

CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN

A comparative study in nine EU member states

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AUTHORS

Yves Pascouau, Senior Policy Analyst, European Policy Centre
Henri Labayle, Prof. at the University of Pau (France)

NATIONAL EXPERTS

Belgium	Prof. Sylvie Sarolea, Catholic University of Louvain
France	Prof. Henri Labayle, University of Pau
Germany	Prof. Dr. Kay Hailbronner, University of Konstanz
Poland	Prof. Barbara Mikolajczyk, University of Silesia
Portugal	Prof. Nuno Piçarra and Prof. Francisco Pereira Coutinho, Nova University of Lisbon
Slovenia	Neza Kogovsek Salamon, Il.m., Peace Institute, Institute for Contemporary Social and Political Studies, Ljubljana
Spain	Prof. Cristina Gortazar Rotaecche, Comillas Pontifical University of Madrid
Sweden	Prof. Orjan Edstrom and Dr. Eva Nilsson, Umeå University, Susanne Riekkola, Migration Board
The Netherlands	Dr. Tineke Strik, Radboud University Nijmegen, Centre for Migration Law

CONTRIBUTION TO THE QUESTIONNAIRE

Prof. Phillipe de Bruycker, Free University of Brussels

EDITING AND LAYOUT

Andrew Williams, European Policy Centre
Sheena McLoughlin, European Policy Centre
Myriane Bartholomé, European Policy Centre

CO-EDITORS

Françoise Pissart, Director, King Baudouin Foundation
Fabrice de Kerchove, Project Manager, King Baudouin Foundation

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GENERAL INTRODUCTION

Migration policies among EU member states have undergone major changes in recent decades, which have had a significant impact on family migration rules and policies.

Firstly, the 1970s oil crisis triggered tremendous change. It drove member states to adopt restrictive labour migration policies. As a consequence, family reunification became one of the main ways to legally enter EU member states. Figures in some EU countries confirm that the majority of migrants entered for the purpose of family reunification.

Meanwhile, the issue of family reunification has been gaining in importance at European level. The growing impact of the European Court of Human Rights and its jurisprudence regarding the right to family life represented a first step. On the basis of Article 8 of the European Convention on Human rights, the Court has framed and limited member states' room for manoeuvre. More precisely, the right to family life has been used as a strong and successful argument against expulsion procedures in member states. It has also been successful in cases regarding the admission of third country nationals.

A second major step occurred at European level after 1999. With the entry into force of the Treaty of Amsterdam, the European Union (EU) gained competences in the field of migration issues. On this basis, it adopted a Directive on the right to family reunification. This Directive (2003/86/EC) determines the conditions for exercising the right to family reunification for third country nationals residing lawfully on the territory of an EU member state. Since then, several rules related to the conditions for exercising the right to family reunification – as well as rights deriving from this status – have been embedded in EU rules, which impact upon national rules and practices.

However, the novelty introduced by the Treaty of Amsterdam goes much further than the 'technical' adoption of common rules. It proposes a 'new' reading of the issue. Firstly, the roots of the Directive are closely linked to the integration of migrants. In this view, the Directive should not to be considered as a tool to manage migration but rather as a means of enhancing the integration of migrants legally residing in their host society. Secondly, the European Court of Justice's interpretation of the Directive has played a strong role in giving it a crucial dimension: it has recognised the existence of the right to family reunification and firmly delineated member states' margins of manoeuvre.

Family migration rules and policies have been constantly modified for almost 40 years now. On the one hand, this is due to the modification of migration policies at national and European level, and on the other, to the impact of family reunification on migration flows and most probably *vice versa*.

Family reunification is a sensitive issue that is subject to changing landscapes. Ever-evolving policies and modifications have been very important in the last couple of years at both national and European level and explain why a new study on conditions for family reunification is timely (I). However, such a study needs to be delineated (II) and its methodology defined (III).

I. Changing landscapes

The landscape within which family reunification policies and rules are evolving is subject to several modifications that occur either at national (A) or European level (B). It is therefore important to take a closer look to gain an understanding of the reasons and context within which this study is taking place.

A. In EU member states

Two main issues deserve attention when looking at modifications that have intervened in member states' policies.

1. The transposition of the Directive

The first relates to the impact of Directive 2003/86/EC on EU countries. Indeed, EU member states are obliged to transpose the Directive into their national legal systems before a deadline set by the Directive.¹ This means that they must, when required, adapt their rules to the requirements set out in the Directive. In this regard, and notwithstanding often broad wording, the Directive has had a significant impact in the member states.

It has, on the one hand, obliged some states to adopt new rules in the field of family reunification. This has been the case, for instance, in countries where no specific legislation was previously applicable in this matter. On the other hand, some member states have taken advantage of their duty to implement the directive to modify existing rules, sometimes in a more restrictive way. In the end, the obligation to transpose into law Directive 2003/86/EC has served as a very strong lever to modify national rules and to a certain extent national policies in this regard.

All obligations deriving from the transposition of the Directive are monitored by the European Commission. The Commission is in charge of assessing whether member states have transposed the Directive accurately and on time. If not, the Commission is entitled to begin infringement procedures at the European Court of Justice aimed at sanctioning any lack of transposition or incorrect transposition.

However, the duty to transpose the Directive is not the only part of the landscape that is changing at national level. Another has emerged in some member states, in that there is a growing tendency to adopt restrictive policies regarding family reunification.

1. According to Article 20 of Directive 2003/86/EC "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 3 October 2005. They shall forthwith inform the Commission thereof". It should be noted that the United Kingdom, Ireland and Denmark are not participating in this Directive and are not bound by or subject to its application.

2. Restrictive national policies

The underlying idea behind restrictive policies regarding family reunification is based on a two-pronged approach. Firstly, family reunification is often significant in terms of numbers compared to other types of migration. Secondly, because family reunification is protected by fundamental rights, member states consider themselves to be bound by the obligation to admit the family members of third country nationals with very little room for manoeuvre. The discourse developed in France by President Nicolas Sarkozy regarding 'wanted' and 'unwanted' migration is illustrative here.

To make family migration more difficult, member states are thus tempted to modify or have already modified rules governing the conditions requested for family reunification. The debate that took place in Belgium – which led to the adoption of a brand new law – is also evocative of such a trend.

National policies aimed at making family reunification more difficult have been echoed at EU level. Under the French EU Presidency at the end of 2008, heads of state and government adopted the European Pact on Immigration and Asylum. This document sets out orientations for the years to come in the field and addresses, among others, the issue of family reunification. It indicates that the European Council has agreed to regulate family reunification more effectively. In this regard, the Council invites member states "to take into consideration in its national legislation, (...), its own reception capacities and families' capacity to integrate, as evaluated by their resources and accommodation in the country of destination and, for example, their knowledge of that country's language".

As described more precisely below, the objectives defined by the heads of state and government in the European Pact are quite clear. They seek to better regulate, i.e. limit, family reunification by modifying national rules regarding the conditions to be fulfilled, namely resources, accommodation and language knowledge.

3. The bottom-up approach or the impact of national policies at EU level

All of these movements shed light on an interesting fact. Member states are fuelling and shaping policy at EU level in a constant bottom-up movement.

The first step is indicated by the adoption of Directive 2003/86/EC. Notwithstanding its European nature, this rule is deeply rooted in national constraints. Indeed, it was adopted by national ministers on a unanimity basis. As a consequence, member states have secured their national policies and refrained from adopting rules that would limit their margins of manoeuvre. This derives from the content of Directive 2003/86/EC, which is largely based on optional and non-binding rules.

Secondly, and whenever Directive 2003/86/EC has obliged some member states to adapt or modify their rules, governments are still influencing the debate. The involvement of the heads of state and government – the highest EU political level – is a clear demonstration of such an

intervention. The content of political orientations, i.e. the will to better regulate family migration by using levers related to conditions for family reunification, is also a sign of EU countries' commitment to strengthening existing rules.

To sum up, the field of family reunification is subject to a changing process fuelled by member states. At national level, some countries are steering towards restrictive policies. In this regard, the climate is somewhat 'heavy' regarding the issue of family reunification and limiting this phenomenon is often the main goal. This trend is echoed at EU level, where the European Council is calling for more effective regulation of family reunification.

B. At EU level

Major changes are also occurring at EU level. At EU level, the changes concern, first of all, the whole framework. The adoption of the Lisbon Treaty brought with it tremendous modifications that will certainly impact upon the question of family reunification (1). Then, the development of promising jurisprudence by the European Court of Justice is also an element that is shaping in a different manner the policy environment of family migration (2). Both changes have occurred recently, i.e. end 2009 and 2010, and are important to underline as they impact in a very important manner upon the field of family reunification.

1. Changes introduced by the adoption of the Lisbon Treaty

Among the numerous changes introduced by the Lisbon Treaty, which entered into force in December 2009, two are of significant importance regarding family reunification.

The first one concerns modification of the decision-making process. From unanimity, the issue of family reunification, as well as other issues related to legal migration, now come under the co-decision procedure. This means, on the one hand, that decisions within the Council of Ministers are taken on the basis of majority. As a consequence, the power to veto a decision disappears. Hence, a decision to modify Directive 2003/86/EC may be adopted even if a small group of member states is opposed to it.

On the other hand, and more crucially, the European Parliament becomes a co-legislator. In this view, the Parliament may exercise a crucial role. It may go in the direction of some Member States and push for the adoption of new rules, even in a restrictive way. Or, it may adopt a 'migrant-oriented' position that opposes any restrictions on the right to family reunification. In either case, the Parliament is a new player in this game and its role should be followed closely. The redistribution of power and the full participation of the European Parliament present a new landscape which may influence whether or not rules on family reunification can be modified. The scheduled publication of a Green Paper in November 2011 on family reunification and the contributions of European Parliament representatives/groups will help to determine where the institution stands with regard to protecting the right to family reunification in a context where some delegations, such as the Netherlands, would like to restrict, or at least frame in a tougher way, rules enshrined in Directive 2003/86/EC.

The second modification introduced by the Lisbon Treaty concerns the central place awarded to human rights. The treaty gives, on the one hand, legal force to the Charter of Fundamental Rights of the European Union and opens the way, on the other hand, to the accession of the European Union to the European Convention of Human Rights.

The impact of human rights² on the family and family life is threefold. It frames the action of the EU institutions in adopting rules regarding family reunification. In this regard, the EU legislator should not adopt rules that run counter to respecting the right to family life. Secondly, the implementation of EU rules in the member states should also be compatible with human rights requirements. Finally, the legally-binding effect awarded to the Charter constitutes new ground upon which the European Court of Justice will be able to build protective jurisprudence. This is relevant at a time when the Treaty of Lisbon gives full competence to European Court of Justice to interpret rules in the field of immigration and asylum.

Furthermore, the opportunity for the European Union to access the European Charter of Human Rights may act as a lever to uphold the threshold of the commitment to respect human rights. The legislator and the European Court of Justice will be invited to act in accordance and in cooperation with the Court of Human Rights in Strasbourg. This will certainly produce an unprecedented dynamic in a field where fundamental rights are central, not to say crucial.

To summarise, the entry into force of the Lisbon Treaty in December 2009 modified the field of family reunification either in institutional terms, with regard to the decision-making process, or in substantive terms, as fundamental rights now constitute a basis on which EU action is based, implemented and controlled.

2. Impact of ECJ's jurisprudence

Another significant element that has modified the whole field of family reunification concerns the intervention of the European Court of Justice. It has given two interpretations of Directive 2003/86/EC which have considerably framed member states' actions and therefore modified the landscape.³

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2. Article 9 of the Charter of Fundamental Rights of the European Union: Right to marry and right to found a family
 "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".
 Article 33 of the Charter of Fundamental Rights of the European Union: Family and professional life
 "1. The family shall enjoy legal, economic and social protection.
 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child."
 3. ECJ, 27 June 2006, case C-540/03, European Parliament v. Council of the European Union; ECJ 4 March 2010, Rhimou Chakroun, Case C-57/08.

In the first case law, the Court has clearly defined the content of Directive 2003/86/EC and delineated the margins of manoeuvre of the member states. As regards the content, the Court has reminded the member states that they have adopted a Directive on the right to family reunification, which means that as soon as applicants for family reunification fulfil the conditions defined by national law, they benefit from a right to family reunification.⁴

Regarding the margins of manoeuvre of EU countries, the Court has drawn some very important lines relating to the obligations of member states, on the one hand, to respect the best interests of the child and, on the other hand, to proceed to an individual examination of the application, taking into account family links and the length of the stay in the member state and/or in the country of origin.

The second case law is a development of this first round of jurisprudence. Firstly, the Court of Justice has applied the obligation to individualise the examination of the application to the condition of sufficient resources. As we will see below, national authorities are no longer allowed to reject an application for family on the sole grounds that the applicant does not earn a fixed amount of money defined by the law. A minimum income constitutes a reference for the examination of the application and national authorities need to assess whether the income is "sufficient" to maintain the needs of the sponsor and the family.

Secondly, and more importantly, the Court of Justice has defined an objective of the Directive which was not self-evident. Indeed, it has ruled that the Directive's objective is to "promote family reunification". This has a tremendous effect as the Directive's provisions and implementing rules should now be interpreted in the light of this objective. Hence, implementing rules aimed at limiting the right to family reunification may be considered to run counter to the right to family reunification, and their compatibility with the objective of the directive may be questioned if not challenged.

The impact of the jurisprudence of the Court of Justice will be analysed in detail below. However, the enrolment of the European judge has clearly modified the field within which rules related to family reunification are operating.

Significant changes are redefining the whole landscape of family reunification. At EU level, the interpretation of the Court of Justice is one element and the adoption of the Lisbon Treaty another. At national level, the willingness of some states to modify rules regarding family reunification in a more restrictive way and the adoption of the European Pact are important trends in the sense of a new perception of rules regarding family reunification. In this regard, the modification of Belgian rules in May 2011 is a relevant example.

4. The Court stated "the Directive imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation". Case C-540/03.

This changing landscape justifies returning to the issue of the conditions for family reunification to see whether national rules have changed recently and whether forthcoming or existing rules are (still) compatible with new developments and interpretations.

II. Defining the scope of the study

Family reunification covers various situations. This study targets a specific category of persons entitled to family reunification (A). It does not cover all of the EU's member states but only some of them, selected on the basis of different criteria (B).

A. Personal scope

Family reunification is an intricate domain, as the rules applicable are different according to the status of the sponsor. Three main categories can be identified.

The first category concerns family reunification of nationals of an EU state with third country nationals. Rules applicable in this situation fall within the remit of member states.

The second category concerns family reunification of citizens of an EU member state who have exercised their freedom of movement within the EU. For instance, a Spanish citizen living in Germany who wishes his/her spouse of EU or third-country nationality to join him/her. This situation falls within the scope of Directive 2004/38/EC. It should be outlined that rules applicable in this regard are very much favourable to people as they simplify the procedure and limit member states' margins of manoeuvre.

The third category concerns family reunification of third country nationals legally residing in a member state who wishes his/her family of third-country nationality to join him/her. This is the case, for instance, of a Senegalese citizen living in France who wishes his/her family members to join him/her. This situation is covered by Directive 2003/86/EC.

This study covers the third category i.e. family reunification of third country nationals legally residing in one of the EU's member states.

The reasons for such a choice are three-fold. On the one hand, family reunification of third country nationals legally residing into the EU member states is framed by an EU directive. Directive 2003/86/EC establishes a set of rules aiming at harmonising national rules and policies. On the other hand, previous research in the field allows for a comparison of rules and trends taking place in member states at national level. Finally, new rules on family reunification were adopted in Belgium in May 2011, which seem to abandon rules applicable beforehand, where EU citizens and nationals were under the same legal regime. Under these new rules, Belgian nationals hoping to be reunited with family members coming from non EU-countries no longer benefit from favourable rules and have to fulfil new criteria

in order to exercise their right to family reunification. In this view, the situation of a Belgian national is getting closer to the situation of third country nationals.

Considering these elements, this study will focus on the family reunification for third country nationals legally residing in one EU member state. As a consequence, national rules regarding conditions will be disclosed and assessed on the basis of provisions enshrined in Directive 2003/86/EC on the right to family reunification.

B. Member states covered

It was not possible in the framework of this study to cover all 27 EU member states. Hence, it was necessary to target a group of member states in order to reflect, as much as possible, different balances and trends. Therefore, a balance has been struck taking into account the size of the states and their location between South and North.

More specific characteristics related to the migration field have also been taken on board, like old immigration countries and new immigration countries, or states where new rules have been adopted within the last 2-3 years. Finally, the position of certain states in the 'migration debate' was also of importance in the selection. This was particularly the case for those member states that have a loud 'voice', often negative, in the debate. To counter-balance negative discourses, the team has chosen to disclose rules applicable in states where the approach towards migrants is more favourable.

On the basis of these elements, the following member states have been targeted: Belgium, France, Germany, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

III. Methodology

With the support of the Odysseus network – a partner in this project – several national experts coming from the EU member states identified were asked to fill in a questionnaire.⁵ The questionnaire contained over 90 questions related to the conditions for family reunification requested by member states and took into account the effects of EU rules on national systems. This synthesis report based on the analysis of national answers has been revised by one of the experts⁶ and approved before editing by national experts.

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5. National experts are the following: Sylvie Sarolea (Belgium); Henri Labayle (France); Kay Hailbronner (Germany); Tineke Strik (the Netherlands); Barbara Mikolajczyk (Poland); Nuno Picarra and Francisco Pereira Coutinho (Portugal), Neza Kogovsek Salamon (Slovenia), Cristina Gortazar Rotaecche (Spain); Orjan Edstrom, Susanne Riekkola and Eva Nilsson (Sweden).
 6. Prof. Henri Labayle, Université de Pau et des Pays de l'Adour (France).

According to information provided by national experts and on the basis of scientific information already available – primarily the report from the Odysseus Network on the implementation of Directive 2003/86/EC in the member states and the report published by the Centre for Migration Law at Radboud University in Nijmegen (the Netherlands) – the final report seeks to deepen knowledge of family reunification rules. More particularly, it points out new rules adopted in certain member states and highlights trends among them. This approach takes also into account modifications introduced by the jurisprudence of the European court of justice. It also seeks to situate the report in a context where the European Commission is scheduled to publish a Green Paper by the end of 2011.

In the end, this methodology allows us to:

- ✓ identify changes in national law and/or regulation since 2007;
- ✓ deepen knowledge of specific items;
- ✓ confirm or discover trends among member states, be they in favour of family reunification or against;
- ✓ confront national rules with EU requirements and evolutions deriving principally from the European Court of Justice's jurisprudence;
- ✓ put national rules, trends and shortcomings into perspective, in particular given the forthcoming consultation on the basis of the European Commission's Green Paper on family reunification.

CHAPTER 1 – GENERAL OVERVIEW

This first Chapter aims to outline changes in national law (laws and/or regulations) that have occurred since 2007. Such an approach takes principally as a basis two comparative studies dealing with the transposition of Directive 2003/86/EC on the right to family reunification in EU member states. One was written by the Odysseus network for the European Commission.⁷ The other was published by the Centre for Migration Law at Radboud University in Nijmegen (the Netherlands).⁸

Both reports were finished in 2007. They offer a basis for identifying rules that have been adopted since then. Indeed, family reunification is a domain under a lot of strain at both EU and national level (I) and leads member states to modify rules in this regard. Former reports, in this way, provide a basis to assess whether conditions for family reunification have been recently modified and to what extent they have been made more flexible or tougher (II).

I. Moving context: family reunification under strain

Of the nine member states covered by the survey, eight have adopted rules since 2007 modifying conditions for family reunification. **Poland** is the only country not to have substantially modified national rules regarding conditions for family reunification.⁹ The fact that eight member states modified the rules applicable to conditions for family reunification demonstrates that the issue is one of the liveliest in the field of migration. This legislative or regulatory 'activism' is fuelled by different and intertwined reasons at EU and national level.

A. At EU level

At EU level, the obligation to transpose Directive 2003/86/EC into national legal orders obliged member states to act after 2003. As a consequence, national institutions adapted their rules to the requirements and provisions of the directive.

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7. H. Labayle & Y. Pascouau, "Directive 2003/86/EC on the Right to Family Reunification", Study on the "Conformity checking of the Transposition by Member States of 10 Directives in the Sector of Asylum and Immigration" done for DG JLS of the European Commission, 2007 (contract JLS/B4/2006/03).
 8. K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers & T. Strik, "The Family Reunification Directive in EU Member States. The First Year of Implementation", Centre for Migration Law, Willem-Jan and René van der Wolf Publishers, 2007.
 9. This could be explained by the fact that Poland established for the first time a legal regime regarding family reunification when it transposed Directive 2003/86/EC in 2003 (See H. Labayle & Y. Pascouau *op. cit.* p. 161.). As a consequence, these rules did not need to be modified substantially and subsequent legislation aimed at adapting the rules sometimes on specific and technical points such as rules on family reunification for beneficiaries of subsidiary protection or investigation powers awarded to Border Guards.

This legal movement was followed a few years later by a strong political incentive. EU heads of state and government adopted in October 2008 the European Pact on Immigration and Asylum. The European Pact is a document agreed by EU heads of state and government. It defines the orientations of EU immigration and asylum policies for the years to come.

With regard to family reunification, EU leaders agreed "to regulate family migration more effectively". In this regard, the Pact invites each member state "to take into consideration in its national legislation, (...), its own reception capacities and families' capacity to integrate, as evaluated by their resources and accommodation in the country of destination and, for example, their knowledge of that country's language". In other words, it calls for further action at national level, more particularly regarding conditions for family reunification.

B. At national level

At national level, family reunification is subject to enhanced focus and is often under strain for two main and complementary reasons.

Firstly, and since the mid 1970s, family reunification remains the most important way to enter an EU member state legally. As a consequence, it touches upon the question of admission of third country nationals and is therefore a very sensitive issue.

Secondly, and consequently, some member states are tempted to modify rules regarding family reunification with a view to better managing migration flows – i.e. to reducing the number of people entitled to family reunification – by making the rules harder. The debate that has been taking place in France since 2006, qualifying family reunification as "unwanted migration" ("*immigration subie*") or "chosen migration" ("*immigration choisie*") as regards labour migration is a good example of such a trend leading to modification of the rules.

It should, however, be underlined that not all member states are following the same restrictive path. Two of them, **Portugal** and **Slovenia**, have for instance adopted rules making conditions for family reunification easier. But, and as we will see below, this concerns a limited number of member states and modifications may sometimes be considered as minor.

EU obligations and incentives, as well as national priorities, shape the context within which family reunification stands and evolves. This moving context is characterised in the table below, which demonstrates that the member states surveyed have several times modified national rules related to family reunification.

The table takes into account dates of modification and types of rules. In this regard, the distinction is usually that laws establish or modify rules, whereas regulations are implementing instruments i.e. regulations specify legal provisions in order to allow their implementation. Whatever the type of rules, the table below shows that the field of family reunification is constantly evolving in the EU member states selected.

	Changes	Date(s) of modification	Type of rules
BE	Yes	2009-2011	Law & Regulation
FR	Yes	2007-2008	Law & Regulation
GE	Yes	2011	Law
NL	Yes	2009-2010	Law & Regulation
PL	Yes	2008-2011	Law & Regulation
PT	Yes	2009	Regulation
SL	Yes	2008-2011	Law
SP	Yes	2009-2011	Law & Regulation
SW	Yes	2010	Law & Regulation

II. Overview of modifications regarding conditions for family reunification

This short overview addresses the conditions for family reunification defined by Directive 2003/86/EC as a framework (A). It then recalls the type of conditions that were implemented in the member states selected in 2007 (B). The overview concludes with an outline of current trends taking place in the member states surveyed (C).

A. Conditions defined by Directive 2003/86/EC

Directive 2003/86/EC establishes a set of conditions that member states may ask applicants for family reunification to fulfil. For the purposes of this study, the main conditions in articles 4, 7 and 8 have been more particularly targeted.

Article 7 of Directive 2003/86/EC allows member states to require a sponsor to prove that he/she has:

- ✓ appropriate accommodation;
- ✓ sickness insurance;
- ✓ stable and regular resources;
- ✓ compliance with integration measures.

Under Article 8 of Directive 2003/86/EC, member states are entitled to establish a period of legal residence before the sponsor is entitled to be joined by his/her family. This provision stipulates that such a period may not exceed two years.

Article 4, paragraph 5 of Directive 2003/86/EC states "in order to better ensure integration and to prevent forced marriages, member states may require the sponsor and his/her spouse to be of minimum age, and of maximum 21 years, before the spouse is able to join him/her".

B. State of play in 2007

None of the conditions enshrined in the directive are mandatory. Directive 2003/86/EC allows member states to incorporate the conditions into their national legislation but does

not bind them to do so. As demonstrated in the table below¹⁰, based on the outcomes of the study carried out by the Odysseus Network in 2007, some member states request third country nationals to comply with almost all of the conditions foreseen, whereas others do not impose any specific conditions.

Conditions for family reunification requested in the member States (end 2007)

States	Sickness Insurance	Appropriate accommodation	Stable & regular resources	Integration measures	Period of legal residence	Total
BE	YES	YES	YES *	NO	YES	3-4/5
FR	NO	YES	YES	YES	YES	4/5
GE	YES	YES	YES	YES	YES	5/5
NL	NO	NO	YES	YES	NO	2/5
PL	YES	YES	YES	NO	YES	4/5
PT	NO	YES	YES	NO	NO	2/5
SL	YES	NO	YES	NO	YES	3/5
SP	YES	YES	YES	NO	YES	4/5
SW	NO	NO	NO	NO	NO	0/5
	5/9	6/9	8/9	3/9	6/9	

* In Belgium, such a requirement was only asked for in the family reunification of parents of adult handicapped children and foreign students.

This table gives a general overview of conditions requested by member states in the framework of the family reunification procedure at the end of 2007. Although the quantitative approach is always limited, as it needs to be combined with qualitative analyses, it nevertheless offers interesting points of comparison.

First of all, **Sweden** was the only member state not to request any conditions for family reunification. On the contrary, **Germany** required the fulfilment of all the five conditions in the chart. **France**, **Poland** and **Spain**, and to a certain extent **Belgium**, demanded the fulfilment of four conditions. In this group, France was the only state to request third country nationals to comply with integration measures. **Slovenia** imposed three conditions, and **Portugal** and **the Netherlands** demanded the fulfilment of two conditions.

Secondly, of the conditions covered by the chart, that of stable and regular resources is the most commonly used: eight of the member states, with the exception of **Sweden**, use such a requirement. In the category of material conditions, appropriate accommodation is the second most implemented condition. However, it should be pointed out that resources and accommodation conditions vary considerably between member states. Differences in wages and living conditions between member states explain the discrepancies with regard to 'resources' conditions. As for accommodation conditions, the differences are explained by existing variations in national practices and rules.

10. The Chart does not take on board the condition related to minimum age, which will be dealt with separately due to the particular nature of this issue and to huge differences between member states in this regard. However, it is already possible to indicate that, as it stood in 2007, this condition was implemented in BE, FR, GE, NL and SW.

Integration measures were applied in 2007 in three member states: **France, Germany and the Netherlands**. The limited number of member states engaged in such a process must not be underestimated, for several reasons. Firstly, these member states are established countries of immigration and therefore have considerable weight in the debate on migration policy. Secondly, they are very active in the field and may act as 'pioneers' on aspects of migration policy. They have taken advantage of the directive to establish schemes under which family members are requested to fulfil integration measures in the country of origin i.e. before access to the European Union. In addition, rules related to integration have not always been adopted in order to boost the integration capacity of migrants, but rather to control or limit family migration. The Dutch example is one of the most significant in this regard.¹¹ Hence other member states may be tempted to follow this path.¹² In practice, the issue of introducing integration measures in the framework of the family reunification procedure has been either discussed – like in Spain – or already implemented in the United Kingdom and Denmark and planned in Austria. In the end, the possibility of helping to expand such mechanisms is envisaged.¹³ Whenever planned or adopted, mechanisms related to integration measures, and more particularly in the country of origin, must be scrutinised in order to assess whether they seek to enhance integration or limit migration.

C. Current trends in member states surveyed

Of the nine member states covered by the survey, just one – **Poland** – has not modified national rules on conditions for family reunification. The other eight have, on the contrary, adopted legislative or regulatory measures in order to modify previous rules or create new ones.

In **Belgium**, successive laws adopted in 2009 and 2011 have significantly modified rules regarding family reunification. Since 2009, accommodation conditions and sickness insurance are requested for the family reunification of minor refugees. The laws have limited the scope of family reunification in polygamous marriages to one spouse and the children of that spouse. The minister is entitled to assess the effective cohabitation of family life. Last but not least, the law adopted in May 2011 introduced an income requirement on the basis of which the sponsor must prove that they earn a minimum income equivalent to 120% of the minimum social income.

In **the Netherlands**, new rules have made previous ones tougher. Integration requirements have been upheld and income requirements modified to make them stricter. In September 2010, the new coalition government announced several extra requirements for family

11. See report issued by Human Rights Watch, which found that people of Moroccan and Turkish origin are especially affected, while citizens from 'Western' countries such as Canada, Australia and Japan are exempt. Human Rights Watch 'The Netherlands: Discrimination in the Name of Integration Migrants' Rights under the Integration Abroad Act', May 2008, number 1.

12. From a technical point of view, Directive 2003/86/EC does not contain any stand-still clause regarding integration measures. This means that after the entry into force of the directive, any member state may decide to apply such rules and mechanisms in their own country.

13. Y. Pascouau "Mandatory Integration provisions in EC and EU Member States Law" in S. Bonjour, A. Rea & D. Jacobs "The Others in Europe", Editions de l'Université de Bruxelles, 2011.

reunification, including the abolishment of the admission of unmarried partners and spouses who are cousins, the introduction of the accommodation and sickness insurance requirement and the requirement of one year legal residence, and the possibility to withdraw the residence permit of admitted family members if they don't comply with integration conditions. In several parliamentary documents, the government indicated that they would use all the margin of manoeuvre the directive leaves to the Member States in order to restrict the right to family reunification.

On the contrary, **Portugal** has made income requirements easier for people who fall into involuntary unemployment after family reunification. **Slovenia** has adopted successive laws that make, *inter alia*, the calculation of the period of legal residence easier (2008 and 2011) or widen the scope of family members to include partners (2011). In **Germany**, rules are primarily aimed at modifying requirements applicable after entry into its territory and are related to prolonging residence permits or issuing independent residence rights for the spouse.

In other member states, such as **France**, rules have had the principal objective of implementing and therefore specifying legal norms adopted in 2007. For instance, several regulatory acts define integration measures or conditions for implementing the requested condition of sufficient resources.

Finally, only two member states, **Spain** and **Sweden**, have introduced new requirements that were not previously demanded. **Sweden** has abandoned its former position and introduced, under specific circumstances, income and accommodation conditions. In **Spain**, rules adopted in 2011 open the way to an increased role of integration issues. Since then, renewal of the residence permit may be subject to an evaluation of efforts of the alien to integrate.

This shows, as stated above, that the domain is still a major concern and is subject to perpetual modifications throughout EU member states. **Spain** and **Sweden** deserve particular mention as they increase the number of member states using additional conditions in the field of family reunification. As a result, every member state of the European Union, i.e. not only those under scrutiny but all 27, currently applies an income requirement.

Conditions for family reunification requested in the member States (mid 2011)

States	Sickness Insurance	Appropriate accommodation	Stable & regular resources	Integration measures	Period of legal residence	Total
BE	YES	YES	YES	NO	YES	4/5
FR	NO	YES	YES	YES	YES	4/5
GE	YES	YES	YES	YES	YES	5/5
NL	NO	NO	YES	YES	NO	2/5
PL	YES	YES	YES	NO	YES	4/5
PT	NO	YES	YES	NO	NO	2/5
SL	YES	NO	YES	NO	YES	3/5
SP	YES	YES	YES	YES	YES	5/5
SW	NO	YES	YES	NO	NO	1/5
	5/9	7/9	9/9	4/9	6/9	

Such a movement cannot be disconnected from the European Pact in Immigration and Asylum. As we have already stated, this document defines orientations agreed by heads of state and government for the coming years. As regards family reunification, it invites each member state "to take into consideration in its national legislation (...) its own reception capacities and families' capacity to integrate, as evaluated by their resources and accommodation in the country of destination and, for example, their knowledge of that country's language".

Material conditions for family reunification – accommodation, resources and language knowledge – are considered to be areas within which action or further action is agreed. But what is striking in the document is the acknowledgement of taking these elements "into consideration in (its) national legislation". This means that member states that have not introduced such requirements into their legislation already are invited to do so. This explains why Sweden has introduced an income requirement when such a possibility was excluded in 2007 as "it would deviate from the Swedish immigration policy".¹⁴

Furthermore, this shows how heads of state and government have succeeded in modifying the content of Directive 2003/86/EC even without entering into any legislative process. Indeed, material conditions for family reunification defined by the directive are all optional provisions, i.e. member states may or may not use them. The acknowledgement of taking such conditions into consideration in national law means that member states have agreed to adopt and implement such material conditions in their own legislation, particularly when they did not already exist. In this regard, the European Pact transformed optional provisions of a Directive into mandatory ones.¹⁵

This overview demonstrates, on the basis of quantitative analysis, that rules and policies regarding family reunification are under strain. The aim of the current study is to analyse the rules applicable in the selected EU member states regarding conditions for family reunification. Such a qualitative approach offers two main relevant inputs. On the one hand, it offers an insight into the content of the rules and their impact, whether restrictive or flexible, on the family reunification procedure. On the other hand, it allows us to plot trends within and across member states in this highly sensitive domain.

14. H. Labayle & Y. Pascouau, *op. cit.* p. 99.

15. Refer in this regard to P. de Bruycker quoted by H. Dumont "La politique européenne d'immigration. Synthèse des travaux en atelier" in J.-Y. Carlier "L'étranger face au droit, XXème journées d'études juridiques Jean Dabin", Bruylant, Bruxelles, 2010. See also, P. de Bruycker & Y. Pascouau "Le regroupement familial à la croisée des droits européen et belge", Fondation Roi Baudouin, 2011.

CHAPTER 2 – COMPARATIVE ANALYSIS REGARDING CONDITIONS FOR FAMILY REUNIFICATION

This study focuses on the wide range of conditions that member states demand must be fulfilled to exercise the right to family reunification. These include the scope of persons entitled to benefit from the right (Section 1), procedural requirements that applicants must comply with (Section 2) and material conditions that they must fulfil (Section 3). The study also addresses different changes and trends that have taken place in the member states since the adoption of Directive 2003/86/EC (Section 4).

SECTION 1 – FAMILY MEMBERS

It goes without saying that family reunification involves family members. But beyond this elementary statement lurks a more difficult question: which family members should fall within the scope of family reunification? In other words, should family reunification be open to a large group of persons or should it be limited to just a few?

This question is important, as the notion of family is not shared in the same manner all over the world. Indeed, in some regions, family is not based on descent and entails a large group of persons. In other regions, family is more precisely defined as strictly based on descent and covers a limited group of people.

The latter is the position developed at EU level in Directive 2003/86/EC. The right to family reunification is primarily awarded to the nuclear family. Hence, and for the time being, spouses (I), unmarried partners (II) and children (III) fall within the scope of family reunification procedure under EU law. The Directive makes it possible for member states to extend the scope of the right for parents in the direct ascending line, but this possibility remains optional (IV).

I. The spouse

A. Right to reunification for the spouse

The spouse is, with minor children, the person to whom family reunification is most obviously granted. Several international instruments recognise this possibility, whereas at EU level family reunification of the spouse is a right. Directive 2003/86/EC indicates in Article 4 that member states shall authorise entry and residence to "the sponsor's spouse". As a consequence, and provided that the spouse fulfils the appropriate conditions set by national rules, he/she has the right to join the sponsor.

This right to family reunification has been clearly recognised by the Court of Justice. In a case law issued in June 2006 it stated that "Article 4(1) of the Directive imposes precise positive

obligations, with corresponding clearly defined individual rights, on the member states, since it requires them, in the cases determined by the directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation".¹⁶

Unsurprisingly, as shown in previous studies, in all of the member states covered by this study the spouse has a right to family reunification.

B. Condition of minimum age

However, the right is not absolute in the sense that some member states have adopted rules that limit the right to family reunification to spouses that have reached a minimum age. Such a possibility is recognised by Article 4, paragraph 5, of Directive 2003/86/EC. This provision indicates that "in order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years old, before the spouse is able to join him/her".

Among the member states studied, three categories can be distinguished:

- ✓ member states which have instituted a minimum age above the age of majority, such as **Belgium and the Netherlands**;
- ✓ member states which have established rules based on the age of majority, such as **France, Germany and Sweden**;
- ✓ member states which have not adopted any rules in this regard, such as **Poland, Portugal, Slovenia and Spain**.

1. Minimum age above the age of majority

In **the Netherlands**, the age limit has recently been changed and upheld at 21 years old. Previous legislation used to distinguish between 'family reunification', where the family relationship existed before the entry of the sponsor into the territory, and 'family formation', where the family relationship arose at a time when the principal place of residence of the principal person was the Netherlands. The age limit was 18 years old for family reunification and 21 years old for family formation.

The European Court of Justice rejected the distinction established by Dutch law. It indicated that Directive 2003/86/EC precludes national legislation that "draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State".¹⁷ As a consequence of this judgement, the Dutch authorities have

16. ECJ, 27 June 2006, case C-540/03, European Parliament v. Council of the European Union, point 60.

17. ECJ 4 March 2010, Rhimou Chakroun, Case C-57/08, point 66.

modified their legislation. They have aligned all age limits to the 21 years old threshold. Given the restrictive nature of the Dutch policies, the decision was taken to raise the age limit rather than lower it.

In **Belgium**, the spouse or the partner must be older than 21. However, this limit is reduced to 18 when the marriage or the partnership pre-dates the arrival of the sponsor in Belgium. In the wake of the Chakroun case law, it is doubtful whether such a distinction is still valid. If the state wants to keep this rule, it must be objectively justified.

In both cases, the age of 21 represents an important limitation to family reunification. It is allowed under Directive 2003/86/EC. However, this rule is not absolute and is subject to a series of requirements deriving from international and EU obligations. Indeed, EU law and obligations deriving from human rights instruments oblige national authorities to take into account the applicant's individual situation before taking a negative decision. More precisely, and according to Article 17 of Directive 2003/86/EC, when examining an application member states have to take due account of the nature and solidity of the person's family relationships, the duration of his residence in the member state and the existence of family, cultural and social ties with his country of origin.¹⁸ As a consequence, the age limit may act as a reference during examination of the application. But it should not prevent member states from accepting reunification where the individual situation imposes it.

2. Minimum age equal to majority

In **France, Germany and Sweden**, the spouse must be at least 18 years old to be entitled to family reunification.

In **Sweden**, this rule is implemented in order to avoid marriages and cohabitation between minors. Although the rule normally leads to the refusal of the requested residence permit for minors, the Swedish rule stipulates that the authorities must take into account other personal circumstances before taking such a negative decision. For instance, and according to previous jurisprudence, the authorities may not refuse to issue a permit if the spouse is pregnant.

In **France**, the decree implementing the law adopted in 2006 indicates that the minimum age limit must have been reached before the day the application for family reunification is introduced. In other words, no application will be considered valid before the spouse has reached the age of 18 years old.

The French solution, which calls for the automatic rejection of applications, is less flexible than the Swedish one. The latter, which involves assessing each individual situation before

18. On this point, see ECJ points 52 to 64 ECJ, 27 June 2006, case C-540/03, European Parliament v. Council of the European Union, point 60.

rejecting an application, should be considered a good and balanced solution. Indeed, the rule can be adapted to specific situations and may in the end be more favourable. It also looks to be in line with the interpretation of the Court of Justice, which obliges national authorities to conduct "an individual examination of applications for family reunification".¹⁹ In this regard, it is questionable whether the existence of a rule leading to the automatic rejection of an application is compatible with this obligation.

3. No specific rules regarding minimum age

In **Poland, Portugal, Slovenia and Spain**, rules related to family reunification do not set a minimum age limit. But such a solution does not mean that any spouse aged far less than 18 years old is entitled to family reunification. Other national rules to those related to family reunification may in law or in practice set limits. This is the case in **Poland**, where the marriage must be recognised by Polish law. It is thus impossible to apply for family reunification in Poland if the spouse is 13 years old, for example. In **Spain**, and according to Civil Law, a marriage under 14 years old is not allowed and a marriage taking place between 14 to 18 years old is subject to an authorisation provided for by the family or the judge.

4. Comments

Member state rules show that there are still huge differences between even a limited number of examples. From no age limit to rigid rules, the spectrum of possibilities looks diverse and demonstrates that national rules encompass different categories which are not homogenous. Moreover, national rules show further differences between member states in the same category. This is evident in the French and Swedish examples, where Sweden implements rules that render situations more flexible but France relies on strict rules.

However, and as indicated above, EU rules and jurisprudence establish obligations that limit member states' margins of manoeuvre with regard to the minimum age required.

Firstly, Directive 2003/86/EC sets an age limit that cannot be exceeded. Whenever member states want to increase the age limit, they cannot go above 21 years old. In this regard, proposals put forward by the Dutch authorities to increase the minimum age to 24 years is not compatible with the provisions of the directive and therefore not allowed. The only margin of manoeuvre that can be found in the directive lies in the absence of a clear definition of whether the limit of 21 years old is to be interpreted narrowly, at the latest before turning 21, or more openly, in that the spouse is able to join the sponsor when 21 but before turning 22.

Secondly, the purpose of the rule is crucial. The justification of such an age limit is generally²⁰ grounded on the aims enshrined in Article 4, paragraph 5 of Directive 2003/86/EC. This

19. See for instance ECJ 4 March 2010, Rhimou Chakroun, Case C-57/08, point 48.

20. Labayle H. & Pascouau Y., op. cit., p. 45

provision indicates that the minimum age requirement seeks to ensure "better integration and to prevent forced marriages". If such a justification is largely shared by member states, it constitutes a limit on their leeway to act. Indeed, requiring an age limit should only aim to pursue these objectives. Hence other objectives, such as reducing family reunification, cannot justify member states' actions on such grounds. This statement is reinforced by the jurisprudence of the Court of Justice, which has ruled that the objective of the directive is "to promote family reunification".²¹ In other words, member states may not use possibilities offered by the directive to limit or make family reunification harder without legitimate reasons for doing so.

Finally, not fulfilling the minimum age condition would not automatically lead to the rejection of an application. Member states have a duty under Article 17 of Directive 2003/86/EC to proceed to an individual examination of the application. In this view, and during the examination, national authorities have to take due account of the nature and solidity of the person's family relationships, the duration of his residence in the member state and of the existence of family, cultural and social ties with his country of origin. This obligation has been emphasised by the Court of Justice.

To sum up, member states' margins of manoeuvre in this domain are framed by the following rules:

- ✓ 21 years is an age limit that cannot be exceeded.
- ✓ The age limit condition is designed only to ensure better integration and prevent forced marriages.
- ✓ The age limit condition does not prevent national authorities from examining each application on a case-by-case basis with regard to an applicant's individual situation.

C. Rules regarding the validity of the marriage

The right to marry is recognised by the ECHR²² and the EU Charter of Fundamental Rights. The latter stipulates that "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". This provision protects the right of third country nationals to get married in EU member states but recalls that the exercise of this right is framed by national legislation. As a consequence, governments have adopted rules regarding marriages that should be celebrated in EU member states (1) and marriages that have already been celebrated, mostly in the country of origin (2).

21. ECJ 4 March 2010, Rhimou Chakroun, Case C-57/08, point 43.

22. European Convention of Human Rights, Article 12 on the right to marry – "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

1. Marriages celebrated in EU member states

Documents required before marriage

All of the member states surveyed ask third country nationals to provide documents before the marriage takes place.

Primary among these is the obligation to provide a birth certificate, which is requested in eight of the nine states analysed (**Belgium, France, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden**). In **Sweden**, providing a birth certificate is part of a general rule where applicants have to prove their identity. In this regard, the identity is proved with a passport, birth certificate or likewise.

Seven member states ask future spouses to produce a certificate proving that they are not married or divorced (**Belgium, France, the Netherlands, Poland, Slovenia, Spain and Sweden**) or that the former spouse is dead (**Spain**). Such proof may in certain states be accompanied by a certificate issued by the country of origin attesting that he and/or she has the capacity to engage into a marriage or a further marriage (**Belgium, Poland, Portugal and Slovenia**). **France** is quite demanding when it comes proving divorces pronounced in a third country. The official decision must be accompanied by a translation made by an expert and by proof of its definitive nature i.e. all potential remedies have been exhausted and the certificate produced by the foreign authority or other competent body. On the contrary, **Sweden** is more flexible. In every case where an applicant intends to marry or enter into a cohabiting relationship with a sponsor, the applicant is asked if he/she is or has been previously married or has been previously a cohabiting partner. The Migration Board can therefore demand the applicant to provide a certificate proving the applicant's civil status. According to the internal handbook that is applied by the Migration Board, it is natural that the applicant and sponsor has ended any previous relationships or marriages before the applicant can be granted a residence permit because of the seriousness of the new relationship. The handbook notices that in some cultures it can be difficult to obtain a divorce and a permit may be granted anyway but it has to be clear that there are great difficulties to obtain a divorce and that the spouses are no longer living together.

The obligation to produce an identity card/passport or to prove identity is a criterion that is largely shared (**France, Poland, Portugal, Slovenia and Spain**). In **Belgium**, the law asks future spouses to provide proof of nationality. It can be proved on the basis of an ID card, a passport or a certificate of nationality delivered by authorities from the country of origin. In practice, however, passports and ID cards serve as a proof.

A birth certificate, proof that spouses are entitled to get married because they are not married or divorced, and proof of identity must generally be provided by the persons concerned.

Alongside these common features, member states demonstrate some differences. Some require the persons concerned to provide proof of residence (**Belgium, France, Spain**), including residence of witnesses (**France**), residence permits (**Poland**) or work permits (**France**).

Differences also exist among member states with regard to the obligation to legalise requested documents (**Belgium, France, Slovenia and Spain**) and to translate them (**France, Spain**).

In conclusion, the right to marry may lead to very different situations. From very flexible rules, such as in **Sweden**, to more demanding ones, the position of third country nationals with regard to this right is different from one state to another. Where the conditions and proof are very demanding, they could have a negative impact on the right to marry and therefore on the right to family reunification.

In this regard, member states should be prevented from using rules relating to marriages for other means than those necessary to attest the identity and status of future spouses and their ability to get married. In other words, rules on marriages shall not be adopted in order to limit family reunification. If this were the case, such an approach would breach Directive 2003/86/EC.

Grounds to prevent the celebration of marriages

In certain situations, national authorities are entitled, on the basis of a defined procedure, to refuse the celebration of a marriage because it is deemed to have been concluded for means other than engaging in a lasting living community.

This type of rule does not apparently exist in **Germany and Poland**. In **Poland**, however, the celebration of a wedding may only be refused due to a lack of valid documents. There is no legal basis to refuse a marriage in situations where the competent officer suspects that a marriage is one of convenience. This aspect is verified during the application procedure for a residence permit for a fixed period in accordance with the Act on Aliens. In this regard, it is impossible under Polish law to apply for a visa "in order to get married".

In the other member states, however, rules are applicable in order to prevent the celebration of marriage. They define the grounds and procedures that prevent the celebration of marriage. The main grounds for rejecting the celebration of a wedding are two-fold: objective and subjective.

Objective grounds are those which entitle authorities to reject the celebration of a marriage because the future spouses do not fulfil the requested conditions or qualities required by law (**Belgium, France, the Netherlands, Portugal and Slovenia**). Belgian law remains quite vague on this point. It indicates that a marriage should be refused when it seems that the qualities and conditions for concluding it have not been satisfied, and where the celebration of the wedding contradicts the principles of law and public order. Other rules are clearer and allow the identification of a series of objective criteria that may lead to a refusal to celebrate the wedding. **France, Portugal and Slovenia** focus for instance on the validity or absence of documents to be provided. In **the Netherlands and France**, elements regarding the residence of the spouses are also taken into account. **Slovenian** rules are interesting, as they are very precise and provide for a list of objective grounds. Hence, persons concerned should be of the opposite sex, above the age of 18 years old, not seriously

or mentally insane, single and not engaged to relatives (brothers, sisters, uncles, nieces, aunts and nephews, children of brothers and sisters, stepbrothers and stepsisters, adopting parents and adopted children, guardians and persons put under his or her guardianship). In Slovenia and elsewhere where the rules are worded more broadly, all these factors may lead to refusal to celebrate the marriage.

Subjective grounds are based on the lack of intention to marry. This criterion is shared by a majority of member states (**Belgium, France, the Netherlands, Slovenia, Spain and Sweden**), with the exception of **Portugal**, where such grounds do not expressly appear in the law. Here again, the rules are more or less precisely defined. Whereas in some states the law mentions this criterion in broad terms (**Belgium and the Netherlands**), others give more detailed indications. This is the case in **Slovenia**, where the free will to get married is accompanied by the condition that the person should not be mistaken about the identity or other characteristic of the other person he/she will engage with. **France, Spain and Sweden** base their appraisal of the validity of the future marriage and intention to marry on a body of evidence that interestingly is quite similar. Indeed, these member states assess the seriousness of the relationship in order to identify the intention to marry. The length of previous relationships, command of a common language to communicate in, knowledge of each others' data, false addresses, and the existence of previous simulated marriages are among the grounds used to assess whether the marriage is of convenience or not. It should however be underlined that in **Sweden**, if future spouses prove they have lived together abroad on a permanent basis with a common household, in practice for at least two years, the applicant has got the same right to family reunification in Sweden as if they had been married.

Procedures to prevent the celebration of marriages

As regards national procedures, they all involve local authorities, which are responsible for evaluating or initiating procedures whenever doubts exist regarding the validity of the marriage.

In **Belgium**, if there are serious concerns that the conditions for the marriage are not satisfied, the officer can defer the celebration of marriage for a maximum period of two months in order to proceed with an investigation. Within this period, the officer may collect the opinion of the public prosecutor of the judicial district in which the applicants intend to contract the marriage. If no decision has been taken within the two-month period, the officer has to celebrate the marriage. In the event of a refusal to celebrate the wedding, the officer must immediately notify the interested parties of his decision. A copy of this decision, accompanied by copies of any other useful documents, are transmitted to the public prosecutor of the judicial district in which the refusal was expressed.

In **France**, when the civil officer in charge of celebrating the marriage has doubts about the intention to marry, he/she has to organise an interview with the future spouses, individually and in common, in order to gather evidence regarding the validity of the marriage. The interview should target the intention to marry on the basis of confession and of objective

information, such as knowledge of addresses or knowledge of common language, etc. The civil officer may also refer the case to the public prosecutor. The prosecutor must within 15 days decide to refuse, defer or accept the marriage. Different elements are taken into account, such as the place of residence, matrimonial capacity and willingness to get married. In any case, the civil officer may not on his/her own refuse to celebrate the wedding. Jurisprudence has also pointed out that the irregularity of the sojourn in France may not constitute grounds for rejecting the celebration of the wedding. Concerns regarding fraudulent marriages were at the centre of a law adopted in June 2011 which reinforced these requirements.

In the Netherlands, if one or both spouses or registered partners holds a nationality other than Dutch, then the municipal officer of the Registry of Births, Deaths and Marriages only cooperates with the conclusion or registration of a marriage if a declaration from the Superintendent of the police is submitted. In this declaration, information regarding the residence of the immigrant is contained, as well as the advice from the Superintendent to the municipal official on whether or not he should cooperate in concluding or registering the marriage. The Superintendent bases this advice on indications as to whether the marriage may or may not be one of convenience. Negative advice from the Superintendent needs to be justified and accompanied by a completed questionnaire containing information regarding facts and circumstances, such as residence and other observations, which may indicate that the marriage is one of convenience. Judgement of whether a marriage is a marriage of convenience always needs to be based on more than one observation. The sole fact that there is a large difference in age between spouses, for example, is not enough to draw the conclusion that the marriage is one of convenience.

In Spain, persons in charge of the Civil Registry can subject the persons getting married to "examinations of objective facts", through a personalised interview in order to assess their knowledge of one other and certify the "complete moral certainty" of the civil servant who registers the union. This interview covers objective as well as subjective criteria in order to assess the validity of the marriage. In addition, the Public Prosecution Service may take preventive action through the supervision of proceedings being monitored for this purpose before the person in charge of the Civil Registry. If the Public Prosecution Service knows of one of these simulated marriages, it must annul it. The Public Prosecution Service is also reminded of the criminal implications of this type of conduct which, in certain cases, can be classified as an act involving the promotion, favouring or facilitation of illegal immigration (trafficking). In such cases, once the marriage has been declared annulled due to simulation, its referral to the competent Court of Instruction is requested in order to initiate criminal proceedings.

In Sweden, if a relationship is not deemed to be serious according to the Swedish Aliens Act, the application for a residence permit can be rejected. The Migration Board checks how long the relationship has lasted, the extent to which the couple have met, how much they know about each other and whether they have a common language

to communicate in. The assessment is based on information given by the applicant and the sponsor.

- ✓ With the exception of **Germany** and **Poland**, every member state under scrutiny has rules that entitle national authorities to refuse to marry persons whenever future spouses do not fulfil objective criteria or when there are doubts about the intention to marry.
- ✓ The procedures applicable in each member state, however, are different from one another. The differences concern the type – investigations or interviews or even both – the content, the length and the effects of the assessment.
- ✓ A desire to prevent "marriages of convenience" governs such procedures. However, rules adopted in this regard should only pursue this objective and shouldn't in any case be used to curb family migration. In other words, member states should avoid adopting demanding rules in the name of preventing "sham marriages" but which really aim to limit family reunification.

2. Marriages celebrated abroad

Family reunification is awarded to the spouse regardless of where the wedding has taken place. As a consequence, and with the exception of **Germany**, member states have adopted rules that take into account the situation in which a marriage was concluded in a third country. These rules determine the documents to be presented to justify the marriage and define the procedure applicable to assess the validity of the marriage.

Documents to provide for recognition of a marriage concluded in a third country

In the majority of the member states covered by the study, the official act (**Belgium, France, Poland, Slovenia** and **Sweden**) or an official copy (**the Netherlands** and **Spain**) of the marriage celebrated abroad must be produced. In **Portugal**, this does not seem to be required. The applicant must only provide a document that certifies that he/she is married to the spouse, such as an identity card or passport.

In **Belgium, France, Poland** and **Sweden**, national rules state that the act or copy must be translated. In France, implementing rules indicate that the translation must be made by a translator appointed by a Court of Appeal. In **Sweden** the act may be translated into English and, if possible, signed by a public notary or similar body in the third country. This rule is interesting, as it favours applicants. Indeed, finding someone who is able to translate documents into Swedish might be far more difficult than finding a person able to translate from the home language into English.

As for verifying the validity of the documents presented, **French, Slovenian** and **Swedish** rules indicate that consular or diplomatic missions abroad are responsible. For instance, Swedish Embassies and Consulates conduct investigations and interviews with the applicants to verify the validity of the submitted documents, cohabitation abroad and whether the relationship is genuine.

Procedures designed to assess the validity and sincerity of the marriage

Assessing the validity of the marriage, for example with regard to documents, or its sincerity with regard to the intention to marry, is a concern shared by a significant majority of member states. As a consequence and with the exception of **Poland** and **Germany**, states have adopted rules to authorise competent bodies, on the one hand, to refuse to deliver a visa for the purpose of family reunification and, on the other hand, to annul the wedding after reunification has taken place. In other words, procedures are put in place to assess the existence and lawfulness of the marriage before and after the arrival of the spouse on the territory of the member state. The differences between member states' rules are very significant and do not allow us to outline categories of state that implement common schemes.

In **Belgium**, when a so-called 'sham' wedding is suspected, the authorities in charge of immigration may refuse to deliver a visa. This occurs most of time after an inquiry led by the civil prosecutor. An appeal against such a refusal may be introduced before the civil court. Once on Belgian territory, the sincerity of the wedding is also subject to a series of checks at civic or administrative level. At civic level, checks are not automatic and they are initiated only after a complaint or request from the competent authority. As regards administrative controls, they seek to assess the reality of common life. Moreover, the possibility to begin a criminal prosecution when faced with evidence of a false 'white' wedding is always possible.

In **France**, there are three grounds to assess the validity of a marriage and therefore to annul it. The first concerns weddings concluded on the basis of lack of consent, a mistake or violence. Challenging a marriage on these grounds is possible within a period of five years after its celebration. The second chance to annul the marriage concerns marriages of convenience. Here, the action may be introduced 30 years after the celebration. Such a procedure is normally initiated by the public prosecutor. The conclusion of a marriage for the sole purpose for obtaining a residence permit, for protection against expulsion or for acquiring French nationality is subject to a maximum of five years in prison and a €15,000 fine. The third possibility was introduced by a law adopted in 2011. It targets situations in which where only one of the spouses hid his/her consent and purposes. In this case, the "misleading spouse" is subject to five years in prison and a fine of up to €15,000.

In **the Netherlands**, the municipality official may refuse to register a marriage concluded abroad on the basis of a declaration by the Superintendent. The declaration contains information regarding the residence of the immigrant and the Superintendent's advice for the municipal official as to whether or not he should cooperate in registering the marriage. The Superintendent bases this advice on indications as to whether the marriage may or may not be one of convenience. Negative advice from the Superintendent must be justified and accompanied by a completed questionnaire containing information regarding facts and circumstances, such as residence and other observations, which may indicate that the marriage is one of convenience. Judgement of whether a marriage is of convenience always needs to be based on more than one observation. The sole fact that there is a large difference in age between the spouses, for example, is not enough to draw the conclusion that the marriage is one of convenience. The municipal officers shall inform persons of his/her

intention to refuse registration and offer them the opportunity to rebut the presumption of a marriage of convenience. If the official is not convinced by them, he/she may decide to refuse registration. The persons who requested the registration can appeal against the refusal *via* a civil procedure. In addition, the Civil Code also offers the opportunity for the public prosecutor to refuse the registration on grounds of public order. This decision is also subject to the right to appeal.

In **Portugal**, the Borders and Immigration Service may, at any time, promote enquiries and specific checks aimed at evaluating the sincerity of the wedding. Enquiries may take the form of an interview with the alien. Should the competent authority find out that the wedding had the sole purpose of allowing entry into and residence in Portugal, it may take the decision to revoke the alien's residence permit. Revocation of the residence permit must be reasoned and must be notified to the alien. The latter must be informed of the judicial remedies available.

In **Slovenia**, the State Prosecutor's Office may file a lawsuit to invalidate the marriage in the event that the objective and subjective conditions are not fulfilled. The possibility to introduce such a lawsuit is not subject to any statutory and time limitations. The competent authority that decides on such a situation is the District Court where the family lives. Persons concerned by such a decision may introduce an appeal to the higher court within a period of 15 days.

In **Spain**, the existence of a simulated marriage constitutes grounds for its annulment. This decision is taken by the Public Prosecution Service. The Public Prosecution Service is also reminded of the criminal implications of this type of conduct which, in certain cases, can be classified as an act promoting, favouring or facilitating illegal immigration. In these cases, the annulment of the marriage is referred to the competent Court of Instruction in order to initiate the due criminal proceedings.

Sweden is a special case as the core evaluation of the marriage takes place during the procedure. In this view, checks made by the Swedish authorities abroad and the Swedish Migration Board in Sweden are very important and thoroughly documented. The Migration Board is obliged to ensure that the case is being sufficiently investigated. Hence, the purpose of the investigations and/or interviews is to verify the validity of the submitted documents, the real nature of the relationship and cohabitation abroad. The residence permit may therefore be refused in several situations:

- ✓ where the sponsor is married to another person and living with that person in Sweden;
- ✓ where the spouses do not live together or do not intend to do so;
- ✓ where one of the spouses is married to somebody else;
- ✓ where one of the spouses is a minor, and;
- ✓ where the applicant or the sponsor has knowingly given false information or where they did not give certain information significant for obtaining the permit.

If the Migration Board finds that the marriage is not legal in Sweden, it does not have the authority to cancel a wedding but can refuse to grant family reunification and a residence permit. If the applicant and sponsor cannot prove the validity of their marriage, the Migration

Board assesses the seriousness of the relationship. If the relationship seems serious according to the Swedish Aliens Act, the applicant will get a time-limited residence permit due to the seriousness of the relationship. The applicant may afterwards apply for a permanent residence permit. During this examination, the Migration Board assesses whether the relationship will continue. If the alien has held a temporary residence permit for two years, he/she may be granted a permanent residence permit. As a general rule, the application for family reunification should be decided within nine months. A decision to refuse to grant a residence permit for family reunification can be challenged before a migration court, and afterwards and under specific circumstances before the Migration Court of Appeal.

The period within which checks on the validity and sincerity of a marriage may be carried out varies widely. In **Sweden**, checks are very strong during the application procedure for family reunification. Once the reality and validity of the marriage has been assessed and ascertained, national authorities do not reverse this decision. On the contrary, in some member states checks of the validity of the marriage may be organised over very long periods. This is the case in **France**, where for marriages of convenience the checks are carried out over a 30-year period, and in **Slovenia**, where no limits are set by the law.

Sanctions against marriages of convenience are also very different. In **Sweden**, because the procedure takes place before entry into Swedish territory, the authorities do not deliver a residence permit for family reunification. In **Portugal**, whenever a marriage of convenience is discovered, the residence permit is withdrawn. On the contrary, in **Belgium, France or Spain**, the discovery of marriages of convenience may trigger criminal proceedings. Heavy fines and imprisonment are among the sentences that people may face for the purpose of fighting 'sham weddings'.

To sum up, member states are divided into two different categories: those which organise 'balanced' procedures in time and impact, and those which conduct strict checks leading to hard sanctions.

In such a situation, harmonisation between member states may be difficult to attain. On the one hand, some member states are reluctant to make their rules less strict. On the other hand, calling for a hardening of the rules on the basis of criminal law would seem to be difficult for other states. In this regard, it is questionable whether criminal sanctions are appropriate and proportionate in this domain.

These questions may be touched upon during the consultation phase that will take place at the end of 2011 after the publication of the European Commission's Green Paper on family reunification.

II. Unmarried partners

The right for unmarried partners to reunite mirrors changes occurring in society, where partnerships are becoming just as important as and sometimes even more important than

marriages. In this context, Directive 2003/86/EC could not ignore the phenomenon. But there are significant differences between member states that are willing to adapt to this social transformation and take it into account in national law (B) and those that are more reluctant to do so (A).

As a result, the possibility to recognise partners' right to family reunification is enshrined in the directive but remains an optional provision i.e. it is up to member states to decide whether or not to include partners within the scope of rules on family reunification. Hence, Article 4, paragraph 3 is worded as follows: "the Member States may, by law or regulation, authorise the entry and residence (...) of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long term relation, or of a third country national who is bound to the sponsor by a registered partnership (...)".

A. Member states not awarding the right to family reunification to unmarried partners

France and **Poland** do not recognise the right to family reunification of unmarried partners. The possibility exists in France to grant a residence permit to an unmarried partner. But such a possibility is awarded on the basis of the respect of family life, protected by Article 8 of the ECHR, and not on the basis of Directive 2003/86/EC. French legislation indicates that a residence permit may be delivered to a foreigner who has personal and familial links in France and for whom refusal to issue a residence permit may constitute a disproportionate attack on his/her right to family life. The law specifies that the links should be assessed on the basis of their strength, age and stability, with regard to the individual's living conditions and his/her insertion into French society, as well as the nature of links with family that remain in the country of origin. The law adopted in June 2011 reinforced these requirements.

B. Member states where unmarried partners are entitled to family reunification

In seven of the nine member states examined, partners have the right to family reunification. This right is brand new in **Slovenia** and will take effect in October 2011.

However, the rules applicable in these states differ. Some states are flexible in this regard, whereas others have a more narrow perception of the phenomenon. Countries may be divided into two categories: those that rely exclusively on the conclusion of a registered partnership and those that take into account a stable relationship comparable to that of married couples.

Germany and **Belgium** are the only member states under scrutiny that limit the right to family reunification to registered partners. In **Germany**, partners have to fulfil a range of commitments by way of formal agreement to form a partnership. The rules in this regard are more precisely determined at regional level.

Belgium takes into account two types of registered partnership. On the one hand, partnerships concluded under Danish, German, Finnish, Icelandic, Norwegian, English and

Swedish law. These partnerships are considered to be comparable to marriage and trigger the same effects. On the other hand, Belgian law recognises any other registered partnership concluded in conformity with the country's law. However, to open up the right to family reunification, such a partnership must be accompanied by proof that the concerned persons have a long and stable relationship. This condition is fulfilled as follows:

- ✓ the partners have lived together for at least one year in Belgium or elsewhere, or;
- ✓ the partners know each other for at least one year and exchange regular contact (phone calls, letters or e-mails). They met at least three times before introducing the application for family reunification and these meetings number more than 45 days, or;
- ✓ the partners have a child in common.

Belgian law specifies that both partners shall live together and be aged over 21 years old. The age is brought back to 18 years old if the partnership equivalent to marriage was concluded before the arrival of the sponsor in Belgium or if they were living together for at least one year before the arrival of the first person in Belgium.

All the other five member states – **the Netherlands, Portugal, Slovenia, Spain and Sweden** – have a broader understanding of the phenomenon. A stable relationship is considered as a partnership which can open the right to family reunification. Here, differences exist with regard to the proof that has to be provided.

In the Netherlands, unmarried partners are offered family reunification when the relationship is sufficiently comparable to a marriage. This concerns unmarried partners who can prove they have been in a permanent and exclusive relationship with the sponsor. This implies that partners must have lived together and shared the same household before entering the country or must start to do so once the partner has entered the Netherlands. In this view, the partner must be registered at the same address at the administration. From an administrative point of view, partners have also to provide a copy of their unmarried status declaration. They can also demonstrate their sustainable and exclusive relationship by signing a declaration of relationship. However, such a declaration does not constitute absolute proof. A bill has recently been presented to the parliament in which family reunification is no longer applicable to unmarried partners. Homosexual partners who are not allowed to marry in their country, can apply for a visa in order to marry in the Netherlands.

In Portugal, registered partners, persons who prove that they have lived together for a period of two years previously and persons who have a common child are entitled to family reunification by law. This indicates that any kind of legally admissible evidence attesting the relationship can serve as proof. If the relationship is proven by a declaration issued by the Portuguese local authorities of the area of residence of the applicants, the latter must also present a copy of their birth certificates and declare under oath that they have been living together for more than two years.

In Slovenia, registered partners and partners with whom the sponsor has been living in a long-lasting life community will be added to the list of close family members for whom the

sponsor can claim family reunification rights. However, to invoke these rights they will have to wait until 27 October 2011. Until this date sponsors will be able to claim this right only for spouses, according to the 1999 Aliens Act, which is currently still in use.

In **Spain**, since 2009, registered and unregistered partners have the right to family reunification. For the first category, applicants have to bring the certified copy of such registration. Unregistered partners must have cohabited together at least two years before the arrival of the sponsor in Spain. The validity of such a relationship must then be proven by any means. For instance, on the basis of testimony brought by two witnesses or on the basis of registration at the same household. However, it is specified that documents issued by public authorities take priority over any other type of proof.

In **Sweden**, registered partners, cohabiting partners, heterosexual and same sex couples have the right to family reunification. The rules regarding cohabitation indicate that partners must be living together as a couple on a permanent basis in a common household. According to the internal handbook that is applied by the Migration Board, documents proving that the couple are cohabiting partners include a rental agreement or a contract of sale regarding a co-operative flat or house. Common insurance policies can also prove cohabitation as partners. All documents proving the applicant and the sponsor's cohabitation abroad can be submitted too. It is worth noting that a common child is a presumption that a partnership exists. It should be added that Swedish rules also take into account the possibility to grant a residence permit to an alien who intends to marry or enter into a cohabiting relationship with a person who is resident in Sweden or who has been granted a residence permit to settle in Sweden, if the relationship appears to be serious and there are no special grounds to refuse a permit. In this regard, the Migration Board should check how long the relationship has lasted, if the couple have met to some extent, how much they know about each other and if they have a common language in which to communicate. If the couple have lived together abroad on a permanent basis in a common household, in practice for at least two years, the applicant enjoys the same right to family reunification in Sweden as if they were married, provided that the applicant and sponsor can prove their cohabitation abroad.

C. Checking the validity of the partnership

Among the seven member states that award family reunification to partners, **Germany, the Netherlands, Slovenia** and **Spain** have not established any specific procedure to check the validity of the partnership. However, this does not mean that there is no check at all. Indeed, while the authorities are examining the application, they are conducting an evaluation of the validity of the relationship. This derives clearly from the Dutch report, which indicates that the Immigration and Naturalisation Service conducts an assessment of the relationship when examining the eligibility of the application.

A similar statement derives from the **Portuguese** example. Here and whenever deemed necessary, the law gives the Borders and Immigration Service the power to organise interviews with the applicant or his family and conduct any other appropriate investigations necessary to evaluate the validity of the relationship.

The same logic applies in **Sweden**, where the Migration Board is obliged to ensure that the case is sufficiently investigated. Hence, the Swedish Embassies and Consulates conduct interviews with the applicants and the Migration Board conducts interviews with the sponsor, if needed. The purpose of the investigations and/or interviews is to verify the validity of the submitted documents, the nature of the relationship and cohabitation abroad.

In **Belgium**, there are two different procedures to check the validity of the partnership. From an administrative point of view, the competent authority (*office des étrangers*) assesses the reality of common life. This type of check is normally carried out during the examination of the application. But, further unexpected checks may be launched by the administrative authority to verify the reality of common life. The second type of check is a civic one and is initiated on the basis of complaints or at the administration's request. Here, an appointed local officer verifies whether the cohabitation still exists. Belgian law organises *a priori* and *a posteriori* checks.

Checks operated by national authorities would appear to be generally conducted during the application procedure. Further checks, once the partner is admitted on the territory, are less common. This situation must be compared with rules regarding checks applicable to marriages. In Portugal, for instance, the validity of marriage may be verified after entry onto the territory, which does not seem to be the case for partners. Further questions regarding family reunification rights awarded to partners may touch upon the question of the scope, intensity and effects of checks of the relationship.

Two categories exist among member states regarding recognising the right to family reunification of unmarried partners.

The first one concerns states (**Germany** and **Belgium**) that only rely on a registered partnership to allow family reunification. This limited possibility, compared to those recognising the right of partners living together in a stable relationship, may be considered less liberal in the sense that it obliges partners to engage into an administrative procedure to give a 'legal existence' to their common life. In this sense, it might be considered as an additional step to be completed by partners. However, such a procedure may be very simple in practice. Some states do not impose any particular requirements, such as a prior period of common life, to be fulfilled before the registration. This is for instance the case in **Belgium**, where partners may decide to declare their 'common cohabitation' at the town office. This procedure does not require proof of any prior residence. In this regard, registered partnerships are more liberal than schemes where proof of a prior relationship must be provided.

The second category concerns states that recognise the right to family reunification of partners living together in a stable relationship. Here, differences are evident in the proof that must be produced. From specific rules of proof, like in **the Netherlands**, to open systems, like in **Portugal**, the rules are different from one country to another and make family reunification either more or less difficult. The **Swedish** system deserves to be highlighted as a very liberal

and protective one as it awards partners, after two years of common residence, identical rights to those awarded to married couples.

To conclude, these examples show that rules applicable in the member states are still very different and call for further benchmarking between countries:

- ✓ Only two of the member states surveyed (**France** and **Poland**) still oppose this right, since **Slovenia** recently opted to recognise it.
- ✓ Some national rules are very flexible, whereas others seek to maintain tight control over this issue.

To move ahead, two major points should drive further discussion about unmarried partners:

- ✓ Making family reunification of unmarried partners mandatory, since a small number of states are still opposed to this right.
- ✓ Developing extensive benchmarking and coordination between states to get a clearer picture of the 'legal landscape' and to give partners similar possibilities and rights to live together.

All of these points should be dealt with by the consultation which is scheduled to start at the end of the year with the publication of the Commission's Green Paper.

III. Children

Article 4, paragraph 1 of Directive 2003/86/EC grants children the right to family reunification. This right is recognised in all member states with some restrictions regarding the age of minor children and conditions regarding custody or adoption (A). Adult children may also be encompassed by rules related to family reunification (B).

A. Minor children

Regarding the age of the child, eight of the member states surveyed recognise the right to family reunification for minor children up to 18 years old. **Germany** is the only state to move away from this general rule. In that member state, children over 16 years old have to arrive with their parents. If they arrive independently from their parents after 16 years old, they have to fulfil integration conditions. This means that they need to have high-level German language skills or to demonstrate on the basis of their education and way of life that they are able to integrate into the German way of life.

As for conditions requested in cases where the parents are divorced or the children adopted, they mainly rely on the obligation to have custody of the child in case of divorce and to provide the appropriate certificate of adoption. Generally speaking, the French rules are a good example of the way the situation of minor children can be taken into account and dealt with.

In **France**, family reunification concerns minor children aged less than 18 years old when the application is introduced. It includes the children of the couple, the children of the sponsor or the spouse (including children from a previous relationship) and adopted children. For children of the couple, the parents have to produce birth certificates. For adopted children, the application must be accompanied by the definitive decision of adoption. The lawfulness of the decision is assessed by the public prosecutor. With regard to children born during a previous relationship, the sponsor or the spouse shall have custody of the child and its residence shall be with him/her according to a judicial decision. The other parent shall also give his/her approval of the reunification.

Generally speaking, this domain has not been subject to major changes in the last few years. Hence, detailed results provided in previous studies are still relevant.²³

B. Adult children

Reunification of adult children is possible under family reunification rules. Directive 2003/86/EC takes this possibility into account but in a limited manner. On the one hand, the provision devoted to family reunification of adult children is optional. On the other hand, it is accompanied by two additional criteria; adult children must be "unmarried" and "objectively unable to provide for their own needs on account of their state of health". However, nothing prevents member states from implementing more favourable rules.

With regard to the reports analysed, several member states – **France, Poland, and Portugal** – did not make use of such a possibility. As a consequence, unmarried adult children can be authorised to join their parents, but such a possibility will not be awarded on the basis of family reunification rules but on other rules. On the contrary, six member states allow family reunification for unmarried adult children on the basis of the family reunification procedure.

In **Belgium**, adult children of the sponsor or the spouse are authorised for family reunification. Adult children should be more than 18 years old, single and handicapped. Family reunification is allowed where the child is not able to satisfy his/her own needs due to his/her handicap. The sponsor has to prove to have stable, regular and sufficient means of support to meet its own needs and those of his family.

In **Germany**, adult children may be entitled to family reunification under special conditions.

23. H. Labayle & Y. Pascouau, "Directive 2003/86/EC on the Right to Family Reunification", Study on the "Conformity checking of the Transposition by Member States of 10 Directives in the Sector of Asylum and Immigration" done for DG JLS of the European Commission, 2007 (contract JLS/B4/2006/03); K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers & T. Strik, "The Family Reunification Directive in EU Member States. The First Year of Implementation", Centre for Migration Law, Willem-Jan and René van der Wolf Publishers, 2007.

In **Slovenia**, the Aliens Act stipulates that a sponsor is entitled to family reunification with an adult unmarried child. There is no apparent specification in the rules with regard to the health of the child. The Act includes an additional condition that the sponsor or his or her spouse is obliged to maintain the child in accordance with the laws of the country of nationality of the sponsor or his or her spouse, which may be the case, for instance, in cases of intellectual or physical disabilities of the child.

Dutch legislation states, as is the case in Directive 2003/86/EC, that adult unmarried children of the sponsor must be objectively unable to provide for their own needs on account of their state of health. A circular defines more precisely the rules applicable to such a situation. Firstly, the adult children must be morally and financially dependent on their parents. Such dependence must previously have existed in the country of origin. Secondly, the circular also specifies that "a real family relationship" needs to exist between the parents and the adult child. This implies that the family relationship must already have existed in the country of origin, or the country of permanent residence, and that the adult child must come to live with his/her parents. The circular also determines conditions under which the real relationship will cease to exist. Finally, refusing family reunification to adult children must not represent "disproportionate harshness". Disproportionate harshness is only constituted in extraordinary situations and does not occur in general circumstances in the country of origin or in the fact that the adult child will remain in the country of origin as the sole member of the family.

Spain's Aliens Act adopted in 2009 and implementation rules adopted in 2011 clearly explain that adult children fall under the scope of family reunification rules "when they are handicapped and not able to satisfy their own needs because of their health".

In **Sweden**, a residence permit may be delivered to a close relative of someone who is resident in or who has been granted a residence permit to settle in Sweden. Adult children living with their parents fall within the scope of this definition. Swedish rules indicate that a special relationship of dependence between the relatives should have existed in the country of origin. On the one hand, the dependence between the relatives must make it difficult for them to live apart. On the other hand, the adult child and the sponsor must have lived in the same household immediately before the sponsor moved to Sweden and the application should be submitted relatively soon after the sponsor's settlement in Sweden, in order to prove the dependence. If these conditions are not fulfilled it may be difficult to prove the special relationship of dependency between the sponsor and the family member. However, difficulties in applying for reunification directly after the sponsor has settled in Sweden must be taken into account. Moreover, the Aliens' Act adds that if there are exceptional grounds a residence permit may also be granted to an alien who was adopted in Sweden as an adult, is a relative of an alien who is a refugee or a person otherwise in need of protection, or if the alien in some other way has special ties with Sweden.

To summarise the family reunification of adult children:

- ✓ Three member states – **Belgium, the Netherlands and Spain** – have transposed the requirements defined by the directive related to the state of health of the adult children.
- ✓ The other member states rely either on the capacity of the sponsor to support the children or on pre-existing links and facts of dependence.
- ✓ In **Sweden**, the rules seem more flexible than others as they are not limited to adult unmarried children but more broadly open to any kind of relative.

C. Proof of links between parents and children

The existence of a link between parents and children is sometimes very difficult to prove. This concerns difficulties in gathering appropriate administrative documents attesting the link and the validity of such documents, which is sometimes contested by member states. It also concerns member state rules which may make the proving process easier or more difficult. It depends more precisely on the variety of means of proof accepted by the member states; from documentary evidence to DNA testing. In the end, the picture regarding ways to prove the link between parents and children would appear to be a bit tricky.

1. General requirements

Asking for the production of official documents in order to prove the relationship between the members of the family is a first, and widely accepted, element taken into consideration by member states. However, this may not be sufficient and calls for additional actions. The latter can take the form of further investigations/interviews lead by national authorities in the member state or in the country of origin, or the possibility to take a DNA test. As shown below, solutions adopted by member states are sometimes very different from one another.

In **Belgium**, a law adopted in March 2009 specifies the accepted means of proving family relationships. When these links cannot be established by official documents under the code of private international law, there are other valid ways, such as interviews, additional analysis, and genetic or blood tests.

In **France**, a regulation determines the proof that has to be produced in order to attest family links. Parents should provide the "family record book" or where such a document does not exist in the country of origin, the birth certificate establishing family links. In case of adoption, the decision to adopt should be presented. If one of the parents of the child, for whom family reunification is requested, is dead – or if one of the parent's rights are revoked – the applicant must provide a death certificate or revocation act.

Finally, regarding family reunification of children born in a previous marriage or relationship, the divorce certificate allowing custody of the children or a certificate indicating that custody has been granted to the applicant must be presented. Copies of the document must be produced, accompanied by translations from a certified translator, to allow consulates to

examine their authenticity. A law adopted in 2007 planned to allow DNA testing. But the implementing decree necessary to launch such a procedure has never been adopted. As a consequence, DNA tests are not used in France.

In **Germany**, family links are proven via a variety of means, including official documents, investigations and DNA tests. The difficulty in Germany lies in the extreme differences that exist in practice between *Länder*. Indeed, Germany is a federal state and this question is dealt with and implemented by the federal entities. As a consequence, this procedure goes through hundreds of authorities and practices may vary widely even within one *Bundesland*.

In **the Netherlands**, family links are assessed and proven on the basis of official documents, investigations and DNA tests. Regarding documents, Dutch rules make a distinction between proof that must be provided for minor children and that which needs to be produced for adult ones. With regard to minor children, applicants must provide a copy of the child's birth certificate, and when the child comes from a previous relationship of the sponsor or his/her spouse or partner, documents relating to the parental authority in respect of the child, accompanied by a declaration of consent from the remaining parent regarding the child's departure from the country of origin, must be produced. For adult children, the following proof has to be produced:

- ✓ Copy of child's birth certificate.
- ✓ Documents relating to the legal family relationship between child and sponsor or the sponsor's spouse/partner (only if the relationship is not clear from the birth certificate).
- ✓ Copy of child's unmarried status declaration.
- ✓ Proof that leaving the child in the country of origin would cause disproportionate hardship.
- ✓ Documentary evidence related to contributions to the costs of the child's upbringing and living expenses since the sponsor's arrival in the Netherlands.
- ✓ Documents relating to the legal custody of the child.
- ✓ Documents relating to actual authority with respect to the child.
- ✓ Documents relating to the relatives with whom the child resides or can reside in the country of origin.

In **Poland**, family links have been examined by officials from 'governorship' and since 2009 by border guards. They are entitled to verify the validity of documents produced by family members and, if necessary, to launch investigations in the framework of the administrative procedure. Hence, officers of the Border Guard are allowed to check all documents provided by applicants and verify them. This includes checks related to employment and earnings. Officers are moreover entitled to check whether a given person lives in the place indicated in the application, who lives there, etc. In any case, providing false documents or information justifies a negative decision.

In **Portugal**, links are assessed on the basis of official documents. However, specific authorities may ask family members to undertake a DNA test, as DNA tests are also considered to be "official documents". However, there is no official organised DNA testing

in Portugal. As a consequence, the sponsor may request DNA testing in any certified laboratory. However, such a procedure must be carried out at his/her own expense.

In **Slovenia**, family links are proven by presenting the official documents requested and particularly birth certificates. No other procedure is available in this country.

In **Spain**, a royal decree asks for a copy of all documentation attesting to family or kinship relationships or the existence of a common law marriage, and possibly also of legal and economic dependence. However, it is also possible to provide DNA tests. For example, this occurs when a minor child has been refused a visa to reunify due to having provided only "late" registration of birth. This is the case for instance with regard to the Dominican Republic, where there are minors who are not registered at birth. Late registration is seemingly treated with suspicion by the Spanish Administration. Moreover, and from 2006 onwards, migrants may ask for DNA testing to prove family links.

In **Sweden**, family links are assessed on the basis of official documents, investigations and DNA testing. The documents requested are birth certificates and documents related to custody or adoption. Investigations may be necessary in order to determine relationships between members of the family or the situation of custody. Where investigations are not sufficient, the Migration Board may offer the chance to proceed to DNA testing.

State	Official doc.	Investigation	DNA Test
BE	X	X	X
FR	X		
GER	X	X	X
NL	X	X	X
PL	X	X	
PT	X		X
SLO	X		
SP	X		X
SW	X	X	X

To sum up:

- ✓ All of the member states at first hand and as a general rule rely on official documents.
- ✓ Five offer the opportunity to conduct further interviews/investigations.
- ✓ Six out of nine recognise the right to resort to DNA testing in order to prove family links.

2. DNA testing

The question of whether the use of DNA testing is acceptable in the field of family reunification was much discussed and contested in France during the adoption of the law on immigration in 2007. Four out of the main criticisms that were put forward against the use of this process were:

- ✓ DNA testing is allowed in criminal matters and should not be extended to the migration field.
- ✓ DNA testing may cause problems where fathers are not the real genitors.
- ✓ DNA testing is useless when it comes to adopted children.
- ✓ DNA testing is limited to the 'European' conception of the nuclear family and does not take into account notions and definitions of family that exist in other regions of the world.

Despite these criticisms, and from a practical point of view, DNA tests are very helpful to speed up lengthy procedures. Indeed, for persons coming from countries where official documents are very difficult to obtain or with regard to which European administrations are very suspicious, DNA testing is efficient proof of the existence of family links and helps overcome administrative obstacles.

Although several member states use this possibility, as noted above, there are significant differences between the procedures established at national level.

The decision to undertake a DNA test is taken either by the applicant himself or proposed by the administration. In **Belgium, the Netherlands** and **Portugal**, the decision is taken by the applicant. This occurs where the administration does not accept or is not convinced by the documents provided, or where documents to be presented do not exist or do not exist anymore. In such situations, applicants for family reunification may decide to resort to such a test.

In **Spain**, DNA tests are requested by the administration or the applicant. The administration may request the applicant to go for a DNA test in particular where a visa has not been issued to children because the latter registered their birth only recently. Applicants have been entitled to ask for such a test since 2006. They will in this case bear the cost of the test.

Sweden stands in the middle, as DNA testing is offered by the Migration Board when previous investigations have been unsuccessful to prove family links or relationships. But in Sweden, persons may have recourse to DNA testing on their own.

Here, four member states are implementing three different types of procedure, from voluntary to mandatory testing.

Differences also exist regarding the price of tests and the person who has to pay for it. In **Belgium, the Netherlands** and **Portugal**, the applicant covers the cost of the test. It is different in **Sweden**, where the administration pays for the test even when it has not been offered by the Migration Board. In this case, the costs are covered if it appears that the residence permit has been issued on the basis of the relationship between members of the family. In **the Netherlands**, expenses are reimbursed to family members of refugees, if the outcome of the test is positive.

The price of the tests varies between member states. In **Belgium**, a test costs around €200 per person. The applicant has to pay for two tests and the transportation of blood samples from the country of origin to Belgium, which does not cost less than €50. In the end, a DNA test

costs around €450. However, in Kinshasa and in Abidjan, an experimental project was set up using blotting paper that carries drops of blood. The blotting paper is then sent by diplomatic mail, reducing the cost. In **the Netherlands**, a DNA test costs around €200 for one child and €326,72 for three children. It increases even further for more children. In **Spain**, the test costs around €300. Finally, in **Sweden**, a DNA analysis involving two persons costs around €800.

Rules applicable in the member states regarding the use of DNA tests are diverse in terms of the people involved and in terms of cost. On the other hand, and notwithstanding the rapidity and certainty that such tests bring to the process, the use of technology related to genetics in the migration policy remains highly sensitive and much debated.

Hence, and in order to define whether this specific means of proof should be further promoted at EU level and developed at national level, four main issues should be further discussed between member states with the participation and support of the EU institutions. These are the following:

- ✓ An in-depth discussion should take place with regard to the voluntary or mandatory nature of DNA testing in the family reunification procedure.
- ✓ The chance to proceed to DNA testing should be accompanied by thorough information about the type, scope and use of data.
- ✓ The cost of DNA testing may constitute a significant financial burden and the possibility to seek financial support from the state or EU funding could be one way to go.
- ✓ The issue of data protection of data and its use, including questions relating to storage and interconnection of data.

The consultation following the publication of the Commission's Green Paper should launch discussion of these crucial topics.

D. Reunification of minor children of a further spouse

This point relates to two different situations. It covers, first of all, the situation of a child born in a previous relationship or marriage. It also covers the situation of polygamous marriages. Polygamy is forbidden in all EU member states. As a consequence, it is assumed that only one spouse and her children are entitled to join the sponsor. This assumption is reversed in some countries, where the rules applicable are more flexible in this regard.

1. No restrictions for reunification of minor children of a further spouse

In **Germany**, **Portugal** and **Sweden** no restrictions are imposed on family reunification for minor children of a further spouse by the sponsor. In Sweden for instance, the child's interest in being able to reunite with a resident parent is of such importance that no limits on family reunification of minor children of a further spouse should be imposed. The reason for this is that a child whose parent is married to more than one person can have an equal need to reunite with the parent in Sweden as a child whose parents are divorced and one of the

parents has remarried and is living in Sweden. In both cases, the parent abroad may be unable to exercise custody over the child for health or other reasons. The preparatory work also discussed the risk that the other parent, the spouse living abroad, will later on apply for reunification with the child in Sweden, and this indirectly could be considered as sanctioning polygamy. The child's interest in being able to reunite with a parent resident in Sweden was, however, considered to be of such importance that no limits on the family reunification of minor children of a further spouse were imposed, despite the risk raised. Hence, there are no limits in the regulations regarding an unmarried child's right to family reunification with a parent who is resident in or has been granted a residence permit to settle in Sweden. If a child obtains a residence permit in such situations, future applications from the parent abroad may be rejected, according to the preparatory work, because in Sweden a relationship to a child does not entail an unconditional right to obtain a residence permit.

2. Reunification of minor children of a further spouse framed by national rules

Other countries impose limits on the reunification of minor children of a further spouse. These concern children born in a previous marriage or relationship. In these states, the rules applicable are generally those implemented in a situation where the sponsor or the spouse has custody of the child or children. In this case, appropriate proof must be presented, for example the decision to grant custody, and if necessary the consent of the other parent or proof that the other parent is dead. Such rules are in force with some slight differences in **Belgium, France, the Netherlands and Spain.**

As for polygamous marriages, different rules are implemented in each member state.

In **Belgium**, it was possible to refuse family reunification before 2008. This is no longer the case under case law issued by the Constitutional Court, which judged that the legislator can limit spouses' family entry and settlement if the marital link – such as polygamy – violates public order. Since then, reunification of children of a further spouse can only be refused on the basis of civil rights i.e. if one of the parents does not agree and has the right to contest the reunification.

In **France**, the sponsor is not usually entitled to ask for family reunification of children of any spouse other than the one authorised to reside in France. But it is possible if the mother of the children has died or if their parental authority has been revoked. For polygamous marriages, documents proving family links are subject to in-depth scrutiny.

In **the Netherlands**, reunification is possible if the sponsor has custody over the children. This needs to be proven by legalised documents relating to parental authority in respect of the child. The child of a single mother is assumed to be under her custody. In this case, no further proof of custody is required. The children are not required to be dependent on the sponsor. In the event that custody is shared, and in the event that this is required by the legal system of the country of residence of the other parent, a declaration of consent from the remaining parent regarding the child's departure from the country of origin needs to be submitted with the request for a temporary stay. Also, a copy of the other parent's ID to verify

the signature needs to be submitted. Should the parent whose consent is required refuse to grant it, or if they cannot be found or have passed away, a competent foreign authority can give the necessary consent.

In **Spain**, the rules state that in principle it is not possible to reunite more than one spouse. However, rules regarding children are different. Indeed, the children of any spouse may be united with them provided that the sponsor can prove that he/she has full custody of the child or that the child is under his/her custody and care.

In **Slovenia**, only one spouse in polygamous marriages is entitled to family reunification. The minor children of other spouses in the polygamous marriage, if they are not at the same time children of the sponsor as well, are not entitled to family reunification. In other words, if a child is a child of the sponsor and of a further spouse, he or she is entitled to family reunification.

In **Poland**, further spouses are not considered family members and may not therefore be entitled to family reunification.

To sum up, three different categories of state may be distinguished:

- ✓ States which have not established any restrictions on family reunification for minor children of a further spouse (Germany, Portugal and Sweden).
- ✓ States which accept reunification subject to specific limitations or minor checking (Belgium, France, the Netherlands, Spain and Slovenia).
- ✓ States which reject reunification as a principle (Poland).

However, and according to the sensitivity of an issue that is mainly linked to polygamous marriage, it remains difficult to find a sound common approach among the member states.

However, this does not preclude member states and EU institutions from exchanging information and knowledge on this issue to define further means of action or coordination in this field.

IV. Relatives in the direct ascending line

According to Article 4, paragraph 2 of Directive 2003/86/EC, member states may authorise "entry and residence of first degree relatives in the direct ascending line of the sponsor or his or her spouse where they are dependent on them and do not enjoy proper support in the country of origin".

This provision sets three limits. Firstly, it does not concern parents of minor children. Secondly, it is an optional provision, because member states "may" transpose it into national law. Finally, relatives in the direct ascending line must be dependent and not benefit from proper support in their country of origin. This optional provision has limited scope.

It is not implemented in three member states: **Belgium, France and Poland**. In **France**, for instance, relatives in the ascending line are excluded from the family reunification procedure. They may however be admitted to reside in France as "visitors". To do so they must prove that they have sufficient resources and acknowledge that they are not entitled to carry out any kind of labour.

In the other six member states, first degree relatives in the direct ascending line fall under the scope of rules related to family reunification.

In **Germany**, family reunification is allowed only if refusal would lead to exceptional hardship. Exceptional hardship includes dependency on the care of family members. German law encompasses special rules applicable for parents of minor children who possess a humanitarian residence permit or a settlement permit, provided that no parent with a right of care is already resident in Germany.

In **the Netherlands**, the parents of a sponsor may be granted a residence permit on the grounds of family reunification if certain requirements are fulfilled. The parent must be aged 65 or over, and must be single. The latter condition is proven on the basis of legal documents such as a death or divorce certificate. As regards the children, they need to have an unlimited right to reside in the Netherlands, to have been granted a residence permit on asylum grounds or to have Dutch nationality. This means that children holding a residence permit for a limited time period do not enjoy the right to family reunification for relatives in the ascending line. Finally, the law specifies that no other children must be living in the country of origin who could take care of the parent. From 1 January 2012, the condition that all children have to live in the Netherlands will be abolished. At the same time, one child has to act as a sponsor, and to that end, he/she will have to earn 150% of the minimum wage.

Portugal allows family reunification of first degree relatives in the ascending line of the applicant, as well as for the spouse or partner. The law requires that relatives in the ascending line of the applicant, as well as from the spouse or partner, must be dependent on them.

In **Slovenia**, the Aliens' Act stipulates that the sponsor has the right to family reunification with his/her or his/her spouse's parents, if either of them is obliged to sustain them in accordance with the laws of the state of which they are nationals. As regards all other relatives in the ascending line, they may be exceptionally and by discretion of the state body granted the right to family reunification if special circumstances support such reunification in Slovenia.

In **Spain**, a royal decree implementing a law adopted in 2009 authorises the reunification of parents in the first degree, and of those of his/her spouse or partner. Parents must be over 65 years old, be dependent on him/her and provide reasons that justify reunification in Spain. Dependence is proven if the sponsor can demonstrate that during at least the last year of his/her residence in Spain, he/she transferred funds or paid expenses to his/her family member amounting to at least 51% of the *per capita* gross domestic product, calculated annually, of the country of residence of the latter as established by the National Statistics Institute.

In Spain, the issue of age was much discussed and initial requirements were eventually softened. Thus the age limit stipulated in the decree can be waived for the following humanitarian reasons:

- ✓ the ascendant of the sponsor, or his/her spouse or partner, is the spouse or partner of the other parent and the latter is over 65;
- ✓ the ascendant lived with the sponsor in the country of origin when the later obtained his/her permit;
- ✓ the ascendant is incapable and his/her guardianship is granted by the competent authority in the country of origin to the alien resident or to his/her spouse or the reunified partner;
- ✓ the ascendant is not objectively capable of providing for his/her own needs.

As a general rule in **Sweden**, a residence permit may be given to an alien who is a close relative of someone who is resident in or who has been granted a residence permit to settle in Sweden. The following conditions must be fulfilled: the sponsor and relative must have been living in the same household in the country of origin and a special relationship of dependence must exist between them: for example parents whose adult children must take care of them. According to preparatory work, this special relationship of dependence between the relatives must make it difficult for them to live apart. This means that the applicant and the sponsor must have been living in the same household immediately before the sponsor moved to Sweden and the application must be submitted relatively soon after the sponsor's settlement in Sweden to prove the dependence.

As stated above, the provision of the directive regarding relatives in the direct ascending line is narrow in scope. However, it leaves significant room for manoeuvre to member states in implementing it and in particular with regard to the definition of persons falling within its scope.

Hence, member states may adopt a series of conditions regarding the minimum age, proof of dependence – which may be very precisely defined, like in Spain – the obligation not to have family in the country of origin, exceptions, etc. The analysis demonstrates that in this domain, national rules are very diverse and that common approaches could be difficult to find.

Notwithstanding the margins of manoeuvre awarded to member states in this domain, it may however be pointed out that their leeway is not absolute. Hence, and for instance, it is uncertain whether a requirement imposed by Dutch law regarding the single status of the parent is acceptable under EU law. Indeed, such a condition does not appear in Article 4, paragraph 2, and it is questionable whether it is lawful. This example demonstrates that EU law may sometimes constitute barriers to member states' freedom to act.

Finally, it has been explicitly reported by national experts that **Belgium, Poland and Slovenia** recognise the possibility for parents of minor children (Belgium and Slovenia) and minor refugees to join their children.

The section devoted to family members highlights some interesting points:

- ✓ First of all, the definition of family members entitled to family reunification is narrow and mainly limited to the European perception of the family i.e. the nuclear family.
- ✓ Secondly, and despite this narrow scope, the rules applicable to family members among the Member States are very different in terms of both content and procedure. As a consequence, the rules regarding the personal scope of family reunification may be very different from one state to another. Hence, the right to family reunification might be easier or more difficult to exercise depending on the state the sponsor is living in.
- ✓ Finally, and consequently, common approaches should be improved. These could take the form of better coordination of national rules on the basis of enhanced exchange of information and practices. This could take the form of further harmonisation through EU rules. Discussions following the Green Paper will certainly address these issues and highlight where coordination is desirable and harmonisation possible.

SECTION 2 – RESIDENCE AND PROCEDURAL ASPECTS

Having addressed issues related to the personal scope of family reunification, i.e. persons entitled to benefit from the right to family reunification, the study will now seek to define rules applicable in the member states regarding procedural aspects. These concern conditions regarding the residence of the sponsor in the member state before being joined by his/her family (I). They also touch upon procedural aspects, such as the place of application, examination rules and related costs (II).

I. Prior residence requirements

As a rule, family reunification is granted to third country nationals residing legally on the territory of a member state. Directive 2003/86/EC does not say anything else when it states "the purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States". Hence prior legal residence in the member state is a crucial criterion. But such a criterion may be interpreted and implemented differently from one state to another. Examples include the type of residence permit(s) allowing its holder to apply for family reunification (A) and the length of period of prior residence required (B).

A. Type of residence permit

In the majority of cases surveyed in this study – eight out of nine – member states determine what type of residence permit the sponsor needs to hold in order to apply for family reunification. Such rules may be very precise. Member states establish a list of residence

permits that include the right to family reunification and list the permits that are excluded from the procedure.

However, such rules may be formulated rather broadly and can cover a wide range of residence permits. Here, the main criterion is not the type of residence permit but rather the length of stay that the residence permit offers its holder.

Among the member states covered, there is one very specific case – **Portugal** – where rules are exceptionally broad. Indeed, in that country, all legal residence permits allow the holder to apply for family reunification.

In other countries, as stated above, the rules are more specific and are as follows:

In **Belgium**, sponsors may hold a residence permit for either an unlimited or limited stay. Initially, the right to family reunification was only accessible to people with an unlimited residence permit. The law was modified in this regard to extend the scope of family reunification to persons in possession of a residence permit of limited duration.²⁴ Since then, third country nationals entitled to precarious residence permits, such as asylum seekers, cannot benefit from the right to family reunification. However, this does not prevent them from making an application. In such situations, the application will not be examined on the basis of family reunification but at the minister's discretion.

In **France**, the law specifies that third country nationals who have resided legally in France for at least 18 months with the appropriate residence permit may ask to be reunited with their family. Regulatory rules determine the categories of residence permit that allow family reunification. These are the following: a temporary residence permit that lasts for at least one year, or a residence card that states "EU long-term residence permit". The regulation adds, however, that a period of 18 months may also be acceptable with the following documents: a temporary residence permit lasting less than one year, provisional authorisation to stay, a receipt attesting the application for or renewal of the residence permit and a receipt attesting the position of the asylum seeker. The French rules thus take into account a broad definition of residence permits that grant the right to family reunification. In this regard, the main element taken into account is not the nature of the residence permit, but rather the length of the legal stay.

In **Germany**, the rule is quite generous as family reunification is open to persons in possession of a settlement permit or an ordinary residence permit. But, persons awarded special temporary residence permits for humanitarian reasons are not entitled to apply for family reunification.

In **the Netherlands**, the sponsor must hold a residence permit that has been issued for a non-temporary goal. This excludes persons granted a residence permit for temporary grounds

24. H. Labayle & Y. Pascouau, *op. cit.* p. 37.

i.e. persons visiting relatives or staying as au pairs, or those staying for study reasons or for medical purposes. The Dutch Aliens Decree specifies that all other reasons for residence are of a non-temporary nature.

In **Poland**, foreigners who have obtained a permit to settle, an EU long-term resident permit or recognition as a refugee, as well as the beneficiaries of subsidiary protection and other foreigners who have resided in Poland for at least for two years on the basis of a residence permit for a fixed period, may apply for family reunification. This means that a wide range of persons may ask for family reunification once they have fulfilled the appropriate period of residence for family reunification. On the contrary, persons holding short-term residence permits of less than two years, such as students, au pairs or the beneficiaries of tolerated stays, may not be entitled to apply for the procedure.

In **Slovenia**, the right to family reunification is recognised to sponsors residing in Slovenia either on the basis of a permanent residence permit or on the basis of a temporary residence permit. In the latter situation, the sponsor should have resided there for the last year and must hold a temporary residence permit valid for at least one additional year. These conditions will cease to exist from 27 October 2011 with the entry into force of the new Aliens Act.

A similar rule is applicable in **Spain**, where an application for family reunification can be submitted when the sponsor has been living in Spain for at least one year and has applied for a permit to reside for at least another year.

In **Sweden**, and according to amendments to the Aliens law introduced in 2009, the sponsor has to be resident in Sweden or must have been granted a residence permit to settle in Sweden. According to the government bill, requirements related to the residence permit mean that a foreigner or stateless sponsor must have a permanent residence permit. The reason for such requirements is the desire for a uniform, appropriate and non-discriminatory law.

With the exception of some member states that determine very precisely which types of residence permit allow for or exclude family reunification (**Belgium, Germany or the Netherlands**, for instance), the picture emerging is that the main element taken into account is the length of the stay and its continuity rather than the type of residence permit.

This is particularly the case in **France, Poland, Spain or Slovenia**, not to mention **Portugal** of course, where a wide range of permits allow family reunification. Here the focus is on the ongoing stay or long-term residence of third country nationals in the member states.

This statement is reinforced by the **Dutch** system, where holders of permits issued for specific temporary stays are excluded from the family reunification procedure, and the **Swedish** one, where only holders of permanent residence permits may apply for family reunification.

B. Length of prior legal residence

Some member states, as is allowed by Directive 2003/86/EC, require the sponsor to have stayed lawfully on their territory for a fixed period of time before being joined by family members. But the Directive limits the margins of manoeuvre of the member states in this regard, as it states that the period must not exceed two years.

The results of the study on this issue show that rules applicable by EU member states in this domain are very diverse. They range from member states that have not established a minimal period of lawful residence required before reunification to member states that have introduced such a rule of varying durations.

The Netherlands, Portugal and Sweden have not introduced any special rules regarding the period of lawful residence into their legislation. Two situations may therefore arise. In the first one, any type of residence permit allows the holder to apply for family reunification and, as a consequence, third country nationals holding a residence permit may very rapidly ask for family reunification. In **Portugal**, for example, the application for family reunification may be introduced simultaneously with the application for a residence permit. The second situation concerns states where there is no specific period enshrined in the law but the residence permit needed for family reunification itself implies that a minimum period of time exists. This could be the case for instance if a state requests the sponsor to hold a permanent residence permit, which is in any case never issued before the first year of residence (with the exception of the specific situation of refugees). In this situation, the type of residence permit requested *de facto* introduces a period of lawful residence. In **the Netherlands**, the applicant must hold a residence permit that has been issued for a non-temporary goal. However, the Dutch government planned in 2010 to introduce the requirement that the applicant has already legally resided for one year.

The second category of member state is those that introduced a defined period of lawful residence before residents are able to apply for family reunification. **Slovenia** and **Spain** ask the applicant to have resided on their territory one year before the application can be introduced. This condition will however cease to exist in Slovenia from the 27 October 2011. In **France**, the period is 18 months, whereas **Germany** and **Poland** have opted for the maximum period of two years. Three different periods thus exist in just five member states. This shows how diverse the picture is and how difficult harmonisation in the domain could be.

Belgium stands in the middle of these two previous examples. It has transposed into law the obligation to have previously resided two years. But this rule is only applicable in very specific circumstances. Indeed, the two-year period applies in situations of subsequent reunification. This is the case of a sponsor who has already benefited from family reunification and who wishes to reunite with his/her new spouse or partner. In this case, the two-year period is applicable.

However, it should be outlined that in any of the cases mentioned above, Directive 2003/86/EC forbids the imposition of periods of longer than two years before the sponsor can

have his/her family members join him/her.²⁵ This means that the procedure must start before the end of the two-year period and family members must indeed join the sponsor before the end of the two-year period. In practice, if a foreigner arrived in a member state on 1 January 2010 and fulfilled from that date the appropriate conditions for family reunification, his/her family members should at the latest be entitled to join him/her on 1 January 2012.

Length of prior legal residence			
No specific rule	1 year	18 months	2 years
The Netherlands, Portugal, Sweden, Belgium	Slovenia*, Spain	France	Germany, Poland

*In Slovenia this condition will cease to exist from 27 October 2011

II. Procedure

In order to grant or refuse entry and residence for the purpose of family reunification, member states have to establish appropriate procedures. Such a condition is underlined in recital n° 13 of Directive 2003/86/EC, which states that "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". Alongside national rules, Directive 2003/86/EC defines some lines that member states have to follow and at least not overrule in this domain. Sometimes optional, sometimes mandatory, these provisions concern *inter alia* rules related the duty of applicants (A) and national authorities (B). The cost of the procedure is not directly tackled by the directive but has to be addressed in the general framework of EU law and developments (C).

A. Application

Questions related to the application are numerous and the answers show interesting differences between the member states.

1. Persons entitled to table applications for family reunification

The first question relates to the person in charge of introducing the application for family reunification. While Directive 2003/86/EC obliges member states to take action on this point, it leaves them full margins of manoeuvre to determine who has the duty to initiate the procedure. Article 5, paragraph 1 reads as follows: "member states shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the member state concerned, either by the sponsor or by the family member or members".

25. Article 8 indent 2 of Directive 2003/86/EC allows for a derogation under very specific circumstances. It states" By way of derogation, where the legislation of a member state relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the member state may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members".

The leeway authorised by Directive 2003/86/EC reflects, or is the result of, the wide diversity that exists in the member states. Indeed, four member states (**France, Poland, Slovenia and Spain**) require the sponsor to introduce the application, whereas three (**Belgium, Germany and Sweden**) request the application to be introduced by members of the family. Consequently, applications should be introduced either in the member state or the country of origin.

The Netherlands and Portugal have a mixed system where both the sponsor and family members are entitled to introduce the application. But the reasons for such a system differ from one country to the other. In **Portugal**, this derives from a very liberal approach and depends on whether the family remains in the country of origin or not. Hence, the application for family reunification is lodged by the sponsor if the family members are abroad. But, if the relatives are already on Portuguese territory, family reunion may be requested by them or the sponsor.

In **the Netherlands**, the rules are more complex. Family members have both the opportunity to submit an application for advice concerning an authorisation for a temporary stay (visa) on the grounds of family reunification. The family member has to do this in his country of origin or permanent residence, whereas the sponsor asks for advice in the Netherlands. The administrative authorities in the Netherlands give their advice on this application, which is crucial. When the advice is positive, authorisation for a temporary stay can be granted.²⁶ Negative advice will lead to the application for authorising a temporary stay in the Netherlands being refused. The sponsor cannot appeal against the advice. In the future, the advisory procedure will be replaced by a formal application allowing the sponsor to appeal against a denial.

2. Obligation for family members to reside outside the territory

The obligation for family members to reside outside the territory concerned while the application is being processed is a widely recognised principle. Directive 2003/86/EC demonstrates that member states broadly agree in this regard. Indeed, they have agreed to introduce a mandatory provision which reads as follows: "The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides".

This widely-accepted principle is also reflected in the study. Seven of the nine member states oblige members of the family to reside in the country of origin or the third country of residence during the examination of the application. These are **Belgium, France, Germany, the Netherlands, Slovenia, Spain and Sweden**.

26. It should be underlined, however, that once admitted into the Netherlands, the family member still needs to make an application for a residence permit on family reunification grounds. A bill was adopted in 2010 which provides for the automatic granting of a residence permit within two weeks after arrival in the Netherlands with a valid authorisation for a temporary stay on the grounds of family reunification.

Two member states, **Poland** and **Portugal**, have not transposed this obligation into their national legislation. In **Poland**, the law stipulates that the residence permit for a specified period of time is granted to an alien who intends to arrive on the territory of Poland or already resides on that territory. Consequently, an application submitted by a family member who already resides on the territory of Poland cannot be regarded as an exception.²⁷

The absence of formal transposition of this obligatory rule in **Poland** and **Portugal** may not be considered as a breach of EU law. On the one hand, it may be considered as a more favourable provision for foreigners allowed by Article 4 of Directive 2003/86/EC.²⁸ Being able to reside in the territory during the application process is far better for the family than being forced to wait abroad. On the other hand, Article 5, paragraph 3, second indent of Directive 2003/86/EC states "by way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory".

3. Derogation from the obligation to reside outside the territory

As already pointed out, Directive 2003/86/EC obliges member states to introduce in their national legislation the obligation for family members to reside abroad. But the same directive permits the adoption of derogations. It should be added that the scope for introducing such derogations is very wide, as they must be grounded on "appropriate circumstances" which are not defined by the directive. As a result, it is up to member states to define the scope and content of "appropriate circumstances".

Only one of the member states that oblige family members to reside outside their territory – **Slovenia** – has not made use of derogations. The others have but in different fashions.

In **Belgium**, the grounds for derogations are broad. According to the law and in exceptional circumstances, applications for family reunification may be introduced in Belgium. This possibility is open to the following third country nationals:

- ✓ Those who are already authorised to stay legally in Belgium, such as students, workers.
- ✓ Those who are authorised for a temporary stay on the basis of a short-stay visa or because they do not need a visa.
- ✓ Those who can prove that exceptional circumstances are preventing them from going back to their country.

The exceptional circumstances are defined by case law as those which make "impossible or particularly difficult the return of the foreigner to his/her country of origin". The assessment of exceptional circumstances takes into account ties with Belgium – such as schooling of

27. On this point, see H. Labayle & Y. Pascouau, p. 77.

28. Directive 2003/86/EC recalls in its article 4 "This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions".

children, attendance of training courses or family links – and the situation in the country of origin – such as the absence of a Belgian diplomatic post in the country of origin, insecurity, impossibility of travel, dangerous situations, etc. The individual situation of family members, such as statelessness or health conditions, is also taken into account.

Moreover, the 2011 law introduces two new opportunities for the application to be tabled, exceptionally, with the municipal administration. The first of these situations is when the foreigner has a valid visa to conclude a marriage or a partnership in Belgium, if this marriage or partnership was effectively concluded before the end of this authorisation period and if he fulfils the conditions before the end of the period. The second concerns parents of a minor child recognised as a refugee or benefiting from subsidiary protection. The father and/or the mother will be able to apply for family reunification in Belgium if they prove that they have sufficient and regular means of supporting themselves.

In **France**, the rules state that the derogation applies where the foreigner is getting married to a third country national residing legally in France on the basis of a one-year temporary residence permit. In such a case, family members are not obliged to reside in the country of origin or abroad. The jurisprudence recalls that the administration is not bound to refuse family reunification in these cases in particular where such a refusal would upset family life disproportionately or according to consequences related to a return to the country of origin.

In **Germany**, exceptions apply if it is intolerable to require an applicant who is already legally residing in Germany to apply abroad, provided that there is the legal right of family reunification.

In **the Netherlands**, derogations are possible when demanding authorisation for a temporary stay (visa) constitutes unreasonable harshness. Here, the condition of residing outside the territory does not apply. But it is applied very strictly, for instance in cases of illness. In mid-2011, the government decided to abolish the exemption from an authorisation for temporary stay which was applied to third country nationals who had lawfully stayed in the Netherlands for five years continuously before having reached the age of 19.

In **Sweden**, the principle is that family members are supposed to apply and be granted a residence permit before coming to Sweden, because a residence permit cannot be granted if the application is submitted in Sweden. However, three main derogations are enshrined in Swedish law. The first concerns foreigners who have introduced an application for the extension of a temporary residence permit which has been granted to an alien with family ties. It may, for instance, cover a person who intends to marry or begin a partnership with the sponsor when the relationship seems serious. This concerns the situation where the applicant has already lived in Sweden with a temporary residence permit which he/she was granted because of the seriousness of the relationship. The other derogation targets persons who have strong ties with another person residing in Sweden and who cannot reasonably be required to travel to another country to submit the application there. The Migration Board should especially consider the consequences for a child of being separated from her or his parent when deciding if the application should have been granted, if the investigation had been

done before the arrival in Sweden. Finally, an application can also be introduced in Sweden if there are some other exceptional grounds.

In **Spain**, the principle of so-called "reunification in fact" of minors is applied when it can be proven that they have lived in Spain for two or more years. This is considered as "regularisation by settlement".

With regard to derogatory rules adopted in the member states, two main trends can be identified:

- ✓ Family members are already residing in the member state on the basis of a residence permit. This concerns for instance a foreign woman residing legally and getting married to a third country national residing legally as well. Whenever they fall under the scope of family reunification rules, they will not be asked to go back to their own country while the application is processed.
- ✓ Applicants falling within the scope of "exceptional circumstances". Here, requiring family members to move abroad would be disproportionate or endanger the people concerned. Hence they are not required to return to the country of origin.

The issue related to "exceptional circumstances" deserves further analysis and discussion. Indeed, it exists in a large number of countries but is implemented in different ways. As a consequence, third country nationals may be treated in different ways depending on which country they are living in. In order to foster common approaches and harmonisation, this point could be opportunely put on the agenda of further consultations in the domain.

Obligation for family members to reside outside the territory and derogations

	Who has to apply?	Where is the application introduced?	Are family members obliged to reside abroad?	If yes, are derogations organized?
BE	Family member(s)	Country of Origin	Yes	Yes
FR	Sponsor	France	Yes	Yes
GER	Family member(s)	Country of Origin	Yes	Yes
NL	Family member(s)/Sponsor	Country of Origin /Netherlands (not the official application, only a request for an advice)	Yes	Yes
PL	Sponsor	Poland	No	No
PT	Sponsor where family member(s) are abroad /Both where family member(s) reside in Portugal	Country of Origin/Portugal	No	No
SLO	Sponsor	Slovenia	Yes	No
SP	Sponsor	Spain	Yes	Yes
SW	Family member(s)	Country of Origin	Yes	Yes

B. Examination and decision

This part of the process concerns in particular duties weighing on the shoulders of the member states. It deals with the procedure and rules that states have to comply with. In this domain, Directive 2003/86/EC defines delays within which applications for family reunification should be examined and rules related to decisions on applications. National rules and practices show some differences between member states' rules. It also demonstrates that some countries do not always comply with the requirements of the Directive.

1. Framework established by Directive 2003/86/EC

Article 5, paragraph 4 of the Directive states "the competent authorities of the member state shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged". It adds: "In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended." Three elements have to be taken into consideration here.

First, the decision should be taken as soon as possible. This requirement is difficult to assess. If the delay set by law is a good point of comparison between countries, then the rapidity with which the application is examined is a matter of administrative practice and as such is difficult to assess.

Second, the decision should in any case be made no later than nine months from the date the application is lodged. But, what emerges from the wording of the directive and is largely acknowledged by member states is that the application must be complete. In this regard, differences and uncertainty may derive from national law and practice on interpreting the rule regarding a "complete" application.

Third, the time limit set by the law may be extended. The directive limits the reasons that justify such an extension. It can be awarded in "exceptional circumstances" and when "linked to the complexity of the examination". Although at first glance, this limits the margins of manoeuvre of the member states, the latter do still have some leeway. They have the possibility to define more or less broadly the notion of "the complexity of the examination". Administrative practice is a crucial element here and plays an important role in implementing this notion. However, the margin of manoeuvre of the member states is not absolute and is subject to the interpretation of the Court of Justice. This may then frame member states' action and delineate the balance between the goal pursued by extension and the right to family reunification.

2. Deadlines for examination in national legislation and regulations

The deadline for examining an application for family reunification, once the application is considered complete, varies between one and nine months.

In **Sweden**, the decision has to be taken within nine months. Due to the complexity of the application, the period of nine months may be extended. However, no specific time of extension is planned in Swedish law.

A nine-month delay is also applicable in **the Netherlands**. Here it is a combination of the three-month period generally necessary for obtaining a visa and the six-month period normally required to issue a residence permit, leading to an average nine-month period. This period may be extended for another six months if the minister deems that the advice of the public prosecutor or an investigation by a third party is necessary for the decision on the application to be taken. However, new legislation adopted in 2010, that should enter into force in January 2012, states that a residence permit should be provided within two weeks after arrival if the family member has been granted an authorisation for temporary stay on the basis of family reunification. Thus, no longer will second assessment on the fulfilment of the requirements take place.

A six-month period is applicable in **France** and **Belgium**. In **France**, there is no chance of extending this fixed period. In **Belgium**, the law adopted in 2007 introduced for the first time a nine-month period for the examination of applications. The law adopted in May 2011 reduced this delay to six months. It maintains nevertheless the option of prolonging this deadline twice by three months due to the complexity of the case.

In **Portugal**, the application should be examined within three months, which may be extended for three additional months due to the complexity of the application.

In **Slovenia**, in accordance with the General Administrative Procedure Act, the decision has to be issued within two months of the complete application being lodged. There is no possibility in this member state to extend the two-month period. In practice, however, this time limit is often not respected.

In **Spain**, the administration normally has three months to give an answer on the application. If no decision is taken within this period, it may be considered as a negative answer.

In **Poland**, the rules applicable derive from the Code of Administrative Procedure, which determines general provisions on the length of the administrative procedure. Generally, a decision on an application for family reunification should be taken as soon as possible and within one month at the latest. An extension for another month is possible due to the complexity of the application. According to data gathered, family reunification procedures usually take between 45 and 60 days.

Germany does not have any specific rule regarding family reunification but applies general rules regarding administrative practice. According to the 2007 Odysseus study, Germany does not breach the provisions of the directive, as a decision on an application for family reunification is taken within the 9-month period required.

Time established by law or regulation within which an application should be examined and extended

State	Examination	Extension	Total
Sweden	9 months	Undefined	Undefined
the Netherlands	9 months (3 visa + 6 permit)	6 months	12/15 months
Belgium	6 months	6 months (2 X 3 months)	12 months
France	6 months	No extension	6 months
Portugal	3 months	3 months	6 months
Spain	3 months	No extension	3 months
Slovenia	2 months	No extension	2 months
Poland	1 month	1 months	2 months

The survey demonstrates that huge differences still exist between the member states. These concern first of all the time granted to the competent authorities for examining an application, which ranges from one month to nine months. There is no explanation in the reports for such a difference between countries. However, some objective comments may be drawn.

Concerning examination delays, the national reports indicate that the shortest delays are in those countries which rely on general administrative rules (**Poland, Slovenia and Germany**). Deadlines enshrined in aliens' legislation are longer (**Belgium, France, the Netherlands, Portugal, Spain and Sweden**). **Portugal** and **Spain** stand in the middle, with delays determined by aliens' laws for examination of the application of three months.

Secondly, the column devoted to examination shows that among eight member states (Germany is not included), there are at least five different rules regarding the time period within which an application should be examined. However, this wide diversity is reduced when taking into account the possibility to extend the period due to the complexity of the application. Three groups of member states thus emerge: member states where the cumulative period is one year or more (**Belgium, the Netherlands and probability Sweden**); member states where the full procedure lasts six months (France and in exceptional cases **Portugal**); and member states where the examination procedure does not last more than three months (**Slovenia, Poland and Spain**). **Slovenia, Poland and Spain** have the shortest deadline.

As regards the extension period, it may in principle delay the whole process of examination and therefore postpone the final decision on the application. In this context, member states may be tempted to rely, or to play, on this possibility to make the procedure longer. But it must be added that the use of an extended period is framed by a provision of Directive 2003/86/EC; it should be exceptional and linked to the complexity of the application. With regard to these two limits, it seems that **Portugal** is the only member state that has formally introduced in its legislation the exceptional nature of such an extension.

It would therefore be of relevance to further assess member states' rules in this regard and to try to define more precisely notions related to "exceptional circumstances" and the "complexity of the application". This approach could be of great help for national administrations in charge of implementing family reunification rules and it could also create added legal certainty and security for applicants. The consultation following the European Commission's Green Paper could be a timely opportunity to develop in-depth discussion and provide for further input in this regard. It is worth noting that an interpretation from the Court of Justice on this matter would be of great help.

To sum up:

- ✓ National rules vary widely between member states and lead to very diverse possibilities.
- ✓ Examination periods based on general administrative rules are generally shorter than those established by migration rules.
- ✓ Differences between member states rules are less significant of the possible extension periods are taken into account.
- ✓ Use of the extension period should remain within the boundaries defined by Directive 2003/86/EC
- ✓ Further specifications and discussions regarding the notions of "exceptional circumstances" and "complexity of the application" would be helpful.

Whenever member states decide to adopt rules regarding the exceptional extension of the period of examination, it must be highlighted that such an extension should also be compatible with the period of two years of legal residence before the sponsor is joined by his/her family.

3. Examination rules vs. Two-year deadline before family joins sponsor

As explained above, Article 8 of Directive 2003/86/EC stipulates that "Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her".

This means that the sponsor should be joined by his/her family at the latest after two years of legal residence in the member state. As a consequence, rules applicable in the member states with regard to prior legal residence and delays for examination should not lead to an overall procedure lasting more than two years. A distinction should be made, however, between law and practice.

Compatibility in law

Regarding delays established in law, and according to reports written for the purpose of this study, eight member states are in line with this requirement (**Belgium, France, Germany, the Netherlands, Portugal, Slovenia, Spain and Sweden**).

The **French** rules give a very good example of the framework established by the directive which must be respected. In France, the possibility to claim for family reunification is opened

after 18 months of legal residence and the examination procedure lasts a maximum of six months. 18 months and six months make two years. From this perspective and according to the rules, France complies with the requirements of EU rules.

Poland does not fulfil the two-year requirement. The sponsor must have resided in Poland at least for two years on the basis of a residence permit for a fixed period. So, the period of residence and the procedure, which lasts a maximum of two months, are longer than two years. Only the length of prior legal residence is shorter in the cases of refugees and beneficiaries of subsidiary protection. The stays of foreigners enjoying the status of long-term residents and foreigners who obtained the right to settle are obviously longer.

In two member states, however, some reservations are apparent. In **Spain**, there are problems related to the family reunification procedure applicable to already reunified ascendants who are themselves asking to benefit from family reunification. In such cases, family reunion is only possible once the ascendants have acquired a long-term residence permit issued after five years of uninterrupted legal residence. In such cases, the law establishes a period of longer than two years, which in the eyes of national experts breaches the Directive.

In **the Netherlands**, the rule is for the time being compatible with the directive's requirements. But a proposed law is currently being discussed that would introduce a one-year period before the sponsor could apply for family reunification. Hence, the one-year period - which must be added to the period of preparation of the integration test, the period of assessment of the application for an authorisation to stay and the period of the examination of the application for a residence permit in the Netherlands – may lead to a longer procedure than the one allowed by Directive 2003/86/EC.

Compatibility in practice

Although in the majority of cases national rules are compatible with the two-year period, in more than half of the member states, including **Poland**, problems may occur in practice.

In **Belgium**, problems may derive from the difficulty for applicants to determine and demonstrate the point of departure of the delays.

In **France**, the six-month period for examining the application may easily be exceeded. In this case, the application is considered overruled. But this does not prevent the competent authority from formally accepting or rejecting formally the application for family reunification.

In **the Netherlands**, the main problems occur with regard to integration tests. Family members have to take a language and civic test in the country of origin. If the test is not successfully taken, then family members, and especially illiterate spouses, do not receive a visa for family reunification. In this regard, the procedure may last more than two years.

In **Spain**, the authorities have three months to make a decision on the application. After a positive decision on the sponsor's application, another period of two months begins within

which family member(s) can apply for the visa in the country of origin. Diplomatic missions or the consular offices have up to two months to deliver the visa. But in practice, a much longer period applies. Indeed, the persons concerned are sometimes given an "appointment" six months or more after the application for a visa has been lodged. Then, the procedure depends on the internal organisation and way of functioning of consulates abroad. Therefore, and taking into account the need to have resided in the Netherlands for at least one year before applying for family reunification, the whole process could easily take longer than two years.

In four member states – **Germany, Portugal, Slovenia and Sweden** – delays in law and practice respected.

The adoption of rules compatible with requirements of Directive 2003/86/EC is not enough where national practices show that these requirements are not respected. Consequently, monitoring how rules are implemented in practice is crucial and should be fully part of the future strategy that will be followed by the Commission on the basis of the Green Paper. On the one hand, appropriate monitoring should limit practices aimed at breaching EU rules. On the other hand, and consequently, this should aim at better protecting the right to family reunification recognised for third country nationals legally residing in an EU member state. Finally, the question of appeal procedures may also be addressed. Indeed, discussions should determine whether the two-year period covers the first decision on the application or the full procedure including appeals against negative decisions.

To sum up:

- ✓ With the exception of Poland, all of the member states respect the two-year limit in law.
- ✓ However, the majority of member states in practice exceed the timeframe set by EU rules.
- ✓ Further monitoring is needed regarding the compatibility of national practices with the two-year period.
- ✓ Discussion regarding the inclusion of appeal procedures in the two-year period should be developed.

4. No decision issued in time

Alongside decisions taken after the two-year period stand situations whereby no decision is taken regarding the application at all. Directive 2003/86/EC takes such situations into account. It states: "Any consequences of no decision being taken by the end of the period provided (...) shall be determined by the national legislation of the relevant member state."

This provision is not very binding as it refers principally to national rules to cope with the situation. In these circumstances, national provisions are diverse and are divided into two main categories: member states where the application is considered implicitly accepted and those where the application is implicitly rejected.

In two member states, if the administration does not make a decision within the requested period, the application for family reunification is accepted. This solution, which is applicable in **Belgium** and **Portugal**, is by far the most favourable to the applicant. It forces the administration to acknowledge that it did not proceed in due time or in an appropriate manner and therefore takes a position against its own "failure".

At the opposite side of the spectrum stand **France**, **the Netherlands**, **Slovenia** and **Spain**. Here, there is no "failure" on the part of the administration. Applicants are entitled to appeal such 'silent decisions'. In **the Netherlands**, the Administrative Act allows "virtual decisions" to be taken, which can be appealed. This does not imply that the authorities have to make a positive decision but the court will demand that the authorities decide on the application within a certain time limit. Since October 2009, the applicant can receive an administrative fine from the authorities on the grounds that they did not decide within the legal limit. This type of sanction for failure to act also exists in France, where the applicant may enforce the state's responsibility.

In three member states, the rules are somewhat different. The situation is quite simple in **Germany** as sanctions are apparently not applicable. In **Sweden**, there are no legal consequences for the applicant regarding either the application or the decision if the nine-month period is exceeded. In **Poland**, and according to the Code of Administrative Procedure, administrative authorities shall inform the parties of any failure to deal with a case within the deadline. They have to explain the reasons for the delay and define a new deadline for dealing with the case. The same obligation shall also apply in the event of a delay caused by factors that are beyond the control of the administrative authority responsible. In the event of a failure to deal with a case within the deadline, the parties have the right to make an interlocutory objection to the higher public administration authority. If this authority accepts the validity of the complaint, it shall set an additional deadline for dealing with the case, and clarify the reasons for the delay and the identity of the parties responsible for the failure to deal with the case within the deadline. Where necessary, the authority shall take steps to ensure that future deadlines for dealing with the case are respected. Since February 2011, a new law refers to responsibility for damage caused civil servants' gross violation of law.

In the end, the absence of an answer to an application leads to different types of solutions among member states. Here again, and notwithstanding national administrative cultures, two common approaches can be identified:

The first relates to situations where no decision leads to a positive decision for the applicant. In a situation where the failure lies on the shoulders of the administration, one positive outcome for the applicant is to issue an implicit decision of acceptance. This may constitute a positive step forward in the definition of common rules in the field of family reunification and ease the procedure so as to promote family reunification.

Secondly, the possibility to engage member states' responsibility should be further discussed. This will enhance migrants' protection and put some pressure on national authorities in exercising their duty to examine appropriately and in due time applications for family reunification.

Recap of rules applicable

	Delay for examination	Extension	Decision not taken in due time	Delay in Law (prior + exam)	Delay in practice (prior + exam)
BE	9 months	6 months → complexity of application	Application accepted	OK → env. 15 months	NO Could be > 2 years
FR	6 months	No	Application rejected	OK → 18 + 6 = 2 years	NO Could be > 2 years See report
GER	No specific rules	No	Not applicable	In time	In time
NL	6 months + 3 months for visa	6 months → complexity of application (prosecutor's advice or investigations needed)	Application rejected	OK unless remedy against negative decision for visa	NO Could be > 2 years Due to integration tests abroad
PL	1 month	1 month → complexity of application	Specific provisions → new deadline	NO Is > 2 years See report	NO Is > 2 years See report
PT	3 months	3 months → complexity of application	Application accepted	OK	OK
SLO	2 months	No	Application rejected	OK	OK
SP	3 months	No	Application rejected	OK	NO → delays for appointment at Embassies or Consulates abroad very long
SW	9 months	Yes → incomplete file + complexity of application	No legal consequences	OK	OK

C. Costs

The right to family reunification has a cost mostly linked to administrative fees (visas, residence permits, proof ...) that applicants have to cover.

In **Belgium**, the cost of the procedure depends on the municipality in which the application is introduced.

In **France**, the spouse has to pay a tax up to €340 for the residence permit. The price is reduced for children entering France for family reunification, who have to pay €110. The rules specify that children benefiting from family reunification but who are already residing in France have to pay €340 for the issuance of their first residence permit when they turn 18. Renewal of residence permits in France costs €140. There are no other costs than those requested for the residence permit.

In **Germany**, the Act of Residence Regulation indicates that the cost of a residence permit issued for family reunification is €60. There are no other costs other than those requested for the residence permit.

The Netherlands is the most expensive member state surveyed. Before July 2011, costs (in brackets hereinafter) were already very high. Since 1 July 2011, they have increased. The fees for a visa for family reunification are now €1,250 (€830) for the principal family member and €250 for each extra family member, if they travel together. After arrival,

they have to pay €300 (€188) for each family member for the residence permit. Renewal of the residence permit costs €375 (€288). A visa for a child who is adopted or taken into custody costs €950 and the residence permit costs €300. Furthermore, adult family members must pay to take the integration test, which costs €350 each time for each family member. The materials needed to prepare for the test cost €110 (€68.90). In the end, a spouse who wants to join his/her partner in the Netherlands will have to pay around €2,000 (formerly €1,435).

In **Poland**, the stamp duty for residence permit is around €85 (340 PLN). This price is fixed for a defined period of time and has not been changed since 2006.

In **Portugal**, three different prices are applicable. Applicants travelling without a residence visa have to pay €250. Applicants travelling with a residence visa will pay a lower price, as they will be asked to pay €140. Finally, nationals of Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Sao Tome and Principe will have to pay €35. All these permits can be sent to the applicant's home address for an extra €6.

In **Slovenia**, applicants for family reunification will have to pay around €37. This price comprises €31.91 for applications lodged at the administrative unit and €5.42 for the issuance of the residence permit. Additional costs may be incurred for translation or verification of documents. These additional costs may exceed the administrative costs.

In **Spain**, the fee the sponsor has to pay in order to apply for reunification is €10.20. The visa is free of charge and once in Spain, each family member reunified pays €15 for the issuance of the residence permit.

In **Sweden**, the cost for applying for a residence permit for family reunification is €169 (SEK 1,500) for adults and €84.50 (SEK 750) for minors. The prices were modified in April 2011 and have tripled compared to the prices that were applicable in 2006 (€56 for adults and €28 for minors). In specific situations, some family members are exempted from the payment.

Costs for applications for family reunification

States	Adult	Children	Additional costs
NL	1550	550	460 integration abroad (for adults)
FR	340	110	
PT	250 140 35	/	
SW	169	84,50	
PL	85	85	
GER	60	60	
SLO	37	37	
SP	25,20	15	

The table above shows very significant differences between member states regarding the cost of applying for family reunification. Administrative costs differ from one member state to another, but there is no real explanation for these discrepancies.

The Netherlands is a very specific case that needs to be tackled in an isolated manner. The price for family reunification here is very high, something which is not very encouraging for family reunification. Reunification of a two-child family would cost around €3,100. In any case, the huge fees demanded for family reunification in the Netherlands constitute an obstacle to the exercising of this right. The European Commission has highlighted this point²⁹ but never launched an infringement procedure. This point is highly problematic and remains a source of major concern. In this regard, a member of the European Parliament has sent written questions to the European Commissioner for Home Affairs. Commissioner Cecilia Malmström replied as follows "the Commission is aware of the recent modification of Dutch national legislation raising the fees for residence permits for family reunification from 1 July 2011. (...) At EU level, family reunification between third country nationals is regulated by Directive 2003/86/EC on the right to family reunification. This directive has no specific provisions on fees. Nevertheless, Member States have to respect the general principles of EC law (proportionality and '*effet utile*') when setting their fees and should not apply excessive fees which can undermine the effect of the directive by hampering the right to family reunification. Therefore the Commission is currently examining the Dutch rules in light of these general principles".³⁰ It is to be hoped that the Commission's appraisal will provide for clear rules in this matter.

While being far more "reasonable", it is hard to explain why the procedure in **France** costs more than ten times that in place in **Spain**. It costs €560 for a two-child family to reunite in France, whereas the family will have to pay €55.20 in Spain.

To sum up:

- ✓ Family reunification costs differ tremendously between member states.
- ✓ The differences are hard to explain between countries where the cost of living is comparable.
- ✓ Large families can be disadvantaged where costs increase with the number of family members.
- ✓ Further scrutiny aimed at explaining how costs are calculated may be required in order to have a fair procedure based on fair costs which does not prevent people from exercising their rights.

SECTION 3 – MATERIAL CONDITIONS

As already mentioned, Directive 2003/86/EC establishes a set of conditions that member states may ask applicants for family reunification to fulfil. Article 7 of Directive 2003/86/EC

deals with material conditions. It indicates that member states may require the sponsor to prove that he/she has:

- ✓ appropriate accommodation;
- ✓ sickness insurance;
- ✓ stable and regular resources;
- ✓ complied with integration measures.

The material conditions defined by Directive 2003/86/EC are not, for the time being, mandatory. This means that member states are not obliged to demand the fulfilment of one or all of these conditions.

However, rules related to material conditions are, along with those dealing with personal scope, the most important and sensitive ones. First of all, because they shape the conditions under which family reunification is possible: they thus give a strong indication of the openness of member states in the field of family reunification. Secondly, rules relating to material conditions are under strain in some member states and subject to modifications in order to make family reunification more difficult. Although this trend is not true for all of the member states, it was strong enough to receive some echo at the level of heads of state and government in the European Pact on Immigration and Asylum adopted in 2008.

In this context, an analysis of material conditions applicable in the member states should give an in-depth view of the state of play and shed some light on trends that may or may not be apparent in some countries, as well as on specific rules.

I. Accommodation conditions

According to Article 7, paragraph 1, a) of Directive 2003/86/EC, member states may require the person who has submitted the application for family reunification to provide evidence that the sponsor has "accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned".

Of the nine member states surveyed, three – **the Netherlands, Slovenia and Sweden** – did not ask for such a condition to be fulfilled in 2007. In 2011, this has slightly changed, as **Sweden** has joined the group of states requesting this condition to be fulfilled and the **Dutch** Government is currently considering reintroducing such a requirement.

A. Conditions requested in the member states

Directive 2003/86/EC frames the use of this condition. On the one hand, the accommodation should be regarded as normal for a comparable family in the same region. This means that national authorities are not entitled to ask more from foreigners than they ask

of nationals. If the authorities consider accommodation of 50 m² to be sufficient for a 'national' family, they cannot ask foreigners to have 75 m² accommodation for the same-sized family.

On the other hand, the accommodation should meet the general health and safety standards in force in the member states concerned. Here, the authorities are entitled to refuse family reunification if the accommodation is not safe enough.

In each of these cases, the requirements seek to protect third country nationals from being discriminated against compared to nationals, or exploited by slumlords. These purposes are more or less openly pursued in national legislations.

In **Belgium**, the issue of accommodation conditions has been heavily discussed and subject to judicial appeal. In February 2010, the Council of State defeated Article 9 of the 2007 Royal Decree, which linked the criterion of "sufficient housing" to provisions enshrined in regional Housing Codes. The court stated that the dismissal of family reunification applications due to insufficient housing conditions in the sense of a regional Housing Code inflicts more rigorous preconditions than the regional codes initially intended. As the intention of the legislator was *de facto* misconceived by Article 9 of the Royal Decree, this provision was abolished. Until the adoption of new rules, which occurred with the adoption of the Royal Decree of 26 August 2010, applicants were no longer obliged to present proof of sufficient housing. Since the entry into force of the Royal Decree, "accommodation is sufficient in the sense of Articles 10 and 10 bis of the law, for the foreigner and for the members of his/her family who ask to join him, if it satisfies to the elementary requirements of safety, healthiness and habitability in the sense of the [Civil Code – provisions related to rental contracts]". Refugees are exempt from this requirement.

In **France**, the law stipulates that family reunification may be refused if the applicant does not prove that he/she has or will have upon the family's arrival accommodation regarded as normal for a comparable family in the same region. This condition is assessed on the basis of the living area available and with regard to the size of the family. The accommodation must also meet the conditions of hygiene, comfort and roominess as stated by appropriate regulations. These conditions concern the composition and dimension of the housing, openings and ventilation, the layout of the kitchen, bathroom and toilet, as well as gas, electricity and water supplies. Rules applicable in France are very precise. A good example of this is the size of the accommodation. This criterion is adjusted according to the region in which the application is lodged. Hence, France is divided into three regions or zones which take into account the property market, which may be very different according to these specific regions. The rules then take into account the size of the family and adjust the requested conditions accordingly. The table below shows how the calculation is made.

Zones	Couple	3 pers.	4 pers.	5 pers.	6 pers.	7 pers.	8 pers.
Zone A (Paris and immediate neighbourhood, the French Riviera and regions bordering Switzerland)	22 m ²	32 m ²	42 m ²	52 m ²	62 m ²	72 m ²	82 m ² (+ 5 m ² / added persons)
Zone B (agglomeration of more than 50,000 inhabitants, some cities bordering Paris region, coastal and border regions)	24 m ²	34 m ²	44 m ²	54 m ²	64 m ²	74 m ²	84 m ² (+ 5 m ² / added persons)
Zone C (other parts of France)	28 m ²	38 m ²	48 m ²	58 m ²	68 m ²	78 m ²	88 m ² (+ 5 m ² / added persons)

In **Germany**, applicants for family reunification have to prove they have sufficient accommodation. The definition of sufficient accommodation is established by the Aliens' Law, which states that for adequate housing there is no requirement other than that requested from a person looking for rental housing subsidised by the state. Accommodation is not sufficient if it does not meet the legal provisions applicable to Germans in terms of quality and occupation. Children are taken into account in the assessment of sufficient accommodation after the age of two.

In **Poland**, the Act on Aliens provides that information on legal title applicable to the current or intended place of housing and documents confirming the cost of housing must be included in the application. Polish rules do not ask for any specific conditions to be fulfilled regarding the size of the accommodation or its salubriousness. It must however be obvious to national experts that the accommodation is suitable for living in. This means for instance that the alien cannot rent a basement or a barn.

In **Portugal**, applicants for family reunification must prove that they have accommodation. But the rules in this member state do not indicate what type or size of accommodation should be rented or own by the applicant.

The rules were modified in **Spain** by a law in 2009 and by a Royal Decree in 2011. The decree defines the conditions applicable in this regard. Broadly speaking, proof of appropriate accommodation takes into consideration, on the one hand, the number of rooms available with regard to the number of persons living in the house and, on the other hand, habitability and the equipment available in the accommodation. Spanish rules do not include any specific provisions regarding the comparability of requirements asked of foreigners and those requested of nationals.

Finally, **Sweden** joined the group of countries that impose accommodation conditions after a modification of the law in 2010. Since then, the sponsor must have accommodation of an adequate size and standard for the sponsor and the family member applying for

reunification. The Migration Board has the authority to give directions regarding the requirements of size and standard of accommodation. According to these directions, the accommodation should be of a reasonable standard and an appropriate size for the number of persons who are supposed to live in it. For two adults without children, there should be at least one bedroom, one living room and a kitchen or a kitchenette. If children are to live in the accommodation there should be more bedrooms. But two minor children can share one bedroom. It should be added that according to Swedish rules, several third country nationals are exempted from this condition. Such exceptions apply where the sponsor is a child, a parent of a child, a citizen in Sweden, another EEA-state or Switzerland, a refugee, a quota refugee, or a person eligible for subsidiary protection. Exceptions also apply if the sponsor has a permanent residence permit and has been living in Sweden with a residence permit to settle for at least four years.

Accommodation conditions raise the following issues:

This is a domain where various national rules regarding family reunification have been adopted or specified in recent years. These modifications demonstrate the increasing importance of the issue for member states.

In nearly all of the member states implementing the accommodation condition, criteria comparing the size of the house and the size of the family are taken into consideration. Most of the time, the comparability to requirements applicable to nationals is taken on board.

The criterion relating to health and safety standards seems to be less implemented in national rules. Member states and the European Commission could be encouraged to further analyse this point. It could be the basis of an exchange of national experience and good practice, and help at the same time to enhance the fight against slumlords.

In this regard, the option laid down in Article 7 of directive 2003/86/EC allowing member states to make use of the accommodation condition is accompanied by obligations. Indeed, as soon as member states decide to implement this condition in their national legislation, they should follow the lines delineated by the directive. In this view, proof that housing conditions are respected should comprise the living area and general standards regarding health and safety. These are not alternative but cumulative criteria.

Finally, the examination of the accommodation condition should, according to the Chakroun case law, be individualised.

B. Proof of accommodation conditions

In most of the member states analysed, the satisfaction of the accommodation condition is mainly proven by presenting a rental agreement or a title of property. This is the case in **Belgium, France, Poland, Portugal, Spain and Sweden**. But the rules in these member states differ in scope and some are more precise than others.

In **Belgium**, a previous regulation specified that to prove that a sponsor has appropriate accommodation, he/she must provide proof that a housing lease has been registered or provide a title of property. These documents constitute a presumption that the condition is fulfilled. The regulation added that the proof would be accepted provided that the accommodation is not declared unhealthy by the competent authorities. The requirements introduced by Belgian regulation are the subject of criticism.³¹ Indeed, the obligation to provide proof of registration is limited, as the registration does not give any information regarding the size of the accommodation. In this regard it does not help to determine whether the accommodation is big enough for the family. Since 2011, the condition of sufficient accommodation is directly defined in the new Act. Hence, the adequate housing must now "meet the conditions for a building that is leased as a residence". An implementing Royal Decree needs to be adopted to clarify this condition.

In **France**, the list of appropriate documents to be provided is established by a bylaw. It takes into account a series of situations that may occur. Tenants must provide the lease agreement and the last electricity or telephone bill. Owners must provide a deed of ownership. Foreigners housed by their employers must present an attestation produced by the employer that the foreigner benefits from an accommodation. The attestation must specify the length and conditions of occupation of the house. Foreigners accommodated free of charge will provide the lease or the last rent receipt of the tenant or the title, accompanied by a certificate of residence issued by the host, certified by the mayor's residence. Finally, subtenants must make available the commitment sublease and the justification that this sublease is permitted under the lease. According to French regulations, all of these documents should provide information regarding the size and salubrity of the accommodation.

In **Spain**, applications for family reunification are accompanied by proof related to accommodation. This proof must contain at the very least a notary certificate, the title to occupy the house, the number of rooms, the purpose assigned to each of the rooms, the number of persons who will live inside as well as conditions and equipment. Since the law adopted in 2009 and implementing the Royal Decree in 2011, the accommodation condition is assessed by the Autonomous Community or the Local Council (Ayuntamiento) of the place where the sponsor resides (once the sponsor has applied for this). The competent body issues a report in this regard within a maximum period of thirty days from the time of application.

In **Sweden**, the sponsor must prove the accommodation situation with documents, for example by submitting a rental agreement or a certificate from the property owner, landlord or the housing agency. If the accommodation is rented by subletting, it must be approved by the landlord or housing co-operative, or by the rental tribunal.

31. P. de Bruycker & Y. Pascouau, "Le regroupement familial à la croisée des droits européen et belge", Fondation Roi Baudouin, 2011.

Poland and **Germany** may be considered together. In these two member states, the rules are formulated in a very broad manner (Poland) or do not exist (Germany), and the solutions applicable derive from practice. Hence, in **Germany**, there are no legal or administrative rules and as a consequence, every type of proof is admissible. In practice, however, the presentation of a rental agreement or a property title is accepted. In **Poland**, the law refers to the accommodation's legal title in a very general way and does not provide any precise information about this title. Hence, acceptable proof is a tenancy agreement or an agreement to lease or to loan for use. However, a contract of loan for use shall not be regarded as a legal title for a dwelling in which an alien resides or intends to reside unless the loaner is an alien's descendant, ascendant, siblings, spouse or spouse's parents.

C. Obligation to fulfil requirement before or after entry of family

Although the sponsor must provide proof that the accommodation satisfies the requested conditions, a problem still remains. Should the sponsor bring the proof that he/she already has the accommodation required? Or should the sponsor bring proof that he/she will have the appropriate accommodation at the moment of the family's arrival on the territory of the member state? **Belgium** applies the first solution, whereas **France**, **Spain** and **Sweden** apply the second.

In **Belgium**, the Constitutional Court does not consider disproportionate the obligation for the sponsor to fulfil the accommodation condition when the application is lodged. According to the Court, this requirement allows the competent authority to be sure that the sponsor will have appropriate accommodation once he/she is joined by family members.

This solution must be subject to further scrutiny as it may constitute a heavy burden for the sponsor according to the length of the procedure and the number of family members entitled to join him/her. This has rightly been questioned by the European Commission in its report relating to the implementation of Directive 2003/86/EC.³² However, no real answer has been given to this question so far, and it could be appropriate to ask the Commission to take action in this regard i.e. to give a clear interpretation of the rule or to table infringement procedures against certain states.

In **Poland**, the promise of a sponsor that appropriate accommodation is admissible cannot be recognised as sufficient. He/she must have a legal title. The possibility to refer to future accommodation is possible, but such a possibility seems to be limited in time. Indeed, the sponsor may for example provide proof that he/she will have appropriate accommodation for the next month. In this regard, the Polish solutions are not very different to Belgian ones.

32. "the practice [in some States] of asking the sponsor to meet these requirements prior to the entry of his/her family members is questionable since the duration of the reunification procedure can impose a considerable financial burden on the sponsor", Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the Right to Family Reunification, COM(2008) 610 final, 08.10.2008, p. 6.

The solutions adopted in **France**, **Spain** and **Sweden** are totally different. In **France**, the rules take into account future tenants or owners. Future tenants must accompany the application for family reunification with a promise and attestation that the accommodation will be available. As for future owners, they should provide the sales agreement or any document certifying that the applicant will own the accommodation before the family's arrival. A similar rule is applicable in **Sweden**, where the sponsor may prove the accommodation situation with a forthcoming rental agreement or forthcoming title of property.

Issues related to the obligation to fulfil the requirement before or after entry into the territory are important as they might constitute an obstacle to family reunification. They deserve further scrutiny.

Exchange of good practice may lead member states to define common rules regarding the possibility for the sponsor to prove that he/she will have in future appropriate accommodation.

D. Assessing the proof

In almost all of the member states, proof of the accommodation condition is examined by local or regional authorities. This is the case in **Belgium** (municipal authorities), **France** (the mayor, and if appropriate, representatives of a central body³³), **Poland** (border guards on behalf of or in cooperation with the governor of the province), **Portugal** (border guards and immigration service), **Spain** (competent body in the Autonomous Community or local council) and **Sweden** (local offices of the Migration Board).

The examination process is accompanied in all of the states concerned, with the exception of Spain, by the possibility to proceed to an investigation i.e. on-the-spot check.

In **Belgium**, municipal authorities are entitled to ascertain whether conditions set by the tenancy law and regarding basic requirements of safety, health and habitability are satisfied. A bylaw defines a series of conditions relating to the size and state of the accommodation. It specifies that "the area and volume of housing should be large enough to allow cooking, staying and sleeping there".

In **France**, the mayor of the town where the applicant and the family member wish to reside examines the documents provided as proof that the sponsor fulfils the accommodation condition. The mayor may also ask the competent authorities at local level to conduct on-the-spot investigations to ensure that the accommodation conditions are duly respected. On the spot investigations may also be requested by the French Office for Immigration and Integration.

33. French Office for Immigration and Integration.

In **Poland**, border guard officers are allowed to check that all documents and elements provided by applicants regarding housing conditions are correct. If there are doubts, officers may check the place of stay indicated by the applicant. They have the right to enter the place of residence, to require the production of elements and objects belonging to the foreigner, and to request clarifications. They also have the right to speak to neighbours and employers. A report is then sent to the Governor of the Province, who takes the final decision on the matter.

In **Sweden**, the Migration Board is responsible for assessing the proof of accommodation conditions. Examination of the accommodation conditions takes place at the local offices of the Migration Board. It has a duty to investigate fully all cases. If necessary, it investigates by examining the facts and performing interviews with the persons concerned.

In the cases reported above, local authorities or representatives have the power to conduct on-the-spot checks to assess whether the conditions are fulfilled or correspond to the documents previously provided. In all of the cases, national reports show that the authorities have very limited or no margin of manoeuvre. This is explained by the fact that rules encompassing the accommodation condition are very precise. In this regard, they do not leave any leeway for national authorities, whose main duty is to check whether 'on-the-spot' conditions fulfil accurate rules regarding *inter alia* the size of the habitation and its salubrity.

One member state, **Spain**, does not follow the same path as the others. In this country, the Autonomous Community issues a report on accommodation conditions and notifies the person concerned within a maximum period of 30 days from the time of application. Such a report can also be issued by the local corporation where the alien has his/her residence when this has been established by the competent Autonomous Community. In the event that the report is not issued in time, the requisite of adequate housing by any means of proof admitted in law – normally a notary certificate – might be justified. In Spain, therefore, contrary to the other member states surveyed, the law does not specifically allow the authorities to conduct investigations. However, and in practice, the authorities conduct *in situ* checks.

It should finally be underlined that in practice none of the states surveyed ask for additional conditions to be fulfilled.

E. Effects of the accommodation condition

Any investigation of the effect(s) of the accommodation condition must be linked to their purpose. In other words, did the introduction of this condition achieve the goal for which it was established?

For instance, this condition was abandoned by **the Netherlands** in 2001 because it was deemed ineffective. At that time, the sponsor only had the opportunity to rent family accommodation if the family already resided in the Netherlands. He/she therefore could not provide evidence of this accommodation at the moment of tabling an application for family reunification. In 2005, the Dutch minister in charge of migration issues wanted to reintroduce

the accommodation requirement, but civil servants managed to convince her of the requirement's ineffectiveness. Notwithstanding this negative experience, the government wishes to reintroduce this condition into Dutch law. The aim is to request the sponsor to provide independent accommodation in order to prevent the new family from being influenced or forced to act by the parents of the sponsor.

According to the reports issued for the purposes of this study, the aims of accommodation conditions are threefold. On the one hand, accommodation conditions are established in order to ensure normal and adequate living conditions for family members and as a consequence limit owners' abuse of migrants (**Germany, France, Poland, Portugal and Belgium**). On the other hand, such conditions are adopted in order to foster integration (**Sweden and Belgium**). Finally, and more astonishingly, the Spanish expert indicates that accommodation conditions were adopted in **Spain** in order to limit the number of migrants and reduce the number of family reunion permits. According to the **Polish** national expert, accommodation conditions are also recognised as a "test" for an applicant's credibility.

However, it does not derive very clearly from the national reports that in practice accommodation conditions did achieve the aims of law or regulation. Indeed, it seems too early in **Belgium** to assess the effect of the measure. In **Germany** the measure is seen positively but without giving the reasons for such an assessment.

The **French** report bridges the legal conditions with a factual approach. Hence, while outlining progress achieved from a legal point of view, the report underlines that such a rule may not in itself overcome problems relating to the lack of available accommodation. In this regard, issues relating to unhealthy houses and slumlords remain.

The **Swedish** report takes another point of analysis. It puts forward the ethnocentric view reflected by such a condition, as it is based on the nuclear family living in the same accommodation. The report underlines that for persons who are used to living together with other relatives in addition to the nuclear family, this requirement may be problematic. It adds that the requirement may also cause family reunification to become an issue of class belonging.

Finally, the **Spanish** report indicates that the effectiveness of the rules, which aim to limit family reunification, will be more effective since local authorities are now asked to complete reports regarding accommodation conditions.

With regard to these issues, it is not entirely certain whether accommodation conditions adopted in EU member states produce the desired effect. Such uncertainty is worrying at a time when a tightening of the conditions for family reunification has been advocated by the heads of state and government in the European Pact.

In this context and without clear results, accommodation conditions may be regarded or used as an additional condition for applicants. It might therefore be very important to further evaluate the effects of these rules and try to define whether they have been adopted in order to help and protect migrants, or in order to make family reunification more difficult.

The expected publication of the European Commission's Green Paper (by the end of 2011) is a timely moment to launch a wide-ranging discussion about the aims of accommodation conditions, their scope and content and the evaluation of their effects. As for the aim, such a condition should be of great help in enhancing migrant integration and fighting landlord abuse. Large-scale exchange of knowledge and practices among member states should constitute good grounds for defining the content of such a condition on the basis of common rules and approaches. Finally, a systematic and common evaluation of the effect of the accommodation condition should help to further develop a common approach on this issue.

II. Sickness insurance

Proof of sickness insurance is another condition member states may ask applicants for family reunification to fulfil. Article 7, paragraph 1, b) indicates that applicant may be required to prove that the sponsor has "sickness insurance in respect of all risks normally covered for its own nationals in the member state concerned for himself/herself and the members of his/her family".

This condition is not required by **France, the Netherlands, Portugal and Sweden**. On the contrary, **Belgium, Germany, Poland, Slovenia and Spain** require it.

In the latter member states, the application for family reunification must be accompanied by proof that the sponsor has insurance that covers the risks for the family. Normally, where the sponsor is exercising an employed activity, he/she is covered by public or private insurance. Where the applicant is acting as a self-employed or independent worker, he/she is affiliated to a private regime. He/she must in both cases provide a certificate from the insurance company that any risks and the costs deriving from those risks are covered by the insurance.

In the **Netherlands**, legal residence is a requirement for concluding a sickness insurance. As a consequence, the coalition government announced, in an agreement concluded in September 2010, its intention to introduce proof of sickness insurance as a requirement for family reunification.

The obligation to provide such proof is generally based on the idea that the sponsor and the family joining him/her should not become a burden for the health system of the member state. In this regard, the insurance, be it public and/or private, should cover all expenses deriving from sickness and accidents.

III. Resources

The condition related to resources is one of the most important. On the one hand, all the member states surveyed implement this condition. While an extension of the condition is under way in **Belgium**, the introduction of an income requirement in **Sweden** in April 2010 is a major and significant step. Indeed, the implementation of this condition is a revolution in a member state that previously refused to use it as "it would deviate from

the Swedish immigration policy".³⁴ The arrival of Sweden in this group of member states is also a sign of a growing tendency to implement this condition in the framework of family reunification.

On the other hand, this income requirement which is embedded in Article 7, paragraph 1, c) of Directive 2003/86/EC, has been subject to the interpretation of the European Court of Justice. In the Chakroun case law already mentioned, the Court delineated in a very strong manner the margins of manoeuvre of the member states regarding the implementation of this condition. National rules must therefore be analysed in light of the jurisprudence. In certain circumstances, national rules no longer comply with EU rules.

A. Evaluation of resource conditions

Directive 2003/86/EC sets a series of elements that have to be taken into account while examining the income requirement. Article 7 stipulates that the sponsor needs to have "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members".

In most of the member states, sufficient resources are evaluated on the basis of the national minimal income below which persons are entitled to apply for general social assistance. This largely shared principle is implemented differently from one country to another. Some define rules that establish the amount of resources required. Others do not and prefer to base the evaluation on a general rule.

1. No specific amount of resources required

Only **Germany** has not established detailed rules regarding the amount of resources to be provided. It relies on rules that take into account the ability of the sponsor to support the needs of the family without needing to resort to social assistance.

In **Germany**, calculation of sufficient resources does not take as a basis a defined minimum amount of money. The criterion implemented is whether the foreigner is entitled to social benefits under the Social 'welfare' Code (sec. 12) or the Social 'general unemployment benefits' Code (sec. II). In this view, the federal Administrative Court stated in November 2010 that the spouse applying for a residence permit must demonstrate that the sponsor is able to cover the living costs of the spouse and children without having recourse to social welfare.

34. H. Labayle & Y. Pascouau, *op. cit.*, p. 99.

2. Defined amount of resources to be provided

Eight member states have adopted rules fixing the amount of resources required from the sponsor in order to allow for family reunification. These states are **Belgium, France, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.**

Belgium has recently extended the scope of the resources condition. Previously limited to family reunification of adult disabled children, the law now asks the foreigner living in Belgium wishing to be joined by his/her spouse or her partner and child/children to prove that he/she has stable, regular and sufficient means to meet his own needs as well as those of his/her family. The stable and sufficient means of support must be equivalent at least to 120% of the income of integration and cannot be based on social assistance payments. However, if the sponsor is entitled to unemployment benefits, the spouse or the concerned partner has to prove that he is looking actively for work. The existence of stable, regular and sufficient means of support must be proven in every case. However, if the condition relative to the means of support is not fulfilled, the minister or his/her delegate will have to determine, according to the appropriate needs of the foreigner and the members of his family, the necessary means of support to allow them to meet their needs without becoming a burden for the public authorities. Belgian rules distinguish three type of income for integration: for cohabitants, isolated persons and persons with a family. According to these categories and the 120% threshold, the sponsor must prove he/she earns:

- ✓ cohabitant: €513 for nationals → €615 for family reunification;
- ✓ isolated persons: €770 for nationals → €924 for family reunification;
- ✓ persons with family: €1,026 for nationals → €1,231 for family reunification.

In **France**, examination of income takes into account the resources received by the sponsor and the spouse. But the calculation does not include family benefits and social allowances that they may be entitled to receive by law, nor does it count extra money provided by third persons such as family members. The resources should reflect the size of the family. An implementing decree indicates that the amount of resources must be at least equal to the monthly minimum wage, and then increased according to the size of the family. Hence, the monthly minimum wage serves as a basis to evaluate the resources for a two/three person family. This basis of calculation is increased by one tenth for a family of four or five people. This basis is increased by one fifth for a family of six or more. Currently, the monthly minimum wage is equivalent to €1,070 net.

In **the Netherlands**, the rules require the sponsor to permanently and independently receive an income at the level of social security for a married couple. This income is equivalent to the monthly minimum wage of €1,550,02. Income is regarded as permanent if the income was available for at least one year before the date of application or decision and will be available for at least one year after that date. However, a permit will also be granted if the sponsor had an employment contract for the last three years before the application date. In the latter case, the sponsor must prove that for those three years, their income reached the minimum required level each month, and that this income is also guaranteed in the coming

six months (this last requirement will be abolished in 2012). As for families of one or several children, Dutch law does not make any distinction and requires the same amount of money. For a single parent, who wants to reunite with his/her child(ren), the required income level is €1,395,01.

In **Poland**, the sponsor must have sufficient financial resources for themselves and their dependent family members. Sufficient resources are based on the monthly income required and calculated per person to take into account all dependent family members. Housing costs are deducted from these resources. They should not be lower than the income level which forms a basis for granting social assistance. Since October 2009, the net monthly income below which social assistance is granted is approximately €120 (477 PLN) per single person, and approximately €90 (351 PLN) for each family member. It should be noted that maintenance costs may be covered by a family member of the person upon whom he/she is dependent, if this person resides in Poland and is able to do so.

In **Portugal**, the level of resources required is precisely defined by the law. The level of resources required from the applicant for each family member is as follows: twelve minimum monthly guaranteed retributions for the first adult; 50% of twelve minimum monthly guaranteed retributions for the second adult; 30% of twelve minimum monthly guaranteed retributions for minors (under 18 years old). The minimum monthly guaranteed retribution is €422,75. The applicant must provide evidence that he/she has enough resources for a year when applying for family reunification.

In **Slovenia**, the rules require applicants for family reunification to have sufficient means of subsistence for the duration of their residence in the country. Sufficient means are considered met where the applicant provides proof of earnings or possession of an amount of money equal to the basic minimum income in Slovenia for each family member. This sum is currently €226 and represents the threshold under which social assistance is granted to citizens and permanent residents who have no other means of subsistence. Proof of sufficient resources is assessed on the basis of money earned from professional activity. In Slovenia an applicant may present a contract attesting that a legal or natural person is committed to providing half of the required amount. This contract must be concluded in the Republic of Slovenia in the form of a directly executable notary contract. Slovenian expert has some reservations concerning the level of income requested. The monthly minimum income required is €226, whereas the value of an essential basket of goods in Slovenia is currently set at €500.

In **Spain**, the sponsor must prove that he/she has sufficient financial resources to attend to the needs of the family, including healthcare assistance in the event that the person is not covered by social security. A Royal Decree defines precisely the level of income that the sponsor must provide in order to fulfil the resources condition. For the sponsor and another family member, the level requested represents 150% of the monthly minimum salary (called IPREM in Spain). For 2011, the monthly minimum salary is equivalent to €532.51. Hence to reunify the first family member, the sponsor must bring proof of sufficient resources up to €798.77. This sum is completed with 50% of the minimum salary for each additional family

member; that is to say almost €266. Financial solvency is calculated by adding the earnings of the sponsor to those of his/her spouse or partner, as well as those of another family member in the direct line in the first degree who is resident in Spain and lives with them.

In **Sweden**, income requirements were introduced in 2010. Since then, the sponsor must be able to support themselves and family members. The sponsor's salary must be sufficient to fulfil the resources requirement. In Sweden, possession of adequate resources can be proven on the basis of a monthly salary or a personal fortune that allows the sponsor to support their family. Remuneration from unemployment insurance or any other similar work-related income is considered equal to a salary. As a rule, there is no set amount because this differs depending on whether the couple live alone or have children, and if they do, the children's' age. However, national experts cited the example of situations in which the reservation amount is or is not reached. The figures are the following:

- ✓ A couple with a salary of SEK 15,000 (€1,637) before taxes (33%) and housing costs of SEK 4,500 (€491) reaches the reservation amount.
- ✓ A couple with one child and a salary of SEK 20,000 (€2,183) before taxes (33%) and housing costs of SEK 4,500 (€491) reaches the reservation amount.
- ✓ A couple with two children and a salary of SEK 20,000 (€2,183) before taxes (33%) and housing costs of SEK 4,500 (€491) reaches the reservation amount.
- ✓ A couple with three children and a salary of SEK 20,000 (€2,183) before taxes (33%) and housing costs of SEK 4,500 (€491) may reach the reservation amount, depending on the age of the children (if at least one child is under the age of six the reservation amount is reached).

Approximate resources conditions required for family reunification (parents + children)

	Sponsor/ min. income	Couple	+ 1 child	+ 2 children	+ 3 children	+ 4 children
SW	/	1637 + 491 (housing cost)	2180 + 491 (housing cost)	2180 + 491 (housing cost)	2180 + 491 (housing cost)	/
NL	1550 for couple 1395 for single parent	1550	1550	1550	1550	1550
FR	1070	1070	1070	1177	1177	1232
BE	/	615	1231	1231	1231	1231
SP	532	798	1064	1330	1596	1862
PT	422	422	548	674	800	926
SLO	226	452	678	904	1130	1356
PL	120	210	300	390	480	570

This table deserves further comment. Firstly, as it was shown by the 2007 study, there are huge gaps between some member states. As the resource conditions required for family reunification are based on the minimum wage, they correspond to the differences that exist between member states in this regard. As a consequence, the income requirement for a couple is eight times higher in **Sweden** and seven times higher in **the Netherlands** than that requested in **Poland**.

Secondly, with regard to conditions required of the sponsor and their spouse or partner, three groups of country may be defined. The 'northern' ones, comprising **the Netherlands, France and Sweden**, impose income requirements for couples at the top of the scale. The 'southern' ones, represented by **Spain and Portugal**, require a level of resources of between €400 and €550. Finally, **Poland** is the only representative of the "Eastern side" requesting an amount of resources at the bottom of the scale and therefore rather low. **Slovenia** is difficult to categorise as the requirements regarding the sponsor are quite low but increases rapidly with the size of the family.

Thirdly, several of the countries surveyed have established rules on the basis of which the level of resources required increases along with the size of the family. Although understandable in principle, this rule may nevertheless prove very difficult to obey for families with several children. It may therefore constitute an obstacle for family reunification if the sponsor engages in a low-skilled activity. This is the case in **Spain**, where the sponsor of a four-child family must prove that he/she earns €1,862 a month. According to this calculation, the sponsor's resources would have to be 3.5 times superior to the minimum wage.

It is crucial for member states using 'resource scales' to follow two rules.

First, the level of income requested should remain proportionate. This is particularly the case regarding families with several children. In such cases, the level of income requested should at best stay the same irrespective of the size of the family, as is the case in Sweden, the Netherlands or Belgium. Another solution is the one applicable in France, where the level of income required decreases in proportion to the increase in family size.

Second, and following the jurisprudence of the Court of Justice, member states should make sure that the amount of income acts as a reference and not as a threshold below which the application for family reunification is automatically rejected, as we will see in the next section.

B. Lack of sufficient resources and family reunification

The question of whether an application for family reunification should be rejected if the sponsor does not meet the financial requirements was at the heart of the Chakroun case law adopted in March 2010. The Court of Justice strongly delineated member states' margins of manoeuvre in this regard (1). As a consequence, the compliance of current national rules with these jurisprudential requirements needs to be assessed (2).

1. Boundaries set by the European Court of Justice (Chakroun case law)

In the Chakroun case, Mr. Chakroun's application for family reunification was rejected because his resources were lower than the amount requested by Dutch legislation. In practice, the means of support were considered sufficient if the net income were €1,441.44

per month, and Mr Chakroun's unemployment benefit amounted to just €1,322.73 net per month. As a consequence, because the applicant's resources did not meet the legal amount defined by law, the competent national authority rejected the application.

Asked to interpret the provision of the directive related to income requirements, the Court of Justice did not give the same reading. On the contrary it gave an interpretation that greatly limits member states' margins of manoeuvre in this regard.

The core reasoning of the judgement is enshrined in point 48 of the court case and reads as follows: "Since the extent of needs can vary greatly depending on the individuals, that authorisation [to impose an income requirement] must, moreover, be interpreted as meaning that the member states may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. That interpretation is supported by Article 17 of the directive, which requires individual examination of applications for family reunification".

There are three main consequences of this interpretation:

- ✓ The amount of resources defined by law or regulation is only a reference. Therefore the immediate consequence of not meeting the income condition may not be the automatic rejection of the application.
- ✓ Administrations are thus obliged to proceed to individual examinations of every application for family reunification. These individual examinations should allow the competent body to determine whether the resources provided by the applicants are sufficient to support their needs, because
- ✓ "needs can vary greatly depending on the individuals". Indeed, a 60 year-old couple, like that in the Chakroun case law, do not have the same needs as a 30 year-old couple.

In summary, national authorities are not allowed to reject an application for family reunification for the sole reason that the resources provided by the applicant do not reach the amount defined by law. They need to proceed to an individual examination and to determine whether the resources at the disposal of the applicant are sufficient to maintain himself/herself and the members of his/her family without resorting to the social assistance system of the member state concerned.

2. Assessing the compliance of national rules

With regard to this interpretation, it is interesting to assess whether the member states surveyed are complying with the obligations defined by the Court of Justice. As the case law referred to fixed amounts of money requested, assessing the compliance of national rules concerns the group of eight member states that have established a fixed amount of resources in order to assess income requirements. Two sub-groups of state must be distinguished.

In the most problematic, comprising **Belgium, France, the Netherlands and Slovenia**, possession of resources that are below the threshold leads to rejection of the application. This rule might in some circumstances be tempered due to the best interests of the child (**France**) or the right to family life (**France and Germany**). In **Belgium**, if the condition is not fulfilled, the minister determines, according to the appropriate needs of the foreigner and the members of their family, the necessary means of support to allow them meet their needs without becoming a burden for the public authorities. However, these exceptions are not sufficient to meet the requirements of the Court of Justice. Indeed, the administrative authorities must evaluate whether the resources are sufficient or not. As a consequence, these countries must align their rules and practices to the interpretation of the Court of Justice.

The second subgroup is composed of states in which there is no automatic rejection of the application if the level of resources required is not reached. This is the case in **Poland, Portugal, Spain and Sweden**.

In **Portugal**, although the level of resources constitutes a threshold below which applications for family reunification are in principle rejected, the administrative authorities take into consideration other factors, especially when the family member of the applicant is a minor. More precisely, the law establishes that any decision to reject an application for family reunification has to take into account the nature and strength of the applicant's family ties, the period of residence in Portugal and the existence of family, cultural and social ties with the country of origin. In other words, the Portuguese authorities do implement obligations deriving from Article 17 of Directive 2003/86/EC.³⁵

In **Spain**, legislation defines situations where the income requirement may be reduced. The income requirement may be reduced in the following situations:

- ✓ when the family member who can be reunified is under age;
- ✓ when there are accredited exceptional circumstances which make the reduction advisable based on the principle of the superior interests of minor children;
- ✓ regarding the reunification of other family members, when humanitarian reasons related to individual cases are noted and there is a favourable report from the Department of Immigration.

As regards **Sweden**, the current law is not clear on this issue. However, preparatory work states that the income must be of a particular duration and that the assessment should be forward-looking. Therefore the Swedish system would appear to be flexible and in any case easily adaptable to the jurisprudence of the Court of Justice.

35. Article 17 of Directive 2003/86/EC: "Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family."

As regards the only country not to establish a fixed amount of resources (**Germany**), the main question is elsewhere. Germany considers the resources condition to have been fulfilled in that the applicant does not have recourse to social assistance. Hence, the issue is to determine when recourse to social assistance leads to the rejection of an application. The answer is once again given by the Court of Justice in the Chakroun case law.

C. Recourse to social assistance and family reunification

Here again, the European Court of Justice has delineated member states' margins of manoeuvre (1). National rules comply with its interpretation (2).

1. Boundaries set by the European Court of Justice (Chakroun case law)

In its definition of the resources to be provided, Directive 2003/86/EC considers that they must be stable, regular and sufficient "without recourse to the social assistance system of the Member State". The main difficulty here is in interpreting the notion of having recourse to social assistance. More precisely, when and which type of social assistance leads to the exclusion of its beneficiary from the family reunification procedure?

The answer is given by the Court of Justice. First of all, the Court sets the scene. It underlines that the wording "social assistance system" refers to "a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law". In other words, the concept is EU-based and should be interpreted within that ambit and along the lines drawn by the Court. Secondly, and consequently, the Court defines the scope of the concept. In the meaning of the Directive it refers to "assistance granted by the public authorities, whether at national, regional or local level, which can be claimed by an individual, (...), who does not have stable and regular resources which are sufficient to maintain himself and the members of his family and who, by reason of that fact, is likely to become a burden on the social assistance system of the host Member State during his period of residence".

According to this interpretation, the Court makes a distinction between two types of social assistance. Firstly, social assistance granted to support applicants who do not have sufficient resources: in such cases, he/she is deemed not to satisfy the resources condition and the application for family reunification may be refused on those grounds. Secondly, social assistance granted to applicants with sufficient resources but who might nevertheless be entitled to special assistance in order to meet exceptional, individually determined, essential living costs. In such cases, the applicant benefits from social assistance but is not likely to become a burden on the social system. As a consequence, the sole fact that the applicant receives or may receive special or exceptional assistance cannot constitute grounds to refuse family reunification.

In this regard, the Court has framed in a very important manner the margins of manoeuvre of member states. It is not because the applicant is receiving public assistance that the application for family reunification should be rejected. For instance, a yearly allowance for

school granted to the sponsor due to their level of resources may not lead to a rejection. In practice, and since then, national authorities have to examine the individual situation of the sponsor and assess precisely which type of social assistance – that he/she receives or is entitled to receive – may impede the application and which do not.

2. Compliance of national rules

In the different member states surveyed this rule is apparently well implemented. But there seems to be a problem with regard to **Belgium**. Under Belgian rules, stable and sufficient resources must be equivalent at least to 120% of the income of integration and cannot be based on allocations of social assistance. For unemployment benefits, the spouse or the concerned partner must prove that they are actively looking for work. In this regard, applications for family reunification are rejected if the sponsor receives social assistance. In this case, it is important, on the one hand, to determine which type of social assistance is concerned and, on the other hand, to invite the Belgian authorities to make this rule accessible to applicants for family reunification.

In the other states, the rules applicable seem to comply with the interpretation of the Court of Justice. Indeed, if the sponsor has recourse to general social assistance then the application for family reunification is rejected due to lack of sufficient resources. As explained in the Swedish report, "resources should be work-related [and] that is why general social assistance can be a ground for rejecting an application".

Two other reports offer further explanation of this issue. In **Poland**, social assistance benefits are not "a case" in procedures for family reunification. Indeed, the benefit of social welfare is only accessible to long-term residents, refugees and beneficiaries of subsidiary protection, persons with a tolerated stay as well as victims of human trafficking. All these benefits are very low and cannot be considered sufficient because they target particular needs, such as food, education and medical supplies. Moreover, some benefits are only periodic. Generally they are designed to help families in a crisis situation and are not as such considered as income.

In **France**, the rules regarding social assistance are very clear. Since 2006, the law defines social assistance that can be taken into account in calculating the resources necessary for family reunification. This is the case for family allowances, education allowances for children with disabilities, family support allowances, yearly allowances for school or the single parent allowance. On the contrary, certain social assistance cannot be taken into consideration in an application for family reunification. Such assistance includes *inter alia* the minimum income, the solidarity allowance for the elderly, the specific solidarity allowance or the allowance equivalent to retirement. To sum up, this shows that in France, applicants for family reunification may be entitled to a series of public funds that do not jeopardise their application for family reunification.

From this perspective, discussions following the publication of the European Commission's Green Paper may address the impact of social assistance on the family reunification procedure. An exchange of views and practices between competent bodies may help to paint

a clearer picture of the rules and practices applicable in the member states. This may help and encourage the European Commission to define common orientations and guidelines.

D. National authorities' margins of manoeuvre in examining applications

Notwithstanding the jurisprudence of the Court of Justice obliging authorities to proceed to individual evaluations of applications, national experts were asked whether national authorities benefit from margins of manoeuvre in appraising the condition of sufficient resources.

In seven countries – **Belgium, France, Germany, the Netherlands, Poland, Portugal and Slovenia** – the answer was negative. Indeed, most of the experts underline that specific national rules regarding the level of resources required do not allow authorities to have wide margins of manoeuvre.

On the contrary, two member states answered that the authorities enjoy some leeway in their appraisal of the condition of resources. This is the case in **Sweden**, where the rules are not very well defined. In **Spain**, the rules are somewhat different.

In **Sweden** for instance, information from the law or regulations and even from the preparatory work is limited regarding the evaluation of resources. Moreover, there is a lack of direction on the part of the Migration Board. The only criteria mentioned are reaching the reservation amount, that the resources should be of a certain duration and that there should be reasonable grounds to believe that the sponsor would be able to support herself or himself in the future. As a consequence, the Migration Board enjoys some margins of interpretation in deciding on cases where it is uncertain whether the sponsor satisfies the resources requirement.

In **Spain**, the picture is different. Indeed, reforms adopted in 2009 have considerably reduced the discretionary power that national authorities enjoyed before. If this paves the way for less leeway, national experts underline that it is too early to draw definitive conclusions on that point. The experts underline more precisely that further examination should target the use of exceptions allowed by the law.

E. Persons or groups of persons exempted from the income requirement

In several of the member states some persons or groups of persons are exempted from fulfilling the condition related to sufficient resources. However, the types of exemption vary widely from one state to another and highlight the absence of any common approach to this point. Some selected examples of these exemptions picked up from national rules demonstrate how diverse these solutions are.

In **Belgium**, the income requirement is not imposed where family reunification concerns only the children of the sponsor or his/her spouse and where family reunification is requested for refugees and beneficiaries of subsidiary protection.

In **France**, the sufficient resources condition is not required of holders of an adult disability allowance.

In **the Netherlands**, sponsors who have reached the age of 65, or who are permanently and completely unable to work, are exempt from the income requirement.

In **Poland**, this condition is not applicable to persons applying for a permit for temporary residence for a fixed period in order to reunite with family members if they have been granted refugee status or subsidiary protection. But, an application for a permit to reside must be submitted within six months of the date of obtaining refugee status or subsidiary protection.

In **Sweden**, exceptions can be made if the sponsor is a child and the sponsor is a parent of the child, or if the other parent of the child is applying for a residence permit along with the child.

Portugal is one of the most interesting examples. If the applicant involuntarily ends up unemployed and family reunification has already occurred in Portugal, then the level of resources required is diminished.

Here again, further discussion should focus on the diversity of exemptions applicable in EU member states in order to get a full picture and to outline common rules and practices. This could also help in defining new steps for further harmonisation of national rules.

To summarise the range of income requirements:

- ✓ All of the states surveyed ask the sponsor to prove sufficient resources.
- ✓ With the exception of Germany, all of them have defined a fixed amount of sufficient resources.
- ✓ There is a movement towards toughening the requirement either by establishing new rules in this regard (Belgium and Sweden) or in specifying or elevating the level of resources needed (Spain and France).
- ✓ According to the Court of Justice, this amount of resources is a reference and national administrations are obliged to proceed to individual examinations of each application in order to determine whether the amount of resources provided by the applicants is sufficient to support their needs.
- ✓ In practice, defining the amount of resources limits administrative authorities' margins of appreciation.
- ✓ There are sometimes huge differences between the amount of resources requested by member states. Three groups may be outlined: 'northern', 'southern' and 'eastern' ones.
- ✓ The situation must be more precisely framed regarding the level of resources requested in comparison to the size of the family. Several rules and schemes are applicable in the member states. Better harmonisation in this regard is needed.
- ✓ Portugal is the only country to have taken into account the effects of the crisis and adapted rules on family reunification accordingly.
- ✓ Whenever the implementation of the rule related to social assistance is largely shared, member states should keep in mind the ECJ's interpretation in this regard.

IV. Integration measures

The introduction of integration measures in the field of family reunification is widely debated among member states. Directive 2003/86/EC allows for such rules and now constitutes the background in this regard (A). An overview of the states surveyed (B) shows that three are implementing such rules (C). This trend deserves some additional comment (D).

A. Background

Family reunification is in itself a way to promote the integration of migrants into the host society. The preamble of Directive 2003/86/EC is clear on this point. It says "(...) [family reunification] helps to create socio-cultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental objective stated in the Treaty". In this view, family reunification is an element of the integration process.

Article 7, paragraph 2 of the Directive echoes this point and deals with the issue of integration. It allows member states to require third country nationals to comply with integration measures in order to exercise the right to family reunification. Two readings may derive from this requirement.

On the one hand, it might be considered appropriate to ask migrants to comply with integration measures after their arrival in the member state. Such measures may be constituted with mandatory language learning or civic orientation classes. Both measures may be adopted in order to foster the integration of new arrivals.

On the other hand, however, the process may appear to be the opposite where fulfilment of integration measures constitutes a prerequisite for exercising the right to family reunification. This is the case, for instance, where integration measures should be fulfilled in the country of origin before receiving the appropriate visa to move within the member state for family reunification purposes. Here, integration is not the consequence of exercising the right to family reunification but a condition that comes beforehand.

Both readings lead to very different situations. Integration measures are a tool that either reinforces the capacity of migrants to integrate into society or adds a requirement to the procedure and renders family reunification more difficult.

The possibility to introduce integration measures to the framework of the family reunification procedure has been the source of much debate in the academic world.³⁶ But has this debate had an echo in member-state law and what options have been implemented?

36. See for instance and *inter alia*, K. Groenedijk, E. Guild & S. Carrera (Edited by) "Illiberal Liberal States: Immigration, Citizenship and Integration in the EU", Ashgate, 2009; R. Van Oers, E. Ersbøll and D. Kostakopoulou "A Re-Definition of Belonging? Language and Integration Tests in Europe", Martinus Nijhoff Publishers, 2010; Y. Pascouau "Mandatory Integration provisions in EC and EU Member States Law" in S. Bonjour, A. Rea & D. Jacobs "The Others in Europe", Editions de l'Université de Bruxelles, 2011.

B. Overview of member states implementing integration measures or related mechanisms

Of the nine member states studied, **France, Germany and the Netherlands** have adopted a complete system of rules related to integration measures. Under these rules, family members have to comply with integration measures in the country of origin before entry into the territory of the member state. In **France**, the integration process is pursued upon arrival. The content of integration measures may differ between these countries but their effects are similar in the sense that they play on the legal status of family members i.e. on his/her entry into the territory and/or his/her capacity to remain on the territory.

In **Belgium**, the requirement is different for three reasons. First, it is only applicable after arrival in the country. Second, due to constitutional constraints integration measures are only applicable in the Flemish region of the country. Indeed, Belgium is divided into three Communities, and each has sole responsibility for developing integration policies. As a consequence, only one – Flanders – has decided to introduce integration measures for third country nationals. Third, the effects are different. Indeed, non-fulfilment of integration measures may not impact upon the legal status of migrants, as migration issues are an exclusive competence of the federation.

A fifth member state, **Spain**, does not formally use integration measures. However, rules adopted in 2011 may pave the way to an increased role of integration issues in Spanish migration law. Hence, for the renewal of the residence permit, and when other requirements are not fulfilled, the efforts of the foreigner to integrate may be evaluated. The evaluation is based on a report, issued at the level of the Autonomous Community, which takes into account "the active participation in training in the knowledge and respect for the constitutional values of Spain and the learning of the official languages of the place of residence". This effort to integrate can be seized upon by the alien as information to be valued in the event that compliance with any of the requirements for the renewal of authorisation is questioned. While there are no integration measures as such in Spain, NGOs consider that this mechanism may become mandatory after the general elections that should take place on 20 November 2011. The new government expected may adopt new rules regarding integration measures.

C. Integration measures adopted in France, Germany and the Netherlands

France, Germany and the Netherlands constitute, along with Denmark and the United Kingdom, a group of member states where integration measures have been widely developed. Established in order to enhance the integration of new migrants, the rules adopted in these states do not always follow this objective. On the contrary, they may be considered as further conditions introduced in order to make family reunification more difficult. In this view, and as we will see below, it is questionable whether such rules are compatible with Directive 2003/86/EC.

1. France

Rules related to integration in France concern either the sponsor or the spouse and are applied in three different stages.

As a first rule, family reunification may be refused if the sponsor does not comply with essential principles that govern family life in France. These principles are *inter alia* the following: monogamy, equality between men and women, respect of the physical integrity of children, respect for freedom of marriage, mandatory school attendance, etc. It is up to the administration to demonstrate that the sponsor does not fulfil these requirements and to reject on this basis their application for family reunification.

The second stage concerns the possibility awarded by Directive 2003/86/EC to ask third country nationals to comply with integration measures in the country of origin. Under a law adopted in 2007, each family member aged over 16 and under 65 has to undergo an evaluation of his/her knowledge of the language and values of French society in the country of origin. If this evaluation is successful, a visa is issued. If not, the family member must attend training sessions in the country of origin. These sessions, which deal with knowledge of the French language and Republican values, does not last more than two months. After attendance, a new evaluation is carried out. If it is successful, the visa is granted. If the knowledge is insufficient, the visa is still issued but the authorities have to decide upon the duration of further training to be followed in France within the framework of the welcoming contract. In any case, knowledge of French is not a condition for issuing the visa.

Finally, since 2006 the law has imposed a general integration obligation. Every third country national has to sign up to a welcoming contract on the basis of which he/she agrees to attend to language and civic training as well as an information session about daily life in France. The fulfilment of this contract lasts one year and may in certain circumstances be extended for an additional year. Family members are subject to this contract. But since the introduction of the integration abroad evaluation in 2007, family members who have passed successfully a language evaluation in the country of origin are exempted from attending language training after arriving in France. They are nevertheless obliged to sign the contract and to attend to the training and information sessions. Non-fulfilment of the integration contract is taken into account when renewing the residence permit. Unwillingness to fulfil the integration contract may lead to refusal to renew the first residence permit. This scheme was reinforced in June 2011, after which date non-fulfilment is taken into account each time the residence permit is renewed, i.e. every year until the issuance of a residence card, which may be requested after five years of legal residence.

Since 2006, France has developed a set of rules regarding the integration of newcomers and family members in the framework of the family reunification procedure.

2. The Netherlands

In the Netherlands, the integration of family members is evaluated at two different stages: in the country of origin and for the acquisition of permanent residence.

The Netherlands was the first country to establish integration measures in the country of origin in the framework of the Family Reunification Directive. Since 2006, adult family members, between 18 and 65 years old, need to take an integration test as a requirement for

family reunification before admission to the Netherlands. The test consists of a language test and questions regarding Dutch society. The examination is oral and, since 1 April 2011, it has also included a reading test that requires the applicant to understand written texts. The level of the test has also been raised from level A1 minus of the Common European Framework of Reference for languages³⁷ (CEFR) to level A1. The test is taken at a Dutch embassy or consulate general abroad. The candidate answers the questions by phone, after which a computer based in the United States judges whether the candidate has passed the exam. If the family member fails the test, meaning that he/she does not have an adequate comprehension of Dutch or does not have enough knowledge of Dutch society, a visa for family reunification is not issued to the applicant. As a consequence, family members must then take the test again and pay again to do so. Persons who are permanently unable to pass an integration exam on the grounds of physical or mental handicaps are exempted from this requirement. This has to be proved by a medical certificate. Exemptions are also awarded to persons holding the nationality of the following states: EU member states, Surinam, Australia, Canada, the United States, Switzerland, New Zealand and Iceland.

After arrival in the Netherlands, family members below the age of 65 may be subjected to a test if they wish to apply for permanent residence after five years. This test consists of an examination in reading, writing, listening and speaking skills at level of A2 (CEFR) and an obligation to provide a portfolio of 20 pieces of proof of written and oral language skills. Migrants who can prove they are incapable of doing the test and those who can prove their knowledge of the Dutch language with diplomas or certificates are exempted from taking the test. The Dutch government announced on 17 June 2011 that migrants will have to pass the integration test within three years of arrival. If they fail to do so, their residence permit can be withdrawn. At the same time the government has decided to leave the organisation of integration courses to the private market. It has replaced its offer of integration courses by the possibility of a loan for migrants, in order to enable them to finance the participation of a course.

3. Germany

Germany is the third member state to have introduced integration requirements for family reunification. These requirements are applicable in the country of origin and after entry onto the territory.

Since 2007, spouses have to demonstrate basic knowledge of the German language. In this regard, they have to produce a language diploma received from the Goethe Institute or any agreed organisation in the country of origin. On a practical basis, the German authorities do

37. The Common Framework of Reference for Languages is a tool developed in the framework of the Council of Europe. It provides a practical tool for setting clear standards to be attained at successive stages of learning and for evaluating outcomes in an internationally comparable manner. It is the result of extensive research and ongoing work on communicative objectives, as exemplified by the popular 'Threshold level' concept. It goes from level A (basic user) to level C (proficient user). The Common European Framework of Reference (CEFR) provides a basis for the mutual recognition of language qualifications, thus facilitating educational and occupational mobility. It is increasingly used in the reform of national curricula and by international consortia for the comparison of language certificates.

not organise a test as such: they require the applicant to provide the diploma. But the latter is delivered after the applicant has taken a test at the Goethe Institute or another accredited organisation. In the end, applicants for family reunification must take a test to prove they have mastered the German language. If they are not able to take a test because there is no Goethe Institute or other accredited organisation in the country of origin, an officer in the German embassy is supposed to evaluate the language skills. If the test is not taken or the candidate fails and consequently the diploma is not available, the visa for family reunification is not issued. The applicant will have to take the test again. A series of persons are exempted from this integration requirement due to their capacity, educational background or nationality. In this regard, nationals of Australia, Israel, Japan, Canada, the Korean Republic, New Zealand and the USA are exempted.

Upon arrival in Germany, family members are entitled – and if their language skills are poor, obliged – to engage into integration courses comprising language and civic orientation courses. At the end of the courses, participants have to take language and civic tests. Non-attendance of these courses may lead to a refusal to renew the residence permit. Failure to pass the tests may lead to non-issuance of a permanent residence permit.

D. Trends and comments regarding integration measures

The Netherlands was the first country to take the opportunity to introduce integration measures from abroad to the family reunification procedure. It was rapidly followed by Germany and France. As a consequence, the phenomenon may have been expected to extend to other member states. This movement did not occur in the member states under scrutiny. Neither did it in other states, with the exception of the United Kingdom and Denmark.

In addition to this very limited effect, it must be underlined that among the three states surveyed, the rules adopted are very different. **The Netherlands** and **Germany** have adopted a very demanding procedure as the issuing of the visa, and therefore the possibility to join the sponsor, is conditional on a test. This is the opposite in **France**, where the applicant may have to attend classes but where the visa is issued in any case. In this regard, the right to family reunification is not subject to a test in France.

This point is highly important as it sheds light on the limits set by Directive 2003/86/EC. It refers to integration measures and does not mention integration conditions as a requirement for family reunification.³⁸ From a legal point of view this has a huge effect. Indeed, requiring integration measures leads to asking family members to fulfil obligations, such as attending classes. On the contrary, requesting an integration condition leads to the necessary achievement of results, such as taking successfully a test. In other words, one is allowed by the directive but the other is not, because it conditions the right to family reunification.

38. As it is for instance the case in another Directive dealing with immigration.

In this regard, the compatibility of the Dutch and German schemes with EU requirements is highly questionable.³⁹ In its opinion given in *Inram* Case law, the European Commission explicitly stated that passing an integration test as a condition for admission is incompatible with Directive 2003/86/EC.

Other differences that exist between the three member states concern the scope of persons exempted and more precisely exemptions awarded on the basis of nationality. Such a distinction made in national law may be incompatible with the prohibition of discrimination on the basis of nationality. Unless the distinction between persons exempted from the integration requirement is objectively grounded, it might be difficult to understand why a Japanese spouse is exempted from the test while a Russian one is not.

As shown above, rules related to integration schemes implemented from abroad are legally very dubious. From a practical point of view, such rules raise several questions. They are on the one hand very difficult to organise. It is up to the member state that wishes to introduce such rules to provide the necessary structures either to attend classes and/or to take tests. Such structures should be provided worldwide and in sufficient quantity in major nations. In this regard, a few years ago, the United Kingdom abandoned the idea of developing an integration-from-abroad scheme because it considered itself unable to provide enough language classes worldwide. One can therefore easily imagine that such constraints may also be applicable to other states with a less widely-spoken language. Indeed, providing the necessary structures is very expensive and may constitute a very significant obstacle for some states in undergoing this process. A solution in this view may be to leave the organisation of integration courses to the private market as it has been decided by **the Netherlands**.

Finally, these three member states have also adopted rules related to the integration duties that migrants have to comply with after arrival on their territory. Two different schemes are implemented. The Netherlands imposes a test for the issuance of a permanent residence permit, whereas France and Germany request family members to engage in an integration process after arrival in the country. This process requires attendance of mandatory classes and concludes with a test to assess the level of knowledge acquired. The integration process may last more than a year and its effects are evaluated either at the renewal of the residence permit stage and/or when issuing a long-term residence permit. Such effects should nevertheless be compatible with human rights requirements, such as respect for family life and the best interests of the child. Here again, national schemes may differ greatly from one another and demonstrate that harmonisation of national rules is still a long process.

However, the question of integration measures in the framework of family reunification should remain high on the agenda, particularly within the framework of the consultation

39. The Court of justice was asked to answer this question. But due to the fact that the main proceedings were lacking of purposes, since the applicant request for provisional residence permit was met, the Court of justice has considered not necessary to give a ruling on the request. See ECJ, 10 June 2011, Bibi Mohammad Imran, C-155/11 PPU.

process following the European Commission's Green Paper. Several points should be discussed so as to:

- ✓ Provide a clear definition and scope of 'integration measures' compared to 'integration conditions'.
- ✓ Evaluate the compatibility of existing and forthcoming national schemes with the definition and the scope of 'integration measures'.
- ✓ Evaluate the compatibility of national schemes with the interpretation of the ECJ in the Chakroun case law. Where national rules are compatible with the definition of 'integration measures', they may nevertheless, in practice, run counter to the objective of the directive, which is to "promote family reunification".
- ✓ On the basis of these evaluations, introduce in due time any infringement procedure against states that do not respect EU requirements.
- ✓ Link this part of the consultation process to policy on integration of third country nationals developed at EU level.

V. Public order and public health

Public order threats and public health risks are grounds upon which member states are entitled to reject an application, to withdraw a residence permit or refuse to renew a residence permit.⁴⁰

A. Public health

Regarding public health concerns, two member states – **Spain** and **Sweden** – do not apparently accept this element as grounds for rejecting an application or withdrawing or refusing to renew a residence permit. In the other member states, this criterion is taken into account but only when examining the application. In other words, illness may only be grounds for rejecting an application; it does not come into consideration for withdrawal or non-renewal of the residence permit.

This largely shared consideration corresponds to the limits established by Directive 2003/86/EC. Article 6, paragraph 3 states that "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".

The rejection of the application or the issuance of the residence permit for family reunification may be based on a list of illnesses or diseases established by national rules or on the basis of international instruments adopted by the World Health Organisation (**Belgium, France, Poland and Slovenia**).

40. See on this point article 6 of Directive 2003/86/EC.

In most cases, the risk for public health is assessed on the basis of an individual examination. However, this rule is implemented in a different way in **Slovenia**. There, an application for a residence permit for family reunification is rejected if it is discovered that the third country national comes from a region where there is an outbreak of a contagious disease which may cause an epidemic listed in the international health rules of the World Health Organisation, or from regions where there are contagious diseases which could threaten people's health and for which prescribed measures should be introduced on the basis of the law regulating contagious diseases. It is questionable whether such a general assessment, based on regional appraisal, fulfils the obligation to proceed to an individual examination of the application for family reunification.

B. Public order

In all of the member states surveyed, threats to public order constitute grounds for refusing or limiting the right to family reunification. The threat the applicant may cause is assessed on the basis of previous evidence or evaluated when the application is examined. In any case, previous and/or potential 'danger' is taken into consideration.

Grounds for rejecting the application, withdrawing or refusing to renew the residence permit are numerous in the member states. They include the following:

- ✓ The applicant is registered in the Schengen Information System for non-admission purposes (**Belgium, Poland, Slovenia, Sweden**).
- ✓ The applicant has been subject to an expulsion order issued by the member state examining The application (**Belgium and France**) or by another EU member state (**Sweden**).
- ✓ The applicant has stayed illegally on the territory of the member state (**Poland**).
- ✓ The applicant is suspected of having committed or it is assumed that the applicant will engage in terrorism, sabotage, espionage, illegal intelligence, drug-related or criminal acts (**Slovenia, Sweden**).

In two member states, rules related to the threat to public order are interpreted and implemented in a specific way. **Portugal** is applying the rule in a narrow perspective. Threats to public policy, public security or public health may only be taken into account to reject the application. Such criteria may not be taken into consideration for the renewal or the withdrawal of the residence permit.

In **Spain**, on the contrary, the application is rejected whenever the family member has a criminal record. As for renewal of the residence permit, the seriousness of the criminal record must be taken into consideration. In Spain if rejection or non-renewal is based solely on one criterion, it must be underlined that it is interpreted in a very broad manner. Indeed, and in practice, the family member is systematically refused the initial authorisation and renewal. Spanish NGOs also criticise the fact that refusals or non-renewals are not only due to criminal records but due to "police records".

Finally, **Poland** has established some very wide criteria to give grounds for a negative decision. In this member state, reasons to refuse to renew the residence permit may be based

on the fact that the applicant does not comply with fiscal obligations or that the applicant has entered and resided in the territory for purposes other than those declared. Fiscal reasons cannot be the sole reason to issue a negative decision. In **Slovenia**, a negative decision may also be given because there are reasons to suspect that a family is not going to abide by the national legal system.

To sum up, every member state has adopted rules to refuse family reunification for public order reasons. But, the rules applicable in each state can be very detailed and cover very specific situations.

In this context, however, some rules are common to all the member states. This is particularly the case regarding the obligation for national authorities to take into account the severity of an offence as well as the length of legal residence in the territory before issuing a negative decision.

This obligation leads national authorities to evaluate which interest has to be protected, the interest of the state with a negative decision or the interest of the individual in accepting family reunification.

Such a decision shall in any case be grounded upon an individual examination. Hence, and with the exception of the Slovenian case mentioned above, this frame exists in national rules and is in compliance with the obligations deriving from EU law. Article 6 of Directive 2003/86/EC recalls "When taking the relevant decision, the member state shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person".

This provision of the Directive is very important, and at least as important as article 17, because it obliges Member states to strike a balance between the security of the state and the right to family reunification.

Further developments in the member states, interpretations by the European Courts (EU Court of justice in Luxembourg and European Court of Human Rights in Strasbourg) and discussions at EU level on this issue will serve to highlight whether member states and EU actors are willing to protect one against the other.

VI. Consequences for not meeting the conditions

For some, it might be considered that whenever the sponsor or family members do not fulfil appropriate conditions, the application for family reunification is rejected. This view is too simplistic and must be put into perspective. Indeed, when assessing and deciding on an application for family reunification, member states are bound by at least three obligations deriving from the Directive and the jurisprudence (A). As a consequence, member states rules should comply with these requirements (B). However, the scope of obligations deserves further clarification (C).

A. Member state obligations in the examination of applications

Firstly, according to the Court of justice, member states have an obligation to individualise the examination of the application and to assess conditions for family reunification in a manner that promotes the exercise of this right. The very flexible interpretation given by the Court of justice with regard to 'resources' conditions can be extended to all other conditions required in the framework of the procedure: accommodation, insurance, integration and public order.

Secondly, when taking a decision to reject an application or to withdraw or the refuse to renew a residence permit, national authorities have to take into account obligations deriving from article 17 of the Directive. This latter states "member states shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the member state and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family". The assessment of the length and nature of existing links and relationships resembles the European Court of Human Rights (ECHR) jurisprudence on article 8. But EU law introduces a huge difference, while the ECHR has developed this jurisprudence mainly with regard to removal orders, Directive 2003/86/EC has clearly extended it to admission procedures i.e. acceptance of family reunification and issuance of residence permits.

Finally, article 5, paragraph 5, of Directive 2003/86/EC imposes a clear obligation on the member states. It states "when examining an application, the member states shall have due regard to the best interests of minor children".

The margins of manoeuvre of the member states are importantly framed by EU law. Member states have to

- ✓ carry out an individual examination of each application;
- ✓ evaluate conditions for family reunification in a flexible way that takes into account the specificity of each case and with a view to promote family reunification;
- ✓ pay due account to the nature and solidity of the family relationship, the length of the stay in the territory and the links with the country of origin;
- ✓ where necessary have due regard to the best interest of the children.

B. Member state rules

National reports completed for the purpose of this study show differences between the member states regarding the obligations deriving from EU rules. While some member states seem to respect, in general, these requirements, others seem to be less demanding.

Slovenia is an isolated example, where the rejection of an application for a first residence permit for family reunification is automatic. The rejection of an extension of the residence

permit is however discretionary rather than automatic. According to the Aliens Act, when deciding on the application for extension, the competent authority is obliged to consider the nature and strength of the family relationship, the duration of his or her residence in the Republic of Slovenia and the existence of family, cultural and social ties with the country of origin.

Regarding the other member states, they refer to all or several of the obligations mentioned above.

A first group of member states is composed with **France, Germany and Sweden**. These States respect the main conditions established by EU law: namely, the obligations deriving from article 17, the individual examination of the application and the best interest of the children.

A second group comprises **Poland, Portugal, and Belgium**. These States fulfil two of the three obligations. **Portugal** and **Belgium** respect obligations imposed by article 17 and the best interest of the children, whereas **Poland** takes into account the individual examination and the best interest of the children.

However, the **Belgian** case deserves some attention. The possibility to take into account the solidity of links and the length of stay, as requested by article 17 of the Directive, is possible but not in the framework of the family reunification procedure. Instead, where conditions for family reunification are not fulfilled, the Minister may, on a discretionary basis, consider the nature and solidity of links as well as the length of stay in Belgium and the applicant's cultural, family and social ties. In this regard, it is doubtful whether Belgian law complies with EU requirements as this evaluation is not made within the family reunification procedure but in a different one.

A third group is made up of **Spain and the Netherlands**. In **the Netherlands**, article 17 of the Directive seems to be the only requirement that is implemented, but only regarding refusals on grounds of public order. **Spain** only applies rules related to the best interest of the children but, according to the national expert, it also applies the rule regarding individual examination of the application.

According to national reports, some of these States use additional or specific rules.

This is the case for **Germany** where these obligations are completed with a proportionality test in the case where an extension of the residence permit is refused or in an expulsion case.

In **Belgium** and **Poland**, situations related to abuse of marriage may lead to extra investigations or to a withdrawal of the residence permit during a defined period of time after the permit was issued.

Finally, the notion of individual examination of the application is interpreted in a very specific way in **the Netherlands**. Indeed, and in reaction to the Chakroun judgment, the Minister stated that the government already takes into account all individual circumstances

as this obligation is reflected in the policy, especially in the exemptions outlined. In other words, the fact that **Dutch** rules exempt some categories of persons to fulfill the conditions – for instance, persons aged 65 years or older or disabled persons – proves that an individual examination is ensured. While, according to the expert, national judges have approved this argument, it is highly questionable that this position is compatible with EU law. While it is true that exemption allows some people to be relieved of obligations, it is not ensured that applications lodged by people who are subject to conditions will benefit from an individual assessment.

C. The need to clarify the scope of obligations

EU rules and jurisprudence frame the margins of manoeuvre of member states when assessing an application for family reunification. It is not entirely sure whether those member states surveyed respect all of the obligations deriving from EU law. This is the case having regard to the list of obligations but also having regard to their specificity.

For instance, having regard to article 17 of Directive 2003/86/EC, it might be assumed that member states implementing this obligation also fulfil the obligation to conduct an individual assessment of the application. However, this assumption should be specified. Article 17 establishes a general obligation which requires an individual examination of applications for family reunification whereas the jurisprudence developed by the Court of Justice extends this obligation to the assessment of material conditions requested for family reunification. In other words, the Court has clearly defined the obligations that must be fulfilled by national administrations in their appraisal of the conditions. In this regard, this specified obligation should now be implemented at national level in law and practice.

This point leads to an extremely important question: do member states take into consideration all the effects of the jurisprudence of the Court of Justice with regard to family reunification? This may not necessarily be the case when one considers all the duties that must be carried out by competent authorities nowadays. It is, therefore, essential to make these implications very clear for the correct implementation of the rules in the member states as well as the legal protection of applicants for family reunification. It could for instance be very helpful to have guidelines on these effects for the member states and third country nationals. The European Commission could prepare such a document delineating, in a comprehensive and unambiguous manner, rights and obligations for the applicants and the administrations.

In any case, discussions relating to member states' margins of manoeuvre are decisive for the member states and the individuals. While individuals are currently protected by EU rules and the ECJ's interpretations, member states may be tempted to intervene in order to regain some leeway. A clash could arise between the objective outlined by the Court to promote family reunification and the objective followed by some member states, like France or the Netherlands, to limit family migration. Discussions about conditions for family reunification, and the consequences for not meeting them, should be at the heart of further developments in the field of family reunification.

SECTION 4 – IMPACT AND TRENDS IN THE MEMBER STATES

Even before the adoption of Directive 2003/86/EC, family reunification was a core element of most national policies and therefore already subject to public attention and legal action. The adoption of the Directive has had the effect of shifting the issue from national to EU level. Member states' reluctance to adopt common rules in this field led to the adoption of a Directive with low binding effect and full of optional provisions. During the negotiations, national delegations were mainly anxious that the common text would not endanger national rules.

Since the first assessments in 2007⁴¹, it has become clear that the Directive has had several effects on national rules. On the one hand, it has obliged member states to adopt new rules or modify existing rules in order to comply with EU requirements. This has mostly concerned new member states from the East, which did not take part in the negotiation but were still obliged to transpose all the EU *acquis* including Directive 2003/86/EC. On the other hand, it has allowed member states to adapt rules, mainly those that are related to conditions for family reunification. Here, member states have either adopted new requirements or strengthened previous ones.

Family reunification policies appear to have been continuously under strain at national or EU level in recent years. The national level fuels EU level and *vice versa*. This section tries to outline the impact that Directive 2003/86/EC has had over member states at three different levels: at the level of administrative practices (I); at the level of the number of applications (II); and at the level of national jurisprudence (III).

I. Administrative level

The impact of modifications at administrative level refers more precisely to the effects of the transposition of Directive 2003/86/EC and modification of rules on the actions taken by the administration, on the length of the procedure and on the controls implemented in member states with regard to the conditions required.

A. Impact on administrative action

According to the reports, in eight member states, the transposition of the directive has had an impact on the action of competent national bodies.

The national experts in **Germany, Poland, Portugal, Spain** and **Sweden** consider that the impact on the actions taken by the administration in each of these countries has been positive or rather positive.

41. See H. Labayle & Y. Pascouau, *op. cit.*, and K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers & T. Strik "The Family Reunification Directive in EU member states. The First Year of Implementation", Centre for Migration Law, Willem-Jan and René van der Wolf Publishers, 2007.

In **Spain**, for instance, the extension of the scope of family reunification to common law couples as well as the establishment of a financial requirement are considered to be positive modifications.

In **Sweden**, controls over married persons are now less important than before. With the new rules, the sponsor only has to fill in an affirmation of the alleged marriage, contrary to the practice before the Directive was transposed when an investigation of the seriousness of the relationship was systematically carried out.

In **Poland**, the provisions of the family reunification Directive were introduced in 2005. They set in order and unified the work of all 16 administrative bodies ("voivodeships") in the family reunification field. It also forced the authorities to adopt provisions to better coordinate the activities of the Border Guard and administration organs.

In **Portugal**, and as a result of the modifications introduced in 2007, the administrative procedure is considered to be clearer and faster.

On the contrary, the impact of the directive is rather negative in **Belgium, France** and **Slovenia**.

In **France**, the legislator has taken advantage of the transposition of the directive to make previous rules tougher and to introduce new requirements such the integration in the country of origin rule.

In **Belgium**, recent legislative modifications follow the trend taking place in some member states and at EU level in the sense that conditions for family reunification are becoming less flexible. Hence, and in practice, there will be more controls than in the past. However, checks regarding family links are currently more important.

In **Slovenia**, the process has been two-fold. In a first phase that occurred in 2005, in the course of the transposition of the Directive, the conditions for family reunification were made more restrictive than before. For example, the right to family reunification was limited to sponsors with a permanent residence permit and foreigners with a one-year temporary residence permit who have already been residing in Slovenia for one year. Only in 2011 was access to this right again recognised for all sponsors with permanent and temporary residence permits (except seasonal workers) because the state realised that the previous restrictions were not necessary. Also, the scope of family reunification has been widened to registered and cohabiting partners and the new legislation has made conditions regarding the type of residence permit more lenient.

The impact of the Directive in **the Netherlands** is difficult to evaluate. On the one hand, it has been minimal in the sense that the modification of Dutch rules, and consequently administrative rules and practice, did not clearly pursue the implementation of the Directive. On the other hand, the Directive and its interpretation by the European Court of Justice are having an impact on Dutch rules. The abolishment of the distinction between family formation

and family reunification and the modification of the income requirement from 120 to 100% are good examples of this phenomenon. Some Dutch rules remain however incompatible with the Directive and further rulings and modifications may therefore be expected.

To sum up:

- ✓ the impact of the Directive has been positive more particularly with regard to the extension of the personal scope of family reunification and also with regard to the procedure which has either been established for the first time in some member states or made clearer and faster in others;
- ✓ the impact of the Directive has been negative where it has allowed member states to strengthen requirements regarding conditions for family reunification;
- ✓ while the transposition of the Directive has made the procedure clearer, it has also made the rules stricter for family members in many cases.

B. Impact on the length of the procedure

The length of the procedure is crucial for family members. As we have seen, Directive 2003/86/EC sets out two different timelines. The application should be examined within 9 months and the waiting period before the spouse and other family members are able to join the sponsor should not exceed 2 years.

In four member states – **Germany, the Netherlands, Poland and Spain** – no modifications in this regard has been highlighted by the national experts. It should however be underlined that this situation will change in 2012 in the Netherlands where, due to the Directive, the double assessment of the conditions for family reunification – abroad and after admission – will be abandoned. In **Belgium, France, Portugal, Slovenia and Sweden**, however, the length of the procedure has been impacted. In **France**, for instance, the transposition of the Directive has had the effect of increasing the delay of examining the application, more particularly with regard to the rule establishing an evaluation of language skills in the country of origin. In **Slovenia and Sweden**, the impact concerns the mere adoption of a rule regarding the length of the procedure (**Sweden**) or a one year waiting period (**Slovenia**). Finally, in **Portugal**, the impact is significant as the delay for examining an application for family reunification is only 10 days or so, which is very impressive. The procedure applicable in Portugal should therefore be further analysed in order, on the one hand, to define which elements allow for such a fast track examination and, on the other hand, to see to what extent it could be copied by other member states.

C. Impact on controls among applications

The definition of conditions for family reunification goes hand in hand with procedures aimed at checking whether applicants fulfil required conditions. In short, have member states increased internal checks? In two states – **France and Germany** – no modification occurred, whereas in seven others, checks over applications have been modified.

In **Poland** and **Slovenia**, effects over checks are primarily linked with the transposition of the Directive which has obliged these states to establish a formal procedure in this respect. This modification of national rules has led to two different phenomena. In **Poland**, national officers noticed a significant increase in family reunification applications following accession to the EU. In **Slovenia**, and as a consequence of the adoption of new procedures, more family members have been granted the right to family reunification. The establishment of a procedure has *in fine* had a positive effect on family reunification in terms of legal certainty and numbers.

Spain may also be linked to these member states as the transposition of Directive 2003/86/EC has meant the modification of several rules including those related to checks regarding resources and accommodation. Such a development has also occurred in **Sweden** where the introduction of new conditions for family reunification has meant increased controls regarding income and accommodation.

In **Belgium** and **the Netherlands**, checks over applications have intensified. It is, however, difficult to determine whether this phenomenon is linked with the transposition of the Directive or with national policies aimed at controlling different aspects of family reunification more closely such as marriages of convenience (**the Netherlands**). According to the Dutch national expert, this is more likely to be linked with national policy.

Finally, rules regarding the controls of applications have also changed in **Portugal** and **Sweden**. In **Sweden**, controls have been weakened. Hence, before implementing the Directive on Family Reunification, assessments were made regarding the seriousness of the relationship, regardless of whether the applicant and sponsor were married, registered as partners, in a cohabiting relationship or in a newly established relationship. Since the implementation of the Directive, marriages cannot be investigated if the marriage does not appear to be a marriage of convenience or a fraud. In **Portugal**, the Borders and Immigration Service are now entitled to set up interviews with the applicant or his family and conduct any other kind of investigation regarding the application.

To sum up, modifications of national administrative rules and practices are based on two different grounds:

- ✓ the obligation to transpose the Directive which has led to a limitation of member states' leeway such as the rules related to the length of the procedure;
- ✓ national orientations which remain very strong and determine whether member states are willing to facilitate (Portugal) or restrict (the Netherlands) family reunification.

II. Number of applications

In the context of this study devoted to conditions for family migration, one underlying question has been to determine to what extent new or additional conditions introduced in the member states have had an impact on family migration flows.

Therefore, national experts were asked to provide data on the number of residence permits issued for the purpose of family migration and to comment where changes are significant.

Number of residence permits issued for the purpose of family reunification

	2005	2006	2007	2008	2009	2010
BE	na	8 922	na	20320 ⁴²	28 523 ⁴³	na
FR	23 814	20 364	20 414	19 691	17 195	na
GER	29 433	na	na	na	na	na
NL*	21 900	22 652	12 105	15 000	15 000	na
PL	na	na	7 795	8 877	8 666	8 633
PT	na	na	47	4 652	2 577	2 507
SL	848	3 744	2 253	3 495	2 749	2 862
SP**	na	na	na	150 101	125 288	131 669
SW	na	na	28 975	33 184	34 082	24 626

na: not available

*figures reproduced regarding this country represent the number of visas issued for the purpose of family reunification

** figures available for Spain are retrieved from Eurostat statistics. They concern the total data for family reunification i.e. family reunification of third country nationals, EU citizens and students. There are no data related to family reunification of third country nationals only.

A. General trends

As a general comment, the figures provided show huge differences between the member states with regard to the number of residence permit issued for the purpose of family reunification. While **Spain** delivered more than 125,000 residence permits a year in the last two years, **Portugal** delivered around 2,500 i.e. around 50 times less. It should however be underlined that Spanish data refers to all types of family reunification i.e. third country nationals, EU citizens and also students, which thus renders the comparison difficult.

As regards trends, several points need to be touched upon. In three member states – **the Netherlands, Poland** – the number of residence permits or visas issued for the purpose of family reunification grew between 2007 and 2008 and then remained stable (**the Netherlands** and **Poland**). It should be underlined however that changes reported for **the Netherlands** and **Poland** are very small. It is therefore difficult to identify any clear and significant trend. In **Spain**, the number of residence permits issued decreased in 2009 and slightly increased in 2010.

On the contrary, the number of residence permits issued for family reunification declined in **France** after 2007 and since 2008 in **Portugal** and **Slovenia**. In **Sweden** in 2010, the number of residence permits issued dropped from 34 082 to 24 626 in one year.

42. See I. Lodewyckx, C. Timmerman & J. Wets "Le regroupement familial en Belgique: les chiffres derrière le mythe", Fondation Roi Baudouin, 2011.

43. Figures taken from a report issued by the Belgian national contact point for the European Migration Network.

B. Reasons for modifications in trends

Family migration is dependant upon a series of factors that shape it. Economic and political conditions as well as demography are the main factors.⁴⁴ These factors can explain to some extent the changes in the number of applications introduced in the member states.

Political conditions – i.e. policies developed and rules adopted by the member states regarding entry and residence of third country nationals – have played an active role in five member states (**France, the Netherlands, Poland, Portugal and Sweden**).

In **the Netherlands, France and Sweden**, modifications of the conditions for family reunification have played a major role in the decrease of entries for family reunification.

The phenomenon is very much evident regarding the Dutch and Swedish examples. Following modifications introduced by the 2006 law in **the Netherlands**, the number of visas issued for family reunification dropped from 22,652 to 12,015. An identical situation is visible in **Sweden** after the introduction of new requirements regarding accommodation and resources in the 2010 law led to a decrease from 34,082 to 24,626.

In **France**, the phenomenon is less perceptible. Successive modifications introduced in 2006 – extension of the waiting period and modification of resources and accommodation conditions – and 2007 – the introduction of integration measures in the country of origin – produced an effect but it is less important and significant in numbers than in other member states.

The main difference underlined between **the Netherlands** and **Sweden**, on the one hand, and **France**, on the other, may find some explanations. As regards **the Netherlands**, rules regarding conditions for family reunification and more particularly rules related to integration in the country of origin have had a very strong effect in making family reunification far more difficult and deterring family members from applying for family reunification. As a consequence, the number of applications decreased significantly and immediately after the adoption of the rule. In **Sweden**, the introduction of a resources condition and an accommodation condition is a major policy change and may therefore have had a significant impact either on the number of applications introduced or in the number of applications rejected because the conditions were not met. On the contrary, in **France**, rules regarding conditions for family reunification were introduced in a progressive manner and have not overthrown existing rules. The extension of the waiting period from 12 months to 18 months was perhaps the toughest measure taken by French authorities. As regards integration measures in the country of origin, the regime adopted in France is far less restrictive than the Dutch one. In this regard, it may have been considered less as a deterrent.

44. In this regard see I. Goldin, G. Cameron & M. Balarajan, "Exceptional People. How Migration Shaped Our World and Will Define Our Future", Princeton University Press, Princeton and Oxford, 2011.

Finally, a last remark can be put forward regarding this group of States and concerning current and forthcoming trends. Currently, **the Netherlands** are registering a very slight increase in the number of visas issued for family reunification. It is not sure whether this phenomenon will last. However, the number of visas issued currently remains far below figures provided before 2007. As regards **France**, it will be interesting to analyse future figures and see in the long run how 'effective' the rules have been in decreasing family migration flows.

Poland presents a different situation. In this member state, the decrease in the number of residence permits issued is not significant at all. However, another trend is visible and is related to the increase of negative decisions (see table below). According to the national expert, this phenomenon is probably based on new investigation competences awarded to the Border Guard authorities to assess the credibility of applicants. This has contributed to identifying false applications.

Decisions on applications for family reunification in Poland

Year	2007	2008	2009	2010	Total
Applications	8484	9346	9259	9393	36482
Positive decisions	7795	8877	8666	8633	33971
Negative decisions	164	126	351	345	986

Finally, **Portugal** may be added to the group of States within which new legislation has had an effect on the decrease of residence permits issued for family reunification. However, this member state presents a very particular situation. First of all, there was a 'boom' in the numbers of application for family reunification in 2008 due to the regularisation of tens of thousands of migrants in 2007. After 2008 however, the number of applications for family reunification significantly decreased.

In **Slovenia**, the decrease in the number of residence permits issued is linked with the economic crisis. The national expert explains that since the issuance of residence permits for family reunification depends on whether or not residence permits are issued for sponsors, the declining of the former was accompanied by the declining of the latter.

Data given for **Spain** are difficult to interpret as they concern all types of family reunification i.e. third country nationals, EU citizens and also students. This renders the comparison difficult. However, the decrease in the number of permits issued is attributed by the national expert to the crisis as well as the return of numerous families to their own country.

To sum up, three main conclusions may be put forward with regard to the trends in the number of residence permits issued for the purpose of family reunification:

- ✓ In all of the member states surveyed, a general trend starting roughly in 2007/2008 shows a decrease in the number of residence permits or visas issued for family reunification.
- ✓ In these member states, this decline is mainly linked to the modification of national rules related to the conditions for family reunification.
- ✓ The economic crisis has had very little effect on the phenomenon.

III. Jurisprudence

Since the adoption of Directive 2003/86/EC, member states' margins of manoeuvre in the field of family reunification are limited. On the one hand, they have to transpose and correctly implement the provisions of the Directive, particularly at administrative level. On the other hand, the Directive creates rights for individuals. Individuals can therefore rely on the Directive if they wish to challenge a negative decision either before the administrative authorities or before the national judge. Whenever a national judge has to rule in a case involving Directive 2003/86/EC, there are two possibilities. In its duty to guarantee the individual's rights, the national judge may:

- ✓ decide to exclude the implementation of a national rule due to its incompatibility with Directive 2003/86/EC; or
- ✓ ask the European Court of Justice to interpret the provisions of Directive 2003/86/EC in order to apply them correctly to the case law.

As a result, national judges play a crucial role in the implementation of the Directive and the protection of the right to family reunification. The question in the framework of this study was to examine to what extent national judges made use of the possibilities either to apply the provisions of the Directive against national rules and administrative decisions or ask the Court of Justice to interpret some provisions of the Directive. In both situations, the impact and role of national judges has been quite limited.

A. Application of Directive 2003/86/EC against national rules or administrative decisions

This situation may occur where national rules are incompatible with some clear provisions of the Directive. Among the nine member states surveyed, it appears that in only two of them, national courts have considered domestic rules to be incompatible with the provisions of Directive 2003/86/EC.

In **Germany**, several courts considered the requirement for spouses to have German language skills before receiving the visa for family reunification to be incompatible with Directive 2003/86/EC.

In **Poland**, the family reunification of a minor child was being refused because parents were not providing the proof having regular and stable income. Whereas the national court agreed with the administrative body regarding parent's lack of resources, it nevertheless considered the possibility to grant the minor child a permit for a fixed period on the basis of three

grounds: the continuation of education, the short period of economic activity carried out by the minor's parents and the best interest of the child. In this context, the administrative decision rejecting the application for family reunification was reversed.

These are, according to national reports, the only cases where national judges have excluded the implementation of national rules or reversed administrative decisions due to incompatibility with EU law.

B. Preliminary rulings before the Court of Justice

National judges are able to introduce a preliminary ruling in order to have an "authentic" interpretation of the Directive from the European Court of Justice. Here again, results are very limited.

For the time being, the European Court of Justice has been asked just once to provide for an interpretation of the Directive in the Chakroun case law. Given the need to clarify some provisions of the Directive, it is surprising that some questions raised in national proceedings never ended up in the courtroom of the European Court of Justice.

Interestingly enough, some questions raised at national level concerned integration measures. In **Germany**, the question on whether the requirement relating to the language knowledge imposed to spouses is compatible with EU law was raised in a federal administrative court. But the German court did not consider it necessary to ask the European Court of Justice for an interpretation in this regard.

In **the Netherlands**, a lower court requested for a preliminary ruling on the compatibility of the integration test abroad with the provisions of the Directive. The case was referred to the national Court and concerned an Afghan woman whose family reunification was rejected because she was not able to take the test due to her illness and illiteracy. The case was very sensitive as she was the mother of eight children who had already joined their father in the Netherlands. Taking into account this situation, the national court decided to request a preliminary ruling regarding the interpretation of the provision dealing with integration measures in the Directive.⁴⁵ But before the European Court of Justice had the time to give an interpretation, the Dutch government decided to derogate from the integration requirement and to allow family reunification to the Afghan woman. As a result of this individual derogation, the ECJ decided not to answer the preliminary ruling anymore. It should nevertheless be outlined that the Commission considered in an opinion issued during the procedure that taking an integration test abroad as a condition for admission is not in compliance with the Family Reunification Directive.

These are the only situations referred to in national reports where the possibility to request a preliminary ruling from the European Court of Justice was initiated.

45. See ECJ, 10 June 2011, Bibi Mohammad Imran, C-155/11 PPU.

C. General comments on the lack of collaboration between national judges and the ECJ

The very limited role of national and European jurisprudence is a real pity for several reasons.

Having regard to the case of the Afghan woman, it would have been the occasion to finally have a proper interpretation of the provision related to the integration measures that member states are allowed to establish. The scope of this provision and how it is implemented continues to be discussed and debated in the Netherlands. The decision adopted by Dutch authorities to grant family reunification to the Afghan mother is a sign in this regard. Indeed, there are good reasons to think that the European Court of Justice would have given an interpretation that would demonstrate that the Dutch mechanism is incompatible with EU law. By putting an end to the proceeding, the Dutch authorities preserved their margins of manoeuvre for another while. Since the authority to ask a question to the European Court of Justice remains in the hands of national judges, it is difficult to predict when this will happen.

Secondly, the power awarded to national judges to decide whether they may request a preliminary ruling from the European Court of Justice is an obstacle to the recognition of rights for individuals in the field of migration. Having regard to Directive 2003/86/EC, several provisions would need to receive an interpretation in order to assess the compatibility of national rules.⁴⁶ This has not yet happened however. An approximate knowledge of EU migration rules and effects could be one explanation. Another may rely on the reluctance of national judges to refer to the European Court of Justice in the field of migration. Either way, this is not a satisfactory situation because third country nationals' rights deserve to be guaranteed.

Finally, it should be underlined that an alternative mechanism to overcome national judges' inaction does not function either. Indeed, the European Commission has the power to introduce any infringement proceedings when it considers that member states are not correctly implementing EU law. In a report issued in October 2008 and related to the implementation of Directive 2003/86/EC, the Commission identified a number of points where the compliance of member states was not fully ensured.⁴⁷ Dutch rules relating to integration measures were, for instance, highlighted as a potential problem. For the time being, the European Commission has not introduced any infringement procedure regarding this point or other ones.

The use of Directive 2003/86/EC appears very limited and to a certain extent disappointing. Neither national judges nor any other competent authorities such as the European Commission are taking the lead to preserve the right to family reunification. This raises three final comments.

46. In this regard see H. Labayle & Y. Pascouau, "Directive 2003/86/EC on the Right to Family Reunification", *op.cit.* ; K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers & T. Strik, "The Family Reunification Directive in EU Member States. The First Year of Implementation", *op. cit.*

47. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the Right to Family Reunification, COM(2008) 610 final, 08.10.2008.

Firstly, the reluctance of national judges to refer to the European Court of Justice is worrying and raises questions on whether they are knowledgeable enough about the relevant EU law and/or independent enough to challenge the national level.

Secondly, the inaction of the European Commission with regard to infringement procedures highlights the very uncomfortable position of this institution. It has the power to introduce an action against one or several member states but, at the same time, it has to collaborate with them in order to be able to adopt future Directives. In other words, it is very difficult for the Commission to have the support of a member state, against which it has previously introduced infringement proceedings. Crucially, this highlights one of the limits of the EU's institutional construction. Alternative solutions such as the possibility for an ad hoc body to launch infringement procedures where fundamental rights are threatened should be discussed.

Finally, the right to family reunification must be preserved and improved. This may be achieved through a better dissemination of information regarding the scope and effect of Directive 2003/86/EC at national level. In addition, an exchange of experience and practice between judges and lawyers may in this regard constitute much-needed action. The European Commission could take the lead in this regard by providing training sessions within the member states and between national judges and/or lawyers. The European Court of Justice could be involved in this project. In any case, the Europe-wide consultation that is scheduled to take place at the end of 2011 upon the publication of the European Commission's Green Paper should tackle this point.

CONCLUSIONS AND RECOMMENDATIONS

The analysis presented in this study demonstrates that the field of family reunification is constantly moving. This phenomenon is rooted in national politics or/and European transformations.

However, the report highlights one largely shared trend among the member states surveyed: the tendency to adopt new rules regarding conditions for family reunification, and in some countries, to make these conditions harder to fulfil. Minimum age, prior residence, accommodation conditions, income requirements and integration measures are among the various requirements that member states may ask applicants for family reunification to fulfil.

The recent development of such rules in several member states where these requirements were not previously requested is a sign that the trend is growing among all EU member states. On the other hand, the progressive modification of specific conditions in some states is also a sign of the abovementioned phenomenon.

The trend highlighted by the report must nevertheless be nuanced. While more states are adopting rules regarding conditions for family reunification, these rules are implemented differently. Indeed, the rules are either more or less demanding of migrants, or impose stricter or softer procedures and means of proof. Sweden, Portugal and Slovenia may at different stages be considered as being among those states where conditions for family reunification are less strictly framed. On the other side of the spectrum stand France, the Netherlands, Germany and recently Belgium, where conditions have clearly been made more difficult to fulfil.

The difference between restrictive and flexible policies needs to be analysed in light of the goals pursued by member states. As the report has shown, in specific situations conditions for family reunification may seek to make family migration harder or to help migrants to integrate better. Thus conditions for family reunification may act as a tool for managing migration or as a tool for enhancing migrants' integration into society.

Current debates about migration in general and the results of the report may lead to the conclusion that the conditions for family reunification recently adopted by EU member states seek to make the rules harder in order to limit family reunification. This statement is reinforced by national discourse, such as *'immigration subie'* in France, and actions, such as recent modifications of Belgian law. It is also fuelled by European developments such as the European Pact on Immigration and Asylum.

However, the conclusions of this report allow for further thinking about the extent to which rules regarding conditions for family reunification may in law and practice improve the integration of third country nationals. With regard to conditions highlighted in this study, three categories may be outlined as they target three different goals.

The first category concerns rules linked to the stability of the sponsor: a primary condition that member states are going for. For family reunification and further integration

to be successful, the sponsor should demonstrate that he/she has been living for a certain period of time in the member state concerned, has stable and regular resources, and appropriate accommodation.

The second category deals with the issue of commitment. Here, the question relates to the existence of integration measures that family members are asked or invited to fulfil in order to acquire language or civic knowledge. Both of these elements are acknowledged as crucial for integration. Indeed, mastering basic language skills and acquiring information about the functioning of the state and its administration may help newcomers to make their mark more easily in society.

Finally, the third category of rules covers the issue of protecting people. This comprises two different elements. On the one hand, family members should be prepared for reunification, which might in certain cases be very difficult. This could be achieved through information provided to family members before and/or after arrival into the member state. On the other hand, rules related to marriages of convenience may prevent spouses from being misled or abused. In the latter situation, integration may sometimes be even more difficult.

In the end, rules regarding conditions for family reunification may have a positive impact on the future integration of family members into their host society. But these rules should be applied with this underlying principle in mind. Conversely, if the rules are only adopted for the sake of managing migration flows, their impact on integration is likely to be worse. Indeed, either family members are not awarded the right to family reunification or their status – i.e. the right to stay – is made conditional upon the fulfilment of a series of conditions. Checks on marriages of convenience are an interesting issue in this regard. Rules applicable in the majority of member states are similar when it comes to investigating marriages concluded by nationals or third country nationals. This can be interpreted in two different ways. This may demonstrate, on the one hand, that marriages of nationals or foreigners with spouses coming from third countries reach the same level of suspicion. On a more positive note, the similarity of rules may highlight the same level of willingness to ensure and prepare for the sound integration of families into the host society.

This leads us to the very root of the problem: what are family reunification and family reunification rules designed to achieve? Are they a set of rules aimed at promoting the social inclusion of migrants into the receiving society? In other words, allowing migrants to be joined by their family members is seen as a factor of integration. Or, is family reunification a set of rules aimed at defining who is entitled to join the sponsor? In this view, family reunification rules should be considered as one tool among others to manage migration.

The European Commission viewed family unification at the beginning of 2000 as a tool for integration, but member states considered that EU rules in this regard should constitute a tool in their hands in order to manage, openly or restrictively, family migration. Current trends show a tendency among the member states to use their remaining leeway in order to make family migration more difficult.

Two questions remain largely unanswered. Is this strengthening of national rules regarding conditions for family reunification compatible with EU law? Is this strengthening of national rules regarding conditions for family unification desirable for family reunification purposes?

As regards the first question, Directive 2003/86/EC does not prevent member states from exercising their competence where it has left them often very significant leeway to adopt or strengthen rules and conditions. However, this possibility is now framed by the Court of Justice, which has drawn lines that may guide member states' actions.

On the one hand, member states are bound to respect the prescriptions they have agreed to include in Directive 2003/86/EC. These range from the recognition of a right to family reunification, where all the conditions requested by national law are fulfilled, to the respect of the best interest of the child and the interests of migrants when it comes to taking into consideration links with and the length of stay in the member state. In this view, countries have a clear obligation to proceed to individual examinations of all applications.

On the other hand, member states are now obliged to implement the provisions of the Directive in light of its objective to "promote family reunification". This gives birth to a new and unprecedented landscape where member states are prevented, in an *a contrario* argument, from adopting rules that do not promote family reunification. To put it differently, rules aimed at making family reunification more difficult must be legitimate and proportionate to the objective pursued.

Finally, if the issue is yet to be tackled by the Court of Justice, national rules should respect the principle of non-discrimination particularly where conditions for family reunification are not imposed on foreigners coming from specific countries. This will surely constitute the next element of interpretation that will frame member states' margins of manoeuvre.

The second question, on whether this strengthening of national rules regarding conditions for family reunification is desirable, must be put into perspective. More precisely, it must be taken into account having regard to the migrants that EU member states will be in need of in the next couple of years. The demographic challenge facing EU member states calls for an appropriate evaluation of future needs in terms of migrants. It is obvious that migration into the EU will be part of the solution.

Hence, it is questionable whether the EU and its member states will be able to attract migrants if the latter are not able – or encounter huge difficulties – to be joined by their family members due to strict conditions. This concerns all types of migrants that the EU will be in need of, i.e. low- as well as highly-skilled migrants. The picture of a 'defensive Union' that EU countries are currently painting does not encourage foreign workers to come to the EU. They will probably choose to settle in more 'migrant-friendly' countries.

Finally, the issue of access to family reunification must not be tackled in isolation. It is accompanied by the question of rights. What rights are awarded to family members once they reside in the host member state? This issue is equally important as the conditions for family reunification, because it is a sign of the openness of EU society towards migrants and

acts as a magnet or a foil. Considering the importance of family reunification in terms of numbers, the answer to this point is more than relevant.

This study highlights that, over the past few years, a lot of policy change and development has been taking place in member states regarding conditions for family reunification. These developments have been sometimes accompanied by heated national debates. It is in this context that the European Commission will publish a Green Paper on the right to family reunification at the end of 2011. This document will initiate a large scale consultation process and debate on family reunification, which could lead to eventual changes to Directive 2003/86/EC. In view of this consultation process, the European Policy Centre makes the following recommendations:

1. Future discussions and developments should take due account of the jurisprudence of the European Court of Justice and the rights enshrined in the Charter of fundamental rights of the European Union

The right to family reunification is recognised by Directive 2003/86/EC and the jurisprudence of the European Court of Justice. In addition, the ECJ has clearly stated that the objective of the Directive is "to promote family reunification". Furthermore, the right to family life is recognised by the Charter of fundamental rights of the EU, to which member states are legally bound since the entry into force of the Lisbon Treaty. Therefore, the Directive, the Charter and the ECJ's jurisprudence constitute the frame and the limits by which member states must abide when implementing policy in this area.

2. Further harmonisation on conditions for family reunification is needed in order to enhance convergence among member states

Despite the existence of a Directive on the right to family reunification, national rules regarding conditions for family reunification still diverge considerably. The consultation process launched by the European Commission's Green Paper will allow relevant stakeholders to discuss further harmonisation of national and implementing rules, such as transforming current optional provisions into mandatory ones and providing for more detailed rules.

3. Any policy development in the field of family reunification should safeguard the underlying rationale that family reunification aims at promoting integration rather than managing migration flows

Directive 2003/86/EC recognises that "Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the member state, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty." (Recital 4). The current political context in many member states is centred on managing, and in many cases limiting, the arrival of new immigrants. It should however be remembered that family reunification helps migrants to better integrate into the receiving society, as is stated in the Directive. Any attempt to divert from this objective and use family reunification rules as a tool to manage migration, by limiting family reunification, should be avoided.

EXECUTIVE SUMMARY

Over the past forty years, the issue of family reunification has gained in importance at European level. This began with the growing impact of the European Court of Human Rights and its jurisprudence regarding the right to family life but the EU dimension was really solidified with the adoption of Directive 2003/86/EC on the right to family reunification.

While member states have long since transposed the directive, ever-evolving policies and modifications at both national and European level are redefining the whole landscape of family reunification. At EU level, the entry into force of the Lisbon Treaty is one element and the interpretation of the Directive by the European Court of Justice another. At national level, the willingness to make family reunification rules more restrictive constitutes a trend shared by some member states. In this evolving landscape, it should be outlined that national policies fuel European policy and *vice versa*. The adoption of the European Pact on Immigration and Asylum by the heads of state and government in 2008 is an example of this complex interrelationship.

In this context, a new study on conditions for family reunification is needed, and indeed timely, in order to map current trends and shortcomings ahead of the European Commission's consultation process on family reunification, scheduled to be launched with a Green Paper at the end of 2011. This study focuses on nine member states, chosen to reflect, as much as possible, different balances and trends: Belgium, France, Germany, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

Though they sometimes differ in their approaches to family reunification policy, nearly all of the countries surveyed have in recent times adopted new rules regarding conditions for family reunification, be it for minimum age, prior residence, accommodation conditions, income requirements or integration measures. France, the Netherlands, Germany and recently Belgium are highlighted as member states where conditions have clearly been made more difficult to fulfil.

This study highlights that, over the past few years, a lot of policy change and development has been taking place in member states regarding conditions for family reunification. These developments have been sometimes accompanied by heated national debates. Considerable attention is also given to the limits set by Directive 2003/86/EC and the ECJ's jurisprudence, which frame the scope within which member states' actions are to take place.

Taking account of these changes and looking ahead to the consultation process launched by the publication of the European Commission's Green Paper, which could lead to eventual changes to Directive 2003/86/EC, the European Policy Centre makes the following recommendations:

1. Future discussions and developments should take due account of the jurisprudence of the European Court of Justice and the rights enshrined in the Charter of fundamental rights of the European Union.

2. Further harmonisation on conditions for family reunification is needed in order to enhance convergence among member states.
3. Any policy development in the field of family reunification should safeguard the underlying rationale that family reunification aims at promoting integration rather than managing migration flows.

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Mission Statement

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European Policy Centre

Résidence Palace

155 Rue de la Loi

1040 Brussels

Tel: 32 (0)2 231 03 40

Fax: 32 (0)2 231 07 04

Email: info@epc.eu

www.epc.eu



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