EUROPEAN
COMMISSION

Brussels, 29.3.2019
COM(2019) 162 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive 2003/86/EC on the right to family reunification

I. INTRODUCTION

On 22 September 2003 the Council adopted Directive 2003/86/EC setting out common rules on the exercise of the right to family reunification by third-country nationals residing lawfully in Member States (hereinafter "the Directive"). It applies to all Member States except Denmark, Ireland, and the UK[1]. In accordance with Article 3(3) of the Directive, it does not regulate the situation of third-country nationals who are family members of an EU citizen.

For the past 30 years, family reunification has been one of the main reasons of immigration to the EU. In 2017, 472,994 were admitted to the EU-25 on grounds of family reunification, amounting to 28% of all first permits issued to third-country nationals in the EU-25[2].

In many Member States, family reunification accounts for a large share of legal migration. In 2008, the Commission published its first Report on the application of the Directive[3], highlighting the different policy choices taken by Member States on how to manage effectively the large inflow of migrants on the grounds of family reunification. In the recent years, many Member States have introduced or revised in particular the family reunification rules for refugees (and also for beneficiaries of subsidiary protection, who are excluded from the scope of the Directive). In spite of the recent migratory challenges and high numbers of applicants for international protection, beneficiaries of international protection have continued to benefit from more favourable family reunification rules as compared to other categories of third-country nationals, and beneficiaries of subsidiary protection overall benefit from a similar level of legally-ensured protection as refugees[4].

The Commission has been monitoring these policy and legislative choices that need to remain within the margin of discretion offered by the Directive, and respect the right to family reunification set out therein. In 2014, the Commission published a Communication[5] providing guidance to Member States on how to apply the Directive. This guidance document has provided for a consistent interpretation of the main provisions of the Directive that led to meaningful changes in the laws and practices of some Member States[6].

The Court of Justice of the European Union (CJEU) has also played a crucial role in the implementation of the Directive, providing an extensive case law on the interpretation of the most sensitive provisions of the Directive, by mainly addressing preliminary questions sent by the national courts of the Member States.

This report gives an overview of the current situation on the implementation of the Directive by Member States, focusing on the key issues that have emerged from the Commission's own compliance analysis, complaints received and relevant judgements of the CJEU. In this respect, it is worth stressing that the Commission has received numerous complaints related to the family reunification of third-country nationals[7]. The main issues raised concern: the refusal to issue visas or permits, proof of identity or family ties as ground for rejection, long processing times by administrations, disproportionate charges for issuing permits, the notion

1 In this report, "Member States" means the Member States bound by the Directive, alternatively referred as EU-25.
2 Source: Eurostat, [migr_resfam] of 25.09.18.
3 COM(2008) 610 final of 8 October 2008.
4 EMN study on Family Reunification of Third-Country Nationals in the EU, April 2017, p. 43.
5 Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, COM(2014) 210 final.
6 EMN study (2017), p. 12.
7 However, many of those complaints falls outside the scope of the applicable EU legislation, as they concern questions related to access to citizenship of a Member State, family members of "non-mobile" EU citizens, and general complaints about alleged discrimination or maladministration.

of stable and regular resources, access to employment for family members, incorrectly applied waiting periods, and the proportionality of pre-integration conditions.

A recent study carried out by the European Migration Network (EMN)[8], which assessed both legal and practical challenges in the implementation of the Directive, has also informed this report. The study highlighted three major problems faced by applicants. The first concerns the obligation to appear in person at a diplomatic mission to submit their application[9]; this obligation creates a practical problem in particular for applicants to smaller Member States that do not necessarily have a diplomatic representation in every country. The second major problem concerns the often very long processing time of an application[10]. The third major problem is the lack of documents necessary to process the application[11], especially the proof of identity and family ties. From the perspective of national authorities, the study reported as a major challenge the detection of forced or sham marriages or registered partnerships and false declarations of parenthood[12], which requires thorough investigations and in turn may affect the processing time of applications.

II. COMPLIANCE OF THE TRANSPOSITION MEASURES

Right to family reunification – Article 1

The Directive recognises the existence of a right to family reunification. It 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. The subject matter of the Directive has been correctly reflected in the national legislation of all Member States, even if most of them[13] do not have a specific provision corresponding to Article 1, which defines the purpose of the Directive and therefore does not need a specific transposition.

Definitions of key terms – Article 2

Overall, the definitions set by the Directive have been correctly transposed by the majority of Member States. In those cases where Member States have not explicitly transposed the definitions, such in particular the definition of "sponsor", they can nonetheless be inferred from the provisions establishing the conditions for family reunification.

Scope of application – Article 3

Sponsor

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

Article 3 has been correctly transposed by all Member States. It must be emphasised that the national legal frameworks of some Member States contain provisions that are more favourable than Article 3 (for example, Bulgaria, Hungary, the Netherlands and Slovakia have not transposed the criterion of reasonable prospects of obtaining the right of permanent residence), which is allowed by the Directive.

8 EMN study (2017), p. 37.
9 AT, EE, FI, HU, IT, LU, LV, NL, SE.
10 AT, BE, DE, FR, IE, IT, NL, SE.
11 AT, BE, CY, FI, IT, LT, LU, LV, MT, NL.
12 BE, EE, IT.
13 With the exception of EE, ES and MT.

Family members of EU citizens

Both the sponsor and their family member need to be third-country nationals to fall under the scope of the Directive. This implies that the family members of EU citizens are excluded from the Directive. They may however be covered by Directive 2004/38/EC[14], if they are family members of EU citizens who move to or reside in a Member State other than that of which they are a national. However, family reunification of EU citizens residing in the Member State of their nationality is not subject to Union law and remains a national competence. In a recent judgement[15], the CJEU held that it has jurisdiction, on the basis of Article 267 TFEU, to interpret provisions of the Family Reunification Directive, if that provision was made directly and unconditionally applicable under national law to family members of an EU citizen who has not exercised their right of free movement.

In practice, these rules are largely similar in Spain, Lithuania, the Netherlands, and Sweden. Where differences exist, the provisions for third-country nationals who are family members of non-mobile EU citizens are normally more favourable. Such provisions may include, for example[16]: a broader definition of family[17]; a waiver of specific conditions that must be fulfilled by family members[18]; no income threshold[19]; a lower reference amount or less onerous assessment of financial circumstances[20]; no waiting period or a shortened one[21]; no quota requirement[22]; free access to the labour market[23].

Asylum applicants and beneficiaries of temporary or subsidiary protection

The Directive also excludes from its scope sponsors who are beneficiaries of temporary or subsidiary protection, as well as asylum applicants[24]. However, the Commission in its guidance Communication[25] stressed that the Directive should not be interpreted as obliging Member States to deny beneficiaries of temporary or subsidiary protection the right to family reunification. The guidance also encouraged Member States to adopt rules that grant to those categories of people family reunification rights that are similar to the rights of refugees. In a recent judgement[26], the CJEU held that it is competent to interpret the provisions of the Directive in respect of the right to family reunification of a beneficiary of subsidiary protection, if these provisions were made directly and unconditionally applicable to such a situation under national law.

In many Member States beneficiaries of subsidiary protection can apply for family reunification under the same conditions as refugees[27]. In certain Member States, the law provides for family reunification with beneficiaries of subsidiary protection at the earliest three years (Austria) or two years (Latvia) from the date of obtaining subsidiary status.

---

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

15 Judgment of 7 November 2018, C and A (C-257/17) ECLI:EU:C:2018:876.

16 Source: EMN study (2017), p. 30.

17 AT, BE, HU, LV

18 Age requirement in LT, SK.

19 FI, FR, PL, SE.

20 HR, IE, SI.

21 CY, DE, PL.

22 AT.

23 CY, HR, HU, LV.

24 Council Directive 2001/55/EC explicitly entitles beneficiaries of temporary protection to reunite with their family members.

25 COM(2014) 210 final.

26 CJEU, Judgment of 7 November 2018, K and B (C-380/17) ECLI:EU:C:2018:877.

27 BE, BG, EE, EL, ES, FR, HR, HU, IT, LT, LU, NL, SI, SK – source: EMN study (2017), p. 20.

Any marriage or registered partnership with beneficiaries of subsidiary protection or persons granted refugee status must have already existed in the country of origin or prior to entry[28]. Cyprus does not allow beneficiaries of subsidiary protection to apply for family reunification, whilst other Member States such as Czechia allow them to do so under a national scheme (parallel to the Family Reunification Directive). Finally, Germany recently restricted family reunification for beneficiaries of subsidiary protection, suspending family reunification for all those who were granted a residence permit under subsidiary protection after mid-March 2016. Since August 2018, this suspension has been partially lifted for a monthly quota of 1,000 family members.

Eligible family members – Article 4(1)

Family members entitled to join the sponsor include as a minimum the "nuclear family": the sponsor's spouse and the minor children of the sponsor or spouse.

Spouse

Article 4(1) grants the sponsor's spouse the right to family reunification. Most of the Member States have correctly transposed this requirement.

In case of polygamous marriage,[29] the reunification of only one spouse is permitted, and the entry of children of other spouses to join the sponsor may be refused (Article 4(4)). Also, Member States can fix a minimum age for both sponsor and spouse (Article 4(5)). Most Member States have applied this optional clause, arguing that it can help prevent forced marriages. Five Member States[30] set the age at 21 years, the maximum threshold under the Directive.

Most Member States' laws allow same-sex partners to apply for family reunification[31]. A smaller number of Member States does not permit this[32]. Same-sex couples have an equal right to family reunification as spouses from opposite sexes in nine Member States[33].

In its judgement in case *Marjan Noorzia*[34], the CJEU had to decide whether the minimum age of 21 provided under Article 4(5) of the Directive refers to the date when the application seeking family reunification is lodged, or the date when the application is ruled upon. The Court held that Article 4(5) must be interpreted as meaning that the provision does not preclude a rule that spouses and registered partners must have reached the age of 21 when the application is lodged.

In this judgement the Court analysed the objective and proportionality of the minimum age requirement and stated: *"In that regard, it must be noted that the minimum age fixed by the Member States by virtue of Article 4(5) of Directive 2003/86 ultimately corresponds with the age at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated there. (….) Further, such a measure does not undermine the purpose of preventing forced marriages since it permits the presumption that, due to greater maturity, it will be more difficult to influence the persons concerned to contract a forced marriage and accept family reunification if they must have*

28 AT, DE, EE, HR, NL, SI.
29 This issue has not yet led to any judgment from the EU Court of Justice.
30 BE, CY, LT, MT, NL.
31 AT, BE, CY, CZ, DE, ES, FI, FR, HU, LU, NL, SE, SI.
32 EE, LT, LV, MT, PL, SK.
33 AT, BE, CY, CZ, FI, LU, NL, SI, SE. Source: EMN study (2017), p. 21-22.
34 CJEU, *M. Noorzia*, C-338/13, ECLI:EU:C:2014:2092.

reached the age of 21 by the date when the application is lodged than it would be if they were under 21 at that date."

Minor children

Minor children are those below the age of majority set at national level (commonly 18 years) and who are not married. The Directive allows two restrictions for family reunification of minor children, provided they were already part of the Member State's national legislation on the date of implementation of the Directive (so-called "standstill clause").

Firstly, children over 12 years arriving independently of the rest of their families may have to prove that they meet the integration conditions required under national legislation. However, the CJEU held[35] that this provision must respect the best interests of the child. Only DE applies this derogation.

Secondly, Member States may require that applications concerning family reunification of children must be submitted before the age of 15 (Article 4(6)). No Member State has implemented this restriction. As this provision is a standstill clause, such limitations under national legislation are now prohibited.

As regards minor children, two judgements of the CJEU are of particular interest. In the joined cases *O. and S.* and *Maahanmuuttovirasto*[36] the Court confirmed the general rule that the substantive provisions of the Directive[37] must be interpreted and applied in the light of Articles 7 and 24(2) and (3) of the EU Charter of Fundamental Rights and Article 5(5) of that Directive. These provisions require the Member States to assess the applications for reunification in question in the interests of the children concerned and with a view to promoting family life.

In another more recent case[38], *A and S*, the CJEU held that in matters relating to family reunification of refugees, the date of arrival on Member State territory and not the date of application for family reunification should be taken into account for assessing whether a person falls under the definition of 'unaccompanied minor'. According to the judgement delivered in this case, the term 'unaccompanied minor' must therefore be understood as covering a person who was under the age of 18 when they arrived, attained the age of 18 during the asylum procedure, and after having attained the age of 18 applied for family reunification.

Other family members – Article 4(2) and (3)

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

Several Member States decided to widen the number of family members authorised to apply. Many of them[39], however, chose not to include first-degree relatives in the direct ascending line of the sponsor or his/her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin. Italy has partially applied this option by only extending it to the first-degree relatives of the sponsor.

---

35 CJEU, European Parliament v Council of the European Union, C-540/03, ECLI:EU:C:2006:429, para 75.

36 CJEU, *Maahanmuuttovirasto*, C-356/11 and 357/11, ECLI:EU:C:2012:776.

37 In this case the financial resources requirement under Article 7(1)(c) – for more details see section 4.3.3.

38 CJEU, A, S, C-550/16, ECLI:EU:C:2018:248.

39 AT, BE, BG, CY, CZ, EL, FI, FR, LV, MT, NL, PL.

Apart from the first-degree relatives of the sponsor or their spouse, Article 4(2) also grants the possibility of family reunification to the adult unmarried children of the sponsor or their spouse, where they are objectively unable to provide for their own needs on account of their state of health. This option is applied by fifteen Member States[40].

Article 4(3) allows for the entry and residence of the registered partner of the sponsor and the unmarried partner with whom the sponsor is in a duly attested stable long-term relationship. Only ES and SE fully apply this option.

Requirements for exercising the right to family reunification

Article 7 allows Member States to impose two separate types of requirements. Firstly, it allows them to require evidence that the sponsor has accommodation, sickness insurance, and stable and regular resources. Secondly, it allows them to request third-country nationals to comply with integration measures.

Accommodation – Article 7(1)(a)

Member States have the option to request evidence that the sponsor has accommodation regarded as normal for a comparable family in the same region. Most Member States have implemented this option, with the exception of Finland, Croatia, the Netherlands, and Slovenia. The size of the accommodation considered suitable varies across Member States, though some (Latvia, Sweden) do not appear to have set specific criteria for assessing such suitability[41.]

Sickness insurance – Article 7(1)(b)

The possibility to request sickness insurance has been widely used, except for Bulgaria, Finland, France, Portugal and Sweden.

Stable and regular resources – (Article 7(1)(c)

All Member States impose the requirement of stable and regular resources. However, this requirement must be applied in line with the interpretation laid down by the CJEU, which sets out that the relevant national provisions must not undermine the objective and the effectiveness of the Directive.

In the case *Chakroun*[42], the Court limited the room for manoeuvre of Member States in setting the resources requirement. In particular, it ruled that Member States are not allowed to refuse family reunification to a sponsor who has stable and regular resources that are sufficient to maintain themselves and the members of their family, but who, given the level of their resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his/her income, or income-support measures in the context of local-authority minimum-income policies. Furthermore, the Court ruled that the Directive must be interpreted as precluding national legislation that, in applying the income requirement set out in Article 7(1)(c), draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State.

In the joined cases *O. and S.* and *Maahanmuuttovirasto*[43], the Court held that the resources requirement must be applied in the light of Articles 7 (right to family life) and 24 (best interest of the child) of the Charter of Fundamental Rights of the European Union. The CJEU

40 BE, BG, CZ, DE, EE, ES, HR, HU, IT, LU, PT, RO, SE, SI, SK
41 EMN study (2017), p. 21-22.
42 CJEU, *Chakroun, C-578/08,* ECLI:EU:C:2010:117.
43 CJEU, *Maahanmuuttovirasto*, C-356/11 and 357/11, ECLI:EU:C:2012:776.

stressed that the authorisation to family reunification being the general rule and objective of the Directive, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Member States must therefore not use their discretionary powers in a way that would undermine the objective and the effectiveness of that Directive.

In the *Khachab* case[44], the Court confirmed that national provisions providing for a prospective financial resources assessment based on preceding income patterns was compatible with EU law. The Court held that Article 7(1)(c) of the Directive must be interpreted as allowing the national competent authorities to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources in the year following the date of submission of that application. The Court added that the assessment should be based on the pattern of the sponsor's income in the six months preceding that date.

Most Member States[45] have set a reference income threshold for assessing the sufficiency of financial resources required for exercising the right to family reunification. In many Member States this sum is equivalent to[46] or higher than[47] the basic minimum monthly income or minimum subsistence amount per month of that country.

In other Member States, the threshold is set at a specific amount, albeit the amount may vary depending on the size of the family[48]. Most Member States[49] apply exemptions to the income threshold, notably for refugees and/or beneficiaries of subsidiary protection[50]. Some Member States have no income threshold at all, and assess the resources requirement on a case-by-case basis[51].

Integration measures - Article 7(2)

This optional clause enables Member States to require that third-country nationals comply with integration measures, which in the case of family members of refugees can only be applied once family reunification is granted[52]. The Commission has closely monitored the implementation of this clause and has asked some Member States for clarification, as national provisions should not impede the "effet utile" of the Directive and need to comply with relevant case law of the CJEU[53].

Most Member States did not apply this option, though such measures are under investigation or subject to proposals in some instances[54]. Where integration measures exist prior to admission for family reunification, Member States usually require family members to demonstrate basic language proficiency; exemptions apply to family members of refugees or (in some cases) beneficiaries of subsidiary protection.

Language classes or online language tutorials are usually taken at the initiative of family members, and costs arising from these lessons must be borne by them[55]. Fees depend on the

44 CJEU, *Khachab;* C-558/14, ECLI:EU:C:2016:285.
45 AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, HU, LT, LU, LV, NL, PL, SE, SI, SK.
46 AT, BG, DE, FR, LT, LU, LV, NL, SI, SK.
47 BE, MT, PL.
48 CZ, EE, ES, FI, HR, IE, IT. Source: EMN study (2017), p. 25.
49 BE, BG, FI, DE, HR,IT, LT, LU, LV, NL, SE, SI, SK.
50 AT, BE, BG, DE, EE, ES, FI, FR, HR, LT, LU, LV, SE, SI, SK, NL.
51 CY, HU. Source: EMN study (2017), p. 26.
52 Refugees are required to fulfil integration conditions for family formation in the NL.
53 See CJEU judgments in cases C-153/14, *K and A*, ECLI:EU:C:2015:453; C-579/13, *P and S*, ECLI:EU:C:2015:369 and C-540/03, *Parliament / Council*, ECLI:EU:C:2006:429.
54 FI, LU.
55 AT, DE, NL.

country of origin, course provider or course format[56]. Some Member States may additionally require family members to acquire further language proficiency after admission (usually A2 or B1)[57], or to take a civic integration exam after admission[58] – as part of their general integration programme or as part of requirements for permanent settlement in the country[59]. Free-of-charge language training may be provided in some instances[60].

Next to language proficiency, Member States' integration programmes may also include courses about the country history and values, social orientation or professional guidance[61]. Further integration measures may also take the form of reporting to an integration centre[62], signing a declaration of integration[63] or an integration contract[64] prescribing civic training and language training. The non-respect of these integration measures may sometimes lead to the withdrawal/non-renewal of a residence permit or refusal of long-term permits[65].

The objective of such measures is to facilitate the integration of family members. Their admissibility under the Directive depends on whether they serve this purpose and whether they respect the principle of proportionality. Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (e.g. test materials, fees, venue), whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families). The procedural safeguard to ensure the right to mount a legal challenge should also be respected.

In the *Minister van Buitenlandse Zaken v. K. and A.* case[66], the CJEU recognised in paras 53-54 of its judgement that: "*…it cannot be disputed that the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third country nationals and nationals of the Member State concerned and, moreover, encourages interaction and the development of social relations between them. Nor can it be contested that the acquisition of knowledge of the language of the host Member State makes it less difficult for third country nationals to access the labour market and vocational training. (…) From that perspective, the requirement to pass a civic integration examination at a basic level is capable of ensuring that the nationals of third countries acquire knowledge which is undeniably useful for establishing connections with the host Member State."*

However, in the same judgement (paras 56-58) the Court also indicated the limits of Member States discretion when imposing integration conditions: "*The principle of proportionality requires the conditions of application of such a requirement not to exceed what is necessary to achieve those aims. (…) The integration measures referred to in the first subparagraph of Article 7(2) of Directive 2003/86 must be aimed not at filtering those persons who will be able to exercise their right to family reunification, but at facilitating the integration of such persons within the Member States. Moreover, specific individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members must be taken into consideration (…)".*

56 EMN study (2017), p. 26.
57 AT, NL.
58 NL.
59 AT, DE, LV, NL.
60 EE, LV.
61 BE, DE, EE, NL, SE.
62 AT.
63 BE, NL.
64 FR.
65 EMN study (2017), p. 26-27.
66 CJEU, C-153/14, *K and A*, ECLI:EU:C:2015:453.

Therefore, in line with the principle of proportionality, national legislation transposing the first subparagraph of Article 7(2) must be suitable for achieving the objectives of that legislation and must not go beyond what is necessary to attain them.

In two recent judgements[67], the CJEU further elaborated its case law on integration conditions in the specific context of Article 15 (granting of an autonomous permit).

Waiting period and reception capacity – Article 8

Article 8 sets out the possibility for Member States to require a period of lawful residence before a sponsor may be joined by their family members (first subparagraph), and to provide for a waiting period of up to three years for the issue of a residence permit in cases where their previous legislation on family reunification required the need to take into account reception capacities (second subparagraph).

Many countries transposed the option under first subparagraph. However, the Commission identified several inconsistencies in the implementation, which have required clarifications and modifications in national legislations following exchanges with the Member States concerned. The option under second subparagraph was transposed only by Austria and Croatia.

Many Member States do not set a waiting period before a sponsor's family is eligible to apply for family reunification[68]. Where this provision applies, the waiting period can be between one[69], one and a half[70], two[71] or three years[72] from the point the sponsor became resident in the country or received a final decision granting international protection, with exemptions granted by individual Member States[73].

Possible restrictions on grounds of public order, public security and public health - Article 6

Overall, most Member States have correctly transposed Article 6, but a number of difference in the use of terminology have been identified, especially for the term "national security". Member States have used various methods when implementing this provision, some referring to the relevant provisions of the Schengen *acquis*, some referring to a criminal offence with custodial sentence.

Recital 14 of the Directive provides some indication of what might constitute a threat to public policy and public security. Aside from that, Member States are free to set their standards in line with the general principle of proportionality and Article 17 of the Directive, which requires them to take account of the nature and solidity of the persons' relationship and duration of residence, weighing it against the severity and type of offence against public policy or security. The public health criterion can be applied as long as illness or disability is not the sole ground for withdrawal or non-renewal of a residence permit. The terms "public policy", "public security" and "public health" in Article 6 must be interpreted in the light of the case law of the CJEU and the European Court of Human Rights.

---

67 CJEU, Judgment of 7 November 2018, *C and A* (C-257/17), ECLI:EU:C:2018:876 and Judgment of 7 November 2018, *K* (C-484/17), ECLI:EU:C:2018:878.

68 BG, EE, IE, FI, HR, HU, IT, SI, SE, SK.

69 ES, LU, NL.

70 FR.

71 CY, EL, HR, LT, LV, MT, PL.

72 AT.

73 EMN study (2017), p. 27-28.

There is currently no general rule or well-established case law, according to which the public order clauses laid down in the family reunification directive and other migration directives, would always have to be interpreted in the same way as the public order clause in the Free Movement Directive 2004/38/EC (on which a significant CJEU jurisprudence exists).

This was already confirmed in the Commission guidance on the application of the Directive[74], which highlighted that even though the case law of the CJEU on the free movement directive is not directly relevant for third-country nationals, it may serve *mutatis mutandis* as background when defining the notions in question by analogy. Further interpretative guidance by the CJEU can be expected following two preliminary references submitted in cases C-381/18 and C- 382/18 (both pending) in which the Court was asked, for the first time, to directly interpret the public order clauses of both Article 6(1) and (2) of the Directive.

Application assessment procedure – Article 5

The applicant – Article 5(1)

Under Article 5(1) Member States must decide whether the person entitled to submit the application is the family member or the sponsor. Member States are split on the implementation of this Article: in some[75] the entitled person is the sponsor, whereas in others[76] is the family member or both are entitled[77].

Place of application – Article 5(3)

The Directive requires that the family member must reside outside the territory of the Member State at the time when the application is filed, and only allows for a derogation in appropriate circumstances. All Member States have correctly transposed this provision, and all (except Romania and Bulgaria) have used the derogation allowing family members to submit their application in the territory of the Member State, if they are already residing lawfully there[78], or where exceptional conditions justify it[79], e.g. where there is an obstacle in doing so in the country of origin.

Documentary evidence – first subparagraph of Article 5(2)

The list of required documents varies between Member States: some have a detailed list, while others just refer to general requirements and thereby leave authorities with considerable margin of appreciation. The Directive sets specific provisions for refugees: Member States should take into account other evidence where a refugee cannot provide an official document proving the family ties (Article 11(2)). In general, in the absence of (reliable) documentation, Member States take a flexible approach[80], especially for beneficiaries of international protection and their family members. They often accept a range of other means of proof, as long as they can check the identity of the applicants and the existence of family ties[81]. These include documents from asylum interviews, evidence from an appeal hearing, notarised declarations or written statements, photos of events, and receipts.

74 COM (2014)210.
75 BG, CY, EL, ES, FR, PL, SI
76 AT, BE, CZ, DE, EE, FI, HR, HU, LU, LV, SE, SK.
77 IT, LT, LV, NL, PT, RO.
78 BE, CZ, DE, EE, HR, HU, LV.
79 AT, FI, LU. Source: EMN study (2017), p. 32.
80 EMN study (2017), p. 33 and p. 37.
81 In his opinion of 29 November 2018 in CJEU Case C-635/17 (pending), ECLI:EU:C:2018:973, AG Wahl suggested to impose an obligation of active cooperation on both applicants and authorities in case of insufficient documentary evidence.

Member States may also request or suggest a DNA test, usually as a last resort, including in cases when doubt persists and a more reliable confirmation is needed. In spite of this flexible approach, the 2017 EMN study showed that the lack of documents to process the application is one of the most frequently mentioned challenges[82]. This was also shown in some complaints received by the Commission, which in one case have led to information exchanges with the Member State concerned.

Interviews and investigations – second subparagraph of Article 5(2)

Most Member States use the possibility to carry out interviews and to conduct other investigations if deemed necessary to obtain evidence on the existence of a family relationship. Only few Member States[83] do not apply this option.

To be admissible under EU law, the interviews and/or other investigations must be proportionate – thus not render the right to family reunification nugatory – and respect fundamental rights, in particular the right to privacy and family life. The Commission has so far not identified any issues concerning the implementation of this provision.

Fraud, marriage, partnership or adoption of convenience – Article 16(4)

This provision allows Member States to conduct specific checks and inspections where there is a reason to suspect fraud or a marriage, partnership or adoption of convenience. Every national system contains rules to prevent family reunification if a relationship exists with the sole purpose of obtaining a residence permit. The option is implemented in the national legislation of most Member States[84]. Others[85] partially apply the provision, which is not a cause of concern for the Commission.

In a recent preliminary reference[86], the CJEU was asked to state whether Article 16(2)(a) must be interpreted as precluding the withdrawal of a residence permit if the acquisition of that residence permit was based on fraudulent information but the family member was unaware of the fraud.

Fees

In almost all Member States, applicants have to pay fees. The total amount varies depending on the Member State: on average, the fee is between EUR 50 and 150. The Directive is silent on the issue of administrative fees payable in the procedure. However, as stated in the 2008 Commission Report, Member States should not set fees in a way which may undermine the Directive's "effet utile".

On costs for "civic integration examinations", the CJEU held that, while the Member States are free to require third-country nationals to pay various fees related to integration measures adopted under Article 7(2) of the Directive and to determine the amount of those fees, in line with the principle of proportionality, the level at which those fees are determined must not aim to, or have the effect of, making family reunification impossible or excessively difficult.

That would be the case if the amount of the fees to take the civic integration examination were excessive by having a significant financial impact on the third-country nationals concerned[87].

82 AT, BE, CY, FI, IT, LT, LU, LV, MT, NL.
83 BG, EE, HR, NL, SI.
84 AT, BE, BG, CY, DE, EL, FI, HU, IT, LT, MT, PL, PT, RO, SE, SK.
85 EL, FI, LT, PL, SK.
86 CJEU, Pending Case, Y.Z. and others (C-557/17).
87 CJEU, C-153/14, *K and A*, ECLI:EU:C:2015:453, paras 64 and 65.

Written notification and length of procedure – Article 5(4)

The national competent authority is obliged under the first subparagraph of Article 5(4), to give a written notification of the decision to the applicant as soon as possible and in any event no later than nine months from the date on which the application was lodged. Most Member States comply with this provision, applying deadlines under the nine-month requirement. Under the second subparagraph, the time limit may be extended in exceptional circumstances linked to the complexity of the examination. The implementation of this provision raises no concern for the Commission.

Best interest of the child – Article 5(5)

Under Article 5(5), when examining an application, Member States should have due regard to the best interests of minor children. This was emphasised by the CJEU in *O. and S., Maahanmuuttovirasto*[88], and *Parliament/Council*[89]. Most Member States have complied with this obligation, but not all have explicitly transposed it for the purpose of reviewing a family reunification application. However, the obligation of taking into account the best interests of the child appears to be a general legal principle in the national legislation.

Horizontal clause on relevant consideration – Article 17

The obligation to take due account of the nature and solidity of the person's family relationships, the duration of their residence in the Member State and of the existence of family, cultural and social ties with their country of origin, and thereby the need to apply a case-by-case approach, has often been recalled by the CJEU, especially in case *Parliament/Council* of 2006[90]. In line with that judgement, the mere reference to Article 8 of the European Convention on Human Rights does not seem to constitute an adequate implementation of Article 17.

This provision has been correctly implemented by most Member States. The principles of proportionality and legal certainty (general principles of EU law) must be applied in any decision on rejection, withdrawal or refusal to renew a permit. In two pending cases[91], the CJEU was asked to assess the impact of Article 17 in the context of withdrawals of permits for public order reasons.

Redress (Article 18)

In general, Article 18 has been correctly transposed in all Member States. All have established the right to mount a legal challenge in line with this provision (though in different ways). No national provisions have been identified as being too burdensome or hinder the right to legal challenge.

Entry and residence – articles 13 and 15

Visa facilitation – Article 13(1)

As soon as a family reunification application has been accepted, Member States must authorise the entry of the family members and grant them every facility for obtaining the requisite visas. Article 13(1) has been correctly transposed by most Member States. It must be pointed out that facilitation towards obtaining the requisite visa is mandatory for Member States.

88 CJEU, *Maahanmuuttovirasto*, C-356/11 and 357/11, ECLI:EU:C:2012:776.
89 CJEU, C-540/03, *Parliament / Council*, ECLI:EU:C:2006:429.
90 ibid.
91 CJEU, pending cases C-381/18 and 382/18.

Duration of residence – Article 13(2) and (3)

Article 13(2) lays down that Member States must grant family members a first residence permit of at least one year's duration, which shall be renewable. Most Member States correctly transposed the provision; however, some of them explicitly state that the minimum validity of the residence permit is one year.

Article 13(3) provides that the duration of the residence permits granted to the family members must in principle not go beyond the date of expiry of the residence permit held by the sponsor. All Member States correctly transposed this provision.

Autonomous residence permit – Article 15

The first subparagraph of Article 15(1) provides that not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner or a child who has reached majority shall be entitled (upon application if required by the national legislation) to an autonomous permit. This provision has been correctly included within the legislation of the majority of the Member States (notwithstanding a few disparities concerning the duration of the marital status or the counting of the five-year time period, though not raising concerns about compliance).

Article 15(3) lays down an option granting Member States the right, in the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, to issue an autonomous residence permit (upon application if required by the national legislation) to persons who have entered by virtue of family reunification (it also includes this possibility in the event of particularly difficult circumstances). The option was implemented by all Member States.

In two recent judgements[92] related to Article 15, the CJEU clarified that, although issuing an autonomous residence permit is, in principle, an entitlement arising from five years of residence in a Member State by virtue of family reunification, the EU legislature nevertheless authorised the Member States to subject the grant of such a permit to certain conditions, which it left to be defined by the Member States.

In particular, the CJEU considered the possibility for a Member State to impose integration conditions for obtaining an autonomous permit under Article 15 of the Family Reunification Directive (C-257/17 and C-484/17) and clarified that such conditions are compatible with the Directive, subject to their proportionality "*Article 15 (…) does not preclude national legislation which permits an application for an autonomous residence permit, lodged by a third country national who has resided over five years in a Member State by virtue of family reunification, to be rejected on the ground that he has not shown that he has passed a civic integration test on the language and society of that Member State provided that the detailed rules for the requirement to pass that examination do not go beyond what is necessary to attain the objective of facilitating the integration of those third country nationals."*

In its judgement in case C-257/17 the Court also clarified a further procedural detail related to the issuance date of autonomous permits and stated that the Directive does not preclude national legislation which provides that an autonomous residence permit cannot be issued earlier than the date on which it was applied for.

[92] CJEU, Judgment of 7 November 2018, C and A (C-257/17), ECLI:EU:C:2018:876 and Judgment of 7 November 2018, K (C-484/17), ECLI:EU:C:2018:878.

Access to education and employment – Article 14

Article 14(1) lays down the areas in which the sponsor's family members should enjoy equal treatment with the sponsor: access to education, employment, vocational guidance, initial and further training and retraining. The Directive further gives the possibility to Member States to decide, according to national law, the conditions under which family members shall exercise an employed or self-employed activity (Article 14(2)), and allows Member States to restrict access to employment or self-employment activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies (Article 14(3)).

Overall, Member States have correctly transposed the equality requirements set out in Article 14(1), but most of them[93] have not applied the option set out in Article 14(2). The option under Article 14(3) has been adopted only by Slovakia. These provisions have often been implemented in the national legislation together with the general principle of non-discrimination.

Family reunification of refugees – Articles 9 to 12

Chapter V of the Directive refers to a series of derogations granting more favourable provisions for the family reunification of refugees so as to take their particular situation into account. The key aspects are highlighted below.

Article 10 sets out the application of the definition of family members to the family reunification of refugees. It provides for certain exceptions, and for specific rules with respect to sponsors who are unaccompanied minors. This article has been correctly transposed by most Member States. In a recent preliminary reference[94], the CJEU was asked to clarify whether Member States are allowed to use the "may clause" of Article 10(2) in a more restrictive way than provided for in the Directive and to allow the family reunification of other "dependent" family member only in those cases in which the dependency is related to the state of health.

Article 11 sets out the submission and examination of the application for refugees. As stated in Article 11(1), the submission and examination of the application to grant family reunification with a sponsor that has been granted refugee status should be carried out in line with Article 5, subject to Article 11(2).

In line with Article 11(2), Member States should take into account other evidence with which the existence of a family relationship can be proven where a refugee cannot provide official documentary evidence of the family relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking. It must be stressed that compliance issues may easily arise in the practical implementation of this provision, and Member States should remain vigilant to the issue of documentary evidence from refugees. In the *E.* case[95] (pending), a preliminary question was referred to the CJEU concerning the obligation for refugees to cooperate and explain the non-availability of documentary evidence. The impending judgement is likely to clarify this important issue.

Article 12 provides that some of the family reunification facilitations offered to refugees are only applicable, if an application for family reunification is submitted within a period of three months after the granting of refugee status. In a recent judgement[96], the CFEU confirmed, in principle, the absolute character of this time limit, but highlighted that this strict rule cannot

93 Except for BE, BG, CY, EL, LU, MT.
94 CJEU, Pending Case, Bevándorlási és Menekültügyi Hivatal (C-519/18).
95 CJEU Case C-635/17 (pending).
96 CJEU, Judgment of 7 November 2018, K and B (C-380/17) ECLI:EU:C:2018:877.

apply to situations in which particular circumstances render the late submission of the application objectively excusable.

III. CONCLUSIONS

Since 2008, the implementation state of play of the family reunification Directive has improved, also due to the infringement proceedings launched by the Commission and its guidance Communication published in 2014, as well as to the numerous judgments of the Court of Justice of the European Union. Member States have been investing major efforts to improve and adapt their national legislations so that they fulfil the requirements of the Directive.

In its First Report on implementation of the Directive from 2008, the Commission highlighted a number of problematic issues of implementation regarding visa facilitation, autonomous permits, more favourable provisions for refugees, the best interest of the child and legal redress. Nonetheless, these issues mainly revolved around legal aspects of transposition, since Member States had not yet experienced practical application of these rules for a long time.

The Commission Communication from 2014, which served as a guidance for the application of the Directive highlighted persistent issues in national legislations, in particular a few problematic cross-cutting issues that had clearly emerged, such as integration measures, stable and regular resources, the need to take into account effectively the best interest of the child and the more favourable provisions for the family reunification of refugees.

Four years later, these core issues remain a challenge for some Member States, which should continue to seek effective application of the Directive, by paying specific attention to the paramount importance of the fundamental right of respect for family life, the rights of the child and the right to an effective remedy.

Moreover, as mentioned both in the 2008 Report and 2014 Communication, the wording of the Directive, which leaves to Member States relevant room for discretion in its implementation, should not result in lowering the standards when applying "*may*" provisions on certain requirements for the exercise of the right to family reunification in a too broad or disproportionate way. The general principles of EU law, first and foremost proportionality and legal certainty, must be regarded as the main key in assessing the compatibility of national provisions with the Directive.

As the guardian of the EU Treaties, the Commission has been regularly monitoring the legal and practical implementation of the Directive by Member States, particularly on the issues highlighted in this report. As family reunification remains a major challenge for the EU in the frame of migration policy, the Commission will continue to closely monitor national legislations and administrative practices and may consider appropriate action – in line with its powers under the EU Treaties – including opening infringement procedures, where necessary.