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Committee on Migration, Refugees and Displaced Persons

Position paper on family reunification¹

1. The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe (hereafter: "the Committee") welcomes the public consultation² on the right to family reunification of third-country nationals living in the EU (Directive 2003/86/EC)³ launched by the European Commission and is pleased to contribute to this process.

2. In this respect it would like to remind the European Commission of Recommendation 1686 (2004) on human mobility and the right to family reunion adopted by the Parliamentary Assembly in November 2004 (see appendix). In this document, the Assembly addressed its concerns on the tendency of certain member states to impose tighter restrictions than others on the right to family reunification and analysed the main provisions of the Directive.

3. From the outset the Committee would like to underline that the Directive on the right to family reunification provides a sound basis for clarifying and promoting family reunification and represents a minimum standard for member states of the European Union. **This standard can be improved upon, but any reform of the Directive should not lead to a diminution of the standards already set in the Directive.**

4. The Committee takes the opportunity to recall its position on the issue of family reunification and to emphasise the following points of concern, in view of a possible policy follow up with regard to the Directive.

a) The right to family reunification

5. The Committee underlines that member states must comply with their international legal obligations in terms of fundamental rights with regard to family reunification, such as the right to respect for family life, the right to marry, the rights of the child and the principle of non-discrimination. Of particular relevance are the guarantees of the European Convention on Human Rights⁴ and the jurisprudence of the European Court of

¹ As approved by the Committee on 24 January 2012.

² European Commission, [Consultation](#) on the right to family reunification of third-country nationals living in the EU, 15 November 2011.

³ Official Journal of the European Union, L 251, 3 October 2003, p. 12.

⁴ In particular, Article 8 ECHR guarantees the right to respect for private and family life. Although it does not contain a right to family reunification, the European Court of Human Rights provides for a limitation of states' discretionary powers to interfere in a person's private and family life, firstly in the event of entry of foreign nationals onto the territory of a state for the purpose of family reunification, and secondly in the case of deportation of foreigners, leading to the break-up of the family. Such interference may only be justified if "necessary in a democratic society". Furthermore, member states must comply with the absolute right set forth in Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) as well as with the provisions of Article 12 (Right to marry), Article 13 (Right to an effective remedy), Article 14 (Prohibition of discrimination) ECHR and Protocol No. 12 to the ECHR (General prohibition of discrimination).

Human Rights⁵ as well as the relevant recommendations of the Committee of Ministers of the Council of Europe in this field⁶. In addition, several Council of Europe conventions encourage member states to promote the right to family reunification.⁷

6. In Recommendation 1686 (2004), the Assembly noted that “the right to respect for family life is a fundamental right belonging to everyone” and that “reconstitution of the families of lawfully resident migrants and refugees by means of family reunion strengthens the policy of integration into the host society and is in the interest of social cohesion.⁸” The Assembly in the same Recommendation urged member states to protect family members against return to their countries of origin, including irregular migrants or rejected asylum seekers as well as lawfully resident migrants and refugees with a criminal record, if such a move could threaten the unity of their family.

7. The Committee also underlines the obligation to ensure the best interest of the child,⁹ and ensure that vulnerable groups, such as migrant and refugee women, are not discriminated against. Furthermore the Committee highlights the need to protect individuals against arbitrary decisions by public authorities, and ensure that each case is examined individually and that each person has a right to appeal before an independent body, in line with the jurisprudence of the European Court of Human Rights.

8. Regarding the personal scope of the Directive, the Committee calls for the inclusion of Union citizens who remain in their home country, who may also wish to benefit from family reunion. It is hard to explain why ‘own nationals’ in Member States enjoy the lowest level of international protection regarding their right to family life and family reunification. A recent example from Belgium illustrates this point. A national is required to have an income of 120 percent of the minimum wage for before being able to benefit from family reunion. This is a higher level than for non-nationals. This unfairness undermines European integration. It also has the perverse effect where naturalisation takes place, of making it more difficult for naturalised persons to enjoy family reunification.

b) The lack of harmonisation and implementation of the Directive

9. The Committee regrets the lack of harmonisation and possible derogations contained in the Directive, pointed out by the Assembly in Recommendation 1686 (2004) as well as in the first European Commission report on the implementation of the Directive¹⁰. It stresses that it is up to the European Commission to initiate the necessary changes of the existing rules as well as to monitor the correct transposition of all provisions of

⁵ With regard to the case-law of the Court on Article 3, 8 and 13 ECHR, see the Court’s [factsheet](#) on expulsions and extraditions. Further relevant cases on Article 8 ECHR are: European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Appl. No. 9214/80, Judgment of 28 May 1985; *Gül v. Switzerland*, Appl. No. 23218/94, Judgment of 19 February 1996; *Ahmut v. the Netherlands*, Appl. No. 21702/93, Judgment of 28 November 1996; *Moustaquim v. Belgium*, Appl. No. 12313/86, Judgment of 18 February 1991, *Berrehab v. Netherlands*, Appl. No. 10730/84, Judgment of 21 June 1988, *Boultif v. Switzerland*, Application No 54273/00, Judgment of 2 August 2001. See also more recent judgments, in particular those which show that member states have a positive obligation concerning admission of family members, including in particular children and not limiting the issue of family life and family to non-expulsion cases. See for example *Tuquabo-Tekle and others v. Netherlands*, Appl. No. 60665/00, Judgment of 1 December 2005, *Rodrigues da Silva and Hoogkamer v. Netherlands*, Appl. No. 50435/99, Judgment of 31 January 2006, *Nunez v. Norway*, Appl. No. 55597/09, Judgment of 28 June 2011, and *Osman v. Denmark* Application No. 38058/09 Judgment of 14 June 2011. With regard to the case law on Article 14 as well as procedural safeguards of Article 6 ECHR, see the Court’s [factsheet](#) on social welfare.

⁶ Committee of Ministers of the Council of Europe, Recommendation No. [R \(99\) 12](#) on the return of rejected asylum seekers of 18 May 1999, Recommendation No. [R \(99\) 23](#) on family reunion for refugees and other persons in need of international protection of 15 December 1999, Recommendation [Rec\(2002\)4](#) on the legal status of persons admitted for family reunification of 26 March 2002. See also Reply from the Committee of Ministers to Assembly Recommendation 1686 (2004) on human mobility and the right to family reunion, [Doc. 10581](#) of 17 June 2005.

⁷ Article 19 para. 6 of the European Social Charter ([ETS No. 035](#)) of 1961, Article 19 para. 6 of the revised European Social Charter ([ETS No. 163](#)) of 1996, and Article 12 of the European Convention on the legal status of migrant workers ([ETS No. 093](#)) of 1977.

⁸ Recommendation 1686 (2004) para 1 and para 6. There are other Recommendations and Resolutions of the Assembly which deal with different aspects of the right to family life and integration. For example in Resolution 1618 (2008) on the State of democracy in Europe: Measures to improve the democratic participation of migrants the Assembly stated that “Requirements relating to language skills should not constitute an obstacle for the exercise of the right to family life;”

⁹ Court of Justice of the European Union, Judgment in Case C-540/03 of 27 June 2006, *European Parliament v Council of the European Union*, in which the Court of Justice decided that EU member states must apply the Directive’s rules in a manner consistent with the protection of fundamental rights, notably regarding the right to respect for family life and the principle of the best interest of the child.

¹⁰ European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, [COM\(2008\) 610 final](#), 8 October 2008.

the Directive and member states' compliance with their international obligations regarding family reunification.

10. As family reunification continues to be one of the main reasons for immigration to Europe, there is a need to have harmonised rules with regard to the conditions, procedures and related rights. On the contrary, derogations that enable states, *inter alia*, to make applications subject to restrictive financial and housing-related conditions, integration criteria, or age limits, may pose a threat to the right to respect for family life, particularly the rights granted to children, and reinforce the risk of social exclusion of certain nationals of non-EU member states. These derogations and optional provisions allowing for wide discretion should be harmonised and restricted, and all provisions used only by few or none of the EU member states should be withdrawn in a modified version of the Directive.

c) The definition of family

11. In Recommendation 1686 (2004), the Assembly highlighted the lack of a common definition of the concept of family at European level (cf. Article 4 of the Directive) and urged member states to apply, where possible and appropriate, a broad interpretation. Such a common definition should include in particular members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, as well as dependent adult children and dependent parents on the basis of the principle of dependency. This position is in line with the interpretation of the concept of family life of the European Court of Human Rights.¹¹

12. In addition, possible derogations, including a minimum age for the spouse which differs from the age of legal majority (cf. Article 4(5)) and the two stand-still clause derogations (Articles 4(1) last indent and 4(6))¹² should be withdrawn and harmonised in compliance with fundamental rights. Cases of abusive relationships within reunited families should be detected and dealt with in a fair and humane manner and it must be ensured that victims of domestic violence or forced marriage are not sent back to their countries of origin against their will. Spouses should be entitled to an autonomous residence permit as soon as possible and the current waiting period of five years is too long and should be shortened. This is particularly important for those who may be victims of domestic violence or other problems.

d) The conditions for the exercise of the right to family reunification

13. As the reconstitution of the family in the context of family reunification strengthens the policy of integration into the host society, and is in the interest of social cohesion, the Assembly in its Recommendation 1686 (2004) reminded member states to impose less strict conditions for applicants. This is particularly so in respect of financial guarantees, health insurance and housing. It is also necessary to provide support for all vulnerable groups, particularly women migrants and refugees, in order to avoid any discrimination.

14. Therefore, the Committee believes that it is preferable to keep to a minimum the conditions that states can impose, and better harmonise the situation to avoid differing levels between states. The Committee is therefore not in favour of the optional clauses. In any case, it welcomes the position of the European Commission suggesting that the admissibility of pre-entry and integration measures should depend on whether they serve the purpose of facilitating integration and whether they respect the principle of proportionality. Decisions on the application for family reunification in relation to passing tests should be subject to safeguards and take into account specific individual circumstances of vulnerable persons and whether there are available and accessible facilities for members wishing to join their family. From experience it is known that the most vulnerable family members (poorly educated, aged, those living in developing or conflict or post conflict countries) have the greatest difficulty in meeting these integration requirements. As a result, they have fewer possibilities of benefitting from family reunification and this has an adverse effect on the integration of the family members who have already migrated. Therefore the Committee is of the opinion that a knowledge requirement (regarding for example the language or society of the host states) as a condition for family reunification is in itself discriminatory and a threat to family life, and therefore not in line with the purpose of the Family Reunification Directive.

¹¹ According to the European Court of Human Rights, the concept of family life covers the relationship between a parent and his/ her child even if the child's parents are divorced or have never been married and the parent who has not been awarded custody. It does also cover the relationship between an adult and his or her parents and brothers or sisters, themselves adults.

¹² The two stand-still derogations allow the application of integration conditions for children aged over 12 years arriving independently (used by only one EU member state) and of an obligation for children to submit applications before the age of 15 (not used by any EU member state).

15. The condition requiring a sponsor to have reasonable prospects of obtaining the right of permanent residence (cf. Article 3(1)) is problematic, as it could lead to the exclusion of almost any third-country national from the scope of the Directive. While this mainly leads to the exclusion of permit holders with a temporary goal, such as *au pairs* and students, it leaves a great deal of discretion in its application to member states. In addition, the possibility of introducing a minimum period of lawful residence of the sponsor and the derogation on reception capacities providing for a 3 year waiting period should be withdrawn.

e) The status and equal rights of family members

16. The Committee recalls the position of the Assembly in Recommendation 1686 (2004)¹³ in relation to the status and equal rights of reunited family members, urging member states to grant them legal status, enabling them to integrate fully into the host society, and to encourage the issuing of an autonomous residence permit to the spouse, non-married partner and children who reach the age of majority, in order to afford them protection in the event of deportation, divorce, separation or the death of the principal right-holder (Article 13 and 15 of the Directive). In addition, specific rules should foresee the situation of conflict between the duration of a first residence permit granted to family members and the remaining validity of the sponsor's renewable residence permit to avoid legal uncertainty (cf. Article 13(2) and (3) of the Directive).

17. Moreover, the Committee recalls that Recommendation Rec(2002)4 of the Committee of Ministers calls on member states to ensure that their legislation guarantees equal access to the labour market, social rights and, subject to certain conditions, participation in political life for all persons admitted under family reunification in line with the principle of equality (cf. Article 14 of the ECHR). Regarding these rights, the more favourable provisions of the European Social Charter, the revised European Social Charter and the European Convention on the legal status of migrant workers should be duly taken into account.¹⁴

f) Asylum related questions

18. With regard to asylum related questions, the Assembly in its Recommendation 1686 (2004) expressed its regret that the Directive does not recognise the right to family reunification for persons granted subsidiary protection (cf. Article 3(2)(c) of the Directive) and urged member states to grant the right to this category of persons. The Assembly also recommended that member states facilitate family reunification before the completion of the procedure for determining refugee status for humanitarian reasons in exceptional cases. This is currently excluded from the scope of the Directive (cf. Article 3(2)(a) of the Directive) but should not be. In the view of the Committee, beneficiaries of subsidiary protection should be included in the scope of the Directive and benefit from the more favourable rules to achieve the aim of creating a uniform status of protection. This would be in line with the recent recast of Directive 2003/109 concerning the status of third-country nationals who are long-term residents¹⁵. The Committee also regrets that subsidiary protection is still not treated equally in the recast of the Qualification Directive¹⁶.

19. The Assembly also welcomed the preferential treatment granted to refugees. Therefore, possible limitations of the application of more favourable provisions of the Directive to refugees (Articles 9(2) and 12(1)) should be deleted, as they do not take sufficiently into account their vulnerability and the particularities of their situation. For example the provision under Article 12 para. 1 of the Directive which allows states to require applications to be submitted within 3 months of being granted refugee status is unrealistic. Refugees may have all sorts of problems keeping to this deadline including the problem of contacting relatives in war and conflict areas and finding out where they are. Refugees may also be deeply traumatised and not be in a position to carry out such applications within the deadline. Furthermore, family reunification, as mentioned earlier, should be ensured for wider categories of family members of refugees. This should be based on the principle of dependency in line with the Assembly position on the concept of family, as well as the interpretation of the European Court of Human Rights.

Conclusion

20. In view of the above points, the Committee calls for a modification of the Directive allowing for genuine harmonisation of the right to family reunification from the standpoint of definition of the family, conditions and procedures for granting reunification and the status and associated rights to be attached. It emphasises the need to include beneficiaries of subsidiary protection in the scope of the Directive and to ensure full

¹³ PACE Recommendation 1686 (2004), para 12. iii.]

¹⁴ See footnote No. 7.

¹⁵ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

¹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

compliance by EU member states of their international legal obligations with regard to human rights and family reunification.

Recommendation 1686 (2004)¹⁷**Human mobility and the right to family reunion**

1. The right to respect for family life is a fundamental right belonging to everyone and one which is secured by a number of international legal instruments, such as the Universal Declaration of Human Rights (Article 16) and the European Convention on Human Rights (Article 8).
2. Family reunion is the term used to describe a situation in which members of a family come to join one of its members (the “sponsor”), who is lawfully resident in another country.
3. Several Council of Europe conventions, such as the European Social Charter (1961), the revised European Social Charter (1996) and the European Convention on the Legal Status of Migrant Workers (1977), as well as the United Nations Convention on the Rights of the Child (1989), encourage member states to promote the right to family reunion.
4. The right to family reunion in the European Union is one which applies to nationals of non-European Union member states and may be exercised, in principle, by migrants lawfully resident in a member state, persons having obtained refugee status according to the 1951 Geneva Convention relating to the Status of Refugees, as well as persons having been granted complementary or subsidiary protection.
5. The Parliamentary Assembly and also the Committee of Ministers in its recent recommendation on the legal status of persons admitted for family reunification (Rec(2002)4), reiterate their view that any immigration policy has a duty, in accordance with the principles declared at the Tampere European Council (1999), to uphold the principles of equal treatment between nationals of non-EU member states having legal status and citizens of the European Union and must consequently seek to ensure treatment on an equal footing with nationals.
6. The reconstitution of the families of lawfully resident migrants and refugees by means of family reunion strengthens the policy of integration into the host society and is in the interests of social cohesion.
7. However, the concept of “family” underlying that of family reunion has not been defined at European level and varies in particular according to the value and importance attached to the principle of dependence.
8. In its [Recommendation 1327](#) (1997) on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe, the Assembly urged member states to interpret the concept of asylum seekers’ families as including *de facto* family members (natural family), for example an asylum seeker’s partner or natural children as well as elderly, infirm or otherwise dependent relations.
9. The Assembly notes with some concern that certain member states have shown a tendency to revise their immigration policy and impose tighter restrictions on the right to family reunion.
10. While welcoming the preferential treatment granted to refugees in the recent European Union Council Directive on the right to family reunification (2003/86/EC), the Assembly expresses its regret that it does not recognise the right to family reunion for persons granted subsidiary protection, nor does it lay down harmonised provisions with regard to the conditions, procedures and timeframes for granting resident status and associated rights.
11. The Assembly also believes that certain provisions allowing for derogations that enable states to make applications subject to financial and housing-related conditions, integration criteria or age limits could, if applied strictly, pose a threat to the right to respect for family life, particularly the rights granted to children, and reinforce the risk of social exclusion of certain nationals of non-EU member states.
12. Consequently, the Assembly recommends that the Committee of Ministers:

¹⁷ Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2004 (see [Doc. 10123](#), report of the Committee on Migration, Refugees and Population, rapporteur: Ms Zapfl-Helbling; and [Doc. 10179](#), opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Mr Gaburro).

- i. increase its monitoring of compliance by member states with international legal instruments regarding family reunion, particularly compliance with the European Convention on Human Rights and the relevant recommendations of the Committee of Ministers in this field;
- ii. draw up proposals for the harmonisation and implementation of family reunion policies in member states and lay down a common definition of the family unit and rules regarding specific circumstances based on the recommendations set out in sub-paragraph 12.iii;
- iii. address, in the meantime, a recommendation to member states, urging them:
 - a. to apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners, children born out of wedlock, children in joint custody, dependent adult children and dependent parents;
 - b. to grant the right to family reunion to persons benefiting from subsidiary protection;
 - c. to lay down that reasons must be given for any refusal to grant an application for family reunion and ensure that such a decision can be appealed before an independent body;
 - d. to impose less strict conditions for applicants in respect of financial guarantees, health insurance and housing and, in particular, to avoid any discrimination against women migrants and refugees which could result from their imposition;
 - e. to make administrative procedures as straightforward and transparent as possible and to harmonise at European level waiting periods, limiting them to a maximum of twelve months, and not to consider as grounds for rejecting the application the failure to provide certain documents that are not instrumental in the fulfillment of the conditions for family reunification;
 - f. to consider applications in a positive and humane spirit, providing necessary support for all vulnerable groups and applying appropriate assistance measures to refugees in the light of any economic difficulties they may be experiencing;
 - g. to facilitate family reunion, referring to Parliamentary Assembly [Recommendation 1596](#) (2003) on the situation of young migrants in Europe, before the completion of the sometimes very lengthy procedure for determining refugee status, in exceptional cases and for humanitarian reasons;
 - h. not to return, in conformity with the case-law of the European Court of Human Rights and referring to Article 8 of the European Convention on Human Rights, illegal immigrants or asylum seekers whose application has been rejected if such a move could threaten the unity of their family, but rather to seek to solve the problem by bringing their situation into conformity with the law for humanitarian reasons;
 - i. not to return lawfully resident migrants and refugees to their countries of origin after they have served sentences for criminal behaviour, provided their main family ties are in the host country, and not to reject applications for family reunion solely on the grounds that the applicant (be it the “sponsor” or the “sponsored”) has a criminal record;
 - j. to grant members of a reunited family legal status enabling them to integrate fully into the host society and to encourage the issuing of an autonomous residence permit to the spouse, non-married partner and children who reach the age of majority in order to afford them protection in the event of deportation, divorce, separation or the death of the principal right-holder;
 - k. to ensure that cases of abusive relationships within reunited families are detected and dealt with in a fair and humane manner, and that, in particular, women who are victims of domestic violence or forced marriage are not sent back to their countries of origin against their will;
 - l. to authorise members of the family of a non-national living lawfully in a member state to work in an employed or a self-employed capacity as soon as they are issued with a residence permit;
 - m. to introduce special programmes for the integration of families that have been reunited.