ACADEMIC NETWORK FOR LEGAL STUDIES ON IMMIGRATION AND ASYLUM IN EUROPE

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UN RESEAU FONDE AVEC LE SOUTIEN FINANCIER DU PROGRAMME ODYSSEUS DE LA COMMISSION EUROPEENNE

DIRECTIVE 2003/86/EC ON THE RIGHT TO FAMILY REUNIFICATION SYNTHESIS REPORT

by Henri LABAYLE

&

Yves PASCOUAU

STUDY ON THE "CONFORMITY CHECKING OF THE TRANSPOSITION BY MEMBER STATES OF 10 EC DIRECTIVES IN THE SECTOR OF ASYLUM AND IMMIGRATION" DONE FOR DG JLS OF THE EUROPEAN COMMISSION END 2007(CONTRACT JLS/B4/2006/03)

A Network coordinated by the Institute for European Studies
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of the / de l'Université Libre de Bruxelles

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II. GENERAL INTRODUCTION TO THE STUDY

by

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1. PRESENTATION OF THE STUDY

The study contains different types of reports:

1. Two hundred seventy **National Reports** about the implementation of each of the 10 directives in each of the 27 Member States.

2. Ten **Synthesis Reports** for each of the 10 directives about their implementation in the 27 Member States. The abbreviated names used in the study for the 10 directives concerned by this report are:

- Family reunification
- Long-term residents
- Temporary protection
- Reception conditions
- Victims of trafficking
- Qualification
- Assistance for transit
- Carriers Liability
- Facilitation of unauthorised entry and stay
- Mutual recognition (of expulsion)

Those two kinds of reports are all accompanied by a summary.

Each National report is accompanied by a **National Summary Datasheet**. This Summary underlines the most serious problems related to the transposition of the concerned directive in

the concerned Member State. Moreover, translations of the most problematic national provisions have been included in this National Summary Datasheet as requested by the Commission.

Each Synthesis Report is accompanied by a **Summary Datasheet** which underlines the most important conclusions and the main problems related to the transposition of the concerned Directive in the 27 Member States. It contains also some recommendations addressed to the Commission.

There are also 27 **Executive Summaries** about the implementation of the 10 directives in each of the Member States.

Apart of the reports, the **Tables of Correspondence** are very important tools to check the transposition of the directives by Member States. One table has been prepared about the implementation of each of the 10 directives in each of the 27 Member States. They have been included in each National Summary Datasheet. It gives a precise overview of the transposition of each provision (sometimes even of each sentence) of the concerned directive: the state of transposition (has actually the provision or not been transposed?), the legal situation (in case of transposition, is there or not a legal problem?) and a reference to the national provisions of transposition. Footnotes giving brief explanations have also been included in the tables. The reader who wants to have more information can easily find in column 2 of the tables a reference to the number of the question to consult the national report. Guidelines explain how the national rapporteurs were asked to complete the table and how they had to understand each mention proposed in the table.

The paper version of the reports is accompanied by a website. Apart from an electronic version of all the reports, the website gives also access to the full text of the national rules of transposition.

2. METHODOLOGY OF THE STUDY

The study has been done in the framework of the "*Odysseus" Academic Network for Legal Studies on Immigration and Asylum in Europe* by a very large team of persons organised as following:

1. The 120 national rapporteurs in charge of the national reports and tables in each Member State for one or several directives. A lot of the rapporteurs are

members of the Odysseus Academic Network, but the Network has at this occasion been extended to other persons because of the very large scope of the study and the considerable amount of work to be done;

2. The 27 national coordinators in charge of ensuring progress of the work at national level and responsible for the drafting of the Executive Summary per Member State;

3. The six thematic coordination teams in charge of the synthesis reports per directive:
    - Prof. Kees Groenendijck assisted by Ricky Van Oers, Roel Fernhout and Dominique Van Dam in the Netherlands for Long-term residents as well as by Prof. Cristina Gortazar and Maria-José Castano from Madrid in Spain for certain aspects;
    - Prof. Kay Hailbronner assisted by Markus Peek, Simone Alt, Cordelia Carlitz and Georg Jochum in Germany for Assistance in cases of transit for removal, Mutual recognition of expulsion decisions, Carrier sanctions and Facilitation of unauthorised entry and residence;
    - Prof. Henri Labayle assisted by Yves Pascouau in France for Family reunification;
    - Prof. Gregor Noll assisted by Markus Gunneflo in Sweden for Temporary protection and Residence permits for victims of trafficking;
    - Prof. Thomas Spijkerboer assisted by Hemme Battjes and Bram Van Melle in The Netherlands for the part on Qualification of refugees and subsidiary protection & Prof. Jens Vedsted-Hansen assisted by Jesper Lindholm in Denmark for the part on Rights of refugees and of persons under subsidiary protection.

4. The General Coordination team in charge of the overall coordination, methodology and contacts with the Commission as well as for the update of the synthesis report on reception conditions previously done by the Odysseus Academic Network in 2006. Prof. Philippe De Bruycker based in Belgium was therefore assisted by Laurence De Bauche (researcher), Elona Bokshi (manager of the website and also in charge of gathering national rules of transposition) and Nicole Bosmans (administrative and financial secretariat).

The authors are indicated at the beginning of each report with their email address in order to allow the Commission to contact them easily in case of need. The General Coordinator wants to thank warmly all the persons who were involved in this enormous study for their work and in particular their patience because of the many versions of the reports that we exchanged through thousands of emails.

Four meetings were organised: a kick-off and an intermediate meeting with the general and thematic coordination teams, a meeting with the general coordinator and all the researchers

assisting the thematic coordinators and a final plenary meeting including almost all national rapporteurs were drafts for the synthesis reports have been discussed.

NGOs were asked to contribute on a voluntary basis by completing the questionnaires or at least part of it. The Member States were given the possibility to comment about the draft national reports (without the table of correspondence). We got only a limited number of contributions and reactions.

The Commission has been closely associated to the study. It was in particular consulted at the beginning on the projects for questionnaires and for tables of correspondence.

All member States are covered by the study, including those not bound by several directives upon the request of the Commission which asked to be informed about the developments in those Member States in comparison with Community law. The reports and tables of correspondence have been completed as if those States were bound by the concerned directives.

3. EVALUATION OF THE RESPECT OF COMMUNITY LAW

The study is about the transposition of 10 directives by Member States. More precisely, it covers extensively the legal measures adopted by the Member States to transpose those directives. As the process of transposition was not finished in some Member States, the authors decided to take into consideration the projects of national norms of transposition when they were accessible. It is important to note that those projects have been analysed like if they had been adopted as standing, which means that subsequent changes at national level are not covered by the study. The cut-off date for the national rapporteurs is in general 1st October; later developments have only been taken into consideration whenever possible.

The practical implementation of the directives is covered as much as it has been possible to do so. The study came indeed early as the directives have just or even not yet been transposed, so that implementation by Member States is just starting and in particular that the jurisprudence available was very limited. The fact that no practical problems are mentioned does not mean that there are none, but that the rapporteurs have not been informed of their existence.

Explanations are given in the 10 synthesis reports about the transposition of the concerned directive. Fore the mandatory provisions which have not been transposed or pose a problem, the explanations are followed by boxes listing the Member States in order to help the Commission to draw clear conclusions and make the report easy to read. They have been built upon the basis of the tables of correspondence included in the national summary datasheets for each directive and Member State. The guidelines given to national rapporteurs to assess the situation in their Member State are reproduced with the tables to help the reader to understand the methodology.

Some important remarks about the way the transposition of directives was assessed have to be made. The research team had to find a way between different priorities: firstly and obviously, the jurisprudence of the Court of Justice which has strict requirements regarding legal certainty and is even quite rigid on some points. Secondly, pragmatism which leads to check if the directives are effectively applied in practice with less attention given to certain aspects of pure legal transposition. The coordinators tried to find a reasonable middle way between these two approaches and agreed together with DG JLS upon the following elements:

- Administrative circulars of Member States have been considered as formal means of transposition. As much as they are binding for the administrative agents in charge of individual cases, they indeed ensure that the directive is implemented in practice despite they might not be considered sufficient to fulfil the requirements of the Court of Justice regarding an adequate legal transposition. They are nevertheless mentioned in the tables of correspondence separately from laws and regulations.

- Pre-existing norms of transposition meaning laws, regulations and circulars which were adopted before the concerned directive and so obviously not to ensure its formal transposition, have been considered as a mean of transposition. Their content may indeed reflect the provisions of the directives in internal law. This is not in line with the jurisprudence of the Court which has considered that "legislation in force cannot in any way be regarded as ensuring transposition of the directive, which, in article 23(1), second subparagraph, expressly requires the Member States to adopt provisions containing a reference to that directive or accompanied by such a reference" (Commission v. Germany, Case C-137/96 of 27 November 1997). All the ten directives covered by the study contain such an inter-connexion clause. A rigid application of this jurisprudence to our study would have led us to conclude that there is no transposition even when pre-existing rules ensure the implementation of the directive. In line with the approach of DG JLS to assess not only the formal transposition but also the application in practice of the directives, we have not done so and considered pre-existing national rules as a mean of transposition. They are nevertheless mentioned in the table of correspondence as pre-existing law, regulation or circular not under the item "Yes formally" but "Yes otherwise" together with general principles of internal law which the Court has accepted to consider under certain condition as a mean of transposition (Commission v. Germany, Case C-29/84 of 23 may 1985).

Despite the fact that we agreed with the Commission about these choices, the authors of this study considered necessary to make them explicit as they might seem inadequate from a purely legal point of view. Moreover, they have also decided to present in the tables of correspondence these possibilities separately from the classical ones. The Commission will so be perfectly informed about the situation regarding the transposition of the directives in the Member States. The transparency of the information given in the tables will allow it to take a final position which could depart from the choices done at the beginning of this study.

Finally, the provisions about human rights appearing here and there in the ten directives require some explanations. The obligation for Member States to formally transpose provisions like for instance article 20 §4 of the Qualification directive[1], article 15 §4 of the directive on temporary protection[2] or article 3, §2 of the directive on mutual recognition of expulsion decisions[3], gave raise to long discussions between all the rapporteurs involved in the study. It has been impossible to convince the group of 130 lawyers involved in this study to take a common position about the necessity to transpose or not that kind of provisions. The General Coordinator of this study decided in this context to leave the national rapporteurs free to express their own opinion in their report and table. This means that divergent views might be expressed on the same point by the national rapporteurs. This situation reflects the fact that the lawyers involved in the study face obviously very different situations and react sometimes in relation with the context of their Member State by considering that reminding human rights is either superfluous because they are generally respected, either necessary because they care about possible violations.

From a strictly legal point of view, it appears that all the provisions cannot be considered in the same way. Some articles have an added value and are more than repetitions of human rights provisions, like article 10 of the directive on permits for victims of trafficking which after a first clause on the best interests of the child requires specifically an adaptation of the procedure and of the reflection period to the child, or article 17 of the directive on family reunification which refers to the jurisprudence of the European Court of Human Rights on the right to family life and specifies its scope. Others may be considered as redundant with international treaties like article 20 §4 of the Qualification directive or article 15 §4 of the directive on temporary protection. One may consider superfluous to transpose such a provision in the case of Member States which have ratified the Convention on the right of the child and ensure its implementation, for instance by recognising it a direct effect. More in general it appears that references to human rights in secondary legislation require more attention and that their legal value needs to be clarified (see recommendation on this point below).

[1] « *The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this chapter that involve minors* ».
[2] « *When applying this article, the Member States shall take into consideration the best interests of the child* ».
[3] « *Member States shall apply this directive with due respect for human rights and fundamental freedoms*».

4. RECOMMENDATIONS ABOUT THE EVALUATION OF THE IMPLEMENTATION OF DIRECTIVES

This part contains some general recommendations to the Commission about the way of checking transposition of directives by Member States (specific recommendations about the 10 directives are included in the Summary Datasheet of each synthesis report per directive). The following three recommendations are based on the experience acquired during this study covering 10 directives in 27 Member States.

- **Oblige the EU institutions to include tables of correspondence in the final provisions of any directive adopted**

It is clear that the method of checking the implementation of directives still needs to be improved. The increase of the number of Member States and of working languages makes it more and more difficult to check seriously the way they are legally transposed.

There is an absolute need to request the Member States to prepare a table of correspondence (also called concordance or correlation tables) indicating the national norms of transposition for each provision of a directive. The Member States which have prepared the transposition are the best authority to identify precisely these norms of transposition. Leaving it to the Commission or asking external experts to do this part of the job can be considered to large extend as a waste of time and resources. The Member States should be asked only to indicate the rules of transposition and of course not to evaluate its correctness. Even the NIF electronic database of the Commission used by the Member States to notify the rules of transposition is therefore not sufficient. It does not indicate precisely the national norm of transposition for each provision of the directives which might remain difficult to identify in very long national rules. Moreover, Member States send sometimes not only the norms of transposition as some directives require them to communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by the directive. If such a more or less standard provision has been included to allow the Commission to understand the general context of the transposition, it makes the search of the precise norm of transposition more difficult as some Member States transmit a lot of texts.

Remarkably, only one of the 10 directives under analysis contains a provision obliging the Member States to prepare a table of correspondence: following article 4 §2 of the directive on the facilitation of unauthorised entry, transit and residence, "*The Member States shall communicate to the Commission the text of the main provisions of their national law which they adopt in the field covered by this directive**, together with a table showing how the provisions of this directive correspond to the national provisions adopted.** The Commission shall inform the other Member States thereof*". The reasons explaining why only this directive

contains such a requirement are not clear. This directive is the result of a State initiative, namely France. The other instruments proposed during the same period by France regarding carrier sanctions and mutual recognition of expulsion decisions do not contain such a clause. The same is true for the Commission's proposals at the origin of the other directives analysed.

There is a strong and urgent need to request such a table from Member States when they transpose a directive. The Commission should intensify its efforts undertaken since five years so that the European institutions are obliged to include such a clause in any directive adopted as envisaged in its Communication on "A Europe for results: applying Community law"[4].

- **Have a more in-depth debate about the choice of the right instrument instead of favouring directives**

A reflection on the type of instruments of secondary law to be used could also be fruitful. For instance, it seems that a Council decision would have been more appropriate than a directive to regulate the issue of assistance in cases of transit for the purposes of removal by air.

More important, directives should not be automatically chosen for reasons of subsidiarity or proportionality. One may wonder if they are not good reasons for choosing in certain cases a regulation instead of a directive, for example for the qualification of refugees and persons under subsidiary protection in order to ensure a more consistent implementation of the definitions of persons to be protected in the EU by the Member States.

- **Clarify the sense of including human rights references in secondary legislation in view of the future binding effect of the EU Charter on human rights**

As underlined above, many references to human rights have been included in directives adopted in the field of immigration and asylum. Their legal value is doubtful when they only repeat or refer to International or European provisions on human rights. As they may create long discussions during the transposition process by Member States about their need to be transposed and can even create confusion about the precise origin of the concerned human right, they could be omitted and included if relevant in the preamble of the instrument. The need to clarify this point will increase with the entry into force of the new Lisbon Treaty transforming the EU Charter of human rights into a legally binding instrument.

[4] COM(2007)502 of 5 Septembre 2007.

III. METHODOLOGY OF THE STUDY

- Many questions of the synthesis report are accompanied by colored tables. They reflect the answers given by national rapporteurs in their own national report. Green boxes mean the answer to the question is YES. Red boxes mean the answer to the question is NO. White boxes mean that the rapporteur did not answer to the question. Red colour does not necessarily indicate there is a violation of the obligation to transpose the directive. This depends on the sense of the question. For instance, question 19 asks if integration tests have been introduced into national law. The answer is NON and the table is colored in red. In other words, tables show the answers given by the rapporteur without necessarily taking into consideration the obligation to transpose the directive. This assessment is carried out in the synthesis itself following the tables.

- Questions and tables are followed with mentions: mandatory provision, optional provision and specific provisions. These mentions are based on the requirements set by the directive and the framework adopted for the table of correspondence.

  Mandatory provision corresponds to a compulsory provision enshrined in the directive that has to be transposed by Member States.

  Optional provision indicates the directive leaves margin of maneuver to the Member States to transpose or not the concerned provision into national law.

  Specific provision concerns provisions of the directive which allow Member State to derogate from the general rule but within the limits set by the directive.

- The transposition process has been completed in all Member State except for Luxembourg. The assessment of the position of this State regarding the requirements of the directive is based on a project of law published in November 2007.

IV. SUMMARY DATASHEET AND RECOMMENDATIONS

1. MEMBER STATES COVERED AND NOT COVERED BY THE SYNTHESIS REPORT

The 27 Member States are covered by the report.

2. MEMBER STATES BOUND AND NOT BOUND BY THE DIRECTIVE

24 Member states are bound by the directive: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden.

3 Member states are not bound by the directive: Denmark, Ireland, United Kingdom

3. STATE OF TRANSPOSITION OF THE DIRECTIVE

Number of Member States which have transposed the directive (meaning the norm of transposition has been adopted even if it is not yet into force; choose this solution even in case of partial transposition but explain very briefly what is still missing if it is interesting) : ***23***

Number of Member States which have NOT AT ALL transposed the Directive (meaning even no project of transposition is known) : ***0***

Number of Member States where the process of transposition is pending (meaning there is project of transposition but it is not yet adopted) : ***1***

Please check that the total number is equivalent to 27, unless some Member States are not bound by the directive which you have in case to indicate in the table below or some Member States are not covered by your synthesis report.

MEMBER STATES	STATE OF TRANSPOSITION
AUSTRIA	- TRANSPOSED
BELGIUM	- TRANSPOSED
BULGARIA	- TRANSPOSED
CYPRUS	- TRANSPOSED
CZECH REPUBLIC	- TRANSPOSED
DENMARK	- NOT BOUND BY THE DIRECTIVE
ESTONIA	- TRANSPOSED
FINLAND	- TRANSPOSED
FRANCE	- TRANSPOSED
GERMANY	- TRANSPOSED
GREECE	- TRANSPOSED
HUNGARY	- TRANSPOSED
IRELAND	- NOT BOUND BY THE DIRECTIVE
ITALY	- TRANSPOSED
LATVIA	- TRANSPOSED
LITUANIA	- TRANSPOSED
LUXEMBOURG	- IN PROCESS OF BEING TRANSPOSED
MALTA	- TRANSPOSED
NETHERLANDS	- TRANSPOSED
POLAND	- TRANSPOSED
PORTUGAL	- TRANSPOSED
ROMANIA	- TRANSPOSED
SLOVAKIA	- TRANSPOSED
SLOVENIA	- TRANSPOSED
SPAIN	- TRANSPOSED
SWEDEN	- TRANSPOSED
UK	- NOT BOUND BY THE DIRECTIVE

4. TYPES OF TRANSPOSITION OF THE DIRECTIVE

The transposition of the family reunification directive did not raise many difficulties regarding the types of transposition of the directive. In fact, and as laid down in the synthesis report, the oldness of preoccupations relating to family reunification has been expressed in national law for a long time or in the case of new Member States the transposition process has been almost mechanical. National rules were already applicable to the matter in most Member States way before the intervention of the directive. In a lot of cases, this precedence of national law is presented as complying with the obligations inferred from the directive, but is actually only a statement of the compatibility of national law with this directive. Furthermore, this compatibility is all the easier to establish as the negotiation of the text was difficult and led to a rule with a low binding force. It did not require important adaptations of national laws, especially since the most controversial measures are submitted to optional provisions.

Following this statement, it appears that every Member State bound by the directive has adopted a legal frame to transpose it or had previous rules in their national legal order dealing with this issue.

One Member State (Luxembourg) still in the process of transposition of the directive on the basis of a bill presented in November 2007. As a consequence, every Member State as adopted either legislative or regulatory measures relating to family reunification. Circulars have only been adopted to clarify the implementation of these rules.

5. EVALUATION OF THE NUMBER OF PROBLEMS (QUANTITATIVE approach based on the national tables of correspondence and not related to the seriousness of the problems)

The low binding effect of the directive on the right to family reunification commands the quantitative evaluation. On the basis of the mandatory provisions listed in the table of correspondence it appears clearly that problems of transposition are very few.

On the basis of 30 mandatory provisions, three series of Members State can be designated. In the first place, those mentioning they have transposed all the provisions (5). Then, a set of Member State (15) within which between 1 to 3 mandatory provisions have not been transposed, less than 10 % of these provisions. Finally, four tables of correspondence show that Member States did not transposed more than three mandatory provisions listed in the tables. Two Member States have not transposed 4 mandatory provisions, 1 Member State did not transposed 5 of those provisions and in a last one 7 measures of transposition are missing provisions. It means that this latter did not take implementing measure regarding 20 % of the mandatory provisions of the directive. Among the States which have not transposed some provisions of the directive, in six of them this failure is overcome by one practice. It should be pointed out that this evaluation does not give any information about the effectiveness of the practice regarding the compliance vis-à-vis the rules which are not transposed.

The rate of legal problem is also relatively low except for two Member States which indicate 6 legal problems arising from the transposition of the directive by national rules. Taking into account that one of them is the one which did not transposed 7 mandatory provisions, this Member State creates on a quantitative assessment doubt about the effectiveness of the transposition process. While three tables of correspondence highlight four legal problems, fourteen of them show there is only either one (7) or none (7) legal problem due to the transposition of the directive. Finally, in five Member states legal problems arising in this respect are comprise between 2 (1) and 3 (4). As for practical problems of implementation, half of the tables of correspondence (14) do not mention any of them. For the others, these problems vary between one (4 MS) and five (1) practical problems, while five tables identify 2 or 3 problem of this kind.

6. EVALUATION OF THE SERIOUSNESS OF PROBLEMS (QUALITATIVE approach based on the national summary datasheets and VERTICAL approach as it envisages the situation per Member State)

Non transposition of mandatory provisions of the directive appears to be a serious problem. This is so when the provisions concerned intend to enhance the protection of persons targeted by the directive. In that sense non transposition or insufficient transposition of article 5 § 5 of the directive relating to the best interest of the child must be highlighted. This is particularly the case in Austria, Lithuania and the Netherlands. It should also be pointed out that in Bulgaria, this protection only applies to refugees.

On a similar point of view, transposition of article 17 of the directive creates at lot of problems into the Member states. From situations were this provisions is considered not being transposed (Belgium, Czech Republic, Estonia, Hungary, Poland, Spain) to Member states where it is partially transposed (Lithuania, Netherlands, Romania, Slovakia) the protection awarded by the directive is not granted to family members.

The issuance of an autonomous residence permit pursuant to article 15 of the directive is not transposed (Bulgaria) or not completely implemented in a series of Member States. If the wording of the directive leads to a problem of interpretation from the Maltese point of view or is longer than five years in Hungary, the provision is not transposed in Italy where the issuance of an autonomous permit is not subject to a specific temporary deadline, but upon occurrence of specific circumstances. As a consequence in the event that these circumstances do not occur, the family member will not be issued an autonomous permit of stay. A similar situation takes place in Estonia where autonomous residence permit for a family member is not explicitly granted. In practice the person can apply for a separate residence permit under general rules of Aliens Act or rules on asylum but it is not in compliance with the directive intentions. In Finland, the issuance of the autonomous residence permit does not constitute a right but relies on a may clause.

Concerning the issue of non transposition of the directive's provisions and regarding specific Member States, Malta has not transposed a series of articles of the directive upon which

concerns regarding non transposition of article 12, paragraph 1, should be seriously taken into account. The same situation applies in Romania.

In Hungary, the provisions laid down in article 6 § 2 second indent of the directive are not transposed, neither those relating to article 17.

On issues relating to refugees, the Dutch situation must be highlighted. Dutch authorities make a distinction between family members of refugees and apply an income requirement when family members have a different nationality from the refugee. Other problems of compatibility arise from the Dutch legislation. One concerns the breaching of the stand still clause enshrined in article 4 § 1 of the directive relating to integration conditions for children over 12 years of age. The second deals with rules transposing article 7 §2 organize integration conditions that go further than the scope set up by the directive.

Concerning article 4 of the directive, Bulgarian law raises concerns regarding the margin of discretion given to national authorities when assessing the right to family reunification. In this country, the right to family reunification is awarded to long term residents while it is still upon the authorities' discretion regarding third country nationals. In this regards, the leeway organised by national law may hamper critically the right to family reunification recognized by the directive.

On the issue relating to visa facilitation, two Member States (Austria and Netherlands) do not give any particular facility in this regards. The second one, introduces an extra requirement since an application for a visa will be denied if it is applied in another country than the country of origin or permanent residence.

Concerning practical problems of implementation, accommodation conditions asked by Austrian law are doubtful as these conditions have to be met before the entry of the family and create an important financial burden upon the sponsor.

7. TYPES OF PROBLEMS (HORIZONTAL approach throughout all the Member States)

The low harmonizing effect of the directive does not lead to identify many common problems between the Member States when implementing the directive. However, some issues can be put forward as raising problems of transposition or implementation shared by Member States.

This is firstly the case concerning the implementation of provisions on the best interest of the child where some Member States did not properly implement article 5 § 5 of the directive. This provision also raises the question of whether a transposition rule is necessary as long as Member State have ratified the UN convention on the rights of the child. The assessment given into the synthesis report lays on the idea that formal transposition is not necessary in that case so far the UN convention has direct effect in the Member States concerned, which is not the case for instance in the Netherlands according to a statement from the Dutch Council of State.

Article 17 of the directive has also raised many problems in a series of Member States as the rules encompassed by this provision have been partially transposed and more particularly in considering the admission situation. Moreover, it appears that tacking into consideration the implementation of the requirements set up by article 8 of the ECHR and its jurisprudence could be sufficient to overcome this situation and to comply with the directive's obligations. In that sense, this situation does not obligatory lead to a formal transposition of this provision of the directive.

On a material point of view, provisions relating to autonomous residence permit are not clearly implemented by several member states. Another problem comes out from the rules applicable to family members of refugees as they are in some States obliged to comply with conditions before being able to benefit from the right to family reunification. Furthermore, some specific problems may come up regarding children and adopted children.

8. IMPACT OF THE DIRECTIVE ON THE MEMBER STATES

A. Regarding the evolution of national law before and after the transposition of the directive (see the first colon of the table proposed for answering in the questionnaire); list in particular the cases of "perverse effects" when the directive has been used to lower the national standards despite the fact it was not mandatory to do so) :

The "perverse effect" of the directive has been identified in six Member States: Belgium, France, Lithuania, the Netherlands, Slovenia and Spain.

- In Belgium, this aggravation results from the introduction of accommodation and income requirements, as well as from the rule according to which the residence permit obtained on the grounds of family reunification is temporary during three years, during which controls can be operated, whereas it was previously definitive after a maximum of 15 months. That also results from the increase in the condition in age for the husbands at 21 years (18 years front) and in introduction a waiting period of two years for non married couples.

- In France, by extending from one year to 18 months the duration of the initial necessary residence to claim for family reunification, or by extending from two to three years the period during which the spouse's residence permit can be withdrawn in case of breakdown of the communal life, the legislator made national provisions stricter. Moreover, another condition was added concerning the spouse who now must be at least 18 years old when the application is made, and the resources and accommodation requirements were hardened as well. The questions relating to integration measures were also made stricter especially on a linguistic point of view. The use of Community rules to legitimate the strengthening of family reunification

conditions was clear when adopting the law if November 2007 concerning the introduction into French law of DNA tests for family members.

- In Lithuania, the minimum age for marriage went from 18 years old to 21. As well as a 2 years waiting period before an application can be submitted was introduced. In the Netherlands, three important modifications have the same effect. The implementation decree of the directive first raised the age to authorise family formation from 18 years to 21 years. Then it raised the resources requirement for some people. Finally, the introduction of integration tests in the country of origin was also adopted on this occasion.

- In Slovenia, before the transposition, there was no waiting period defined for the right to family reunification; the sponsor could apply for family reunification with his or her family members immediately after he or she began residing in the Republic of Slovenia and regardless of the temporal validity of his or her residence permit. Now the right to family reunification is only accessible to those foreigners who have already resided in Slovenia for at least one year and who have a residence permit valid for at least another year.

- In Spain, new reforms impose a personal introduction of the sponsor when he/she applies for family reunification. They also impose a similar obligation to the members of the family before the consulates or embassies in order to apply for a visa, save for derogation cases. Besides, the law of 2003 cancelled the possibility of visa exemption for aliens on the Spanish territory, which was envisaged for humanitarian reasons or in case of collaboration with Justice. Lastly, the requisite conditions for reunification of relatives in ascending line were made stricter.

- On the contrary, in Estonia, it can be noted that the directive notably improves the applicant's situation. Before the persons could wait 5 years for family reunification; now if the person has resided in Estonia for two years he can apply for the reunification.

Generally speaking, the impact of the directive on national law has not been of major importance. Besides Member States that had introduced new rules into their national legal system (especially Cyprus, Greece, Malta, Romania), the transposition has mainly benefit to new member states. Other States did not significantly modify their national rules and have mainly adapted existing rules to comply with some provisions of the directive.

B. Regarding the content of national law in comparison with the standard of the directive, indicate if there are or not a lot of cases of "more favourable provisions" in your national law (see the second colon of the table proposed for answering in the questionnaire; thanks for listing in your answer the most important examples) :

The impact of the transposition on national laws must be assessed on the basis of the low harmonizing trend of the directive. If four Member States have adopted a new set of rules in

this matter (Cyprus, Greece, Malta, Romania) and therefore apply more favorable rules than the previous ones, the impact is not so significant. This is especially the case regarding the question of the best interest of the child, where national rules are more favorable for only 6 Member States. A similar assessment should be drawn concerning the limitation of reunification of minor children of 12 and 15 years of age enhanced in 5 Member States or in respect of integration measures.

Anyway, it must be underlined that the transposition of the directive made the rules related to margins of maneuver awarded to Member States become from the point of view of the third-country national concerned more favorable regarding the evolution of national law in 12 Member States.

As a conclusion, the directive did not have a strong influence upon Member States legislations. These latter were already and mainly in line with the main requirements of the directive as this legal instrument did not aim at giving a whole legal framework to the issue, taking into account the process of implementation as well as the unanimity voting process which led to a low binding instrument.

9. RECOMMANDATIONS TO THE EUROPEAN COMMISSION

The low legislative harmonizing effect of the transposition process of directive 2003/86 is explained by the existence of former national rules related to family reunification in a majority of Member States and also by the existence of an important international framework, namely the UN convention on the Rights of the Child or the jurisprudence of the European Court of Human Rights.

The added value that Community law could bring to the issue of family reunification should be firstly based on the more coherent technical approach: to rationalize the game of optional and specific provisions of the directive is a priority. This could be all the easiest to achieve as, when looking to the reports, Member States did not make use of these provisions as much as it could have been feared.

It is only on a second step that it could be useful to improve material coherence and more particularly regarding reunification conditions: the obstacle raised by the financial burden of these conditions is without any doubt a concern.

Finally, concerns regarding the rights of the child call for an in-depth harmonization in this field.

10. ANY OTHER INTERESTING PARTICULARITY TO BE MENTIONED ABOUT THE TRANSPOSITION AND THE IMPLEMEMTNATION OF THE DIRECTIVE IN THE MEMBER STATES

V. EUROPEAN SYNTHESIS OF THE NATIONAL REPORTS

1. NATIONAL LEGAL BASIS AND COMPETENT AUTHORITIES

1.1. Norms of Transposition

Q.1.A and 1.B. Identify the MAIN norm(s) of transposition and indicate its legal nature

A. Facts

The legal provisions applicable to family reunification are more difficult to identify in Member States' law than other rules, such as the rules related to asylum. National provisions on family reunification either trivialise or individualise these rules.

The trivialisation leads to include the issue of family reunification in more specific rules, such as refugee law. Individualization of family reunification rules is connected to the weight of migration flows for family reasons, as it is the case in France or the Netherlands.

The legal situation, implementation-wise, is rather divided and several tendencies can be observed.

- In first place, three Member States are not bound by the directive. Therefore, the compatibility of their law with directive 2003/86 cannot be assessed *per se*: Denmark, Ireland, and the United Kingdom.

- Moreover, the oldness of preoccupations relating to family reunification has been expressed in national law for a long time. National rules were already applicable to the matter in most Member States way before the intervention of the directive. In a lot of cases, this precedence of national law is presented as complying with the obligations inferred from the directive. This leads to a statement of compatibility of national law with the directive rather than an evaluation of a real transposition process. This compatibility is all the easier to establish as the negotiation of the text was difficult and led to a rule with a low binding force. It did not require important adaptations of national laws, especially since the most controversial measures are submitted to optional provisions. Therefore not making use of these options created by the text was enough for disagreeing States. Then, the term "implementation" must be given a wide signification.

- For instance, Slovenia introduced as a transposition norm a statute from 2001 that was later modified. Still as an example, the whole French legislation relating to family reunion was built independently from directive 2003/86, including when it was under elaboration or adopted. Today the directive is only invoked by the French authorities to harden existing national provisions appraised as being too liberal. The theme of integration measures of article 7§2 illustrates this tendency. A last example lies in the Spanish case where a real transposition process has not been initiated but the government assumes the compatibility of the Spanish legislation with the directive.

The case of Bulgaria is a caricature on that point as the “implementation” took place before the adoption of the directive according to the national report which states "Transposition in the sense of issuing new regulations with a view of transposing Council Directive 2003/86/ EC of September 2003 on the right to family reunification (henceforth: the directive) has not taken place. Transposition in the sense of correspondence between the goals and the principles of the directive and the norms of domestic law aiming at achieving them exists. However, the main sources of law on the right to family reunification contain explicit references to the directive. In general, transposition would rarely take the form of a single norm transposing the directive into Bulgarian law. Usually the main elements of a directive would become incorporated into the relevant law, decree, or ordinance after amendment".

- These statements do not prevent a majority of Member States (18) from initiating a real transposition process, as in Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, the Federal Republic of Germany, Greece, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden.

  Four Member States proceeded to the implementation of the directive by adopting legislative rules (Finland) or regulations (Italy, Malta, Netherlands) specifically dedicated to this operation.

- Lastly, the current character of pressures relating to immigration for familial reasons is added to the obligation of transposition, which obviously destabilizes national legislations. In four Member States, the legislative process aiming directly or not to implement the directive was recently achieved (Malta, Portugal, and the Federal Republic of Germany) or is under achievement (Luxemburg) while France modified its legislation on November 20th, 2007. The respect of the directive rules can be checked, be it through references made about it during the elaboration process (France, Portugal) or the explicit reminder of the directive's authority by a circular of September 29th, 2005 from the ministry of Home Affairs in Germany, before the formal transposition was made in August 2007.

The diversity of national legal orders gets complicated with the successive adoption of norms in time. The chart of national norms of transposition or dedicated to comply with the directive is much contrasted. Legislative or regulatory norms are mixed. The survey also highlights the relative importance of jurisprudence, including the impact of article 8 ECHR.

CHRONOLOGICAL CHART OF IMPLEMENTATION

2002	2003	2004	2005	2006	2007

BG : 31.05	**ES** : 20.11 **FR** : 26.11	**EE** : 14.04 **LT** : 29.04 **DE** : 30.07 **NL** : 29.09	**PL** : 22.04 **AT** : 16.08 **CZ** : 23.09 **SE** : 25.09 **SI** : 29.09 **SK** : 8.11 **EE** : 14.12	**EE** : 19.04 **FI** : 19.05 **LV** : 16.06 **EL** : 13.07 **FR** : 24.7 **BE** : 15.09 **LV** : 24.11	**HU** : 5.01 **IT** : 8.01 **CY** : 8.01 **RO** : 13.03 **MT** : 5.06 **PT** : 04.07 **DE** : 19.08 **FR** : 22.11

***LU** submitted a draft bill on November 7th, 2007.*
***DK, IRL, UK** : not bound.*

B. Present situation

The assessment of the situation in Member States allows drawing up an apparently satisfying balance sheet quantity-wise if not quality-wise.

- Directive 2003/86 is implemented in almost every Member States by legislative way and is followed by the adoption of regulatory application measures. This is also the case in Italy where a legislative decree was adopted to transpose the directive. Notwithstanding its name, this instrument has a legislative nature. However, five Member States contented themselves with the legislative frame (Cyprus, Czech Republic, Poland, Portugal and Slovakia). Bulgaria does not mention any particular application text of its law of May 31st, 2002. Four Member States (France, Netherlands, Spain, Sweden) have a whole legal corpus (legislative, regulatory, administrative) while two member States seem to content themselves with the first two levels without mentioning circulars or specific instructions to the subject, made to facilitate the application of the texts (Hungary, Romania).

- However, three Member States content themselves with the mere regulatory way in order to implement the directive. In Greece, part of the problem of family reunification is dealt with in a law of 2005 about entry, residence and integration of third country nationals but the main transposition measure of the directive is part of a presidential decree, adopted in 2006, relating to the harmonisation of national law with directive 2003/86. All the provisions of this presidential decree concern the right to family reunification. In the Netherlands, it is the same. The legal frame applicable to immigration is constituted by a law of November 23rd, 2000 on aliens and an application decree from the same day. On the other hand, the implementation of the directive relating to the right to family reunion was made through a decree of September 2004, modifying the application decree of November 23rd, 2000, entered into force on November 1st, 2004. A similar situation is applicable to Malta, which transposed the directive through a regulation of June 5th, 2007.

- In three Member States, a mere legislative norm is enough, sometimes clarified by a circular. Three Member States are in line with this position with different motivations. The simplicity is a first explanation. Finland adopted this way a particularly simple

legal frame composed of a law relating to aliens adopted in 2004 and modified by a law of 2006 entirely dedicated to the implementation of the directive. Two circulars adopted later frame the application of this purview. In Lithuania, the law on aliens adopted on April 29th, 2004, amended in November 2006, deals with family reunification and it is completed by several provisions equivalent to circulars or instructions ("orders" from the ministry of Interior).

The Federal Republic of Germany chose to proceed in the same way for different reasons: the law of July 30th, 2004 is followed by a circular of 2005 adopted by the minister for Home Affairs and aiming at preventing any violation of the directive, as a law was being adopted to implement the directive. The Federal Republic of Germany has adopted an Act on transposition of EU directive the 19th august 2007.

- Lastly, while family reunification characteristically made its legal appearance through national and European (ECHR) case law, the recent character of the directive has not or barely led to jurisprudential applications yet (Austria, Netherlands, Federal Republic of Germany, and Sweden).

Norms necessary to an effective implementation of the right to family reunification must be highlighted In a lot of Member States (Czech Republic, Finland, Federal Republic of Germany, Hungary, Latvia, Poland, Slovakia, Spain, Sweden), this variety of the norms essential to an effective implementation clearly appears.

The peculiarity of national constitutional situations then leads to ascertain that the application of the directive can sometimes receive varied answers in a Member State, as in Spain, for instance, where the rules applicable in terms of free union are adopted by the autonomous communities.

Q.4. A. and B. Has the <u>main</u> regulation <u>foreseen</u> explicitly by the main norm of transposition already been adopted or not (in other words, has the application decree foresee, by the law been adopted?) If the main norm(s) of transposition foresees the adoption of one or several regulations, indicate if they have all been adopted.

Once the situations of the three countries not bound by the directive (Denmark, Ireland, United Kingdom) are put aside, several options are possible:

- Three Member States fully implemented through the legislative process (Finland, Greece, Sweden) and simple administrative measures or instructions completed the text, as the case of Finland perfectly illustrates. That was the case of Germany before the directive was transposed in August 2007.

- A small majority of Member States adopted the necessary application measures in a more complete normative process. There are ten of them: Austria, Estonia, France, Hungary, Latvia, Netherlands, Poland, Romania, Slovakia, and Spain. Two other Member States state the adoption of the main measures but also mention the necessity of an update (Lithuania) or of a termination of the normative execution phase (Belgium).

- Six Member States have not adopted the main application measure (Cyprus, Federal Republic of Germany, Italy, Malta, Portugal, and Slovakia). If the case of Slovakia does not call for particular comments, the main reason for the absence of execution rules in the other Member States mainly lays in the recent character of these transposition norms. In the case of Italy, for example, the legislative decree of application of the directive expressly provides that six months after its adoption, a regulation must be adopted in order to integrate and apply the provisions it contains. Regarding Luxembourg, as this Member State is currently adopting the legislation to transpose the directive, no executive measure is therefore adopted for the moment. In Malta, the transposition was operated through a regulatory act that was not followed by execution measures.

1.2. Situation in federal or assimilated Members States

Q.2.A. and B. Explain which level of government is competent to adopt the norms of transposition. In case, explain if the federal structure and the distribution of competences between the different levels pose any problem or difficulty regarding the transposition and/or the implementation of the directive.

In the States with a federal structure or an extremely advanced decentralisation (Austria, Belgium, Federal Republic of Germany, Italy, Slovenia, Spain) the rules relating to immigration come within the exclusive competence of the federal or central organs. It is clearly the case in Belgium as the matter of access to the territory, residence, establishment, and removal of aliens is a federal competence so that there is no legislation from the components.

The application measures also come within the competence of central organs, such as the ministry of Home Affairs. It is the same for circulars and instructions adopted by central organs. However, when it comes to the internal repartition of competences, federated entities, according to their competence of execution of laws and regulations can adopt administrative instructions, as in Federal Republic of Germany. These can only concern the application of these rules within the components to the extent that the Constitution of the Member State provides that general administrative instructions fall under the competence of the federal government.

However, this presence of the central authorities is not exclusive. Thus it can interestingly be noted that in Austria, federated entities can be given proposition power in the determination of quotas fixed annually by the central power. In a different state of mind, the fact that in Spain the rules relating to family fall under the competence of autonomous communities could have direct consequences on the definition of the notion of family according to each autonomous community, which haven't been the case until now. Lastly, in Italy, regions detain a competence concerning the rules relating to hosting and social services, although they remain within the frame determined by the legislation. This distribution of powers does not lead to interferences between the levels of decision, but can create differences of treatment

between regions themselves – even in terms of hosting and/or social assistance of the alien's family.

On the other hand, it does not seem that the peculiarities of the Member States' constitutional organisation had a consequence on the implementation of directive 2003/86.

1.3. Implementing Authorities

Q.3. Explain which authorities are competent for the practical implementation of the norm of transposition by taking the decisions in individual cases.

- Migratory questions fall under the responsibility of the ministry of Home Affairs in almost every Member State : Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Federal Republic of Germany, Finland, France, Greece, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia. This ministry can be attributed particularly wide prerogatives as in Denmark or France. In the first State, this ministry exerts its competence on refugees, immigration and integration while in France, a real ministerial reorganization is taking place, in order to create a new immigration, integration, national identity and co-development ministry, dealing with all the immigration questions.

- On the contrary, in four Member States, the management of these questions belongs to the ministry of Justice (Ireland, Hungary, Netherlands, and Sweden). In Malta, these questions belong to the ministry of Justice and Home Affairs and in Spain to the ministry of Labour and Social Affairs. In Luxembourg, the competent Ministry is the Ministry of Foreign Affairs and Immigration.

- In several Member States, the role of the minister of foreign affairs is not neutral, notably concerning the policy on visas and because of its responsibility regarding diplomatic and consular missions in charge of issuing them (Bulgaria, Czech Republic, Federal Republic of Germany, Hungary, Netherlands, Slovakia). This assessment would prove if necessary that family reunification cannot exclusively be organised around the questions of entry and residence of third country nationals. Other ministries are associated to the implementation of this area of immigration policy, particularly about policies on access to the employment market, access to education or social integration of the concerned persons (Austria, Czech Republic, Ireland, Slovakia and Spain).

The application of rules in terms of immigration is made according to the territorial division of the Member States. Thus, these administrative authorities exert their competences on the regional level (Czech Republic, Greece, Hungary, Poland) or departmental (France and Romania). The local or communal level can also be used as a frame for the immigration policy, either because the communes notify decisions and issue residence permits (Belgium), or because the municipal police (Finland, Italy) or local Departments of the Alien Police (Slovakia, Slovenia) are in charge of issuing residence permits. In Austria, governors are responsible for the execution of the policy under the supervision of the Ministry of Home

Affairs (mediate federal administration) but they can ask district or municipal authorities to act in their name, within the exercise of this responsibility. It underlines that in the exercise of these functions, authorities remain bound by the instructions of the ministry of Home Affairs.

2. ANALYSIS OF THE CONTENT OF THE NORMS OF TRANSPOSITION

2.1. General provisions:

2.1.1. Existence of a right to family reunification

Q.5. Is family reunification considered as a right in the Member State?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Directive 2003/86 consecrates the existence of a right to family reunification in the Member States of the European Union, as its wording points out, of which it determines the scope and the application modalities. Its first article reports that: "*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*".

The existence of this right is expressly confirmed by the Court of Justice in its case C-540/03. After having recalled the legal grounds of the right to lead a normal family life, the Court states in its paragraphs 59 and 60: "*these various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification...Going beyond those provisions, 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"*.

The identification of these "subjective rights" in national law is thus an indicator of the compatibility of national legislations with the directive's aims such as defined in its first article. This indicator must be assessed while keeping in mind the numerous requirements surrounding these subjective rights, in conformity with the Court's case law.

- Family reunification is considered as a right in almost every Member State, in the sense understood by the Court of justice. Slovakia goes further in that sense as article 19 of its Constitution points out that everyone shall have the right to be free from unjustified interference in his or her privacy and family life. On the contrary, in the United Kingdom, this qualification depends on the value granted to the rules on

immigration law. The 'right' to family reunification derives from the UK Immigration Rules. There is debate about the exact legal status of the Immigration Rules. The power to make the Immigration Rules comes from statute (legislation) in the Immigration Act 1971. However, the Statements of Changes to the Immigration Rules are laid before the UK Parliament and do not require a vote. Though the rules could be categorized as rules of practice, in effect they have the force of law and this has been recognized in UK jurisprudence. The Immigration rules can therefore be seen as a set of 'rights'. If an applicant meets the requirements of the paragraphs of the immigration rules, then there is a right to family reunification. If the UK does not afford that right, then there is a right of appeal before an independent immigration judge.

- Two Member States only do not respect this obligation. The first member State, Hungary, is bound by the directive. National rules do not mention a right to family reunification and its legislation use a terminology leaving important margins of manœuvre to national authorities, to the point where it does not recognize the existence of a right to family reunification. Hence, this entails a breach of the directive.

  The second Member State, Ireland, is not bound by the directive. If refugees have a right to family reunification, it is not the case for third country nationals towards whom the ministerial authority has an important margin of manoeuvre. The Irish legislation tackles the question of family reunification in a scattered way, the area being mainly governed by administrative guidelines and practice, and without mentioning a “right to family reunification” for third country nationals.

These appraisals are far from entailing the inscription of the mention “right to family reunification” in the national rules. Two hypothesises can be distinguished.

- A first group of member States explicitly refers in national law to the notion of "right to family reunification" (Belgium, Bulgaria for a certain category of third country nationals, Cyprus, Estonia, France, Greece, Italy, Latvia, Malta, Portugal, Slovakia and Spain) and this is independent from the transposition of the directive. In several States, the proclamation of a right to family reunification is not related to the transposition of the directive because it was the object of a consecration through the intervention of constitutional jurisdictions (Estonia, France, Federal Republic of Germany, Italy, and Latvia).

- A second group of States even reaches the same result without explicitly writing down this "right to family reunification" in their legislation, regulation or national jurisprudence. These States nevertheless use formulations that do not leave any margin of manoeuvre to the administrations in some cases, as it is described by the Court of Justice. Then, they consecrate the existence of a right on advantage of the beneficiary (Austria, Denmark, Czech Republic, Luxembourg, Netherlands, Poland, Slovenia, Sweden, and Finland).

These positions are easy to understand: if the right to family reunification is not explicitly consecrated by the legislation, it means, as the Court of Justice underlined it herself, that it is

not unconditional and that its implementation is submitted to the satisfaction by the sponsor and the members of his/her family of requirements set by the legislation or the regulation (Austria, Belgium, Greece, Italy, Netherlands, Poland, Romania, Slovenia, and Spain). It is only when these requirements are fulfilled and when the national authorities no longer have a margin of appreciation that the right becomes effective. The family members can then be recognised a "right" to family reunification. National authorities must then allow the family members to enjoy their right to family reunification by authorising the entry and residence on these grounds (see for instance Finland, Lithuania or Czech Republic).

This awareness of the existence of a subjective right where the national margin of appreciation is void is not identical in Member States. Three significant illustrations can be taken.

- In Sweden, the transposition operated on March 30th, 2006, had precisely this effect: in order to transpose the directive the relevant paragraph of the Aliens Act stipulating residence permit because of family reunification (chapter 5 §3) was changed from "*can* be given", to "*shall* be given". This was done to emphasize that family reunification is a right.

- In Denmark, the margin of manoeuvre of national authorities is framed by very detailed directives. The access to family reunification is not based on a legal claim but is discretionary. However, the administrative discretion has to be performed according to very detailed guidelines for the discretion.

- Bulgaria is the opposite. Previous to the obligation to transpose the Directive, the right was enacted and regulated by the same acts now regulating it. However, despite the fact that the amendments of the Law on Asylum and Refugees (LAR) and the Law for the foreigners in the republic of Bulgaria (LFRB) should transpose the Directive, it should be noted that regarding the right to family reunification the two amended acts keep the old formulations, procedures and status quo. If this is due to the fact that the Bulgarian legislator had thought that the right is already respected anyway and that there is not much to be transposed, or for other reason, but some vital nuances in the way the directive is formulated seem not to have been taken into account. The main result of this "extra trust" in the old legislation had led to a situation like the following: the main provision, enacting the right to family reunification for third country nationals as before as now says that "residence permit *may* receive members of the family of …" The provision, which regulates the right to family reunification for refugees states that "a refugee *can* apply for family reunification". A language and a systematic interpretation of these two provisions, when done in the context of the whole norm leads to the conclusion that even in the case where all the conditions for family reunification are fulfilled and lacks an obstacle to permitting the reunification, such *may* be refused. Without clear ground why. What is even more confusing is that on the other hand, the newly amended LFRB and the draft amended LAR does contain hypothesise where the right to family reunification is formulated otherwise. Namely, without "*may*". In cases of 1) persons with temporary protection and 2) third country nationals who do have a long term residence permit in other Member States. For these two categories the law provides that they have the right to reunite with their family. In

other words, in these hypothesises the authorities had no more margin of discretion than the one defined by the conditions in the law itself.

NO TRANSPOSITION	*HU*

2.1.2. Calculated evaluation

Q.5. A – Are there any figures available relating to the exercise of the right to family reunification between 2002 and 2006? If yes, what are the trends, including nationality assessment?

The assessment of the importance of family reunification in the Member States is not made systematically.

- In four Member States (Cyprus, Greece, Poland, Portugal), this assessment is not available. In one Member State not bound by the directive, Ireland, the statistical data is only available for refugees' family reunification.

- For the other Member States, the data's period and quality are very uneven, the year 2006 being the only year on which comparisons can be intended.

➢ On this basis, it is possible to bring out assessments made both on volumes and tendencies.

- Concerning the volumes of residence permits issued to the ends of family reunification, three groups of States can be distinguished during the year 2006.

  - The Member States that issued less than 5000 annual residence permits in 2006: Austria[5] (3129), Czech Republic (3821), Estonia (2316), Finland (3600), Lithuania (2257).

  - The Member States that issued between 5000 and 10 000 annual residence permits in 2006: Belgium (8922), Hungary (8466), Slovenia (5955) and probably Latvia for which the figures are only available for one semester.

  - The Member States that issued more than 10 000 annual residence permits: France (23 500), Federal Republic of Germany (29 432), Spain (68 390), Sweden (26 668).

< 5 000	5000 to 10000	> 10000
AT : 3129	**BE** : 8922	**SE** : 26668

[5] These numbers do not contain refugees granted family reunification. Family reunification of refugees is granted under the Asylum system and there is no statistical information available on the number of persons granted family reunification with a sponsor who has been recognised as a convention refugee.

CZ : 3821	**HU** : 8466	**DE** : 29432
EE : 2316	**SI** : 5955	**FR** : 23500
FI : 3600	**LV** : 6 248	**ES :** (68390)
LT : 2 257		

- This first photography of the present situation shall be combined with a reading of the great statistical tendencies relating to migratory flows for family reasons, whenever these tools are available in the Member States. These tendencies reflect the picture of a contrasted situation.

  - A first increasing tendency is appraised in some Member States. This phenomenon is strong in Lithuania with a progression of almost 30% in two years (2 891 permits in 2006 for 2 027 in 2004). It is the same in Hungary where official figures neatly increase. In another Member State, Sweden, after a stabilisation during the years 2004 and 2005 (22 337 permits and 22 028 permits), 26 668 residence permit for family reunification were issued in 2006. In Spain we can observe a remarkable increasing tendency in the concession of permits for family reunification: in 2000 (16.518), in 2004 (38.437) and in 2006 (68.390). Finally in Belgium, after a period of relative stability, the number of residence permits issued for the purpose of family reunification has increased in 2006 (from 7984 residence permits issued in 2005 to 8922 residence permit issued in 2006).

  - A stabilising tendency can be observed in some Member States. Thus, in France, since 2003 the figures for the permits issued for family reunification has been stabilised (2003: 23808, 2004: 23744, 2005: 23500). In Slovenia, an identical movement is appraised (2003: 6450, 2004: 6049, 2005: 5890, 2006: 5955).

  - A decreasing tendency has also been noticeable in Federal Republic of Germany since 2003 (2003: 42855, 2004: 34514, 2005: 29433). In the Netherlands, the number of requests for family reunification decreased of almost 50 % in four years: from 43368 requests registered in 2002, this Member State only registered 22 652 applications of temporary residence permits for family reunification in 2006. The figures on the issued permits following these requests thus decreases proportionally (about one satisfied request out of two) and this decrease would be directly attributable to the hardening provoked by the transposition of the directive. In Austria, this decline can also be measured: 6928 permits were issued in 2003 against 3129 in 2006.

Generally, the correlation between the drop of permits and application and the hardening of the legislative requirements for reunification seems to be proved. Besides, the fragmental character of the collected information does not allow to go further except to state that family reunification is clearly homogeneous depending on the citizenships and the countries of destination. Thus, traditionally, in France, it is mainly constituted of Maghreb nationals while

Northern European countries, as in Finland or Sweden tend to host Iraqi or Middle East nationals.

2.2. Scope of the right to family reunification

2.2.1. The sponsor

Q.6. Is the period of validity of the sponsor's residence permit superior or equal to one year and how is the requirement for the sponsor to have "reasonable prospects of obtaining the right of permanent residence" traduced?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Article 3 of directive 2003/86 determines the scope of the directive. It applies to third country nationals living on the territory of a Member State and in possession of a residence permit valid for at least one year, without considering the reasons of their residence. However, third country nationals with a residence permit valid for less than one year, such as temporary workers for instance, or with a residence permit due to a seasonal job, are not affected by the directive and their family reunification depends on the Member State's national law.

This compulsory clause of the directive is respected by almost all the European Union Member States. However this result is not reached due to a strict and literal transposition of the article 3 of the directive, member States preferring measures having equivalent effect in their result.

➢ The opening of a right to family reunification is commanded by the issuance of a residence permit of at least a year.

- Most of the Member States act this way. The residence permit commanding family reunification is issued for at least one year (Austria, Bulgaria, Cyprus, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Sweden, and Spain).

  This period can be longer, from two years in Ireland for Green Cards and work permits issued after the 1srt January 2007 or Slovakia, and up to 5 years (in the United Kingdom or Slovakia for foreigners with a long-term residence).

  In Czech Republic, the law does not indicate any precise period. However, the one year period comes from the National legal system which is based on the obtaining of a first visa for one year, followed by a long term residence permit entailing the right to family reunification. The sponsor can obtain the long term residence permit (the national status which the sponsor must possess to have the right of family

reunification) after one year of stay on the territory of the Czech Republic (on long term visa). The long term residence permit will be issued only if the purpose of the stay on the territory of the Czech Republic remains the same as it was before. The right to family reunification as such is connected to the long term residence permit (national temporary status) or higher status (national permanent residence status) of the sponsor only. In an identical way, in Sweden, a period is not enshrined in the legislation, but the *travaux préparatoires* of the legislation transposing the Directive (Government proposal 2005/06:72), state that as a main rule a permanent resident permit is required.

- In three member States, the situation is slightly different. In Belgium the right to family reunification was initially only accessible to people having an unlimited residence permit. The recent modification of the law of 1980 added family reunification for persons having a residence permit with limited duration. As this duration is generally of one year, it is not in practice breaching the directive even if the clause is not formally implemented.

  In Finland, the validity period of the sponsor's first residence permit is according to the main rule one year, although it can change. A residence permit may, however, be issued for a period longer or shorter than one year if it is issued for carrying out a legal act, an assignment or studies that will be completed within a set period. The duration of a fixed-term residence permit must not exceed two years. Furthermore, the validity period of the first residence permit must not exceed the validity period of the travel document. If a residence permit is issued on the basis of family ties, the validity period for the residence permit must not, however, exceed the validity period for the family member's residence permit which was the basis for issuing the residence permit. Under the national legislation the right to family reunification is not conditional upon the duration of the sponsor's residence permit; family reunification is permitted also in most cases where the sponsor resides in Finland by virtue of a temporary residence permit and for a period shorter than one year.

  Finally, in Hungary, in theory, family reunification is possible for the sponsor holding a residence visa or residence permit which validity is inferior to one year.

- Denmark, which is not bound by the directive, presents a remarkable specificity. It is necessary to have possessed a *permanent residence permit* for Denmark for more than the last *3 years*. A permanent residence permit is normally issued after 7 years of lawful residence on the same basis. In exceptional cases a permanent residence permit may be issued after 3 or 5 years of lawful residence. In exceptional circumstances, including respect for family unity, the 3 year period may be dispensed. This is without a doubt a real obstacle to the exercise of the right to family reunification.

- Some national situations go further than the temporary criterion. In Slovenia, the right to family reunification can be granted to third country nationals in possession of a residence permit for research or when their stay has a specific interest for the Member State. They obtain it whatever the validity period of their residence is, even if it is less

than one year. For these nationals, there is no need to take into account the duration of their residence in the Member State, so it can be less than one year.

NO TRANSPOSITION	*BE*
PROBLEM	*FI; HU; SE; DK*

➢ A second condition brings a precision about this first requirement of the directive. Brought at the end of the negotiations, article 3 of the directive establishes that the sponsor has "reasonable prospects of obtaining the right of permanent residence". This particularity remained a detail for most Member States as only three of them take this notion into account in their national Law: Cyprus, Malta and Lithuania. The draft bill introduced in Luxembourg differs very slightly from the wording of the directive as article 69 of the draft bill states "a reasonable prospect of obtaining a long term residence permit". For the rest of the European Union, solutions vary to get the same result.

- A first approach of the Member States consists in assessing the nature of the given residence permit, and particularly on its permanent nature. Thus, if it is the only permit allowing a claim for the right to reunification or although it can be issued after many years of legal residence in the Member State, the potential issuance of a permanent title is considered as satisfying the directive requirements.

  - This is clear in Sweden as the only residence permit allowing to benefit from family reunification is a permanent residence permit. In a slightly different way, Czech Republic follows this process as it issues two different types of temporary residence permit. The first temporary one is a visa which can be valid for up to one year, and the second one is a residence permit defined as a long duration one. The latter, delivered after one year of legal residence on a visa is the first only one allowing a claim for family reunification.

  - Some other Members States keep the spirit of this condition without formally transposing it in their national Law. In Finland, Greece, Slovenia, Slovakia, the United Kingdom, the titular of a residence permit can get a permanent one after several years of residence. This is indirectly linked to article 3 of the directive as the situation in Finland shows it: "This requirement is not explicitly translated to national legislation; it is, however, regarded to be contained implicitly in the national provisions concerning family reunification of persons residing in the country by virtue a continuous residence permit… Fixed-term residence permits are issued for a residence of temporary nature (temporary residence permit) or of continuous nature (continuous residence permit). Permit authorities decide on the purpose of residence, taking account of the information given by the alien on the purpose of his or her entry into the country. A person who resides in Finland by virtue of a continuous fixed-term residence permit shall be issued with a permanent residence permit after four years of residence in the country. Those who reside in the country by virtue of a continuous fixed term residence permit and who thus have a right to permanent residence permit

after four years of residence are regarded as persons who have "reasonable prospects of obtaining the right of permanent residence". However, according to the national legislation, the right to family reunification is not restricted to cases where the sponsor resides in the country by virtue of a continuous residence permit and is thus regarded to have "reasonable prospects of obtaining the right of permanent residence". With certain exceptions, the family members of sponsors residing in Finland by virtue of temporary permit are entitled to family reunification under same conditions as family members of sponsors residing in Finland by virtue of continuous permit. It can also be noticed in Greece and Slovenia.

- Some other Member States have a different reasoning (France, Italy, and Spain). On their point of view, the period of residence on the territory previously required or the renovation of the permit brings itself the evidence of perspectives for a durable settlement.

  Thus, in France, the residence period necessary to open the right of family reunification is of 18 months and has to be seen as an evidence of durable settlement, which is also Italy's or Spain's choice. In Spain the sponsor must have profit from a residence permit for at least one year and must have got the permit to reside al least another year in Spain (renovation).

2.2.2. The sponsor's family

Q.7A and 7B - Are the members of the concerned family Nationals of third countries whatever their legal status is?

Q7. A. Are they third country nationals?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

This compulsory clause of the directive is respected even if most member States did not judged useful to translate this prescription in their national law, which aim is to determine a scope as general as possible, subject to the exclusions defined in the following paragraphs of article 3.

From the Member Sates' point of view, national law grants the right to family reunification to the members of the family without setting up special requirements concerning status. Nevertheless, a few national particularities can be pointed out.

- Thus, in Lithuania, national rules regarding family reunification written in the law on aliens also concern this Member State's citizens. In the Netherlands, the rules that apply to family reunification with third country nationals also apply to family

reunification with Dutch nationals. However, according to a judgment of the Dutch Council of State, the highest administrative Court, Dutch nationals cannot rely on the directly applicable provisions of the directive.

- In Finland, under exceptional circumstances the national provisions implementing the provisions of the Directive are, however, applied to family members of EU citizens, as well. This is so, because the general rules on family reunification, including those that transpose the provisions of the Directive, shall, according to section 153 of the Aliens Act, be applied to cases involving family members of Union citizens if the persons concerned do not meet the requirements laid down for the free movement of Union citizens (for example the requirement concerning secure income, or in case of third country national family members the requirement of previous legal residence in another Member State). EU citizens – and others who are excluded from the scope of the Directive - are not able to appeal directly to the provisions of the Directive, but they can appeal to the national provisions that transpose the Directive, as the scope of application of the national rules is not limited in the same way as the scope of application of the provisions of the Directive is.

- In Sweden, in the *travaux préparatoires* of the main norm of transposition it is stated that to obtain a uniform and non- discriminating legislation, the right of family reunification shall apply irrespective of the nationality/citizenship of the family member (exception of EES- citizens were other rules of course apply). It is further stated that since the directive prescribes only minimum standards these more favorable provisions are allowed.

- In Ireland, a State not bound by the directive, if the legislation complies with this criterion, administrative directives let important margins of manoeuvre to the authorities so that it is theoretically possible for Irish authorities to exercise their discretion by applying rules on Family Reunification to EU citizens, in addition to third country nationals. The Employment Permits Act 2006 and new administrative practice relate only to non EU/EEA nationals. Therefore the qualifying sponsor is a third country national. The guidelines of both the Department of Justice, Equality and Law Reform and the Department of Enterprise, Trade and Employment are silent on whether the family member in respect of whom an application is made must be a third country national. Is it theoretically possible for an EU national family member to be the subject of an application for family reunification by a third country national sponsor. This could be of relevance if that family member was unable to exercise free movement rights due to an inability to fulfil the conditions of the Citizenship Directive (2004/38).

The formulation of article 3 of the directive "independently from its legal status" is only expressly found in two Member States' legislation (Cyprus and Greece), as the other Member States did not judge useful to implement it in a formal way.

2.2.3. More favourable provisions

Q.8 – Does the implementation of the directive breach some international provisions more favourable to individuals?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

From the unanimous expert's opinion, the implementation of the directive does not breach more favourable International provisions in all the Member States bound by the directive. Therefore, there is no breach of the directive regarding article 3, paragraph 4. Hence, the following questions (Q 9 A to D) have received a negative answer by national rapporteurs.

Q.9 – If yes, are those provisions based on:

Q.9.A - Bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other?

Q.9.B - The European Social Charter of 18 October 1961 (a.3 §4)?

Q.9.C. The amended European Social Charter of 3 May 1987 (a.3 §4)?

Q.9.D. The European Convention on the legal status of migrant workers of 24 November 1977 (a.3 §4)?

Q.10 – Does the transposition of the Directive affect national provisions more favorable to individuals?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Directive 2003/86 shall not affect the possibility for the Member States to adopt or maintain more favorable provisions. The text's precaution leaves intact the question of pulling down nationals standards concerning family reunification during the implementation of the directive and in full conformity with it. NGOs and an important part of the doctrine had suggested this hypothesis. The assessment of Member States' legislation reveals that it was not founded, at least generally.

This observation is only apparently favourable and should be put into perspective. The low binding character of the directive and its numerous optional options, added to the lack of distance to assess it on long term must not hide the risks of an evolution in the opposite way. Directive 2003/86 can constitute a "floor" on which member States will be tempted to lean on, with all the more facilities that the legitimacy of an alignment on European rules will be

politically difficult to contest. This reasoning is already adopted by Member States such as France.

- In seven Member States bound by the directive, the implementation of the directive is lowering a more favourable legal system for individuals: Belgium, France, Lithuania, Luxembourg, the Netherlands, Slovenia and Spain.

  - In Belgium, this aggravation results from the introduction of accommodation and income requirements, as well as from the rule according to which the residence permit obtained on the grounds of family reunification is temporary during three years, during which controls can be operated, whereas it was previously definitive after a maximum of 15 months. That also results from the increase in the condition in age for the husbands at 21 years (18 years front) and in introduction a period of waiting of two years for the non married couples.

  - In France, by extending from one year to 18 months the duration of the initial necessary residence to claim for family reunification, or by extending from two to three years the period during which the spouse's residence permit can be withdrawn in case of breakdown of the communal life, the legislator made national provisions stricter. Moreover, another condition was added concerning the spouse who now must be at least 18 years old when the application is made, and the resources and accommodation requirements were hardened as well. The questions relating to integration measures were also made stricter especially on a linguistic point of view. In the same manner, the hardening of the material conditions (accommodation, resources) was completed by pointing up directive 2003 /86 during the parliamentary debate in November 2007.

  - In Lithuania, the minimum age for marriage went from 18 years old to 21. As well as a 2 years waiting period before an application can be submitted was introduced.

  - In the Netherlands, three important modifications have the same effect. The implementation decree of the directive first raised the age to authorise family formation from 18 years to 21 years. Then it raised the resources requirement for some people. Finally, the introduction of integration tests in the country of origin was also adopted on this occasion.

  - In Slovenia, before the transposition, there was no waiting period defined for the right to family reunification; the sponsor could apply for family reunification with his or her family members immediately after he or she began residing in the Republic of Slovenia and regardless of the temporal validity of his or her residence permit. Now the right to family reunification is only accessible to those foreigners who have already resided in Slovenia for at least one year and who have a residence permit valid for at least another year.

  - In Spain, news reforms impose a personal introduction of the sponsor when he/she applies for family reunification, as well as imposing a similar obligation to the members of the family before the consulates or embassies in order to apply for a visa, save for derogation cases. Besides, the law of 2003 cancelled the possibility of visa

exemption for aliens on the Spanish territory, which was envisaged for humanitarian reasons or in case of collaboration with Justice. Lastly, the requisite conditions for reunification of relatives in ascending line were made stricter.

- In Luxembourg, before the adoption of the draft bill, the issue of family reunification was exclusively based on article 8 ECHR. The introduction of the proposal lowers the state of play regarding conditions required from the sponsor, who is now asked to fulfill conditions set up by the directive, and beneficiaries of family reunification that are yet enumerated by the directive.

On the contrary, in Estonia, it can be noted that the directive notably improves the applicant's situation. Before the persons could wait 5 years for family reunification; now if the person has resided in Estonia for two years he can apply for the reunification.

2.3. Family members

The determination of the beneficiaries to the right to family reunification typically fulfills an aim of harmonization, the importance of which was underlined by the Court of Justice in its case C-540/03 of June 27th, 2006. Chapter II of the directive has this function and the Court states in its paragraph 60 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*".

2.3.1. The spouse

Q.11.A – Does your national law recognize the right to family reunification to the sponsor's spouse (a.4§1 a)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

The spouse's right to family reunification guaranteed by this mandatory provision of the directive is ensured in all the Member States. This right is thus ensured in conformity to the text's prescriptions in its principle and subject to the possible restrictions authorised by this text.

2.3.1.1. Minimal age of the spouse (Q.29 to 30)

Q.29 and 30. – Does your Member State use the option set up by article 4 § 5 requiring the sponsor and his/her spouse to be of a minimum age of 21 years old before reunification ?

AT	BE	BG	CY	CZ	DE	EE	EL

ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The directive offers the Member States the possibility to fix a minimal age for the sponsor and his/her spouse, which cannot be over 21 years old, provision notably instigated by the Netherlands.

- A small majority of Member States does not use this faculty: Bulgaria, Estonia, Finland, Hungary, Italy, Latvia, Poland, Portugal, Romania, Slovenia, Spain, and the United Kingdom. Ireland and the United Kingdom, although not bound by the directive, do not fix a minimal age even if this possibility is envisaged by the British authorities.

  The scope of family reunification is not restricted in these States for now, but it can be envisaged that the hardening tendencies concerning the conditions for reunification might be expressed in this area, as the legislative evolution in the Netherlands and Belgium showed it very recently.

- On the other hand, Austria, Belgium, Cyprus, Czech Republic, the Federal Republic of Germany, France, Greece, Lithuania, Luxembourg, Malta, the Netherlands, Slovakia, and Sweden make use of this optional clause.

  Amongst them, the solutions relating to the minimal age are varied and the lack of harmonisation of the European legislation is then accentuated, obviously in an unjustified way. Thus for six Member States, this age is fixed at eighteen years old (Austria, Germany, France, Greece, Luxembourg, Slovakia, Sweden). For another State, the Czech Republic, it is fixed at 20 years old while for five other Member States it is 21 years old, maximal threshold authorised by article 4§5 of the directive (Belgium, Cyprus, Lithuania, Malta). In the Netherlands, the requirement to be 21 years of age only applies in the case of family formation which means when the family was not yet constituted in the country of origin. Both sponsor and partner need to be 21 years old. In case the sponsor and spouse (or partner) has not yet reached the age of 21, the application for family reunification will be denied.

  Belgium and Austria attenuate the strictness of the rule. In Belgium, the minimal age of 21 years old is brought back to 18 years old when the conjugal link or the registered partnership was pre-existing to the alien's arrival in Belgium. Concerning Austria, the option applies but only in regard of the sponsor's spouse but does not require a minimum age of the sponsor.

- Denmark, which is not bound by the directive, goes as far as requiring the spouse to be at least 24 years old, even if that implies accepting derogations in case of exceptional circumstances related to the respect of article 8 of the ECHR.

The grounds on which Member States lean upon to justify this restriction are of two kinds: the prohibition of forced weddings and the will to ensure a better integration. Six Member States (Austria, Belgium, France, Germany, Netherlands, Sweden, and Denmark) point out both of the criteria, with a preference for the integration criterion in the Netherlands, and for the fight against forced weddings in Austria, France and Sweden.

2.3.1.2. Prohibition of polygamy (Q.27)

Q.27 – Is the prohibition of polygamous marriage enshrined in the Member State's national legislation (a. 4 §4)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

All the Member States bound by the directive respect the prohibition to authorise the reunification in case of polygamous marriage either directly or by authorising the reunification of one spouse only by the sponsor.

It is also the case of Member States which are not bound by the text. In Ireland, this prohibition is not enshrined in the legislation but in administrative directives from the Department of Justice, Equality and Law Reform, in which it is stated that '[a] qualifying sponsor may only sponsor an application from one spouse.'

2.3.2. The unmarried partner

Q.21 to 23 – Does the Member State authorise reunification of the unmarried partner of the sponsor, being a third country national? Shall this partnership be based on a duly attested stable long term relationship? Is the partner assimilated to the spouse (see article 4 §3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The possibility to authorise reunification for an unmarried partner was the source of disagreements when directive 2003/86 was elaborated. In the end, a compromise was found, according to which this faculty was opened to Member States willing to establish an equality of treatment between Community citizens and third country nationals. The assessment of national legislations reflects the disagreements that could oppose Member States on that

particular point of the negotiation, but also their different conceptions of the status to give to unmarried partners in national law.

A. Principle

A great majority of Member States (15) (Austria, Bulgaria, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Malta, Poland, Romania, Slovenia, Slovakia, Spain) refuse to use the faculty given by article 4§3, thus confirming their initial opposition. In these States, it is not possible to give unmarried partners an equivalent status as that of spouses in terms of family reunification concerning third country nationals. The situation of France is characteristic on that point. In this Member State, the effects of the "Pacte civil de solidarité" (PACS) are on purpose not extended by the legislator to the family reunification of aliens. At best, and on a case by case basis, the situation of the unmarried partner can be taken into account by the administration and the internal judge on the grounds of the effects of article 8 of the ECHR. Spain presents an analogous situation as national legislation does not give the benefit of family reunification to unmarried partners, although the recent Spanish legislation on that matter is liberal. Furthermore in this Member State the established case law and lots of local legislations from the Autonomous Communities (Catalunia, Aragon, Navarra, Valencia, Baleares, Madrid, Asturias, Andalusia, Canarias, Estremadura, Pais Vasco) also recognize registered partnership within their respective competences.

Amongst these States, two small breaches are opened: on the one hand, Spain accepts reunification for the unmarried partner in the case of refugees, and on the other hand, in a more anecdotic fashion, Bulgaria accepts it as well concerning diplomatic and consular staff.

- Around ten Member States only kept the option allowing family reunification for the unmarried partner: Belgium, Czech Republic, Finland, Federal Republic of Germany, Lithuania, Luxembourg, Netherlands, Portugal, Sweden, United Kingdom and Denmark. The last two are not bound by the directive.

  However this acceptation is not complete concerning two Member States. The Federal Republic of Germany in fact restrains the scope of this provision to homosexual relationships as this faculty applies to same-sex partners only. Section 27§2 Residence Act provides that the norms concerning family reunification with a spouse also apply to reunification with the registered partner. According to national law the possibility to register a partnership is restricted to same-sex partners. In Czech Republic, family reunification is only authorised for same-sex registered partners, which excludes partners in a stable long-term relationship.

  Amongst Member States which used the faculty opened by article 4§3, the choice is generally to assimilate the registered partner to the spouse (Belgium, Czech Republic, the Federal republic of Germany, Finland, Lithuania, Netherlands, Portugal, Sweden, United Kingdom, Denmark).

B. Modalities

The constitutive elements of the unmarried partnership turn out to be rather varying when examined.

- Belgium has the most liberal view, as the partnership can be constituted either by a stable long-term relationship, or by a registered partnership. It gives an advanced definition of the conditions that can be opposed to the request. In that State, the right to family reunification is recognised to the partner, if it is within a registered partnership considered as equivalent to marriage in Belgium, who comes to live with the sponsor and if the two concerned persons are more than 21 years old. A royal byelaw of May 17th, 2007 enumerates the list of the registered partnerships taken into consideration. The right to reunification can also be recognised to the registered partner in the case of a partnership non equivalent to marriage if it is a duly established stable and long term relationship, lasting for at least one year. Any reliable evidence is taken into account and "in any case elements such as a *common* child". The conditions of common life, exclusivity of the relationship, and minimal age of 21 years old are also required, and the minimal age of the partners is brought back to 18 years old when they can show evidence that they had been living together for at least one year prior to the alien's arrival in Belgium. The stable character of the relationship can be demonstrated in two ways: if the partners already live together, they must have cohabited in Belgium or another country, legally and uninterruptedly for at least one year prior to the application and the person creating a right to family reunification must have signed a commitment to take responsibility of his or her partner, in which he/she commits before the Belgian state and the public centre of social action for a three years period to pay for every residence fees, health care, and repatriation. If the partners do not cohabit yet, they must prove that they have known each other for at least two years, that they have kept regular contacts by phone, by ordinary or electronic mail, that they have met at least three times during the two years prior to the request, and that these meetings comprise at least 45 days or more, and that the person creating a right to family reunification signed a commitment before the Belgian state and the public centre of social action for a three years period to pay for every residence fees, health care, and repatriation.

- Six Member States chose to favor the stable and long term relationship between partners as a constitutive element of the partnership (Finland, Netherlands, Portugal, Sweden, United Kingdom, Denmark). In Finland, persons living continuously in a marriage-like relationship within the same household regardless of their sex are comparable to a married couple. The requirement is that they have lived together for at least two years. This is not required if the persons have a child in their joint custody or if there is some other weighty reason for it.

  - In Denmark, unmarried partners have a right to family reunification if they have been living in regular cohabitation of prolonged duration. In practice this means that the partners normally have to prove that they have been cohabiting for a total period of

1½-2 years, although this requirement may be modified if they can show good reasons why they have only been able to cohabit for a shorter period, and/or other proof of stable long-term relationship. In situations where the unmarried partners are not able to prove regular cohabitation of prolonged duration, the couple may be considered as having established a family life encompassed by ECHR Article 8. In these cases family reunification will be granted on exceptional reasons.

- In the United Kingdom, partners must show evidence that they have been living together for at least one or two years and concerning the Netherlands, unmarried partners must be at least 18 years (21 years for family formation) and be in a permanent and exclusive relationship with the sponsor. A sustainable and exclusive relationship exists in case the relationship is sufficiently comparable to a marriage. The partners must live together and share the same household or must start to do so once the partner has entered the Netherlands and the partners must be registered on the same address in the Municipal Base Administration (GBA). The existence of a sustainable and exclusive relationship can be demonstrated by the signing of a declaration of relationship by both partners. The application for family reunification will be denied in case it can be assumed the relationship is one of convenience. Besides, these criteria are encountered in other Member States such as Portugal. In that Member State, article 100 of Law 23/2007 requires that the relationship with the unmarried couple should be duly proved according to the Portuguese law. Article 103.1 of the same law requires that the request of family reunification must be attached with documents that testify the existence of an unmarried relationship. When examining a family reunification request the Border and Immigration Service must take into consideration the existence of a common child, previous cohabitation, registration or other proof elements.

- Three other States are more formalist. They require the partnership to be registered in order to accept to recognise its scope (Czech Republic, Federal Republic of Germany, and Lithuania). This is also the case in Luxembourg. Nevertheless, the rapporteur raises concerns about the ambit of the project as the condition for registration is linked with the national law. This tie seems to hamper the possibility for third country nationals' partners residing outside Luxembourg to benefit from family reunification.

2.3.3. Minor children

2.3.3.1. Minor children of the sponsor and/of his spouse. (Q.11B to 11.K, 12, 13)

Q.11. B, 11. D, E - Does National Law authorize reunification for minor children of the sponsor and his spouse's? (see articles 4 §1 b and c) ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provisions

A. Principle

- All the member States allow family reunification for minor children of the sponsor and his spouse.

  In the United Kingdom, the acceptation of family reunification is also acquired, provided that both parents are being or have been admitted to the United Kingdom. If both parents are not being admitted, then further requirements must be met.

- This acceptation is extended to adopted minor children, under the same conditions evoked above for Spain and the United Kingdom which sets conditions in case of non-admission of the parents to reunification. Sometimes British law does not seem to be compatible with the general obligation deduced from the directive, as the immigration rules require that the child is the child of the sponsor. If the child is not the sponsor's child but only the spouse's (or civil partner) then the requirements of the immigration rules will not be met. However, the definition of "parent" in the Immigration Rules is wider than just biological parent and this must be considered. For instance, if the child's biological father has died and the child's mother has married the sponsor, the relationship between child and sponsor will meet the immigration rules and a right to family reunification will exist.

B. Modalities

Difficulties rise when we have a look at the concrete conditions put by the States to the realization of this right.

- Concerning the requirement relating to "the custody and the charge" of the sponsor's children, a majority of Member States respect the terms of article 4§1 c: Belgium, Czech Republic, Denmark, Estonia, France, Federal Republic of Germany, Greece, Hungry, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Spain, United-Kingdom, Ireland. In Romania, the wording of national law is different as it states that the child should be under the sponsor's support, but not under the sponsor's custody.

- Some other States manifestly move apart from these prescriptions. In Austria, the Settlement and Residence Act does not contain a provision regulating this matter but in practice the authorities require that the sponsor has got children custody. In Bulgaria, Finland, Italy, Slovenia, and Sweden, national Law remains silent on this condition or contents itself with a tolerance. In Cyprus, this condition is only requested for adopted children. This procedural tolerance in these Member States is thus delicate to classify among the more favorable national provisions as the silence of national law does not set aside the substantial rule: the child shall be under custody or responsibility.

These observations are identical regarding the children of the sponsor's spouse despite the fact that the United Kingdom has a restrictive approach in that case as well. Generally,

national law ensures that in case of shared custody, the other parent holding the charge has to have given his/her agreement.

However, the lack of harmonisation of the European legislation appears here again, regarding the diversity of national practices and requirements relating to the existence of such evidence. In several Member States, the legislation remains silent on the existence of such clues. If several Member States require the existence of a common life or a common accommodation (Czech Republic, Denmark, Federal Republic of Germany), other Member States are even more careful, as they ask for the production of an authentic document testifying of it (Latvia, Netherland).

Two Member States are precisely organizing the production of the necessary evidence:

- In Finland, according to the Guidelines given by the Directorate of Immigration concerning the application of the provisions of the Aliens Act (301/2004) that concern residence permits on ground of family tie (hereafter Guidelines on family reunification), documents such as the following should be presented if available: the birth certificate concerning the child; if the biological parents have divorced or one of them has died, a certificate of the divorce or a death certificate; and an official document (for example a court order) indicating that the sponsor holds custody. If such documents are not available, oral proof and other such information is required and DNA-tests may be used.

- In France, article R. 421-5, 3° of the CESEDA plans that when family reunification is asked for the minor child under 18 years old of the sponsor or his/her spouse, who was granted the exercise of parental authority by a foreign jurisdiction, this decision, accompanied by the other parent's consent for this child to come to France in the way envisaged by the country of residence legislation, shall be produced. Besides, article L.411-3 CESEDA states that "family reunification can be requested for the sponsor's minor children under eighteen and his spouse's, who are entrusted, depending on the situation, to one or the other, in respect of the exercise of parental authority, on the grounds of a foreign jurisdiction's decision. A copy of that decision shall be provided as well as the other parent's authorisation to let the minor come to France." Finally, the legislator in November 2007 just organised the resort to DNA tests in order to prove the filiation, after the persons consented to it, in case of default of the civil status in the State of origin and in an experimental way. The new article L.111-6 provides that this procedure will widely take place under judicial control and to the State's expense.

- To conclude, in Sweden, the sponsor does not need to have custody. According to the relevant provision in chapter 5 § 3 1st indent p. 2 in the Aliens Act, being the biological (or adoptive) parent is enough. However, if the other parent or another party has custody, agreement from this person is required (chapter 15 §17 2nd passage of the Aliens Act 2005:716). Anyway and if there are doubts about the relationship the Migration Board shall, under certain conditions (when other investigation is insufficient for a decision or when it is obvious that the alleged relationship does not

exist), offer a opportunity of a DNA- analysis at the expense of the Government. (Aliens Act 2005:716 chapter 13 §15).

Obligation to have children custody and charge	**NO TRANSPOSITION**	*AT ; BG; FI; IT; SI; SE*
	PROBLEM	*CY*

Q.11.C, 11. F, 11 G, 11.J, 11.K. The sponsor and his spouse's minor adopted (art. 4 §1 b, c, d)?

Mandatory provision

All the Member States fulfil this obligation except United Kingdom. This State which is not bound by the directive sets conditions in case of refusal of the two parents' reunification. It should be mentioned that in Luxembourg the project of law does not expressly mention adopted children in the provisions dedicated to adopted children. However, adopted children are quoted in other provisions of the draft bill.

- Concerning children custody, solutions are identical as in the question above. Enumerated States (Belgium, Czech Republic, Estonia, France, Federal Republic of Germany, Greece, Hungry, Latvia, Lithuania, Malta, Netherlands, Poland, Slovakia, Spain, and Ireland) are not breaching the directive, while Austria, Portugal and the United-Kingdom paradoxically remain silent on this condition relating to adopted children. In Austria however, if the Settlement and Residence Act does not contain a provision regulating this matter, in practice the authorities require that the sponsor has got children custody.

  Concerning the charge of children, in Finland, the sponsor or his/her spouse has to hold the custody of the children, Furthermore the relationship between the parent and the child has to be real and efficient. Mere formal custody without indication of the fact that the relationship is real and efficient is not necessarily a sufficient link for family reunification, which is problematic. A further requirement is that the children have to be unmarried because in case of married children the requirement of custody and dependency are not met.

Concerning the directive's formulation planning that the sponsor and the spouse's adopted minor children are "*adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognized in accordance with international obligations*", solutions are diverging.

- Half of the Member States formally recall the conditions planned by the directive (Bulgaria, Cyprus, Czech Republic, France, Federal Republic of Germany, Greece, Netherlands, Portugal, Romania, Slovakia, Sweden and Denmark). There are various

formulas to achieve it. They lay either on internal law or on the convention of The Hague (1993) to which they implicitly refer (Austria, Spain).

The case of the Netherlands is typical on that point as in this country a foreign adoption will be acknowledged when the adoption has taken place in conformity with the Hague Adoption Treaty. A declaration needs to be submitted that the adoption has taken place in conformity with the provisions of the Treaty in a country that is party to the Treaty. In case of an adoption that has taken place in a state not party of the Hague Adoption Treaty, the legalised foreign adoption decision and the decision of a Dutch judge regarding the fulfilment of the requirements of acknowledgment of the adoption decision are required as proof a real family relationship between the adoptive parent (in casu the sponsor) and the child.

- The other member States keep the silence on this precise provision of the directive: Belgium, Estonia, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Slovenia, or they show little interest for this clause.

  Finland's case is typical in this respect: such formal requirement is not laid down in the national law. According to the Guidelines on family reunification, the certificate on the adoption has to be presented if such is available but if such certificate is not available, other proof of the adoption shall be required. It is stated in the Guidelines on family reunification, that in some states no formal decisions on adoption are taken and therefore no official certificates on adoption can be required. According to the guidelines, foster children, too, may be regarded as family members and as such entitled to family reunification. For these cases it is typical that no official documents are available.

  In Luxembourg, even if the law does not expressly refer the adopted minor, other rules of the draft bill take these situations into account. Therefore it can be assumed that adopted children are considered as beneficiaries of family reunification.

Obligation to have children custody	**NO TRANSPOSITION**	*AT; PT*
Obligation to have the charge of the children	**NO TRANSPOSITION**	*FI*
Obligation to have a decision from a competent authority or enforceable	**NO TRANSPOSITION**	*BE; EE; HU; IT; LT; LV; MT; PL; SI*

Q.12 et 13 – Has the Member State transposed the option opened by article 4§1 c: which authorises reunification of minor children of the sponsor – including also adopted children – of whom custody is shared (a 4 §1.c) by filling the condition

that the other party sharing custody has given his or her agreement (see article 4§1. c) ?

Optional provision

These optional provisions from the directive entail four types of answers.

- The first one is given by the States which are not bound by the directive. They are not concerned by these provisions and their national law does not take them into account.

- In second place, amongst the remaining States, ten decided not to use the faculty given to them: Bulgaria, Cyprus, France, Federal Republic of Germany, Greece, Hungry, Italy, Lithuania, Slovenia, and Spain.

- In third place, fourteen other member States use this possibility, namely Austria, Belgium, Czech Republic, Estonia, Finland, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, and Sweden. Amongst them, those respecting its wording shall be distinguished.

  - Thus, in Austria, the definition of family members entitled to family reunification does not mention children of whom custody is shared explicitly. As the definition includes children (and even stepchildren) of the sponsor without making reference to the matter of custody, the natural and the adopted children of the sponsor as well as the children of the sponsor's spouse are entitled to family reunification irrespective of the shared custody. In practice however, the authorities require the consent of the other parent holding shared custody. In Czech Republic, the right to the family reunification is ensured under the condition of previous residence of the sponsor on the territory at least for 15 months. The sponsor must hold a long term or permanent residence permit at the time of lodging of the application for family reunification. The condition of previous residence of the sponsor is not applied in cases of children adopted by the sponsor or his/her spouse.

    In other cases, modalities very different from the other parent's consent can be established: a simple agreement such as in Portugal, Sweden, an official act such as in Lithuania. In Finland, the agreement has to be given in writing form and it has to be officially certified. Alternatively, the other party can be heard orally on the matter. If her whereabouts is unknown and therefore a written agreement cannot be obtained and she cannot be heard orally, a court order shall be required. In Estonia, the consent of the other parent has to be given. All documents have to be translated and have *apostille.*

    The Netherlands has a peculiar system, based on the reciprocity principle. It requires a written declaration accompanying the request for the child's temporary stay, along with an ID, to check the correspondence of the signature with the declaration. If the second parent refuses to give his consent, cannot give it, or passed away, a competent foreign authority can give the consent.

- On the other hand, in Austria and Romania, the national legislation remains silent on the requirement relating to the other parent's consent, which is incompatible with the terms of the directive. Even if in Austria the authorities require in practice the consent of the other parent holding shared custody.

2.3.3.2. Children's age of minority (Q.14).

Q.14 – In any case referred to in questions 7 to 9, is the age of the minor children below the age of majority set up by the law of your Member State (article 4§1, second indent) ?

Mandatory provision

All the National rules relating to the age of minor children concerned by family reunification confirm that member States proceed to an alignment of the required age on the legal age of majority in force in their legal system. In general, this age is of 18 years old.

2.3.3.3. Prohibition of minor children's marriage (Q.15)

Q.15 – In any case referred to in questions 7 to 9, has the prohibition of marriage of minor children been transposed (a.4 §1, second indent) ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

The prohibition of minor children's marriage is transposed in the totality of member States legal system. In cases when it is not formally so, as in three member States, the same result is achieved, as in Czech Republic, Portugal and in Slovakia, where the consequence of minor children's marriage is to lead to consider them as adults. In Estonia, with the consent of a parent it is possible for a person aged between 16 and 18 to get married.

In France the prohibition of marriage of minor children is not specified in national law. Therefore, married minor children will be able to reunite with their family. The law does not however enlighten the situation regarding this child's spouse whose reunification will not be allowed on grounds other than family reunification rules.

2.3.3.4. Criterion of integration of children who are over twelve (Q.16 to 20)

Q.16, 17, 18. Is the derogation set up in article 4§1 third indent relating to the conditions for integration of children over 12 years arrived independently from the rest of the family used by your Member State?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Specific provision

The derogation of article 4§1 of the directive relating to the arrival of children who are more than 12 years independently from the rest of the family is one of the most sensitive questions of the text. In that case, "*the Member State may, before authorizing entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive*". This controversial provision results from the German's authorities' determination to integrate it to the text.

The European Parliament had made one of the main axis of its remedy before the Court of Justice, by underlining the fact that this clause renders family reunification unachievable and negates this right because it was discriminatory, criticizing as well modalities of this standstill clause which was accompanying it. The Court's answers to these arguments was negative, and it delimitated the margin of maneuver self-attributed to the State on the same occasion: "*the final subparagraph of Article 4(1) of the Directive has the effect, in strictly defined circumstances, namely where a child aged over 12 years arrives independently from the rest of the family, of partially preserving the margin of appreciation of the Member States by permitting them, before authorising entry and residence of the child under the Directive, to verify whether he or she meets a condition for integration provided for by the national legislation in force on the date of implementation of the Directive* (§60). *In so doing, the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests*" (§61). De son point de vue, "*the fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights. The Member States which wish to make use of the derogation cannot employ an unspecified concept of integration, but must apply the condition for integration provided for by their legislation existing on the date of implementation of the Directive in order to examine the specific situation of a child over 12 years of age arriving independently from the rest of his or her family"* (§70). "*Consequently, the final subparagraph of Article 4(1) of the Directive cannot be interpreted as authorising the Member States, expressly or impliedly, to adopt implementing provisions that would be contrary to the right to respect for family life*" (§71).

This particular legal context forces to check two points: on the one hand the use or not of a derogatory clause, and on the other hand the respect of the *standstill* clause which accompany it.

- A great majority of member States did not make use of the derogation allowed by article 4§1 last paragraph of the directive. Because of the standstill clause of the article, it is no longer possible for these States to go backwards and implement it today, without breaching the directive. It is the case in Cyprus. This member State introduced an integration condition through a law of February 14th, 2007 whereas it was not authorised to do so by the directive

- Only three member States have been using this option (Cyprus, Federal Republic of Germany, and the Netherlands) while Denmark applies it as well without being bound by the directive.

  - In the Netherlands, in case they no longer have to go to school, 16 and 17 years old children need to pass an integration test as a requirement for family reunification before admission in the Netherlands. The test consists in a language test (level A1 in the Council of Europe's Common Framework of Reference (CEF)) and in questions regarding the Dutch society. However, the difficulty lays in another point. The Dutch legislation creates a problem regarding the *standstill* clause coming from article 4§1 last paragraph. Indeed, it mentions an integration criterion "*planned by its legislation, existing at the date of implementation of the directive"*. But, the implementation of the directive in Dutch law was made in March 15th, 2006, that is to say more than 6 months after the date of implementation of the directive 2003/86, which was fixed in October 3rd, 2005. This constitutes a breach of the directive. Furthermore, the arrival criterion "*independently from the rest of the family*" is not mentioned by Dutch law.

  - In Federal Republic of Germany, which had inspired this clause, the situation is different as the integration condition existed since 1990, that is to say before the date of implementation of the directive. It only concerns minor children who are more than sixteen years old. The content of the integration condition is the following:

    - either the concerned person has some German skills. His or her level has to be equivalent to the C1 of the Common European Frame. The evidence has to be provided by a certificate delivered by a competent national or foreign authority.
    - either it has to appear from the basis of the child education and of his way of life that he or she is able to integrate the main German way of life.

  The integration condition is assessed by the diplomatic missions or by the competent authorities if the alien is already on the National territory.

  - In Denmark, the integration criterion exists since January 9th 2004, which is not really relevant as this Member State is not bound by the directive. It is opposable to people other than minor children aged over 12 years old. Moreover, the integration condition does not apply beyond a two years residence period, or if exceptional reasons make it inappropriate.

PROBLEM	*CY; NL*

Q.19 — Are the children of refugees required to an integration test by your Member State?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

There is no State proceeding to an integration test in that case.

2.3.3.5. Minimum age of fifteen of the minor children (Q.31 to 33)

Q.31 à 33 – Does your Member State use the derogation of article 4 §6 by requesting that the applications concerning family reunification of minor children have to be submitted before the age of 15 and how ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Specific provision

This provision was one of the hardest to decide during the elaboration of the directive. The Court of justice, seized by the European Parliament, consecrated long developments to it in its case C-540/03. According to the Court,*"it does not matter that the final sentence of the contested provision provides that the Member States which decide to apply the derogation are to authorize the entry and residence of children in respect of whom an application is submitted after they have reached 15 years of age 'on grounds other than family reunification'. The term 'family reunification' must be interpreted in the context of the Directive as referring to family reunification in the cases where family reunification is required by the Directive. It cannot be interpreted as prohibiting a Member State which has applied the derogation from authorizing the entry and residence of a child in order to enable the child to join his or her parents*" (cons.86).

By adding that "*article 4(6) of the Directive must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member States to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships*"(cons.87) the Court indicates the way to follow for Member States in order to apply this clause.

- States did not make mistakes about the scope of this derogation to family reunification, as none of them uses it, affirmation barely mitigated by the case of Cyprus, which requires that the child aged over 15 years old lives with his parents. Thus, the application can be submitted even after the age of 15 (up to 18) but the minor must not live independently from the sponsor. If the minor who is above 15

lives independently from the sponsor then the entry and stay is allowed on other grounds other than family reunification. .

- The Austrian case which had inspired this clause is a real paradox. Austria did not make use of the possibilities provided for in Art. 4 § 6 of the Directive. With regards to children over 15 years the Austrian Aliens Act in force until 31 December 2005 made a distinction between sponsors who where residing in Austria before 1 January 1998 and aliens who entered Austria after that date. In respect of sponsors who came to Austria before 1998, family reunification was limited to their spouse and to children who filed an application for family reunification before they reached the age of 15 (Art. 21 § 3 Aliens Act). As Austrian law therefore provided that an application for family reunification of minor children had to be filed before the child reached the age of 15 years only in respect of sponsors who took residence in Austria before 1998, Austria was allowed to make use of the exception provided for in Art. 4 § 6 of the Directive only in this narrow field of application, that meanwhile has lost its practical importance. Children aged over 15 years are seen as minors without any special rules applicable. All children under the age of 18 years are treated the same way. There is therefore no limitation of family reunification in respect of children aged over 15 years.

As article 4 §6 formulates a *stand still clause* prohibiting the use of this derogation after the implementation date of the directive, that is to say after October 3rd, 2005, it is important to underline that this limitation is now prohibited.

Only one State, Denmark, which is not bound by the directive, uses this possibility since June 9th, 2004 and refuses reunifications' requests introduced within this frame.

2.3.3.6. Minor children of another spouse (Q.28)

Q.28 – Does your Member State limit family reunification of minor children of a further spouse and the sponsor (article 4 §4 last indent) ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Specific provision

The situation of minor children of the sponsor's further spouse is envisaged differently depending on the Member States. A group of States does not restrict this kind of reunification in any way, while others strictly prohibit it.

- A first group of 18 Member States does not extend to children the prohibition of reunification formulated about a second spouse within polygamous unions. For most of these States (16), no restriction is opposed to family reunification for minor children of a further spouse by the sponsor. It is the case of Austria, Czech Republic,

Estonia, Federal Republic of Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Denmark.

However, this solution seems to result more often from an uncertainty about these children's status regarding the sponsor's legitimate children than from an affirmed will. For instance, it is the case of Estonia or the federal republic of Germany, if there is no distinction between the sponsor's children. Thus, German law does not distinguish between children of a first and a further spouse. Therefore general rules concerning subsequent migration of children apply: family reunification is granted when the sponsor enjoys the sole right of child custody or when custody is shared and the other spouse is in possession of a residence permit. In Bulgaria, a similar uncertainty plays as the definition of family members is the two spouses and "their" children. If the legislator wished to limit the children entitled to entry and stay only to those common for the sponsor and the spouse could had set down "their children from the marriage". As long as a child of a further marriage to the sponsor is still his/her child, by lack of explicit limitation, author's understanding is that in theory it should be possible for this child to be reunited with the parent in Bulgaria.

- A second group of eight Member States clearly forbids such reunifications. It includes Cyprus, Finland, France, Greece, Luxembourg, Netherlands, Romania, and the United Kingdom.

  This position is justified by a mix of refusal of the concept of polygamous unions (and therefore of its familial consequences) and a very simple reasoning. To the first logic corresponds French law which considers that children of a further spouse non admissible to family reunion are excluded from the reunification except if the spouse deceased or was withdrawn his/her exercise of parental authority. In case of polygamous marriage, the filiation of children whose reunification is requested is thus carefully examined and all evidence and documents relating to their situation must be completed, if they are written in a foreign language, by their translation in French by a translator interpreter registered by a Court of Appeal. Pragmatic, the British view considers that if the spouse cannot be admitted as a spouse, then the children will not be admitted.

  In Latvia, the legislation does not contain references to such a situation. However, such a reunification could not be authorised as this Member State's law does not recognise polygamous marriage, nor would it recognise the family reunification of such future spouse's children. This is likely to be situation also in Lithuania. While no explicit provisions exist, due to restrictions on polygamous marriages in general family law legislation, children of further spouses may not be in practice recognised as eligible for reunification in Lithuania. This may also be a public order issue.

  In Belgium, the legislation specifies that the provisions relating to family reunification are not applicable to polygamous unions concerning the spouse as well as his/her children. Only in exceptional cases, and under some circumstances, the legislation offers a discretionary power to the Minister of Home Affairs to authorise residence for

polygamous children. Thus, the restrictions constitute the norm and the authorisation is the exception.

In Ireland, not bound by the directive, there is no rule on this subject and no precise directive either.

2.3.3.7. The partner's minor children (Q.24.A)

All the Member States, except for the United Kingdom and Denmark, which have chosen to authorise reunification for unmarried partners, also authorise reunification for their minor children, including adopted ones. Belgium notably envisages this possibility as soon as the partner's children come to live with the family, are minors of 18 years old, are single, and as long as the partner has custody, and, in case of shared custody, under the condition that the other custody holder consented to it.

In Denmark, as a main rule, Aliens Act section 9 (1) (ii) does not authorise reunification of minor children of the sponsor's unmarried partner, as the provision holds a condition on the partner being a spouse in cases of family reunification with a child who is not a child of the sponsor. However, this is modified by the fact that a registered partner is considered compatible with a married partner. Also, the residence permit issued for the partner may provide the legal basis for the partner's own eligibility for family reunification with the child, cf. Aliens Act section 9 (1) (ii) and (iii). Finally, Aliens Act section 9c (1) on exceptional reasons, including regards for the family unity, may provide the legal basis for family reunification with a minor child of the partner.

Only three Member States give that possibility to unmarried adult children (Czech Republic, Sweden, Denmark). In the Czech Republic, this solution applies to the adult children of the registered partner only, while the Netherlands accept to authorise family reunification for single children when they are objectively unable to provide for their needs on account of their state of health.

In the majority of cases, it is indeed through the legislative or regulatory way that the exercise of this faculty is implemented.

2.3.4. Adult single children

Q. 20.E to I., 24.B, 25, 26. Does the Member State authorise reunification for the sponsor and his spouse's adult and single children (a 4§2 b) as well as that of the partner and does national law impose that these adult and single children be objectively unable to provide for themselves due to their health status ?

Q. 20. E

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Q.20.G

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

- Fourteen Member States did not make use of the option offered by article 4§2 point b of the directive: Austria, Bulgaria, Cyprus, Finland, France, the Federal Republic of Germany, Greece, Lithuania, Malta, Poland, Denmark, Ireland and the United Kingdom.

- Thirteen Member States envisage in different areas the possibility for the adult and single child to reunite with the sponsor and/or his/her spouse (with the exception of Italy which does not open that possibility for the spouse's children). They include Belgium, Czech Republic, Estonia, Spain, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Slovakia, and Sweden.

Concerning the conditions to reunification, the situations are varied. Belgium specifies that the beneficiary must be handicapped, single and more than 18 years old, and produce a certificate from a doctor registered by the diplomatic or consular Belgian post, stating that he/she is, due to his/her handicap, unable to provide for his/her own needs. Slovakia limits the age of the minor child to 25 years old and three Member States (Latvia, Portugal, and Sweden) envisage the possibility for adult children to join up with the sponsor and his/her spouse without necessity of fulfilling the conditions relating to their state of health. The Netherlands recall the health condition and stress the necessity of having a real family relationship, while listing the cases in which it ceases to exist. It will be added that the fact that the adult child pursues his studies is mentioned by Portugal and Slovakia. The Spanish legislation only imposes that adult and single children are granted reunification when they are in a state of incapability. The incapability declaration can be issued by the judicial authorities. Otherwise, the evidence of the incapability must be brought by a medical expertise establishing the person's incapability level.

Concerning the partner's adult and single children's reunification, only Czech Republic, the Netherlands and Sweden authorise it. In Czech Republic, this reunification is only valid for registered partnerships.

2.3.5. First degree relatives in the direct ascending line

Q.20 A to 20.D and 20.I – Does the Member State authorise reunification for first degree relatives in the direct ascending line of the sponsor and his/her spouse (a 4§2 a), and do they have to be dependent and not enjoy proper family support in their country of origin ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

- Twelve Member States, including two not bound by the directive, do not authorise reunification for first degree relatives in the direct ascending line (Austria, Bulgaria, Cyprus, Finland, France, Federal Republic of Germany, Greece, Malta, Latvia, Poland, Denmark, United Kingdom).

  However, in Germany, in exceptional cases, a discretionary decision from the administration can be taken in order to grant family reunification. Then, the administration or the judge must consider the relative's dependence and his/her capacity to provide for his/her needs. The German case law considers that these conditions are not fulfilled if there are more narrow familial links in the country of origin.

- Four Member States only authorise reunification for the sponsor's relatives and not for his spouse's (Belgium, Czech Republic, Italy, Slovakia), although the Czech situation can be put into perspective as the reunification of relatives in the direct ascending line can be effective when the concerned person is the holder of a residence permit which is delivered through the family reunification procedure.

  In Bulgaria, the possibility is opened but only when the sponsor is a member of the diplomatic or consular staff. In that case, they will be able to join up with the sponsor if they are financially insured.

- Eleven Member States authorise family reunification for relatives in the direct ascending line of the sponsor and/or his/her spouse. They include Czech Republic, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain and Sweden.

  The conditions of implementation of this form of reunification considerably vary between Member States. Generally, the criteria are far from being strict and some States do without (Hungary) or remain very vague (Lithuania) or are set up by an explanatory circular (Italy). In this latter case, it belongs to the Ministry of Foreign Affairs to identify the relevant parameters that shall be taken into consideration when assessing if the conditions for reunification are met.

  Sometimes, as in the Netherlands, the criteria set by the directive apply precisely as the parents must be at least 65 years old, be single, the evidence must be brought by an authentic document (decease or divorce certificate) and none of their children in the country of origin must be likely to take care of them. In Portugal, only the dependence criterion applies. In Slovenia, the legislation provides that the sponsor and his spouse's

single adult children and parents who are dependent in the country of origin are considered as close members of the family and have a right to family reunification. To prove the familial relationship and the obligation to support family members, birth certificates and decisions to support the family delivered by the competent authorities must be joined to the reunification request. These documents must be translated in Slovenian except for international documents delivered in several languages. In the Czech Republic, the legislation authorises reunification for a single person who is more than 65 years old or, regardless of age, is unable to provide for his/her own needs or considering his/her health status. The reunification is only possible with the parent or the child in possession of a residence permit, although without need of a prior residency. The relative in direct ascending line's dependence and the family's support are not explicitly mentioned by the legislation but the mention "single person" is enough. It covers single, widowed or divorced persons.

In Spain, reunification is possible if the requesting persons demonstrate that the relatives in direct ascending line are dependent. They notably have to demonstrate that, at least during his/her last year of residence in Spain, the sponsor transferred money or supported expenses in a proportion that allows to infer an effective economic dependence. A ministerial order from the Minister shall determine the amount or the percentage of resources that can be considered as sufficient to fulfil the "dependence" condition.

In Sweden, the family reunification of relatives of direct ascending line is authorised. Two conditions are necessary. On the one hand, they shall have lived together before the departure. On the other hand, certain dependence shall exist. The latter is assessed on the basis of social and emotional criteria (kind of relationship, age and familial status, if there is a connection with another country, the duration of the common life of the sponsor and the family member) more than financial. If there are doubts about the familial tie, a DNA test can be proposed. In Bulgaria, the possibility is opened when the sponsor is a member of the diplomatic or consular corps. In that case, they will be able to reunite with the sponsor if they are financially insured.

In Belgium, family reunification for relatives in the direct ascending line of the sponsor and/or his/her spouse only exists for recognized refugee children and on the basis of a discretionary power of the minister of Home Affairs for other cases.

- In most cases, it is indeed by the legislative or regulatory way that this faculty is implemented.

2.4. Procedure of assessment of the application for family reunification

2.4.1. Existence of a procedure

Q.34 et 35 – Did the Member State implement a procedure relating to family reunification and what are its main modalities (a.5§1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

According to article 5§1 of the directive, the Member States determine whether an application shall be deposited before the competent services for the family reunification. This article of the directive provides that a procedure, even a basic one, shall exist in order to allow the family reunification application to be assessed. Assessing the States' attitude towards this provision can be useful.

- The great majority of Member States have judged relevant for a long time to implement a specific procedure about the exercise of family reunification. It is revealing to observe that the implementation of directive 2003/86 is not the source of this procedure as most Member States had put it in place before the implementation date (Q.35 E), except for Cyprus, which put it in place afterwards. This is confirmed by the fact that Member States that are not bound by the directive also use such a procedure (Denmark, United Kingdom).

- Only four Member States did not consider useful to institute a specific procedure, knowingly the Czech Republic, Hungary, Latvia, and Poland. In these States, family reunification is dealt with within common alien's law and does not entail a specific treatment. In Ireland, a Member State that is not bound by the directive, such a procedure only exists within refugees law as third country nationals' situations are dealt with through formal and informal procedures.

However, this procedure does not have an exclusive character everywhere.

- In 15 Member States out of 27, including the three Member States that are not bound by the directive, the described procedure is the only applicable to family reunification (Cyprus, Greece, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden and United Kingdom, Ireland, Denmark).

- On the other hand, eleven Member States mention that other procedures can give rise to the possibility of family reunification (Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Federal Republic of Germany, Hungary, Luxembourg, Spain).

  In this second category, Austria and Belgium envisages that the alien not fulfilling the conditions contained in the provisions relating to family reunification can still request

that the Ministry for Home Affairs make use of its discretionary power to authorise the residence.

Several Member States (Austria, Estonia, France, Federal Republic of Germany, Spain) envisage a procedure allowing family members to benefit from the family reunification although they already reside in the host Member State and even if the common law procedure imposes that they reside outside the Member State. This procedural choice lays either on "humanitarian reasons" (Austria), “exceptional circumstances” (Spain), or on the idea that a return to the requester’s country of origin is not reasonable (Federal Republic of Germany), or on the fact that the person simply already resides in the Member State and then can benefit from a different procedure (Estonia). Two Member States envisage that when the person does not enter the categories opening a right to family reunification but has personal and familial links in the host Member State, a refusal of residence would disproportionately affect his right to respect of his private and familial life and therefore shall be granted a residence permit (France, Luxembourg).

In the Czech Republic, migration law (Aliens Act) stipulates three different kinds of stay on the territory (visa, long term residence permit or permanent residence permit), each one of them may be obtained by a family member (the right to family reunification is connected to the long term residence permit or permanent residence permit). Then there is another law which is devoted solely to the issue of asylum seekers and refugees which gives a possibility to grant a refugee status to family members, but the right to family reunification of recognized refugees according to the directive is ensured by the provisions of Aliens Act.

Substantially, it is evidently not possible to describe the great diversity of national solutions (see the first part of the report). The majority of national solutions consist in conferring to the ministry of Home Affairs or Immigration the handling of these questions, a few areas being reserved to the ministry of Foreign Affairs or Social affairs. This predominance of security concerns is confirmed by the fact that NGOs are unanimously put aside while the procedure takes place.

In the end, the exercise of the reunification procedure, as framed by the directive, leaves important margins of manoeuvre to the Member States.

- The author of the reunification request can vary (Q.35.C). Two groups of Member States emerge as only Finland envisages that the request may be introduced indifferently by the sponsor or the family member(s).

    - The sponsor can introduce the family reunification request in a first series of States (Cyprus, France, Greece, Italy, Latvia, Luxembourg, Malta, Poland, Romania, Slovenia, Spain) while Ireland, which is not bound by the directive, only organises such a procedure for refugees.

      In a more original way, Portugal organises two procedures depending on the location of the concerned persons. If the family members who want to join up with the sponsor live outside the Member State, the request is introduced by

the sponsor. On the other hand, if the family already resides on the territory of the Member State, the request can be introduced by the sponsor or the members of his family. Italy envisages that the family reunification application can be introduced by the sponsor or an attorney.

- Family members can also introduce the reunification request (Austria, Belgium, Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Netherlands, Slovakia, Sweden) as in the United Kingdom or in Denmark. In Austria, the application has to be filed by the family member(s) willing to join the sponsor as the sponsor is not a party of these proceedings. Minor children are represented by their parents or legal guardians in the proceedings. A Member State, the Netherlands, distinguishes itself amongst these States. The request is introduced by the family member(s) in the country of origin in order to be granted a temporary residence permit, but the sponsor can also introduce a request to be advised on the issue of this temporary authorisation. If the answer from national authorities is a negative one, it cannot be contested and it entails a negative answer about the temporary residence permit request, which can be the object of an appeal.

2.4.2. Supporting documents

Q. 36 – Which documentary evidence are required to prove (a.5 §2):

Mandatory provisions

It should be emphasized that the project of law presented in Luxembourg does not take this question into account and that it will be encompassed by a regulation to be adopted.

Q. 36. A – Family relationships according to article 4?

Article 5§2 of the directive provides that the family reunification request is completed by documentary evidence proving the existence of family ties.

- The acts relating to the requesters' *identity* are required in several Member States (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Finland, Greece, Federal Republic of Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).

  In these States, the documents required are generally the followings: marriage, birth, adoption, custody certificates. Most of the time, they are certified copies of the originals, the certification of which belonging to the consular or diplomatic authorities, to competent national authorities, or sometimes declaration from nationals court as in Ireland in case of proxy marriages. Some Member States require the deliverance of a cohabitation certificate for partners (Finland, Denmark) or of a decease certificate when one of the parents passed away (Finland, France).

- There is a gap between the extreme precision of some Member States' legislation (France, Denmark, Finland, Netherlands, Slovakia) and the imprecision of some others (Czech Republic, Malta, Spain). This imprecision being the manifestation of indifference from the State towards this question or of its will to keep a discretionary margin of manoeuvre.

  When these documents must be produced, some provisions impose that they are translated into the Member State's language (Austria, France, Federal Republic of Germany, Greece, Hungary Italy and Lithuania). This condition is not provided by the directive, which does not forbid it either. Two Member States specify the conditions in which these documents must be translated, either by an interpreter before national jurisdictions, or, if this is not possible, the copies must be certified by consular or diplomatic authorities (France, Federal Republic of Germany), or by translation and certification by competent national authorities (Greece) or even thanks to an *apostille* (Lithuania). This procedure seems to be framed but there is no precision about the fact that there is a need to pay for the operation. A third Member State (Italy) imposes that the documents are duly translated and certified by consular and diplomatic authorities, obviously leaving this operation at the applicant's expense. When the required documents are not or cannot be produced, some Member States envisage the possibility of an interview (Austria, Belgium, Finland, Ireland, Spain, Sweden) or even blood or genetic tests (Austria, Belgium, Finland, Italy, Lithuania, the Netherlands, Sweden, Denmark, Ireland, United Kingdom).

- Five Member States assume considerable margins of appreciation in this area (Federal Republic of Germany, Lithuania, Malta, Spain and Sweden).

  - Thus, in Sweden, the principle generally lays on the free evaluation and production of evidences while the Federal Republic of Germany considers that the evidence of family relationships belongs to the administration's discretion.

  - In Spain, documentary evidence are not mentioned in any text and family ties can be proved by all means, birth and marriage certificates, family record book, or any other recognised registration. However, to avoid any alteration, these documents shall necessarily be legalised by diplomatic way and if possible in conformity with the Convention of The Hague of October 5th, 1961.

  - In Malta, no specific documentation is mentioned: the regulations simply speak of 'documentary evidence'. It is understood that any document that proves to be of sufficient evidence to the satisfaction of the Director for Citizenship and Expatriate Affairs would suffice. However, this documentation must show that the family members are family members for the purposes of family reunification.

  - In Lithuania, according to the Order on Temporary Residence Permits (paragraph 18), the persons concerned need to submit documents certifying their marriage, partnership relations or that they are unmarried children below 18, or that they are direct ascending line relatives who have been dependent for at least one year and unable to make use of the support of other family members residing in a foreign

country. The Order was supplemented by paragraph 18[1] on 14 June 2007, which refers to alternative documents in case the foreigner's family members are not able to submit required documents and includes: free format written obligation to guarantee means of subsistence for family members, provide accommodation for the period of residence permit and pay the issuance of insurance documents. Such a letter shall be confirmed by notary or by the migration service official who is receiving the letter. According to existing rules, all documents issued by foreign states have to be legalized or approved with "*apostille*", unless the international agreements or EU legal acts provide otherwise, as well as translated to Lithuanian language (paragraph 24 of the abovementioned Order). If existing family relationship cannot be proved in any other manner, a DNA test can be carried out in family reunification cases. The foreigner has to cover the cost of this test (Art. 122 of the Aliens Law). Also, age assessment may be carried out in case of doubt (Art. 123 of the Law).

Q.36. B – The respect of accommodation conditions laid down in article 7?

Optional provision

Generally, this possibility given by the directive is taken back by the majority of Member States. There are two groups drawn inside them.

- A first tendency requires the voluntary production of the documentaries relating to the satisfaction of accommodation conditions by the sponsor.

  Generally it relies on a copy of the title deed, of the lease of rent, of a sale agreement, or of documentaries allowing to establish that the sponsor has an appropriated accommodation at the required date (Austria, Czech Republic, Denmark, France, Greece, Italy, Hungary, Lithuania, Poland, Slovakia, United Kingdom). In some Member States the clue given to show that this condition is satisfied is not really framed and the conditions of its production are quiet liberal. In Bulgaria, it is enough with the address registration of the sponsor. In Federal Republic of Germany, the preliminary instructions of the Federal Ministry of the Interior (AH-BMI) further specify that the foreigner must explain actual verifiable circumstances and put forward the supporting documents. The AH-BMI does not further specify which proofs will generally be asked for to prove the accommodation conditions. No. 2.0.4 only describes the accommodation conditions that need to be fulfilled (e.g. the necessary size of the accommodation). In Latvia, Malta, or in Portugal, the clue of the existence of the accommodation can be brought on the basis of any documentary.

- Another operation consists in the submission of the accommodation's clue to a procedure of authentication by a public authority or by a notarial act (Belgium, Italy, Spain) or a letter signed by the sponsor (Lithuania), all of that without a homogeneous comportment even inside a State itself as in Spain for example, where criteria and controls are completely disparate. Visits on the accommodation's place can be

requested in order to appreciate the appropriated nature of this accommodation (Austria, Cyprus, France, Italy, and Spain).

Several Member States do not require the satisfaction of this formality (Bulgaria, Finland, Ireland, Netherlands, Slovenia, Sweden). In Ireland, although there is no reference to this requirement in the Department of Justice Guidelines, administrative practice appears to require that sufficient/suitable accommodation for the number of family members with whom family reunification is sought.

Q.36. C – The respect of sickness insurance conditions?

Optional provision

- Nine Member States do not impose evidence about the satisfaction of the condition relating to the possession of a sickness insurance (Finland, France, Italy, Latvia, Portugal, Sweden, along with States in a derogatory situation, United Kingdom, Ireland, Denmark).

- The practice of the18 States using this faculty are very varied. One member State, the Czech Republic, does not impose this condition for the deposit of the reunification request, but requires it to issue a residence title before the visa is printed which allows the entry on the territory in view of benefiting from the residence title. Several States impose the possession of a sickness insurance covering the costs in case of illness, without specifying at which step of the procedure (Bulgaria, Cyprus, Federal Republic of Germany, Lithuania, Slovenia, and Spain). Sometimes it is specified that this condition has to cover the duration of the applicant's and his family's stay (Bulgaria, Lithuania).

The evidence can be brought in different ways. Either by the production of a certificate issued by a Social Security institution (Greece, Spain), a document proving the fulfilment of this requirement if the third country National is not affiliated to a compulsory regime or in a written certificate from a National or an alien who commits to cover the health costs during the stay on the National territory (Lithuania), by any way proving that an insurance was concluded (Spain) with a written confirmation given by an insurance company able to provide for a sickness insurance on the concerned Member State's territory (Slovenia).

Q.36. D – Certified copies of family member(s)' travel documents?

Optional provision

- Several Member States (Finland, France, Greece, Hungary, Italy, Lithuania, and Romania) do not require a certified copy of the travelling documents when the family reunification request is introduced.

- For the States applying this requirement (Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Denmark, Federal Republic of Germany, Greece, Ireland, Latvia, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden), the travelling document given is in numerous cases a valid passport, except for one State not bound by the directive and which requires the production of a visa (United Kingdom). In

Spain, the law authorises the presentation of a copy of the passport or the travel document during the first phase of the deposit of the reunification request. It is only at the time of the procedure of the issuance request for the visa that the original passport/travel document is required. In Malta, the regulation does not specify for any particular documentation but foresees the production of any "documentary evidence" that would be considered as sufficient by the authorities such as certified copies.

2.4.3. Interviews and investigations

Q.37 – Is there a possibility to proceed to interviews and/or investigations?

Optional provision

A large majority of Member States uses this possibility given by article 5§2 in order to make sure the reality of the family ties invoked by the sponsor. Most of the time these States chose to cumulate the two techniques (Greece only keeps the interview one). Only Romania apparently does not use it.

- These possibilities sometimes belong to administrative practices such as in Bulgaria, Ireland and Slovakia, which make the transparency and the reliability more doubtful than if the legislation or the rules were organizing this kind of procedures. It is the case in Slovakia for instance, since these possibilities do not come from the law but are ruled by internal regulations in the police. On the contrary, these rules are enshrined into the Code of administrative procedure like in Poland. Sometimes, the aim of these interviews is not necessarily identical to that fixed by the directive: it is often wider than the one of the "proof of the existence of family ties". Thus, in France, interviews target to inform the third country National on the integration process offered to him, while the investigations bear on the accommodation and income requirements, to which is added the checking of family ties. In another State, Lithuania, interviews intend to find the aim of the residence and the validity of the information produced by the third country National. However, it is easy to imagine that during these interviews, the satisfaction of the directive's objective has an accessory role. Furthermore, the lack of precision of the directive regarding the exact meaning of "family ties" leaves an important margin of manoeuvre in the leading of these procedures. In Belgium, the attorney office proceeds sometimes to investigations when there is suspicion of white marriage. It happens that the Belgian consulate abroad and the *Office des étrangers*, before or after the marriage celebrated abroad, request investigations. There are done in Belgium and comprise interviews of the foreigner living in Belgium, of members of his family…

  As an example, the Portuguese law shows that interviews and investigations depend on a discretionary power of the national authorities who can implement it within the assessment of a family reunification application. Also, in Slovenia, interviews and investigations are engaged to check the important facts before the issuance of the decision. In France, the political choice consists in the promotion of an "integration process" which was given a concrete form by the law voted during the autumn 2007,

in which are mixed interviews aiming at making the integration in the host society easier, and investigations aiming at making sure that the concrete will of the foreigner is to insert in this society.

- One distinction between these two procedural phases is possible, as the tendency in Member States seems to be to the generalization of investigations techniques.

  - Concerning interviews, the freedom of action is the rule as in the United Kingdom: an interview is undertaken by an entry clearance officer who is part of the staff of the mission. Sponsors are not required to attend and would usually be excluded from the interview even if present at the time of the interview (this is at the discretion of the mission). There is no set format and the Entry Clearance Officer may ask wide-ranging questions, especially in relation to the genuine nature of a relationship. In Finland, Section 64 of the Aliens Act concern oral hearing. When applying for a residence permit on the basis of family ties, the applicant, sponsor or other relative may be heard orally to establish whether the requirements for entry or for a residence permit are met. The hearing is conducted by the police or by an official of a Finnish mission. The Directorate of Immigration may conduct the hearing if establishing the matter so requires. In practice the applicant and the sponsor are systematically heard orally. In France, the deposit of the application has to be done during a "personalized interview" allowing the applicant to be informed about the steps he will have to complete in order to achieve his family's "integration process". He is informed on the pre-welcoming modalities, meant to help the applicants to fulfil the last steps before the arrival of his family and to prepare this arrival, the ones concerning the welcoming and the role played by the specialized social services. The welcoming and integration contract is then introduced to him, underlining the duties linked to it, notably in terms of learning of the French language and of the respect of the laws of the Republic. The question of the language proficiency has now been settled prior to the arrival since the law of November 20th, 2007 as the issuing of the visa is conditioned by a positive assessment of the degree of knowledge of the language and values of the French Republic according to article L.411-8 CESEDA

  - Concerning investigations, things can go rather far, especially when it comes to the reality of the family tie.

    - In Austria, Section 29 Settlement and Residence Act provides for DNA-tests to prove family relations. These tests must not be ordered by the authority but are only thought as a possibility for the applicant to prove a family relationship that may not be proved by reliable documents.

    - In Belgium, this procedure seems to be exceptional, but only exists for persons coming from States with failing civil status services (destruction of the registers, or deficiency/frauds on the civil status) since June 2003. Depending on a simple administrative practice set up and secured by a circular

coming from the Foreign office, placed under the direction of the Ministry of Home Affairs, this procedure is not framed by any legislative or regulatory text ; the cost of the analysis is borne by the sponsor.

- In Finland, Sections 65 and 66 of the Aliens Act lay down rules on establishing family ties by means of DNA analysis. The Directorate of Immigration may provide the applicant and the sponsor with an opportunity to prove their biological kinship with DNA analysis paid from State funds if no other adequate evidence of family ties based on biological kinship is available and if it is possible to obtain material evidence of the family ties though DNA analysis. It is argued by the Finnish Red Cross and the Refugee Advice Centre that DNA tests are required systematically to provide proof of the biological kinship. In case of false declaration, it is required to refund the costs.

- In France, the law of November 20th, 2007 introduced an identical possibility in terms of family reunification, with the consent of the constitutional judge. The new article L.111-6 CESEDA thus authorises, experimentally and under judicial control, the practice of DNA tests in order to prove the child's biological filiation in cases where the civil status of the State of origin is not reliable. These tests require the consent of the person and their cost is on the State's expense.

- In Italy, DNA tests are possible but subject to several conditions. They are performed by the IOM offices, but are carried out only on a voluntary basis and as a final resource either by asylum seekers, who cannot get family certificates for safety reasons, or by economic migrants, who have never been registered in the Registry office in their country of origin or who prefer to shorten the appeal time in case of recourse against a decision issued by the Italian diplomatic representation attesting that the documents filed are not reliable.

- In Spain, it is possible since 2006 to proceed to DNA test in some diplomatic missions.

- In Lithuania, if existing family relationship cannot be proved in any other manner, a DNA test can be carried out in family reunification cases and the foreigner has to cover the cost of this test, except for refugees who do not need to cover the cost. Also, age assessment may be carried out in case of doubt.

- In the Netherlands, since February 1st, 2000, an executive protocol between the foreign office and the immigration and naturalization service defines the execution mode of DNA tests which are voluntary made, the costs being at the expense of the applicant but refunded if the test can prove the family tie. This procedure is extended to all the applicants in all the embassies when the familial relationship cannot be proved or not sufficiently.

- In Sweden, if there are doubts about the relationship the competent authority shall, under certain conditions (when other investigation is insufficient for a

decision or when it is obvious that the alleged relationship does not exist), the legislation *offer* an opportunity of a DNA- analysis at the expense of the Government. Thus, there is no obligation of the applicants to undergo the test. The test shall accordingly to the *travaux préparatoires* mainly be offered in cases with minor children and parents when it is in the best interest of the child. This to prevent children from being misused as "fictive links" or as "merchandise" in order for persons to get a residence permit under false pretences.

- In France, after a political debate during the elaboration of the law of November 20th, 2007 and a validation by the constitutional judge, the experimental introduction of the DNA tests in order to prove the filiation was implemented by article L.111-6 CESEDA. By virtue of this article, the applicant for a visa for a stay longer than 3 months, or his legal representant, who is a national of a country which civil status have defaults, who wants to join up with or accompany one of his parents mentioned in articles L.411-1 and L.411-2, or having obtained the status of refugee or the benefice of the subsidiary protection, can, in cases of inexistence of the civil status act or when he was informed by the diplomatic or consular agents of the existence of serious doubts regarding its authenticity, that could not be revoked by the possession of state as defined in article L.311-1 of the Civil code, ask that the identification of the applicant by his genetic prints be looked for in order to bring an element of proof of a declared filiation with the applicant's mother.

The consent of the persons whose identification is looked for this way shall be expressly gathered beforehand. Appropriate information regarding the scope and the consequences of such a measure is delivered to them. The diplomatic or consular agents seize the tribunal of great instance in Nantes without delay so that it pronounces its judgment, after all the useful investigations were made and a contradictory debate, on the need to proceed to such identification. If the tribunal judges that the identification measure is necessary, it appoints a person in charge of implementing it among the enabled persons in the conditions envisaged in the last indent. The tribunal's decision and, if the need arises, the conclusions of the identifications analysis it authorised are communicated to the diplomatic or consular agents. These analyses are realized at the State's expense.

- In Denmark, for the examination of an application for a residence permit under section 9 or 9c (1), the immigration authorities may require the applicant and the person with whom the applicant states that he has the family tie on which the residence permit is to be based, to assist in a DNA examination with a view to determine the family tie, if such tie cannot otherwise be deemed sufficiently evidenced.

- In Ireland, the Department of Justice, Equality and Law Reform *Guidelines* state that sponsors and family members may be required to present DNA

evidence at their own expense, although it is also stated that this evidence will not be sought unreasonably.

- In the United Kingdom, the administrative practice has allowed to resort to the tests since the beginning of the 90's, on the initiative of the authorities and their cost is borne by the « UK visas » service, financed itself by the chancellor rights.

The struggle against marriages of convenience is also a preoccupation in some Member States (Bulgaria, Estonia, and the Netherlands). In the latter, the interviews and investigations are required from the police authorities against the competent municipal officers in order to fight against marriages of convenience. Lastly, cohabitation conditions can also be the object of an investigation, as in Denmark, where the police is competent to check the actual character of the cohabitation.

2.4.4. Evidence of the demand

Q.38.A, 38.B, 38.C, 38.D – When examining an application concerning the unmarried partner of the sponsor, which evidences are taken into account by Member States on the basis of national law to prove family relationship (article 5§2 last indent) ?

Mandatory provision

The answer only concerns States accepting family reunification for the unmarried partner. These States use several elements in order to establish the existence of family ties on the grounds of article 5§2, and no exhaustive and obligatory list is opposable to them, and it does not prevent them from using "*any other reliable means of evidence*."

- The existence of family ties, such as a common child, constitutes a first criterion. Amongst the 10 Member States allowing family reunification to unmarried partners, a majority (6 States) takes this element into account in priority, namely Belgium, Finland, the Netherlands, Portugal, Sweden, and Denmark.

  - For Sweden, it constitutes a "presumption" of family tie. In that State, the partnership is assessed on common-law spouses and applies to both homosexual and heterosexual unmarried partners (married homosexual partners, so called registered partnerships, are in Swedish law equal to spouses). The first condition is that the partners shall have lived together under a certain period of time that is not of a temporary art. In case-law 6 months is set as a guideline. As for shorter relationships the will of the partners to remain common- law spouses is taken into consideration. If the partners have common children there is a presumption that a partnership exists. Another factor of relevance is if the partners have the same address of national registration. Other factors of relevance are residence contracts, shared bank accounts etc. This is all based on case-law. The second condition is that the partners live as a couple, including some kind of a sexual relationship. The third condition is that the partners have a common household where domestic duties and the household economy are in some way shared.

Bulgaria, which allows reunification of unmarried partners for consular and diplomatic staffs also lays on this criterion.

- The criterion relating to the prior cohabitation is also used by 6 States (Finland, Lithuania, Netherlands, Portugal, Sweden, and Bulgaria for diplomatic and consular staffs). Two Member States (Finland, Sweden) fix periods which can constitute a prior deadline of cohabitation. If the Swedish case law considers that 6 months are enough to establish a prior cohabitation, the Finnish legislation imposes at least 2 years of common life.

  Curiously, Belgium does not reproduce this appreciation criterion while it is used in order to grant family reunification. Therefore, in case of inexistent cohabitation on the national territory, it is requested that partners have known each other for at least two years, that they prove that they regularly contacted each other by phone, ordinary or electronic mail, that they met three times during the two years preceding the request and that these meetings include in total 45 days or more.

- The registration of the partnership also constitutes an element of appreciation of family ties approved by 8 concerned Member States (Belgium, Czech Republic, Finland, Federal Republic of Germany, Lithuania, Netherlands, Portugal, and Denmark). It constitutes the most approved criterion, which is justified as it contributes to authenticate personal ties between two persons.

  The Dutch approach is an example: the evidence mentioned above is only relevant in case there are serious doubts on whether the relationship is genuine. Unmarried partners must prove their relationship is sustainable and exclusive. To this end the partners must prove that they are not married to someone else. Furthermore, they can sign a declaration that their relationship is exclusive and sustainable and that they will live together and share a common household after admission in the Netherlands. However, the application will still be rejected if there are grounds to believe that the application is asked for the sole purpose of granting a residence permit. This assumption can be based on contradictory declarations of the partners, declarations of other persons and other evidence, such as the finding that the partners are not living together or do not share a common household.

- Several Member States compare the registered partner to the spouse (Belgium, Czech Republic, Finland, Lithuania, Netherlands, Portugal, Sweden, Denmark). Finland has a particularly liberal legislation as the persons living in a relationship comparable to marriage are considered as spouses. The legislation specifies that they must have lived together for at least two years but adds that this condition is not required if they have a common custody of a child or if there are other serious reasons, which could be the case when the cohabitation was interrupted for reasons independent from their will. This situation can be proved by means such as documentary evidence or oral or written depositions.

- Finally, the directive offers the possibility to prove the reality of family ties by “any means of reliable evidence”. Six States use that option. Belgium sets three cumulative

conditions to open the possibility of family reunification to the unmarried partner. The conditions are:

- that the partners have been in a stable and long-term relationship for at least a year ;
- that the partner comes to live with his/her partner;
- that they are both 21 years old and single without another relationship with a third person. The criterion relating to age can be brought back to 18 years old in the case where the partners can prove the existence of a cohabitation of a year before the arrival on the territory of the Member State in question.

Portugal almost literally transposed the directive as the project of law relating to family reunification mentions the possibility to prove the existence of family ties by all reliable evidence. As previously underlined, evidences such as a common lease, common bank accounts, are all elements allowing to prove the existence of the partnership and therefore of family ties.

Finally, France, which does not recognize family reunification for unmarried partners, nevertheless authorises the residence of aliens not belonging to the categories benefiting from family reunification. This procedure can be implemented on the basis of personal and family ties in the Member State, notably assessed regarding their intensity, their duration, their stability, the conditions of existence of the concerned person, and his integration in the host society, along with the ties with his family in the country of origin, so that a refusal to authorise his residence would disproportionately affect his private and family life. This hypothesis can concern an unmarried partner who is already in France.

None of the criteria put forward by the directive have been implemented in Luxembourg, except registration of a partnership.

2.4.5. Conditions of residence abroad

Q.39 and Q.40 - Are family members obliged to reside outside the territory of the Member State while the application is being examined (a5 §3)? Is this obligation sanctioned and how?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

The obligatory residence of family members outside the Member State territory where the sponsor is located is a key element of the harmonisation purview of the conditions of exercise of family reunification. This extern residency allows to proceed to the assessment of the reunification application before the introduction of the family.

- Five Member States bound by the directive do not formulate this rule in their legislation and are breaching the directive (Czech Republic, Finland, Hungary, Poland, and Portugal).

  In the Czech Republic the standard situation is that the procedure is held while the family members reside outside the territory as the application for family reunification does not itself constitute the right to entry and reside on the territory. However, this Member States accepts that a request for a residence permit can be deposited while the spouse or the child are on the national territory under the condition that they legally reside on the grounds of a valid visa or a residence title. Concerning Poland, the law provides that the residence permit for 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 concerned who already resides on the territory of Poland cannot be regarded as an exception.

  Although the solutions chosen by these States can fall under the derogations set up by article 5§3 second indent of the directive, the silence of these national legislations and the lack of general clause recalling the rule set by the directive constitute a breach of the obligation of transposition of this mandatory provision of the directive.

  In Finland, the main rule is that the family member has to wait for the decision abroad. However, if the spouses have lived together before coming to Finland, the spouse can apply for the permit after entering Finland i.e. she does not have to apply from abroad. This modification significantly loosens the requirement of waiting abroad.

- The great majority of Member States (19) consecrates this rule in their national legislation without always explaining the sanctions. These go from a fine (Finland) to the rejection of the application (Austria, Denmark), or even to the exclusion from the family reunification procedure (France) or the expulsion (Spain) of the third country nationals who did not conform to the principle.

- Ireland, which is not bound by the directive, gives a particular answer: third country nationals not submitted to the visa obligation, persons who require a visa legally residing or even persons in an irregular situation can introduce an application in the Member State without having an absolute obligation of leaving the Member State. On the other hand, if a third country national submitted to the visa obligation resides in the Member State on the grounds of a short residence visa and then wishes to change his/her status, he/she is informed that this is not possible and he/she therefore must leave the Member State.

- The rigidity of this rule can create practical application problems questioning the right to family reunification. In Austria, for instance, the obligation to file an application for family reunification in the country of origin may lead to problems especially in situations where one parent has died and the child remains in the country of origin while the other parent is living in Austria. In such cases there is no abrogation from the requirement to file the application in the country of origin and therefore the sponsor has to go to the country where his/her child is staying to file the application.

There is no possibility to file the application in Austria. This seems to cause needless efforts and often bears problems for the persons concerned.

NO TRANSPOSITION	*CZ; FI; HU; PL; PT*
PROBLEM	*AT*

The article 5§3 second indent derogation, which indicates that "*a Member State may, in appropriate circumstances, accept an application submitted when the family members are already on its territory*" is widely used as only Cyprus, Greece, the Netherlands, and Romania do not use it. According to national reports, this derogation can be explained by the will of disposing of a "safety valve" likely to respond to humanitarian cases linked to the obligations of article 8 of the ECHR and also by that of finding a solution to the legal impossibility to remove family members in some cases. The very wide reading of the notion of "*appropriate circumstances*" by the Member States, much further than the strict humanitarian grounds that could objectively justify it according to several national reports, creates a compatibility problem with the rule set in the first indent of article 5§3.

- Most often, the derogation ground enlightened by Member States in their legislation, their case law or their practice, is that of "exceptional circumstances". Nine of them use it: Austria, Belgium, Bulgaria, Denmark, Germany, Finland, Latvia, Spain, and Sweden. The grounds are varied: more often conventional commitments from article 8 of the ECHR (Austria, France) or humanitarian reasons (Belgium, Bulgaria, Latvia) such as the persons' health status that cannot allow their return in the country of origin (Belgium). In Spain, this possibility is strictly framed by the legislation. The person must produce a residence accreditation in that Member State for at least 3 years, not have criminal records including in his country of origin, have a valid work contract of at least a year signed by the worker and the employer, and prove the existence of family ties (spouse, relatives in ascending or descending line) with another alien residing in Spain. Moreover, the mayor must produce a report certifying the person's social integration.

In Luxembourg as well this possibility is framed by the draft bill. Hence, article 73 states that in exceptional and duly motivated cases, the minister can accept the member of the family are on the Luxembourgian territory when the application is introduced.

Article 71 of the Draft bill states that "Are authorised to accompany the third country national, when he enters the territory, if he fulfils the established conditions […]:

a) the sponsor's minor children of whom he ensures the custody alone ; b) the members of the family as defined in article 70, paragraph (1) of the employee aimed at in articles 45 and 47 (about the highly qualified employees and transferred employees), *as well as the researcher aimed at in article 64.*

Finally, on the grounds of article 72 of the Draft bill, "*the family members are authorised to accompany the long term resident who obtained his status in another Member State of the Union and who exercises his right to residence in the Grand Duchy of Luxembourg in conformity with article 86, when the family is already constituted in the first Member State"*

The deposit and the assessment of the reunification application can also be authorised in the Member State in some cases notably when the family member already lives in the Member State and is in possession of a valid residence permit (Austria, Belgium, Denmark, Italy, Latvia, Spain, and Sweden). It is also the case when some third country nationals are not submitted to a visa obligation (Austria – only during the stay, Belgium, Estonia, Latvia).

- In Lithuania, it is also possible to submit the application within a country, but only for persons who entered legally, but this procedure does not guarantee the right of stay on the territory while application is pending (Art. 28(3) of the Aliens Law).

  However, some Member States submit this possibility to conditions as in Italy where the application must be deposited at least a year before the residence permit expires so that it is changed into a residence permit in the ends of family reunification. Spain submits that possibility to a residence of more than three years and the lack of criminal record in that State. Residence permits can also be a valid long-residence (Latvia) or short-residence (Belgium) visa.

  Some Member States extend the possibility of derogations to hypothesis that could be in contradiction with the object of article 5. Then, its beneficiaries are students (Belgium, Latvia), scientists (Austria, Latvia), athletes (Latvia), teachers (Latvia). This sectoral approach can be targeted when it concerns limited enumerated categories not submitted to visas obligations in Latvia (businessmen, company creators, independent workers, expert on atomic energy, persons detaining a specific position in a commercial entity) as well as particular citizenships (United States, Japan for Estonia). Sweden even goes until offer that derogation to third country nationals participating to a criminal investigation.

  Marriage in the Member State can justify a derogation request in France and Bulgaria, under the condition that the spouse is legally authorised to reside in the State. The case of children is also taken into account by several Member States, including newborns whose age must be inferior to 6 months in Austria, to a year in Estonia.

- One single State offers this derogation to third country nationals entered in an irregular way, namely Finland. Section 49 of Aliens Act lays down exceptions to this rule. According to this provision: an alien who has entered the country without a residence permit is issued with a temporary or continuous residence permit in Finland if the requirements for issuing such a permit abroad are met, and if the alien has already, before entering Finland, lived together with his or her married spouse who lives in Finland, or has continuously lived together for at least two years in the same

household in a marriage-like relationship with a person who lives in Finland or refusing a residence permit would be manifestly unreasonable.

The absence of definition of the terms "appropriate circumstances" leads to a wide variety of derogations in Members States' legislations. If one could consider that humanitarian reasons, based on article 8 ECHR or health conditions, could objectively justify derogations to the principle set up in article 5, paragraph 1, first indent, other grounds look sometimes peculiar as they for instance target specific situations or persons without being always convincing. This situation illustrates the difficulties to assess wether national provisions are in breach with the directive because this latter does not give any indications on this point and leaves wide margins of manoeuvre to the Member States when implementing it.

2.4.6. Duration of instruction

Q.41 – Do national legislations include a maximum period of 9 month to answer to the application by way of written notification (a.5 §4) ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Only seventeen Member States formally implemented in their immigration rules the obligation provided for in the directive (Belgium, Cyprus, Czech Republic, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, and Sweden).

However, the existence in the national legal order of general rules imposing to the administration to give a ruling in a required deadline, generally inferior to the 9 months required by the directive puts this deficiency into perspective. This situation is notably encountered in Austria, Estonia, Federal Republic of Germany, Poland and Slovenia. Without having formally transposed the directive prescriptions, these Member States are still not in a situation of breach as the rules of administrative procedure impose answer deadlines inferior to 9 months.

A similar situation exists in Denmark as by Act No. 89 of 30 January 2007 amending Aliens Act a model of self- service was introduced in cases of family reunification. According to the travaux préparatoires, the new model has as its purpose to make the processing of cases on family reunification more efficient and faster. It is stated that in cases where the Danish Immigration Service is provided with all the necessary information and documentation, the cases can normally be processed within 2 months. In practice and according to the service level target for the Danish Immigration Service in 2007, simple cases with the required information should be processed within three months. Complicated cases should be processed within seven months and applications handed in before 1 February 2007 should be processed at the latest on 30 November 2007; for simple cases 31 July 2007. In Ireland, administrative Guidelines state that processing of

applications should take a minimum of eight weeks but warn that this period will vary depending on the workload of the Visa section and the time it takes for the application to reach Ireland from the country of origin. There is no outer limit set for applications to be processed and anecdotal evidence provides that it can take up to two years to have an application processed to completion.

The situation is more problematic for three Member States in which no such rule exists. In Bulgaria, the time periods should be set by a decree implementing the Law. The newly amended regulation for implementation of Law for the Foreigners in the Republic of Bulgaria and the Law for the Foreigners in the Republic of Bulgaria itself foresees a time period for answering, only when the application is from a long term resident of another EU Member State. For the rest of the cases there is no time limit to take a decision for issuing an entry visa. There is a 7 days time period for taking a decision for renewing a residence permit. However the 7 days period is from the category "recommended time periods". This means that the authorities are not obliged to keep it. There is no time limit for the Chairperson of the Agency for Refugees to decide on an application for family reunification submitted from a refugee/person with a humanitarian protection/temporary protection.

In Spain, the Law does not set any deadline of nine months to answer to the family reunification request. Nevertheless, in practice the time to receive the notification is of 4-5 months. In the United Kingdom, in practice, applications are usually decided in a period between one day and three months-the length of time depends on the British mission who is making the decision. A period of nine months would only be reached in a situation where the application is refused and an appeal lodged.

Finally, the Swedish rapporteur points out that independently from the formal transposition operated by national authorities, by amending the existing legislation on that point, some organisations underline that in practice, the 9 months deadline imposed by the directive and the national legislation is not respected.

NO TRANSPOSITION	*ES*
PROBLEM	*BG; SE*

Q.42 – Can the initial time limit be extended (a.5 §4 second indent) ?

Optional provision

- 14 Member States use the option allowing an extension of the decision taking period. This can be justified by the complexity of the application assessment (Belgium, Cyprus, Finland, Federal Republic of Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, and Sweden).

  The use of this extension by Member States is precise: when alien authorities hardly or slowly produce the necessary certificates in Greece, when an investigation by a third person is necessary for the decision in the Netherlands, when the applicant did not produce the necessary information in the required times, and/or did not contribute to the case, or in complicated situations relating to public order and security in Sweden.

In two Member States the extension conditions lay on wider notions than the request complexity. In Finland for exceptional circumstances or for "justified cases" in Hungary allow it.

Finally, in Spain, if there is no precise provision on that point, the practice shows that extensions are granted on this ground provided for by the directive i.e. complexity of the examination of the application.

The duration of the extension vary according to the Member States. It can be of 6 months in the Netherlands, sometimes divided in twice 3 months in Belgium, more commonly of 3 months (Cyprus, Greece, Lithuania, Portugal, Slovakia) or comprised between 30 and 15 days if it applies to minors (Hungary). In three States, the extension period is not mentioned (Finland, Spain, Sweden).

In Ireland, state not bound by the directive, as no time limit is set out, the processing of applications can be extended regarding the workload of the Visa section and the time it takes for the application to reach Ireland from the country of origin.

- Eleven Member States refuse the faculty opened by article 5§4 and the deadline cannot be extended in Austria, Czech Republic, Denmark, Estonia, France, Italy, Latvia, Romania, Spain, Slovenia, United Kingdom). As stated above, Spain did not transpose the optional provision of the directive but apply it in practice.

Q.44 – In case of lack of decision at the end of the time allowed, what is the consequence for the applicant?

Mandatory provision

Article 5§4 last sentence plans that "*any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State*". If it relies on a compulsory clause of the directive, this provision leaves important margins of manoeuvre to Member States by stating that the consequences shall be determined by national legislation.

- Three Member States are breaching the directive as national law does not provide for any consequence in such case (Cyprus, Estonia, Lithuania,) and two States which are not bound by the directive are not in phase with the provision (Denmark, United Kingdom). In Latvia, such a situation cannot take place as no rule was adopted in that sense. In Ireland, this provision was not implemented. In Slovakia, the procedure established by the directive is not respected as if no decision is taken by the end of the 90 days the police department will draw up an official record where the reasons because of which it could not be decided (that caused difficulties for which it could not be decided) should be stated. In that record it also must be made briefly comments on proceeding undertaken in the procedure. Ireland doesn't have any equivalent rule. Notwithstanding the absence of rules in this regards, the Lithuanian rapporteur indicates that in case of lack of action on the side of the authorities, the applicant can appeal this to the court.

- In 13 Member States, absence of decision at the end of the period provided for by national legislation opens the possibility to bring a remedy. Here again solutions between the Member States are varied.

  It can be a gracious settlement (Poland, Slovenia). Four Member States allow to introduce a gracious and legal remedy (Austria, Czech Republic, Hungary, Spain). Lastly, six Member States plan the possibility of a legal settlement (France, Germany, Lithuania, Luxembourg, the Netherlands, and Romania). In Greece, the possibility of judicial protection is provided according to the general principles concerning the failure of emission of an administrative act.

  Amongst these States, Hungary deserves a special attention for its real complexity. If the authority does not fulfill its obligation, the supervisor authority – upon request or ex officio – shall examine the cause of omission and order the authority to proceed within an appropriate deadline. In case this deadline runs out without avail, the supervisor authority will appoint another authority, which has the same competence as the defaulting authority. The supervisor authority shall inform the client regarding these measures and examines, whether the appointed authority fulfills its obligation. The appointed authority is obliged to act on the merit of the case and pass a resolution within the relevant deadline. In case, there is no supervisory authority in a particular case (which is not the case in family reunification) or the supervisory authority fails to proceed and take measures, the Metropolitan Court (or the competent County Court) will order the local authority to proceed, based on the demand of the client. (Act CXL of 2004 on General Rules of Public Proceedings and Services §20).

  In Austria, a particular situation can explain the difficulty to deliver a decision and is susceptible to be in contradiction with the directive. In respect of applications for family reunification, there are special rules regarding the time limits for the decisions. These exceptions are necessary, because family reunification in most cases depends on a yearly maximum quota of settlement permits granted. If all requirements are met by an applicant but the settlement permit cannot be granted because the quota has already been exhausted, the application may not be rejected but the authority has to postpone the decision until a place in the quota is available in one of the subsequent years. According to Sect. 12 § 7 Settlement and Residence Act the general provisions on the time limits for the delivery of decisions in administrative procedures (Sect. 73 General Administrative Procedures Act, Sect. 27 Administrative Court Act) are not applicable in this case.

  Six Member States point out that the absence of decision is similar to an implicit reject decision (Bulgaria, France, Greece, Luxembourg, the Netherlands, Slovenia) solution which is reversed in Belgium, in Italy, and in Portugal where the implicit decision entails the authorization of the reunification request. In Italy, the beneficiary can directly request the issuance of a visa directly to the diplomatic authorities, in Portugal the positive decision is approved and certified by competent authorities and notified to States authorities so that they issue a residence title to the beneficiary.

- Two Member States openly conform to the directive by organising procedures in case of absence of answer. The first one envisages that the applicant can ask for the Directorate of Immigration that is the decision making body to adopt the decision and the Directorate of Immigration has to deliver an explanation on the reasons why the 9 months time period was not respected (Finland). In the second one (Malta), in the event that a decision is not laid down within 9 months, the application shall automatically be passed on for appeal to the Immigration Appeals Board in terms of regulation. In Sweden, the seizure of the Parliamentary mediator is possible, the mediator being the supervision authorities of the immigration service's activities.

NO TRANSPOSITION	*LV*
PROBLEM	*AT; CY; EE; LT; SK;*

2.4.7. Notification

Q.45 – Is the decision rejecting the application notified in a written form, and does it contain the motives of rejection?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Almost all the Member States have legal rules in their national order allowing to conform to the obligation of article 5§4 last indent of the directive, at the end of which the decision of reject of the family reunification application is duly justified and notified. But in Bulgaria, law about foreigners does not contain a requirement for reasoning a rejection contrary to the law on asylum and refugees. Since Aliens Act is *lex specialis*, it derogates the rule for reasoning set in *lex generalis*, namely the general rules for issuing an individual administrative act.

2.4.8. Best interest of minor children

Q.46 – How is the best interest of minor children taken into account by the Member State's legislation and authorities during examination of the application (article 5§5)?

Mandatory provision

Article 5§5 of the directive is clear: "*when examining an application, the Member States shall have due regard to the best interests of minor children*". Twice in its case quoted above (also see point 101), the Court of Justice underlined the importance of this obligation: "*furthermore, as required by Article 5(5) of the Directive, the Member States must when weighing those interests have due regard to the best interests of minor children*" (§63).

- Some Member States formally implemented this obligation: Belgium, Cyprus, Estonia, Finland, Italy, Malta, Romania and Slovakia. In Sweden a pre-existing general provision in the Aliens' Law ensures due regard to the best interest of the child in all procedures concerning alien minors. France thus partially proceeds as the consideration of the child's interests is an integral part of the jurisprudential criteria used by the judge in his control of the administrative decision answering to reunification and it also corresponds to article 3-1 of the New-York Convention relating to children's rights which has a direct applicability on that point. Besides, the possibility to authorise a partial family reunification is expressly planned by article L.411-4 last indent of the Aliens Code, under the only condition that "the grounds relating to the child's interest" are taken into account. In Malta, this obligation does not appear in the implementation measure but constitutes a general principle in Maltese family legislation that the best interests of minors are always taken into consideration when minors are involved.

- In Bulgaria, it is announced as principle only in Law on Asylum and Refugees, but not in Law for the Foreigners in the Republic of Bulgaria. However, both laws contain provisions pronouncing that all unaccompanied minors are entitled to stay with a foster family, stay with a relative, stay in a specialized institution, have a legal guardian, while their legal status is figured out and further. Law on Foreigners refers to the procedures under the Law for protection of the child. The reference to the sole unaccompanied minor does not seem to be sufficient to envisage an integral transposition of the obligation set by the directive.

- A second group of Member States also refers to the New York Convention relating to children's rights (Czech Republic, Denmark, Federal Republic of Germany, Latvia, Luxembourg and Spain) which provisions are perfectly clear. In theses States the respect of the obligation formulated by the directive is guaranteed and there is no need to formally transpose the directive. In Spain this obligation is formally expressed in the Organic Law of the protection of minors from 1996.

- Poland consecrates this obligation on a constitutional plan. Article 72(1) of the 1997 Polish Constitution states that the Republic of Poland shall ensure protection of the rights of the child. Furthermore, Art. 72(3) provides that organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. It is the same case in Slovenia: in accordance with Article 56, § 1, of the Constitution of the Republic of Slovenia, children enjoy special protection and care.

However, a series of other Member States create problems.

- This obligation is not expressly mentioned in the concerned Member States' legislation, which is likely to entail a breach of the directive (Austria, Greece, Portugal, United Kingdom) or incompatibility in the case of Ireland. The Greek example is patent as according to the law family links shall be taken into account by the authorities. There are no more particular specifications.

In the Netherlands, the absence of formal transposition cannot satisfy the reference made by the royal decree implementing the directive to the general rules applicable to administrative acts. These impose to public authorities to take into account all the relevant circumstances when they apply a decision, to which is added the consideration of article 8 of the ECHR.

This reference to the ECHR is obviously subjacent in all the Member States (Lithuania, Spain) and it creates the problem of its sufficient character regarding the obligations set by the directive, underlined with force by the Court of Justice. It is clear that, on a legal point of view, the silence kept by Member States constitute a breach, all the more when it appears in some Member States that this interest of the child is not enough taken into account in the opinion of observants such as NGOs (Austria). It is also the case for Member States which, like Hungary, do not specifically integrate the protection of the child's superior interest in their legislation and refer to the guarantees offered by international agreements without other precisions.

- If for some States this obligation is not taken into account by authorities (Ireland), the administrative practice overcomes this lack of juridical implementation in some other States.

  This practical obligation is imposed in a different way depending on the States. In Lithuania, authorities impose in practice that this principle is taken into account in the assessment of the requests in order to ensure the maintaining of family ties and the child's development within a family. In Austria, active NGOs in the legal support to aliens consider that the child's superior interest is not sufficiently considered by authorities.

  However, the absence of consideration of this obligation by the legislation makes it random and the interpretations on that field are very varying.

NO TRANSPOSITION	*AT; EL; LT; PT; NL*
PROBLEM	*BG ; HU*

2.5. Conditions required to the exercise of family reunification.

This is a field in which the interpretation of the Court of Justice in its case C-540/03 is determining. The Court of Justice precisely indicates concerning article 8 : "*that provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family*

reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights.

It should, however, be remembered that, as is apparent from Article 17 of the Directive, duration of residence in the Member State is only one of the factors which must be taken into account by the Member State when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors" (cons.98 et 99).

2.5.1. Clause of public order, security and public health

Q.47.A – Can public policy, public security or public health grounds be taken into account (a.6 §1 and §2) to reject a family reunification's requirement?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The public order clause is present at the heart of national migration law and the rules relating to family reunification do not escape from it. It is thus likely to be used in order to oppose a refusal to a request for family reunification on the grounds of the directive, even if the analysis reveals that Member States have used it for a long time and independently from article 6 of the text.

- Generally, the public order clause is not read in direct relation with family reunification but with the conditions of residence of the alien, be it its acceptation or its ending. The reasoning on which the national administration lays is indeed identical.

  - Six Member States prefer specifying things, in the line of the prescriptions of the directive. Thus, in France, article L.411-6 of the CESEDA envisages that can be excluded from family reunification a member of the family whose presence in France would constitute a threat to public order or a member of the family with an illness registered in the Sanitary International Regulation in its indents 1 and 2. This rejection does not entail the rejection of the request for all the beneficiaries of family reunification. In the Czech Republic, the Aliens Act gives an opportunity to refuse the application for the residence permit for the purpose of family reunification on grounds of public policy, public security or public health (Sec. 46 par. 3 in conjunction Sec. 56 par. 1 lett. h) and Sec. 9 par. 1 lett. h), lett. i) and lett. j) Aliens Act). The terms public policy and public security are explicitly mentioned there, the reason of health is stipulated as follows: if there is a well-founded suspicion that the applicant suffers from an illness which is on a list issued by the Ministry of Health (Sec. 182a par. 1

Aliens Act). The list of illness is published as a regulation and those illnesses are taken into account as those which can endanger public health or seriously endanger public policy (Sec. 182a par. 1 Aliens Act). In Finland, a residence permit on ground of family tie may be refused if the alien is considered a danger to public order, security or public health and it is exactly the same in Greece, Lithuania, and United Kingdom.

- For the other Member States it is generally at the time of ruling on the residence request that clauses relating to public order and health are implemented. Member States then assess very classically the possible risks for public order and for public health. Sometime, as in Bulgaria, the degree of competence of the administrative authority is framed: there are two categories of reasons to reject an application. In case that the first group of reasons is present, the authorities shall reject. In case of that the second group of reasons is present, the authorities may reject an application. All together there are 26 grounds for rejecting an application, in addition to the situations, when it is concluded that the entry and stay of the family member will "burden they national social system", when the marriage has been disclosed as a false one or some of the conditions for allowing reunification is missing (i.e. documents, relationship, finances etc.).

- The grounds of refusal can be formalised more or less precisely or remain undetermined, the judge being likely to carry out the balance of interests himself during his potential control. Almost all the Member States content themselves with a mere reference to the notion of public order (Cyprus, Czech Republic, France, Finland, Denmark, Sweden, and United Kingdom) without tacking into account indications set by recital 14 of the directive. This latter states "Family reunification may be refused on duly justified grounds. In particular, the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations"

  - However, some of them consider useful to bring precisions either by mentioning some types of harm to public order likely to justify the rejection of the request or by referring to reference texts. States then target the existence of freedom depriving penalties adopted towards the person in the Member State in case of drug traffic or breach of the peace (Federal Republic of Germany), risked prosecutions for offences punished with a 2 years imprisonment (Slovenia), thus manifesting a generalised attention for the alien's criminal records (Spain).

  - Some Member States (Belgium, Denmark, Spain) choose textual references to Schengen provisions and especially to the Schengen information system to reject the request for family reunification when the concerned persons are the subject of a description in the ends of non-admission. Slovenia goes even further, as it directly refers to this point of the Community Borders Code: this provision further stipulates

that the Minister of Interior prescribes reasons for rejecting an entry of a foreigner due to danger for public order, internal security of the Republic of Slovenia and public health. Pursuant this provision an implementing act was adopted titled "Instructions on refusal of entry to an alien, conditions for issuing visas at the border, conditions for issuing visas for humanitarian reasons, and regarding the procedure of repealing a visa".

- Two member States (Austria, Slovenia) explicitly refer to terrorism as a constitutive element of a threat for public order, most of the States implicitly suggesting that through wide notions likely to integrate this phenomenon (as the peace violation allows to deduce it in Germany, the risk for International Relations or the harm of the external security in many other States).

- The rejection grounds relating to Public health considerations are object of a great attention. Their formalisation is more systematic.

  Estonia is the only member State susceptible to be a problem regarding the directive because its legislation does not expressly mention this clause but allows to justify a refusal in case of "a threat to interests of other persons", hypothesis which is susceptible to recover the case of Public health mentioned in the directive.

  Other Member States multiply the precisions concerning the means and other lists used to check whether they are fulfilled. Thus, the issuance of a medical certificate or a medical control can be required (Austria, France, Poland, Spain, United Kingdom) and national practices do not hesitate to have recourse to a medical exam when diseases lists exist.

  The refusal to submit to a control in Hungary or to a medical treatment in Poland can lead to the rejection of the reunification application. These medical exams can be the basis of a refusal to enter the territory and therefore to a rejection of the application. Ministerial lists of countries and diseases can be established in Austria or in Czech Republic and the refusal can also be opposed notably when third country Nationals are coming from a country in which the disease risk is high and as a consequence has to produce a medical certificate or submit to a medical visit (Austria, Slovenia). It is also the case by laying on the International Sanitary Regulation to reject an entry requirement and the issuance of a residence permit (France, Ireland, Slovenia, and Spain).

PROBLEM	*EE*

Q.47. B - Can public policy, public security or public health grounds be taken into account to withdraw a family member's residence permit? (a. 6§1 and 2)

The problematic is similar to that of the reject of a reunification application, except for the fact that the concerned alien's individual behaviour here directly weighs in the Member States' appreciation.

- Concerning the public order clause, almost all States do not proceed to a specific distinction about family reunification through national rules on the end of the alien's residence. This lining up is sometimes formulated by national law as in Belgium, but it is not a general case.

  Grounds and procedures are globalised and there are few Member States willing to grant a particular attention to family reunification. Thus, Finland mentions that a residence permit on ground of family tie may be withdrawn if the alien is considered as a danger to public order and security and Czech Republic states that there are several reasons for withdrawal stipulated in the law. The residence permit for the reason of family reunification can be withdrawn *inter alia* if it was found out that the third country national would have endanger public security or seriously violate public policy.

  In any case, in all States, grounds of public order and security are likely to found the withdrawal of the reunification request under the conditions examined in the following question. Some States can notably be named, such as Austria, Bulgaria, Denmark, Estonia, Federal Republic of Germany (which makes a distinction between withdrawal for general administrative reasons, and withdrawal proper to aliens' law), France, Greece, Ireland, Lithuania, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, United Kingdom and Sweden.

  In the case of Sweden, it is precisely pointed out that a residence permit may be withdrawn from an alien who has entered the country if it can be assumed on the basis of previous activities or otherwise that the alien will engage in sabotage, espionage or unlawful intelligence activities in Sweden or in some other Nordic country, Nordic solidarity which can seem curious.

- Withdrawal for public health grounds led Member States to give more precisions, and doing so they do not automatically adopt a position compatible with the directive.

  Finland goes further than the directive as the public health ground cannot be appealed to as a ground for withdrawing the residence permit and the Netherlands have the same approach. Czech Republic is also in harmony with the text's prescriptions as the reason of public health can be taken into account only in case of illness suffered before the entry to the Czech Republic. The inadequate impact to a private or family life of the person concerned is taken into account. The temporal criterion used here therefore looks conform to the text's logic.

  On the other hand, four Member States are likely to be a problem. In Estonia, Lithuania, Slovakia, and Romania, the public health criterion can be appealed to as a ground for withdrawing the residence permit. Article 6§2 second indent imposes to take into consideration "*the dangers that are emanating from such person*", which does not seem to be taken into account by their national legislations, which shallow character is not satisfying.

PROBLEM	*EE ; LT ; SK ; RO*

Q.47. C - Can public policy, public security or public health grounds be taken into account (a 6§1 and 2) to refuse to renew a family member's residence permit?

States' behaviours are identical to those described above but a particular room must be spared to public health considerations. Article 6 provides in its paragraph 3 that the "*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*". This temporal criterion, the occurrence of illness "after" the residence permit was delivered is not always respected by Member States.

- Some Member States do not use the public health ground when renewing the residence permit. Austria is an example on that point: "therefore public policy and public security grounds are taken into account in regard of a renewal of a settlement permit in the same way as in regard of the first application. The requirement of providing a health certificate does not apply in case of a renewal because the person concerned has already entered Austria and therefore bears no risk of bringing in infectious deceases to Austria". Finland acts in phase with this demand, just like Czech Republic, Portugal and Spain.

- On the other hand, several Member States use the public health clause as a ground not to renew the residence permit without specifying the temporal condition set by the directive (Bulgaria, Denmark, Federal Republic of Germany, Hungary, Lithuania, Romania). They are therefore in breach of the directive as soon as the concerned alien could fall within the scope of article 6§3. In Hungary, for instance, the legislation causes serious compatibility problems with the directive as the residence permit can be withdrawn in case of an applicant who suffer from any disease that is considered to constitute a threat to public health and who refuses to submit to the appropriate compulsory medical treatment, or who fails to abide by the Hungarian health regulations while staying in the territory of the Republic of Hungary. About the Federal Republic of Germany, the refusal to renew the permit will be justified if the person's behavior creates a risk for public health, which refers to individual acts rather than the health status. In Greece, renewal of the residence permit may not be withheld and removal from the territory may not be ordered on the sole ground of illness suffered after the issue of the residence permit.

PROBLEM	*BG ; DE; HU; LT; RO*

Q.48 – Does national legislation take into account the severity or type of offence against public policy or public security and the solidity of family relationships regarding article 17 of the Directive in case of a decision of withdrawal or refusal to renew a family member's residence permit?

Mandatory provision

A great majority of Member States takes in consideration the seriousness of the offence against public order (Q. 48 A), as 21 of them state that obligation. However, almost all of them do not give any added precisions about this criterion and keep a wide margin of manoeuvre in order to assess the situation on a case by case basis. Sometimes, as it is the case in Belgium, national law goes a bit further when displaying the grounds of its legislation where it is stated that "the notion of public order can cover the condemnation for serious offence and this notion, as well as that of national security, can also cover cases in which the alien belongs to an association supporting terrorism or having extremist ideas."

Hungary and Romania are in situation of breach as the requirements of article 6 of the directive are not implemented into the national legislation. Slovakia and Spain did not transpose the obligation to take into account the gravity and the nature of the breach. In the Czech Republic, the law uses the terms public policy and public security but does not define them which could lead to implementation problems.

Concerning the respect of the importance of family ties (Q. 48 B), this obligation was not formally transposed in Belgium but the family ties (implicitly) matter and their importance, in effect, will be checked. A similar situation exists in Poland, although without the occurrence of a breach. Although there is no provision in the Act on Aliens directly transposing Art. 17 of the Directive, it seems that the Act on Aliens creates a legal framework in which due account of the solidity of family relationships is ensured. Also, general rules of administrative procedure apply. Art. 7 of the Code of Administrative Procedure obliges the relevant authorities to take all necessary steps to clarify the facts and decide on the case with due account of public interest as well as of legitimate interest of individuals). However, direct transposition of Art. 17 of the Directive would eliminate some ambiguity.

In Estonia, the obligation to take into account the solidity of family ties is not formally transposed but is achieved through the administrative practice.

In Czech Republic, only the private and family life is included in the legislation. The other criteria underlined by article 17 of the directive will be considered in a circular to come.

On the other hand, two Member States seem to be in breach with this rule as it is not mentioned in their legislation: Hungary and Romania . In Romania, the fact that the law takes into consideration the fact that the members of the family have a common residence and the absence of fictive marriage does not seem to be sufficient to fulfil the requirements of the directive.

Q. 48 A

NO TRANSPOSITION	*HU; ES; SK; RO*
PROBLEM	*CZ*

Q. 48 B

NO TRANSPOSITION	*BE; EE; HU; RO*
PROBLEM	*PL; ; CZ*

Caution: the Hungarian TOC states there is a problem of transposition. The synthesis team considers there is a problem of non transposition of the directive. This latter statement is confirmed by the negative answer given to this question in the Hungarian national report.

Q.49 – Can a withdrawal or removal be justified on the sole ground of the occurrence of an illness or infirmity after the authorisation was granted (a 6 §3) ?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

In breach of article 6§3 of the directive, Bulgaria envisages the possibility not to renew the family member's residence permit in case of occurrence of an illness. In Romania, this is notably the case when the third country national refuses to let himself/herself medically cared by the authorities.

In Hungary, the legislation also creates serious compatibility problems with the directive as the residence permit can be withdrawn in case of an applicant who suffer from any disease that is considered to constitute a threat to public health and who refuses to submit to the appropriate compulsory medical treatment, or who fails to abide by the Hungarian health regulations while staying in the territory of the Republic of Hungary. The temporal limit set by the directive is not limited. The same uncertainty arises with Romania as national legislation foresees the possibility to withdraw the residence permit if the third country national refuses to let him/herself medically cared by the authorities.

The Lithuanian legislation also raises compatibility issues as the temporal criterion of article 6§3 does not emerge from the applicable legislation (see answer Q.47 C).

On that point the Slovakian legislation expresses reservations. If the legislation specifies that a police department must not administratively expel an alien who falls ill of a disease which endangers the public health after being granted a residence permit, no provision concerns the withdrawal of the residence permit. In that context, the legislation breaches the directive.

In Denmark, the renewal of a residence permit of limited duration follows an identical procedure to that of the deliverance of the residence permit. Thus, the considerations on the health status can found a refusal to renew the permit, which would not be compatible with the directive if this Member State were bound.

PROBLEM	*BG; HG; LT; SK; RO*

2.5.2. Accommodation conditions

Q.50 and 51 – Are accommodation conditions required from the applicant (a.7 §1 a)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Article 7§1 a) provides that, while the family reunification application is deposited, the concerned Member State provides 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.

This clause is not mandatory and Member States are not obliged to implement it in their national law. In reality, the directive here contents itself with recalling a provision widely present in the legislations framing family reunification. A comparative assessment reveals the very weak contribution of the directive in that field, each Member State retaining its margin of action, despite a general tendency to hardening.

- Four Member States (Finland, the Netherlands, Slovenia, and Sweden) choose not to make use of accommodation conditions they judge useless. In Slovakia, accommodation conditions are not specified neither in the legislative nor in the internal regulation for the Police Department but foreigners are required to submit documents not older than 90 days confirming secured accommodation which leads in fact to the fulfilment of this provision of the directive in practice.

- Twenty two Member States make use of that possibility: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Hungary, Federal Republic of Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Spain, United Kingdom, and Denmark. In Ireland, this condition is not required by legislation or administrative guidelines but in practice NGOs working in the area of family reunification note that in order to apply for a visa, it is necessary to provide proof of adequate accommodation in Ireland.

  Amongst these States, fourteen Member States use the criterion of the comparability of the accommodation with that of a normal family living in the same area (Austria, Cyprus, Estonia, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Romania, Spain, United Kingdom, Denmark). In the Czech Republic, and when the accommodation is provided on a commercial basis, the accommodation provider/house lord is obliged to provide accommodation, which is not obviously

inadequate compared to accommodation provided by other accommodation providers/house lords in similar facilities in the municipality/region. The adequacy is considered mainly through comparing the hygiene conditions and the numbers of accommodated persons. The criterion of comparability is not mentioned in Portugal and in Slovakia, where no comparison is made.

Inferring from the sole reading of these figures that the harmonisation of legislations within the European Union progressed is probably too fast as the lack of precisions on the condition in article 7 makes possible the maintaining of differences of appreciation existing before the directive was elaborated. These differences lay on administrative practices as much as on more and more demanding legislations.

- The proof for accommodation raises a first difficulty. If most States are satisfied with a valid invitation letter certified by authorities (Estonia, France, Latvia, Lithuania, Poland, Slovakia, Spain), others, such as the Czech Republic, require the production of a certificate from the accommodation's owner, as well as a document attesting of the owner's person. Austria requires prove of a legal title to accommodation and the provision in the Regulation on Settlement and Residence referring to this mentions contracts of tenancy or property titles as examples. Others, lastly, such as Hungary, establish a list of the titles or grounds that allow to justify this condition of accommodation: a copy of a title deed not older than thirty days, which proves the applicant's ownership in connection with its Hungarian dwelling; lease contract, which proves the rental relationship; letter of invitation with valid official endorsement; a document, which proves the existence of the reserved and paid lodging; a family member's statement incorporated into a public notary document who possesses a residence visa, a residence permit, immigration or settlement permit, under specific other legislation in possession of a residence card or permanent residence card, or who has been granted refugee status, ensuring the proper accommodation of the applicant; in any other genuine way. Without proceeding to such an enumeration, Romanian law simply imposes to have a legal accommodation, which infers in terms of evidence wide margins of manœuvre.

  Besides, the necessity to produce an evidence of accommodation can entail fraud problems to which are confronted Member States. It is notably the case in Spain, which now knows a massive fraud and falsification movement of accommodation contracts.

- Another difficulty is raised to fulfil the criterion relating to the "normal" character of the accommodation, due to the impossibility to determine a standard on this "normality", a harmonised approach. As a consequence, manifest inequalities of treatment can be observed between third country nationals according to the States to which they apply for the reunification, and national situations do not always justify it.

  If some Member States use general notions without concretely adding precisions to them, like Greece when it mentions the condition of a "comfortable accommodation", most Member States make the effort of determining a spatial approach, more or less convincing. This approach is most often formalised in relation with the number and

the age of the family members occupying the accommodation. The approach is far from rigorous when the definition of this spatial criterion is trusted to local entities as in Austria or based on a maximal criterion likely to be brought down as in the federal republic of Germany. Sometimes lastly, this spatial criterion gets more complicated with an additional criterion as in Denmark or the United Kingdom where a maximal number of persons admissible per accommodation room is established.

A rough calculation demonstrates the lack of homogeneity of this criterion:

	Evaluation basis	***Additional person***
DK	*2 pers./ room or 20 m² per pers.*	
EE	*18 m² as a general space plus 15m 2 per person, (33m 2)*	*15 m² per additional person*
FR	*16 m² for a couple*	*9 m² per additional person up to 8 persons and then 5m²*
GER	*12 m²/pers. > 6 yrs old ; 10 m² < 6 yrs old*	
UK	*5 m²/pers. But calculation made on the basis of pers./room*	

- Therefore some Member States prefer not to content themselves with this mathematical approach. They estimate that the salubriousness and security conditions of the accommodations also constitute an important element of evaluation (Belgium, France, Italy, Spain). Thus, when the accommodation is unsanitary or dangerous, this criterion independently prevails upon the sufficient size of the good.

  France subordinates the spatial criterion to that of spaciousness, the accommodation having to be "decently habitable". Italy also imposes that hygiene conditions shall be respected. In that case, competent national services in terms of health can assess the situation and deliver a certificate. Spain also adopts this approach even if the control procedures leave much to be desired. Thus, the checkout of the accommodation characteristics can be operated by engineers or policemen, be paying or free. In any case, when the accommodation report is not realised by competent authorities within fifteen days, the sponsor can ask that this checkout is realised by notarial deed. But on a structural point of view, given the difficulties encountered by aliens to find an

accommodation in Spain, the conditions of accommodation are not strictly assessed and the certificates easily delivered.

- A lot of controls are led by national authorities in order to make sure of the sufficient character of the accommodation or of its characteristics. These controls can be systematic (Belgium, France, Spain) or organised when it is judged necessary (Austria, Cyprus, Estonia, Hungary) even if some States do not seem to dispose of any reference in that field (Portugal). The mechanics of these controls can sometimes reach such rigorous constraints that the exercise of the right is perturbed. Thus, the descriptive of the Belgian legislation states that the alien is considered as disposing of a sufficient accommodation according to the law, if he/she can show an attestation delivered by communal authorities, from which it will appear that the accommodation he/she lives in will satisfy, for him/her and his/her family, the security, health and salubriousness requirements in force in the concerned area. The burgomaster delivers an acknowledgement of receipt to the alien requesting such an attestation and transmits a copy to the minister or his delegate. Within a 6 months time limit, from the deliverance of the acknowledgement of receipt, the burgomaster or his delegate informs the alien whether the attestation can be delivered or not. When, 6 months after the acknowledgement of receipt date, no decision was taken by the burgomaster or his delegate concerning the attribution of the attestation, the alien will be considered as having fulfilled the conditions stipulated in the first indent in the concerned town. In practice, according to the Belgian rapporteur, it means that the alien willing to be joined up by his relatives could wait for the burgomaster's attestation during 6 months and then 9 months, if the need arises twice extended of 3 months, that is to say 21 months in total, almost two years, to obtain an answer.

- It is sometimes asked to the sponsor to dispose of a sufficient accommodation for the family members before their entry on the territory. As a consequence, an obvious problem is raised (Austria, Belgium, Denmark). The duration of the reunification procedure can effectively entail a considerable financial charge for the sponsor who must be in possession of an accommodation for the whole family whereas he/she still lives alone. This practice can perfectly make the reunification fail and can be considered as a technique made to reach this result. Indeed, a State not bound by the directive, Denmark, imposes that the sponsor have disposed of the accommodation for at least 3 years, which is perfectly disproportionate regarding the purpose of this kind of clause. A Member State (France) circles the difficulty by envisaging this hypothesis. If the sponsor does not dispose of the accommodation for the family members yet, he is invited to produce an accommodation promise. A control will be operated by the competent authorities to assess the sufficient character of the future accommodation. This also seems to be the case in Spain, with the prior consent of the leaser.

PROBLEM	*AT; BE*

2.5.3. Sickness insurance conditions

Q.52 – Is a sickness insurance required from the applicant (a. 7§1b)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

This possibility offered by directive 2003/86 is only used by half of the Member States(Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Spain, Germany, Greece, Latvia, Lithuania, Malta, Poland, Romania, and Slovenia) while Finland, France, Italy, Netherlands, Portugal, Sweden, Ireland, United Kingdom and Denmark do not use it.

Slovakia is in an intermediary position as this condition is not required in order to enter the Slovakian territory but the person who beneficiates from a residence permit has a 30 days time limit to introduce herself to a Police Station with a document proving that she is in possession of a sickness insurance covering the duration of her staying and also of a document confirming that she does not suffer from any disease able to endanger the Public Health.

In Spain, the sponsor is normally covered by the Spanish Social security. If it is not the case he will have to produce a certificate of private medical insurance covering the familial needs (sanitary mutual).

Hungary instituted an alternative system. The law stipulates that the third country national must have full healthcare insurance *or* sufficient financial resources to cover healthcare services. What is finally like imposing this condition.

2.5.4. Resources conditions

Q.53 — Are stable resources required and what are their characteristics (a7 §1c)?

Optional provision

In 1999, the Commission stated that "resources must be equivalent to the minimum wage in France, Portugal and Spain. They must be no less than the minimum social-security pension in Germany and the Netherlands. The United Kingdom requires that there be no demand on public funds, and Denmark requires the resident to satisfy the needs of the members of his family. France and the Netherlands further require that resources be permanent and stable. Austria requires family members to have social insurance. The adequate resources condition is not imposed in Belgium, Finland, Luxembourg or Sweden".

After assessment of the conditions in which directive 2003/86 allowed to implement the refusal of States to assume the financial charge of the sponsoring family, it should be established that its intervention did not really change the situation. The wide formulation of article 7 §1 c) which mentions "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" is explaining this negative statement.

- All the Member States make use of this criterion linked to stable, regular and satisfying resources except for Sweden because such requirement would deviate from the Swedish immigration policy or Belgium which only imposes it for the parents of the adult handicapped child and foreign students. The progressive hardening of these conditions in some Member States such as France where the legislative reformation of November 20th, 2007 precisely increased the amount of the sponsor's payable resources by 20% to be able to make his family come, can also be pointed out.

- However, this unanimity has to be moderated as in two Member States, national law plans a minimal income requirement that has not yet been adopted by regulatory acts which should fix it (Portugal, Spain). This situation explains why in Spain differences exist between the national authorities regarding the income requirement.

- Some States do not judge useful to precise what is the level from which the sponsor's income is considered as sufficient (Cyprus, Federal Republic of Germany, and United Kingdom), for different reasons. Sometime, as in federal Republic of Germany, the precisions given by local regulation can be the source of disparity, and on the contrary, sometimes, pragmatism is stronger as in the United Kingdom: there is no specific sum set out in legislation, but the Home Office's view is that the level set by income support is the minimum standard of support considered to be acceptable. Each case though is judged individually and is dependent on what the individuals need.

- Many other States, on the contrary, strive to determinate a minimal income limit from which reunification is judged viable on an economical point, and therefore acceptable. The use of the reference constituted by the "minimum wage" then frequently gives an answer as in France, in Greece, in Lithuania, in Luxembourg, in Romania, and in Slovakia. The advantage is then to dispose of an amounted reference without the levels to be comparable between States.

In Finland, the income guidelines refer to subsistence support as a point of reference. The Guidelines given by the Directorate of Immigration on applying the income requirement laid down in define an indicative level of net monthly income that is 900 euros/month and 10.800 euros/year for the sponsor and 630 euros/month and 7.560 euros/year for the spouse. In case of minor children the indicative level of net monthly income is 450 euros/month and 5.400 euros/year. It is emphasized in the Guidelines that the defined levels of net monthly income are only indicative and that the situation of the family concerned, including factors such as the number of children, should always be taken into account when assessing whether the income is secure within the meaning of section 36 of the Act. The sufficient means of support as defined in the Guidelines is in comparison with the subsistence support as defined under the Act on Social Assistance.

Some other States are going to use more precise calculations taking into account more particularly attribution threshold of Social assistances. Indeed, the directive plans in the same indent of article 7 §1 c) that "*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*".

- Thus, Austria does not base its calculation on the National income but in comparison of the minimum income under which social allocations are granted. This monthly income is of 1055, 90 Euros per month for a married couple, plus 72,33 Euros per child. If the couple is not married, the income has to reach 690 Euros per person. Furthermore, the rent cost has to be added to this minimal income, subject to a deduction of 231, 45 Euros. Thus, and as an example, a married couple paying a rent of 500 Euros has to dispose of a monthly salary 1324, 45 Euros (1055, 90 + 500 – 231, 45 = 1324, 45). If this married couple has a child, it is necessary to add 72, 33 Euros, that is to say 1396, 78 Euros. A comparable system exists in Czech Republic at the end of which the sufficient income level has to be superior to the minimum subsistence level fixed by the law. The sponsor and his family incomes are taken into account and the accommodation's cost as well. The sponsor mentions it in a general way, requirements on the third countries Nationals are higher than those required for Nationals who beneficiate from the minimal subsistence income. Abroad, as in Poland, the consideration of the rent is also planned as in this Member State, the required income has to, after deducting the costs of this accommodation, be superior to the income forming the basis to grant social assistance, which is of 120 Euros per month for a lonely person, to which are added 90 Euros per member of the family. The comparison to these 3 neighbours Member States demonstrates how much a concrete harmonization of the conditions to fulfil for familial reunification is still far from being achieved despite similar principles.

- In the Netherlands, the system can seem much more complex as it makes a difference between family members. When the marriage was already concluded before the sponsor was admitted to the Netherlands, the sponsor must permanently and independently dispose of an income at the social security level for a married couple. The current level is 1236, 86 Euros. In case of the formation of a family the required income is 120 % of the legal minimum wage of a worker of 23 years, also if the sponsor is younger than 23 years. The statutory minimum wage of workers younger than 23 years is considerably lower. The level is 1484, 23 Euros. This means that a sponsor who is 18 years old will have to earn almost 280% and a person aged 21 will have to earn more than 160% of the minimum wage for workers of his age. If the sponsor has reached the age of 65, or is permanently and completely unable to work, he is exempted from the income requirement, for family reunification as well as for family formation.

- Other curiosity, Latvia makes a difference between businessmen and independents whose salaries have to be twice the normal gross salary, that is to say about 351 Euros per month and those who reside for other reasons, whose income has to be superior or equal to a normal salary.

- In Italy, the sponsor's income has to be superior to the annual social allocation, which is of 5061, 60 Euros for the reunification of one member of the family so about 421 Euros per month. This amount then increases proportionately depending of the number of reunited family members. In the hypothesis where the reunification is required for two or three members, the amount of the incomes has to be twice superior to the annual social allocation. For the reunification of more than 4 members of the family or more, the incomes have to be at least three times superior to the annual social allocation. However, if the reunifications is relating to two or several children who are less than 14 years old, the income must be twice

superior to the annual social allocation. The all family members' income has to be taken into account for the calculation.

If it is logical that these requirements concerning income increase depending on the size of the reunited family, two States raise the same problem on this point of view. In Estonia, the required income grows of almost one part (required income for the sponsor) for each family member. In Finland, the reference amounts also seem to be high enough to be prohibitive: the required income for the spouse's reunification is going from 900 Euros to 1530 Euros (900 + 630) and increases to 450 EUR per reunited child.

Often, precise requirements accompany the income condition. That concerns the obligation to produce salary slips in Ireland or notarial deeds certifying that the resources condition is satisfied in Hungary, the copy of a working contract in Cyprus and in Ireland or the income checking of the last twelve days (in France and in Netherlands) if necessary thanks to an investigation carried out by competent services (France). Denmark is going further by imposing that the sponsor has not been the one whose public support was addressed to during one year before the decision relating to the residence permit.

Three categories of Member States can be distinguished:

- Those which requirements are inferior 500 euros per month;

- Those which requirements are superior to 500 and inferior to 1 000 euros per month ;

- Those which requirements are superior to 1 000 euros.

Approximate monthly income required for the reunification.

Poland	120 Euros
Lithuania	174 Euros
Slovenia	200 Euros
Slovakia	274 Euros
Latvia	351 Euros
Italy	420 Euros
Greece	700 Euros
France	900 Euros
Austria	1050 Euros
Netherlands	1250 Euros
Finland	1500 Euros

The huge differences between the income requirements constitute an obstacle to family reunification. This can be highlighted when taking into account the income requirement set up by Finland which is more than three times higher than the one asked by Italy. The silence of the directive and the comparison with social minimas in the Member States seems nevertheless to authorize such differences between Member States.

2.5.5. Integration criteria

Q.55 – Are integration criteria required to allow family reunification (a.7§2)? If yes, what are those criteria?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The debate on the integration criteria has raised a lot of reactions during the elaboration phase of directive 2003/86 but the analysis of the implementation operated by Member States reveals that this theme did not have a lot of echoes in practice.

- Only six Member States use the possibility opened by article 7§2 of the text: Austria, France, Federal Republic of Germany, Latvia, the Netherlands, and Denmark. These Member States impose the satisfaction of criteria or integration measures in terms of family reunification even if, in Latvia's case, these integration measures are more widely required in order to obtain a permanent residence permit.

  This minority situation must be replaced in a particular political context. This provision of the directive is not accompanied by a stand still clause which would have allowed closing definitively the debate. Therefore directive 2003/86 can be used by Member States to justify or to legitimate the introduction of such integration measures in national legislations. The case of France is enlightening on that point and might be precursor of evolutions to come in the Union. This Member State already resorted to the theme of "integration contracts" on the grounds of its sole national legislation as soon as 2003. It notably just reinforced its national law, explicitly leaning on the compatibility of this reform with European rules and systematically comparing its action with that of other Member States such as the Netherlands. Nothing prevents from thinking that this tendency will be used as an example on short term and that other Member States will join the half-dozen States which gave effect to article 7§2 of the directive.

- Actually, if Latvia is set aside, five Member States really implemented integration measures or conditions imposed to persons able to benefit from family reunification without presenting identical characteristics. Indeed, their perceptions of the notion of integration differ and their legislation can be appreciated regarding the directive.

  - Two Member States (Austria, France) do not represent a problem regarding article 7§2 of the directive as their integration measures consist in courses on the language and elements of the country's politics. These two systems are based on the principle of the "integration contract".

    - Concerning Austria, the provisions on the "integration agreement" apply to all family members accepted for family reunification. The only persons excepted are children under the age of nine years in the moment of their entry into Austria as well as elderly people or sick people, who may not be demanded to fulfil the agreement are not obliged to fulfil the "integration agreement" The "integration agreement" consists of two modules : module 1 serves to learn to read and write. This alphabetisation course comprises 75 units (a 45 minutes). Module 1 has to be completed within twelve months from the entry into Austria. Completing this course is a precondition for taking part in module 2. Module 2 serves the learning of the German language and contains also elements of political education. The course provided for comprises 300 units and ends with a written examination. This module has to be completed within five years. In general the "integration agreement" is fulfilled by getting through the courses offered, but it may also be fulfilled by providing evidence for the knowledge and skills required. Therefore module 1 may be regarded as fulfilled when the person concerned proves that he/she can read and write (e.g. in form of school reports). The accomplishment of module 2 can also be established by proving the knowledge of the German language through other evidence such as school reports showing a sufficient knowledge of German (Sect. 14 §5 Settlement and Residence Act). This provision aims at people who visited school at least in part in Austria or who learned German in school in their home country. According to Sect. 11 § 2 No. 6 Settlement and Residence Act a settlement permit may only be extended when the person concerned has fulfilled integration measures provided for in Sect. 14 Settlement and Residence Act.

    - Concerning France, the theme of integration measures appeared fairly recently, at the beginning of the 2000's, on two levels. In first place, it is required that the alien respects "the essential principles that, in conformity with the laws of the Republic, rule the family life in France. » In the opposite case, article L411-5 §3 CESEDA authorises to refuse the sponsor's application. In second place, integration is now an objective determined by the legislator, which leads the new article L. 411-8 of the law of November 2007 to prepare the « republican integration in the French society » of the sponsor who is more than sixteen years old and less than sixty-five years old for whom family reunification is asked, by making him benefit from an evaluation and a

formation in order to improve his knowledge of the language and the values of the Republic. The visa issuing is subordinated to the production of a certificate attesting that the formation was followed. This certificate is immediately delivered at the end of the formation. More generally, finally, French law wants to ensure that the alien indeed submits to this plan by instituting a contract for the family (CAIF) which respect will possibly guide the French administrative authority when the application for the renewal of the residence permit is made.

- The silence kept by the directive on the moment when the third country national must comply with the integration measures shows the ambiguity of such measures. According to when they are required to be implemented (before or after the entry on the national territory), they appear to Member States as an additional way to restrict the access to the national territory. The situation in two Member States opposing these integration measures previously to the applicant's entry accredits this view.

- In the Federal Republic of Germany spouses are required to demonstrate German language skills at a basic level. According to instructions of the Federal Ministry of the Interior to the Transposition Act these language skills must correspond to competence level A1 of the Common European Framework of Reference for Languages. (In comparison, for minor children stricter requirements apply which are based on Art. 4 § 3 subpara 3 of the Directive: Minor children aged 16 and older are required to have a **command of German language** or it must be secured with regard to their education or life to date that they will integrate, sec. 32 para. 2 Residence Act. The preliminary instructions of the Federal Ministry for the Interior explain in no. 32.2.2. that for them language skills corresponding to level C 1 of the CEFL are required.)

  The relevant provision for spouses is sec. 30 of the amended Residence Act which read as follows:
  (1) [sentence 1] A foreigner's spouse shall be granted a residence permit if
  ...
  2. the spouse is able to communicate in the German language on a basic level...
  …
  [sentence 3] Notwithstanding sentence 1 no. 2 a residence permit shall be granted when
  1. The foreigner [i.e. the sponsor] holds a residence title pursuant to sec. 25 para. 1 [this concerns recognized refugees] … and the marriage already existed at the time when the foreigner relocated the central focus of his/her life into the Federal territory,
  2. the spouse is not able to prove basic knowledge of the German language due to physical, mental or psychic illness or disability,
  3. there is obviously only marginal necessity for integration in the sense of the regulation adopted on the basis of sec. 43§4 [this is the regulation on integration courses which provides that in certain cases spouses do not need to attend the integration course, e.g. spouses of short time residents]
  4. by virtue of his or her nationality the foreigner may enter and stay in the Federal territory without requiring a visa also for a stay which does not constitute a short time stay.
  A spouse seeking family reunification must generally demonstrate (and thus possess) the above-mentioned language skills abroad when applying for a visa

at the German embassy or consulate general. This is a consequence of sec. 4 §1 no. 1 Residence Act according to which foreigners generally need a visa to enter the Federal territory. Pursuant to sec. 6§4 sentence 2 Residence Act the visa is issued on the basis of the same provisions that apply on the issuance of the residence permit and since sec. 30§1 sent. 1 no. 2 Residence Act requires language skills for the residence title this is needed for the visa already.

Sec. 30§1 sentences 2 and 3 Residence Act exempt certain categories of spouses from the language requirement. Thus, spouses who by virtue of their nationality do not need a visa before entering Germany even for long-term stays are exempted from the language requirement at all. This applies to citizens of Australia, Israel, Japan, Canada, The Republic of Korea, New Zealand and the United States of America (sec. 41 §1 AufenthV).

Pursuant to the general provision sec. 82 Residence Act the applicant [i.e. the family member seeking reunification] must provide evidence of the existence of language skills. The practical implementation of sec. 82 Residence Act is described in the instructions of the Federal Ministry of the Interior to the Transposition Act. According to these instructions the applicant must generally submit a certificate of the Goethe Institute for the A1-level language examination "Start Deutsch 1" (together with the application documents). The Goethe Institutes are the German cultural institutes abroad. They offer German lessons and examinations. The language test "Start Deutsch 1" can be taken at the Goethe Institute. The language test can, however, also be taken at a licensed examiner's or in the premises of a partner institute of the Goethe Institute. In countries in which the "Start Deutsch 1" examination is not yet available, the embassies or consulates general determine themselves whether the spouse has basic knowledge of the German language during the visa application procedure. In exceptional cases, other language certificates shall suffice as proof, if they are of equal value to the language test "Start Deutsch 1" of the Goethe Institute. The instructions also state that if during the personal interview in the embassy or consulate general it becomes evident beyond reasonable doubt that the applicant has the required knowledge of the German language, no separate proof is required (no. 220-222 Instructions Transposition Act). This interpretation has been confirmed by the High administrative court of Berlin-Brandenburg (judgement of 16.1.2008, case 2 M 1.08) which rejected a contradicting practice of the German embassies and consulates.

As a conclusion, a family member must furnish proof of the language skills corresponding to level A1 of the Common European Framework for reference on languages already before entering Germany during the visa application procedure. This does not mean that the passing of the test "Start Deutsch 1" is compulsory. But this test is the best way to demonstrate such language skills. If it becomes clear during the visa procedure that such language skills exist, they do not have to be demonstrated otherwise.

During the debate on the adoption of the Transposition Act it has been argued that this integration condition, works as a precondition for entry, and is therefore not covered by art. 7§2 Directive 2003/86/EC which deals with "integration measures". In its Draft on the Transposition Act the German Government explains that sec. 30§1 no. 2 takes into account that art. 7§2 of the Directive provides the possibility to link the family reunification to the requirement that the third country nationals must comply with integration measures. The Government continues that the participation in an integration course inside Germany is no sufficient alternative, since in this case the successful completion of this course is not guaranteed whereas the obligation

to prove knowledge of the German language before entry makes sure that this knowledge exists. According to the Government's explanation the new provision is also meant to make it harder for families in law to prevent victims of forced marriages from establishing their own social life by using the fact that they do not possess language skills. The provision shall also have preventive effects, since educated men and women are considered less "controllable" and therefore less attractive for forced marriages. Furthermore the Government argues that no sufficient language skills but only basic language skills, i.e. the ability to make oneself understood in a rudimentary way are required.
Another integration measure is contained in new sec. 44a §1 no. 1 a) Residence Act. This condition was introduced by the Transposition Act that entered into force on 28 August 2007. According to this provision a foreigner who migrated for the purpose of family reunification is obliged to participate in an integration course if he/she is not able to **communicate** at a basic level in the German language. (According to the previous legislation the foreigner was only obliged in case he/she was not able to communicate **verbally** at a basic level in the German language.)
In contrast to the Netherlands, Germany offers a variety of tools to acquire knowledge of the German language abroad: The Goethe Institutes offer German language courses in all main countries of origin and further other tools are available (internet, radio).
Furthermore, the German provision seems to be more flexible as regards the language test. There is no set (telephone) language test which must be passed, language skills may also be demonstrated otherwise.

- The Netherlands went further. They implemented the most elaborated system on that point. Family members (adults and children of 16 and 17 years old who no longer have to go to school) need to pass an integration test as a requirement for family reunification before admission in the Netherlands. The test consists of a language test (level A1 in the Council of Europe's Common Framework of Reference (CEF)) and questions regarding the Dutch society. To all potential beneficiaries, except for minor children below the age of 16, family members who have reached the age of 65 and persons who are permanently unable to pass an integration exam on the ground of a physical or mental handicap. This has to be proved by a medical attest. Persons with a certain nationality (besides nationality of EU Member State: Surinamese, Australian, Canadian, US, Swiss, New Zealand, Iceland) are equally exempt from the integration abroad requirement and so are family members of knowledge migrants. The test has to be taken at a Dutch embassy or consulate general abroad. The way of examination is oral. The candidate answers the questions by phone, after which a computer based in the US judges whether the candidate has passed the exam. The only preparation that is provided for by

the Dutch government is an education pack which can be purchased for € 63,90. The education pack includes a CD with all the questions that may come up during the part of the exam that tests knowledge of society, three mock Dutch language tests and a film about the Netherlands on DVD or video. Taking the exam costs € 350. If a candidate fails the test, there is no possibility of challenging this decision. The test will have to be taken again, which will cost another € 350.

Obviously, the aim of this procedure seems to be the concern of standing in the way of the reunification more than allowing a better integration for the alien: the previous character of the test, its important cost, the selectivity of concerned citizenships plead in that sense.

Denmark is not bound by the directive but presents similar characteristics as well. In that State, it must be made a condition for family reunification that the applicant and the person living in Denmark sign a declaration stating that they will involve themselves actively in the Danish course and integration into Danish society of the applicant and any accompanying foreign children. According to Aliens Act a residence permit (minor unmarried child) in cases where the applicant and one of the applicant's parents live in their country of origin or another country, as a main rule can only be issued if the applicant has or is able to obtain such ties with Denmark that there is basis for a successful integration in Denmark. Third country nationals will normally be required to participate in a financed introduction programme under the Act on Integration of Aliens upon taking up residence in Denmark. The introduction programme encompasses Danish course and guidance, trainee placement at a company and/or employment with wage subsidy. In addition to economical sanctions for the refusal of participation or absence from introduction measures, the right to permanent residence permit will normally be conditioned upon the applicant's successful participation in the introduction programme. The Act adopted by the parliament by Act No. 379 of 25 April 2007 makes it a precondition for family reunification for spouses/partners that an 'immigration test' has been passed before the residence permit is issued, i.e. before admission. The immigration test is a supplement to participation in the introduction programme.

PROBLEM	*NL*

Q.56. D – Are refugees and their families required to fulfil them (a.7 §2 second indent)?

AT	DE	FR	LV	NL	DK

Mandatory provision

Except for Latvia, which imposed the fulfilment of these criteria to obtain a permanent residence permit, only the Netherlands expect the integration conditions to be satisfied. However, the Netherlands do not breach the directive as family members of holders of a residence permit on asylum related grounds are exempted from this requirement. However the integration condition is imposed when asylum seeker has been granted a permit on regular grounds, his family members will have to comply with the integration condition abroad, which is not prohibited by the directive.

2.5.6. Minimal period of lawful residence

Q.57 – Is a minimal period of lawful residence required before reunification (a.8 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Fourteen Member States, almost half of the Member States of the Union, use the option stipulated in article 8§1 of the directive which provides 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*". The initial Commission's proposition was that of a one year residence deadline, without which the reality of a right to reunification would be cancelled and the reunification *out of* the procedure would be supported, but it was not followed by Member States. Amongst the thirteen States concerned, three sub-categories can be distinguished.

- A first group of States recalls the terms of the directive and uses the whole legal period of two years envisaged in the text: Belgium, Cyprus, Estonia, Federal Republic of Germany, Greece, Lithuania, Malta, Poland.

  Belgium makes a difference by keeping a possibility to derogate from this rule. Its legislation envisages that the invocation of the right to family reunification as a spouse or a partner by an alien who obtained his/her right to residence on the grounds of a precedent marriage or partnership must be justified by a two years long regular residence in Belgium. Before this deadline expires, family reunification is not a right, even if the possibility for the alien to obtain it on the grounds of a request addressed to the Minister is not ruled out.

  In the Federal Republic of Germany, a new legislation adopted in August 2007 proceeds to an alignment of the German law with article 8§1 of the directive. The law provides for the two-years-period. It must be completed not at the moment of the application but at the moment when the requested residence title becomes effective. (Temporary residence titles are always issued for a specific time. The applicant, when applying for the residence title, must specify from which date on the residence title shall be valid, this will obviously be the date when he wishes to enter Germany, hence the date of reunification is crucial).

  In Estonia, the temporary resident permit can be given to the spouse of Estonian citizen or spouse with residence permit who have lived at least for two years in Estonia and is living permanently in Estonia and if the spouses have tight economical ties and psychological dependency, the family is permanent and the marriage is not fictive. In the case of a refugee or a person with subsidiary or temporary protection there is no minimal period of lawful residence requirement.

- A second group of States, composed of five Member States, namely France, Czech Republic, Luxembourg, Spain and Slovenia, fix a prior residence period for the sponsor, which is inferior to two years. Although it was recently lengthened, on the grounds of the directive, the period required lasts eighteen months in France, fifteen in Czech Republic, and a year in Slovenia. In Spain the sponsor must have legally resided during one year and must have obtained the permit to reside, at least, one more year.

- Lastly, two Member States that are not bound by the directive, Ireland and Denmark, go much further than the two years period required to authorise the reunification.

  In Ireland, in order to qualify as a sponsor, a holder of a Work Permit must either: have been in '…employment for at least twelve months prior to the date of application. He/she must be in full time employment on the date of application and have an income above the threshold which would qualify the family for payment under the Family Income Supplement Scheme…or have been in '… employment for at least thirty six months prior to the date of application. He/she must be in full time employment on the date of application.

  In Denmark, the sponsor has to be either having held a permanent residence permit for Denmark for more than the last 3 years. A permanent residence permit is normally issued after 7 years of lawful residence. In exceptional cases a permanent residence permit may be issued after 3 or 5 years of lawful residence and in exceptional circumstances the 3 year period may be dispensed.

Lastly, one will wonder about the consequences to infer from the interpretations of the directive by Member States. If article 8, 1st paragraph, is clear on the time limit point, that is to say that it can be required "before being joined up by the members of the family", some Member States visibly took some freedom regarding this requirement by considering that the time limits precedes the reunification application and not the reunification itself.

These measures can lead in practice to a breach of the directive. If that risk is minimised in Slovenia, Poland and Spain, as the request can be introduced after a year of legal residence, doubts can be raised concerning France. Article L411-1 of the CESEDA plans that the reunification request can be introduced after a time period of 18 months. If the procedure lasts more than 6 months the two years time limit imposed by the directive can be ignored. The breach is nonetheless confirmed in Cyprus, Greece and Lithuania as national law plans that a two years period preceded the reunification request.

It seems that the federal Republic of Germany fully realised this nuance and avoided the mistake as the transposition law specifies that the two-years-period must be completed not at the moment of the application but at the moment when the requested residence title becomes effective.

PROBLEM	*CY; EL; LT*

2.5.7. Reception capacities of Member States

Q.59 and 60 – Does the Member State apply the derogation set up by article 8 § 2 allowing Member States to impose a waiting period of maximum three years due to reception capacities between the submission of the application and the issuance of a residence permit?

Specific provision

This derogatory clause was made by the Austrian delegation while the directive was elaborated. The Court of justice attached a particular attention to it in its case C-540/03 as it framed its interpretation: "… *the same is true of the criterion of the Member State's reception capacity, which may be one of the factors taken into account when considering an application, but cannot be interpreted as authorising any quota system or a three-year waiting period imposed without regard to the particular circumstances of specific cases. Analysis of all the factors, as prescribed in Article 17 of the Directive, does not allow just this one factor to be taken into account and requires genuine examination of reception capacity at the time of the application...When carrying out that analysis, the Member States must, as is pointed out in paragraph 63 of the present judgment, also have due regard to the best interests of minor children*."

Austria is the only Member State that made use of it.

Austrian legislation does not explicitly provide for a waiting period before an application for family reunification can be filed or before family reunification can be accepted, but nevertheless applicants in practice have to wait for substantial periods before family reunification is granted because only a limited number of settlement permits may be issued every year. The number of new settlement permits that may be granted in each of the Austrian countries and in sum is fixed by the government each year. (The regulation for 2007 provides for a total of 6.500 permits, 4.540 of these are dedicated for family reunification within the meaning of Sect. 46 § 4 Settlement and Residence Act.).

If this maximum has already been reached at the time of the application or in the moment of the decision, the authority must not dismiss the application, but has to suspend the proceedings until the quota for one of the subsequent years allows a positive decision. That means the alien concerned has to await a decision until the settlement permit may be granted due to a new contingent in one of the following years. As the quota usually is lower than the number of applications, the persons concerned may have to wait for several years. This system has been subject to harsh criticism by human rights groups. In 2003 the Constitutional Court decided that the application of the system of fixed quotas in the field of family reunification was unconstitutional because it did not allow any exceptions if family reunification was indicated by Art. 8 ECHR (VfGH G 119, 120/03, 8 October 2003). In reply to this judgement and the Directive the legislation in force since 1 January 2006 provides for a maximum waiting period of three years. According to Sect. 12 § 7 last sentence Settlement and Residence Act three years after the application was filed, a settlement permit for the purpose of family reunification has to be granted regardless of the quota.

2.6 Family reunification of refugees

Chapter V of the directive 2003/86 shall apply to family reunification of refugees recognized by the Member States even if it adapts these rules to the particular situation of this category of addressees.

2.6.1. Exercise of family reunification by refugees

Q.61 – Does the Member State allow family reunification of refugees on the basis of Directive 2003/86 (a.9 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Almost unanimously, Member States authorise family reunification of refugees without hindrance. It will be noted that in Sweden, this authorisation is not made on the grounds of the directive but a current project of law should allow to refer to it.

- Within Member States bound by the directive, Spain adheres to a restrictive approach of refugees' right to reunification in conformity with article 9§2. In that Member State, if the reunification application is not made within 3 months from the recognition of the refugee status, Spain can require the refugee to fulfil the conditions opposable in common law (the evidence that he/she disposes of an appropriate accommodation, an illness insurance for the refugee and his/her family and fix and regular resources, sufficient to provide for the needs of the family). A similar situation also applies in Lithuania.

- In Slovenia, a project of law aiming at replacing the law on asylum plans to recognise family reunification for the refugee's spouse, the unmarried partner and the unmarried minor dependent child. On the other hand, reunification for unaccompanied minors should be excluded, which sets a compatibility problem with article 10 of the directive.

- Amongst the Member States not bound by the directive, the United Kingdom and Denmark authorize family reunification of refugees. In Denmark, the *travaux préparatoires* of the law show that the refugees are not necessarily required to fulfill the conditions set by aliens' law to benefit from family reunification. In Ireland, this reunification is submitted to the discretionary appreciation of the minister: a refugee is entitled to make an application for family reunification. Once the application is thoroughly investigated and reported on by the first instance status determination body, and the Minister of Justice, Equality and Law Reform is satisfied that the person

the subject of the application is indeed a family member of the refugee, the Minister 'shall' grant permission to the person to enter and reside in the State.

Q.62 – Is this right limited to family relationships predating the entry on the territory (a.9 §2)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The possibility confines the application of the directive to refugees whose family relationships predate their entry, is used in a balanced way across the European Union.

- Thus, twelve Member States including two States in a derogatory situation (Ireland and United Kingdom) take advantage of this restrictive clause: Austria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, the Netherlands, Romania, Slovenia, Spain.

  Another Member States makes an even more restricted use of it as the Federal Republic of Germany applies it only in case of refugees enjoying temporary protection (on the basis of a decision of the European council according to directive 2001/55/EC) the family relationship must be predating. This applies to spouses and children alike.

- On the other hand, fifteen other Member States decided not to use this option: Belgium, Bulgaria, Finland, France, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Federal Republic of Germany, Portugal, Slovakia, Sweden, Denmark.

  However, this choice does not necessarily result from an actual transposition operation. Thus, in Sweden, this rule is not legally consecrated but comes from the case law, but case-law family relationships predating the entry has set this requirement as a main rule. Derogation is possible and an individual evaluation is made of every case.

2.6.2. Personal scope

Q.63 – Does the Member State allow family reunification of family Members not quoted in article 4 of the Directive (a.10 §2)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The definition of article 4 of the directive includes the spouse, minor and adopted children, dependent relatives in ascending line, dependent adult children and partners, depending on the applicable legislation in the Member State. As it was observed above, a majority of States is reluctant to integrate them completely within the scope of family reunification law.

- Therefore, it is not very surprising to note that only seven Member States go further than the provisions of article 4. That being said, article 10§2 points out that Member States can authorise family reunification to other family members than those enumerated by this provision of the directive. Six rapporteurs indicate that national provisions envisage a wider scope than that established by article 4 (Belgium, Finland, Hungary, Latvia, Portugal, Spain, United Kingdom).

  Thus, in Finland, a residence permit is issued to other relatives of a refugee or an alien who has been granted a residence permit on the basis of a need for protection or enjoyed temporary protection, if refusing the residence permit would be unreasonable because the persons intend to resume their close family life in Finland or because the relative is fully dependent on the sponsor living in Finland. If the applicant is considered a danger to public order, security or health, or Finland's international relations, an overall consideration is carried out as provided in section 114.2. Issuing a residence permit does not require that the alien have secure means of support.

  In Hungary, the following relatives of the sponsor, the spouse of sponsor or of persons with refugee status may be granted a residence visa or a residence permit on the grounds of family reunification the parents of the sponsor if they are dependant parents and brothers and sisters and relatives in the direct line of the sponsor, if they are unable to provide for themselves due to health reasons.

  In Portugal, the new law allows reunification with the minor's brothers that are dependent on the sponsor, in harmony with a decision from the origin country competent authorities and as long as this decision is recognized in Portugal.

  Lastly, in Spain, article 10 of the Asylum Law allows to grant asylum by familial extension to the person with whom the refugee is linked by an affectivity and cohabitation tie analogous to the spouse, as well as the possibility to reunite relatives in first degree ascending and descending lines.

In Belgium, nothing is envisaged for other members of the family: they could only obtain a residence permit on the grounds of article 9 bis (authorised residence on humanitarian grounds – discretionary power of the minister) of the law of December 15th, 1980.

In Germany, reunification of other family members is possible but does not constitute a right, but comes under a discretionary decision. Thus, all members of the family, even grandparents, uncles, aunts, grandchildren or sisters or brothers in law, may be granted the right to family reunification on the basis of sec. 36 §2 Residence Act. According to this section, a residence permit "may" be granted if it is necessary to avoid an extraordinary hardship. In addition, the provisions set up for spouses apply to adult family members, and the provisions set up for reunification of children apply to minor family members.

In the United Kingdom, In addition to spouses and minor children, the immigration rules make provision for the civil partners, unmarried partners and same sex partners of refugees provided that the relationship subsisted prior to the refugee leaving the country of origin and provided that the couple intend to live together permanently (paragraph 352 of the Immigration Rules).

Q.64 – Does the Member State authorise family reunification of first degree relatives in the direct ascending line without applying the conditions laid down in article 4 § 2 (a.10 §3 a)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

- This mandatory provision of the directive is not implemented in seven Member States: Bulgaria, Cyprus, Finland, France, Lithuania, Malta, Slovenia. Two Member States out of three not bound by the directive do not envisage it either: Denmark and the United Kingdom.

  In Finland, the national legislation explicitly refers to the legal tutor and does not identify the parent(s) as being able to join up with the unaccompanied minor refugee. In Lithuania, the parents are able to join up with the minor refugee but they have to respect the conditions relating to dependence. Lastly, in the United Kingdom, due to the absence of such a rule in national law, it lies with the parents of the refugee child to consult the manual of the HCR, to the qualification directive and the ECHR. In Malta, the fact that the first degree relatives in the direct ascending line are not considered to be family members for purposes of the family reunification exclude the possibility of reunification opened by the directive.

- If the other Member States implemented this mandatory clause, this implementation can sometimes bring problems. It is the case in two Member States: Federal Republic of Germany.

  Amongst the States which transposed this obligation, several elements can be underlined. Firstly, one can doubt of the correct transposition of this provision of the directive.

  - In the Federal Republic of Germany, the legislation adopted in August, the Residence Act, in its Section 36, first paragraph provides that a residence permit must be issued to the parents of a minor recognized refugee notwithstanding the conditions laid down in sec. 5 §1 no. 1 (resources including health insurance, Art. 4 §2 a) Directive) and sec. 29 §1 no. 2 (accommodation) Residence Act if there is no parent living in Germany who is in possession of the right of care and custody. Parent means first degree relative in the direct ascending line.

NO TRANSPOSITION	*BG; CY; FI; FR; LT; MT; SI*
PROBLEM	*DE*

Positive provisions for the beneficiaries appear in some national situations. It is the case about the alignment of the status of the parent on that of the minor refugee child in Austria or as a consequence of a wide definition of relatives in ascending line, not only comprising those of first degree, as in Poland.

- Substantially, in Austria, the parents of an unaccompanied minor who has been recognised as a convention refugee will be granted the same status as their child. The conditions laid down in Art. 4 § 2 of the Directive don't have to be met as according to Sect. 34 § 2 Asylum Act the only preconditions for family reunification of persons granted refugee status under the Geneva Convention are the family relationship defined in Sect. 2 § 22 Asylum Act and the impossibility to continue family life in another country.

  In Belgium, the father and the mother of an alien recognised as refugee are authorised to residence if they come to live with him/her and if he/she is less than 18 years old. In Estonia, the family member of the unaccompanied minor is its parent and the person in responsible of custody or other family member, if the child does not have parents or it is not possible to find them but not in the case it is contrary with rights and the best interests of the child. In Ireland, la legislation requires that in case the refugee is, on the date of his or her application [for family reunification], under the age of 18 years and is not married [he/she is entitled to reunify with] his or her parents. Italy does not fix any condition. In the Netherlands, the Royal Decree implementing the directive provides for family reunification for family members in the ascending line of unaccompanied refugees who are minors. These family members, legal guardians are

not mentioned, are entitled to a residence permit if they apply for family reunification within three months after the residence permit has been issued to the unaccompanied minor and if family reunification is not possible in a third country with which the unaccompanied minor or the family member has special ties. Furthermore, they have tot fulfil the following conditions: they have an authorisation for temporary stay (visa), a valid document to cross the border, they are willing to undergo an examination regarding tuberculosis, they do not constitute a threat to public order or public security. If the application for family reunification is issued later than three months after the residence permit has been issued to the unaccompanied minor, the minor will have to prove to permanently and independently dispose of an income at social security level for single persons (€ 618,43). In Sweden, the minor shall be unaccompanied at the arrival or have been left alone after arrival by both its parents or by any other adult person that can be considered as having taken the parents place. But it is only the parents that *shall* obtain residence permit in these cases. Other than parents *may* obtain a resident permit on another ground when there are exceptional grounds a residence permit may also be granted to an alien in cases other than those referred to in the first and second paragraphs if the alien has been 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 has some other special tie with Sweden. Exceptional grounds includes according to the *travaux préparatoires* for instance when the health of the unaccompanied minor gives cause for a permit. As is clear from the stated provision, the right of family reunification is not applied only on unaccompanied minor refugees, but also on unaccompanied minors under subsidiary protection.

Q. 65 – Does the Member State authorize entry and residence of the legal guardian or any member of the family where the unaccompanied minor refugee has no relatives in the direct ascending line or such relatives cannot be traced (a10 §3 b)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

A few Member States use this option as only ten of them have judged opportune to offer this possibility: Bulgaria, Czech Republic, Estonia, Finland, Greece, Hungry, Luxembourg, Portugal, Romania and Sweden.

Concerning Sweden, the Swedish transposition does not authorize a *right* of family reunification when there are no relatives or when such cannot be traced. The relative or legal guardian (other than parents) *can* obtain a residence permits on other grounds. In cases where the parents are missing an overall assessment should be made in each individual case. Factors of significance are if there are other relatives already living in Sweden or if there are other persons that can offer support instead. The relative can obtain a residence permit as a relative of a refugee or beneficiary of subsidiary protection if there are particular reasons or the relative otherwise has a special connection to Sweden.

- The directive's dispositions are particularly flexible and five Member States take up the terms targeting the legal guardian or "other family members" : Czech Republic, Finland, Greece, Portugal, and Sweden.

  Two Member States restrict it either to the alone legal guardian or only to the family members (Romania). In Hungary, for example, the legal guardian, and only the legal guardian (no other member of the family has been included) of the unaccompanied minor refugee may be granted a long-term visa or a residence permit on the basis of family reunification. No additional requirements are needed, in other words, the same conditions apply on them.

  The Finnish case is very specific. In that Member State, according to section 37 of Aliens Act, if the person residing in Finland is a minor, his or her guardian is considered a family member. Thus, strictly taken, according to the Aliens Act it is the guardian and not the biological parent, whose entry shall be authorised under this provision. The Government Proposal for the Act amending the Aliens Act (HE 185/2005) however clarifies that this provision is based on the idea that a child's parent is normally also her guardian and thus the person whose entry shall be authorised under the Aliens Act. In situations where a child has both a biological parent and a guardian, the emphasis is in the administrative practice paid on which of the relationships is more real and meaningful for the child; if the child, for example, had lived with the biological parent and not with the guardian, it is the parent who shall be regarded as the family member within the meaning of section 37 of the Act and *vice versa*.

  In Belgium, the applicable procedure is totally discretionary as when the minor refugee doesn't have father or mother anymore, the minister can decide to authorize the staying of his legal guardian or any other member of the close family. This decision doesn't lay on applicable decisions to family reunification.

- The clues of the existence of the familial link are not necessary required (except in Ireland, Greece, Hungary and in Portugal).

  In Finland this provision is based on the idea that a child's parent is normally also her guardian and thus the person whose entry shall be authorized under the Aliens Act. In situations where a child has both a biological parent and a guardian, the emphasis is in the administrative practice paid on which of the relationships is more real and meaningful for the child; if the child, for example, had lived with the biological parent and not with the guardian, it is the parent who shall be regarded as the family member within the meaning of section 37 of the Act and *vice versa*. If the child does not have biological parents, the guardian's entry shall be authorised. It is worth noting, that the authorisation of the guardian's entry is not conditional upon that the child does not have biological parents or that they cannot be traced. According to the Aliens Act and administrative practice it is in principle sufficient that the parent no longer has the custody of the child and that their relationship is not effective. Furthermore, a residence permit on grounds of family tie is issued to other relatives of a refugee or an alien who has been granted a residence permit on the basis of a need for protection or

enjoyed temporary protection, if refusing the residence permit would be unreasonable because the persons concerned intend to resume their close family life in Finland or because the relative is fully dependent on the sponsor living in Finland. The following documents and information shall be required to prove the family ties: a form concerning information on the family relationship between the persons concerned, a photocopy of the applicant's and the sponsor's passport or other travel document or if the person concerned does not have a passport or a travel document, a photocopy of her identity document, birth certificate that contains information on the parents, certificate or other proof on adoption if such is relevant in the case, in case of a child born outside marriage, certificate on paternity, death certificate in case one or both of the parents have died, divorce certificate in case the parents have divorced, proof on custody (for example a court order), if the child is in joint custody, a written and officially certified statement from the other parent indicating that the parent allows the child to move to Finland. Alternatively the other parent can be heard orally. If the written and officially certified statement cannot be received and the parent cannot be heard, a court decision shall be required, information on earlier trips to Finland including information on possible previous visas and residence permits, information on income in cases where secured income is required, extracts from the criminal record concerning the applicant and the sponsor.

In Hungary, the family relationship can be justified with any authentic evidence in case of family reunification to a refugee.

- Solutions kept by Member States in order to respect this obligation are varied. If the interviews constitute an element allowing to look for clues shared by 5 Member States (Belgium, Finland, France, Federal Republic of Germany, Netherlands, and Slovenia), investigations can also be performed abroad as in Belgium, Finland, Ireland, Italy, . In that case, the financial charge of the investigations is supported by the concerned persons, which is a problem concerning the compatibility with the researched objective of the directive. The clue of the familial link's research can also be realized on the basis of DNA tests in Austria, Belgium, Finland, Italy, Lithuania, the Netherlands, Sweden, Denmark, United Kingdom, here as well it is necessary to pay in Austria and in the Netherlands. In the Netherlands, the third State's National deposits an advance for the realization of this test which will be refund if in case of positive result. In Austria, it is also necessary to pay for the test but the refusal to submit to it cannot be considered as a usable clue to testify of the inexistence of a familial link.

2.6.3. Opposability of National law conditions

Q.66 – Does the Member State take into account other evidence of family relationship where the refugee cannot provide official evidence (a. 11 §2)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

This is a mandatory clause of the directive planning that "where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking".

- In three Member States (Cyprus, Estonia, Malta), this obligation is not implemented into the national legislation. In a fourth one, Poland, there is no official implementation of that provision in the legal system even if it is compensated by the fact that general rules of administrative procedure require the authorities to take into account any legal evidence which would help the process of decision. In Ireland, a similar situation is applied in practice as Section 18(2) of the act empowers the Office of the Refugee Applications Commissioner (the first instance refugee status determination body) to undertake an investigation of the application for family reunification and 'to submit a report in writing to the Minister and such a report shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person.'. However, the act is silent on what evidence is taken into account in proving the relationship. In practice, the applicant is required to fill in a questionnaire, requiring the applicant to prove family relationships e.g. by way of birth certificates, marriage certificates, evidence of how contact is maintained (letters, email, phone bills) etc., and also requiring the applicant to provide evidence of any financial support for family members e.g. evidence of monetary transfers, accounts, regularity of transactions etc.

- Solutions used by Member States in order to respect this obligation are diverse. If the leading of interviews constitute an element in order to look for evidence shared by 5 Member States, investigations can also be used abroad as in Belgium, Ireland, Italy. In that case, the cost of investigations are borne by the concerned persons which can be a problem concerning the compatibility with the directive objectives. The search for the evidence of family ties can also be done by DNA tests in Austria, Belgium, Italy, Finland, Lithuania, the Netherlands, Sweden and Denmark, United Kingdom. In Denmark, the immigration authorities may require the applicant and the person with whom the applicant states that he has the family tie on which the residence permit is to be based, to assist in a DNA examination with a view to determining the family tie, if such tie cannot otherwise be deemed sufficiently evidenced. Here again it is sometime necessary to pay for it; in Austria and in the Netherlands. In Netherlands, the third

country national will deposit an advance for the test realisation, and he will be refunded if the result is positive. In Austria, it is also necessary to pay for the test but the refusal to submit to it cannot be considered as a usable clue in order to testify of the inexistence of the familial link. Here again, the cost of DNA test borne by the concerned persons could constitute a problem concerning the compatibility with the directive objectives.

Other evidence techniques are used abroad, as the signature of a declaration (Bulgaria, Federal Republic of Germany) accompanied by a testimony (Federal Republic of Germany). Finally, in some States, a wide lecture of the directive is put forward (Portugal, Latvia, Romania) as well as in Denmark. In Slovakia, for instance, the person concerned shall submit, together with the application, only a travel document and a document confirming their relationship or other proof of existence of such relationship.

In Spain, the situation is settled in the conventional way. The International Commission of Civilian State (ICCS) has invited Member States to give to refugees documents substituting the « Civilian State act » and makes easier the international recognition of these documents. Because of that a Convention relating to the International collaboration for the administrative help given to refugees has been elaborated, and is giving the legislation relating to civilian acts for refugees.

Finally, in the Netherlands, the refugee has to demonstrate that the impossibility to produce these documents is not his responsibility whether if it is, the family reunification will be rejected. The compatibility of this position with article 11.2 of the directive in accordance with which «a decision rejecting an application may not be based solely on the fact that documentary evidence is lacking", is really doubtful even if the Netherlands' authorities competence is discretionary and if the reunification stays possible.

NO TRANSPOSITION	*CY; EE; MT*
PROBLEM	*AT; PL; NL*

Q.67 – Does the examination of the refugee application take into account their specific situation :

Q.67. A – Are proofs regarding accommodation conditions, sickness insurance or resources required (a.12 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Three Member States are breaching the directive. Poland by imposing the satisfaction of the accommodation condition whereas Cyprus is opposing the two of them. In Malta no distinction is made between refugees and third country nationals in the family reunification Regulations.

Q.67. B – If one of the person concerned (sponsor or family member) has special links with a third country within which reunification is possible, does the member state require those proofs according?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Six Member States have been using this optional clause: Austria, Belgium, Estonia, Federal Republic of Germany, Malta and the Netherlands.

- Malta does not make any distinction between refugees and third States nationals in the applicable rules to family reunification, which leads to put it under the influence of this clause from article 12.

- In Austria, if there is a possibility to continue family life in a third country, the family members of a sponsor who has been recognised as a Convention refugee are not granted international protection, but according to Sect. 46 § 4 No. 4 lit. d Settlement and Residence Act may apply for family reunification under the general regime of the Settlement and Residence Act. In this case, the general preconditions regarding accommodation, health insurance and income have to be met.

- In Belgium, the minister can decide to require the respect of these conditions if the family reunification is possible in a third State. He could do it if the family member applicant has himself been recognized as a refugee, or if he is allowed to a staying by another title in another European Union Member, or third State. However, it will be necessary to take into account the conditions fixed for family reunification in this other State and of the factual circumstances in which it could happen.

- In Federal Republic of Germany, in that case the spouse and the children of the recognized refugee are not entitled to a residence permit without the proofs (*cf.* sec. 29 §2 sent. 2 Residence Act). So the proofs are generally needed. However, sec. 29 §2 sent. 1 Residence Act applies. Pursuant to this paragraph the accommodation, health insurance and resources requirements may be waived at the discretion of the deciding administration

- In the Netherlands, this condition only applies when family members of a refugee with another nationality apply for family reunification within three months after the residence permit has been granted to the sponsor. In case the sponsor or the family member has special

ties with a third country, the income requirement will have to be fulfilled. In case no special ties exist, the income requirement will not be applied.

Q.67. C – If a refugee has introduced its application after a period of three months, does the Member State require the refugee to meet the three conditions or one of them (accommodation, sickness insurance, resources (a 12 §1 alinea 3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Thirteen Member States use this option: Cyprus, Czech Republic, Estonia, Federal Republic of Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Spain. In Hungary, these conditions are also required if the family reunification's requirement is done 6 months after the Refugee's status recognition.

In the Netherlands, the sufficient resources condition is required and in Slovakia, the condition relating to the affiliation to a sickness insurance system will only be required 30 days after the temporary residence permit's deliverance. The importance of financial considerations has to be: in case the sponsor is a refugee that resides in the Netherlands on the basis of a residence permit on regular grounds, the family members of 16 years and up will have to pass the integration exam abroad before they will be granted a visa (authorisation for temporary stay). For an application after the three month period, the regular fees must be paid, which amount to 1616 euros for each family member.

There again, Malta is one of the States which have implemented the directive, but that solution is only the consequence of the lack of distinction between refugees and third States nationals lack of distinction in the directive's appliance regulations.

Q.68 – Does the Member State apply the prohibition to impose a residence condition before reunification (a 12 §2)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Two States are breaching the directive concerning this compulsory provision: Bulgaria and Malta.

In Malta, conditions fixed by the directive's appliance regulations, also applicable to refugees, impose that the sponsor must have resided in Malta lawfully for at least two years in order to apply for family reunification. However, the Director for Citizenship and Expatriate Affairs may allow for exceptions in 'exceptional circumstances.

In Ireland, non bound by the directive state, the Refugee Act, 1996, as amended, is silent on the need to meet such a condition. In practice, there are no such requirements.

NO TRANSPOSITION	*BG; CZ; MT; IE*

2.7. Entry and residence of members of the family

2.7.1. Facilitated entry

Q.69 – Is entry and residence facilitated by your Member State, as soon as the application for family reunification has been accepted, including the issue of obtaining visas (a.13 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Once the request for family reunification is accepted, the entry of family members is authorised by virtue of the directive and Members States have to grant all facilities to the concerned persons to obtain the required visas. The respect of this mandatory provision obviously creates problems to some States, on a legal as much as on a practical point of view.

- In first place, some Member States are in breach of the directive as they did not proceed to the implementation of the text: Belgium, Bulgaria, Hungary, Luxembourg, Netherlands, Slovenia.

  - Amongst this group of States, the Netherlands are author of a deliberated breach of this mandatory provision and not only of a mere negligence or omission in their implementation. Their practice is contrary to the directive. They require the applicant that he/she will first have to apply for a visa (authorization for temporary stay) which will allow him or her to travel to the Netherlands before he or she can apply for family reunification in the Netherlands. The Dutch system requires a double test whether the requirements for family reunification are met, namely once when at the application for the authorisation for temporary stay and then again at the application for a residence permit. Recently, the Court of The Hague ruled that the Dutch system of double checking whether the requirements for family reunification are met may indeed not be in conformity with the Directive (Court of The Hague 16 November 2006, LJN: AZ7350). In a letter of 15 October 2007, the Dutch Secretary of State has announced that she will investigate how the Dutch system of 'double checking' of the requirements can in future be abolished in order to accelerate the procedure of acquiring a residence permit. Furthermore, the requirement that a visa (authorisation for

temporary stay) needs to be applied for in the country of origin or the country of permanent residence can be considered contrary to the obligation of article 13(1) to grant every facility for obtaining required visas. The Netherlands introduce an extra requirement for family reunification, since an application for a visa will be denied in case it is applied for in another country than the country of origin or permanent residence.

In Denmark, a State not bound by the directive, this provision was not formally recorded into the national plan. However, normally administrative practice is likely to be in accordance with the standard laid down in Article 13 (1). There has, however, been reported certain practical difficulties in obtaining the requisite visa due to long distance or difficult access to Danish embassies

- The situation in other Member States, despite their implementation of the directive, forces to wonder about the effectiveness of the implementation.

  - In Federal Republic of Germany, no specific rule regulates this point even though the practice leads to an issuing of visas as soon as the request is accepted. It is not certain in that context that the sponsor's rights are properly guaranteed. The situation is similar in Latvia where no facilitation is envisaged by the legislation even if the practice plans that controls relating to financial conditions or conditions of accommodation and others will not be operated.

  - In Austria, article 13 was the object of a transposition but, in practice, the beneficiary of family reunification remains submitted to the normal procedure to issue visas and does not benefit from any facilitation. The authority has to order the consulate to issue the required visa. However, this does not mean that the visa is issued automatically. The consulate has to advice the family member on the requirement to apply for a "visa – D" (Sect. 20 § 1 No. 4 Aliens Police Act). This type of visa entitles the holder to a single entry to Austria. The family member has to apply for the visa within three months of the notification; otherwise the proceedings will be discontinued. As there are no special provisions with regard to the granting of this visa to persons accepted for family reunification, the family member has to fulfil the general requirements (Sect. 21 Aliens Police Act) and the usual fees (€ 43,-) are to be paid. After the entry into Austria the applicant is required to pick up the settlement permit personally at the issuing authority (i.e. the district authority of the place where she/he will take residence). If the applicant fails to pick up the residence permit within six months from the notification it becomes invalid and the proceedings are discontinued. As this system of issuing visa to family members accepted for family reunification corresponds exactly to the general procedure, Austria does in fact not grant the family member any facility for obtaining the requisite visas. In practice this system gives rise to problems for the persons concerned as they are required to appear at the consulate at least two times and therefore have to bear travel costs to reach the consulates that are sometimes rather far away from there place of residence. Furthermore, the

complexity of these proceedings leads to unreasonable duration of the proceedings in many cases.

- The submission to common law rules in terms of visa issuing are also found in Ireland. But, in accordance with Article 13, once a family reunification application is approved the State facilitates the persons concerned with regard to obtaining the requisite visas.

- On the other hand, in other Member States, the implementation indeed aims at facilitating the entry of beneficiaries of family reunification.

  It is the case of Member States in which the residence permit exempts beneficiaries from the obligation of being beholders of an entry visa (Estonia, Finland, Sweden).

  - In Finland, according to the main rule, the family member has to wait for the decision of the Directorate of Immigration abroad. After the Directorate of Immigration has decided to issue a residence permit on ground of family tie, a Finnish embassy abroad serves the decision and the permit to the family member. A person who has been issued with a residence permit is not required to hold a visa to enter Finland. She is able to enter the country by virtue of the valid residence permit. In Romania and Czech Republic, the decision of family reunification is transmitted to consular authorities that have to issue the requisite visa.

  - In France, a circular from the Minister for Home Affairs indicates to the prefectorial authority that, in any case, the residence permit will have to be issued in rapid delays. The beneficiaries, admitted to the title of family reunification at the ends of a careful assessment of their request, have the right to have their case dealt with in the shortest possible delays. The receipt issued bears the mention “authorises its beholder to work”. Another circular adds precisions about the conditions of issuing of the requisite visa. Indeed, “after the fee owed to the National Agency of aliens admission and migrations is paid, the amount of which is fixed by a combined byelaw from the minister in charge of integration and the minister in charge of the budget, the application for family reunification is sent by the institution to its missions in the country where it is embedded and to the competent French consulates by means of the place of residence of the family. The mission or the consulate summons the family which members have to present themselves in possession of a valid passport, in order to proceed to the departure formalities. After the usual checkouts, the consulate of France affixes, on each currently valid passport showed by the members of the family, a visa with the mention “family reunification”. In case a fraud would have been noted, the consulate refuses the visa issuing. The prefect is informed and the decision is withdrawn. The consular authority cannot legally refuse an entry visa on the French territory to an alien beneficiary of a family reunification measure, unless public order grounds justify it, or when the authenticity of the civil status documents is not established or also, when the decision concerns a child committed by kafala when it appears that it would be contrary to the superior interest of the child to authorise his entry in France. It is up to the authority to inform the prefect as soon as possible so

that he can, if the need arises, proceed to the withdrawal of the authorisation of family reunification.

- In Portugal, after the request for family reunification is made, the immigration and borders service has three months to reply. If it concludes that the request should be granted, the applicant is given a residence permit and visa. In other words, the ranting of the appropriate documents is automatically done.

- In Malta, the Regulations state that as soon as the application for family reunification has been accepted, the Director for Citizenship and Expatriate Affairs shall authorize the entry of the family member or members who were the subject of the application, and every facility for obtaining the requisite visas shall be given to the persons concerned.

- In another Member State, Italy, the controls operated by consular authorities are limited to the control of the authenticity of the documents attesting for family ties.

Lastly, the question of the scope of the obligation laid down in article 13 remains entire concerning the cost of visas regarding the obligation to facilitate the entry. The Polish rapporteur thus blames this cost as being contrary to that obligation, which, in our opinion, seems to be an excessive interpretation. The issuing delay of the visa can also create problems. This question is solved in a different way depending on the Member States. In Czech Republic, when the request for family reunification is accepted, the applicant is automatically issued a long-term visa which entitles him/her to enter the Czech territory for the purpose of being handed-over the residence permit for the purpose of family reunification. In Spain, the legislation states that the requisite visa shall be issued within a month and the request for the visa must be dealt with in priority. On the other hand, the uncertainty exists in the United Kingdom as the speed with which the visa is issued will depend on the British mission which has responsibility for the application.

NO TRANSPOSITION	*BE; BG; HG; LU; NL; SI*
PROBLEM	*DE; LV; AT*

2.7.2. Duration of residence

Q.70 and 71 – Is a residence permit of at least one year's duration granted to the family members and is it renewable?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

The issuing of a residence permit of one year's duration is a mandatory provision of the directive. It is not respected by all Member States. Further than this statement, in 23 Member States, the residence permit issued complies with the conditions set by the directive.

- Four Member States including one not bound by the directive did not formally transposed this mandatory clause: Greece, Finland, Czech Republic and the United Kingdom. The main reason of this situation lays on the fact that the duration of the residence permit granted to the members of the family is aligned on that of the sponsor. If this sponsor has a residence permit inferior to one year, mechanically the breach of the directive is operated as it is the case in Finland, Greece and the United Kingdom. In Finland, according to the main rule, the first fixed-term residence permit shall be issued for one year. The validity period of the residence permit must, however, not exceed the validity period of the travel document. Furthermore, if the residence permit is requested for a shorter period than one year, its validity period must not exceed that requested period. In addition to this, the first fixed-term residence permit may be issued for a period of longer or shorter than one year if it is issued for carrying out a legal act, an assignment, or studies that will be completed within a set period. In Greece, the duration of the initial residence permit granted to a family member, corresponds to the residence permit held by the sponsor in accordance with article 13§3 of the directive. Further renewals have the same duration with residence permit of the sponsor (which, in any case, according to migration legislation, cannot be less than a year – normally residence permits for working purposes are renewed every two years, after the initial issue). Regarding the Czech Republic, the residence permit will be issued for a period of one year, if the sponsor was granted a long term residence permit and two years if the sponsor was granted permanent residence permit (Sec. 44 par. 5 lett. c and d) and Sec. 44 par. 6 ALA) which means that this Member State respects the requirement of the directive. Several Member States consecrate the rule of the alignment of the family member's residence permit duration on that of the sponsor (Bulgaria, Estonia, Italy, Latvia, Portugal, Spain), although without being able to determinate if the rule laid down in article 13§2 of the directive is respected. In Spain the Law imposes the alignment of the family member's permit duration on that of the sponsor but in practice the permit is normally given for one year.

- The other Member States respect the directive (Austria, Belgium, Bulgaria, Cyprus, France, Federal Republic of Germany, Estonia, Ireland, Italy, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, Denmark). Slovenia even specifies that the residence permit can be renewed (extended) even if the sponsor's permit's duration is less than one year. In general, the renewal of the family member's residence permit is in line with the duration of the sponsor's permit, but the family member's residence permit duration can never exceed two years.

- In four Member States, the residence permit issued is superior to the text as it has two years duration (Czech Republic, Denmark, Poland, Portugal). In the Member States bound by the directive, this duration is subordinated to the possession of a permanent

residence permit by the sponsor, which leaves intact the question of the permit's duration in another case apart for the Czech Republic where in case of a long term residence permit delivered to the sponsor the family member is issued with a one year residence permit. Lastly, Hungary delivers a residence permit lasting three years to the members of the family, with the limitation that it cannot exceeds the duration of the sponsor's permit.

Besides, all Member States respect the obligation to issue a renewable title, without which the right to family reunification would not make sense, and therefore they align the family members' residence permit on the sponsor's one.

NO TRANSPOSITION	*CZ; FI; EL; UK*
PROBLEM	BG; EL; ES; FI; UK

Q.72 – Is the duration of the residence permit aligned with the duration of sponsor's residence permit (a.13§3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

The alignment of the family members' residence permit on that of the sponsor is partly solved by article 13§3 of the directive, which formulates a "principle" prohibition concerning cases where the residence permit's duration would "exceed" that of the duration granted to the sponsor. However, the directive remains silent on a possible differentiation between the sponsor's residence permit and the family member's permit, as long as the minimal one year duration is respected according to article 13§2. The respect of this mandatory provision therefore opened margins of manoeuvre to some Member States.

- The great majority of Member States proceeded to simple alignment of the two residence permits. On that point, it will be noted that in the Federal Republic of Germany, Section 27 § 4 sent.1 Residence Act stipulates that the residence period shall be issued for the period of validity of the sponsor's residence permit at the longest.

- Five Member States (Austria, France, Denmark, the Netherlands, Portugal) stand out. France issued a residence permit of one year. The family members' residence permit does not have the same nature as the sponsor's one. It is a temporary residence permit bearing the mention "private and familial life" and valid for a period of one year.

In a second Member State, the Netherlands, family members are granted a permit for a year, after which the administration will assess whether all conditions for family reunification are still fulfilled. If that is the case, the family member will be granted a permit for five years. Minor children of a Dutch national, a knowledge migrant with a permanent employment contract or a holder of a permanent residence permit can receive a permit for five years immediately after admission.

A similar approach was taken in Austria. In case of family reunification a settlement permit with a period of validity of one year is issued even if the sponsor's settlement permit expires earlier. After one year the family member has to apply for a renewal of the settlement permit that will only be granted if the general requirements are fulfilled (except of the yearly quota that is relevant only at the first application). After five years a settlement permit of unlimited duration may be applied for.

In Portugal, the duration of the residence permit is of two years (renewable) if the sponsor has a permanent residence permit or equal to the period of the sponsor's temporary residence permit. In both cases, after the two years residence permit expired, the family member can apply for an autonomous permit.

In the last Member State, not bound by the directive, Denmark, the sponsor must either be a beneficiary of the international protection, or a third country national holder of a permanent residence permit issued after seven years of residence. In that case, the spouse or partner is granted a residence permit which duration cannot exceed two years and three years in case of a renewal. The residence permit of the sponsor's children is aligned on that of the parents until they are 18 years old.

2.7.3. Autonomy of the residence permit

2.7.3.1. After a 5 years delay of regular residence (Q.78)

Q.78 – Are spouses, unmarried partners and child who has reached majority entitled to an autonomous residence permit at the latest five years after lawful residence on the basis of the residence permit issued for family reunification (a. 15 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

- A significant group of Member States (21) grants an autonomous residence permit to the members of the family after a 5 years period. These States therefore act in conformity with the obligation laid down in the directive : Austria, Belgium, Cyprus, Czech Republic, France, Federal Republic of Germany, Greece, Hungary, Italy,

Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom.

- Four Member States are satisfied with a prior residence of 3 years, in conformity with the directive, which fixes a delay "at the latest" (Belgium, Czech Republic, the Netherlands, France).

  For the two last Member States, this opening is not complete though. Indeed, the alien also has to comply with the condition of republican integration in France, while in the Netherlands, spouses and unmarried partners of a sponsor who has a permit for the purpose of a non-temporary stay (studies, medical treatment, but a permit on asylum grounds is regarded as temporary stay as well), can be granted an autonomous residence permit after three years of residence with the sponsor. Children, who were minor when they were admitted, of a sponsor who has a permit for the purpose of non-temporary stay (studies, medical treatment, but a permit on asylum grounds is regarded as temporary stay as well), can be granted an autonomous residence permit after at least one year of residence with the sponsor.

  In Italy, no specific deadline has been set forth and the issuance of an autonomous residence permit is subject to occurrence of specific circumstances. The period enshrined in the directive is nevertheless respected because spouses may be granted an autonomous permit of stay upon renewal. In this case, the spouse should carry out an activity and the permit of stay for family reasons is converted into a permit of stay for purposes related to the activity which is actually carried out by her/him). It must nevertheless be pointed out that if the spouse does not carry out an autonomous activity, he/she won't be granted any autonomous permit. This situation leads to a violation of the directive.

- Concerning the children's residence permit, national legislations generally correspond to the directive requirements, for instance in Poland. Sometimes they slightly move aside from them and in conformity with the directive. The Federal Republic of Germany thus allows to grant the residence permit from the age of 16 if the prior residence lasted 5 years. Sometimes, the delay of prior residence is reduced (two years in France, or one year in the Netherlands) or is not even taken into account (Czech Republic, Greece) as the autonomous residence permit is issued as the age of majority.

  In Portugal, two years after the first residence permit was issued or before if the members of the family have children in that Member State, an autonomous residence permit is granted to the members of the family, including unmarried partners. This plan adds that children can obtain an autonomous when they reach their majority even before the expiration of the two years delay. The issuance of an autonomous residence permit is automatic if the marriage lasts at least 5 years.

- However, the directive creates specific problems of transposition on a few particular points.

- Thus, in Estonia, the notion of « autonomous residence permit » does not have an equivalent in national law. Therefore, the members of the family can apply for the residence permit on normal grounds; the person can fall under the quota if he or she is not a family member any more.

The formal implementation of this provision of the directive also raise questions to some States as the “autonomous residence permit” is for them a part of the common law more than a transposition of article 15 of the directive.

- Thus, in France, an autonomous residence permit can be issued after three years but this possibility concerns a precise category of family members, namely the members of an alien’s family holder of a resident card. For the others, they are granted a temporary residence card and there is no further precision. As a consequence, the family member will only be able to be autonomous after 5 years on the grounds of a residence permit "long-term resident – EC".

- In Latvia, generally, spouses and children can re-apply for a temporary residence permit on other basis at any time, for instance, by becoming employed or self-employed in Latvia. In those cases residence becomes autonomous from spouse. Moreover, after 5 years of residence on basis of temporary residence permit they can rely on point 7, paragraph 1 of Article 24 of *Immigration law* which provides that foreigner who has resided in Latvia on basis of temporary residence permit for at least five years has a right to apply for permanent residence permit.

- The connection with the directive "long term resident" is also possible, as the Slovenian case shows it. Pursuant Article 36, § 8 of the Aliens Act, family members who fulfill the conditions, may be issued an autonomous residence permit. The conditions are stipulated in Article 41, § 1 of the Aliens Act: a foreigner who resides in the Republic of Slovenia uninterruptedly for five years on the basis of almost any type of temporary residence permit (including the one on the basis of family reunification) may be issued an autonomous permanent residence permit, if he or she fulfils other conditions required by the law. The five-year condition is also fulfilled if a foreigner was absent from Slovenia for periods not exceeding six months and if all periods of absence in total do not exceed ten months. There is also a special provision for close family members of a sponsor who resides in Slovenia on the basis of a permanent residence permit (Article 41, § 2 of the Aliens Act). The conditions for obtaining a permanent residence permit are equal for all family members.

- Romania adopts a restrictive reading of the directive, granting the autonomous residence permit in limitedly enumerated cases, namely when the minor becomes adult (18 years old); (ii) if the sponsor demised (for any other person) or (iii) in case of divorce (for the husband/wife).

- In two Member States, the requisite delay to obtain an autonomous residence permit is an obstacle to the implementation of the directive. Thus, in Hungary, all the family members are entitled to an autonomous residence permit five years after the first issue of residence permit on family reunification account. (AA §19(7)) This is slightly different than what is provided by the Directive, the period when the family member

was holding a residence visa, prior to get his/her first residence permit, is not calculated in this way; therefore right for autonomous residence permit is opened later than five years of residence. The case of Malta follows this interpretation as whereas the Directive reads 'Not later than after five years of residence...', the Maltese Regulations read 'Upon the expiry of a period of five years' residence...'. The wording of the Directive is somewhat ambiguous - it appears to give the option of obtaining an autonomous residence permit within five years ; the Maltese Regulations only give the option after five years.

- Two States are in breach with the directive.

  - In Finland, a permanent residence permit is issued to an alien who has resided legally in the country for a continuous period of four years after being issued with a continuous residence permit if the requirements for issuing a continuous residence permit are still met and if there are no obstacles mentioned in this Act to issuing a permanent residence permit... A person who has been issued with a fixed-term residence permit on the ground of a family tie may be issued with a permanent residence permit even if the sponsor does not meet the requirements for issuing a permanent permit. This provision thus covers the spouses, unmarried partners, registered partners and children including children who have reached majority, who reside in Finland by virtue of a residence permit on grounds of family ties. Autonomous residence permit may be issued under similar conditions in all these cases. The residence permit referred to in subsection two of this provision is autonomous so that the family member may be issued with it even though the sponsor would not meet the requirements for being issued with a permanent residence permit. Furthermore, once the permanent and autonomous residence permit is issued to the family member, it cannot be withdrawn even if the sponsor's residence permit would be withdrawn. However, the existence of the family tie is the preconditions for issuing the permanent permit under this provision. It is, however, important to notice that the wording of this provision deviates from the wording of the Directive. According to the Aliens Act autonomous residence permit '*may be issued*' whereas according to the Directive persons concerned are entitled to autonomous residence permit.

  - Sweden also creates a problem concerning certain groups of family members. In the *travaux préparatoires* it is stated that since 1984 permanent residence permits are issued as a main rule, if the person intends to settle in Sweden on a permanent basis or at least for a considerable time. From this follows that persons that obtain a residence permit on the ground of family reunification, usually immediately obtain a permanent permit. Permanent permits are always autonomous. But exceptions apply to permits issued to persons that *intends* to marry, register a partnership or to begin a partnership, so called "fast connections", and to married /unmarried couples that have not been living together on a permanent basis before coming to Sweden. These permits are limited in time (usually two years) and are renewed on the condition that the marriage/relationship is lasting, in other words they are not as a main rule autonomous. But there are situations when the permit *can* be renewed even if the marriage/relationship has ended in particular when the person *has special ties to*

Sweden, the relationship has ended primarily because in the relationship the alien or the alien's child has been subjected to violence or some other serious violation of their liberty or peace or there are other strong grounds for prolonging the alien's residence permit. This gives that after 5 years the person can be seen as having a special connection to Sweden (a new family, work etc) although the relationship with the sponsor has ended. The person then obtains a permanent and autonomous permit. But if there is no such connection or other reasons to renew the permit, the person will not get a permanent autonomous permit even after 5 years. In sum spouses, unmarried partners and child are *usually* given a permanent and autonomous resident permit after 5 years. But as this is not a *right* as stated by art. 15.1, the Swedish legislation is not entirely in line with the requirements of the Directives.

Lastly, concerning States not bound by the directive, national law is not compatible in Denmark as the autonomous residence permit can only be issued after a period of seven years, and, in Ireland, State not bound by the directive, there are no legislative provisions on the granting of autonomous residence permits.

NO TRANSPOSITION	*BG; EE*
PROBLEM	*IT; RO; HU; MT; FI; SW*

2.7.3.2. In case of breakdown of the family relationship

Q.79 – Does your Member state limit the granting of the autonomous residence permit in cases of breakdown of the family relationship?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Article 15§1 second indent of the directive provides that in case of breakdown of the family tie, Member States can limit the granting of the autonomous residence permit to the spouse or the unmarried partner. Twelve Member States, including one not bound by the directive, made use of this optional clause of the directive (Belgium, Czech Republic, Finland, France, Latvia, Luxembourg, Malta, Portugal, Slovenia, Spain, Sweden, Denmark). The limitation can intervene when the autonomous residence permit is granted (Belgium, France, Finland, Latvia, Portugal, Sweden) or take place through a withdrawal of the residence permit (Czech Republic, Denmark). Besides, modulations of the limitation exist in some Member States when for instance the breakdown of the family tie entails a refusal to issue the autonomous title under the condition that the breakdown takes place before the second (Spain) or the third

year (Slovenia) of common life. In Sweden, this possibility only exists when the couple did not live together on a permanent basis before the arrival in that State.

Lastly, thirteen Member States, including one not bound by the directive, do not limit the issuance of the residence permit in case of breakdown of the family ties.

2.7.3.3. For relatives in direct ascending line and unmarried children

Q.80. A et B. – Does your Member State grant autonomous residence permit to first-degree relatives in the direct ascending line (a15 §2) and to adult unmarried children objectively unable to provide for their own needs on account of their state of health (a15§2)?

Optional provision

Article 15 §2 offers the option of the granting of an autonomous residence permit to this category of recipients. Eleven Member States decided not to make use of it (Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Malta, Romania, Ireland) for the same reasons as those evoked above, notably regarding the material scope of the reunification (Austria, France).

For first degree relatives in the direct ascending line

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

- For the Member States having chosen that option (Czech Republic, Federal Republic of Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Denmark), the possibility to issue an autonomous residence permit to first degree relatives in the direct ascending line is recognised at different titles.

  Thus, in the Netherlands, the relatives in the direct ascending line of the sponsor holding a residence permit for specific reasons (studies, medical treatment…) can be granted an autonomous residence permit after three years of residence with the sponsor. Any third country national who reside in the Czech Republic with the valid residence permit for the purpose of family reunification may after three years of residence or after reaching 18 years be granted an autonomous residence permit – long term residence permit (national status) for another purpose than for the purpose of family reunification. In Slovenia, a general rule of national law allows to grant an autonomous residence permit to all the close family members legally residing on the grounds of family reunification. This residence title is issued if the member of the family fulfils the requisite conditions and has legally resided in that State for five years. Finally, in the Federal Republic of Germany, an autonomous residence permit is granted all relatives (who may have entered by virtue of family reunification in order to avoid an extremely difficult situation) after having resided on the territory for five

years. Lastly, in Sweden, an autonomous permanent resident permit is not obligatory delivered, but applies as a main rule according to well- established case law and *travaux préparatoires*.

The question of the formal transposition of the directive is brought back about this point. In Lithuania and Italy, the benefit of the residence permit lays on common law. In Spain the possibility to issue an autonomous residence permit to first degree relatives in the direct ascending line only is possible in case of having minors or a person with incapacity in charge, if the ascendant has obtain a work permit. Others rights are related to the permanent permit.

For adult unmarried children objectively unable to provide for their own needs on account of their state of health

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

- About adult unmarried children objectively unable to provide for their own needs on account of their state of health, this situation is observed again as Member States issuing an autonomous residence permit to relatives in the direct ascending line also grant an autonomous residence permit to this category of children.

  Five of these Member States apply to adult children the same conditions as those applicable to first degree relatives in the direct ascending line (Czech Republic, Lithuania, the Netherlands, Slovenia, Sweden). In Portugal, this possibility is only opened to children their studies in that Member State.

  Besides, there can be doubts, here again, about the reality of the formal implementation of that option when, in case of breakdown of the family ties, the member of the family can ask for an autonomous residence permit to be issued after two years of residence.

  In Italy, since no specific restriction is established for issuance of a separate permit of stay upon renewal, it can also be issued in favour of adult married children. However, since the new permit of stay is issued in relation to the real activity which is carried out by the foreigner concerned, and adult children must be objectively unable to provide for their own needs on account of their state of health, the issuance will be limited to reasons different from work activity. In Spain, adult children can obtain a residence permit if they have resided in Spain for at least 5 years and dispose of a working licence, which puts aside the condition of inability to provide for their needs laid down by the directive. In Finland, lastly, according to the main rule, residence permits on grounds of family ties are not issued to adult unmarried children objectively unable to provide for their own needs on account of their state of health. However, section 115 of the Aliens Act lays down a special rule concerning refugees and others who get international protection. According to this provision, a residence

permit on grounds of family tie is issued to other relatives, including adult unmarried children objectively unable to provide for their own needs on account of their state of health, of a refugee or an alien who has been granted a residence permit on the basis of a need for protection (subsidiary protection) or enjoyed temporary protection, if refusing the residence permit would be unreasonable because the persons concerned intend to resume their close family life in Finland or because the relative is fully dependent on the sponsor living in Finland. If the applicant is considered a danger to public order, security or health, an overall consideration is carried out as provided in section 114 (2) of the Act. Section 56 of the Act concerning autonomous residence permits is applicable in these cases, and thus an autonomous permit may be issued.

2.7.3.4. In case of widowhood

Q.81 – Do member States grant autonomous residence permit in the event of widowhood, divorce, separation or death of first first-degree relatives in the direct ascending or descending line (a 15 §3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The option opened by the directive got the agreement of 16 member States (Austria, Cyprus, Czech Republic, Federal Republic of Germany, Greece, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden).

- Concerning the case of widowhood, some States such as the Netherlands do not add conditions to the residence permit as it is automatically issued when the decease occurs within the 3 first years of residence. In Federal Republic of Germany, the legislation provides that the residence permit is prolonged for one year in case of the sponsor has died.

  Sometimes conditions are set by the Member States. The Czech Republic thus sets a condition of residence by requiring a residence of two years prior to the decease, even if it tolerates exceptions: the continuous stay is not required if the survivor lost his Czech citizenship as a result of a marriage to a sponsor or the death of the sponsor was caused by work-related accident or occupational disease (Sec. 45 par. 3 AlA). Greece also sets a condition of prior residence but of a shorter duration, one year. Two Member States envisage that the application for the residence permit intervenes within a requisite time period after the decease: the Czech Republic fixes this time period to one year after the decease, while it is shorter in Lithuania (six months). For Poland, an autonomous residence permit is to be granted, even before the normally required period of five years, in case of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line. However, granting such an autonomous residence permit is conditioned on "*special interest*" of an alien

concerned. In Lithuania, temporary residence permit may be granted if particularly serious circumstances arise with regard to death of the family member. In this case the application for residence permit should have been submitted before the death of the family member, provided the residence permit on family reunification basis has not yet been issued; or not later than within 6 months from the death of the family member, provided that before that the foreigner had a residence permit issued on the basis of family reunification.

- Concerning the situations of breaking off, divorce or separation, a Member State (Finland) points out that an alien who has been issued with a residence permit on ground of family tie may be issued with a residence permit on the basis of close ties to Finland after these family ties are broken. On the other hand, several Member States impose a prior duration of marriage. Czech Republic requires the marriage to be lasting for at least 5 years and the prior residence in that Member State to be lasting for at least 2 years, unless for exceptional cases. The application for the autonomous residence permit must be deposited within the year following the divorce. In Lithuania, on the other hand, a temporary residence permit may be granted if particularly serious circumstances arise with regard to divorce. In this case the application for the residence permit should have been submitted before the termination of the marriage or partnership agreement, provided the residence permit on family reunification basis has not yet been issued; or not later than within 6 months from divorce or termination of partnership agreement, provided that before that the foreigner had a residence permit issued on the basis of family reunification (paragraph 8 of Art. 43(1) of the Aliens Law). In the Netherlands, if the divorce occurs within the 3 first years of residence, an autonomous residence permit will be issued if humanitarian grounds justify it. A circular adds precisions about the specific conditions which have to be taken into account in this assessment (the situation of an unmarried woman in the country of origin; the woman's social position ; the reception abilities in the country of origin ; the responsibility of a child born in the Member State or benefiting from an education in this State; the evidence of (sexual) familial violence). In Slovenia and in Greece, the marriage in the Member State must have a duration superior than 3 years. Lastly, in Spain and in Federal Republic of Germany, a community of life of at least 2 years must have existed. The solution applicable in Austria creates practical problems though, as the settlement permit of a family member will be renewed irrespective of the loss of family relationship in the case of divorce on the sponsor's fault. This provision gives rise to a practical problem as the assessment of the fault is not known in all the legislations.

- The optional clause of article 15§3 allows States to grant an autonomous residence permit only to cases it enumerates. In this regard, in Hungary, family members are entitled to an autonomous residence permit in case of the sponsor's death, if the requirements of stay are fulfilled. This situation is also encountered in Cyprus, Italy and Malta. In Finland, the notion of breakdown of the family ties does not allow to determine whether the situations of decease are comprised within this scope. The

national provision may also be applied in the event of widowhood, divorce, separation or death.

Lastly, amongst the Member States not consecrating the issuance of an autonomous residence permit, two Member States (France and Greece) nevertheless envisage the possibility to extend the family member's residence permit.

2.7.3.5. In case of particularly difficult situations

Q.82 – Has your Member State adopted rules granting autonomous residence permit "in the event of particularly difficult circumstances" (a 15 §3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

This provision forces the Member States to take into account the individual situation of the concerned third country nationals. The directive was not implemented by 7 Member States: Bulgaria, Estonia, Hungary, Italy, Romania, Poland, and Slovenia which are therefore in breach of it. In Poland, if the provision was not the object of an express transposition, the framework of granting an autonomous residence permit in case of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line (see answer to Q.81) seems to ensure this standard. The three States not bound by the directive, Denmark, Ireland and the United Kingdom ignore it as well. In Ireland however, if there is a change in the situation of the family member they must tell the Minister for Justice and then the matter is at his/her discretion.

- The notion of "*particularly difficult situation*" is vast enough to receive a wide interpretation from national legislations in conformity with the directive. The notion of "particularly difficult circumstances" is enlightened in the Czech, German and Dutch legislations. It the Netherlands, it is specified that the alien will have to prove that there are special and individual circumstances, and that therefore he cannot leave the Member State. France prefers to refer to "exceptional grounds", Austria to "special circumstances" and Latvia to "exceptional circumstances". Finland illustrates well the spirit, if not the wording of the directive by arguing that aliens residing in Finland are issued with a continuous residence permit if refusing a residence permit would be manifestly unreasonable with regard to their health or ties to Finland or on other compassionate grounds, particularly in consideration of the circumstances they would face in their home country or of their vulnerable position. Issuing a residence permit does not require that the alien has secure means of support. In Malta, national provisions proceed to a literal transposition of the directive.

- Conjugal violence is expressly mentioned in four Member States (Austria, Greece, Portugal, Spain) while Belgium and Cyprus prefer underlining the notion of "familial violence" or "domestic" and Sweden simply states "violence".
- Two Member States, France and Latvia, lastly state the possibility to issue a residence permit to third country nationals for humanitarian grounds.

Beside these differences between the wording of national laws and regulations arises the question of whether the wide margins of discretion awarded to national authorities are compatible with the directive. Hence, in Belgium or in France, for instance, authorities have discretionary competence to decide on cases and are able consequently to derive from the meaning of article 15 § 3 of the directive.

NO TRANSPOSITION	*BG; EE; HU; IT; PL; RO; SI*

2.7.4. Scope of the rights

2.7.4.1. Equivalence with the sponsor's rights (Q.73)

Q.73 – Are the rights awarded to family members' equivalent to those granted to the sponsor (a.14 §1):

Q.73. A - Regarding access to education?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

In all the States bound by the directive this provision is respected even if in two Member States, Belgium and Romania, this provision is not explicitly implemented in national legislations, although without recording of contrary practices. In Romania, this provision is implemented by the general principle of domestic law concerning the equality and non-discrimination. In Federal Republic of Germany for instance, access to school and tertiary education is granted because there is no restricting legislation.

In one Member State not bound by the directive, Ireland, family members of refugees are entitled to access free primary and secondary education and State funded third level education. Family members of third country nationals who are not refugees are entitled to access free primary and secondary education, but as non-EU citizens are required to pay large fees in respect of third level education, which are generally prohibitive.

Q.73. B and 75, 76, 77 - Regarding access to employment?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK

DK	IE	UK

Mandatory and optional provisions

The question of access to employment is one of the most sensitive and this sensibility was clearly expressed during the negotiations of the text. Article 14§2 of the directive leaves important margins of discretion to Member States for that reason. It opens a discretionary competence by stipulating that "*Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorizing family members to exercise an employed or self-employed activity*".

This reference to national law allows Member States to organise the conditions of access to the labour market for reunited families, by framing them with a reference to the situation of the labour market in the Member States which can prevent access to employment during a year at most. It entails very varied situations harming the harmonisation aim of the directive: the absence of restrictions, the alignment on the sponsor's status, the regulated access.

- A first minor tendency consists in imposing no condition for the access to the labour market for a third country national's members of the family (Estonia, Finland, Lithuania, Luxembourg, , United Kingdom). In this last Member State, access to employment can be paradoxically wider than that granted to the sponsor. As an example, the sponsor holding a labour licence will have to work for a determined employer whereas his/her spouse will be able to work for any employer. Otherwise, the equality remains the rule, as in Finland where aliens who have been issued with a residence permit on the ground of family ties have a right to gainful employment. This provisions covers self-employment

- A second movement chooses the regulation, more or less flexible. The most simple is probably the choice made by several States to align the family's situation on that of the sponsor (Austria, Federal Republic of Germany, Malta, and the Netherlands). In Austria, a whole series of hypothesises are envisaged in a very detailed way depending on the sponsor's situation and independently from the period of 12 months during which access to the labour market can be refused. The member of the concerned family can then be exempted as well as obliged to hold a labour licence. In the Netherlands, a similar logic applies. A free, conditioned, restricted, or even forbidden access to the labour market results from that. The alignment with the sponsor's status is also the option chosen in the Federal Republic of Germany as the Residence Act permits access to employment where the sponsor is also entitled to employment or, in case of reunification of a spouse, if marital cohabitation has lawfully existed in the Federal territory for at least two years.

- However, a majority of Member States prefer submitting the members of the family to the requirement of a work permit : Austria, Belgium, Czech Republic, Estonia, France, Hungary, Ireland, Latvia, Poland, Romania, Spain, Sweden are in that case, this latter

Member State applies legislation prohibiting any kind of discrimination on the labour market. In Spain, Order TAS 3698/2006 of November 22nd (EOB December 6th, 2006, number 291) rules the inscription of aliens in Public Services for Employment and Occupation Agencies and it grants the right to access to the labour market specifying that members having a residence permit. by reunification can apply as employment seekers to work, with the only limitation of the period fixed in his current residence permit. It also envisages that even if they have stayed for less than a year in a situation of legal residence, they can have access to the labour market if the employer presents a request of residence and labour authorisation.

A good illustration of this tendency can be encountered in Belgium. In this Member State, in the current state of texts and before a modification of the legislation to come, an alien's family authorised to unlimited residence will be dispensed from a work permit after three years, that is to say once his residence will have an unlimited duration. During these three years, it can obtain a labour licence valid for one year to exercise any profession. The family of an alien authorised to a limited residence will have access to a labour licence for one year upon request of an employer, without assessment of the labour market and without necessity to come from a country which signed a manpower agreement with Belgium. Further than that, nuances have to be added. They first concern the refugees' family members for whom this requirement does not exist in Czech Republic. In Sweden, despite this condition, the force of the non discrimination principle will make the labour licence automatically issued to the concerned persons.

Hence, most Member States choose to limit or set more or less strict conditions to the access to labour, the flexibility of the directive frame letting them a great margin of action for that purpose.

- The temporary limitation of the access to the labour market for a maximal duration twelve months is laid down in the directive. It is thus implemented by Austria, Greece and Slovakia. Another way to proceed consists in regulating the access to employment depending on the concerned sectors of activity, independent or not, the first not being the object of many restrictions. If in Bulgaria, members of the family of a sponsor with a long term residence permit are not allowed to have freelance jobs, on the other hand it is the contrary in Austria, Finland,. If in the first State, the national legislation does not make a distinction between the status of the sponsor and that of his family (contrary to waged activities), in the others access to independent activities is not submitted to any condition, just like waged jobs. Hungary did not explicitly implement the maximal time period of restriction to the national labour market. The person's legal situation prevails upon this temporal criterion which is likely to create problems.

- Lastly, concerning the access to employment of relatives in ascending lines and adult children objectively unable to provide for their own needs on account of their state of health as mentioned in article 14§3, Member States barely used the discretionary competence recognised by the directive and the optional clause offered. It points out that "member States may restrict access to employment or self employed activity by first-degree relatives in the direct ascending line or adult unmarried children to whom

Article 4(2) applies". This option obviously does not have to be implemented in Member States not recognizing the right to family reunification of these categories of third country nationals (Austria, France, Greece). In one Member State not bound by the directive, Ireland, the non immediate family members have very little chance to benefit from family reunification. If they can benefit from this procedure they will be authorised to work in the same conditions as those granted to the family members. The situation is identical in Spain where the relatives in ascending line can have access to the labour market but where the reunification is particularly hard to obtain, notably due to the necessity to demonstrate the necessity to resort to it.

Substantially, in Bulgaria, it is noted that these persons formally do not encounter limitations but in practice, the administrative formalities are so important and long that they actually are assimilated to a limitation. In the Netherlands, limitations were introduced only for unmarried adults entering the scope of this provision and their access to the labour market depends on the access granted to the sponsor.

Q.73. C – Regarding access to vocational guidance, initial and further training and retraining?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

All the Member States recognise an access to the formation, the improvement and the professional recycling for the sponsor's family members in the same conditions as for the sponsor. In four Member States (Austria, Belgium, Estonia, Spain) this access is in parallel authorised to the access to employment granted to the member of the family. However there can be doubts on the reality of this access to Greece where no rule regulates the question.

Q.74 – Does your Member State grant specific rights in social matters to reunified family members?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

In a great majority of States, the answer is negative.

2.8 – Penalties and redress

2.8.1 – Grounds of rejection, withdrawal or refusal of the family reunification authorisation. (Q.83)

Q.83 – What are the legal grounds to reject, withdraw or refuse to renew a family member's residence permit (a. 16 §1 and 2)?

Q.83. A – Conditions required by the directive not satisfied?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

All the Member States bound by the directive consider that the fact that the conditions required by the directive are not satisfied constitute a legal ground to reject, withdraw or refuse to renew the family reunification authorisation. France adds to that the transgression of the obligation to live outside the French territory during the family reunification procedure.

In two Member States not bound by the directive, the legislation is not compatible with this optional provision. However, in Ireland, there are common points between the national criteria and those set by the directive. In the United Kingdom, the residence permit or its renewal will be refused if the conditions set by the national rules on immigration are not or no longer satisfied.

Q.83. B – Absence of real marital or family relationship?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Here again, all the Member States use this ground of reject. If Poland is silent on that point, in Belgium the legislation does not precise this criterion. The cohabitation will probably be determining and it can be supposed that the Aliens Office will proceed to domiciliary investigations by neighbour agents when the renewals are done. However in Slovakia, the foreigner is not obliged to attach documents proving his family or marital relationship to his application for the renewal of the residence permit again. The only document required is the document proving the pending reason of un-provision of the child in the case this is the ground of the prolonging of the temporary stay.

The real difficulty of this optional clause lays in the evaluation mechanisms of the absence or the reality of the marital or family life. These mechanisms are used in various ways by the

Member States around two large tendencies already described above, which can besides be associated to each other: the investigation and the interview.

- The first mechanism consists for the State's authorities in proceeding to investigations on site (Belgium, Cyprus, Czech Republic, Estonia, Finland, Federal Republic of Germany, Greece, Slovakia, Slovenia). They can even comprise visits of the common home (Estonia) with the family's consent (Federal Republic of Germany). Regarding this technique, the Bulgarian system catches the attention as it is organised on the basis of denouncement (See answer to Q 83 H). Thus, it says that if the control body receives " information", it can start a procedure. This in practice will mean that if the neighbours of the "couple" report or submit a "signal" that the couple does not live together, then authorities will start a procedure to check the circumstances It also means that the control authorities can also initiate own investigations and collect information for the couples on regular basis. In Belgium, a control of the reality of the marriage could be done before the delivery of a visa by the Belgian authorities abroad. They may ask the attorney to make investigations over the reality of the relationship and in some cases refuse to deliver the visa if that leads to the conclusion that the union is a simulated one.

- The second method consists in conducting interviews with the concerned persons (Estonia, Federal Republic of Germany, Greece, Ireland, Latvia, United Kingdom). France requires the applicant to support his request with the indications relating to his *civil status* and, of the need arises, to that of his/her spouse and dependent children, which leads him/her to establish the evidence that the common life did not cease. Generally, it is for the sponsor and his family members to prove that the marital and family life is or remains effective on the basis of documents or through interviews and investigations, and in several States he/she must prove that the common life is current (Italy, Lithuania, Romania, Spain).

In Finland, the elements taken into consideration when the residence permit is issued or renewed are: : life together (when and under what kind of circumstances the persons concerned had met; have they lived together before and/or after concluding the marriage; how have they kept in touch when they have lived separately), meetings and contacts before concluding the marriage, contradictory information given by the partners on each other and their relationship, if one of the spouses paid to the other for concluding the marriage, the relationship shall normally not be regarded as real, lack of common language, indications on the fact that the spouses don't live together without an acceptable reason for that.

On that point, two particularities deserve to be mentioned. In the Netherlands, concerning unmarried and non-registered partners, the relationship must be sustainable and exclusive. To this end, the partners must prove that they are not married. They can sign a declaration to prove that their relationship is exclusive and sustainable and that they will live together and share a common household after admission in the Netherlands. However, the application will still be rejected if there are grounds to believe that the application is asked for the sole purpose of granting a residence permit (based on declaration of the partners or other persons or other evidence). If the administration finds that the partners do not live together after admission or do not share a common household, the permit will be withdrawn. The Swedish

report exposes a particular situation as these grounds are only meant to be used in the case of residence permit of limited duration (people envisaging to get married, registered partnership, beginning of a partnership) as well as in cases in which married or unmarried couples did not live together permanently before their arrival in that Member State. In all the other cases, the residence permit will be issued for permanent and autonomous family reunification. It implies that the family member keeps his residence permit even in case of absence from the family or marital life.

Q.83. C – Stable long term relationship with another person?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Eleven reports mention that maintaining a long term relationship with another partner do not constitute a ground justifying the refusal to issue or renew the residence permit or its withdrawal. 16 Member States take into account this exclusion criterion (Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, Federal Republic of Germany, Greece, Luxembourg, Malta, the Netherlands, Sweden, Portugal, United Kingdom, Denmark, Ireland) while eleven ignore it.

- To make sure of it, there can be investigations (Cyprus, Czech Republic, Estonia, Greece, Sweden) or interviews (Estonia, Federal Republic of Germany, Greece, Sweden) in order to assess the existence of a long term relationship with another partner. In Austria, spouses may not rely on the marriage for the purpose of an application for the granting of renewal of a settlement permit if they in fact don't live in a family relationship within the meaning of Art. 8 ECHR. As a stable long term relationship with a third person will in general justify the conclusion that the person concerned does not live in a real conjugal relationship with his/her spouse, the renewal of his/her settlement permit may be refused.

  In Sweden, a particular procedure concerns polygamous unions. The Aliens Act distinguishes the situation of when the sponsor is married to another person than the applicant, from the situation when the applicant is married to another person than the sponsor. As for the case of the *sponsor*, reunification is always denied if he/she already is married and lives on permanent basis with the other person (Aliens Act chapter 5 §17b). As for the case when the *applicant* is already married reunification can be denied. The most important factor is the reason of the polygamy: if the situation exists because of difficulties of getting a divorce (for instance if the applicant is a woman and cannot get a divorce according to the law in the country of origin or if the process of divorce in the country of origin is not recognized by Swedish law), a permit is usually issued. As always the decision-making authorities in these cases have a duty of investigation according to the principle of official investigation, which means that the authorities have to make sure that every case is duly investigated

(through examination of facts and interviews) with consideration to the nature of the case. In other cases, if the sponsor or the applicant lives on a permanent basis with another person reunification *may* be refused (Aliens Act chapter 5 §17a 2nd indent p.2). The main factors to assess are that there has to be an intention of the sponsor and the applicant to live together on a permanent basis in Sweden, and the relationship has to be real and not contracted for the sole purpose of enabling reunification. If the sponsor already has a long-term relationship and lives with another person than the applicant, these criterions are usually not fulfilled. If it is the applicant that has a long-term relationship with another person, considerations are made to circumstances, like if the applicant is forced to this relationship (by social norms etc) and such. The evaluation is made with consideration to the *whole* living situation of the concerned person (chapter 5 §17a last indent).

Q.83. D – False or falsified documents?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

By providing that Member States can refuse, withdraw, or not renew the residence permit issued for the purpose of family reunification when the request is based on false or falsified documents, the directive simply recalls a rule known in every Member State.

It is unsurprisingly noted that all the Member States bound or not by the directive appropriate this option as their own. If in Italy, this situation is not specifically regulated by national law, a general rule of immigration law provides that the residence permit is withdrawn when the issue conditions are lacking or do not exist. This also covers the cases of production of falsified documents.

Q.83.E and 83.F – Marriage, partnership or adoption contracted for the sole purpose of enabling reunification?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

Here again, this hypothesis, widely comparable to the preceding fraudulence ones, is known by every Member State. For that reason, every national system contains rules aiming at preventing the effects of family reunification when the relationship only exists in order to obtain a residence permit in a Member State. Therefore, one can be surprised that this clause,

widely justified by the will to fight against marriages of convenience, was solely the object of a facultative clause and not a mandatory rule.

Controls are established by administrative authorities in order to find out about marriages of convenience in a great majority of States (Austria, Cyprus, Czech Republic, Estonia, France, Federal Republic of Germany, Greece, Italy, Latvia, Lithuania, the Netherlands, Portugal, Slovakia, Romania, Slovenia, Spain, Sweden). In that case, the residence permit is not issued, is withdrawn or not renewed. Belgium even refers to a more advanced system. In that Member State, controls can be operated at any time "when there are founded presumptions of fraud or when the marriage, the partnership or the adoption was contracted to allow the concerned person to enter or reside in the Kingdom." These are specific controls that will only be operated when it will seem appropriate and not systematically. They are operated by a police agent, generally the neighbour agent. An order to leave the territory can be issued towards the alien notably if the marital or family link invoked only exists to allow the residence in Belgium. In Slovakia, the system instituted is very detailed as well. If there is a reasonable suspicion that the foreigner contracted the marriage or adoption for the sole purpose of enabling reunification the police department must investigate. After the application for renew of the residence permit is filed the police department investigates in the place of residence in the Slovak Republic to find out if the spouses lives a common family life. The results of the investigation must be recorded. In the case the police department during its investigations founds out matters that are reasons for rejecting the application for renewing of the temporary residence permit the police officer produces a complex report upon the findings during the investigation and after the authorization he made a decision in which he explains the reasons for not renewing the residence permit. In Austria, fines and even prison sentences can be pronounced by judicial way. If the authority competent for settlement permits or any other authority or court has got a suspicion that there is a marriage or adoption of convenience, it has to inform the aliens' police authority that has to take up investigations.

In three Member States, the conditions of control are less obvious. In Italy, the legislation or the regulation does not specify in what way this appreciation is led so that the margin of manoeuvre of administrative authorities is very important in that field. In Malta, the implementation of the regulation is too recent to be able to determine precisely the scope of the controls that need to be operated. In Ireland, formal mechanisms to monitor the stability of familial relationships do not exist.

Q.83. G – When the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence (a.16 §3)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The forfeiture of the family member's right to residence when the sponsor's residence comes to an end is a classic consequence of the rules on family reunification. Thus, the rules

applicable in a great majority of States confirm that the residence permit granted to the family member(s) is withdrawn or that its renewal cannot be accepted.

However some Member States do not act this way. In Portugal, this criterion does not constitute a ground to withdraw or not renew the residence permit. In Slovenia, if the competent bodies find out that the claims of the applicants are true and if they fulfil the conditions for a residence permit, the permit is renewed (or granted, if they fulfil the conditions for the autonomous residence permit). In Luxembourg, this provision has not been transposed.

In Estonia, the person can however ask to be able to reside in that State on the grounds of another residence permit, if he/she fulfils the required conditions.

In Belgium, the appreciation power of the minister is quite full as the legislation provides that in these situations, he « can » withdraw the residence permit.

When the sponsor's residence permit comes to an end, several solutions are available. The most widespread amongst Member States is that of the non-renewal of the family members' residence permit (Austria, Finland, Federal Republic of Germany, Lithuania, Romania and Spain). In Austria, for instance, the cessation of the sponsor's settlement permit does not lead to an automatic cessation of the settlement permits of the family members. The consequence of an end of the family relationship before an autonomous right of residence has been acquired is that the family member is no longer able to obtain a renewal of his/her settlement permit. In Spain, this situation emerges more from the practice as most controls are operated when the residence authorisation is renewed.

Withdrawing the residence permit of family members constitutes the second option. It is less widespread than the previous one as only four Member States make use of it (Latvia, Netherlands, Poland, United Kingdom). Although this situation can be put in perspective in practice given that in the Netherlands for instance, if there authorities are informed about a change in circumstances that undermines the grounds on which the permit was granted, the authorities can withdraw the permit, but there are no active controls in the meantime.

Lastly, a few Member States withdraw or refuse to renew the family member's residence permit taking account of the situation (Czech Republic, Denmark, Greece, Slovenia). Either the alignment on the sponsor's residence permit and the withdrawal or non renewal of his/her permit entails identical consequences on his/her family members' residence permit (Czech Republic), or the conditions to obtain the permit combine to decide what to do (Denmark, Slovenia). In Slovenia, If the competent bodies find that the claims of the applicants are false they withdraw the residence permit. If they find that the conditions are no longer fulfilled, the residence permit is not granted. A final possibility is that the legislation will not allow to determine what the withdrawal or non-renewal conditions are (Greece).

Q.83. H – What type of control are organised thereof?

Some Member States classically organise interviews with the concerned persons (Estonia, Greece).

Others organise control modalities articulated around controls and interviews (Czech Republic, Denmark, Malta, Slovakia, Sweden). In Malta, the Director for Citizenship and Expatriate Affairs may conduct specific checks and inspections in cases when there is a reason to suspect that there is a fraud or a marriage or adoption of convenience. Specific checks may also be undertaken on the occasion of the renewal of residence permits of family members. In Denmark, the checks undertaken in this regard seem to be generally in conformity with Article 16 (4), including both documentary evidence, data checks and the possibility for the immigration authorities to request police inspection of the spouses'/partners' common place of residence.

Lastly, in some Member States, no particular control is operated and the checkout takes place when the request to renew the residence permit is made (Austria, Cyprus, Finland, Italy, the Netherlands, Romania, Slovenia, Spain, Federal Republic of Germany).

In Bulgaria, the system is organized on the basis of denouncement. In Belgium, controls can be activated by police or neighborhood controls or on the basis for instance of the accommodation's visit.

2.8.2. Consideration of the resources when the renewal takes place

Q.84 – Are resources of the family taken into account when renewing residence permit where the sponsor does not have sufficient resources without recourse to the social assistance system of the member state?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Optional provision

The great majority of Member States takes into account the sponsor's resources but also those coming from the family members when the residence permit is renewed, this attitude sometimes only being observed in practice (Finland, Greece, Federal Republic of Germany and Spain). Four Member States only do not use the possibility opened by the directive, not taking into account the family resources (Italy, Luxembourg, Slovakia, Sweden). In Italy, the family resources are required to issue the residence permit but this condition is not used in the case of renewals.

2.8.3. Consideration of the nature and the solidity of family ties.

Q.85 – Does your Member State's legislation take into consideration (a. 17):

The evaluation of the conformity of national legislations regarding article 17 of the directive has been divided into two sets of questions as this provision of the directive proposes two types of assessment according to the jurisprudence applicable in this field. One focusing on the personal situation of family members within the host state. The other taking into account remaining links with the country of origin.

Q.85. A - The nature and solidity of the person's family relationships and the duration of his residence in the Member State?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

Mandatory provision of the directive, article 17 provides that "*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*".

Four Member States, including two not bound by the directive, did not implement this provision in their national legal order (Czech Republic, Hungary, Ireland and the United Kingdom). Concerning Ireland, this statement should be balanced. According to section 3(6)

of the Immigration Act 1999, when the Minister of Justice, Equality and Law Reform is deciding whether to make a deportation order in relation to a person, s/he must consider the following factors: the duration of residence in the State of the person; the family and domestic circumstances of the person; the nature of the person's connection with the State. In Spain the legislation only takes into consideration the family ties for the permit given in "exceptional circumstances" and the judicial authorities takes also into account the family ties in the moment to decide the expulsion or deportation applying the ECHR case law.

Amongst the Member States complying with this obligation, several degrees of conformity can be described. Thus, if it can be considered that 12 Member States implemented the directive on that point (Bulgaria, Cyprus, Finland, Federal Republic of Germany, Greece, Italy, the Netherlands, Malta, Poland, Portugal, Slovenia, Sweden) to which Italy can be added regarding the "ties with country of origin", every Member State is not in a similar situation. Three Member States (Austria, Luxembourg and Denmark) recall to appreciate the implementation of this provision, to the respect imposed by national rules of article 8 of the ECHR. In a similar manner, Slovakian law imposes the respect of the alien's private and family life. In Austria, the legislator did not consider the application of article 17 as necessary as this provision does not contain stricter conditions than article 8 of the ECHR. In Denmark, the family ties and the duration of the residence are amongst the elements taken into consideration. Other situations are more problematic. In Belgium the legislation does not take these criteria into consideration and contents itself with mentioning them in the preamble. In France, the implementation of this condition is focused and concerns a specific category of persons, the child within the *Kafala*. Besides, this partial implementation is ensured through a circular. In two other States (Ireland, Latvia) the legislation does not contain any reference to the directive. In the first case, the impact is relative as the Member State is not bound by the directive. In the second case, these elements are taken into consideration by the law on administrative procedure.

Lastly, in several Member States, rules other than those applicable regarding the issue, the withdrawal or the non-renewal of residence permits are meant to be applied (Hungary, Lithuania, Romania). In Hungary and Lithuania, these criteria are solely taken into consideration regarding expulsion and not in the other situations aimed at by article 17 of the directive. An identical situation arises from the Dutch situation as these considerations are only taken into account in case of a rejection of an application or a refusal to renew an application on public order grounds. Regarding applications for family reunification, a problem of transposition appears to be the fact that the national requirements for family reunification are applied very strictly, and that the authorities are not obliged to assess on an individual basis if certain circumstances justify that a requirement is not applied. The authorities normally do not explain in their rejecting decision why the rules are strictly applied in that certain case, even if the applicant has brought up special circumstances and reasons that could justify a decision to make an exception to the rules. This strict application of the rules is shown with regard to the age limit, the income requirement, the requirement to pass an integration exam abroad, the three months period for refugees and the requirement of an authorisation for temporary stay. In Romania for instance, the only criteria taken into account is the nature and solidity of the family relationships and only in the case of marriage.

A mock marriage may be established based on this criterion having as consequence the rejection of the extension of the residence right in Romania.

NO TRANSPOSITION	*CZ ;*
PROBLEM	*BE; FR; HU; LT; NL; RO*

Q.85. B. - 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?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

The obligation taken from the second part of article 17 of the directive was transposed in 20 Member States (Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Federal Republic of Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovenia, Sweden, Ireland). In ten of them, the application measure is identical to that described in the previous question (Austria, Belgium, Czech Republic, Denmark, Finland, Federal Republic of Germany, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Slovenia) with a slight difference for Malta which has literally transposed the second part of article 17 of the directive.

In Italy, Legislative Decree n°3 of 2007 has added a new provision to the single text on immigration. Pursuant to section 5§5, of the Single text on immigration it is therefore stated that when adopting the measure of reject of application, withdraw or refuse to renew the permit of stay of the sponsor or the family member, it shall also be taken into account the nature and effectiveness of the family and social with his/her country of origin. In Sweden, the *travaux préparatoires* of the Aliens Act (Government proposal 1999/2000:43 and 2005/06:72) and case-law on the relevant provisions (chapter 5 § 16 3rd indent and § 17a last indent, chapter 7 §4 of the Aliens Act), state that such considerations shall be taken into account in the sense that if the applicant is at risk of being socially outputted or otherwise subject for reprisals, the permit shall not be terminated in any way, unless there are compelling reasons otherwise.

In three Member States, if the legislation does not make an explicit reference to article 17 of the directive, the consideration of family ties is nonetheless ensured. First, concerning the cases of expulsion as in Latvia where a person's ties with his country of origin are generally only taken into account in the cases of expulsion. In Spain, the legislation does not make any express reference to the grounds of article 17 of the directive but the practice demonstrates that in case of expulsion the family ties are taken into account. Also, most administrative and judicial decisions take into account the family ties according to the ECHR case law. The

familial situation will notably be taken into consideration to decide the type of sanction applicable in case of offence and the possible choice between a pecuniary sanction or an expulsion measure. Nevertheless, National rapporteur considers there is a lack of transposition regarding the situation of renewal of the residence permit and the consequences thereof as there are no specific protection provided by law in this case. In Ireland, State not bound by the directive, law does not make any explicit reference to the provision concerned but this State has now a legislation integrating the ECHR in the national order which requires public decision-makers and judicial authorities to take due notice of the Convention and the jurisprudence on the European Court of Human Rights when making decisions. Thus, Ireland is bound to consider Article 8 of the Convention and relevant jurisprudence.

On the other hand, 6 Member States did not transpose that obligation. If in Estonia, this lack appears about the whole article 17, four Member States are in breach with its second part only (Czech Republic, Lithuania, Romania, Slovakia). In the Czech Republic for instance, the Aliens Act only mentions impact to private and family life and thus does not contain all the criteria explicitly mentioned in Article 17. Furthermore, the notion of private and family life (also in terms of Article 8 ECHR) is not a widely used overall principle in the judicial and administrative practice. This situation causes problems of compatibility with the requirements of the directive. In Lithuania, only the relationships with Lithuania are taken into account in the cases of expulsion.

NO TRANSPOSITION	*EE; RO; SK*
PROBLEM	*CZ; ES; LT;*

Q.86 – Do the sponsor and/or members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected (a18 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

All the Member States, except for Ireland which is not bound by the directive, allow the sponsor and the members of his/her family to bring a remedy against a negative decision concerning them.

Article 18 of the directive offers some margins of manoeuvre to Member States as they can determine who, between the sponsor and/or the members of his/her family, can bring such a remedy. Austria consecrates this distinction: as the sponsor is not a party of the proceedings on applications for family reunification of her/his family members he may not challenge the

decision in these proceedings. The application has to be filed by the family member concerned who may appeal against a negative decision.

In Ireland, there are no judicial remedies against a negative decision. The remedies in alien's law are mainly introduced before administrative authorities. The judicial way does not seem completely eliminated but its implementation is submitted to numerous conditions affecting a lot its efficiency. Thus, when a negative decision is taken in terms of family reunification, the concerned persons can introduce a request to have a review of the decision by the administrative authority. The rules specify that the possibility to introduce an appeal against the decision taken by the administrative authority will not be opened if it appears that the applicant produced false information and falsified documents. Besides, the rapporteur underlines that when the entry on the territory is forbidden to the family by competent authorities, there is no possibility to appeal this decision.

PROBLEM	*IE*

Q.87 – Is this right to legal challenge considered as a right to a judicial review according to jurisprudence C-540/03 (a18 §1)?

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK
DK	IE	UK					

Mandatory provision

All the Member States, respect that obligation. In Spain however, critics appear regarding the procedure when diplomatic mission deny the issuance of a visa for family reunification. In this case judicial review can only take place before the "Tribunal Superior de Justicia de Madrid". This implies a concentration and saturation of cases and an excessive length of the resolutions (more or less 4 years).

PROBLEM	*ES*

3. IMPACT OF THE DIRECTIVE ON NATIONAL LAW

3.1. Impact of the Directive on national law on due regard to the best interest of minor children

The consideration of the child's superior interest when it comes to rule on the application for family reunification is a crucial element of the law applicable in that area. The text of the directive itself underlines its importance in its article 17, recalling in that way the initial proposition of the Commission which recalled the importance of article 3 of the United Nations Convention on the Rights of the Child 1989, which provides that in all actions concerning children, their best interests are a primary consideration.

Besides, taking into account article 24 of the Chart of Fundamental Rights as well as article 5§5 of the directive, the Court of Justice delivered a determining interpretation of the scope of this provision in the points 63 and 64 of its case C-540/03 : "*as required by Article 5(5) of the Directive, the Member States must when weighing those interests have due regard to the best interests of minor children...Note should also be taken of Article 17 of the Directive which requires Member States to 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 country of origin. As is apparent from paragraph 56 of the present judgment, such criteria correspond to those taken into consideration by the European Court of Human Rights when it reviews whether a State which has refused an application for family reunification has correctly weighed the competing interests*".

The assessment of the impact of this consideration of the interest of minor children is thus important.

- Unsurprisingly, due to the constraints of the established case law of the European Court of Human Rights as well as by respect of the directive, the evaluation is largely positive and it is even possible to conclude to a real contribution brought by the directive.

  Indeed, quite a lot of States already had a particular protection of the child's interest in national law. To this regard, the ten Member States did not judge useful to make particular efforts in order to transpose the directive in this area because they considered they were in conformity with the directive. The Czech Republic, Finland, France, the Federal Republic of Germany, Italy, Lithuania, the Netherlands, Poland, Slovenia, Spain and Sweden are in that case.

  However, their respective situation is not identical even though the obligatory force of this provision is undeniable. A first series of States specifically formulated this guarantee in its legislation, without need for it to be specific to immigration law (Czech Republic, Finland, Lithuania, Netherlands, Poland, Slovenia, Spain). Others underline to this regard the importance of the Convention of the United Nations as it is the case in Federal Republic of Germany, Luxembourg and in Italy. Indeed article 3§1 of this Convention provides that " in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the

child shall be a primary consideration". Some, finally, such as France, indicate that this consideration is made both on the grounds of the Convention of the United Nations and in a jurisprudential way.

Paradoxically, one can be surprised by the weak impact of the ECHR case law in that field, given how this case law weighed on national legislations regarding family reunification. Undoubtedly the answer can be found in the restrictive character of this case law regarding the exercise of a right to family reunification, that is to say the entrance of the national territory. The usefulness of the immediate reference to the text of the United Nations is then understood rather than the ECHR.

- In parallel to these Member States, the implementation of the directive gave the opportunity either to the introduction of the clause in national law, or an improvement of the relevant national law. Eight Member States thus reinforced their national provisions. In Estonia, the best interest of the child has to be taken into account from 1st July 2006. It is not allowed to declare void or refuse to give the residence permit to a minor when it is not in conformity with the rights of a minor. In Spain and in Malta, the legislation now envisages a specific protection for the child. Other States, Belgium, Cyprus, Greece, Romania, and Slovakia also state a specific reference to the superior interest of the child. In Greece, for instance, the implementation was made in July 2006.

- On the other hand, in two Member States, Austria and Bulgaria, there were no particular rules concerning the consideration of the child's superior interest and these two Member States did not judge useful to proceed to a transposition of the directive on that point. Despite the fact that they are therefore in breach of the directive, these two States have national rules, the guarantees of which are inferior to those of the directive by maintaining this statu quo.

A qualitative analysis of the national provisions complying with the directive reveals that actually the impact of the directive was relative. Generally, if it undeniably has the effect of constraining States to a protective alignment, this impact only comforts existing provisions, namely the conformity with the Convention of United Nations.

In the end, three Member States make use of a national protection superior to that of the directive on the only grounds of national law and in the most interesting case, that of Finland, this protection is former to the transposition of the directive.

3.2. Impact of the directive on national law on definition of the beneficiaries of the right to family reunification

A first series of States introduced modifications in the national legislation and it can henceforth be underlined that these modifications are in conformity with the directive.

- One State only went as far as widening the scope in a more favorable way than the directive. In Slovenia, after the transposition family reunification is allowed for a spouse, minor unmarried children of the sponsor, minor unmarried children of the spouse, parents of a minor foreigner, dependent parents and dependent adult unmarried children. In addition to that the competent body may consider other persons as close family members if special circumstances spoke in favour of family reunification in the Republic of Slovenia.

  For the other Member States, the extension of beneficiaries was all the easier for some since they did not have rules relating to reunification. Hence, the implementation of the directive is the occasion to carry it out and adopt a legal frame (Cyprus, Czech Republic, Greece, Malta and Romania). The contribution of the directive is thus interesting on the point of view of legal security. The Czech example is characteristic as previously, the national legislation did not mention these beneficiaries and, now, the migration law explicitly mentions the possibility of family reunification as it is stipulated in the Directive. The beneficiaries are stipulated by the law and the right to family reunification for them is newly introduced. The possibility of issue the permanent residence permit and of issue of a refugee status to the family members in cases deserving special consideration remains. This effect is not achieved as in Portugal, after the adoption of the project under elaboration, the law 23/2007 maintained the previous beneficiaries of the right to family reunification. Nonetheless, adult children also became entitled to family reunification, as well as the first-degree relatives or legal guardians of minor children refugees. Under certain conditions, reunification of the unmarried partner of the sponsor also became possible.

  Otherwise, in other Member States, the modifications are occasional. Belgium widened the scope of beneficiaries to unmarried registered partners, and, in Italy, further than the transposition, amendments have been brought to the requirements for family reunification: minor children do not need to be dependent on their parents anymore and children older than 18 years do not need to be completely invalid, but must be unable, on a permanent basis, to provide for their fundamental needs due to health conditions. As far as parents are concerned, it is no more necessary to assess whether the concerned person had other children in the country of origin, but they must only show that they do not have any other adequate family support in such country. Moreover, it has been indicated that minor age is determined at the time when the application is filed. In Slovakia, the implementation of the directive gave the occasion to widen the personal scope of the existing legislation. However, the transposition had negative effects on this Member State's legislation, notably regarding the age of the children entitled to

benefit from the right to family reunification which went from 21 years old to 18 years old.

On the other hand, in three Member States, the transposition of the directive was the occasion to limit the scope of family reunification precisely in order to be in conformity with article 4 of the directive. Austria and Sweden thus introduced modifications of their national provisions in order to prevent family reunification in case of polygamy. These modifications thus introduce stricter rules than the pre-existing provisions but are not contrary to the directive though (see for example the case of Luxembourg). In a third Member State, Spain, the implementation measure introduced stricter conditions regarding the reunification of relatives in ascending line, according to the provisions of the directive.

A second category of States did not introduce any modifications in their legislation. The reason is simple to determine: their national law was in conformity with the directive (Bulgaria, Estonia, Finland, France, Latvia, Netherlands, Poland).

More favourable than previous provisions / In line with the directive	*BE; CY; CZ; EL; IT; MT; PT; RO; SK*
More favourable than previous provisions / More favourable than the directive	*SI; ES*
Less favourable than previous provisions / In line with the directive	*AT; SE (polygamy); ES ; LU*
Statu Quo / In line with the directive	*BG; EE; FI; FR; LV; LT; NL; PL*
Statu Quo / More favourable than the directive	*DE*

3.3. Impact of the directive on national law on limitation of reunification of minor children of 12 years of age and on limitation of reunification of minor children of 15 years of age

Contrary to the fears expressed regarding the clauses on the restrictions potentially opposed to minor children aged over 12 years old and 15 years old, the statu quo is the rule in the Member States' law.

The national law of all the Member States bound by the directive is more favourable than the faculty offered by article 4§1 of the directive concerning the situation of 12 years old children arrived independently from their family.
However, two problems are raised.

- The first is that of Federal Republic of Germany, at the origin of the introduction of this clause in the directive text. It applies to 16 years old children and is actually more favourable than the previous national legislation. Previously, a child aged over 16 arriving independently is entitled to a **discretionary decision** only when he fulfils an additional integration condition. After, Sec. 32 para. 2

Residence Act provides that a child above the age of 16 is **entitled** to a residence permit if he/she fulfils the additional integration condition.

- The second is that of the Netherlands which introduced this provision in 2006 despite the stand still clause while it does not apply this restriction to 12 years old children but over 16 years old. The Integration Abroad Act that came into force 15 March 2006, obliges children aged 16 and 17 that no longer have to go to school to pass the integration abroad exam as a condition for admission for the purpose of family reunification. Furthermore, the clause that the minor child has to arrive in the Netherlands independently from the rest of the family has not been implemented.

Concerning the clause in article 4§6 relating to children over 15 years old, this exception remains reserved to Austria. Paradoxically, this restriction lost all its practical interest for Austria, which did not make use of the possibilities provided for in Article 4 §6 of the directive. Children aged over 15 years are seen as minors without any special rules applicable. All children under the age of 18 years are treated the same way. There is therefore no limitation of family reunification in respect of children aged over 15 years.

3.5. Impact of the directive on national law on requirements for the exercise of family reunification

It is possible to introduce Member States under different angles on the conditions for family reunification point of view.

- A majority of States did not modify the rules relating to reunification :

  - because the maintenance of national law did not create compatibility problems with the directive. It is so in Austria, Federal Republic of Germany, Portugal, and Bulgaria.

  - because the maintenance of national law was more favourable than the application of the directive. This position was chosen by Finland, Latvia, Lithuania, and Sweden.

  In Finland, no requirement of accommodation or sickness insurance is laid down in the Aliens Act. Secure income is required with some exceptions in cases other than those where the sponsor receives international protection including subsidiary and temporary protection. There is no obligation to participate to integration measures. The transposition of the Directive did not change the national legislation in this respect.

  Sweden offers a truly unique case: no such requirements existed. The Government proposal stated that such requirements would counter to the Swedish general policy on immigration. The Government also stated in its proposal that no such requirements should be introduced.

- A second group of Member States modified national provisions relating to the conditions for family reunification.

  - some went further than the directive by adopting more favourable rules. This can be explained for Greece and Czech Republic by the will to build a real coherent ensemble when the transposition was made. In Czech Republic, the migration law did not explicitly mention the possibility of family reunification as it is stipulated in the Directive. Third country nationals might have asked for different national statuses for this purpose, but the law did not explicitly stipulate it. When asking for the national statuses, the third country nationals had to present documents required by the law. Après, The migration law explicitly mentions the possibility of family reunification as it is stipulated in the Directive. The national status which the family member can apply for had existed in the law before and the documents which are required are the same. Pour ce qui est de l'Italie, une volonté d'harmonisation du droit applicable au logement au sein des différentes régions de l'Etat italien explique cette attitude. In Slovakia, with the transposition of the Directive the amount of required money for the stay in Slovakia became more favourable for a foreigner.

  - other Member States modified their national law in a less favourable way than the pre-existing rules but in a compatible way with the directive. In Belgium, the previous rules did not envisage specific conditions to family reunification. The implementation of the directive was the occasion to integrate into the national legislation conditions of sufficient accommodation and mutual cover. Poland experienced a similar situation as no condition was previously imposed by the legislation. The implementation of the directive allowed this Member State to impose the fulfilment of the three conditions set by article 7 of the directive. In the Netherlands, the resources condition was increased when the directive was transposed. Its amount is very important so that its compatibility with the directive is questioned in the sense that it can indirectly hinder family reunification. In France, the income, accommodation, prior residence on the territory and integration requirements progressively hardened while remaining above the directive thresholds and compatible with it while remaining more favourable than the directive on these points. In Spain, a tendency appears to reinforce and make more stricter the accommodation requirements in some municipalities. Thus, some consulates are becoming stricter on the control of documents.

  In Luxembourg, the project of law now requires that the sponsor personally and durably provides for his relatives' needs. Thus, he shall have stable, regular and sufficient resources to provide for his own needs and those of the members of his family that are under his responsibility, without having recourse to the social aid system, in conformity with the conditions and modalities envisaged in the grand duchy's regulation.

In Cyprus, Malta and in Romania, the introduction of specific rules for family reunification in the national legislation led to an alignment on the directive.

Statu quo / In line with the directive	*AT; DE; PT; EE*
Statu quo / Less favourable than the directive	*BG*
Statu quo / More favourable than the directive	*FI; HU; LV; LT; SE*
More favourable than previous provisions / In line with the directive	*CY; CZ; EL; IT; LU MT; RO; SK*
Less favourable than previous provisions / In line with the directive	*BE; NL; PL; ES; LU; SI*
Less favourable than previous provisions / More favourable than the directive	*FR*

3.6. Impact of the directive on national law on limitation of margins of manoeuvre

In the light of the interpretation delivered by the Court of Justice concerning Member States' margin of appreciation and articles 5§5 and 17 of the directive, it was interesting to assess these member States' behaviour on the occasion of the transposition of directive 2003/86.

- In eight Member States, the impact of the directive on this margin of appreciation is estimated as inexistent. Thus the transposition of the directive did not have impact on national legislations as States chose not to formally transpose article 17 of the text.

  - a first reason is perfectly understandable as it puts forward article 8 of the ECHR to justify the solution chosen. Thus, for Austria, article 17 of the Directive was not transposed in Austrian law, but the migration law contains provisions on the respect of private and family life that remained unchanged following transposition of the Directive. They are conditioned rather by Article 8 of the ECHR. It seems that the Austrian legislator did not see an instigation to a particular implementation of article 17 Directive 2003/86/EC as this provision does not contain any stricter requirements than Article 8 of the ECHR. It is also France's reasoning, comforted by the constitutional jurisprudence putting forward the necessity to reconcile interests in presence.

  - for other Member States (Czech Republic, Federal Republic of Germany and Spain), the conclusion of the United Nations Convention of children rights is enough to consider that children's superior interest is taken into account in national provisions. Thus, in Czech Republic, the national law has used the term "best interest of child" before the transposition of this Directive because of the requirements of the Convention of the Right of a Child (Art. 3). The best interest of the child is taken into account in all laws which apply to minors and is also applied by courts as a general principle of law. The migration law has also taken

into account the impact on the concerned person's private or family life since January 1, 2000" Therefore, the regulation remained the same. In Spain it is not only made reference to the United Nations Convention of children rights but also to the Organic Law for the protection of minors of 1996 but nevertheless national authorities still enjoy wide margins of manœuvre in this respect.

- another explanation lays in the fact that other national norms give the same guarantee. For Poland, the previous legislation provides for it; in Latvia, it is administrative procedure rules and in Lithuania, these guarantees were already considered before the directive was transposed, notably concerning removal measures (LIT).

- in two cases, lastly, (Estonia and Bulgaria) the status quo has the effect of keeping in the Member State less favourable rules than the directive. In Bulgaria, "this principle is transposed only regarding third country nationals with long term residence permits in other Member State. The rest, even the refugees do not have the right per se, they MAY be allowed and they MAY be allowed even after the conditions are fulfilled". In Estonia, nothing is envisaged in the legislation. In Belgium, the national legislation does not expressly refer to these provisions of the directive, except when they mention them in the grounds. This simple mention would have a practical impact as administrative authorities will be able to refer to them.. However, the national provisions appear here lower than the directive prescriptions.

- On the other hand, in twelve member States the improvement was perceptible as more favourable rules than those previously existing were adopted (Cyprus, Finland, Federal Republic of Germany, Greece, Italy, Malta, Netherlands, Portugal, Romania, Slovenia, Slovakia, Sweden). They are all conform to the directive and sometimes more favourable than the Community provisions.

  Thus, in Cyprus, Malta and Romania, in Greece, the directive required the introduction into the national system of a provision relating to family reunification and proceeded to align the national law on the directive prescriptions. In Portugal, the discussed project has the same goal as in Slovenia. If in Finland, the national legislation was already in conformity with the directive concerning article 5§5, on the other hand concerning article 17, the following provision was added to the Aliens Act when the Directive was transposed : when the residence permit has been applied on the ground of family tie, when considering refusal of the permit, due account shall be taken of the nature and solidity of the person's family relationships, the duration of his or her residence in the country as well as the existence of family, cultural and social tie with the country of origin. The same applies to the consideration concerning withdrawal of the residence permit issued on the ground of family tie as well as taking a decision on removing the sponsor or her family member from the country. In Slovakia, it was enacted that the police department shall take into account interests of the foreigner's minor child in its decision-making on an application for a temporary stay permit.

As in Federal Republic of Germany, in Sweden the criteria set by article 17 of the directive can be taken into consideration by national legislation as, after the directive was transposed, a new provision (in force since 2006-04-30) was inserted into the Aliens Act stating that when deciding on rejection considerations of the applicants living conditions and family ties, shall be made. As for withdrawals the existing provision (in force since 1998-02-01) was kept.

If in Italy the superior interest of the child was already taken into consideration in order to limit the authorities' margin of appreciation, the implementation of the directive leads to the fact that personal circumstances of the sponsor and/or his/her family members must be taken into account before rejecting an application, withdrawing or refusing to renew a residence permit or deciding to order the removal. This is particular important, because before transposition reject, refusal to renew, withdrawal or removal were automatically applied upon occurrence of certain situations considered as affecting public order or safety of the state or in case the requirements for family reunifications were lacking.

In the Netherlands the transposition leads to the adoption of more favourable provisions than the directive: the Royal Decree implementing the Directive refers to the same general principles that provide for the consideration of all relevant circumstances when taking a decision with regard to Article 5(5) and 17. The Royal Decree furthermore refers to Article 8 ECHR. Recently, new paragraphs were introduced in the Aliens Decree saying that in case the Minister wants to deny an application, or refuse to renew a residence permit, on public order grounds, he will, in case of family reunification, at least have to take into account the nature and solidity of the family relationship, the duration of the stay of the family member and the existence of family, cultural or social ties with the country of origin.

Statu quo / In line with the directive	*AT; BE; CZ; FR; LV; LT; PL; ES; LU*
Statu quo / Less favourable than the directive	*BG; EE (NT)*
Statu quo / More favourable than the directive	
More favourable than previous provisions / In line with the directive	*CY; FI; DE; EL; HU; IT; MT; NL; PT; SI ; RO; SK; SE*
Less favourable than previous provisions / In line with the directive	
More favourable than previous provisions / More favourable than the directive	*NL*

3.7. Impact of the directive on national law on the rules related to integration objectives and criterions

Only five Member States took advantage of the potentialities of the directive on that point (Austria, France, Lithuania, Netherlands, and the Federal Republic of Germany). Without using the opportunities to set up rules relating to integration measures or criteria, integration objectives were already existing before the transposition of the directive in Italy. Concerning the other Member States, no transposition of articles 4§1 last indent and 7§2 was made to that day. This reluctance can be diversely interpreted either as the durable maintenance of more favourable national provisions or on the contrary as a transition situation, the directive being used as a starting point and a legitimisation of legislative evolutions to come. Indeed, article 7§2 is not accompanied by a stand still clause as article 4§1 is and the introduction of obligatory integration measures for the reunification is still possible in national law.

Amongst the Member States engaged on the field on integration measures and criteria, two different approaches stand out. They raise questions of principle of great importance which will call for clarification and maybe an interpretation by the Court of Justice.

- The integration theme is first used in order to concretely implement measures which fulfilment will effectively allow to accompany the insertion of aliens admitted to reunification. Here, the link with the problematic of entry on the territory and the control of borders appears as secondary regarding the will to stabilise and succeed the family member's residence but also that of all the third country nationals. Integration is here more a goal than a criterion and it applies to the whole foreign population without being specific to family reunification. A priori, it will thus concern the member of the sponsoring family already entered on the territory of the State.

  - In Austria for instance, the so called "integration agreement" requiring aliens settling in Austria to pass language courses and courses on Austrian history, politics and society has been introduced on 1 January 2003. The fulfilment of the "integration agreement" was a precondition for the renewal of a settlement permit also in regard of persons accepted for family reunification. After the transposition of the directive and according to Art. 11 § 2 No. 6 Settlement and Residence Act a settlement permit may only be extended when the person concerned has fulfilled integration measures provided for in Art. 14 Settlement and Residence Act. Also family members have to fulfil the so called "integration agreement" after their entry into Austria.

  - In Lithuania, when the directive was transposed, integration requirement was introduced for foreigners who arrived on family reunification grounds when applying for permanent residence permit.

  - In France, the plan of « integration contract » currently in force fully respects this insertion logic, marked by the will to get the migrant's voluntary adhesion to the host State's values. The current modification of the French legislation also demonstrates a change of logic.

- The problematic of the integration in the host society is also used by some Member States in order to set a filter within the migratory flows they intend to regulate.

  This attempt is not new. It had already opposed Member States during the negotiation of directive 2003/109 on long term residents third country nationals expressly containing the term “integration conditions” in its article 5§2. Here, the wording of directive 2003/86 prefers using the term “integration measures”: "member States may require third country nationals to comply with integration measures, in accordance with national law". For some, the difference of terminology hence excludes that integration « conditions » could be applied to the applicant for reunification, especially since the text of the directive does not contain precisions regarding the potential content of these integration measures, and, mainly, on the moment when such measures will be implemented. For three Member States on the contrary, Germany, the Netherlands, and Austria, the problematic of the « integration measures » was essential and the redaction of article 7§2 was made on a Dutch initiative.

  Without precisions from the directive, it is not possible to decide and two important questions are raised:

  - That of the moment when such “measures” can be required; it will be either before or at the moment of the entry on the territory and it obviously makes a capital change. The second question concerns
  - That of the sanction of the disrespect of that measure : non renewal of the residence permit or impossibility to enter the territory.

  According to the answers given, the State can be in conformity with the directive requirements or in breach with them because it added an additional requirement to the exercise of reunification.

  - For the Netherlands, the term « integration measures » must be read as equivalent to the term « condition ». A textual argument is supports this reading; the second indent of article 7§2 points out (on the express demand of Dutch authorities during the negotiations) that " with regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification." Then and on the contrary, it would mean that such integration measures could be opposed in an obligatory way outside the national territory, that is to say before the reunification.

  Thus, the law of March 15th, 2006, on the integration measures abroad obliges family members between 16 and 65 years old to pass an integration exam before they are admitted in the Netherlands for the purpose of family reunification/formation. Except for the fact that the Integration Abroad Act obliges minors of 16 and 17 years old who no longer have to go to school to pass the integration exam before admission to the Netherlands. The question then

asked to judge the compatibility of this clause with the directive is simple: does passing the language test conditioning the entry on the territory constitute a new condition added by the Dutch authorities? In that case, the obligation to pass the test is not in conformity with the directive as it constitutes a « condition », creates an obligation of result for the third country national. The practical modalities of such language tests also reinforce the feeling of a change of the "integration measure" theme in favour of an instrument to regulate familial migratory flows. Indeed, the practical modalities of these tests, exposed in question 55, and their prohibitive cost reinforce that feeling.

- The case of France, openly referring to the directive provisions and the Dutch « good practices », is quite different. In the recent law of 2007, the French authorities choose to reinforce their integration provisions, particularly regarding family reunification, of which they do not hide that it occupies too much room within migratory flows. Then, a reinforcement of the integration contract already offered to third country nationals regularly residing on the territory, an assessment of his/her degree of knowledge of the language and the Republican values will be offered to the foreign national aged of more than 16 years old for whom family reunification is requested. This assessment, supposedly free, will be followed, if the need arises, by a formation organised by the French authorities in the country of residence, that is to say before the departure, which duration will be limited.

Without being followed by a final exam that would have to be passed in order to entail the reunification authorisation, this evaluation will be nonetheless be obligatory in conformity with the directive provisions and the benefit of family reunification will be subordinated to the production of a document attesting that the formation was followed.

In that case, and as soon as the interpretation of the directive retains the hypothesis of obligatory « integration measures » prior to the departure and the reunification, such measures appear as being compatible with the directive.

In Germany, the law adopted in August 2007 to implement the family reunification directive establishes integration conditions in the procedure for family reunification. The Transposition Act introduced the condition that the **spouse** shall be able to make her- or himself understood in German on a basic level. The provision is also applicable within the visa procedure, meaning that also an entry-visa for the purpose of family reunification will be granted only if the applicant possesses basic language skills. The legislation envisages exceptions to this obligation notably concerning persons unable to prove their knowledge of the language due to their physical or mental state of incapacity, the members of the refugees' family or some aliens because of their citizenship. The explanations put forward in the travaux préparatoires show the German authorities' will to establish a condition to the entry on the national territory. Thus, in its Draft on the Transposition Act the German Government explains that sec. 30 para. 1 no. 2 takes into account that art. 7 para. 2 of the Directive

provides for the possibility to link the family reunification to the requirement that the third country nationals must comply with integration measures. The Government continues about the fact that the participation to an integration course in Germany is not a sufficient alternative, since in this case the successful completion of this course is not guaranteed whereas the obligation to prove knowledge of the German language before entry makes sure that this knowledge exists. According to the Government's explanation the new provision is also meant to make it harder for families in law to prevent victims of forced marriages from establishing their own social life by using the fact that they do not possess language skills. The provision shall also have preventive effects, since educated men and women are considered less "controllable" and therefore less attractive for forced marriages. Furthermore no sufficient language skills but only basic language skills, i.e. the ability to make oneself understood in a rudimentary way is required.

The implementation law institutes another integration measure, this time applicable on the Member State's territory, which envisages that a foreigner's spouse is obliged to participate in an integration course if he/she does not possess **sufficient** knowledge of the German language. According to the previous legislation the spouse, as generally all foreigners - was only obliged in case he/she was not able to communicate verbally at a **basic** level.

Besides, minor children aged 16 or older arriving independently must either have command of the German language or it must be secured with regard to their education or life to date that they will integrate (sec. 32 para. 2 Residence Act). To alleviate the consequences of this provision, sect. 32 para. 4 Residence Act states that a child may, at the discretion of the authority, be granted a residence permit without the integration condition fulfilled if refusal of the residence permit would result in a particular hardship.

Statu quo / In line with the directive	*AT; PL (NT); PT (NT); SI (NT); BE; MT; SI;*
Statu quo / Less favourable than the directive	
Statu quo / More favourable than the directive	*BG (NT); CZ (NT); EE (NT); FI (NT); IT ; LU (NT); LV (NT); ES (NT); SE (NT);*
More favourable than previous provisions / In line with the directive	*CY ; RO*
Less favourable than previous provisions / In line with the directive	*FR; DE; LT; NL*
More favourable than previous provisions / More favourable than the directive	

3.8. Evolution of Internal Law due to the transposition, tendency to copy the provisions of the directive

- Contrary to what could have been imagined due to the weak virtues of directive 2003/86, its influence on national legislations is judged as positive in 10 Member States where the rules adopted in order to transpose the directive appear as being more favourable than the pre-existing rules (Cyprus, Finland, Greece, Italy, Lithuania, Malta, Netherlands, Poland, Romania, Sweden).

  - In Finland, three fields reflect this improvement:
    - before the transposition, the children of the spouse were not entitled to family reunification. Section 37 § 1 of the Aliens Act laying down the definition of a family was amended so that it now covers also the spouse's minor children.
    - before the transposition of the directive all persons residing in Finland by virtue of a family member's residence permit were not entitled to gainful employment. Section 79 of the Aliens Act was amended and now according to it: "Aliens who have been issued with a residence permit on ground of family tie have right to gainful employment."
    - before the transposition a family members residence permit could be refused not only on ground of jeopardy to public order and security or public health but also on ground of jeopardy to Finland's international relations. Section 36 of the Aliens Act was amended and now a residence permit on ground of family tie may no longer be refused on the ground that the person concerned would jeopardize Finland's international relations.

  - In Italy, the implementation of the directive allowed the introduction into national provisions of rules relating to family reunification of refugees.

  - In Lithuania, several changes were introduced. Thus, "as a result of transposition, the norms concerning marriages of convenience were introduced on 12 October 2005 (through Amendments to the Aliens Law of 28 November 2006). With amendments to the mentioned Aliens Law the young families will be able to reunite only after they reach the age of 21 years. Right for parents to reunify with their unaccompanied child in Lithuania was introduced, as well as special treatment of family members of refugees as concerns fulfilment of requirements for reunification were introduced by amendments to the Aliens Law of 28 November 2006".

  - In the Netherlands, a modification of the national practice in terms of family reunification comes from a letter of the Minister of Foreign Affairs and Integration. The minister indicates that the real family tie requirement which was no longer considered as existing after 5 years of separation between the parents and the children is not imposed anymore. The minister refers to article 8 of the

ECHR in his letter. The adoption of the directive is also linked to the modification thus introduced.

- In Sweden, two fields show an improvement:
  - the right to family reunification for the sponsor's spouse is the first one. Before the transposition, married couples that had not lived together on a permanent basis abroad were not given an unconditional right of family reunification. The couple had to first pass an evaluation of seriousness to get a resident permit. After transposition, the requirement of the evaluation of seriousness was taken away in order to be in line with the directive. Married couples were given the unconditional right of reunification. But the permit can be limited in time. The new provision has been in force since 2006-04-30.
  - Family reunification of minor children also was modified. Before the transposition, minor children had to be or have been living with the parent in the country of origin to enjoy the right of family reunification. After transposition, the condition that the minor was living or had lived with the sponsor in the country of origin was removed. The new wording of the relevant provision came into force 2006-04-30.

- In Poland, three fields positively benefited from the implementation.
  - The possibility to apply for family reunification directly on the territory, which was not recognised previously, is now opened.
  - The shortening of the waiting period, which went from three years to two years.
  - The guarantees in terms of equality of treatment were introduced so that in some cases "admitted family members enjoy even more favourable treatment than the sponsor".

In Portugal, positive effects of the directive result from the possibility to introduce a request on the Portuguese territory but also of the grouped assessment of the residence permits which avoids several requests.

- On the other hand, several Member States note a lowering of the rules benefiting to the sponsor without this lowering necessarily being contrary to the directive. Thus, the harmonisation looked for by the directive becomes a « floor-harmonisation » while the contrary could be expected when the income or the stability of the residence requirements are brought back to the strict minimum.

  - In Austria, under the influence of the directive, resources requirements were introduced into national legislations. The new legislation in force since 1 January 2006 requires a net monthly income of at least Euros 1055,90 for a married couple plus Euros 72,33 for each minor child. The costs for accommodation have to be added to this amount. The required income was increased following transposition of the Directive and bears grave problems for many applicants and their sponsors respectively.

- In Belgium, accommodation and health insurance requirements were introduced due to the implementation.

- In Slovenia, a waiting period of one year has been introduced after the transposition of the directive.

- In Spain, the transposition of the directive led to the reform of the LOE 4/2000 by the law 14/2003 with a tendency to introduce more restrictions to family reunification (especially for relatives in ascending line and chain reunification), but also to improve the procedures to grant authorisations (despite the persisting flaws).

- In Lithuania, some restrictive provisions concerning the time limits for applying for family reunification for refugees as a condition to exempt them from certain requirements to be fulfilled were introduced (through Amendments to the Aliens Law of 28 November 2006).

- France, which benefited from a relatively liberal regime in this respect, characterises this reducing effect of the directive: increasing of the duration of the residence prior to the reunification from one year to 18 months, lengthening of the time limit to withdraw the residence permit in case of breakdown of the common life from 2 to 3 years, emphasis of the resources and accommodation requirements, introduction of a minimal age for the spouse, adoption of obligatory integration measures are all the recent modifications of the national legislation that were legitimated by directive 2003/86.

Several rapporteurs did not answer to this question (Bulgaria, Cyprus, Czech Republic, Estonia, Germany, Slovakia).

General tendency to just copy the provisions of the directive into national legislation without redrafting or adaptation them to national circumstances

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK

In six Member States (Cyprus, Greece, Lithuania, Luxembourg, Malta, Romania), the national legislation consecrates a tendency to copy out provisions of the directive. On the other hand, no problem of application of the transposition measures was pointed out in these Member States.

In one Member State, however, in Slovenia, one provision that was copied is the provision stipulating that when rejecting the application for family reunification the competent body should take into account the nature and solidity of the family relations, duration of stay and ties to the country of origin. This provision is supposed to be favourable for the family members. However, since it has be created as a principle, but not as rule, and since the Republic of Slovenia has copied it as a principle without creating more specific rules, the provision remains unimplemented.

3.9. Jurisprudence interesting the directive

The case law applicable to the directive, its transposition and its application progressively develop before national jurisdictions. Several jurisdictional decisions concern the application of the right to family reunification in general and on its links with international texts that must be respected by Member States. Article 8 of the ECHR and the Convention of United Nations on Children's Rights constitute the main texts of reference (see particularly the decision of the administrative Court of the Vilnius district of December 19th, 2005. See also the case of the Austrian constitutional Court of October 8th, 2003 and that of the Latvian constitutional Court of February 28th, 2007. In Denmark, some decisions of the Courts of Appeal also merge in that field.

Two Member States (Austria and the Netherlands) stand out because of their already important jurisdictional production.

- ***On the scope of the directive (article 3) :***

The Dutch national report states that Dutch jurisdictions had to rule out on the application of the directive regarding the cases of double nationality (people having the Dutch nationality and that of a third country). The Conseil d'Etat (State Council) had, three times, considered that article 3§3 of the directive did not apply to persons also possessing the Dutch citizenship. This position, lastly confirmed on March 20th, 2007, was not followed by a Court of Appeal that considered that the directive also applied to third country nationals possessing the Dutch citizenship as well. In that case, the Court used the preamble and the goal described in article 1 of the Directive to state that the wording of the Directive does not exclude application to dual nationals. According to the Court, no account has been taken of the position of persons having both the nationality of the country of origin and of a Member State during the negotiations of the Directive. If the Court would decide to rule out dual nationals of the scope of application of the Directive, it would create the possibility that the Directive would have a different effect in each Member State. This would also imply that third country nationals, who have resided in a Member State long enough to apply for naturalisation, would loose their right to family reunification under the Directive if they become a Dutch national. This would constitute a discrimination on grounds of nationality, which is explicitly prohibited by article 12 of the EU Treaty.

- ***Beneficiaries (article 4) :***

In a case from June 28th, 2006, the Supreme administrative Court of Austria states that the first degree relatives in the direct ascending line are not eligible to family reunification as they are not covered by the national legislation in this respect.

Concerning major children, a Swedish Court of appeal has given the right to family reunification on the basis of the state of health of the beneficiary. In this case law, the applicant is 29 years old and seriously mentally ill. The Court states that due to the applicant's incurable illness and to the fact that he is declared legally incompetent in the country of origin, he should be equaled to a minor child in the evaluation. The Court applies the right of family reunification of minor unmarried children analogously and gives the applicant a resident permit.

- ***Deposit and assessment of the request (article 5) :***

A Dutch Court of Appeal considered that the national legislation imposing a double control of the conditions relating to family reunification was contrary to article 5, first paragraph of the directive. Thus, the Dutch system which requires a double test whether the requirements for family reunification are met, namely once when at the application for the authorisation for temporary stay and then again at the application for a residence permit, is contradictory to the Directive, which provides only for one test regarding the right to a residence permit.

A case from the Supreme administrative Court of Austria of July 27th, 2006 recalls that Austria did not insert into its national law the option formulated in article 5, paragraph 3, second indent of the directive relating to the possibility of introducing a request of family reunification in the Member State.

A Spanish Supreme Court estimated on November 17th, 2006 that to grant a residence authorisation, the administration must take in consideration not only the circumstances appearing in the administrative file but also the circumstances which took place when the decision was taken. In a decision of November 30th, 2006 a Supreme Court in the same Member State judged that to demonstrate that a person who is in Spain at a certain date, it can be done by any way of proof. If the administration considers that a copy of a labour offer is not valid, it must ask for the mistake to be corrected or indicate the problem in the document.

- ***Public order (article 6) :***

The clause relating to public order was the object of two jurisdictional interpretations.

The first is that of the Swedish Supreme Court. The question laid on knowing whether the right to family reunification of an applicant with his/her spouse can be refused on the grounds of public order considerations. The Court established that EC- law (directives and case- law) on the definition of public police and security is (indirectly) decisive in the evaluation. The Court stated that an enforceable judgment entailing a sanction of prison for not too short period of a time, is necessary for a refusal on this ground. It also stated that the ground of public policy and security should be applied in restrictive manners. The fact that the applicant had been found guilty of smuggling of alcohol and sentenced to 9 months in prison was not considered enough to infringe on the right of family reunification. This judgment clarifies the meaning of "public policy and security".

The second interpretation was made by the Lithuanian High administrative Court. The Court analysed the definition of national security and public order in a case of a Chechen applicant who was asking for the application of alternative measure to detention pending his expulsion and who had a minor child residing in Lithuania. The National Security Department was claiming in the case that the applicant poses a threat to national security of Lithuania, because he was maintaining relations with persons suspected in terrorist activities, against whom investigations have been going on. Concerning the public order, the argument was that the applicant was charged with several administrative offences and thus it allegedly proves that he is not abiding by the laws of Lithuania and thus shows disrespect to the society and poses

danger to the public order. The Court in its decision was of the opinion that the lower court by stating that the applicant poses danger to national security, relied only on the letter of the National Security Department, while it should have verified the information. Therefore, the Court repealed the decision of the first instance court and returned the case for reconsideration.

- ***Requisite conditions (article 7) :***

A Dutch Court of Appeal considered that the specific resources requirements introduced in the new legislation are not contrary to the directive. The requirement that the level of income of the sponsor that wants to benefit from family formation needs to be 120% of the legal minimum wage of a worker of 23 years is not incompatible with the Directive.

In a second decision, a Court of Appeal considered that " Social assistance system' in Article 7(1)c) does not refer to social assistance only. The inclusion of other income-related benefits is not incompatible with the Directive".

A Slovenian jurisdiction considers that article 40 of the Aliens Act stipulates that the temporary residence permit in the Republic of Slovenia can also be granted to foreigner who in accordance with the law, international agreement or international principles proves a well-founded reason for which his or her residence in Slovenia is justified. This provision is general and is taken into account when the foreigner does not fulfil the conditions for residence permit on another ground. In the Administrative Court's opinion this provision does not exclude the situation when the residence permit should have been issued due to family reunification, but the applicant does not fulfil the conditions for that in accordance with Article 36 of the Aliens Act. If the applicant (a daughter of an elderly man whose only remaining relative she is but is living in another country) would establish that her care for the father is absolutely necessary, it would be possible to grant her residence permit on the basis of Article 40 of the Aliens Act. However, since the applicant said herself that her father is still quite healthy and capable of independent life, her application was denied.

A Spanish first instance jurisdiction refers to article 7 of directive 2003/86 to define the concept of « sufficient resources ». In that case, Member States shall take in consideration the income and minimal allowances (referring to the fact that in Spain the minimal wage is of 540,90 euros). The judge considers that, given the conditions of the rent market, an accommodation of 70m² with three bedrooms and a living room is adequate to cover the needs of a family with three or four members.

- ***Family reunification of refugees (article 9) :***

A German administrative Court ruled out on the resources requirements applicable to refugees. This decision concerns the requirement of stable resources in case of refugees. Art. 12 §1 Directive 2003/86/EC obliges the Member States to exempt refugees and/or their families from the requirements of accommodation, stable resources and health insurance. Since a transposition norm was missing at the time the court stated that Art. 12 para. 1 1st indent of the Directive was directly applicable. The court also held that art. 9 para. 2 of the Directive was not directly applicable but needed a transposition act. (Art. 9 para. 2 Directive 2003/86/EC provides the option for Member States to confine the application of art. 12 para.

1 to refugees whose family relationships predate their entry.) The court furthermore tends to the opinion that the derogations of art. 12 para. 1 2nd and 3rd indent of the Directive are not directly applicable as well. The question was, whether those provisions were to be interpreted as an exception of art. 12 para. 1 1st indent or whether it they have to be understood as a room for manoeuvre for the member states (in this case they may only applied after transposition). In view of the projected explicit transposition the court doubted that the provisions only constituted a directly applicable exception. However there was no final decision on this issue: Since the case was presented to the court within the framework of expedited proceedings the court's doubts were already sufficient to rule in favour of the applicant. The court finally reasoned that instructions of a German *Land* were not sufficient to transpose those provisions.

- ***Renewal of the residence permit (article 16)***

The administrative Court of Appeal of Low Saxe ruled out in march 2006 in a case concerning a minor child who has been issued a visa for the purpose of family reunification by the diplomatic mission abroad, the subsequent application for a residence permit with the foreigners' authority is to be regarded as an application for renewal of the residence permit (not as a primary application). Therefore – in regard to this application for renewal – the foreigners' authority may not reject the residence permit on the basis of the fact that the applicant has passed the specific age limit.

- ***Framing of the decisions (article 17) :***

The Supreme administrative Court of Austria reached a decision on the interpretation of article 17 of the directive. In that case, the complainant challenged a residence ban and referred to Art. 17 of the Directive in this context. The Administrative Court stated that Art. 17 of the Directive did not hinder the residence ban as the complainant had committed serious crimes and the authority had taken due regard to the interests of the alien concerned mentioned in Art. 17 of the Directive. This balance of interests was based on Sect. 37 Aliens Act as in force until 31 December 2005.

Concerning the burden of proof in the procedure, a German administrative Court of appeal set the following rules. In case of an application for a residence permit the applicant carries the burden of proof for the existence of a family relationship. In contrast, in a case in which the administration wants to rescind an existing residence permit, it is the administration that carries the burden of proof. However, in cases of untypical marital cohabitation the foreigner is obliged to name the facts that allow reasoning that a family relationship exists indeed.

A Spanish Court of appeal suspended on April 21st, 2006 an expulsion decision because it matters to consider the familial, social or economical interests and to assess whether the expulsion order harm it in a way that is hardly repairable.

- ***Jurisprudence in the Member States not bound by the directive :***

In Denmark, a series of jurisdictional decisions relating to family reunification deserve the attention.

A decision of November 30th, 2005 of a supreme court deals with the sponsor's conditions of support towards the applicant. The alien, who was a Pakistan citizen, was issued with a residence permit on the basis of *family reunification with a spouse*, who was a Pakistan citizen born in Denmark. The issuance of the residence permit was conditioned by *the sponsor supporting the applicant*. The application of renewal of the residence permit was rejected on the grounds that *the sponsor was no longer able to provide for the applicant*. The sponsor was *unemployed* and *received unemployment benefit*. The fact that the sponsor was born in Denmark and had his childhood in Denmark did not in itself lead to the dispensing with the requirement on documentation of supporting requirement. The decision was not found to breach ECHR Article 8.

An appeal court ruled out in a case on the rejection of a renewal application for a residence permit. In that case, the decision of the Ministry of Refugee, Immigration and Integration Affairs on renewal of residence permit was overruled by the court on the basis of Aliens Act section 26. The alien, who was a Philippine citizen, was issued with a residence permit under the rules of family reunification for children when she was 16 years old – the mother was the sponsor. 2 years after the issuance, the alien's mother left Denmark. The alien was *rejected renewal* of the residence permit due to fact, that the *mother/sponsor left Denmark*, that the alien lived in Denmark for not more than 2 years, that the alien spend most of childhood in the Philippines and the fact that there was no information on health related issues or similar causing the rejection to be particularly burdensome. Information on the alien not having any family to return to in the Philippines, that the alien had had a boyfriend in Denmark the past 2 years, spoke Danish, was well integrated in Denmark and provided for herself did not change this evaluation. The court overruled the decision with regard to the circumstances mentioned in Aliens Act section 26. The court agreed that the conditions for the residence permit was no longer present, but found that a rejection of renewal would be particularly burdensome based on an assessment of all the circumstances in the case, such as the fact that the alien was well-integrated in Denmark and did not have a family in her home country.

An appeal court ruled out in a case dealing with a presumption of fraud. The rules in Aliens Act on residence permit for a child, does not encompass minors who by marriage have started their own family. The residence permit was revoked due to fraud. The alien was issued with a residence permit on the basis of the rules on family reunification with minors. The alien stated in the application that she was unmarried. The residence permit was later revoked due to fraud, since the authorities learned that the alien was married. The court stated that the rules in Aliens Act on family reunification of a child have to be seen in context with the general rules on custody. The rules on custody states that persons below 18 are under custody unless they are married. On this background - and due to the fact that the rejection did not seem particularly burdensome for the applicant - it was considered a condition for family reunification of a child, that the child is not married.

3.10. Problems with the translation

AT	BE	BG	CY	CZ	DE	EE	EL
ES	FI	FR	IT	HU	LT	LU	LV
MT	NL	PL	PT	RO	SE	SI	SK

Translation problems appear in four Member States. However, in three of them the translation problems will not have significative consequences.

It is not the case of problems affecting Dutch law. In that Member State, two translation problems stand out. In first place, there is an apparent mistranslation in the Dutch translation of the directive in the first sentence of paragraph 1 of article 12. Where the French and English versions of the directive mention the conditions of article of article 7 as conditions refugees and their family members referred to in article 4(1) do not have to fulfil, the Dutch version only refers to the conditions of article 4(1) as conditions refugees and their family members do not have to fulfil. The only condition mentioned in article 4(1) is an integration requirement for children over 12 years who arrive independently from the rest of the family. However, the Dutch legislation does provide for the possibility for family reunification with refugees without compliance with the income requirement, in case the application is made within three months after the sponsor has been granted a temporary residence permit on asylum grounds. In case the family member has another nationality, an extra condition is that family reunification is not possible in another country. In case the family member has the same nationality as the refugee, he or she will be granted a residence permit on asylum grounds too. In case the family member has another nationality, he or she will have to apply for a regular residence permit, which means that the family member will need an authorisation for temporary stay (mvv) before admission to the Netherlands will be granted.

In English, German and French versions of the directive, article 7(2) gives Member States the possibility to require from family members that they comply with "measures" "Maβnahmen", and "mesures". In the Dutch version this term is translated as "voorwaarden", which means conditions. Therefore the Dutch version allows a test on integration, while the other versions allow the obligation to attend a course, for instance. Council Directive 2003/109/EC of 25 November 2003 clearly distinguishes these different terms (see article 5(2) and article 15 (3). Therefore it is possible that, due to a wrong translation, the Dutch transposition appears to be in line with the Directive, but in fact breaches it.

Very surprisingly, the Bulgarian rapporteur points out that the directive was not always translated in Bulgaria, which obviously raises important problems in terms of accessibility. This is no more the case nowadays.

3.11. Other interesting elements

This opened question allows rapporteurs to integrate in the report any aspect relating to family reunification not mentioned in the questionnaire and that the judged relevant to underline. Several rapporteurs wished to express themselves on that point.

- ***Observations relating to the transposition process:***

The Austrian rapporteur mainly wished to comment on the transposition process of the directive in that Member State. He draws up a very interesting reading of the transposition process and its effects in the concerned Member State on a legal and a practical point of view.

Thus, the Directive has not been implemented in Austria by the adoption of a particular act, but in course of an extensive reform of the whole asylum and migration law. Therefore it cannot be determined with absolute certainty in every case which amendments were motivated by the directive. In general the reform that entered into force on 1 January 2006 is determined by further restrictions for migration to Austria. As family reunification was in practice the only possibility for third country nationals to obtain a residence permit in Austria in the last years, the Austrian legislator seemed to be endeavoured to restrict family reunification. This has to be seen before the background of a policy that is rather hostile to foreigners. The latest reform was marked by an approach that seems to understand migration as a threat for public security and economic wealth rather than as a chance for society and an opportunity that should not be lost.

The Directive has led to some improvements. The major impact can be seen in the field of access to employment. The general access to employment after a period of one year must be seen as an important improvement for third country nationals accepted for family reunification.
Although the Directive itself contains only minimum standards that do not go far beyond the standard that had already been reached in Austria before the latest reform, it should be kept in mind, that also this standard is not undisputed in Austria. The legislator seems to try to restrict family reunification by implementing new conditions in fields not covered by the Directive (especially regarding aliens not covered by the Directive due to a lack of reasonable prospects of obtaining the right to permanent residence) or by restricting conditions also foreseen by the Directive (e.g. increasing the income requirement). Therefore the Directive may also be regarded as valuable if it helps to avoid a further deterioration of the rights to family reunification. The impact of the Directive therefore must not be underestimated.

With regard to the quality of the legislation it should be noted that the legislator laid great emphasis on the speedy conduct of the reform of the asylum and migration law rather than on the legal quality. The time limits for comments on the drafts were very short and it seems that the concerns submitted by legal authors as well as by NGOs was not really taken into consideration. Also the editorial quality is rather low. Parts of the legislation are regulated far more complex than required by the subject. There are also a number of unclear formulations and references to other provisions. There are also some referrals to provisions that were contained in the draft set up by the government but were in fact not set into force.

Another practical problem resulted from the fact that the new asylum and migration acts entered into force without provisional regulations providing for time limits to end pending proceedings on base of the legislation in force until 31 December 2005. As there were also major changes in the competences of the different authorities, pending procedures had to be continued by other authorities which led to delays. It seems that by the date of the entry into force of the new legislation not all authorities were instructed and prepared sufficiently. Soon after the new legislation entered into force it became clear that numerous provisions in the Settlement and Residence Act and the Aliens Police Act are unclear and lead to unreasonable consequences. It seems that some of the new provisions were not really well considered. It may be assumed that the Constitutional Court will not only clarify some of the unclear

provisions but also abrogate some provisions because they are not sufficiently determined and therefore not in conformity with the constitution. At the moment political debate is underway on different issues of the Austrian asylum and migration law.

Regarding the integration process, the Bulgarian rapporteur underlines the reasons that led to a « strange » implementation of the directive. In first place, the rapporteur points out that during the years the country has not been an attractive destination for work migration or asylum. It is still the case. For the migrants, Bulgaria has been mainly playing role of a temporary stop, a transit country on the way to others, more attractive countries. Therefore the relevant for the right to family reunification norms stipulate the right and have a procedure which mirrors exactly such reality. It can easily mislead the legislator that it is enough and there is no need of some substantial changes that will transpose the Directive. In second place, the author considers that there is insufficient experience and knowledge with work with the Community legislation, with its principles for transposition, type of clauses, margins of manoeuvre. This had led to a peculiar mixture of provisions in the main norms which had not used the opportunities of manoeuvre that the Directive gives the States and at the same time had not transposed correctly the provisions where such margin lacks.

The Latvian rapporteur mentions that the transposition of the directive did not contribute to introduce changes in the national provisions applicable to family reunification. Thus, this Member State did not choose a restrictive approach in that field, so that the Latvian rules are liberal. The rapporteur nevertheless underlines that the absence of modifications entail problems regarding the provisions relating to removal. To his point of view, and even if the rules relating to administrative procedure apply, the law should be amended in order to introduce the relevant articles of the directive in the law on immigration. Lastly, the rapporteur indicates that if family reunification falls within the scope of the rules relating to immigration, they do not come under the sole competence of the Minister of Home Affairs but also concern other Ministers (Social Affairs, Integration and Justice).

In a very unexpected way, the Lithuanian rapporteur points out that family reunification was the object of a debate in the national Parliament as well as in the medias concerning particularly the rule of the prior residence of two years. This debate was notably inspired by the sportive clubs which encountered problems with the family members of sports players arriving in Lithuania in order to play in national teams, as well as foreign investors who are unable to bring their families with them once arrive to work in Lithuania.

In Spain, the majority of possible restrictions envisaged by the directive were not incorporated into Spanish law so that the conditions required in Spain for reunification are more favourable and generous than the options envisaged or allowed by Directive 2003/86.

In Belgium, remedies were introduced against the law before the constitutional Courts and could lead to the cancellation of some provisions in the next few months. Remedies were also introduced before the Conseil d'Etat (*State Council*) against royal byelaws, particularly to challenge the verification way of the sufficient accommodation requirement. These remedies were introduced by different NGOs and they underline that the royal byelaw adds to the law

by notably leaving 6 months to attest from the sufficient character of the accommodation, which lengthens the waiting delay. The fact that it is referred to regional criteria for the healthy character of the accommodation as it creates a difference of treatment depending on the place where the sponsor lives.

- ***Observations on the application of the rules:***

The Czech rapporteur underlines that the practical application of rules relating to family reunification is likely to be tricky as national authorities do not always have a good knowledge of the rules laid down in aliens' law.

In Spain there is still a lot of normative deficiency offering important margins of appreciation to administrative authorities and lead to great divergences in the application of the requisite conditions and the procedures by local or provincial authorities. The concept of public order is also submitted to a large discretionary power of the competent administration and very varied practices.
Besides this statement is reinforced by the intensification in the new law of the implication of local corporations in the management of immigration, with a complementary role to that of « register » and allowance of services as these corporations must control (elaboration of reports) the degree of the aliens' social integration and the conditions of accommodation.

- ***Scope of the directive:***

Under the Finnish Aliens Act the right to family reunification and more favourable treatment in this respect (for example lifting the income requirement) is not limited to refugees within the meaning of the Refugee Convention but covers also persons receiving subsidiary and temporary protection.

Furthermore, family reunification is granted not only in cases where the sponsor resides in Finland by virtue of a continuous residence permit but also in most cases where she resides in Finland by virtue of a temporary residence permit such as students provided that the preconditions (such as the income requirement) for that are met. The Aliens Act does not differentiate between these cases and therefore the provisions of the Aliens Act that implement the directive are, too, applied in cases of family members of persons residing in the country by virtue of a temporary permit.

- ***Obstacles to family reunification :***

The Dutch report formulates important reservations regarding the effective character of family reunification regarding national law. Several points are raised by the rapporteur, here reproduced in extenso. It is highly questionable whether article 13 (1) of the Directive allows the Dutch procedure in which each application for family reunification is examined twice, namely first with the application for an authorisation for temporary stay, and after admission to the Dutch territory, again with the application for the residence permit.
Furthermore we want to draw attention on the high amount that applicants have to pay for fees and the costs of the integration exam. The total amount of fees to be paid for a residence permit for family reunion is €1600. These fees include:

- Request for the issue of the authorisation for temporary stay: € 830

- Civic integration examination abroad: € 350
- Legalisation of documents: € 248
- Issue of a residence permit for temporary stay: € 188 +

€ 1.616

In case more family members ask to be admitted at the same time, an extra €188 per family member is charged.[6] If the children are 16 years of older, this amount will increase with 350 or 700 euros. This amount can cause an extra obstacle for the exercise of the right to family reunification. As the Directive allows a limited number of requirements and does not explicitly allow Member States to require such high fees, it is questionable whether the Dutch government is allowed to do so.

4. PARTICULARITIES OF THE SITUATION OF MEMBER STATES NOT BOUND BY THE DIRECTIVE

We have decided, on the basis of national reports, to consider "opt out" Member State as if they were bound by the directive. Consequently, their position regarding the provisions of the directive has been assessed all along the synthesis report. The paragraphs below dedicated to the particularities of the situation of Member States not bound by the directive just recall the specific situation of these States and outline the general trends of their legislations vis-à-vis the requirements of the directive.

Lastly, the British rapporteur, while underlining that his Member State is not bound by the directive and did not proceed to the implementation, states that in this Member State rules relating to family reunification are mainly in compliance with the requirements set by the directive and goes even further than the minimal norms formulated in the directive. This is the case for example regarding the personal scope as national rules recognize registered and unmarried partnerships even if these partnerships concern same sex partners. Furthermore, requirements for applying for family reunification are set at a level which is comparable to the minimum in the UK rather than "normal for a comparable family". Sickness insurance is not required as well as integration measures or a minimal period of residence before applying for family reunification. From a procedural perspective, practice shows that a nine month period to decide an application would be extremely rare.
The rapporteur acknowledges, however, that some national rules would benefit from the directive's provisions. This is especially the case concerning the concept of the best interest of the child which is not expressly provided for in the Immigration rules. This concept cannot be considered a guiding principle of family reunification for children in the UK and an explicit statement in this regards could improve the UK practice. Provisions are also lacking in some specific areas such as first-degree relatives in the ascending line or unmarried adult children and also autonomous residence permit.
Having regard to the system tacking place in the UK, it should be considered that the rules applicable to family reunification do not derive fundamentally from the minimum standards set by the directive.

[6] Art. 3.34c sub b and c Aliens Instruction.

In the Irish rapporteur's opinion, the state of Ireland's family reunification procedures is much more rudimentary than this questionnaire assumes. It has been difficult to give concrete answers to many questions posed because there is currently no legislation on family reunification in Ireland (other than in respect of refugees), administrative guidelines are basic, and administrative practice often unclear. The outgoing government (there is a general election in May 2007) drafted a bill to reform the entire immigration system, but this bill is silent on the issue of family reunification. The bill does empower the Minister for Justice, Equality and Law Reform to make 'immigration policy statements' from time to time, and it may be that the intention of the government was for family reunification to be dealt with by way of these statements. The precise legal standing and content of such statements is unknown at present. In any event, the bill has lapsed due to the dissolution of the lower house of Parliament in preparation for the election. It remains to be seen how the next government will deal with immigration, including family reunification. In conclusion, Ireland's approach to family reunification has developed in an *ad hoc* manner, with no legislative parameters and little by way of publicly available policy guidance. This situation was due to be reformed, but pending the formation of a new government, it is unclear whether the reforms will happen and if so, what form they might take.

Denmark's situation regarding the directive provisions is without doubt the most complex among the Member States not bound by the text and goes further than this Member State's traditional hedging regarding Title IV of the Community Treaty as shows the reading of the National Data Sheet relating to this State. The question of family reunification is indeed emblematic of Denmark's restrictive approach regarding migratory policies. On questions absolutely essential studied along the report, the divergence between the choices made in Danish law and the content of directive 2003 /86 is obvious. Thus, and as an example, about the spouse's minimal age to the conditions of duration required from the sponsor (up to ten years), everything in the solutions adopted by the Member States diverge from the grounds on which the directive was elaborated, as illustrated by the importance of the discretionary power recognised to Danish authorities.