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AK Position Paper

Green Paper on the right to family reunification of members of third countries living in the European Union (Council Directive 2003/86/EC)

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About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

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Director

Executive Summary

The AK has been demanding for a long time that Austrian migration law should be assessed as to its suitability with regard to integration

In 2003, a Directive was issued for the purpose of family reunification that had to be implemented into national law by October 2005. Now the EU Commission wants to submit the rules to an evaluation and has published a Green Paper for this purpose in which institutions as well as the civil population are asked to take a position on the issue.

The Federal Chamber of Labour is very happy to do so.

It is worthy of note that the European Standards are to be submitted to such an evaluation. In this respect, we are grateful to the Federal Ministry of the Interior for the opportunity to also participate in this domestic process.

We would like to point out on this occasion, however, that we have been demanding for a long time that Austrian migration law should be assessed as to its suitability with regard to integration. We therefore take this opportunity to reiterate this demand. We are of the opinion that many provisions in national immigration law do not contribute to successful integration.

- In this sense, all legal norms, especially however, those that are directly concerned with migration issues, should be evaluated to assess whether they contribute to the harmonious coexistence of all residents in Austria, or whether this is not the case.

Our main contentions for an evaluation of the provisions of the family reunification Directive are:

- No knowledge of the language should be required prior to making a first application as this does not bring any added value to successful integration.

- Integration courses after arrival should be designed so as to give consideration to individual, personal circumstances. Not prolonging settlement/resident permits if a test has not been successfully completed after two years does not fulfil this criterion.

- The age of spouses or partners in subsequent family reunification migration should not be higher than the legal age. A minimum age of 21 is not a valid means of combatting forced marriages.

The AK position in detail

Concerning question 1

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?

It makes absolute sense that a right to family reunification, especially one that is in the nature of universal European law, should not apply in the case of a sole short stay in the territory of a member state. However, the current regulation allows interpretations that go too far. In Austrian law, for instance, pastoral workers and, to some extent, academics only obtain an authorisation to take up residence, which means that these persons do not count as being established and cannot receive an unlimited entitlement, in the form of "EU Permanent Residence", even after five years. These persons also do not fall under the Directive's scope of application. However, the fact is that the sojourn of these persons is actually completely based on permanence; the legal system, however, does not reflect this in these cases. There is no factual reason that can be ascertained which would deny these people the right to family reunification under European law. It is true that in most cases nationally family reunion is possible, but the legal position of those affected is then decisively weaker. For example, family members do not have access to the employment market. There are also misgivings from the point of view of European law on whether the exclusion of artists, pastoral workers and other groups of persons from the entitlement of "EU Permanent Residence", in the sense of Council Directive 2003/109/EC, conforms to European law; this is, however, not the subject of the present opinion.

Although this does not specifically relate to the substance of the question, we would like to point out that the exclusion of member states' own citizens from the Directive's scope of application can lead to worse conditions for family reunion of a member state's own citizens as compared to third-country nationals.

At least as a minimum standard, family reunion for member states' own citizens should be treated in the same manner.

A possible simplification would also be to harmonise the definition of the term "family members" and not to, for instance, differentiate between third-country family members of EU citizens according to

Directive 2004/38/EC and family members of third-country nationals according to Directive 2003/86/EC. These differentiations are not comprehensible for the family members affected and standardising these for the purpose of simplifying legislation would be desirable. This would also lead to a decisively better legal position for those affected.

Concerning question 2

The Federal Chamber of Labour supports the goal of preventing forced marriages

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?

The Federal Chamber of Labour supports the goal of preventing forced marriages. Even if this is not always successful, the legal system should not support these through the opportunity for family reunion. The age of migration at 21 for both spouses goes far beyond this objective. In our view, it is recommended that the phenomenon of forced marriage be more closely observed as it is neither clarified in a quantified nor in a differentiated manner. Here, a clear difference has to be made between arranged and forced marriages.

Setting the age of marriage at 21 years of age in no way prevents forced marriages, but only prolongs the waiting period for family reunification. What is more important is that mothers and young women need appropriate information, education and support in order to prevent forced marriages or, as the case may be, at least to ensure that more concrete steps can be adopted even after family reunification has taken place.

We strongly believe that the family reunion age should be not be disassociated from the age of majority; this passage should therefore be removed from the Directive.

Concerning question 3

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?

It is reasonable that children should be able to migrate as soon as possible, as inclusion in the member state is then far simpler, and this extends from social integration to acquiring the language. Nevertheless, older children should not be excluded because of this.

Actually, this possibility is already limited in the Directive by the fact that, at the time of implementation in national legislation, this type of regulation was already in existence. From the point of view of the Federal Chamber of Labour, this provision should be dispensed with so that subsequent migration is in any case possible at least up to reaching the age of majority.

The Federal Chamber of Labour has always stressed the importance of acquiring the language for successful integration and equitable participation in society

Concerning question 4

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?

The provisions of Art 4 Para 2 and 3 regarding the inclusion of other relatives are of a facultative nature. In as much as this is the case, it should also be possible to include other relatives. Grandchildren, in particular, should be named specifically in this respect.

Concerning question 5

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?

1/ Language competence before immigration

Since July 2011, Austrian law stipulates that evidence of language competence must already be provided when the first application for a settlement residence permit is made. An exception to this is made mainly for leave to remain permits that are issued for employment immigration (Red-White-Red Card). This makes the required evidence of competence in the German language primarily relevant for family reunion.

The Federal Chamber of Labour has always stressed the importance of acquiring the language for successful integration and equitable participation in society. However, we see the requirement to prove German language competence as early on as by the first application (in most cases before arriving in Austria) very critically. We doubt that the compulsion to show evidence of language competence prior to arrival is actually useful for the integra-

tion of these persons in Austria. What does make sense are offers related to integration directly after arrival or issuing the leave to remain permit – naturally including those particularly for language acquisition. The planned legislation appears, however, to serve the purpose of selection more than integration. In cases of family reunion migration, such a background should definitely be rejected.

Not every third country has sufficient language institutes, and even if they do, these are often in other provinces and cities located far away. It is, therefore, not reasonable to expect women – often with small children – to fulfil this requirement

We consider the requirement of language competence, for which evidence must be provided in the home country before arrival, as a clear barrier to family reunification. As the language courses needed to meet this requirement are usually only offered in larger cities in third countries, if at all, this means an enormous financial outlay and time (travel) outlay for family members from remote areas to acquire language competence in their home country.

Requiring German language skills before immigration presents an enormous disadvantage, especially for women (who are reuniting with their families). Not every third country has sufficient language institutes, and even if they do, these are often in other provinces and cities located far away. It is, therefore, not reasonable to expect women – often with small children – to fulfil this requirement. In many cases, the certified institutes are only to be found in large cities. Another point to note is that this requirement does not give any consideration to illiterate people (who are often women), women from minority groups or persons who have yet to become literate in one language.

At least partially, the Austrian provision contradicts stringent EU law: according to Directive 2003/86/EC (on the right to family reunification), integration requirements in the case of children over 12 years old who follow their families alone (e.g. without their father or mother accompanying them) can only be introduced if these were already effective prior to the implementation of the Council Directive. In this respect, there is therefore, according to European law, a "standstill" clause. For this group in any case, § 21a of the Settlement and Residence Act (NAG) in the current version is not feasible due to reasons pertinent to European law and has to remain inapplicable.

It is, however, also very questionable whether Art 7 Para 2 of Directive 2003/86/EC can be reconciled with requirements prior to immigration. This is because, while integration requirements can be made, whether this is possible before arrival has not been conclusively clarified in terms of European law, as there is no adjudication by the European Court of Justice on this topic. Nevertheless, in the case of Imran (C-155/11), where no decision as regards content was made because

it was deemed unnecessary to give a ruling, it was rightly put forward that mandatory courses prior to immigration are not reconcilable with the Council Directive on family reunification.

Stringent evidence for family members of Turkish workers immigrating for family reunification furthermore contradicts, in the opinion of the Federal Chamber of Labour, the standstill clause of the EEC-Turkey Association Agreement. The European Court of Justice recently addressed this issue (even if in a somewhat different context, in the Dereci case, C-256/11).

We therefore reject such a provision that would require evidence of language competence to be provided as early as prior to arrival, due to applicable European law, as well as reasons related to its meaningfulness and practicability from the point of view of integration policy.

2/ Integration requirements after immigration

According to Art 7 Para 2 of the Council Directive, the member states can require integration measures to be fulfilled. However, it is unclear what consequences the member states can establish for non-fulfilment or fulfilment which is not timely.

The deadline by which Module 1 of the Austrian Integration Agreement (principally successfully completing a German language integration course) must be successfully completed has been significantly reduced (from five to now only two years), and an extension can no longer be granted informally, but must instead occur on application through a formal procedure. This provision is enough to threaten family members who are following for reunion (as well as other groups) as far as their leave to remain is concerned, because they are weaker learners. Above all, this short deadline leads to a climate of insecurity.

It is questionable in terms of European law whether successfully completing an examination is reconcilable with Art 7 Para 2 of the Council Directive. In our opinion, serious attempts should be sufficient as integration requirements have, in the end, to always be directed at real people and their abilities.

Concerning question 6

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?

In any case, by posing this question the European Commission initiates a discussion on whether a quota system can be retained, such as the one intended in Austrian immigration law regarding family members migrating for reunification from third countries. In the Green Book, the European Commission is clearly of the opinion that the Austrian quota system principally contradicts Art 8 of the Council Directive; indications for this can also be found in Austrian literature. There have been no proceedings on this to date, neither at the European or national level. The Austrian system does not pose any problems in respect of administrative application because, as a general rule, there is room for all family members who apply, within the quota of the year in question.

From the point of view of educational policy, it is to be recommended that it is made possible for children to join the sponsor for reunification very quickly so that they can enter the educational system in Austria early on and to ensure that the way can be paved for them to acquire a good education

It should also be stressed that, from the point of view of family policy, family reunification must, in any case, be allowed as soon as possible. It is primarily women and children from third countries who are affected; long-term separation of family members cannot be expected, it is inhumane and leads to unstable family conditions. The role of the father is often taken over by other family members in the country of origin and this makes it difficult for the natural father to resume this role again. Children find it difficult to accept the father as a family member once more after long separation. From the point of view of educational policy, it is to be recommended that it is made possible for children to join the sponsor for reunification very quickly so that they can enter the educational system in Austria early on and to ensure that the way can be paved for them to acquire a good education. This constitutes an important cornerstone for successful integration in Austria.

In the view of the Federal Chamber of Labour, an effective rethinking of the Austrian quota requirement should take place, as this requirement only begins to take effect in the case of family members from third countries – apart from some small quotas such as those affected by changes in status [due to death or divorce of partners] or persons of independent means.

In this respect, the possibility of a 3-year waiting period, as is envisaged in Art 8, can to all intents and purposes be discussed.

Concerning question 8

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)?

At present, the Council Directive excludes those with subsidiary protection status from the scope of application. In most cases of application, however, the actual situation of these persons is the same as for refugees, given that those with subsidiary protection status are also unable to return to their home countries. In Austria, this group has immediate access to the employment market (according to domestic law) and after five years a transition to a leave to remain entitlement is possible, according to the Settlement and Residence Act (NAG).

An alignment of the rights of refugees and persons with subsidiary protection status would be welcome by those affected, as well as by the aid organisations and legal consultants who have to retain an overview of the applicable provisions.

Concerning question 9

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?

The Federal Chamber of Labour sees no reason for a different treatment of family reunification for refugees and other migrants. As this is the case, we support efforts to align the rights of refugees to those of other members of third countries, also with respect to family reunification.

Concerning question 12

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?

The Federal Chamber of Labour envisages a harmonisation of the costs involved in the application procedures for residence permits for family reunification, which would make sense, especially in a mutual space of security and law such as the European Union. This would not allow financial considerations to play a role in the first place

when deciding on immigration/family reunification. However, this type of regulation on procedural costs has to be designed in such a way to ensure that it does not make the right of family reunification impossible. Here, consideration should be given to the fact that larger families can also be heavily burdened by the sum of costs which, taken as single items, are not unreasonable.

Should you have any further questions please do not hesitate to contact

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