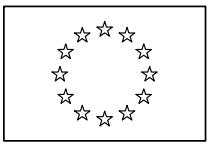

EUROPEAN COMMISSION

Brussels, 15.11.2011
COM(2011) 735 final

GREEN PAPER

on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)

I. INTRODUCTION AND AIM OF THE GREEN PAPER

For immigrants family reunification is a necessity for making family life possible. Since 2003 there are common European immigration rules in place to regulate the conditions to exercise the right to family reunification of third-country nationals at EU level.[1] The Directive defines the conditions of entry and residence for non-EU family members joining a non-EU citizen already legally residing in a Member State. This Directive does not apply to EU citizens.[2]

When adopted, the Directive was considered as a first step harmonisation only and was criticised after adoption by NGOs and academics for establishing a rather low level of harmonisation. At the same time over the last years some Member States have set up restrictive rules and have even called for a modification of the Directive[3] in order to be able to add further conditions to family reunification. They claim that such changes are necessary in order to tackle abuse and better manage the large inflow of migrants.

Indeed family reunification accounts for a large although decreasing[4] share of legal migration. In the early 2000s, family migration seemed to make up, in those Member States with reliable data, more than 50 percent of the total legal immigration. Today, this share amounts to about one third of all immigration to the EU. The share is even smaller when considering solely those targeted by the Directive – *i.e.* third country nationals joining non-EU citizens, which corresponds to roughly 500.000 migrants at EU level 21 percent of the overall permits.[5]

Both the Stockholm Programme and the European Pact on immigration and asylum identified family reunification as an issue where EU policies should be further developed with special regard to integration measures. The Commission itself, in its first report on the implementation of the Directive (COM 2008/610)[6], identified national implementation problems and shortcomings of the Directive. On the one hand a few cross-cutting issues of incorrect transposition were identified (the provisions on visa facilitation, granting autonomous residence permits, taking into account the best interest of the child, legal redress and more favourable provisions for the family reunification of refugees). On the other hand the report concluded that the Directive itself leaves Member States too much discretion when applying some of its optional provisions (the "may"-clauses) in particular as regards the possible waiting period, the income requirement and the possible integration measures.

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1 Directive 2003/86 on the right to family reunification, Hereinafter referred as "the Directive"

2 The situation of family reunification for EU citizens and their third-country national family members is covered by EU law through Directive 2004/38/EC. However, this Directive only covers cases where a Union citizen moves to, resides in or has resided in a Member State other than that of which he/she is a national and his/her third-country national family member joins or accompanies him/her.

3 Position paper – the Dutch standpoint on EU migration policy

4 This decrease is probably partly linked to recent policy changes in some Member States introducing stricter conditions. These policy changes claim to better manage large inflows of migrants but put in question the acknowledged right to family reunification as set out in the Directive which at present serves as a minimum legal guarantee throughout the EU.

5 EUROSTAT- Please see specific numbers in the annex; no data for Estonia, Luxembourg and Netherlands available

6 http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0610:FIN:EN:PDF.

In view of the above the Commission considers it necessary to initiate a public debate on family reunification highlighting certain issues within the remit of the Directive[7], which is the purpose of this Green Paper. All stakeholders are invited to reply to different questions on how to have more effective rules on family reunification at EU level and to provide available factual information and data on the application of the Directive to underpin the qualitative assessment provided. The objective of the Directive, namely to determine the conditions for the exercise of the **right to family reunification** and to facilitate the integration of third-country nationals meeting the conditions in the given Member State should be kept in mind.[8] The Commission would in particular like to invite Member States who reported problems of abuse of the right to family reunification to specify and quantify them in order to be able to address them at EU level in a more targeted way.

Depending on the outcome of this consultation the Commission will decide whether any concrete policy follow up is necessary (e.g. modification of the Directive, interpretative guidelines or status quo). Any possible EU instrument will need to comply with the Charter of Fundamental Rights, in particular respect for private and family life, the right to marry, the rights of the child, the principle of non discrimination, as well as with other international obligations. The Commission will therefore ensure that any possible follow-up is subject to an in-depth assessment of its impact on fundamental rights, and its compliance with the Charter, in line with the "fundamental rights check-list" established by the Commission in its Strategy for the effective implementation of the Charter of Fundamental Rights.[9]

II. QUESTIONS TO STAKEHOLDERS

1. SCOPE OF APPLICATION

1.1 Who can qualify as a sponsor for the purpose of the Directive?

The Directive identifies two conditions for being eligible as a sponsor for family reunification; a valid residence permit of at least one year and reasonable prospects of obtaining the right of permanent residence[10] (Article 3(1)). The Directive leaves a margin of interpretation to Member States concerning the second condition which could lead to legal insecurity and to the exclusion of almost any third-country national from the scope of the Directive.

In addition to these two conditions Article 8(1) allows Member States to introduce a minimum period of lawful residence (not exceeding two years) before reunification can take place. This means the application may be filed, but Member States may delay granting family reunification until the period determined by their legislation expires.

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7 Notably, this consultation does not touch upon issues linked to Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

8 See recital 4 of the Directive.

9 COM(2010)573 final of 19.10.2010; see also the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final of 6.5.2011.

10 In accordance with the travaux preparatoire the idea of this condition was that the right to family reunification would not be open to persons staying only temporarily without the possibility of renewal.

Q1

Are these criteria (reasonable prospect for the right of permanent residence at the time of application as regulated in Article 3 and a waiting period until reunification can actually take place as regulated in Article 8) the correct approach and the best way to qualify the sponsors?

1.2. Eligible family members

1.2.1. Mandatory provisions- the nuclear family

Currently in accordance with Article 4(1), the Directive requires (subject to the other conditions of the Directive) Member States to authorize the entry and residence of the "nuclear" or "core" family, which means the sponsor's spouse and minor children of the sponsor or spouse. However, even for this category, the Directive allows certain restrictions.

As for the **spouse**, under Article 4(5) Member States can fix a minimum age (21 years is the maximum threshold under the Directive) irrespective of whether this corresponds to the age of majority in the given Member States. The reason behind this provision was a worry that the rules on family reunification could be abused for forced marriages. However, it is difficult to estimate if this is a real problem and how big it is.

Q2

Is it legitimate to have a minimum age for the spouse which differs from the age of majority in a Member State?Are there other ways of preventing forced marriages within the context of family reunification and if yes, which?

Do you have clear evidence of the problem of forced marriages? If yes how big is this problem (statistics) and is it related to the rules on family reunification (to fix a different minimum age than the age of majority)?

For **minor children**, two further restrictions are allowed by the Directive, both in the form of a stand-still clause derogation. The first one (Article 4(1) last indent) asking children over 12 years arriving independently of the rest of their families to prove that they meet integration conditions.[11] has only been used by one Member State. The second possible restriction (Article 4(6)) states that children older than 15 may be required to enter a Member State on grounds other than family reunification - has not been used by any Member State.

Q3

Do you see an interest in maintaining those standstill clauses which are not used by Member States, such as the one concerning children older than 15?

[11] See page 5 of the report (COM 2008/610).

1.2.2. Optional clause- other family members

As the Directive only obliges Member States to ensure family reunification for the core/nuclear family, Member States are free to decide whether to include other family members in their national legislation (Article 4(3)). Despite the fact that it is only a "may" clause, more than half of Member States have chosen to include parents of the sponsor and/or his/her spouse. In this context, it should be noted that it flows from recital 5 of the Directive that Member States that recognise same sex marriages within their national family law should also do so in application of the Directive[12]. In the same vein, whenever same sex registered partners are recognised under national family law and Member States apply the "may" clause of the Directive for registered partners, they should also do so for same sex partners.

Q4

Are the rules on eligible family members adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family?

2. REQUIREMENTS FOR THE EXERCISE OF THE RIGHT TO FAMILY REUNIFICATION

The Directive does not oblige Member States to introduce conditions for family reunification such as various integration measures, but allows them to do so - a contrario other conditions cannot be applied for family reunification within the EU.

2.1 Integration measures

The optional clause (Article 7(2)) enables Member States to require third-country nationals to comply with integration measures. This was one of the most controversial and debated requirements during the negotiations. In its present form the Directive itself does not give any precise indication what these integration measures should entail and how should they be applied and they are used in some Member States only. Three Member States use these measures as a condition before admission to the territory requiring the family members to pass language tests, test on the knowledge of the host society or to sign a contract obliging them to take civic and if needed, linguistic courses upon entry. Other Member States require family members to undertake certain obligations only upon entry such as participation in integration (mainly language) courses.

The admissibility of integration measures - as stated already in the evaluation report - should depend on whether they serve the purpose of facilitating integration and whether they respect the principles of proportionality[13] and of subsidiarity. Decisions on the application for family reunification in relation to passing tests should take into account whether there are available facilities (translated materials, courses) to prepare for them and whether they are accessible (location, fees). Specific individual circumstances (such as proven illiteracy, medical conditions) should also be taken into account.

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12 "Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation."

13 For more details see 4.3.4 of the report.

The renewed European Agenda for the Integration of third-country nationals[14] contains specific recommendations to Member States also on the provision of language courses, reflecting migrants' varying needs at different stages of their integration process, including introductory programmes for newly arrived migrants.

Q5

Do these measures efficiently serve the purpose of integration? How can this be assessed in practice? Which integration measures are most effective in that respect?

Would you consider it useful to further define these measures at EU level?

Would you recommend pre-entry measures? If so, how can safeguards be introduced in order to ensure that they do not de facto lead to undue barriers for family reunification (such as disproportionate fees or requirements) and take into account individual abilities such as age, illiteracy, disability, educational level?

2.2 Waiting period in relation to reception capacity

The second indent of Article 8 provides for a specific derogation for those Member States whose legislation took reception capacity into account at a time of the adoption of the Directive. It allows them to introduce a three years waiting period as from the submission of the application. In connection with this clause the ECJ has clarified[15] that, at the latest three years after an application is filed, a residence permit needs to be issued if the conditions are met.

In other words reception capacity 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. This derogation is used by only one Member State.

Q6

In view of its application, is it necessary and justified to keep such a derogation in the Directive to provide for a three year wating period as from the submission of the application?

3. ENTRY AND RESIDENCE OF FAMILY MEMBERS

Member States must grant family members a first residence permit of at least one year's duration (Article 13(2)). It is also stipulated that the duration of residence permits granted to family members in principle should not go beyond the date of expiry of the sponsor's residence permit (Article 13(3)).

When implementing these provisions a problem may arise if the remaining validity of the sponsor's residence permit is less than one year when the family member's residence permit is issued. In that case these two rules could be in conflict with specific regard to the case when the sponsor's residence permit is already in the process of renewal.

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14 COM (2011) 455 final as adopted on 19/07/2011

15 C 540/03 para 100 and 101.

Q7

Should specific rules foresee the situation when the remaining validity of the sponsor's residence permit is less than one year, but to be renewed?

4. ASYLUM RELATED QUESTIONS

4.1 Exclusion of subsidiary protection

Third-country nationals who are beneficiaries of subsidiary protection are excluded from the scope of the Directive (Article 3(2)b). However, the Stockholm Programme called for the establishment of a uniform status of protection as one of the main objectives for the completion of the Common European Asylum System, based on the fact that protection needs of refugees and of beneficiaries of subsidiary protection are the same. The aim, therefore, is to increase the approximation of the rights of beneficiaries of subsidiary protection to those provided to refugees, as underlined in the recast of the Qualification Directive [16]. The question thus arises whether such an approximation should also take place as regards family reunification, which would necessitate the adjustment of the personal scope of the Directive.

Q8

Should the family reunification of third country nationals who are beneficiaries of subsidiary protection be subject to the rules of the Family reunification Directive?

Should beneficiaries of subsidiary protection benefit from the more favourable rules of the Family reunification Directive which exempt refugees from meeting certain requirements (accommodation, sickness insurance, stable and regual resources)?

4.2 Other asylum related questions

The Directive provides some more favourable rules for refugees (Chapter V). However, Member States may limit the application of these more favourable rules to certain situations. For example to family relationships which were formed prior to the entry of the refugee to a Member State (Article 9(2)), or to the applications for family reunification submitted within a period of three months after the granting of the refugee status.(Article 12(1)). These possible limitations do not take sufficiently into account the particularities of their situation. Refugees encounter practical difficulties linked to their specific situation which are of a different nature than those faced by other third country nationals (e.g.: problems maintaining the contact with the family left in the country of origin). In addition, refugees may have spent lengthy periods in exile or on the territory of a Member State waiting for the outcome of the asylum procedure and may have founded a family during this time. Refugees may also be unaware of family members who are still alive or unable to produce information regarding their location or to provide the necessary documentation for an application for reunification within a short period after receiving a protection status. Their family members may have undergone similar situations of conflict, trauma and extreme hardship as the refugees have suffered themselves.

[16] Minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast) COM (2009)551.

Some issues should therefore be reconsidered in this context – in partiuclar in order to judge whether these possible limitatios should be deleted from the Directive.

Q9

Should Member States continue to have the possibility to limit the application of the more favourable provisions of the Directive to refugees whose family relationships predate their entry to the territory of a Member State?

Should family reunification be ensured for wider categories of family members who are dependent on the refugees, if so to which degree?

Should refugees continue to be required to provide evidence that they fulfil the requirements regarding accommodation, sickness insurance and resources if the application for family reunification is not submitted within a period of three months after granting the refugee status?

5. FRAUD, ABUSE , PROCEDURAL ISSUES

5.1 Interviews and investigations

Article 5(2) of the Directive provides for the possibility to carry out interviews and to conduct other investigations if deemed necessary. A number of Member States have introduced the possibility of DNA tests to prove family ties. The Directive is silent on this type of evidence. The Commission has stated that in order to be admissible under EU law these interviews and other investigations must be proportionate - thus not render the right to family reunification nugatory - and respect fundamental rights, in particular the right to privacy and family life.

Q10

Do you have clear evidence of problems of fraud? How big is the problem (statistics)? Do you think rules on interviews and investigations, including DNA testing, can be instrumental to solve them? Would you consider it useful to regulate more specifically these interviews or investigations at EU level?If so, which type of rules would you consider?

5.2 Marriages of convenience

Marriage of convenience is a specific case of fraud, which Member States should counteract. In addition to its general procedural rules Article 16(4) of the Directive provides for the possibility to conduct specific checks and inspections where there is reason to suspect fraud or marriage of convenience. Every national system has such rules; an EU financed project has compiled Member States' practices[17]. Nevertheless, it is difficult to estimate if this is a big problem for Member States and if it is linked to the Directive.

[17] ARGO, Project, an action programme on "Cooperation in the combat against abuse or misuse of EU administrative statutes" tackling also marriages of convenience among other things highlighted the need of the promotion of a common database and the need of a common approach how to deal with these "bogus marriages."

Q11

Do you have clear evidence of problems of marriages of convenience? Do you have statistics of such marriages (if detected)? Are they related to the rules of the Directive? Could the provisions in the Directive for checks and inspections be more effectively implemented, and if so, how?

5.3 Fees

Currently there is no harmonisation at EU level as regards the fees to be paid for the purpose of family reunification (application fees, fees for visa and residence permits and other related costs for fulfilling the conditions such as pre-departure languages tests if exist etc.). Excessive fees can undermine the effect of the Directive by hampering the right to family reunification. The absence of EU rules on this matter has resulted in very different levels of fees in Member States.

Q12

Should administrative fees payable in the procedure be regulated? If so, should it be in a form of safeguards or should more precise indications be given?

5.4 Length of procedure - deadline for the administrative decision

The application procedure for family reunification can be rather lengthy. The Directive sets an absolute deadline within which a written notification of the decision is to be given to the applicant. The notification of the decision should be given no later than nine months from the date on which the application was lodged (Article 5(4)). However, Member States can extend this deadline if exceptional circumstances which are linked to the complexity of the application justify it. In practice such deadlines are set at an average of three months combined with the extension clause.

Q13

Is the administrative deadline laid down by the Directive for examination of the application justified?

5.5 Horizontal clauses

There are two horizontal mandatory clauses in the Directive. Article 5(5) obliges Member States to pay due regard to the best interests of minor children when examining an application. This provision mirrors the obligation in Article 24(2) of the Charter of Fundamental Rights and in Article 3(1) of the UN Convention on the Rights of the Child that the child's best interest must be a primary consideration in all actions relating to children as well as the need, expressed in Article 24(3) of the Charter, for a child to maintain on a regular basis a personal relationship with both parents. The ECJ has put an extra emphasis on these provisions of the Charter and to Article 5(5) in its relevant case law.[18] As shown in the report

[18] ECJ C-540/03

on the implementation of the Directive, many Member States have nevertheless implemented this clause only through a general reference to other international instruments (e.g. the European Convention on Human Rights and UN Convention on the Rights of the Child)[19].

The other horizontal clause, Article 17, is an obligation to take due account of the nature and solidity of the person's family relationships, the duration of his or her residence in the Member State and of the existence of family; cultural and social ties with his or her country of origin. In other words, this clause obliges Member States to make individual examinations of each case, specifically recalled by the ECJ in its case law.[20]

Q14

How could the application of these horizontal clauses be facilitated and ensured in practice?

6. CONCLUSION AND FOLLOW-UP

The Commission aims to launch a broad discussion among all relevant stakeholders. All EU institutions, national, regional and local authorities, candidate countries, third-country partners, intergovernmental and non-governmental organisations, all state actors and private service providers involved with family members, academia, social partners, civil society organisations and individuals are invited to contribute by replying the above questions.

The Commission plans to organise a public hearing. In order to prepare it the Commission invites all interested parties to send their responses to this consultation in writing no later than 1 March 2012 to:

Immigration and Integration Unit – "Green Paper on Family reunification"
Directorate General Home Affairs
European Commission
B-1049 Brussels
e-mail: HOME-family-reunification-green-paper@ec.europa.eu
All relevant contributions will be published on the web portal 'Your Voice in Europe'
http://ec.europa.eu/yourvoice/consultations/index_en.htm

19 COM (2008) 610 p 11.
20 C-540/03; ECJ C-578/08.

Annex: Family reunification in numbers

Total number of residence permits issued to third country nationals joining non-EU citizens (family reasons, compared to total number of residence permits issued to third country nationals (all reasons)

	Family related first permits for TCNs joining non-EU citizens			Total first residence permits issued to TCNs, all reasons			Share of permits issued to TCNs joining non-EU citizens to total first permits issued to TCNs		
COUNTRY/YEAR	2008	2009	2010	2008	2009	2010	2008	2009	2010
Belgium	7,333	8,596	9,997	46,201	58,939	67,653	15.9	14.6	14.8
Bulgaria	1,480	1,482	1,725	3,933	4,385	4,051	37.6	33.8	42.6
Czech Republic	9,712	8,281	13,398	61,350	27,539	34,653	15.8	30.1	38.7
Denmark	:	1,410	1,490	31,655	30,255	28,576	:	4.7	5.2
Germany	29,215	29,761	28,200	114,289	121,954	117,202	25.6	24.4	24.1
Estonia	:	:	:	3,884	3,777	2,647	:	:	:
Ireland	456	568	300	28,926	25,509	22,235	1.6	2.2	1.3
Greece	18,684	19,570	13,398	40,411	45,148	33,623	46.2	43.3	39.8
Spain	103,640	82,521	89,905	399,827	290,813	257,918	25.9	28.4	34.9
France	32,333	29,607	29,400	188,723	193,500	194,973	17.1	15.3	15.1
Italy	60,134	70,904	160,200	550,226	506,833	589,988	10.9	14.0	27.2
Cyprus	1	1	741	25,156	25,638	19,139	0.0	0.0	3.9
Latvia	1,498	414	413	7,706	2,304	2,329	19.4	18.0	17.7
Lithuania	641	764	691	5,298	2,659	1,861	12.1	28.7	37.1
Luxembourg	:	:	:	:	:	:	:	:	:
Hungary	5,337	1,144	1,349	37,486	14,289	14,601	14.2	8.0	9.2
Malta	172	61	30	4,989	3,682	2,763	3.4	1.7	1.1
Netherlands	:	:	:	62,589	56,489	54,478	:	:	:
Austria	7,891	7,651	7,838	21,783	28,035	30,596	36.2	27.3	25.6
Poland	8,805	8,549	598	40,907	33,427	101,574	21.5	25.6	0.6
Portugal	17,087	11,036	11,967	63,715	46,324	37,010	26.8	23.8	32.3
Romania	1,216	1,261	910	19,354	15,380	10,218	6.3	8.2	8.9
Slovenia	0	2,110	2,231	29,215	15,759	7,537	0.0	13.4	29.6
Slovakia	619	640	697	8,025	5,336	4,373	7.7	12.0	15.9
Finland	4,915	4,304	4,302	21,873	18,034	19,210	22.5	23.9	22.4
Sweden	35,050	36,325	25,358	84,144	91,337	74,931	41.7	39.8	33.8
United Kingdom	106,538	96,341	103,187	633,170	671,324	732,208	16.8	14.4	14.1
EU above[21]	**452,757**	**423,301**	**508,325**	**2,534,835**	**2,338,669**	**2,466,347**	**17.9**	**18.1**	**20.6**

Source of the data: Eurostat

Data from years before 2008 are not available as the data collection on residence permits was established by Regulation 862/2007, with 2008 as first reference year. Estonia and the Netherlands have not provided data on first permits issued to TCNs joining an non-EU

[21] EU total, excluding those Member States for which data are not available.

citizens, as these data cannot be distinguisehd from other permits issued for family related reasons. Denmark did not provide data for 2008. Luxembourg did not provide any data for 2008-2010.

The relative low overall ratio of permits issued for family reasons as opposed to the other permits is due to the fact that this statistic only covers the Family reunification scenario, and does not include those third-country national family members who join EU nationals.

Number of first residence permits issued to third country nationals joining non-EU citizens for family related reasons, by type of family member.

REASON	Family reasons: Person joining a non EU citizen			
COUNTRY/YEAR - 2010	Total	Spouse/partner joining a non EU citizen	Child joining a non EU citizen	Other family member joining a non EU citizen
Belgium	9,997	4,157	5,831	9
Bulgaria	1,725	:	:	:
Czech Republic	13,398	4,547	7,626	1,225
Denmark	1,490	600	890	0
Germany	28,200	11,912	15,895	393
Estonia	:	:	:	:
Ireland	300	112	117	71
Greece	13,398	4,044	9,354	0
Spain	89,905	19,140	69,099	1,666
France	29,400	:	:	:
Italy	160,200	67,509	70,336	22,355
Cyprus	741	:	:	:
Latvia	413	254	78	81
Lithuania	691	:	:	:
Luxembourg	:	:	:	:
Hungary	1,349	0	794	555
Malta	30	2	21	7
Netherlands	:	:	:	:
Austria	7,838	:	:	:
Poland	598	291	286	21
Portugal	11,967	916	1,013	10,038
Romania	910	424	429	57
Slovenia	2,231	:	:	:
Slovakia	697	401	75	0
Finland	4,302	1,576	2,497	229
Sweden	25,358	18,223	6,938	197
United Kingdom	103,187	:	:	: