed Chakroun has resided in the Netherlands since 1970 and holds a permanent residence permit. In 1972, two years after his moving to the Netherlands, the couple got married in Morocco, where the wife continued to reside for the following years. In 2006, she decided to apply for a provisional residence permit to live with her husband in the Netherlands. Unfortunately, at that point in time Mr. Chakroun was receiving unemployment benefits. The Dutch authorities refused the application on the grounds that Mr Chakroun's income was below the minimum income applicable to family formation under the Dutch Aliens Order. The Dutch forum asking for a preliminary decision of the CJEU enquired first whether member states are entitled, by virtue of Art. 7(1)(c) of Directive 2003/86/EC, to deny family reunification to a sponsor who has stable and regular resources to meet general subsistence costs, but who will been entitled to claim special assistance. Second, the Council of State asked whether the Directive, and in particular Art. 2(d) thereof, precludes national legislation that makes a distinction according to whether a family relationship arose before or after the entry of the resident into the member state. It declares that, in order to fall under the definition of family reunification in the sense of the Directive, no distinction is made between cases where the family relationship arose before or after the sponsor's entry.

Dutch immigration law, however, draws a distinction between those cases where the family relationship already existed prior to the sponsor's entry into the Netherlands (family reunification) and cases where the family relationship was created at a time when the sponsor was already living in the Netherlands (family formation). Under Dutch law since 2004, in the case of family formation, the permanent and individual net income must amount to at least 120% of the Dutch minimum salary for a worker aged 23 years or older. However, in cases of family reunification, the net income must be equal to the statutory minimum wage.

Thus, such a distinction between family formation and family reunification could be questioned on the basis of the Directive When answering the relevant questions, the CJEU relied on its previous case law concerning Union citizens as to the interpretation of the provisions of Directive 2003/86/EC on the right of family reunification. First, the Court held that Article 7(1)(c) of the Directive, which contains the requirement of stable and regular resources of the sponsor as a precondition for family reunification, precludes the application of a minimum income requirement which amounts to 120% of the national minimum salary. Even though Member States are allowed to take into account the level of minimum wages when evaluating the sponsor's resources, they may not operate a minimum income level below which all family reunifications will be refused. This stems from Article 17 of the Directive, which stipulates that an "individual examination of applications for family reunification" is required under all circumstances. The Court also emphasised that the Directive precludes Member States from making a distinction between family relationships that arose before or after the sponsor entered the territory. Such a difference in treatment is not warranted by the relevant provisions of the Directive.

Underlying this, the Court referred to Article 8 of the ECHR, but also to its judgement in Metock[77] which concerned TCN family members of union citizens. In that case the Court declared that the requirement of "prior lawful residence" must be reconsidered and held that a non-Community spouse of a Union citizen who accompanies or joins that citizen can

[76] Case C-578/08, *Chakroun* [2010] ECR I-0000.

[77] Case C-127/08 Metock and Others (2008) ECR I-6241, para 93. In the Metock case, TCN spouses applied for a residence card as the spouse of a Union citizen. The applications were refused by the Minister for Justice on the ground that the spouse did not satisfy the condition of prior lawful residence in another Member State. CURRIE S., "Accelerated justice or a step too far? Residence rights of non-EU family members and the Court's ruling in Metock", European Law Review, Vol. 34, 2009, pp. 310-326.

benefit from the 2004/38/EC directive, irrespective of when and where their marriage took place and of how that spouse entered the host Member State.

Second, the Court also declared, that concept of 'social assistance' in the Directive refers to assistance granted in compensation for a lack of stable, regular and sufficient resources, and not to special assistance, which covers exceptional or unforeseen needs. When interpreting the requirement of having "sufficient resources" so as not to rely on "social assistance", the CJEU referred to its previous judgement in Eind[78], which similar to the Metock case also concerned a TCN family member of a Union citizen.

The above references by the Court to the Eind and Metock cases in the Chakroun judgement indicate that some key concepts, benefits and rights (and the exceptions applicable to these) of non-EU nationals will presumably be more frequently interpreted in the light of European citizenship and free movement law.

With regard to the integration conditions, only a few Member States have introduced an integration measure into national legislation. Three of them (the Netherlands, Germany, France) use it as a condition before admission to the territory.[79] Other member states, like Austria, require family members to participate in integration courses or to pass language exams after admission. Hungary, Slovenia and Romania do not apply any condition in respect of the integration of TCNs. However, several arguments emerged against the integration agreement applied by Austria. One of the most pertinent is that it is not an agreement, since an agreement is based on the free will and decision of both partners signing a contract. The immigrants are obliged to sign the agreement and there is no way to negotiate its conditions. Secondly, the law has little to do with integration. It sees integration as a one-sided responsibility of the immigrant, while there is no mention made of the role of any native Austrians in that process at all. It is a concept that has much more to do with assimilation than with an understanding of integration as a mutual process of immigrants and the host community. Moreover, it defines integration as an capability of the immigrant, which can be taught and learned in so-called "integration courses" and measured by the degree of language proficiency. However, better language skills do not automatically lead to better integration. Language skills can support integration but they cannot substitute for integration on an economic and social level.[80]

Integration measures' admissibility under the Directive depends on whether they serve the purpose of facilitating the integration of family members and whether they respect the principle of proportionality as a general principle of EU law. Thus, integration tests may fail the proportionality test if they do not allow for a balancing of factors in each individual case, as required by Article 17.The admissibility of integration measures can thus 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.), and whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families). [81]

Apart from integration requirements, Union citizens and their family members enjoy a more favourable position than TCN family members for other conditions. Even though Union citizens and their family members are also required to comply with the condition of having sufficient resources, the 2004/38/EC Directive expressly states that recourse to the social assistance system of the host Member State shall never have an automatic consequence of

[78] Case C-291/05 Eind (2007) ECR I- 10719

[79] Germany 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 France 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. The Dutch authorities require family members to pass a first integration test covering language and knowledge of Dutch society, which can only be taken in their country of origin.

[80] http://international.metropolis.net/events/8th_vienna_conf_2003/en/WS8.2Rieder.pdf

[81] In respect of the integration conditions before entry, it must be emphasised that requirements attached to the right to family reunification must always be interpreted restrictively and may not amount to a complete denial of family reunification.

an expulsion measure for Union citizens. However, an explicit reference to Union citizens case law in a judgement concerning resource requirements for family reunification of TCNs suggests that the Court will apply a similar concept for individuals with different status.

4. Residence and working rights of family members

Directive:

Articles 13 to15 lay down the conditions for entry and residence of family members. Article 13(1) declares that, 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. Member States are under an obligation to process an application for family reunification as soon as possible and in any event no later than nine months from the date on which the application was lodged. In accordance with Article 13 (2) of the Directive, family members shall granted a first residence permit with a duration of at least one year, which is renewable. 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 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.)

Although strictly speaking not a right, possessing a residence permit has proven to be of great importance for foreigners in the sense that, in practice, it is conducive to actually exercising the rights listed in Article 14 of the Directive. It is therefore commonsense to discuss this provision in this section.

After having been admitted on the basis of family reunification, family members acquire the right of access to education, employment and self-employed activity, as well as to vocational and further training in the same way as the sponsor.[82]However, the right to work is not absolute, as Article 14(2) permits Member States to decide on the conditions under which this right can be exercised. Therefore, a time limit for exercising this right may be set, as long as it does not exceed a period of 12 months. During this period Member States can examine the situation of their labour market prior to authorising family members to exercise their right.

National legislation:

According to NAG, family members in general have to apply for a settlement permit before entering **Austria**.[83] The application has to be submitted to the competent Austrian authority in the country of origin, i.e. the consulate or embassy (consular office). The entry into Austrian territory is only allowed after the settlement permit has been granted; the family member concerned therefore has to await the decision in his/her country of residence. Some exceptions to this general rule are provided for in Art. 21(2) Settlement and Residence Act.[84]

[82] Article 14 (1) a-c of the Directive.
[83] NAG Art. 21(1)
[84] According to this provision, the following groups of aliens may file their application in Austria: aliens who have been entitled to reside in Austria (irrespective of whether they needed a settlement permit under the Austrian aliens law or not), aliens who have been Austrian citizens or citizens of a member state of the EEC but have lost their citizenship, newborn children under the age of six months, aliens who may enter Austria without a visa, but only during their authorised sojourn, aliens who apply for the special settlement permit reserved to scientists (Art. 67 Settlement and Residence Act). All these groups comprise aliens who are already staying lawfully in Austria and who can therefore not be obliged to leave Austria while their application for family reunification is pending. In practice this exception is relevant for people who did not need a settlement permit in Austria so far or who want to change the type of settlement permit granted. Another exception is provided for in Art. 74 Settlement and Residence Act: in exceptional circumstances the competent authority may accept an application filed in Austria, if

According to the Austrian Act on General Administrative Procedural Rules (Allgemeines Verwaltungsverfahrensgesetz), the Austrian public administration authorities are obliged to decide within six months from the date of the application being lodged.[85]

Usually the first settlement permit is valid for one year, with the exception of key professionals and their dependants, for whom a first settlement permit is issued for a period of a maximum 18 months.[86] In no case may the duration of validity of the dependant's permit exceed the validity of the sponsor's permit.

With regard to family reunification, access to employment in Austria depends on the type of settlement permit issued for the family member. As the type of residence permit granted to family members depends on the settlement permit of the sponsor, their access to employment also depends on the status of the sponsor. If the sponsor has a settlement permit not entitling him/her to access to employment ('settlement permit - except employment'), the family members accepted for family reunification are also granted only this type of settlement permit that does not allow any employment.

If the sponsor has been granted a 'settlement permit - limited', he/she may take up employment only if permission under the Employment of Aliens Act is granted. If the sponsor holds this type of settlement permit, other family members are granted a 'settlement permit - limited' too. Family reunification with regard to sponsors holding a 'settlement permit - limited' is only possible if the sponsor has already fulfilled their 'integration agreement'. Family members need a permit under the Employment of Aliens Act if they want to engage in an employment. The granting of the required permit under the Employment of Aliens Act depends on the employment status of the sponsor. If the sponsor has been granted an employment permit other family members may also be granted such a permit. An employment permit is granted only in respect of a specified employer. The permit has to be applied for by the employer; the alien concerned is not able to change their job without obtaining a new permit. In such cases, permission may also be issued if the relevant maximum number of permissions to be granted in each year has not already been exhausted.[87] After twelve months, the granting of an employment permission may no longer be refused because of the labour market situation.[88] If the sponsor is holding a work permit other family members may also be granted a work permit [89] if he/she has already been residing in Austria for at least twelve months. A work permit allows any employment in the county it is issued for. Other than employment permits, work permits are not limited to a specified employer. If the sponsor is granted a 'settlement permit - unlimited' or 'permanent settlement - EC' after the family reunification has been accepted, the family members are entitled to a 'settlement permit - unlimited' after their settlement has lasted twelve months.[90] The 'settlement permit - unlimited' entitles employment without a further permit under the Employment of Aliens Act.

Hungary does not deem it useful to have a specific procedure, but deal with family reunification within the general immigration rules. A residence permit is usually issued for three years with a right to renewal. A residence title for the purpose of family reunification may not exceed the period of validity of the sponsor's long-term visa or residence permit.[91]

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there are humanitarian reasons justifying the further sojourn in Austria. According to the case law of the Constitutional Court and the Administrative Court this is especially the case when a right to family reunification can be derived from Art. 8 ECHR (Constitutional Court G 119, 120/03, 8 October 2003).
http://cmr.jur.ru.nl/cmr/qs/family/Austria/

[85] AVG Art. 73

[86] For residence permits, the period of validity last for up to one year.

[87] Employment of Aliens Act Art. 4(6)

[88] Ibid Art. 4(8)

[89] Ibid Art. 14(a)(1)

[90] Settlement and Residence Act, Art. 46(5)

[91] ThirdA, Art. 19(9) - (10)

In the Republic of Hungary the procedure of issuing work permit falls under the competence of the Ministry of Social Affairs and Labour and the work authorities. The several times amended Ministerial Decree 8/1999. (XI.10.)7 regulates the employment of foreigners in Hungary and contains provisions on the different types of work permits, exemptions from obtaining a work permit and the procedural rules.

The ministerial decree (PermitD)[92] states in Section 2(1) that the creation of all legal relationships aimed at employment, on the basis of which a foreigner performs work in Hungary for a domestic employer, are subject to permission, unless falling within the exceptions contained in the EmployA[93] and PermitD. Regular migrants in possession of settlement permit, however have the right to be employed without a labour permit.[94]The spouse of a sponsor holding a permanent residence permit obtains a labour permit without investigation of the local labour market supply if he or she has been living together with the sponsor in Hungary for at least one year prior to the submission of the application. It means an almost automatic authorisation. The same provision applies to the spouse and descendents of a migrant worker who has been employed in Hungary for at least the preceding eight years, if they have been living together with the sponsor in Hungary for at least the preceding five years.[95] A labour permit requiring a bureaucratic investigation of the labour market needs and supply (economic test) is necessary in all other cases. [96]

According to **Slovenian** law, a temporary residence permit for a close family member of a TCN who permanently resides in Slovenia is granted for the period of one year and extended for a period of up to two years.[97] With regard to the conditions of employment, in order to provide a better mechanism for identifying and regulating various forms of work of aliens, a new Employment and Work of Aliens Act,[98] came into force on January1, 2001 and has been since that date amended twice.[99] In accordance with the relevant provision of the Employment and Work of Aliens Act, [100]a close family member[101] may require a personal work permit valid for three years if s/he is a family member of a TCN who has a personal work permit for an indefinite period of time and a permit for temporary residence for the purpose of family reunification. For this type of work permit a close family member of a TCN who has completed a research programme in Slovenia or of a TCN who has the status of researcher and finds an employer or becomes self-employed within a period of one year may also apply.[102]

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[92] Ministerial Decree No.8 of 1999, 10 November of the (then) Minister of Social and Family Affairs
[93] The Act IV of 1991
[94] EmployA Art. 7
[95] PermitD Art. 6(g); Art. 6(h).
[96] PermitD Art. 2.
[97] On the application of a TCN who unites his or her family, close family members who are TCNs are granted a temporary residence permit that is valid for the same period of time as the applicant's, but not longer than one year. The permit may be extended for the period of time equal to that granted to the applicant's temporary residence permit, but not longer than two years. Refer to Article 36 of the Aliens Act.
[98] See *Official Gazette of the Republic of Slovenia*, No. 76/2007-UPB2 (official consolidated text 2)
[99] The work permit quota is the main instrument of limiting the maximum number of aliens in the labour market. It is annually determined by the Government, taking into account fluctuations and conditions of the labour market, but it may not exceed 5 per cent of the actively working population of Slovenia on an annual basis. TCNs who are to gain a new work permit are categorised in the following priority order: (i) those who are to be issued a work permit irrespective of the situation and conditions on the labour market; (ii) immediate family members of TCNs in possession of personal work permits for an indefinite period of time; (iii) TCNs with professional qualifications in skill-shortage occupations; (iv) migrant workers from neighbouring countries; (v) long-term residents and close family members of TCNs who have a temporary residence permit
[100] Art. 10(8)
[101] Under paragraph 10, immediate family members of an alien shall be deemed to be spouses, unmarried minors of the alien, unmarried minors of the spouse, parents of a minor alien, adult unmarried children and parents of an alien or spouse, whom an alien or spouse is liable to maintain in accordance with the law of the state of which he/she is a national. Under this Act, immediate family members of an alien shall be deemed to be also other relatives to whom an authority in charge of issuing a residence permit has issued a permit for residence in Slovenia for the purpose of family reunion.
[102] Researcher as defined in Articles 2 of the Employment and Work of Aliens Act and of the Aliens Act.

In **Romania** the request shall be processed within a time limit of a maximum 3 months from the date of submission.[103] The residence permit for the family members is granted, individually, for each dependant for the same period as the sponsor. The dependants of the sponsor who benefits from long term/permanent residence shall be issued residence permits for a maximum 5 years. Aliens who intend to get employment in Romania shall obtain a long-stay visa issued based on a work authorisation. The residence permit is granted upon presentation of the individual work contract and other documents proving the amount of salary (minimum wage in the Romanian economy), medical insurance, and also a fiscal certificate proving the hiring company is requesting a long stay visa issued on the basis of authorisation to work is required.[104]

Analysis:

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 mainly the sponsor who introduces the family reunification request in most Member States such as in Romania and Slovenia. In some Member States, other family members can also introduce the reunification request, except for Austria and Hungary where the applicant can only be a family member. 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.[105] Among the Member States under consideration, Hungary impedes this provision as it does not even enact the primary rule of family members having to reside outside their territory. [106]All other Member States[107] 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. Among the Member States under consideration we need to highlight the relevant legislation of Austria, which makes it possible only on humanitarian grounds for TCNs to reside in the territory Member State at the time of the application.

Concerning employment rights, according to the Directive a relative form of equal treatment is to be provided for the family member. If the sponsor does not have access to employment nor does the family member, under the Directive. Some Member States, such as Austria 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. [108]

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). 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 Austria, Hungary and Slovenia as well. The European Commission, however, has criticised how some Member States like Hungary,

[103] Alien's Law Art. 46(11)
[104] EMN Report Romania at 9.
[105] As the Directive requires that the family member resides outside the territory of the Member State at the time of the application, TCN family members have to await the outcome of the proceedings in the country of origin. This leads to the phenomenon that spouses staying in Austria with their Austrian or third country national partners are no longer able to apply for a settlement permit in Austria but have to leave Austria and stay in their country of origin until their application has been accepted. This is problematic especially in cases where the spouse has left his/her country of origin due to fear of persecution but has not yet been recognised as a Convention refugee. In these cases the Austrian authorities demand the asylum seekers to withdraw their application for asylum before a settlement permit is granted. This leads to a loss of the provisional right to stay in Austria granted to asylum seekers and requires that these persons return to their country of origin to file an application for family reunification. It seems that many asylum seekers followed this proposal of the authorities before the entry into force of the new legislation because they were promised to be granted a settlement permit under the old legislation and are now in a precarious situation because the authorities did not decide on the basis of the old legislation and the persons concerned therefore lost their provisional right to stay in Austria on 1 January 2006.
[106] Commission report 4.4
[107] Except for Cyprus
[108] GROENENDIJK above n 5 at 34., COM 2008 (0610) 4.5.2.

Germany and Slovenia have gone further than is allowed under the Directive, as certain categories of family members can be completely denied access to the labour market, whilst the Directive only allows [109]for the application of a labour market test. According to the German legislation, the right to full access to the labour market is not granted to family members after two years of residence if the sponsor only has a temporary residence permit that cannot be extended on the basis of a legal provision.

Contrary to the Commission's view, the German government argues that the provision is in compliance with Article 3(1) of the Directive, which states that the Directive only applies to sponsors with a reasonable prospect of permanent residence.[110]According to the explanatory documents, this means that the right of family members to exercise an economic activity is not applicable if the sponsor merely holds a temporary residence permit that cannot be extended. There are, however, no indications in the explanatory documents explaining the necessity to introduce this last, more restrictive provision in the wake of implementing Directive 2003/86/EC. Even though the Directive itself only applies to sponsors with reasonable prospects of obtaining a permanent residence permit, Article 3(5) allows Member States to maintain or introduce more favourable provisions.[111]

The above restrictions, however, are not applied to family members of Union citizens under Directive 2004/38. They enjoy free access to the labour market of the host state and full equal treatment with nationals of that state from the first day of entry.

5. Autonomous residence permit

Directive:

The conditions relating to the granting of an autonomous residence permit as well as the duration of its validity are to be determined by national law. Article 15 does, however, include a number of obligations for Member States. According to Article 15 (1), after up to five years of residence, a sponsor's spouse and children having reached majority must be granted an autonomous residence permit. This period corresponds with the five year period in Article 4(1) of the Long-term Residence Directive that allows a TCN to apply for the status of long-term resident. The Directive Art 15(3) stipulates that Member States may issue an autonomous residence permit for persons entering for the purpose of family reunification, in the event of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line where the applicant has entered by virtue of family reunification. There is no choice concerning the obligation to lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

National legislation:

Austria made use of the maximum waiting period of five years provided for in Article 15 of Directive 2003/86/EC before an autonomous residence permit may be granted. In the Austrian law the right to residence/settlement of family dependants is derived from the right to residence, and settlement of the sponsor. Only dependants who hold a settlement permit can acquire an autonomous settlement permit after five years of settlement, or even earlier, if

[109] In three of those Member States (Germany, Hungary and Slovenia), the use of the exception exceeds that 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.
[110] Bundesrats-Drucksache 224/07, p. 296.
[111] DIENELT, K.:" *Die Auswirkungen der Familienzusammenfürungsrichtlinie auf die Möglischkeit der Aufname einer Erwerbstatigkeit*"(2006), Informationsbrief Auslanderrecht 2006, at 1-3.

they fulfil the general conditions for settlement permits by themselves.[112] For residence permits, these provisions do not apply.

There are special rules in the event of family relations breaking down before this five-year-period has ended. In the case of a breakdown of the family relationship or a loss of the sponsor's right to reside in Austria within the first five years, the settlement permit of spouses or children will in general not be renewed.

However, Article 27(3) Settlement and Residence Act provides for exceptions from this general dependence on the sponsor. According to this provision, the settlement permit will be prolonged irrespective of the loss of family relation in the event of the spouse's or the parents' death, divorce through the sponsor's fault or other special circumstances. Such special circumstances exist, for instance, when the person concerned is a victim of violence exerted by the sponsor and the sponsor was expelled from the family's accommodation by the police due to his violent behaviour or when the sponsor has lost his settlement permit due to a conviction for an intentionally committed offence.

As mentioned above, dependants do not lose their right to settlement if they are able to sustain themselves and more precisely, if they fulfil the general requirements for residence titles.[113] After five years, spouses and children are entitled to an autonomous settlement permit, if they meet the general requirements provided for in Art. 11 Settlement and Residence Act, and if they have fulfilled the 'integration agreement'. This means, in particular, that the person concerned has to provide evidence on sufficient income, accommodation and sickness insurance. If these requirements are met, the alien is granted a settlement permit called 'permanent residence - EC'. This permit is unlimited in duration and entitles employment in Austria.

In **Hungary**, the general rule is that the family member is entitled to continue to stay, even in the absence of other grounds, if five years have passed since the first issue of a residence permit for family reunification, or in th event of the sponsor’s death or that of the recognised refugee if the conditions for residence are secured. [114]

The ThirdA Act changed the rules on the consequences of divorce on the settlement permit: the spouse of the divorced sponsor only loses the right to stay if the divorce occurs within three years (and not five) from granting the settlement permit.

“The immigration authority may withdraw any authority to reside if the permit was issued on the grounds of family reunification, and the marriage was dissolved within three years from receipt of the permit for reasons other than the spouse's death, or if the third-country national no longer has parental custody, unless the third-country national in question has resided in Hungary for at least four years under permanent resident or immigrant status.” [115]

After five years of residence in **Slovenia** on the basis of a temporary residence permit, a spouse or unmarried partner and children are entitled to an autonomous residence permit. According to Article 36(8) the residence permit of an immediate family member of a foreigner may be extended if the duration of the marriage in Slovenia has been at least three years, even in the event of the death of the alien concerned or after the end of the marriage. The aforesaid permit shall be extended only once for a validity of up to one year.

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[112] NAG Art. 27. „Family members with a settlement permit have the right of residence derived from the sponsor, valid for up to five years. The right of continued abode shall remain if the requirements for the family reunification cease to exist later then five years after granting of the initial settlement permit. The lost of the settlement permit of the sponsor in the first five years shall cause the loss of the settlement right of the family member *ex officio*.”

[113] NAG Art 27(2) in corroboration with Art.11(2) (2-4). The latter provides for fulfilling the requirements for sufficient resources, accommodation and health insurance.

[114] ThirdA Act Art 19(1) (7) “Family members - unless they have obtained the right of residence on any other grounds - shall be authorised to extend their right of residence after five years from the date of issue of their first residence permit, or upon the death of the spouse or the persons with refugee status, and if other requirements for further residence are ensured.”

[115] ThirdA Act Art. 37 (1) (b)

In **Romanian** law, aliens holding a right of stay for family reunification may have their right of stay extended independently if they reach adulthood or if the person who requested the family reunification dies or the marriage upon which reunification was made ends in divorce or annulment. Once a child reaches the legal age of majority in Romania their residence or settlement permit becomes an independent right of residence in its own right, which is not related to family reunification.[116]

Analysis:

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 use this maximum five years.[117] In the Commission's view, Romania implemented this provision too restrictively, by including a closed list defining when the autonomous residence permit should be issued (namely when the minor becomes an adult, if the sponsor died (for any other person), or in cases of divorce (for the husband/wife). In addition, in Hungary, the five years count from the first issue of a residence permit which can be problematic as well if the family member was first holding a visa before obtaining a residence permit.

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. It is unfortunate that several Member States did not provide such a provision.

Concerning autonomous residence titles, Austria transposed the option to issue an autonomous residence title to dependants in difficult circumstances (e.g. widowhood), which is independent from the sponsor's right to residence.[118] However, with respect to Article 15(3) of the Directive the requirement of a divorce through the sponsor's fault seems to be problematic. This limitation is not provided for in the Directive and the requirement of a divorce on the fault of the sponsor will also give rise to practical problems as the assessment of fault of one of the spouses in the case of divorce is not known to all legislations. I agree with Ecker's view when he asserts that the clause was not correctly transposed into national law, because the Directive does not envisage any specification regarding the person who bears the responsibility for the divorce.[119]

The mandatory provision to lay down the rules of granting an autonomous residence permit was impeded by Hungary, Slovenia and Romania.

In any case, it seems that, in respect of rules on the acquisition of an autonomous residence right to family members, the Directive does not seem to have led to the introduction of more restrictive rules, which means that the granting of an autonomous residence permit to family members of TCNs after several years is a less sensitive issue than admitting them in the first place.[120]

Contrary to the legal status of TCNs, family members of Union citizens, in the event of death or departure of the sponsor, have a right to remain in the Member State if certain conditions are fulfilled, whereas family members of TCNs have to rely upon the discretion of the Member State concerned. The TCN family members of Union citizens who fall under the 2004/38/EC Directive will receive a permanent residence permit after five years in the host

[116] Aliens Act Art. 64(1)(a) The alien holding a right to residence for family reunification may be granted an extension of the right to temporary residence for family members of the sponsor if they become major, the sponsor has deceased or the marriage has been dissolved.

[117] Belgium, the Netherlands and France require only three years of prior residence

[118] The possibility to obtain an autonomous residence permit is another field where the implementation of the directive improved the situation of third country nationals in Austria. Under the old legislation there were no provisions with regard to exceptional circumstances as mentioned in Art. 15(3)of the Directive.

[119] ECKER, J.M.: *Umsetzung der RL 2003/86/EG durch das Fremdenrechtspaket 2005*? In: Migralex, Vol. 2/2007. at 53.

[120] This is also underlined by Wiesbrock as regards Sweden, Germany, and the Netherlands, ibid at 371

state. Family members of TCNs have that possibility only if they apply for an EC long term residence permit and fulfil the conditions attached to the acquisition of that status.

6. Grounds for rejection, refusal and withdrawal

Directive:

In line with 6(1) and (2) of the Directive, Member States are allowed to reject an application as well as to withdraw or refuse to renew the residence permit for family reunification if this is justified on the grounds of public policy, public security or public health. When taking such a decision, besides considering the seriousness of the offence committed, Member States are required to take the person's personal circumstances into account, having regard to the stability of the family relationship, the duration of residence and the existing ties with the country of origin (Article 17). In addition, Article 16 of the Directive contains a number of grounds upon which Member States can refuse to grant a residence permit (or refuse to renew or withdraw one). This will be the case if the conditions laid down in the Directive are no longer satisfied. Possible grounds for refusal/withdrawal also include the situation where the sponsor and his family members do not (or no longer) live in a real marital or family relationship and where the sponsor is in a stable long-term relationship with another person. In addition, an application for a residence permit may be refused on the basis of the provision of false or misleading information, or a marriage that has been contracted solely for the purpose of enabling one of the spouses to enter the host state.

National legislation:

In **Austria** the general requirements for residence titles apply to all third country nationals in Austria including dependants.[121] One of these requirements is the condition that the residence of an alien must not contradict public interest. Art. 11(4) Settlement and Residence Act specifies under which circumstances this is the case. According to this provision, the sojourn is contrary to public interest when it either threatens public order or public health or if the person concerned has a terrorist background. The latter exclusion clause is defined as close connections to extremist or terrorist groups (if, with regard to their structures or future prospects, extremist or terrorist activities cannot be ruled out). As the explanatory report states, the sojourn of an alien constitutes a threat to public order or security 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 respect of public health, Austrian immigration law provides that a person applying for a settlement permit has to submit a medical certificate stating that the applicant does not suffer from certain serious diseases, mentioned in Art. 23 Aliens Police Act, if the applicant has been in a country where a high risk of these diseases exists within the last six months. The countries concerned have to be listed in a regulation by the Ministry of Health. Up to now, however, no such regulation has been set into force.

It has also to be taken into account that the NAG and the Austrian Aliens' Police Act (FPG) entails the principle of 'consolidation of residence' even if it only applies to holders of a settlement permit, not to the holders of a residence permit. Consequently, after a longer period of settlement (5, 8, 10 years), the renewal of a permit must not be refused, even if the applicant would no longer comply with certain basic conditions for the granting of a settlement permit.[122] The same applies to expulsions and removals.

The NAG contains provisions against "fictitious marriages". This is an issue, which the new

[121] Art. 11 Settlement and Residence Act provides for general requirements that have to be fulfilled by any alien who applies for a settlement permit, irrespective of whether the person concerned applies for family reunification or any other settlement permit. According to Art. 11 § 2 No. 1 Settlement and Residence Act a settlement permit may only be granted if the applicant's sojourn in Austria does not conflict public interests.
[122] FPG Art. 55

Aliens' Law Package aimed to address specifically. A spouse who does not live in a real marital relationship, according to Art 8 ECHR, cannot refer to their marriage for the sake of keeping or receiving a residence title.[123]The same counts for adoptions where the hidden intention is to get a residence title.[124] The responsible authority for examinations related to such cases is the Aliens' Police. According to administrative and criminal law, sanctions are foreseen for both partners if a marriage or adoption was contracted for the sole purpose of receiving a residence title.[125]

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.

Article 17 has not been explicitly transposed into Austrian legislation. However, as Groenendijk points out, provisions regarding the respect for private and family life already existed before the entry into force of the Directive and relate to Art. 8 ECHR. As stated by the author, "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"[126]

According **Romanian** law, the competent Romanian authorities reject the application for family reunification if any of the conditions provided for by the national legislation is not fulfilled by the applicant. Aliens' entry will also be refused if they have been notified by an international organisation that they support in any way or commit acts of terrorism, or there are clues indicating they are part of organised criminal groups at an international level. Similarly, entry is refused if there are serious reasons to assume that they have carried out or taken part in carrying out acts of violation against peace and humanity or war crimes or crimes against humanity, as provided by international agreements Romania is a part of.[127]

The border police bodies may also deny aliens entry to the territory of the Romania if they have committed offences during previous stays in Romania or other states, against the Romanian state or against a Romanian citizen or have introduced or attempted to introduce illegal aliens to the territory of Romania. Finally, entry can also be refused on public health grounds if the TCN concerned suffers from serious illnesses which may seriously endanger public health, as defined by Order of the Minister of Public Health.

The Romanian Immigration Office (RIO) refuses the right of temporary stay if, following the renewal of the temporary stay right in Romania, it is discovered that the alien did not fulfil the conditions provided for by the Aliens' Act or it is subsequently discovered that certain documents, on the basis of which the right of temporary stay was granted, are false or falsified or the temporary stay right was obtained on the basis of a marriage, and the marriage is subsequently declared a marriage of convenience. The extension of the right to residence obtained on the basis of marriage shall be refused if, as a result of verifications carried out, it results that the marriage is one of convenience.[128]

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[123] NAG Art. 30(1)
[124] Ibid Art. 30 (2)
[125] FPG Art. 117-118.
[126] GROENENDIJK above n 5 at
[127] Art. 8(1)
[128] Aliens Act Art. 63. The existence of a marriage of convenience matrimonial cohabitation does not exist; b) spouses have not known each other before the marriage has been concluded; c) lack of effective contribution to fulfilling the obligations incurred by marriage; d) spouses do not speak a common language; e) there is information that one of the spouses has previously concluded another marriage of convenience; f) spouses are inconsistent in declaring data of a personal nature, regarding the circumstances in which they met or any other relevant information; g) conclusion of the marriage has been conditioned by payment of an amount of money between spouses, excluding any amounts received as gifts.

The RIO on a discretionary ground may revoke the temporary stay right in Romania if, subsequent to specific checks made by competent units of the RIO, or to information given by competent authorities according to the law, it is discovered that the alien no longer complies with the conditions for renewing the right to stay, or he does no longer comply to the purpose this right was granted for.

It is worth noting that the Romanian Aliens' Act does not provide for exceptions based on the nature and solidity of the person's family relationships and the duration of his/her residence in the Member State when processing family reunification applications.

The **Hungarian** ThirdA Act has a three layer system (shorter than 3 months (Schengen) visa, longer than 3 months, and settlement permit). Whereas in the context of the short term visa it refers to the Schengen Codex[129]in the long term visa context it establishes 'national' rules.

Article 18 of ThirdA Act lists the grounds of denial of granting or extending the residence permit. It envisages compulsory denial of longer than three months residence permit if the applicant is under an entry or stay ban or jeopardises public policy (public security), national security or the interests of public health.[130]Besides, Article 18 refers back to paragraph 13 which declares that the entry of aliens is allowed only if they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry.[131]

Additionally, in compliance with Article 18, new residence permits or the extension of existing ones will also be refused for those who have disclosed false information or untrue facts to the competent authority in the interest of obtaining the right of residence, who suffer from any disease that is considered to constitute a threat to public health, and who refuse to submit to the appropriate compulsory medical treatment, or who fail to abide by the **Hungarian** health regulations while staying in the territory of Hungary, or those who established the family relationship solely for the purpose of obtaining a residence permit on the grounds of family reunification.

As to the settlement permit, compulsory denial conditions are narrower. Denial of the permit is only compulsory (in the public policy context) if settlement jeopardises the national security of the Hungarian Republic or the person is subject to an entry or residence ban or has been expelled.

Entry and residence bans may be ordered by the immigration authority for a great number of reasons, among others if 'the entry and stay of the foreigner violates or jeopardises national security, public security or public order or public health.[132] However, third country nationals having at least a residence permit who live in marriage or conduct family life with another third country national who has a settlement permit may only be expelled if their continued residence would seriously violate national security, public security or public order.[133]

When deciding on expulsion the authority is called upon to consider elements similar to (but not identical with) those listed in paragraph 17 of the Family Reunification Directive.[134] The criteria are: severity of the threat to national security, public security, public order or public health; length of previous stay; age, family circumstances of the person to be expelled and the consequences of the expulsion to her/his family members; his/her bonds to the Hungarian Republic and lack of contacts with the country of origin.

According to Article 43 of the **Slovenian** Aliens Act, the issue of a residence permit is refused if there is a suspicion that the alien might pose a threat to public order and safety or Slovenia's international relations, or if there is a suspicion that the alien's residence in the country will be associated with the committing of terrorist or other violent acts, illegal

[129] 562/2006/EC regulation Art. (5)(e)
[130] New AlienA Art. 13 (1) h
[131] ThirdA Act Art. 13(1)(i)
[132] Ibid Art. 43 (1) f and g
[133] Ibid Art. 45 (2) (b)
[134] Ibid Art.45 (1) (a) -(d)

intelligence activities, drug trafficking or the committing of other criminal acts, or if, during the procedure of issuing a permit for first residence, it is established that the alien is coming from a region endangered by epidemic or infectious diseases and he or she has no evidence of vaccination or that the alien is infected with an epidemic or infectious disease laid down in the documents of the World Health Organisation.

A family member's residence permit may be refused or withdrawn if it is obvious that marriage was contracted for the sole purpose of obtaining the residence permit, or if during the process of renewing the permit it is stated that an immediate family member, who has the right to family reunification, no longer lives in a real marital relationship with the sponsor. Parents and minor children are not expressly mentioned in this relation.

In the event of refusal to extend a temporary residence permit to a family member, the competent body must take into account the nature and closeness of family relationship, the length of the person's residence in Slovenia and the existence of family, cultural and social ties with the country of origin.

Analysis:

Member States have used various methods of implementing Article 6 relating to the possible restrictions on grounds of public order, public security and public health provision, some referring to the relevant Schengen acquis provisions, some referring to a criminal offence with custodial sentence. Recital 14 of the Directive clarifies that the notion of public policy may cover a conviction for committing a serious crime. The word "may" suggests that a conviction is not a *sine qua non* for invoking public policy as a reason to refuse or withdraw entry/residence permission. This finding is confirmed by the final sentence of Recital 14, where we find that the notion of public policy also covers cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations. The changes made to the public policy exception reflect the changes in climate following the attacks in the US on 9/11. [135]

This change of the political climate is accordingly reflected also in the national legislations of the Member States under discussion (Austria, Slovenia and Romania) as they all include a reference to any terrorist background as a ground for expulsion.

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. However, Slovenia and Romania do not comply with this requirement.

All Member States require a real marital or family relationship with spouses or partners who apply for reunification. Similarly, in all Member States, a residence permit shall be refused or withdrawn if the marriage was concluded for the sole purpose of obtaining a residence permit.

According to the 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.

As we see, there are several grounds on which the Member State authorities can withdraw the residence permit of a TCN family member (or can deny its renewal), which only partially applicable to EU citizens' family members. Family members of Union citizens might only face the loss of their residence rights in the event of abuse of rights or fraud, such as marriages of convenience.[136]While family members of TCNs will lose their right of residence if the marital

[135] OOSTEROM-STAPLES above n 37 at 482.

[136] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States /* COM/2008/0840 final */ 3.1. and 3.8.3.

relationship with the sponsor ceases to exist, or if one the partners enter into a stable, long-term relationship with another person, the Court declared in Diatta that spouses cannot be obliged to live together, and the family relationship will remain intact for the purpose of applying EU law, as long as the marriage has not been terminated officially.

They may be required to leave the member state only on grounds of public policy, security and public health, or if the person concerned presents a threat to one of the fundamental interests of society, and the justification must be based on the personal conduct of the person.

In addition, there is a difference in respect of the factors that have to be taken into account with regard to the expulsion decision. For family members of Union citizens additional factors include their age, state of health and social and cultural integration in the host member State.[137] However, for TCNs the level of protection against expulsion is lower. The only group which enjoys a greater degree of protection are family members of Turkish migrants. The residence and working rights of Turkish citizens can be restricted if they constitute, on account of their own conduct, a genuine and serious threat to public policy, public security and public health. In Ergat, the Court found that a family member loses his legal status not only on the basis of public policy provision, but also when he leaves the territory of the Member State for a significant length of time without a legitimate reason.[138] However, these two grounds for loss of rights were confirmed in the case law of the CJEU as exhaustive grounds.[139]

IV. CONCLUDING REMARKS

Has the goal of approximating the national laws in the field of family reunification been achieved by the introduction of Directive 2003/86/EC? The answer is a complex one. On the one hand, the answer is affirmative, as the adoption of the Directive has led to clear and binding rules in the field of family reunification. This is also due to the case law of the CJEU, which 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. [140] 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.[141]

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.[142] Prior to the implementation of the Directive, several Member States operated vague provisions under national law, which did not grant the right of family reunification to TCNs, but awarded broad discretion to the Member States' authorities. The very creation of a

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DE LA FERIA, Rita: Abuse of law, CMLRev, vol. 45 number 2., 2008, 411-418.; PEERS, *Free Movement, Immigration Control and Constitutional Conflict,* European Constitutional Law Review, Vol. 5, 2009.at 194., COSTELLO, C: *Metock: Free movement and "normal family life" in the Union,* CMLR, Vol. 46. 2009. at 617-619.

[137] Article 28 (1) of 2004/38/EC Directive

[138] TEZCAN/IDRIZ, N.: Free movement of persons between Turkey and the EU. To move or not to move? The response of the judiciary. CMLRev. Vol. 46. (2009) at 1662.
at 1662.

[139] Judgement of 11 November 2004, Cetinkaya (C-467/02, ECR 2004 p. I-10895); Judgement of 7 July 2005, Aydinli (C-373/03, ECR 2005 p. I-6181); Judgment of 16 February 2006, Torun (C-502/04, ECR 2006 p. I-1563); Judgement of 18 July 2007, Derin (C-325/05, ECR 2007 p. I-6495); Judgement of 25 September 2008, Er (C-453/07, ECR 2008 p. I-7299)

[140] Judgment of 27 June 2006, Parliament / Council (C-540/03, ECR 2006 p. I-5769)

[141] Commission report, COM (2008) 0610 3.1.

[142] GROENENDIJK above n 5 at 62.

statutory right to family reunification in all Member States bound by EC immigration law is thus one of the main advantages of the adoption and implementation of Directive 2003/86/EC.

However, the Member States agreed to common rules of such a wide scope that the discretion within this field is only marginally restricted. The 2003/86/EC Directive follows a minimum standards approach. This conclusion is also shared by the Commission in its report on the transposition of the Directive of 2008. The Commission takes the view that the harmonising effect of the Directive is limited due to the very broad and extensive transposition of the facultative provisions of the Directive in the Member States.

Moreover, several Commentators question the compliance of Directive with international human rights standards, despite the C- 540/03 ruling of the ECJ that the Directive is not incompatible with the ECHR.[143] As Oosterom-Staples rightly points out in her outstanding study "although the recent transfer of power to regulate family reunification to the Community suggests a blank canvas, this was not the case".[144]The reality was that numerous international obligations of the Member States concerning respect for family life had to be accommodated.[145]

As has been already mentioned above, in 2005 the EP brought an action before the ECJ, questioning the compatibility of certain provisions of the Directive with the fundamental rights obligations of the Union. The EP claimed that the possibility for Member States to impose limits on the family reunification for children above 12 (Article 4(1)) and 15 years of age (Article 4(6)), as well as the possibility of imposing a waiting period of up to three years before the issue of a residence permit (Article 8), were incompatible with the protection of family life and the principle of equality of treatment.

Even though the Court dismissed these claims and ruled that the provisions of the directive in question are in compliance with Article 8 of the ECHR, one might come to a different conclusion when assessing these provisions in the light of the right to family reunification and the right to equal treatment as fundamental rights of Community law. According to Martin, the Court referred to the case law of the ECtHR in respect of the right to family life, rather than the much stronger right to family reunification embodied in Community law.[146]Any derogation to these fundamental rights must be interpreted narrowly, and it is questionable whether the wide scope of discretion granted to Member States under the relevant Articles complies with this requirement. It is therefore disputed whether the ECJ in EP. v. Council clearly recognised a subjective right to family reunification for TCNs under EC law or whether it missed the opportunity to do so.[147]

In any case, the provisions challenged by the EP before the ECJ seem not to be the most problematic, as none of the Member States under consideration has made use of the possibility laid down in Article 4(6) of the Directive to request that an application for the family reunification of children must be submitted before they reach the age of 15. Similarly, none of the Member States in question made use of the possibility of introducing a special integration

[143] MARTIN, D: Comment on European Parliament v. Council (2007), European Journal of migration and Law 9(1) OOSTEROM-STAPLES, H. above n 37; WIESBROCK: *Legal Migration to the European Union*, Nijhoff, 2010.;CARRERA above n 2.

[144] OOSTEROM-STAPLES above n 37 at 452.

[145] There can be no doubt about the Commission's awareness of the existence of these documents as it took great pains to paint the international framework in its initial proposal. The most obvious international obligations follows from Article 8 of the ECHR on the right to respect for family and private life and Article 12 on the right to marry. Other obligations relevant to the protection of family unity: The Universal Declaration of Human Rights, the International Covenants of 1966 on Civil and Political Rights and on Economic and Social Rights, Convention No 143 of the International Labour Organisation, the International Convention on the protection of the rights of all migrant workers and members of their families, adopted by the General Assembly of the United Nations in December 1990, Convention on the Rights of the Child of 20 November 1989. COM (1999) 638, para 3.

[146] MARTIN, D above n 142 at 148.

[147] LAWSON, R.: Family Reunification and the Union's Charter of Fundamental Rights, Judgement of 27 June 2006, Case 540/03, (2007) European Constitutional Law Review 3, at 324-342.

condition, to make the entry of children of 12 years and above dependent upon the fulfilment of an integration requirement, although Austria (next to Germany and the Netherlands) was amongst the countries that insisted on the introduction of that possibility.[148] In terms of Article 8, however, we must establish that it is one of the few provisions that seems to have had a favourable effect on Member State legislation. In Germany, for instance, the minimum period of residence of the sponsor was lowered to two years in the case of family formation.

This standstill derogation[149] laid down in the second indent of Article 8 was specifically requested by Austria - the only Member State using it - as it had a quota system in its national legislation. However, upon implementation of the Directive and following the ECJ ruling[150] Austria modified its provisions so that three years after an application has been filed, a settlement permit for the purpose of family reunification has to be granted regardless of the quota.

In the light of the above, then what are the most problematic points from the perspective of Article 8? The Directive is criticised for its narrow definition of family members entitled to family reunification, and for the possibility of excluding family reunification if the spouse is under the age of 21. In the Directive, the concept of a family is essentially restricted to what is called the *"nuclear family",* including spouses and minor children. The Directive is subject to criticism that, in respect of third country national sponsors, Member States are able to prohibit family reunification with family members other than the nuclear family, in spite of the fact that the notion of family life under the case law of the ECtHR is much wider and may include grandparents and siblings as well as uncles and aunts. Indeed, in its case law on the application of Article 8 ECHR to domestic issues, the Court developed a wide understanding of family life. Instead of relying on abstract legal criteria, it focused on the existence of substantive family life in real terms, thereby leading the legal drive for the equal treatment of 'illegitimate' children and the recognition of non-married couples. [151]It extended the substantive reach of Article 8 ECHR to 'ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life'.[152] Against this background it was not surprising that the Court applied its wide understanding of family life to immigration cases alike. Thus, the Court did not only examine whether an expulsion or deportation of a foreigner would affect the joint life of spouses and children, but extended its reasoning to the relations of the applicant with their parents and siblings.

However, we need to mention that a new trend emerges in the jurisprudence of the ECtHR, which seems to re-conceptualise the traditional notion of family life. The Court laid the basis for the new line of argument in its Grand Chamber judgment of 9 October 2003 on the application of Slivenko et al v Latvia, which confronted the Court with the precarious situation of the Russophone minority in the Baltic States.[153] In its decision, the Court restricted its formerly wide understanding with a new focus on the 'nuclear family' of spouses and minor children, while at the same time it broadened the protective reach of Article 8 ECHR to the

[148] Germany continues to apply an integration condition for children aged sixteen and above in the case of children arriving independently from their parents.
[149] It provides for a waiting period of three years counted as from the submission of an application.
[150] "The same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application." C-540/03, para 100.
[151] DIJK, P. and HOOF, G.J.H,: *Theory and Practice of the European Convention on Human Rights* (3rd edn Kluwer, The Hague, 1998) 504–8.
[152] ECtHR, judgment of 13 June 1979, No 6833/74, Marckx v Belgium, para 45.
[153] The applicants, a former Soviet army officer and his family who had lived in Latvia most of their lives, contested their deportation from Latvia after their claims for residence rights under the 1994 Russo-Latvian Treaty on troop withdrawal had been rejected.

network of personal, social and economic relations that make up the private life of every human being.[154]

With respect to the *age requirement*, Article 4(5) allows Member States to require the sponsor and the spouse to be 21 years of age before acquiring the right to family reunification. The provision is aimed to serve the better integration of the TCN into the host society and to prevent forced marriages. While most of the Member States fix an age limit, Hungary, Slovenia and Romania did not use this possibility. However, Austria, which is a traditional recipient country of TCNs, imposes an age limit of 18 years in respect of the family reunification of spouses.

All Members States cite similar reasoning for the introduction of such an age limit. Such reasons are to reduce the chance of being pressured to leave school early (thereby avoiding being insufficiently prepared for access to the labour market and stunting their further social development) and increase the likelihood that joining a (marriage) partner is based on a deliberate and voluntary choice. Forced marriages that are concluded between spouses above the age of 18 years will, however, continue to occur. Moreover, such rules do not prevent forced marriages from being concluded abroad before reaching the age of majority, but temporarily delay the entry of the foreign spouse. What is more, minimum age requirements do not seem to be necessary, as there are arguably more suitable and less restrictive provisions with regard to achieving the desired aim. The immigration law of the EU countries contains specific provisions prohibiting family reunification in cases where forced marriages are detected. Furthermore, forced marriages are punished by under criminal law and it allows for the annulment of the marriage upon request by the victim. According to Wiesbrock, such measures are providing a greater degree of protection to victims of forced marriages after arrival than if the person were left in a precarious situation in the country of origin.[155]

Thus, all circumstances must be taken account when judging whether to permit the family reunification of a spouse who is under the age limit, which precludes at the same time the automatic refusal of the application on the grounds of age. This must especially be the case for those who have young children.

Nevertheless, it is surprising that the EP did not challenge the provision relating to the spousal age limit before the Court. However, it can be assumed that if it had done this, the CJEU would have similarly concluded that the provision in conjunction with Articles 5(5) and 17 of Directive leaves enough scope to be interpreted by the Member States with human rights standards.

Even if, in line with the judgement of the CJEU, the Directive is considered to be in conformity with human rights standard, there are still concerns that the adoption of the Directive has led to a deterioration of third country national rights in some Member States. Few articles include a standstill clause, precluding the adoption of stricter conditions than those existing at the date of implementation.[156]However, due to the pressure of some Member States, the general standstill clause, contained in Article 3(6) of the second amended Commission proposal, was left out from the final text of the Directive. The clause made it impossible for Member States to change their national legislation to more restrictive requirements than those that were in force at the moment of adoption of the Directive. As Wiesbrock highlights, without such a standstill clause there are indications that the creation of common minimum standards at the Union level might have given rise to a “race to the bottom”, with Member States adopting more restrictive family reunification rules in the implementation process. The implementation of the Directive has led to more restrictive rules, such as in Austria where the income requirement was increased significantly with the

[154] THYM, D.: *Respect for private and family life under article 8 ECHR in immigration cases. Human right to regularize illegal stay*? ICLQ, 2008, 57at 91.
[155] WIESBROCK: Legal Migration to the European Union, Nijhoff, 2010 at 478.
[156] Articles 4(1) and 4(6)

implementation of the Directive. This poses an obstacle for many third country nationals living and working in Austria who want to reunite with their family but whose income does not reach the required minimum sum.[157] As a result of the Directive a new, stricter regulation has also been adopted in Slovenia, according to which family reunification is possible only if a sponsor is holding a permanent residence permit or he/she is holding a temporary residence permit and has for the last year resided in Slovenia. In this regard, the Act has become stricter as under the previous regulation family reunification was allowed as soon as the temporary residence permit has been issued to the sponsor. Sweden is not an exception, where the minimum age requirement was officially introduced with a view to implementing the Directive. The same holds true for the introduction of an integration tests abroad on the part of Germany.

However, as regards the possible deterioration of TCNs' rights, the situation is different in respect of Turkish labour migrants resident in a Member State and their family members who are protected against the introduction of more restrictive provisions regarding the free movement of workers on the grounds of Article 13 of the Ankara Agreement.[158] This is of particular concern in the case of Austria where the number of Turkish[159] migrants is relatively high.[160]In the Sahin case, the CJEU has concluded that the standstill clause[161] precludes the introduction of disproportionate administrative charges for a residence permit that are not demanded from Community nationals.[162] The same reasoning must be considered to apply

[157] http://cmr.jur.ru.nl/cmr/qs/family/Austria/#B23 http://cmr.jur.ru.nl/cmr/qs/family/Austria/#B23.
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 the 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 Wiesbrock's view the German legislator used the implementation of the Directive as an argument in order to stress the necessity of introducing a minimum age of spousal reunification. WIESBROCK: 306.; GROENENDIJK: 7.

[158] TEZCAN/IDRIZ, N above n 137. at 1621-1665.

[159] Looking at citizenship, the settlement permits are issued mainly to "traditional" nationalities of immigrants in Austria. The main nationalities are Serbia, Turkey, Bosnia-Herzegovina, Croatia, and Macedonia. EMN Study: Family reunification in Austria, 36.

[160] The largest number of Turkish immigrant workers is to be found in Germany and Austria. The Turkish diaspora in Europe is growing steadily. For Western Europe as a whole it rose from 1,988 million in 1985 to 3,034 million in 1996 (2,944 million in the EU countries). This is a 52.6% increase over one decade. One of the explanations for this growth is that, despite the limits set by the host countries, immigration from Turkey is continuing through marriage. Indeed, many young people continue to respect the custom of wedding someone from their parents' native village, and in many cases the spouses even belong to the same family.

[161] Art. 13 is the standstill clause of Decision 1/80 and reads as follows: 'The Member States of the Community and Turkey may introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.'

[162] Case Sahin C-242/06: Mr Sahin is a Turkish national who obtained a residence permit in the Netherlands to live with his Dutch wife. In February 2003, Mr Sahin applied for an extension of his permit, which was refused on the grounds that he had not paid the administrative charges for this application, which amounted to EUR 169. Mr Sahin filed several complaints against this refusal and the case arrived on appeal before the Raad van State, which referred several questions to the Court of Justice regarding Article 13 of Decision No 1/80, adopted by the Association Council set up by the Agreement establishing an Association with Turkey. The Court confirmed in its case-law concerning the implications of the standstill clause in Article 13 of Decision No 1/80, that this Article has a direct effect and prohibits Member States from introducing new restrictions concerning the conditions of access to employment applicable to Turkish workers and members of their families who have fulfilled the legal requirements. The Court held that Member States may introduce new restrictions on Turkish citizens where these same restrictions also apply to Community nationals. The Court nevertheless specifies that in such a case, Member States may not subject Turkish nationals to new obligations which are disproportionate as compared with those established for Community nationals. TEZCAN/IDRIZ and SLOT: Free movement of persons between Turkey and the EU: Hidden potential of Article 41(1) of the additional protocol. 12.

to the introduction of integration requirements.[163]Thus, the above measures will be caught by the standstill clause.[164]

Integration-related conditions were not part of the initial propositions by the Commission, but were introduced during the negotiations between the representatives of the EU and Member States at the Council level. Three Member States, Austria, Germany, conducted by the Netherlands, advocated modifying the propositions. Their national immigration legislations already contained integration conditions or, as mentioned earlier, were in the process to be modified with the inclusion of such conditions.[165] Since unanimity was required to adopt the directives, all Member States accepted such conditions even though most of them were not in favour.

However, commentators all take an approach that integration abroad tests are particularly problematic and could lead to violation of Article 8 ECHR. As noted by Kees Groenendijk, the scheme can pose substantial practical obstacles to applicants for family reunification. "Significant efforts with regard to finances, time and motivation are required from the family member in order to learn the language and acquire the necessary civic knowledge while still residing abroad. Depending on the country of origin and the home town or village of the applicant, it might be difficult to find the infrastructure to study the required subjects. Furthermore, it should be noted that learning a language is certainly more difficult for the elderly and/or those who are less educated or even illiterate. However, those persons have the same right to family reunification as more literate persons".[166] Taking into account this burden on the shoulder of the TCN who resides legally in the EU and participates at its welfare and social cohesion, it becomes important to define the Member States' community obligations.[167]

Although the ECJ rejected the European Parliament's action for annulment, we must not forget, that it took the occasion to underline the following statement: "The fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights".[168] If the ECJ is consistent with its settled case law, the integration-related conditions should therefore be interpreted restrictively.

In respect of the Tampere goals, rights granted to third country nationals can hardly be considered to lay down satisfying standards as they do not enjoy full treatment rights equal to what is ensured for Union citizens and their family members under Directive 2004/38/EC. Before all, their right of access to employment may be restricted during their first 12 months of residence in the receiving country.[169]On the basis of the optional clause in paragraph 14(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 Austria, Slovenia and Hungary as well.

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[163] WIESBROCK above n 154 at 476.

[164] Similar to any measures making the visa application process more complex or expensive for applicants. PEERS: *EC immigration law and EC association agreements: fragmentation or integration*? ELR, 2009, Vol. 34, issue 4. at 634.

[165] The Commission report concludes that several Member States have introduced integration measures into national legislation in line with the above mentioned requirements. Three of them (NL, DE, FR) use these measures as conditions before admission to the territory. However, among the member States under consideration, Austria is the only, who uses this possibility and requires the foreigners to sign an integration agreement under which they are obliged to participate in integration courses.

[166] GROENENDIJK, K., "*Integration Tests Abroad as a Condition for Family Reunification in the EU?"* in Immigration Law Practionners' Association (ILPA) European Update (June 2007)

[167] GUEVREMONT,S.: *Integration measures in the EU family reunification and long term residents directives,* http://www3.surrey.ac.uk/Arts/CRONEM/CRONEM-papers09/Guevremont.pdf, 5.

[168] The ECJ added, that "Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories"

[169] In contrast to Article 23

In relation to conditions for admission, residence rights, protection from expulsion, the status of third country nationals is also less favourable than that of EU citizens and their family members. A TCN sponsor has to fulfil several additional conditions that are not applied to EU citizens for the purpose of family reunification (the requirement that the sponsor must have reasonable prospects to obtain permanent residence permit, suitable accommodation for the whole family, stable and regular resources, etc.).

To sum it up, as a result of the wide discretion enjoyed by the Member States and the limitations on the exercise of the rights guaranteed by the Directive, it can be questioned whether the family reunification provided for TCNs can be called a right in the proper sense of the world.[170]

However, in judging the legal position of TCN family members, we cannot leave out of consideration the CJEU's progressive case law in respect of the status enjoyed by legally residing TCN family members in the territory of the EU. As mentioned above, all legal provisions in respect of TCNs adopted both at the national and the Union levels must comply with the general principles of EU law, such as the respect of fundamental rights and the principles of equal treatment and proportionality. The rights of TCNs in Europe, and their entitlement to equality of treatment have been subject to increasing litigation before the CJEU in Luxembourg (the above mentioned cases: Chakroun, Metock, Sahin and Commission v. the Netherlands).[171]

The CJEU's case law shows that some key concepts, benefits and rights (and the exceptions applicable to these) of non-EU nationals will presumably be more frequently interpreted in the light of European citizenship and free movement law. These judgements question traditionalist divisions and the relevance and legitimacy underlying differential treatment between EU nationals and TCNs in relation to certain characteristics of the status of European citizenship, as well as the exclusive competence (and margin of appreciation) that national administrations are said to hold in this field.

[170] WIESBROCK above n 154 at 482.

[171] CARRERA, S. and WIESBROCK, A.: *Whose citizenship to empower in the Area of freedom security and Justice? The Act of mobility and litigation in the enactment of European citizenship.* CEPS Working paper.2010. May.http://www.ceps.eu/book/whose-citizenship-empower-area-freedom-security-and-justice-act-mobility-and-litigation-enactment.

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