

Brussels, 18 September 2017

COFACE Families Europe response to the public consultation on EU's legislation on the legal migration of non-EU citizens (Fitness Check on EU legal migration legislation).

COFACE Families Europe has only replied and is providing complementary information only on the Directive on the Right to Family Reunification (2003/86/EC), because this is the area in which COFACE and its national/local Members (Family associations) are mostly involved.

In addition to the questionnaire online, COFACE Families Europe would like to point out a number of additional or complementary issues. This annex contribution is divided into two parts:

(1) a number of complementary information that are fundamental to the debate on the family reunification but were not possible to raise in a multiple choice questionnaire without open questions;

(2) a report from a thematic workshop on Family Reunification hold in the COFACE conference "Families on the move" on 12 May 2017 in Brussels.

First, the EU Directive on family reunification aims to ensure the right to family reunification and not to manage migration flows. However, this goal – despite being very clearly stated in the directive's title – is often overlooked and rules are tightened and standards are raised by Member States, to achieve the opposite objective: make family reunification more complex and serve as a push factors to induce potential migrants to choose another destination country. Moreover, family diversity is a fact and family forms are evolving, together with society (e.g. divorces, recomposed families, multi-generational families, rainbow families..). However, EU rules are made for a single type of family and the right to family life for those persons living in different family forms can be unachievable under the current legislation. Plus, unfortunately, family reunification for minors does not play any role in the questionnaire.

Amendments to question 14 (Family reunification)

Entitled family members for reunification

- The Directive should give less discretionality to Member States regarding the reunification of family members beyond the core family. The "may clause" giving the Member States the opportunity to choose which near relatives are also eligible for reunification often hinders families to actually live together and take responsibility for one another.
- Serious concerns for the well-being of family members who are left behind in the home countries absorbs much time, energy and strength that could be invested into improving life in the new home country and thereby enhancing the overall integration process.
- In case of dependent parents and adult children, families must be given the opportunity to sponsor their entry in the EU and take care for them, e.g. for ageing parents or disabled children.
- Member States that recognize same-sex marriages within their national family law should also do so in application of the Directive, it should also be the case for same-sex registered partnerships.

Obligatory integration measures (more details in the workshop report below)

- COFACE rejects mandatory pre-departure integration measures that can prevent family reunification. It is certainly advisable to learn the host-country language as quickly and proficiently as possible, however, this should not be a condition for people wishing to pursue a family life. Language skills are developed more effectively and fruitfully within the respective language-speaking environment.
- Family life should not be subject to wealth and any obligation that may raise financial, organizational, social or personal hardships should be avoided to prevent discrimination.
- Mandatory pre-departure integration measures may delay the capacity for family to reunite and this may lead to a long-term negative impact on the children well-being.

Below, a workshop report on **“Separated families moving across borders: how to make the right to family reunification a reality for third country nationals of the EU?”** held in Brussels on 12 May 2017. The report is the result of a discussion with 30+ stakeholders from civil society and European/National/International organisations from EU Member States. The full programme of the conference “Families on the Move” and the reports from other workshops are available at this page: <http://www.coface-eu.org/consumers/families-on-the-move/>

Separated families moving across borders: how to make the right to family reunification a reality for third country nationals of the EU?

Family reunification is one of the main driver of migration towards the EU and a number of instruments are in place to regulate how families can move and reunite. This workshop aimed to discuss the right to family reunification in the EU. In a first panel, we set the framework with an overview and the state of play of family reunification in the EU, including challenges that families face at national and local level in accessing or finalizing this process. In the second session, the workshop aimed to build on the framework pictured earlier and start to look at the future, discussing about possible actions and key steps that need to be taken in order to ensure that the right to family reunification can be enjoyed across the EU. There were about 25 workshop participants present, from several countries (Belgium, Germany, France, Spain, Ireland, Denmark, The Netherlands, Hungary, ..) and from several backgrounds (civil society, university, public administration, European institutions, research and network of national authorities). All presentations can be found online on www.coface-eu.org

Chairs: Paola Panzeri, COFACE Senior Policy and Advocacy Officer & Anaïs Faure Atger, Head of Unit, Red Cross EU Office

Session 1: “Reality check & State of play”

The right to family reunification: figures and trends in the EU

Thomas Huddleston, Programme Director – Migration Policy Group

Exercising a right: challenges and experiences from the ground.

The German example

Swenja Gerhard – Association of Binational Families and Partnerships, Germany

Family Reunification of Third Country Nationals in the EU: review of National Practices

Samantha Arnold, Researcher – European Migration Network (EMN), Economic and Social Research Institute, Ireland

Session 2: “Actions & next steps”

EU law and policy: the role of the EU Commission and upcoming work on family reunification

Katri Niskanen, Policy officer – DG Migration and Home Affairs, European Commission

EU law and policy: the perspective and role of NGOs

Doris Peschke, Secretary General, CCME and Chair EPAM – European Platform on Asylum and Migration

Family reunion for refugees: recommendations to the EU

Pauline Chaigne, Senior Policy Associate – UNHCR EU Office

The main instrument to regulate family reunification of third country nationals in the EU is [Directive 2003/86/EC](#) on “The right to family reunification”. In 2011, the European Commission launched a public consultation and green paper to investigate the possibility to re-open or amend this Directive. A full session of the [2017 European Migration Forum](#) was also dedicated to this discussion. The respondents to the 2011 consultation clearly stated the necessity not to modify the text of the Directive but emphasized the need to provide guidance for its implementation in Member States. This led to the publication of a set of [guidelines](#) for implementation of the Family Reunification Directive. In 2016, the European Commission announced that there will be a fitness check (REFIT) of legislation on legal channels of migration, to take stock of coherence and efficiency of these instruments. Among the six legal instruments that will be considered, there is the Family Reunification Directive. The [public consultation](#) on the fitness check is open from 19 June 2017 to 18 September 2017.

Session 1: “Reality check & State of play”

Given the number of refugee arrivals since 2015, family reunification should now represent one of the main immigration channels to the EU however current figures remain extremely low compared to projected needs. With this argument Thomas Huddleston (MPG) opened the first session of the workshop and started the discussion on what family reunification is, how it is often presented and perceived and recent trends in national practices and policies. Family reunification is a right and European legislation is in place to facilitate the enjoyment of the right to family life by migrant families, however, it is rarely presented as such in the press or media, where it is often showcased in a negative light, as a “benefit” generously provided by the EU. Moreover, in the current context of migration inflows, family reunification could have a great potential to increase safe, legal migration and reduce the number of people that find themselves with the only choice of crossing borders illegally, risking their lives in the hands of smugglers.

According to Eurostat, permits for family reunification of third country nationals make up for around 30% of all new residence permits. Since 2011 to 2015, over 400.000 first family reunification permits were issued across the EU; of which around half are delivered to children. Recently and despite needs, member states have nonetheless introduced more restrictions on the modalities to enjoy the right to family life with a view to limiting and delaying family reunion.

Taking stock of the situation: the Member States perspective

In 2016, the European Migration Network (EMN) undertook a [study](#) on national practices Family Reunification of Third-Country Nationals in the EU plus Norway, looking at how Member States are implementing the Directive between 2011 and 2015. **Samantha Arnold** (EMN Irish National Contact Point) presented the key results of the study. One of

the main findings is that there is some level of harmonization but interpretation and implementation of the Directive is still varies. The study scope includes all third country nationals (TCNs), including refugees.. Family reunification under the Dublin Regulation fell outside the scope of the study. Among the key findings of the report:

- a number of Member States (AT, BE; DE; FI, IE, ...) recently introduced changes at national legislation level, restricting the possibility to access family reunification. For example, Belgium has introduced an income requirement, and lengthened the processing times, Germany and Sweden have issued temporary orders to limit reunification for beneficiaries of subsidiary protection.

- Sponsors: sponsors are people residing legally in the Member States, including refugees; most MS also extend this to beneficiaries of subsidiary protection, and UAMs are also possible sponsors in most MS.

- eligible family members: the nuclear family members are eligible for family reunification and in a number of MS others are included, including dependent family members. However, in some MS some categories like parents of adults, adult children, same sex partners and non-married partners, and other dependent persons are excluded.

- Material requirements: the report shows that they vary greatly across the EU and may include evidence of adequate accommodation, health insurance and a minimum income.

- refugees: some of these requirements are waived if the applicant for family reunification is a refugee. However, refugees face a number of challenges like the window period in which they can apply for family reunification and the proof of pre-existence of family ties

In the presentations and in the discussion with participants, it emerged clearly that there are challenges for families to access family reunification and increasingly worrying trends that are making the process more difficult, resulting in concrete obstacles. In the discussion, a number of challenges and obstacles were mentioned and they were mainly belonging to two categories: challenges and obstacles at policy and political level, with a restrictive interpretation of the legislation and, secondly, concrete challenges that families face on the ground. These two are inevitably interlinked and cannot be dissociated as they often have a causality link between each other.

Challenges and obstacles at policy level

As mentioned above, the current Directive regulating the right to family reunification, setting standards and showing the direction Member States should follow remains valid and adequate. However, the margin of interpretation for Member States is quite large and used, sometimes, as a political lever to control migration flows.

Among the main challenges at political and policy level that were raised during the discussion and by the presentation of **Thomas Huddleston** and **Swenja Gerhard**:

- the misinterpretation of the spirit of the Directive and its underuse in the current migration policies. Family reunification is a working legal channel but its potential is not exploited enough. Moreover, this is often accompanied by the argument that family reunification will be abused to bring a very high number of people that would rely on EU social security systems. However, as Swenja Gerhard underlined, the current directive requires an minimum income and only people who can afford it are allowed to apply for family reunification.

- discretion in the application of the directive: as shown as well in the recent EMN study, divergences between Member States are still quite high and implementation of the directive

can be quite different from one Member State to another. This creates uncertainty among the potential beneficiaries.

- presence of hidden (practical) obstacles in the directive and a trend to shift from hidden and unexpected obstacles to intentional ones. The provisions included in the directive may in the past have given space for unintended challenges for families in the practice of applications. However, in the recent years, there has been a voluntary choice by some Member States to make family reunification procedures more difficult (increasing waiting periods or shortening times for lodging an application, requesting language tests...). Migration Policy Group is trying to identify these obstacles and if this is the result in some countries of changes into national legislation, in other countries, even if the law has not changed, the procedure have been de facto made more complex (reduced staff or facilities to process applications..) to reduce the number of family reunification applications.

- the European Commission has not launched infringement procedures against Member States. The European Commission published guidelines to assist Member States in the implementation of the family reunification directive but they appear to be underused, and have not prevented a number of Member States from changing their legislation or practice to reduce family reunification. However, according to the [Chakroun case](#) and the logic followed by the CJEU, Member States cannot adopt laws whose aim is that of restricting or reducing the right to family reunification. Yet this is something that the European Commission is not acting upon.

- application of Family reunification directive to person with a status of subsidiary protection and the choice of Member States to grant the subsidiary protection status instead of the status of refugees. Refugees are covered by the family reunification directive and the conditions for their application to family reunification are simplified. On the contrary, persons with a status of subsidiary protection are not explicitly covered, even if they were assimilated, *de facto*, to refugees when applying to family reunification in many Member States. Recently, in some Member States, this practice has been reversing, excluding beneficiaries of subsidiary protection from the simplified rules. This has been coupled with a move towards the choice of channeling people, including from war-torn Syria, into the process of obtaining subsidiary protection instead of refugee status. This has inevitably reduced the possibilities for families to apply for family reunification.

Challenges and obstacles on the grounds

During the discussion a number of examples of challenges and obstacles that families face on the ground were mentioned and discussed. These included:

- language requirements: the need to pass a language test before entering the host country in order to have a language certificate and reunite with the family member in the EU. This gives rise to a lot of issues, especially if applicants are illiterate, have basic literacy skills (sometimes in a different alphabet). Swenja Gerhard pointed out that, additionally, in some States you can only get certificates for German from the Goethe Institute, which is expensive and might require the applicant to move abroad or to a bigger city, causing problems for those applicants with low financial means, with children or other relatives with care needs. Moreover, often the applicant has to pay every time he/she takes an exam. This requirement is expensive, not efficient (languages are learnt best where the learner can practice i.e. in the host country) and time consuming. The German language test was subjected to review at the CJEU and the Court found that language tests could be kept but authorities must apply the hardship clause and apply their demands in a proportionate and flexible manner, therefore if a person has no reasonable avenue to learn the language, he/she does not need to. However, the problem is that the hardship clause is still not applied also because it is very vague and nobody knows what is needed to meet the hardship threshold (how long must the travel to the classes be to qualify as being too long? Etc.).

- Waiting periods for lodging an application and for completing the process by authorities have been extended and used as deterrent and as a political tool, to discourage families to apply for family reunification.

- Access to embassies and information: the approach of many administration is that the information is available online and thus, there is no need to provide it in a more active way to potential beneficiaries. There are however also coordination problems between embassies - embassies face a big problem in facilitating reunification.

- level of income required: sponsors are requested to have a certain level of income to apply for family reunification. However, this level is higher than the one that many families live on. For example, in Finland, the level that is required by Finnish law is such that a parent, living alone in Finland in a decent way, would not be able to benefit from family reunification. If similar criteria were applied to allow national citizens to form a family, many would not be able to fulfil them.

More generally, the participants also underlined the need to take into account the adverse effects of long separations of families on children and to review national legislation and practices to facilitate reunification

Session 2: "Actions & next steps"

The second session of the workshop was meant to build on the discussion held in session 1 and reflect on the future and next steps that are needed to ensure the right to family reunification.

The session started with a presentation by **Katri Niskanen**, from the Directorate General Home Affairs of the European Commission who presented the EU legal framework and the current work of the European Commission on Family Reunification.

The key directive in this policy area is the [2003/86/EC Family Reunification Directive](#) (for and between Third Country Nationals). Another important instrument is the [2004/38/EC freedom of movement and residence Directive](#) which the CJEU has extended to third-country national family members of EU citizens even when they move to an EU Member State directly from a third country.

The essence of the Family Reunification Directive is to guarantee the right to family reunification where certain conditions imposed by the Member State in question are fulfilled. From this perspective, it is very different from other EU legal migration directives because it does not allow for quotas and apart from checking the family tie, it does not oblige Member States to impose any mandatory conditions that must be fulfilled by applicants, making it stand out when compared to all other legal migration directives. On the other hand, it is one of the first generation directives: thus, it has a low level of harmonization, many "may" clauses, some gaps in personal scope and procedurally it was adopted by Council alone (with a vote with unanimity and no EP role but for consultation).

Among the most important case-law, it is relevant to recall:

- 540/03, [EP vs Council and COM](#): the Directive establishes a precise obligation on MS to admit family members, where the sponsor fulfils the conditions;
- 578/08, [Chakroun](#): the "may" clauses must be interpreted strictly, to ensure full application of right to family life.

It is the task of the Commission to ensure the proper implementation of the Directive and there are a number of tools that are used:

- implementation reports: the first one was adopted in 2008 (and it found some aspects where harmonization level is low or implementation is lacking); the second one will come up in the context of the fitness check that will run through 2017-18;
- public consultation: a public consultation was launched in 2011 and a session of the European Integration Forum was dedicated to the topic. Following this wide consultation, the European Commission decided not to reopen the directive but to focus on better implementation, producing a set of guidelines (published in 2014);
- fitness check: there will be a public consultation in the summer 2017 to look back at the lifeline of multiple instruments in order to assess them, retrospectively (with some little forecast) to eventually identify the gaps, inconsistencies, overlaps, ...
- conformity assessment and handling of complaints: these tools can help the European Commission to understand where the problems lie, which leads to contacts with MS but then also possibly infringement proceedings.

The latest round of conformity studies on family reunification was finalized in 2016, and contacts are ongoing between the European Commission and Member States (through the contact group on legal migration, bilateral discussions, the EU pilot system, and potentially infringement procedures).

The other channel for the European Commission to get involved is through individual complaints. However, unfortunately they are often too focused on circumstances of individual cases, while the EU Commission can only address issues which reveal a more general shortcoming in implementation, be it national legislation or its application. In any case, complaints are a good way for the EU Commission to have the pulse of the situation about more general problems encountered on the ground. It has to be noted that this is not a means of redress and the Commission cannot oblige the Member State to issue a residence permit to the complainant, but instead individual appeals must be handled in national courts.

Following this overview of the legal framework and means of the European Commission to monitor the situation, **Doris Peschke**, Chair of European Platform of Asylum and Migration and CCME (Council of Churches for Migration) presented the view of civil society and the role that it has played, and continues playing, in shaping legislation, supporting its implementation and bridging the EU context with the ground.

She started by recalling that the process that led to family reunification directive in 2003 was a good example of consultation with the civil society both as a way to run consultations and because the European Commission truly took into account the views of NGOs and civil society. This is particularly important, especially compared to recent years where there has been no consultation at all.

In 2007 a study on the implementation of the family reunification directive showed that transposition was not complete everywhere, but also that some courts still used the Directive as a standard even where it had not been transposed.

Doris underlined that there are few main misconceptions that should be addressed around the family reunification directive:

- this directive is NOT a migration management tool but it is a tool to enforce a right, the right to family life, and the Directive aims to ensure that right and cannot be used as a tool to manage migration:
- migration figures are currently stable and it would be appropriate for the European Commission to remind Member States these data and that the fearsome views that everyone wants to come to Europe are not grounded
- if family life is a right, it must be accessible. There is a discourse that is used more and more by a number of Member States that if the family can enjoy the right to family life in other countries (e.g. in Turkey, in Lebanon etc.) then they do not need to be granted

reunification in the EU. This is not reasonable, especially since not all these countries are safe or grant the same level of fundamental rights as the EU. Moreover, making a right accessible means as well keeping fees and costs low and for example reducing the fees for visas. However, what is currently happening is the contrary, visa costs are increasing. This happens even if it goes against the CJEU that said that visa fees should be proportionate, and against the directive that states clearly that there should be no hidden costs.

In 2015 there were high hopes for the European Migration Agenda, yet it could not be implemented as foreseen, there has been a need to rush several new proposals concerning the Common European Asylum System. In 2015 there was still an interest to keep legal migration on the agenda, but as of 2016 this is clearly no longer the case.

In terms of consultation of the civil society and other stakeholders, some of the consultations in recent years have either not been launched at all, or have been rushed through (with insufficient time to consult with national members of the networks, who are the one who have the practical and specific expertise). The same happened with the European Migration Forum: until 2013 it has been a good platform and there has been a good cooperation on the guidelines, but this has not been the case recently.

Last speaker of the session, Pauline Chaigne, UNHCR Senior Policy Associate, that presented the particular challenges of family reunification for refugees. Pauline started off with the story of a girl who fled while she was 16 and by the time she arrived in the EU and managed to obtain status, she was 18 and was no longer entitled to ask for family reunification. This is just an example of the fact that for refugees, most of the times, family reunification is the only way to enjoy their right to family life - because they cannot enjoy it in their country of origin, which they fled.

Under the Family Reunification Directive, refugees have some special benefits and advantages (e.g. they do not need to meet some criteria, like the salary thresholds etc.). However, the situation for beneficiaries of subsidiary protection (who include Somalis, Afghans, Syrians) is less clear and if they used to be assimilated to refugees because they were fleeing their countries because of war and persecution, they are now, in a number of Member States excluded from the more beneficial treatment.

Coming back to some of the obstacles mentioned in the previous session, like access to embassies and information, they apply to refugees as well. For example, some Nordic states do not process family reunification applications from Syrians living in Lebanon at their embassies in Lebanon, but applicants have to have to travel to Jordan to apply. However, to travel from Lebanon to Jordan, Syrians need a visa that costs money and adds a layer to the application process, so in the end, many applicant resort to smuggling.

Finally, a number of other issues that should be addressed have been presented:

- the definition of family members to have a more inclusive definition, considering that families take many shapes and forms and people who may need to be reunited may be siblings, same-sex partners with whom the applicant could have not been married in the country of origin, older family members etc..;

- to assist with the costs: there are cases of refugees who have to select which family members to bring in because they do not have money for all of them. E.g. an Eritrean family had to choose to bring in the boy, to avoid him going to military service, but his little sister was left behind because they did not have the money for her;

- there should be common guidelines on establishing family links.