

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DIRECTIVE

on the right to family reunification

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. TOWARDS A COMMON EUROPEAN POLICY ON IMMIGRATION OF THIRD-COUNTRY NATIONALS: FAMILY REUNIFICATION

1.1. One of the amendments made by the Amsterdam Treaty which entered into force on 1 May 1999 requires that an area of freedom, security and justice be established progressively. The Treaty establishing the European Community now accordingly provides for the adoption of measures relating to free movement of persons, in conjunction with flanking measures relating to border controls, asylum, immigration and the protection of the rights of third-country nationals. The immigration measures provided for by Article 63(3) and (4) concern the conditions for entry and residence and the issuance by Member States of visas and long-term residence permits, illegal immigration and illegal residence, including the repatriation of illegal residents, and the rights of third-country nationals legally resident in a Member State to reside in another Member State, and the conditions under which they may do so.

It is therefore possible for the European Community[1] to adopt measures concerning the entry and residence of third-country nationals in the Member States, this being a matter which, prior to the entry into force of the Amsterdam Treaty, was governed by Title VI of the Treaty on European Union before it was amended and was only partly covered by Community powers[2].

1.2. The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third-country nationals, to be based on a common evaluation both of social and demographic trends within the Union and of the situation in countries of origin. The European Council accordingly asked the Council to rapidly adopt decisions on the basis of Commission proposals. These decisions were to take account not only of the absorption capacity of each Member State but also their historical and cultural links with countries of origin[3].

1.3. The identification of guiding principles to serve as a basis for a common immigration policy is an important task and the Commission's intention is to give it its fullest attention. The Commission considers that the zero immigration mentioned in past Community discussion of immigration was never realistic and never really justified. The policy has never been fully implemented as such, and there are a number of reasons for that: not just that, in the short and medium term, immigration facilities such as family reunification could not and should not be interrupted but also that there were branches of industry that were short of manpower. Moreover, the Member States wished to remain open to the outside world, and in particular to maintain their privileged relationships with certain non-member countries. In the longer term, there are demographic factors such as the ageing of the population, with

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1 Three Member States (the United Kingdom, Ireland and Denmark) enjoy a special status under the Protocols annexed to the Treaty.

2 It should be emphasised that, even before the Amsterdam Treaty entered into force, the list of non-member countries whose nationals had to have a visa in order to cross external borders and measures relating to visas in cases of a sudden influx were already within Community powers.

3 Presidency Conclusions, point 20.

all that this entails in terms of welfare protection and the funding of pension schemes.

1.4. It is true that the current employment market situation does not give the Community the grounds for operating an entry and residence policy of the very open kind that prevailed in the 1950s and 1960s. But the unemployment rate is not the only factor underlying immigration policy: specific sectors of business activity may well be short of skilled and qualified staff. More generally, a common immigration policy at European level will need to be flexible so that it can reflect the manifold dimensions of migratory flows, be they economic, social, cultural or historical, relating both to host countries and to countries of origin.

1.5. The Commission, following up directly the conclusions of the Tampere European Council, is planning to begin and pursue work on legal immigration so as to exploit every opportunity offered by Title IV of the EC Treaty. In the medium term it will tackle all aspects of entry and residence of third-country nationals in turn, and particularly entry and residence for the purposes of study, of salaried and self-employed occupations and unpaid activities. The Commission is also planning to look into the legal position of third-country nationals holding a long-term residence permit, and into the application of Article 63(4) (rights of third-country nationals residing lawfully in one Member State to reside in another Member State).

2. ENTRY AND RESIDENCE FOR THE PURPOSES OF FAMILY REUNIFICATION

2.1. For some years now, entry and residence for the purposes of family reunification have been the chief form of legal immigration of third-country nationals. Family immigration is predominant in virtually all the OECD countries, in particular Canada and the United States; the same applies in the Union Member States, even though the figures vary from one to another. Family immigration refers both to family reunification *stricto sensu* - where family members join the head of family who is already a resident- and family formation, where family ties come about after the head of family entered the host country.

2.2. Beyond the purely quantitative importance of this form of legal immigration, family reunification is a necessary way of making a success of the integration of third-country nationals residing lawfully in the Member States. The presence of family members makes for greater stability and deepens the roots of these people since they are enabled to lead a normal family life.

3. THE INTERNATIONAL LEGAL FRAMEWORK

3.1. The rules governing family reunification are substantially outside the scope of national legislation, being laid down by international instruments. The Universal Declaration of Human Rights and the International Covenants of 1966 on Civil and Political Rights and on Economic and Social Rights recognise that the family is the natural and fundamental unit of society and is entitled to the fullest possible protection by society and the State. Convention No 143 of the International Labour Organisation, ratified by Italy, Portugal and Sweden, calls on States to facilitate family reunification of all migrant workers residing lawfully in their territory.

3.2. 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, provides that "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children". The Convention describes the areas in which members of the family of a migrant worker are to enjoy the same treatment as nationals: access to education, to vocational training, to health and welfare services and to cultural life. States must also endeavour to facilitate the teaching of the local language and their mother tongue and culture for the children of migrant workers. In the case of the death of a migrant worker or dissolution of marriage, the State of employment must favourably consider granting family members of that migrant worker residing in that State on the basis of family reunification an authorisation to stay; the State of employment shall take into account the length of time they have already resided in that State. Members of the family to whom such authorisation is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment. The Convention has not yet entered into force as the requisite number of ratifications has not been reached; no member State has ratified the Convention yet.

3.3. The 1951 Convention relating to the Status of Refugees makes no provision for family reunification. But the principle was recognised in the Final Act of the Conference that adopted it. The Executive Committee of the Office of the High Commissioner for Refugees (HCR) has repeatedly reminded States that the principle of unity of the family has been proclaimed in the international human rights instruments and that Governments must take the requisite measures to ensure that the unity of the family is preserved. Regarding the definition of the family and its members, the HCR Executive Committee has argued for a pragmatic, flexible approach that has regard to factors of physical, financial and psychological dependence of the central parents/children nucleus[4].

3.4. In the context of the international legal framework, mention must be made of the Convention on the Rights of the Child of 20 November 1989. This Convention requires States to ensure that the child is not separated from its parents. Every application to leave or enter a country for the purposes of family reunification must be dealt with in a positive, humane and expeditious manner. In all decisions concerning the child, his superior interests are the paramount consideration.

3.5. Among European legal instruments relevant to family reunification, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 is especially important. Article 8 secures the right to respect for private and family life; Article 12 secures the right to marry and found a family. There is a long line of cases decided by the Court interpreting the Convention. The Court has not deduced that there is an unlimited right to family reunification of the members of the family of a third-country national lawfully settled in a Member State, nor absolute protection against separation from members of the family in the event of

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[4] Conclusions Nos 9 (XXVIII), 24 (XXXII), 84 (XLVIII) and 85 (XLIX) and Conclusions of 50th session (1999).

expulsion, unless a normal family life is impossible in the country of origin. But the Court's decisions put limits on the discretionary exercise of the powers of public authorities regarding controls on entry into the territory and in the event of expulsion.

3.6. Two European instruments apply specifically to family reunification – the European Social Charter and the European Convention of 1997 on the Legal Status of Migrant Workers. The Parties to the European Social Charter undertake to facilitate as far as possible the family reunification of a migrant worker authorised to settle in their territory so as to ensure the effective exercise of the right of migrant workers and their families to protection and assistance. The European Convention of 1977 on the Legal Status of Migrant Workers provides that the spouse and unmarried children are authorised to join the migrant worker already residing in the territory of a Contracting Party. But there are two limits to the scope of this Convention: it applies only to employed workers, and only to workers who are nationals of a Contracting Party. The Convention has not been ratified by all the Member States.

4. THE SITUATION AT NATIONAL LEVEL

4.1. It should be noted that protection of the family is a principle explicitly upheld by the constitutional provisions in several Member States, notably Germany, Greece, Portugal and Italy. The Member States recognise either a right to family reunification, or the discretionary possibility of allowing family reunification, depending on the category and the legal status of third-country nationals. Only one Member State applies a policy of quotas to applications for admission of family members.

4.2. The exercise of this right is, however, subject to conditions, such as respect for public policy and public security, the availability of adequate accommodation and resources, and in some cases even a qualifying period. The legislation and practice of the Member States vary widely on these matters.

4.3. Regarding accommodation, some Member States require a resident who wishes to receive his family to have adequate accommodation to house them in acceptable conditions. This conditions is fixed in different ways depending on the Member State. In Germany, the accommodation must be equivalent to social housing. In France, Portugal and the Netherlands, it must be equivalent to the normal accommodation occupied by nationals. Other criteria such as size, hygiene and safety may be applied (Greece, Italy, Austria, United Kingdom). Spain and Luxembourg do not apply predefined rules and consider situations case by case. The adequate accommodation condition is not imposed in Belgium, Denmark, Finland or Sweden.

4.4. The resources criterion is also subject to divergent interpretations. Resources must be equivalent to the minimum wage in France, Portugal and Spain. They must be no less than the minimum social-security pension in Germany and the Netherlands. The United Kingdom requires that there be no demand on public funds, and Denmark requires the resident to satisfy the needs of the members of his family. France and the Netherlands further require that resources be permanent and stable. Austria requires family members to have social insurance. The adequate resources condition is not imposed in Belgium, Finland, Luxembourg or Sweden.

4.5. Certain Member States impose a qualifying period on newly admitted third-country nationals. The duration varies, from one year in France and Spain to three years in Denmark and five years in Greece. The other Member States impose no formal qualifying period, but the waiting time before family reunification can be long because examination of the application takes so long. The effect of the quota scheme in Austria is that the waiting time may last several years.

4.6. Differences are also encountered as regards the family members who are admitted to join the resident head of family, the age of children allowed to be reunited and the admission of unmarried partners.

4.7. Third-country nationals recognised as refugees in accordance with Article 1A of the 1951 Geneva Convention relating to the status of refugees enjoy better family reunification terms in certain Member States: they are exempt from the resources and accommodation conditions, there is no qualifying period and the right to family reunification sometimes extends beyond the nuclear family.

5. THE RULES OF COMMUNITY LAW ON FAMILY REUNIFICATION

5.1. Community law already contains provisions relating to family reunification of third-country nationals. The instruments governing free movement for Union citizens within the European Community apply to family members whether they are Community or third-country nationals. A Union citizen exercising the right to free movement may be accompanied or joined by his family; the terms for integration of the family in the host country are the *sine qua non* for the exercise of free movement in objective conditions of freedom and dignity.

5.2. The right to be accompanied or joined by the family is conferred on Union citizens who establish themselves in another Member State to exercise a gainful activity, whether they are employed workers[5] or self-employed[6]. The family members retain the right to reside in the host country, on certain conditions, where the Union citizen on whom they depend has ceased working[7]. In addition, the right to family reunification is enjoyed by Union citizens other than employed or self-employed workers who also enjoy the right to free movement, provided they have adequate resources and sickness insurance cover[8].

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5 Regulation (EEC) No 1612/68, 15.10.1968 (OJ L 257, 19.10.1968 p. 2).

6 Directive 73/148/EEC, 21.5.1973 (OJ L 172, 28.6.1973, p. 14).

7 Regulation (EEC) No 1251/70, 29.6.1970 (OJ L 142, 30.6.1970, p. 24), and Directive 75/34/EEC, 17.12.1974 (OJ L 14, 20.1.1975, p. 28).

8 Directive 90/364/EEC, 28.6.1990 (OJ L 180, 13.7.1990, p. 26) and Directive 90/365/EEC, 28.6.1990 (OJ L 180, 13.7.1990, p. 28).

5.3. The family members to whom this applies are the spouse and dependent relatives in the descending and ascending lines[9]. Students may be accompanied or joined by their spouse and dependent children only if they can show that they have adequate resources and sickness insurance cover[10]. These rules also apply to nationals of the European Economic Area pursuant to the Agreement of 2 May 1992.

5.4. The rights of family members are derived rights flowing from those enjoyed by the Union citizen enjoying the right to free movement, so family members are given a residence document valid on the same terms as the document issued to the person on whom they are dependent. The Member States may impose limits on the exercise of the admission and residence rights of family members on grounds of public policy, domestic security and public health[11]. Community rules also allow the spouse and children to have access to employment, even if they do not have the nationality of a Member State.

5.5. Apart from the situation of third-country nationals who are family members of a Union citizen exercising his right to free movement, Community law contains no rules on family reunification of third-country nationals, of refugees or of other categories of migrants. This is the direct consequence of the absence of a Community legal basis prior to the entry into force of the Amsterdam Treaty on 1 May 1999.

6. WORK IN THE EUROPEAN UNION

6.1. The importance of family reunification had already been recognised in the European Union by Council activities before the Amsterdam Treaty came into force. Family reunification was a priority topic in the programme of harmonisation of immigration policies adopted by the Ministers responsible for immigration and approved by the European Council at Maastricht in 1991.

6.2. In 1993, the Ministers responsible for immigration adopted a Resolution on the harmonisation of national policies on family reunification[12]. This instrument of soft law sets out the principles which should govern the Member States' national policies (family members eligible for admission, conditions for entry and residence). It concerns the family reunification of third-country nationals residing in the territory of the Member States on a basis offering the prospect of durable residence; it does not deal with the family reunification of Union citizens or of third-country nationals who have obtained refugee status.

6.3. The relevant Council bodies have continued to pay special attention to family reunification; the topic has always been on the Council agenda, even before the Amsterdam Treaty came into force, in the form of exchanges of views, information gathering, background documents and discussion of proposals, during the Dutch, Luxembourg, British and Austrian Presidencies.

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9 Regarding Union citizens who settle in another Member State to engage in a gainful activity, it is also provided that Member States must support the admission of other family members if in the country of origin they are dependent on the migrant worker or live under his roof. See Commission proposals for amendment of Regulation (EEC) No 1612/68 in OJ C 344, 12.11.1998, p. 9).

10 Directive 93/96/EEC, 29.10.1993 (OJ L 317, 18.12.1993, p. 59).

11 Directive 64/221/EEC, 25.2.1964 (OJ 56, 4.4.1964, p. 850/64).

12 Document SN 282/1/93 WGI 1497 REV 1.

6.4. In December 1997, the Council adopted a Resolution on measures to combat marriages of convenience[13]. It does not directly concern family reunification, but it is related; it concerns measures to combat or repress possible circumventions of the rules on entry and residence by means of marriages of convenience.

6.5. In 1997, the Commission presented a proposal for a Convention on rules for the admission of third-country nationals to the Member States[14]. The aim was to provide input for the debate on immigration questions before the Amsterdam Treaty came into force with all the major institutional changes that followed it. In a preliminary declaration the Commission stated its intention of presenting a new draft directive after the entry into force of the new Treaty. The object here was to preserve the benefit of discussions on the substance of the text when producing a Community legal instrument.

6.6. Following the entry into force of the Amsterdam Treaty and the insertion of a new Title IV in the Treaty establishing the European Community, relating to visas, asylum, immigration and other policies related to the free movement of persons, the Commission feels the time has come to give practical form to the commitment entered into in 1997 and present a new proposal regarding family reunification in the form of a Community legal instrument.

6.7. This sits well with the Council and Commission Plan of Action of 3 December 1998[15] on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. Under this Plan, an instrument on the legal status of legal immigrants is to be adopted within two years of the entry into force of the Treaty, and rules on the conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purposes of family reunion are to be prepared within five years. This confirms the attention paid by the Council and the Commission to these topics. Lastly, it will be remembered that the Vienna European Council on 11 and 12 December 1998 urged the Council to continue work on, among other things, the rules applicable to third-country nationals[16].

6.8. It is also useful to recall that at the Cologne European Council meeting on 3-4 June 1999, the Heads of State and Government decided that a Charter of Fundamental Rights of the European Union should be drawn up. This Charter should bring together the fundamental rights applying on a Union wide basis in order to raise their profile. Its scope should not only be limited to the citizens of the union. Nevertheless, to date; no decision has been taken concerning the legal scope and the enforceable value of the Charter.

6.9. In the course of preparatory work for the presentation of the proposal, there have been consultations to sound out the Office of the High Commissioner for Refugees and non-governmental organisations active in this area. By taking account of work done by the Council on family reunification and of the European Parliament's Opinion on the proposal for a Convention on admission, the Commission has been able to base its decision on a full overview of the problem of family reunification.

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13 OJ C 382, 16.12.1997, p. 1.
14 OJ C 337, 7.11.1997, p. 9.
15 OJ C 19, 23.1.1999, p. 1.
16 Presidency Conclusions, Vienna, 11 and 12 December 1998, point 85.

7. OBJECTIVE OF THE COMMISSION PROPOSAL

7.1. At its special meeting at Tampere on 15 and 16 October 1999[17], the European Council reiterated that the European Union must offer fair treatment to third-country nationals residing lawfully in the territory of its Member State. It also recognised that a more dynamic integration policy should aim to offer them rights and obligations comparable to those enjoyed by Union citizens.

7.2. To attain this objective, the Commission considers it necessary to allow third-country nationals residing lawfully in the territory of the Member States to enjoy the right to family reunification, subject to certain conditions. This is indispensable if these people are to lead a normal family life and will help them to integrate into society in the Member States. To ensure that they can look forward to being treated in the same way as Union citizens, the proposal for a directive is based on certain provisions of existing Community law as regards the family reunification of Union citizens who exercise their right to free movement.

7.3. Respect for family life applies to all third-country nationals, irrespective of their reasons for opting to live in the territory of the Member States (employment, self-employed activity, studies, etc.). The scope of the proposed directive is not confined to certain categories of third-country nationals. The sole criterion is lawful residence. Refugees and persons enjoying subsidiary protection are eligible for respect for family life only via reunification in a country in which they can lead a normal family life together after being forced to flee their country of origin, such flight often being the cause of separation of members of a family. In these specific circumstances, the directive provides for specific treatment in terms of the preconditions for reunification (accommodation, resources, qualifying period) and of the family members eligible for reunification.

7.4. Ultimately, the proposed directive seeks to harmonise the legislation of the Member States for two main reasons. Third-country nationals are to be eligible for broadly the same family reunification conditions, irrespective of the Member State in which they are admitted for residence purposes. And the possibility that the choice of the Member State in which a third-country national decides to reside will be based on the more generous terms offered there must be restricted.

7.5. The situation of family members of Citizens of the Union who reside in the country of their nationality and who did not exercise their right of freedom of movement is only governed by national law. Since they did not exercised their right to freedom of movement, in the past it has been considered that it was a pure internal situation falling under Member States competences.

Thus, a difference exists depending on whether the Union citizen exercises or not his right to free movement. The Commission considers that an appropriate solution has to be found to avoid this difference and to fill the legal gap. It is thus proposed to remove this difference and give the Union citizens full access to existing Community law.

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[17] Presidency Conclusions, point 18.

In this exercise, the Commission is nonetheless conscious that existing Community law does not cater for all the situations foreseen in this directive proposition. On one point, the disposition concerning the autonomous residence permit, the proposition offers to family members of third-country nationals more favorable conditions, in the current state of community law on free movement, than to those being family members of Union citizens. On a medium-term basis, in the framework of future initiatives in the domain of free movement, the Commission will see to maintain a balance between the legal situation of Union citizens and their family members and third-country nationals.

8. CHOICE OF LEGAL BASIS

8.1. The choice of legal basis is consistent with the amendments made to the Treaty establishing the European Community by the Amsterdam Treaty, which entered into force on 1 May 1999. Article 63(3)(a) of the EC Treaty now provides that the Council is to adopt measures relating to conditions of entry and residence, and standards for the issue of long-term visas and residence permits, including those for the purposes of family reunion.

8.2. That Article is accordingly the natural legal basis for a proposal that establishes family reunification as a right of third-country nationals already residing in the territory of a Member State, determines the conditions of entry of members of his family and establishes certain elements of the legal status of those family members.

8.3. The proposal for a directive falls to be adopted by the procedure of Article 67 of the Treaty, whereby, during a transitional period of five years, the Council is to act unanimously on a proposal from the Commission or on the initiative of a Member State, after consulting the European Parliament. Title IV of the EC Treaty is not applicable to the United Kingdom and Ireland unless the two countries decide otherwise in accordance with the procedure laid down in the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties. Title IV of the EC Treaty is not applicable to Denmark by virtue of the Protocol on the position of Denmark annexed to the Treaties.

9. SUBSIDIARITY AND PROPORTIONALITY: JUSTIFICATION AND VALUE ADDED

9.1. The insertion of the new Title IV (visa, asylum, immigration and other policies related to free movement of persons) in the EC Treaty is evidence of the desire of the High Contracting Parties to confer powers on the European Community in these matters.

9.2. But the Community does not have exclusive powers here; consequently, even if there is the political will to implement a common policy on asylum and immigration, it must still act in accordance with Article 5 of the Treaty, in other words if and in so far as the objectives of the planned action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the planned action, be better achieved by the Community. The proposal for a directive satisfies these criteria.

9.3. Subsidiarity

An area of freedom, security and justice entails common rules on immigration policy. The object of this proposal is to establish a right to family reunification that can be exercised in accordance with common criteria in all the Member States; this will improve certainty as to the law for third-country nationals. The situation regarding entry and residence for family members of third-country nationals varies from one Member State to another. Common criteria for the Community must be set by action of the kind proposed. Common criteria will also help to ensure that third-country nationals are less likely to select their country of destination purely on the basis of the more generous conditions available to them there.

9.4. Proportionality

The form of the Community action must be the simplest that will enable the proposal's objectives to be attained effectively. In this spirit, the legal instrument chosen is a directive, which would set the guiding principles while leaving the Member States to which it is addressed free to choose the form and methods for the implementation of these principles in their legal systems and national context. Moreover, the proposal for a directive does not set out to settle the legal situation of all third-country nationals residing lawfully in the territory of the Member States, leaving the Member States free to determine rules governing persons whose residence permit is valid for less than one year.

COMMENTARY ON THE ARTICLES

Chapter I: General provisions

Article 1

The right to family reunification established by this proposal for a Directive flows from the need to protect the family as the natural fundamental unit of society and from the right to respect for family life secured by international law, and in particular by the European Convention for the protection of human rights and fundamental freedoms. The proposal for a Directive establishes a right to family reunification for third-country nationals residing lawfully in a Member State; it also establishes this right for Union citizens not exercising their right to free movement. The right is not absolute: its exercise is subject to respect for the practical and procedural conditions determined by the proposed Directive.

Article 2

This Article defines the various concepts used in the proposed Directive:

(a) The concept of third-country national is given a default definition: it means persons excluding Union citizens as defined in the EC Treaty. This refers to persons having the nationality of a non-member country plus stateless persons within the meaning of the New York Convention of 28 September 1954.

(b) The concept of refugee covers third-country nationals who have obtained refugee status under the Geneva Convention of 1951 and those who have obtained it on the basis of constitutional provisions in the Member States, as in the case of France (constitutional asylum for freedom fighters) and Germany (refugees recognised on the basis of Article 16(1) of the Constitution).

(c) The concept of "person enjoying subsidiary protection" covers all cases where a person not eligible for protection under the Geneva Convention of 1951 is granted protection by a Member State on the basis of humanitarian obligations linked to national practice or legislation or to its international obligations (notably the prohibition on expulsion to a country where a person risks the death penalty or cruel, inhuman or degrading treatment (Article 3 of the European Convention for the protection of human rights and fundamental freedoms and Articles 1 and 3 of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment).

(d) The concept of applicant (for family reunification) refers to a third-country national residing lawfully in the territory of a Member State irrespective of the reasons why he was authorised to reside there (employment, exercise of a self-employed activity, studies, non-gainful activity, because he has been given refugee status or enjoys subsidiary protection). The concept also covers Union citizens who have not exercised their right to free movement.

(e) As regards third country nationals, the concept of family reunification covers two situations: family reunification *stricto sensu* and family formation. In the former case, the applicant has had to leave his family members to settle in a Member State and wishes to have them join him. In the latter case, he decides after entering a Member State to form a family with a third-country national who does not reside in the Member State and wishes to have this person join him. The legal situation of persons wishing to enter the territory of a Member State to marry a third-country national already residing there in not within the scope of the proposal for a Directive. This situation remains subject to national law.

(f) The residence permit is defined in broad terms to include all categories of applicant: the Directive applies to all third-country nationals residing in the territory of a Member State irrespective of the reasons for their residence there; likewise, the definition of residence permit includes all forms of residence permit issued by the Member States without distinction as to the reasons for their issuance. The concept does not include provisional residence authorisations such as are issued to asylum-seekers.

Article 3

1. This Article concerns the scope of the proposed Directive. The applicant must belong to one of the categories of persons listed in paragraph 1:

   (a) The first category consists of third-country nationals who are lawfully in the territory of a Member State and hold a residence permit valid for at least a year. This definition includes all third-country nationals irrespective of the reasons for their residence there, including persons enjoying subsidiary protection. But third country nationals residing in a Member State with a residence permit valid for less than a year, as is the case of temporary workers, or with a residence

permit confined to seasonal employment, are not covered. The question of family reunification then falls to be treated under Member States' national rules.

(b) The second category covers refugees. The proposed Directive would apply to them irrespective of the period of validity of their residence permit issued by a Member State. Refugee status suffices to confer the right to family reunification.

(c) The third category consists of Union citizens who have not exercised their right to free movement of persons.

The proposed Directive applies, however, regardless of the legal status of the family members. In other words, family members may reside in a Member State for some other reason, reside outside the Member State, be asylum-seekers, be covered by temporary protection scheme, etc.

2. The second paragraph of Article 3 concerns exclusions from the scope of the proposed Directive by reference to the applicant's legal situation.

(a) The proposal does not cover the family reunification of asylum-seekers, as the outcome of their application cannot be predicted in advance.

(b) The proposal does not cover the family reunification of persons enjoying temporary protection. In 1997, the Commission presented a proposal for a joint action on the temporary protection of displaced persons[18]; an amended proposal was presented in 1998[19]. The two proposals covered the family reunification of persons enjoying temporary protection. The Commission is planning a new proposal to reflect the entry into force of the Amsterdam Treaty. It is therefore preferable to deal with family reunification in the context of the future proposal, given the specific aspects involved in temporary protection.

3. The third paragraph of Article 3 deals with general exclusions from the proposal for a directive. The legal situation of third-country nationals who are family members of a Union citizen exercising his right to free movement of persons is excluded; they are and remain covered by the provisions of Community law relating to free movement.

4. At a time when it is embarking on harmonisation of the rules on family reunification, the European Community must abide by its international commitments and therefore by the agreements, be they Community or mixed agreements, that are already in force.

(a) Consequently, the proposal for a directive is without prejudice to more favorable provisions of Community or mixed agreements concluded with third-countries and already in force. This exclusion is valid in so far as these provisions are relevant to the content of the proposal for a directive; it concerns agreements, decisions taken under them and case-law relating to them. Even if such agreements do not directly deal with the question of family reunification, they do contain provisions governing family members' rights; these will not be affected by the proposed Directive where they are more favourable.

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[18] OJ C 106, 4.4.1997, p. 13.
[19] OJ C 268, 27.8.1998.

This exclusion concerns:

– the European Economic Area 1992[20], which extends to nationals of Norway, Iceland and Liechtenstein and their family members the benefit of all rules of Community law relating to free movement of persons;

– the Association Agreement with Turkey of 1962[21];

– the Europe Agreements with countries applying for accession in central and eastern Europe; and

– the Euro-Mediterranean Association Agreements with Morocco and Tunisia.

(b) A final exclusion concerns two international instruments established by the Council of Europe, which apply to migrant workers, being nationals of the member countries of the Council of Europe.

Article 4

The family reunification of Union citizens who do not exercise their right to free movement of persons has hitherto been subject solely to national rules. This situation generates an unwarranted difference in treatment between the family of Union citizens who have not exercised their right to free movement and have stayed in the country of their nationality and those who have exercised their right to free movement. National law in some circumstances regulates the family reunification of its own nationals more restrictively than Community law. As Union citizenship is indivisible, the gap must be filled. This Article accordingly allows the family members of Union citizens to enjoy the benefit of the relevant provisions of Community law in matters of family reunification.

Chapter II: Family members

Article 5

1. This Article specifies the family members who are eligible for reunification.

(a) Point (a) concerns the applicant's spouse, or his unmarried partner (who may be of the same sex). The provision on unmarried partners is applicable only in Member States where unmarried couples are treated for legal purposes in the same way as married couples[22]. This provision generates no actual harmonisation of national rules relating to the recognition of unmarried couples; it merely allows the principle of equal treatment to operate. To avert the risk of abuse, unmarried partners must be in a stable relationship, backed up by evidence of cohabitation or by reliable testimony.

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20 OJ L 1, 3.1.1994, p. 3.

21 OJ L 217, 29.12.1964.

22 The Court of Justice has already recognised that a Member State which allows its own nationals to have their partner, being a national of another Member State, reside in its territory, cannot withhold this benefit from migrant workers, being nationals of other Member States. Case 59/85 *Netherlands* v *Ann Florence Reed* [1986] ECR 1283.

(b) Point (b) concerns the children of the married or unmarried couple. There is no difference in the treatment of children born out of wedlock, born of earlier marriages or adopted. If the adoption was not decided by the relevant authority in the Member State, it must have been recognised by such authority in accordance with the rules of private international law applied by all the Member States. Consequently, the entry of children "entrusted" in accordance with certain local customs is not possible, unless the relevant authority of the Member State recognises that such customs have the same effect as adoption.

(c) The children of just one of the spouses or partners are legally within the category of persons eligible for reunification. But the spouse or partner applying for reunification must have actual custody and responsibility. If custody is shared, the other parent's authorisation will be required. The purpose of this rule is to ensure that reunification does not have the effect of defeating the other parent's rights to custody.

(d) Point (d) concerns relatives in the ascending line; reunification is possible where they have no family support in the country of origin and are dependent on the applicant. This provision represents progress towards comparable rights for third-country nationals and Union citizens exercising their right to free movement; the rules of Community law provide for the family reunification of relatives in the ascending line who are dependent on a migrant worker and of non-active persons.

(e) The general rule is that family reunification is for the benefit of children being minors; point (e) lays down a specific rule applicable to children who are of full age. Reunification is made possible in order to respond to particularly difficult situations. It would not be right to prohibit the family reunification of a child who has no independent means of supporting himself and needs the care and material affective support of the family, for example if he suffers a serious handicap.

2. Polygamous marriages are not generally compatible with the fundamental principles of the Member States' legal orders. But where such marriages have been lawfully contracted in a non-member country, account should be taken of certain of their effects. Moreover, an absolute prohibition on family reunification would have the effect of depriving the spouse residing in a Member State of the possibility of leading a normal family life. The family reunification of several spouses and their children is accordingly prohibited, but the reunification of one spouse and her children is accepted. The reunification of the children of a second spouse is possible only where the child's interests prevail over other considerations, for instance where the biological mother dies.

3. The general principle governing family reunification of children is that they must be *de jure* and *de facto* dependent on the applicant. Their age must be below the limit set by the Member States in their national law for the attainment of majority, and they must not be married. But this provision serves to avoid differences between the age of majority for nationals and the age required for a child to be eligible for family reunification.

4. Where the applicant is a refugee, the Member States, having regard to the factors which led him to flee his country and prevent him from returning there, must facilitate family reunification of other family members, such as collateral relatives. This provision takes over one of the components of the Conclusions of the Executive Committee of the Office of the High Commissioner for Refugees of 1981 and 1999. But it will apply only to family members who are dependent on the applicant.

5. The principle of not interrupting or preventing family life is valid also for third-country nationals residing lawfully in a Member State to pursue their studies. But since their residence is for a limited period and in some Member States they do not have access to employment, students are not eligible for the same benefits as other residents. Their right to family reunification concerns only their spouse or unmarried partner, their children being minors and their dependants children of full age.

Article 6

This Article provides for derogations from Article 5 as regards refugees who are unaccompanied minors, given their specific needs and their vulnerability. It is based on Article 22 of the United Nations Convention on the Rights of the Child of 1989.

First, it provides that unaccompanied minors may be joined by their parents without the specific conditions of Article 5(1)(d) (relatives in the ascending line being dependent on the applicant and having no other family links in the country of origin) being applied.

The second derogation concerns the possibility of authorising the entry and residence of other family members, such as collateral relatives, where the minor has no parents or where it has not been possible to trace them.

This Article is without prejudice to national provisions concerning the access of unaccompanied minors to the territory of Member States, the possibility of returning them and the procedure for examining their requests for asylum. In 1997, the Council adopted a Resolution on unaccompanied minors who are nationals of third countries[23], which lays down the minimum standards to be applied by the Member States in handling such cases.

Chapter III: Submission and examination of the application

Article 7

1. This Article governs the procedure for family reunification. The applicant files an application for reunification of his family; he is the right-holder, and he, being resident, will find it easiest to handle the administrative formalities as he will be familiar with the language of the country and the practices of national administrative authorities. The Article raises no obstacles to partial family reunification. Applications can be spread over time. It is for the applicant to provide documentary evidence of the family relationship and to provide evidence that the conditions provided for by Articles 5, 8, 9 and 10 are met. The Member State may ask him, for example, to supply extracts from court records, leases or salary statements.

[23] OJ C 221, 19.7.1997.

2. The applicant must file his application for family reunification while the members of his family are outside the territory of the Member State. But flexibility will be needed here in specific cases, particularly where the family member is already in the territory for some other reason and merely wishes to change status, or where there are humanitarian considerations; an example might be a child who has a single parent – the applicant – and cannot be returned to the country of origin.

3. The relevant authorities of the Member State will examine the application in the light of the documentary evidence supplied and other evidence that they are at liberty to seek. The application may be examined jointly by central, local or even consular authorities. To provide the applicant with a degree of certainty as to his legal position, the application must be dealt with in a period of six months maximum, and if the decision is negative reasons must be given so that the applicant can contest it through redress procedures.

4. Refugees and persons enjoying subsidiary protection have often had to flee their country in such conditions that they do not have all the documents needed for processing their application; they should not be penalised, but the rules should be relaxed to accept other forms of proof (testimony, photographs, correspondence, separate interviews with the applicant and the family member applied for, etc.).

5. This provision is in conformity with Article 3 of the United Nations Convention on the Rights of the Child 1989, which provides that in all actions concerning children, their best interests are a primary consideration.

Chapter IV: Practical conditions for the exercise of the right to family reunification

Article 8

1. States have the discretionary power to decide on the entry and residence of third-country nationals wherever considerations of public policy, domestic security and public health come into play. But their discretionary power is not unlimited, and a degree of transparency is necessary. The public policy, domestic security and public health considerations must be properly defined and reasons must be given in accordance with the rule set out in Article 7(3) of the proposal.

2. The public policy and domestic security considerations that can be taken as a basis for refusing entry must be based on the family member's personal conduct. This criterion is similar to the one used in Community law (Directive 64/221/EEC of 25 February 1964 for the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health[24]). But this does not release Member States from the obligation to consider the proportionality relationship between the seriousness of the alleged offence and respect for the right to family reunification.

3. Although States have discretionary powers in relation to public health, nobody should ever be penalised for suffering from an illness after entry. States of health cannot be a barrier to the residence permit that is issued.

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[24] OJ 56, 4.4.1964, p. 850/64.

Article 9

Member States may require proof that the applicant is in a position to satisfy his family's needs. But the evaluation criteria are strictly defined so as to avoid rendering the right to family reunification nugatory. The applicant may be asked to prove at the time of his application that he has:

(a) adequate accommodation. The evaluation of the accommodation is left to the discretion of the Member State, but the criteria adopted may not be discriminatory. 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;

(b) sickness insurance covering all risks. The purpose of this condition is also to ensure that the reunified family does not become a burden on the host Member State's social security system. It corresponds to the condition applied in certain cases in the context of the free movement of persons (e.g. Directive 90/364/EC of 28 June 1990 on the right of residence[25]);

(c) stable and adequate resources. The minimum amount of resources required to be sure that the applicant will be able to satisfy his family's needs may not be higher than the minimum income guaranteed by the State. If the Member State's social legislation makes no provision for this form of assistance, the level of resources may not exceed the minimum retirement pension paid by the State. These criteria correspond to those applied in certain cases in the context of the free movement of persons (e.g. the Directive on the right of residence[26]).

Refugees and persons enjoying subsidiary protection, given the overriding reasons why they have had to flee their country of origin and cannot lead a normal family life, cannot be subjected to the same additional conditions without their right lead a family life being imperilled.

Article 10

1. To ensure stability in the applicant's residence, Member States may set a qualifying period before he exercises his right to family reunification. The qualifying period may not exceed one year, for otherwise the exercise of the right to family reunification would be devoid of substance. As a result, the applicant may always be joined by his family within a maximum of one year after his entry in the Member State, provided he respects the conditions of Articles 8 and 9.

2. This measure is not applicable to refugees and persons enjoying subsidiary protection, for they should be offered more favourable conditions than other categories of third-country nationals.

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25 OJ L 180, 13.7.1990.

26 *Ibid*.

Chapter V: Entry and residence of family members

Article 11

1. Paragraph 1 governs the entry of family members. Once a positive decision has been taken by the authorities of the Member State on the applicant's application, the entry of the family member is authorised. If the third-country national, being a member of the applicant's family, needs a visa to enter the Member State where the applicant resides, the Member State must facilitate the issuance of the visa and, in particular, issue it without delay. It must also refrain from charging for the visa. If the third-country national has to transit via another Member State which imposes a transit visa when travelling to the Member State where he resides, the issuance of this type of visa must also be facilitated and free of charge.

2. The family member's residence permit is to be of the same duration as the applicant's residence permit. An exception is made where the applicant's permit is of unlimited duration, in which case the Member State may limit the family member's initial permit to one year. This exception serves to prevent abuse and, where appropriate, to check whether family life is still pursued when the renewal is applied for.

Article 12

Family members authorised to enter and reside in a Member State are entitled to a number of rights needed to help them integrate into their new social environment on the same basis as nationals of the Member State in which they reside. This follows directly from the Conclusions of the Tampere European Council of 15 and 16 October 1999 relating to immigration policy and fair treatment for third-country nationals.

(a) All family members enjoy access to education, meaning not just to general education – primary or secondary – but also to vocational and university education.

(b) and (c) Members of the nuclear family (spouse and children) enjoy access to employment and self-employed activity and to all forms of vocational training. Other family members – including children of full age and relatives in the ascending line – are not authorised to exercise a gainful activity or to receive vocational training, as they have been eligible for reunification solely on the basis of their dependence on the applicant.

Article 13

1. Access to an autonomous status enables family members to cease depending on the applicant's residence permit and to enjoy certainty as to their own legal position. If the applicant leaves the Member State of residence or if the family links are broken, the Member States may not withdraw the residence permits issued to members of the nuclear family. This autonomous right of residence is given no later than after four years' residence. The duration of the residence permit granted to the family member when they are entitled to an autonomous residence title, is fixed by the Member States in relation with the common duration of residence permits granted to third-country nationals.

This provision covers broader situations than those covered to date by right to remain of third-country nationals who are family members of citizens of the Union exercising their right to freedom of movement, as well as those which fall within the scope of the draft proposal amending Council Regulation (EEC) No 1612/68 and Directive 68/360/EEC, tabled by the Commission in March 1998.

This is justified by the specific situation of persons concerned by the provision. They are third-country national family members of third-country nationals; therefore, if the applicant is removed or if the family links break down, there is a high possibility that their status becomes weaker. It has therefore been considered necessary to propose measures that are tailored to their needs, in the framework of a migration policy to be developed on the basis of the new provision of the Treaty of Amsterdam. The Commission will be careful to maintain a balance as regards the legal status of third-country nationals whether they are family members of a citizen of the Union or family members of a third-country national, on the basis of future developments in the field of community law on free movement of the persons as well as of migration policies as regards third-country nationals.

2. For other family members dependent on the applicant, Member States retain the possibility of granting autonomous status.

3. A change of family situation (death, separation, divorce) authorises family members to apply for autonomous status before the four years are up. After one year's residence, if the applicant is in a particularly difficult situation, the Member States are under an obligation to issue an autonomous residence permit. This provision too, was not foreseen by existing community law; it is designed to face specific situations. This provision is designed among other things to protect women who have suffered domestic violence; they cannot be penalised by withdrawal of their residence permit if they decide to leave home. The provision may also be useful in the situation of women who are widowed, divorced or repudiated, and who would be in particularly difficult circumstances if they were obliged to return to the country of origin.

Chapter VI: Penalties and redress

Article 14

1. If the proposal for a directive is to create a right to family reunification, it must provide for penalties in the event of circumventions of its rules and procedures. The cases in which penalties are incurred are enumerated exhaustively (fraud, falsification of documents, marriages and adoptions of convenience). Marriages and adoptions of convenience are defined in strict terms – case where it is shown that the marriage or adoption was contracted for the sole purpose of enabling the person concerned to enter and reside in a Member State. Where there is evidence of infringements or fraud, the Member State may refuse to issue or renew a residence permit or withdraw an existing permit.

2. But controls to combat abuses should not lead to the arbitrary interference of public authorities in private and family life; consequently, systematic controls are prohibited. Checks are to be made where there is a suspicion of illegality.

Article 15

The threat to family life flowing from measures that might change the status of the relevant family member must not be out of proportion to the alleged grounds. Inspiration should be drawn from the interpretation of Article 8 by the European Court of Human Rights (notably in *Moustaquim* v *Belgium* (18.2.1991) and *Beldjoudi* v *France* (26.3.1992), and account should be taken of three criteria: family relationships, the duration of residence and the existence of links in the country of origin.

Article 16

In any event, where an application is rejected, where a family member's residence permit is withdrawn or not renewed or where an expulsion measure is ordered, the persons concerned – the applicant or his family members – should have access to the judicial redress procedures that will enable them to contest the decisions, even if other redress procedures have been available at earlier stages.

Article 17

This Article is a standard provision in Community law; it provides for effective, proportionate and dissuasive penalties. It leaves the Member States with the discretionary power to determine the penalties applicable in the event of infringement of national provisions for the application of the Directive.

Chapter VII: Final provisions

Article 18

The Commission is made responsible for reporting on the application of the Directive by the Member States, in keeping with its role of monitoring the application of provisions adopted by the institutions under the Treaty. It is also responsible for proposing amendments.

Article 19

The Member States are required to transpose the Directive by 31 December 2002 at the latest. They are to inform the Commission of changes to their laws, regulations and administrative provisions. They are to insert a reference to the Directive when adopting such provisions.

Article 20

This Article sets the date of entry into force.

Article 21

The Directive is addressed to the Member States.

Proposal for a

COUNCIL DIRECTIVE

on the right to family reunification

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63 thereof,

Having regard to the proposal from the Commission[1],

Having regard to the Opinion of the European Parliament[2],

Having regard to the Opinion of the Economic and Social Committee[3],

Whereas:

(1) Article 63(3) of the Treaty provides that the Council is to adopt measures on immigration policy. Article 63(3)(a) provides, in particular, that the Council is to adopt measures relating to the conditions of entry and residence, and specifically refers to entry and residence for the purpose of family reunion.

(2) Measures concerning family reunification must be adopted in conformity with the obligation to protect the family and respect family life which is laid down in a variety of international legal instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The Union respects the fundamental rights secured by that Convention by virtue of Article 6(2) of the Treaty on European Union.

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third-country nationals, to be based on a common evaluation both of economic and demographic trends within the Union and of the situation in countries of origin. The European Council accordingly asked the Council rapidly to adopt decisions on the basis of Commission proposals. Those decisions were to take account not only of the absorption capacity of each Member State but also their historical and cultural links with countries of origin.

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1 OJ C

2 OJ C

3 OJ C

(4) The European Council, at its special meeting in Tampere, stated that the European Union should ensure fair treatment of third-country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union.

(5) In accordance with the Council and Commission Plan of Action of 3 December 1998[4], an instrument on the legal status of legal immigrants should be adopted within two years of the entry into force of the Amsterdam Treaty, and rules on the conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purposes of family reunification, should be prepared within five years.

(6) Family reunification is a necessary way of making family life possible. It helps to create a socio-cultural environment facilitating the integration of third-country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in Article 2 and Article 3(1)(k) of the EC Treaty.

(7) To ensure protection of the family and the preservation or formation of family life, a right to family reunification should be established and recognised by the Member States. The practical conditions for the exercise of that right should be determined on the basis of common criteria.

(8) Special attention should be paid to the situation of refugees and persons enjoying subsidiary protection on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.

(9) To avoid discriminating between citizens of the Union who exercise their right to free movement and those who do not, provision should be made for the family reunification of citizens of the Union residing in countries of which they are nationals to be governed by the rules of Community law relating to free movement.

(10) Family reunification applies to members of the nuclear family, that is to say the spouse and the minor children. However, if the situation of unmarried couples is treated as corresponding to that of married couples in a Member State, the principle of equal treatment should be respected and provision should be made for unmarried partners to be eligible for reunification.

(11) Family reunification should also apply to children of full age and to relatives in the ascending line where, in view of their personal situation, there are important objective reasons for not separating them from the third-country national residing lawfully in a Member State.

(12) A set of rules governing the procedure for examination of applications for family reunification and for entry and residence of family members should be laid down. Those procedures should be effective and fair and offer proper protection to those concerned.

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[4] Plan of Action of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (OJ C 19, 23.1.1999, p. 1).

(13) The integration of family members should be promoted. To that end, they should be granted a status independent of that of the applicant after a period of residence in the Member State. They should have access to education, employment and vocational training.

(14) Effective, proportionate and dissuasive measures should be taken to avoid and penalise breaches of the rules and procedures relating to family reunification.

(15) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, namely the establishment of a right to family reunification for third-country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved by the Community. This Directive confines itself to the minimum required to achieve those objectives and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

Chapter I

General provisions

Article 1

The purpose of this Directive is to establish a right to family reunification for the benefit of third-country nationals residing lawfully in the territory of the Member States and citizens of the Union who do not exercise their right to free movement. This right shall be exercised in the manner prescribed by this Directive.

Article 2

For the purposes of this Directive:

(a) "*third-country national*" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community;

(b) "*refugee*" means any third-country national or stateless person enjoying refugee status within the meaning of the Convention on the Status of Refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967;

(c) "*person enjoying subsidiary protection*" means any third country national or stateless person authorised to reside in a Member State pursuant to a subsidiary form of protection in accordance with international law, national legislation or the practice of the Member States;

(d) "*applicant for reunification*" or *"applicant"* means a third-country national residing lawfully in a Member State or a citizen of the Union and applying to be joined by members of his family;

(e) "*family reunification*" means the entry into and residence in a Member State by family members of a citizen of the Union or of a third-country national residing lawfully in that Member State in order to form or preserve the family unit, whether the family relationship arose before or after the resident's entry;

(f) "*residence permit*" means a permit or authorisation issued by the authorities of a Member State in accordance with its legislation allowing a third-country national to reside in its territory, with the exception of provisional authorisations pending examination of an application for asylum.

Article 3

1. This Directive applies where the applicant for reunification is:

   (a) a third-country national residing lawfully in a Member State and holding a residence permit issued by that Member State for a period of at least one year;

   (b) a refugee, irrespective of the duration of his residence permit; or

   (c) a citizen of the Union not exercising his right to free movement,

   if the applicant's family members are third-country nationals, irrespective of their legal status.

2. This Directive shall not apply where the applicant for reunification is:

   (a) a third-country national applying for recognition of refugee status whose application has not yet given rise to a final decision; or

   (b) a third-country national authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status.

3. This Directive shall not apply to family members of citizens of the Union exercising their right to free movement of persons.

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

   (a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other, which entered into force before the date of entry into force of this Directive; or

   (b) the European Social Charter of 18 October 1961 and the European Convention on the Legal Status of Migrant Workers of 24 November 1977.

Article 4

By way of derogation from this Directive, the family reunification of third-country nationals who are family members of a citizen of the Union residing in the Member State of which he is a national and who has not exercised his right to free movement of persons, is governed *mutatis mutandis* by Articles 10, 11 and 12 of Council Regulation (EEC) No 1612/68[5] and by the other provisions of Community law listed in the Annex.

Chapter II

Family members

Article 5

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

   (a) the applicant's spouse, or an unmarried partner living in a durable relationship with the applicant, if the legislation of the Member State concerned treats the situation of unmarried couples as corresponding to that of married couples;

   (b) the minor children of the applicant and of his spouse or unmarried partner, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision recognised by that authority;

   (c) the minor children including adopted children of the applicant or his spouse or unmarried partner, where one of them has custody and the children are dependent on him or her; where custody is shared, the agreement of the other parent shall be required;

   (d) the relatives in the ascending line of the applicant or his spouse or unmarried partner who are dependent on them and have no other means of family support in the country of origin;

   (e) children of the applicant or his spouse or unmarried partner, being of full age, who are objectively unable to satisfy their needs by reason of their state of health.

2. In the event of a polygamous marriage, where the applicant already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the entry and residence of a further spouse, nor the children of such spouse; the entry and residence of children of another spouse shall be authorised if the best interests of the child so require.

3. The minor children referred to in points (b) and (c) of paragraph 1 must be below the age of majority set by the law of the Member State concerned and must not be married.

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5 OJ L 257, 19.10.1968, p. 2.

4. Where the applicant is a refugee or a person enjoying subsidiary protection, the Member States shall facilitate the reunification of other family members not referred to in paragraph 1, if they are dependent on the applicant.

5. Third-country nationals residing in a Member State for the purpose of study may not be joined by the relatives in the ascending line as defined in point (d) of paragraph 1.

Article 6

If the refugee is an unaccompanied minor, the Member States may:

(a) authorise the entry and residence for the purposes of family reunification of his relatives in the ascending line without applying the conditions laid down in Article 5(1)(d);

(b) authorise the entry and residence for the purposes of family reunification of other family members not referred to in Article 5, where the minor has no relatives in the ascending line or such relatives cannot be traced.

Chapter III

Submission and examination of the application

Article 7

1. In order to exercise his right to family reunification, the applicant shall submit an application for entry and residence of a member of his family to the competent authorities of the Member State where he resides. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 5, 8 and, where applicable, 9 and 10. The application shall be submitted when the family member is outside the territory of the Member State.

2. By way of derogation from paragraph 1, the Member State concerned shall examine an application submitted when the family member is already residing in its territory, in exceptional circumstances or on humanitarian grounds.

3. After examining the application, the competent authorities of the Member State shall give the applicant written notification of the decision within a period which may not exceed six months. Reasons shall be given for the decision rejecting the application.

4. If the applicant is a refugee or a person enjoying subsidiary protection and cannot provide documentary evidence of the family relationship, the Member States shall have regard to other evidence of the existence of the family relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

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

Chapter IV

Practical conditions for the exercise of the right to family reunification

Article 8

1. The Member States may refuse to allow the entry and residence of a family member on grounds of public policy, domestic security or public health.

2. The grounds of public policy or domestic security must be based exclusively on the personal conduct of the family member concerned.

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

Article 9

1. When the application for family reunification is submitted, the Member State concerned may ask the applicant to provide evidence that he has:

   (a) adequate accommodation, that is to say accommodation that would be regarded as normal for a comparable family living in the same region of the Member State concerned;

   (b) sickness insurance in respect of all risks in the Member State concerned for himself and the members of his family;

   (c) stable and sufficient resources, that is to say resources which are higher than or equal to the level of resources below which the Member State concerned may grant social assistance;

   Where the first subparagraph cannot be applied, resources shall be deemed sufficient if they are equal to or higher than the level of the minimum social security pension paid by the Member State.

2. The conditions relating to accommodation, sickness insurance and resources provided for by paragraph 1 may be set by the Member States only in order to ensure that the applicant for family reunification will be able to satisfy the needs of his reunified family members without further recourse to public funds. They may not have the effect of discriminating between nationals of the Member State and third-country nationals.

3. Paragraph 1 shall not apply if the applicant is a refugee or a person enjoying subsidiary protection.

Article 10

1. The Member States may require the applicant to have resided lawfully in their territory for a period not exceeding one year, before having his family members join him.

2. Paragraph 1 shall not apply if the applicant is a refugee or a person enjoying subsidiary protection.

Chapter V

Entry and residence of family members

Article 11

1. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member. The Member States shall grant such person every facility for obtaining the requisite visas, including transit visas where required. Such visas shall be issued without charge.

2. The Member State concerned shall grant the family member a renewable residence permit of the same duration as that held by the applicant. If the applicant's residence permit is permanent or for an unlimited duration, the Member States may limit the duration of the family member's first residence permit to one year.

Article12

1. The applicant's family members shall be entitled, in the same way as citizens of the Union, to:

   (a) access to education;

   (b) access to employment and self-employed activity;

   (c) access to vocational guidance, initial and further training and retraining.

2. Points (b) and (c) of paragraph 1 shall not apply to relatives in the ascending line or to children of full age to whom Article 5(1)(d) and (e) applies.

Article 13

1. At the latest after four years of residence, and provided the family relationship still exists, the spouse or unmarried partner and a child who has reached majority shall be entitled to an autonomous residence permit, independent of that of the applicant.

2. The Member States may issue an autonomous residence permit to children of full age and to relatives in the ascending line to whom Article 5(1)(d) and (e) applies.

3. In the event of widowhood, divorce, separation or death of relatives in the ascending or descending line, persons who have entered by virtue of family reunification and have been resident for at least one year, may apply for an autonomous residence permit. Where necessary by reason of particularly difficult situations, Member States shall accept such applications.

Chapter VI

Penalties and redress

Article 14

1. Member States may reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew a residence permit, where it is shown that:

   (a) entry and/or residence was obtained by means of falsified documents or fraud; or

   (b) the marriage or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.

2. Member States shall undertake specific checks where there are grounds for suspicion.

Article 15

Member States shall have proper regard for the nature and solidity of the person's family relationships and the duration of his residence in the Member State and to the existence of family, cultural and social ties with his country of origin where they withdraw or refuse to renew a residence permit or decide to order the removal of the applicant or members of his family.

Article 16

Where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered, the applicant and the members of his family have the right to apply to the courts of the Member State concerned.

Article 17

The Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by the date specified in Article 19 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Chapter VII

Final provisions

Article 18

No later than two years after the deadline set by Article 19 the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose such amendments as may appear necessary.

Article 19

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 20

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities.*

Article 21

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEX

Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health[1].

Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families[2].

Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State[3].

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services[4].

Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity[5].

Council Directive 90/364/EEC of 28 June 1990 on the right of residence[6].

Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity[7].

Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students[8].

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1 OJ 56, 4.4.1964, p. 850/64.
2 OJ L 257, 19.10.1968, p. 13.
3 OJ L 142, 30.6.1970, p. 24.
4 OJ L 172, 28.6.1973, p. 14.
5 OJ L 14, 20.1.1975, p. 10.
6 OJ L 180, 13.7.1990, p. 26.
7 OJ L 180, 13.7.1990, p. 28.
8 OJ L 317, 18.12.1993, p. 59.