



## EU-CITZEN: ACADEMIC NETWORK ON EUROPEAN CITIZENSHIP RIGHTS

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### Study for Type B Report – Facilitation of entry and residence of ‘other family members’ of Union citizens

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## List of abbreviations and definitions

Abbreviation	Definition
A-G	Advocate General
AVG	<i>Allgemeines Verwaltungsverfahrensgesetz</i> (General Administrative Procedure Law) [AT]
Awb	<i>Algemene wet bestuursrecht</i> (General Administrative Law Act) [NL]
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ELKS	<i>Euroopa Liidu kodaniku seadus</i> (Citizen of the European Union Act) [EE]
ETAP	<i>Euroopa Liidu kodaniku ja tema perekonnaliikme elamisõiguse taotlemise, andmise ning selle pikendamise ja lõpetamise kord</i> (Procedure for applying for, granting, extending and terminating the right of residence of a citizen of the European Union and his/her family member) [EE]
EU	European Union
EU CFR	Charter of Fundamental Rights of the European Union
FPG	<i>Fremdenpolizeigesetz 2005</i> (Alien Police Act 2005) [AT]
Harmtv.	<i>2007. évi II. Törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról</i> (Act II of 2007 on the Conditions of Entry and Residence of Third-Country Nationals) [HU]
HMS	<i>Haldusmenetluse seadus</i> (Administrative Procedure Act) [EE]
LERD	Law on Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and Their Family Members ( <i>Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства</i> ) [BG]
MS	Member State
n.b.	<i>nota bene</i>
NAG	<i>Niederlassungs- und Aufenthaltsgesetz</i> (Settlement and Residence Act) [AT]
P.D.	<i>Προεδρικό διάταγμα</i> (Presidential Decree) [EL]
SEF	<i>Serviço de Estrangeiros e Fronteiras</i> (Foreigners and Borders Service) [PT]
Szmtv.	<i>2007. évi I. Törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról</i> (Act I of 2007 on the Conditions of Entry and Residence of Persons with the Right of Free Movement and Residence) [HU]
TCN	third-country national
TFEU	Treaty on the Functioning of the European Union
Vb 2000	<i>Vreemdelingenbesluit 2000</i> (Foreigners' Decree 2000) [NL]
Vc 2000 (B)	<i>Vreemdelingendecret 2000 (B)</i> (Foreigners' Circular 2000 (B)) [NL]
VMS	<i>Välismaalaste seadus</i> (Aliens Act) [EE]
Vw 2000	<i>Vreemdelingenwet 2000</i> (Foreigners' Act 2000) [NL]



## 1. Introduction and methodology

Union citizens are entitled, under Article 20(2)(a) and 21 TFEU, to move and reside freely within the territory of the Member States. The specificities of this free movement right is enshrined in secondary EU law, more specifically the Free Movement Directive (Directive 2004/38).<sup>1</sup> A corollary to this right of Union citizens is the extension of free movement rights to their family members. This is specifically stated in the preamble to the Free Movement Directive, noting that “[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality”.<sup>2</sup>

The Free Movement Directive contains its own, specific, definition of what constitutes ‘family members’ for the purposes of free movement. Under Article 2(2) of the Free Movement Directive only includes as ‘family members’ spouses, registered partners (under certain conditions), minor or dependent direct descendants, and dependent direct relatives in ascending line. Only these ‘direct’ family member of Union citizens may benefit from residence rights pursuant to the Free Movement Directive. Persons other than direct family members of Union citizens are, pursuant to Article 3(2) of the Free Movement Directive, accorded a degree of enhanced treatment.

This study for EU-CITIZEN’s Type B report for 2019 aims to examine the position accorded to a specific subset of persons under this ‘family in a broader sense’, namely those members of Union citizens’ families covered by Article 3(2)(a) of Directive 2004/38. It specifically aims to explore which categories of persons are covered under this provision, the extent of the rights and benefits they are able to receive pursuant to this provision, as well as the criteria used to establish the eligibility under the Directive.

In light of the focus of this study on the legal interpretation of (Article 3(2)(a) of) Directive 2004/38 and its transposition and implementation in the EU Member States, the research for this study will primarily be based on desk research. The reference sources for the desk research includes existing literature on the Free Movement Directive, more specifically, Article 3(2) thereof, as well as primary and secondary legal sources of EU law and legislation of the EU Member States, including case law of the Court of Justice of the EU (CJEU).

Qualitative research methods, including targeted surveys and interviews, will be used to complement the desk research. The qualitative methods aim at elucidating the specificities of transposition and implementation of the ‘facilitation of entry and residence’ of extended family members contained in Article 3(2)(a) of the Free Movement Directive.

The study shall consist of providing an overview of the Member States’ legislation of relevance for the entry and residence of extended family members (see Annex 1). In order to better identify the intricacies and diversity of manners in which Member States have transposed and implemented the facilitation required by the Free Movement Directive, the study will further include in-depth analysis of

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<sup>1</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77–123.

<sup>2</sup> See para. 6 of preamble to Dir. 2004/38/EC.



select Member States’ legislation of relevance. The selection of Member States is based on a combination of factors, including geographical balance (i.e. Northern/Southern MS, Western/Eastern MS) as well as broad category of method of transposition (based on the overview in Annex 1). The Member States’ selected are Austria, Belgium, Bulgaria, Estonia, Germany, Greece, Hungary, the Netherlands, and Portugal.

#### A brief note on terminology

The following terms will be used throughout this study with the meanings provided:

- **Union citizen:** an individual as described in Article 20(1) TFEU, who possesses the nationality of (at least) one EU Member State;
- **Mobile Union citizen:** a Union citizen who has made use of his or her free movement rights (as contained in *inter alia* Article 21 TFEU) to reside in, and is currently residing in, an EU Member State other than his or her Member State of nationality;
- **Returnee (or returning Union citizen):** a Union citizen who has made use of his or her free movement rights (as contained in *inter alia* Article 21 TFEU) to reside in an EU Member State other than his or her Member State of nationality, and who has since returned to his or her Member State of nationality;
- **Direct family member:** a family member of a Union citizen as provided for in Article 2(2) of the Free Movement Directive;
- **Extended family member:** an individual, regardless of nationality, who is a family member of a mobile Union citizen as described in Article 3(2)(a) of the Free Movement Directive (also referred to as ‘other family member’);<sup>3</sup>

<sup>3</sup> The choice for “extended family member” to denote the categories of persons falling within the scope of Article 3(2)(a) of the Free Movement Directive finds support in the relevant literature and publications (such as E. Guild, S. Peers, and J. Tomkin (2019), *The EU Citizenship Directive: A Commentary*, second edition, Oxford: Oxford University Press).



## 2. ‘Other family members’ and the personal scope of Article 3(2)(a) Directive 2004/38/EC

Directive 2004/38 extends entry and residence rights to certain family members of mobile Union citizen. This is specifically the case for spouses and registered partners (Article 2(2)(a) and (b)), their direct descendants (Article 2(2)(c)) and dependant direct ascendants (Article 2(2)(d)), as well as family members deriving residence rights from Article 21 TFEU (pursuant to the *Chen*-ruling).<sup>4</sup> It is crucial to take note of this definition of ‘family members’ under Directive 2004/38 when examining the personal scope of ‘other family members’ under Article 3(2)(a) of Directive 2004/38, as Article 3(2) of Directive 2004/38 specifically states that:

**“Without prejudice to any right to free movement and residence the persons concerned may have in their own right,** the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

- (a) any other family members, irrespective of their nationality, **not falling under the definition in point 2 of Article 2** who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; [...]

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.” (emphasis added)<sup>5</sup>

The wording of Article 3(2)(a) Directive 2004/38 therefore sets out that it does not apply to those family members of mobile Union citizens who are already entitled to *entry and residence rights* under the Directive, i.e. family members falling within the definition of Article 2(2) of Directive 2004/38. This is clearly reflected in the preamble to Directive 2004/38, which states that

“In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and **who therefore do not enjoy an automatic right of entry and residence** in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen” (emphasis added).<sup>6</sup>

Correspondingly, Article 3(2)(a) Directive 2004/38 should be interpreted as encompassing all family members of mobile Union citizens who do not derive an *automatic* entry and residence rights from the Directive. This could potentially include family members, such as direct descendants and direct relatives in the ascending line who would not meet the conditions of ‘dependency’ of Article 2(2) Directive 2004/38. To conclude otherwise would entail that such relatives would be excluded from the scope of both Article 2(2) and 3(2) of Directive 2004/38 to accompany or join their mobile Union citizen family member.

<sup>4</sup> CJEU 19 October 2004, Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639.

<sup>5</sup> Article 3(2) Directive 2004/38/EC.

<sup>6</sup> Directive 2004/38/EC, preamble, recital 6.



Article 3(2)(a) Directive 2004/38 broadly defines three categories of ‘other family members’ of mobile Union citizens whose entry and residence rights are to be facilitated by EU Member States, namely other family members who are *dependants* or *members of the household* of the mobile Union citizen concerned, as well as other family members where *serious health conditions strictly require the personal care* by the mobile Union citizen.

The CJEU has had the first opportunity to clarify the scope of Article 3(2)(a) Directive 2004/38 in the *Rahman* judgment.<sup>7</sup> Two subsequent rulings further expanded on the provision of Article 3(2)(a) Directive 2004/38, namely in the *Banger*<sup>8</sup> and *SM* judgments.<sup>9</sup> This section will focus specifically on clarifications brought by the *Rahman*, *Banger* and *SM* rulings to the personal scope of Article 3(2)(a) Directive 2004/38. Questions about the extent of procedural or substantive obligations for Member States resulting from Article 3(2)(a) Directive 2004/38 will be addressed in section 3, while the role of fundamental rights in Article 3(2)(a)-cases will be examined in section 4.

The three aforementioned judgments of the Court have provided some clarification on the following issues pertaining to the personal scope of Article 3(2)(a) Directive 2004/38:

- a) Interpretation of the term ‘other family member’;
- b) Interpretation of the ‘dependency’ criterion;
- c) Interpretation of the term ‘country from which they have come’;
- d) The moment at which extended family members must meet the conditions stipulated *inter alia* in Article 3(2)(a) Directive 2004/38;
- e) Whether ‘facilitated’ entry and residence of extended family members in the sense of Article 3(2)(a) Directive 2004/38 may be made conditional upon the continued fulfilment of the eligibility criteria;

*Ad a)* While the CJEU has yet to fully specify who can be considered as ‘other family members’ for the purpose of facilitating entry and residence pursuant to Article 3(2)(a) Directive 2004/38, the *SM* ruling has provided some clarity in this respect. *SM* concerned a minor child under permanent legal guardianship of a Union citizen in accordance with the Algerian *kafala* system.<sup>10</sup> In this specific instance, the Court concluded that the lack of a (biological or legal) parent-child relationship between the legal guardian (*kafil*) and the child (*makful*) entails that the child (*SM*) could not be considered as a ‘direct descendent’ of Mr M for the purpose of Article 2(2)(c) of Directive 2004/38.<sup>11</sup> However, the Court explicitly acknowledges – in concurrence with the referring court – that a child placed under *kafala* falls under the definition of Article 3(2)(a) Directive 2004/38.<sup>12</sup> The *SM* ruling therefore makes clear that children under legal guardianship fall within the scope *ratione personae* of Article 3(2)(a) Directive 2004/38. More interestingly, Advocate General (A-G) Campos Sánchez-Bordona refers to Article 3(2)(a) Directive 2004/38 as a route “by which a child who is not a Union citizen may enter and residence in a Member State in the company of the persons with whom he or she has a ‘family life’”, seemingly

<sup>7</sup> CJEU 5 September 2012, Case C-83/11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and others*, ECLI:EU:C:2012:519.

<sup>8</sup> CJEU 12 July 2018, Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger*, ECLI:EU:C:2018:570.

<sup>9</sup> CJEU 26 March 2019, Case C-129/18 *SM v Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:24.

<sup>10</sup> C-129/18 *SM*, paras. 23-42.

<sup>11</sup> C-129/18 *SM*, paras. 49-56.

<sup>12</sup> C-129/18 *SM*, para. 57.





indicating that the existence of ‘family life’ is sufficient to fall within the personal scope of this said provision.<sup>13</sup>

*Ad b)* In *Rahman*, the CJEU was requested to elaborate specifically on the notion of dependency in respect of Article 3(2)(a) Directive 2004/38. While the CJEU noted that Member States may determine ‘the factors to be taken into account’ in assessing whether entry and residence should be granted to extended family members, the Court specifically emphasised that such criteria must be “consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2), and which *do not deprive that provision of its effectiveness*”.<sup>14</sup> More specifically, the Luxembourg Court, in reference to recital 6 in the preamble to Directive 2004/38, notes that in examining the personal circumstances of the applicant (i.e. the extended family member concerned), Member States must take account of the various factors that may be relevant in the particular case, such as “*the extent of economic or physical dependence* and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join” (emphasis added).<sup>15</sup> It is also important to take note of A-G Bot’s opinion on the concept of ‘dependence’, and specifically that ‘dependence’ under Article 3(2)(a) Directive 2004/38 must be understood as a distinct condition from ‘members of the same household’.<sup>16</sup>

*Ad c)* Another issue raised in the preliminary reference in *Rahman* was the interpretation of the term ‘the country from which they have come’, and, more specifically, whether this ‘country’ must be the same country as the one where the mobile Union citizen resided in prior to his or her exercise of free movement rights. On this note, the CJEU explicitly stated that

“there is nothing to indicate that the term ‘country from which they have come’ or ‘country from which they are arriving’ [‘pays de provenance’] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a ‘dependant’ of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen”.<sup>17</sup>

The Luxembourg Court clearly considered that ‘other family members’ may, depending on the personal circumstances, fall within the personal scope of Article 3(2)(a) Directive 2004/38, notwithstanding that the ‘other’ family member’s last country of residence prior to accompanying or joining the mobile Union citizen concerned does not correspond to the last country of residence of the mobile Union citizen concerned prior to settling within the host Member State. In fact, the CJEU explicitly notes that ‘[i]t is clear that [close and stable family ties] may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State’.<sup>18</sup>

*Ad d)* The Court has ruled in *Rahman* on the moment in which the criteria of Article 3(2)(a) of Directive 2004/38 must have been fulfilled, stating that “the situation of dependence must exist, in the country

<sup>13</sup> C-129/18 *SM*, opinion of Advocate-General Campos Sánchez-Bordona of 26 February 2019, ECLI:EU:C:2019:140, para. 91.

<sup>14</sup> C-83/11 *Rahman*, para. 24.

<sup>15</sup> C-83/11 *Rahman*, para. 23.

<sup>16</sup> C-83/11 *Rahman*, opinion of Advocate-General Bot of 27 March 2012, ECLI:EU:C:2012:174, para. 89-90.

<sup>17</sup> C-83/11 *Rahman*, para. 31.

<sup>18</sup> C-83/11 *Rahman*, para. 33.





from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent”.<sup>19</sup> In light of the lack of further clarification on Article 3(2)(a) Directive 2004/38, it is likely that – in line with *Rahman* – the ‘other family member’ must have been dependent on, belonging to the household of, or requiring care on serious health grounds of the mobile Union citizen concerned *at the time of application* for family reunification.

*Ad e)* The CJEU has ruled in *Rahman* that host Member States are entitled to require that any continued residence by the extended family members be conditional upon the continued fulfilment of the applicable criteria of Article 3(2)(a) Directive 2004/38. Specifically in *Rahman*, the CJEU noted that “[t]he [Union] legislature did not settle [...] the question whether family members of a Union citizen who do not fall under the definition in Article 2(2) of the directive and who apply for issue of a residence card [...] can be refused a residence card on the ground that, after their entry into the host Member State, they have ceased to be dependants of that citizen”.<sup>20</sup> Accordingly, the CJEU decided that the matter falls outside of the scope of Directive 2004/38;<sup>21</sup> consequently, it is up to the (host) Member States to decide whether continued fulfilment, in this case, of the required dependency on the mobile Union citizen, is required for the issuance of a residence card. The caveat in this respect is that any such criteria determined by the Member States must respect the CJEU’s ruling of being consistent with the normal meaning of ‘facilitate’ and not deprive Article 3(2)(a) Directive 2004/38 of its effectiveness.<sup>22</sup>

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<sup>19</sup> C-83/11 *Rahman*, para. 33.

<sup>20</sup> C-83/11 *Rahman*, para. 44.

<sup>21</sup> C-83/11 *Rahman*, para. 45.

<sup>22</sup> As A-G Bot highlighted in his opinion in *Rahman*, such would be the case, for example, where the national provision would require the extended family member to have been dependent on a Union citizen for more than 20 years; see C-83/11 *Rahman*, opinion of Advocate-General Bot of 27 March 2012, ECLI:EU:C:2012:174, para. 106.



### 3. Rights of ‘other family members’ and the substance of ‘facilitation’ under EU law

This section examines the extent to which Article 3(2)(a) of Directive 2004/38 places obligation on EU Member States and/or grants rights to extended family members in respect of accompanying or joining a mobile Union citizen. Article 3(2) of Directive 2004/38 requires Member States to facilitate the entry and residence of extended family members of mobile Union citizens. Member States have taken different approaches towards this obligation to facilitate. As will be examined in section 6 of this study, a number of Member State have implemented this ‘facilitation’ by granting extended family members of mobile Union citizens *automatic entry and residence rights*,<sup>23</sup> while other Member States require extended family members to apply for entry and residence, with varying degrees of discretionary freedom for the authorities to grant or refuse the application.

Article 3(2)(a) Directive 2004/38, read in light of the CJEU’s case law, imposes certain obligations on Member States, and correspondingly, grant certain rights to extended family members. These can be categorised as *procedural* and *substantive* obligations for Member States. It is therefore essential to set out these core obligations that Member States must respect in implementing Article 3(2)(a) Directive 2004/38.

Furthermore, an extensive examination of the personal circumstances in Article 3(2)(a)-cases in light of fundamental rights – in particular the right to family life and the best interests of the child – may result in Member States being obliged to grant entry and residence to the extended family members concerned. This interaction of Article 3(2)(a) Directive 2004/38 and fundamental rights will be addressed in section 4.

#### 3.1. Core obligations of Member States: procedural rights in Article 3(2)(a)-cases

Article 3(2) Directive 2004/38 *explicitly* stipulates an essential *procedural rights* of extended family members applying to accompany or join a mobile Union citizen. Applications for entry and/or residence of extended family members must be assessed by the (host) Member State on the basis of an *extensive examination* of the *personal circumstances*.<sup>24</sup> According to the European Commission, the Member States would have to take into consideration the relationship between the extended family members and the mobile Union citizens concerned, as well as other circumstances such as the financial or physical dependence.<sup>25</sup> These possible factors to be considered have similarly been expressed by the CJEU.<sup>26</sup> The wording of Article 3(2) of Directive 2004/38, as well as the guidance of the European Commission and the case law of the CJEU, seem to indicate that decisions by Member States on applications for entry and residence by extended family members of mobile Union citizens on their

<sup>23</sup> See e.g. M.A.K. Klaassen (2015), “The right to family unification. Between migration control and human rights”, Doctoral thesis, Leiden, Universiteit Leiden, 3 November, p. 194; see further the Overview in Annex 1 to this section 6 in this study.

<sup>24</sup> See Article 3(2) Directive 2004/38/EC.

<sup>25</sup> It can be noted that Member States are not obliged to grant entry and residence *rights* to extended family members; see C83/11 *Rahman*, para. 19-21; see also European Commission (2009), Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of 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, COM(2009) 313 final, Brussels, 2.7.2009, pp. 4-5.

<sup>26</sup> See C-83/11 *Rahman*, para. 23.



territory must be taken in light of all personal circumstances and factors of the applicant(s); Member States would therefore not be permitted to decide on such applications on general grounds.

Moreover, Article 3(2) Directive 2004/38 entails, pursuant to the CJEU’s ruling in *Rahman*, an obligation on Member States to “make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances” (emphasis added).<sup>27</sup> Importantly, Article 3(2) requires that any refusal of extended family members’ entry and residence must be justified.

Directive 2004/38/EC grants extended family members falling within the scope of Article 3(2) thereof additional *procedural* rights in applying for entry and residence. In *Rahman*, the CJEU explicitly stated that applicants for entry and residence falling within the scope of Article 3(2)(a) Directive 2004/38 are “entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive”.<sup>28</sup> In *Banger*, the Court further clarified that this judicial review must allow the court concerned “to ascertain in particular whether the contested decision is based on a sufficiently solid factual basis” as well as “whether the factual and legal elements on which the exercise of the power of assessment depends were present” in light of the procedural safeguards.<sup>29</sup>

The procedural safeguards accorded to extended family members is broader than just access to judicial review, however. According to the European Commission, negative decision on applications for entry and residence by persons falling within the scope of Article 3(2) are ‘subject to all the material and procedural safeguards of the Directive. [They] must be fully justified in writing and open to appeal’.<sup>30</sup> This interpretation of the procedural safeguards attached to Article 3(2) of Directive 2004/38/EC has been confirmed by the CJEU. In *Banger*, the CJEU, relying on the use in other provisions in Directive 2004/38/EC of the term ‘family members’ as encompassing persons falling within the scope of Article 3(2) of the Directive, as well as the requirements stemming from Article 47 EU Charter of Fundamental Rights to have access to effective judicial remedy,<sup>31</sup> affirmed that the procedural guarantees contained in Directive 2004/38/EC, including Articles 15, 30 and 31 thereof, are applicable to extended family members applying for entry or residence pursuant to Article 3(2) of the Directive.<sup>32</sup>

This would entail that, by way of Article 15(1) Directive 2004/38, applicants for entry and residence falling within the scope of Article 3(2) would need to be informed *in writing* of (negative) decisions in a clear and comprehensible manner.<sup>33</sup> They would also need to be informed of their rights to appeal the (negative decision), including the relevant judicial or administrative authority and the time limit for their appeal, among others.<sup>34</sup> Under this interpretation, they would further be entitled to the procedural safeguards established under Article 31 Directive 2004/38.

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<sup>27</sup> C-83/11 *Rahman*, para. 22.

<sup>28</sup> C-83/11 *Rahman*, para. 25.

<sup>29</sup> C-89/17 *Banger*, para. 51.

<sup>30</sup> European Commission (2009), p. 5.

<sup>31</sup> See C-89/17 *Banger*, opinion of Advocate General Bobek of 10 April 2018, ECLI:EU:C:2018:225, paras. 70-115.

<sup>32</sup> C-89/17 *Banger*, paras. 46-49.

<sup>33</sup> See Article 15(1) in conjunction with 30(1) Directive 2004/38.

<sup>34</sup> Article 15(1) in conjunction with 30(3) Directive 2004/38.



### 3.2. Obligations of Member States in respect of the substance of Article 3(2)(a)

Substantively, Article 3(2)(a) of Directive 2004/38, as interpreted by the case of the CJEU, further places a number of obligations on EU Member States in facilitating the entry and residence of extended family members of mobile Union citizens. Member States must ensure that their national legislation do not affect the **effectiveness** of Article 3(2)(a) Directive 2004/38, and their decisions in individual cases must be **legitimate**, particularly in light of the EU Charter of Fundamental Rights. The recognition of the fact that Member States are not completely free to interpret the content of the obligation to ‘facilitate’ entry and residence was best expressed by A-G Bot in his opinion in *Rahman*:

“The facilitation obligation is formulated in general terms, allowing each Member State enormous latitude, the extent of which is further accentuated by the express reference to national legislation. [...] **This does not mean that Member States have unfettered freedom to facilitate, as they wish, entry and residence for persons coming within the scope of that provision**” (emphasis added).<sup>35</sup>

As regards obligations in substance pertaining to *effectiveness*, it is clear that Member States may not implement and apply Article 3(2)(a) Directive 2004/38 in a manner which would run counter to the **effectiveness** of that provision. This has been clearly recognised by the CJEU in *inter alia* the *Rahman* ruling, where the Court states that “the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness”.<sup>36</sup> According to the Court, Member States must therefore “confer *a certain advantage*, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen” (emphasis added).<sup>37</sup>

A-G Bot, in his opinion in *Rahman*, more clearly sets out the impermissibility of Member States’ legislation being allowed to undermine the effectiveness of Article 3(2)(a). Thus, he makes reference to the fact that Member States do not have unfettered freedom in determining the scope *rationa personae* of Article 3(2)(a) of Directive 2004/38:

“[...] a Member State **may not reduce the scope, either directly**, by deciding, for example, to exclude from the facilitation measures family members in the direct line beyond a certain degree of relationship, or even collaterals, or the partner with whom the Union citizen has a durable relationship, **or indirectly**, by laying down conditions which have the purpose or effect of excluding certain categories of beneficiaries” (emphasis added).<sup>38</sup>

Similarly, A-G Bot clearly notes that Member States setting conditions and criteria for extended family members’ eligibility must respect the principle of effectiveness:

“I cannot identify any fundamental obstacle to a Member State laying down particular conditions for obtaining the right of entry and residence in order to ensure the reality, effectiveness and duration of the dependency. [...] **Such conditions must, however, respect the principle of effectiveness**, which presupposes that they **must not be framed in such a way as to render practically impossible the exercise of the rights conferred by the EU legal order**. Accordingly, the conditions laid down by the Member States **cannot deprive, de facto, persons coming within the**

<sup>35</sup> C-83/11 *Rahman*, opinion A-G Bot, para. 64-65.

<sup>36</sup> C-83/11 *Rahman*, para. 24.

<sup>37</sup> C-83/11 *Rahman*, para. 21.

<sup>38</sup> C-83/11 *Rahman*, opinion A-G Bot, para. 67.



**scope of that provision of all possibility of obtaining a right of entry and residence.** For example, a national provision would be unacceptable if it provided that, in order to be able to benefit from a right of residence, a national of a non-member country had to prove that he had been dependent on the Union citizen for more than 20 years” (emphasis added).<sup>39</sup>

As regards the **legitimacy** of national provisions transposing and implementing Article 3(2)(a) of Directive 2004/38, reference can be made to the following passage in A-G Bot’s opinion:

“Furthermore, conditions as to the nature or duration of dependency may constitute restrictions on the admission of other family members, which the Member States are, however, required to facilitate. Consequently, in order to be permissible, they **must pursue a legitimate objective, be appropriate for securing the attainment of that objective and must not go beyond what is necessary to attain it**” (emphasis added).<sup>40</sup>

The cited passage makes clear that, even in exercising their discretionary freedom within the context of Article 3(2)(a) Directive 2004/38, Member States may not adopt provisions that *inter alia* cannot meet the criteria of legitimacy of its objectives and its effects. In particular, the role of fundamental rights, as enshrined in the EU Charter of Fundamental Rights, is crucial in assessing the legitimacy of Member States’ measures to ‘facilitate’ extended family members’ entry and residence. While not (initially) followed by the Court in *Rahman*, A-G Bot recognised the role played by EU fundamental rights such as the freedom of movement and the right to family life in limiting the margin of discretion of Member States.<sup>41</sup> As set out in Section 4.1 below, the Court has (in the *SM* ruling) recognised the key role played by EU fundamental rights in the context of Article 3(2)(a) of Directive 2004/38.

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<sup>39</sup> C-83/11 *Rahman*, opinion A-G Bot, para. 105-106.

<sup>40</sup> C-83/11 *Rahman*, opinion A-G Bot, para. 107.

<sup>41</sup> C-83/11 *Rahman*, opinion A-G Bot, para. 68-73.



## 4. Fundamental rights considerations in Article 3(2)(a)-applications

The enshrinement of fundamental rights in the EU Charter of Fundamental Rights and the status of the Charter as primary EU law demonstrates the instrumental role played by fundamental rights in the EU. In the context of Directive 2004/38/EC, specific reference can be made to the right to private and family life (Article 7 EU CFR) and the rights of the child (Article 24 EU CFR). Particularly for Article 7 EU CFR, it is established EU ‘lore’ that its scope and content are determined by the corresponding right in the European Convention on Human Rights, more specifically Article 8 thereof, and the European Court of Human Rights’ judgments thereupon.

Within the context of Article 3(2)(a) of Directive 2004/38/EC, however, there are two important issues that need to be considered as regards the role of fundamental rights. The first issue concerns the role of fundamental rights in the discretionary freedom accorded by Directive 2004/38/EC to Member States in operationalising the ‘facilitation of entry and residence’ of extended family member of mobile Union citizens. Secondly, the case law of the ECtHR as regards Article 8 ECHR (indirectly determining the content of Article 7 EU CFR) may also raise questions as to the scope of application of the right to private and family life in free movement and family reunification cases.

### 4.1. *Fundamental rights and discretionary freedom under Article 3(2)(a)-cases*

As to the first question, namely on the role of fundamental rights in light of the discretionary freedom granted to Member States by Article 3(2)(a) of Directive 2004/38/EC, two observations can be made. First, where EU Member States, in the transposition of Directive 2004/38/EC, grant entry and residence to extended family members as a matter of *right* (as is the case of e.g. the Netherlands), the role of fundamental rights will naturally be minor. As the extended family members concerned obtain a *right* to enter and reside in the relevant Member State, the mere satisfaction of the eligibility criteria will lead to automatic entry and residence rights. In this case, fundamental rights concerns will only be relevant in the ‘eligibility determination’ stage.

On the other hand, where Member States reserve discretionary powers to approve or reject an application for entry or residence by extended family members – notwithstanding their eligibility thereto, fundamental rights may end up playing a more prominent role in the ‘extensive examination’ or ‘suitability’ phase.

The second observation concerns the applicability of fundamental rights (enshrined in the Charter) in entry or residence applications based on transposition and implementation of Article 3(2)(a) of Directive 2004/38/EC. This concerns the scope of the EU Charter of Fundamental Rights (Article 51 EU CFR). Article 51(1) of the Charter clearly notes that the fundamental rights contained therein are addressed “to the Member States only when they are implementing Union law”.

The question thus arises of whether Member States are implementing Union law when considering applications of extended family members of Union citizens. On the one hand, Article 3(2)(a) of Directive 2004/38/EC clearly calls on the Member States to facilitate the entry and residence of extended family members, thereby creating an obligation upon the Member States pursuant to EU law. On the other hand, the provision also clearly indicates that said facilitation is to be effectuated “in accordance with [the host Member State’s] national legislation”.



Within the perspective of these two observations, the role of fundamental rights in Article 3(2)(a)-cases must therefore be sought in the CJEU’s case law. In the Court’s first ruling on Article 3(2) of Directive 2004/38/EC in *Rahman*, the CJEU’s judgment makes no explicit reference to the Charter or EU fundamental rights. The Court restricts itself to determining that, in the exercise of the discretion accorded by Article 3(2)(a), “the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness”.<sup>42</sup>

By contrast, in the case *SM v Entry Clearance Officer, UK Visa Section*,<sup>43</sup> the CJEU explicitly acknowledges the role of the EU Charter of Fundamental Rights, both in determining the personal scope of Article 3(2)(a), as well as in the discretionary freedom of Member States in approving or rejecting applications for entry and residence of extended family members. *SM* concerned a minor child under permanent legal guardianship of a Union citizen in accordance with the Algerian *kafala* system, and the question was whether this minor child would be entitled to entry and residence as a direct family member of a Union citizen.<sup>44</sup> While the primary focus of the preliminary reference in *SM* was on Article 2(2)(c) of Directive 2004/38/EC and whether minors under *kafala* could be considered as a ‘direct descendent’, the conclusions of both the A-G and the Court as to the lack of a parental relationship resulting from *kafala* led to observations as to whether such a system of legal guardianship could fall within the scope of Article 3(2)(a) Directive 2004/38/EC.

It is in this context that the CJEU notes that the discretion of Member States to facilitate entry and residence of extended family members “must [...] be exercised in light of and in line with the provisions of the Charter of Fundamental Rights of the European Union”.<sup>45</sup> The Court continues by explicitly referring to the right to family life (Article 7 EU CFR) and the obligation of Member States to take into considerations the best interests of the child (Article 24(2) EU CFR).<sup>46</sup> In the present case, the Court examines specifically what the consequences are of the application of fundamental rights considerations in Article 3(2)(a)-cases. The Court, after specifying the considerations to be taken into account,<sup>47</sup> concluded that

“[i]n the event that it is established [...] that *the child placed under the Algerian kafala system and its guardians, who are citizens of the Union, are called to lead a genuine family life* and that that child is dependent on its guardians, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence as one of the other family members of the citizens of the Union for the purposes of Article 3(2)(a) of Directive 2004/38, read in the light of Article 7 and Article 24(2) of the Charter, in order to enable the child to live with its guardians in their host Member State”.<sup>48</sup>

This conclusion of the Court demonstrates the role of fundamental rights in Article 3(2)(a)-cases in two respects. First, the Court seems to indicate that the existence of genuine family life (pursuant to Article

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<sup>42</sup> C-83/11 *Rahman*, para. 24.

<sup>43</sup> CJEU 26 March 2019, Case C-129/18 *SM v Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248.

<sup>44</sup> C-129/18 *SM*, paras. 23-42.

<sup>45</sup> C-129/18 *SM*, paras. 63-64.

<sup>46</sup> C-129/18 *SM*, paras. 65-67.

<sup>47</sup> See C-129/18 *SM*, paras. 69-70.

<sup>48</sup> C-129/18 *SM*, para. 71.





7 EU CFR and Article 8 ECHR) is sufficient to satisfy the criteria of ‘other family members’ under Article 3(2)(a) Directive 2004/38/EC, notwithstanding the lack of a familial relationship by blood or law. Second, considerations of family life (Article 7 EU CFR) and the best interests of the child (Article 24 EU CFR) may result in an obligation of Member States to grant entry and residence rights pursuant to Article 3(2)(a) Directive 2004/38/EC, notwithstanding discretionary freedom of Member States under said provision. This latter role of fundamental rights in ‘shaping’ Article 3(2)(a)-cases also relates to the question of whether fundamental rights, more specifically the right to family life, may oblige Member States to grant entry and residence to extended family members of mobile Union citizens beyond the strict ‘facilitation’ contained in Article 3(2) of Directive 2004/38.

#### 4.2. *The right to family life (pursuant to Article 8 ECHR) in family reunification cases*

As already mentioned, another question that needs to be answered in the context of Article 3(2)(a) of Directive 2004/38/EC concerns the case law of the ECtHR as regards Article 8 ECHR affecting indirectly Article 7 Charter, which may also raise questions as to the scope of application of the right to private and family life in free movement and family reunification cases.

Article 8(1) ECHR states that “everyone has the right to respect for his private and family life, his home and his correspondence”.<sup>49</sup> This provision contains both a negative and a positive obligation, denoting the fundamental principle of rule of law according to the case law of the ECtHR.<sup>50</sup> This means that the state must refrain from interference with the family and private life, as well as protect individuals from violation of their rights by others. No matter which understanding of Article 8 is applied, a positive or a negative, the Court follows the same principles – striking a fair balance “between the competing interests of the individual and the community as a whole” and leaving the states to enjoy a certain margin of appreciation.<sup>51</sup>

It should be reminded that the ECHR does not generally stipulate the right of entry for family members. The case law of the ECtHR, however, has provided protection in two types of cases: first, when disproportionate restrictions in the context of deportation/expulsion result in a break up of family unity; and second, in cases of (refusal of) entry for the purposes of family reunification.<sup>52</sup> Thus, Article 8 ECHR may engender a positive obligation for states to facilitate family reunification under certain circumstances, by granting admission or issuing residence permits to family members, if this is deemed to be necessary for the protection of one’s family life.<sup>53</sup> Furthermore, states also have a negative obligation under Article 8 ECHR to abstain from expelling long-term migrants from a country where they live with close family, if this would lead to a breach of the right to family life.

The research focus of this study requires a closer look at the ECtHR’s family reunification (admission) cases. States generally benefit from a wide margin of appreciation in such cases as the Strasbourg Court’s case law so far has ascertained their right to manage the entry of non-nationals into their territory. Therefore, restrictive immigration policies do not typically constitute a violation of Article 8 ECHR because in most instances they are considered to pursue ‘legitimate aims’ and be proportionate

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<sup>49</sup> W. A. Schabas (2015), *The European Convention on Human Rights. A Commentary*, Oxford: Oxford University Press, p. 359.

<sup>50</sup> Ibid., pp. 367- 368.

<sup>51</sup> Ibid., p. 368.

<sup>52</sup> H. Lambert, H. (2014), “Family unity in migration law: The evolution of a more unified approach in Europe”, in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration*, Cheltenham: Edward Elgar Publishing, p. 204.

<sup>53</sup> A. Wiesbrock (2010), *Legal Migration to the European Union*, Leiden: Brill/Nijhoff, p. 210.



to that aim. For instance, in the *Gül v Switzerland* case,<sup>54</sup> the Court held that Article 8 ECHR does not contain a general obligation by the contracting parties to respect the choice by married couples as to where to reside and settle. Furthermore, in line with the ‘elsewhere doctrine’ (originating from the case *Abdulaziz, Cabales and Balkandali*)<sup>55</sup>, the Strasbourg Court’s approach has been to establish whether it is reasonable to expect immigrants to relocate their family life elsewhere, unless they can prove that there are serious obstacles to exercise family life in the country of origin.<sup>56</sup> This has also been applied to cases concerning children that have been left behind. Cases such as *Şen v the Netherlands*<sup>57</sup> and *Tuquabo-Tekle and Others v the Netherlands*<sup>58</sup> demonstrate that the circumstances of the applicant will need to be rather extreme and mainly based on the specific situation for a complaint on a denial for family reunion to be upheld.<sup>59</sup> Therefore, it should be stressed that the Strasbourg Court’s reasoning so far has ignored the absolute right of citizens to reside in their own country and the qualified right of settled residents to continue to live in the same country by allowing States to impose obligation to leave when it comes to enjoyment of the right to family life with a foreign national.<sup>60</sup> It is high time for the ECtHR to rethink its case law on Article 8 when it comes to the application of the right to family and private life in family reunification cases.<sup>61</sup>

Furthermore, when focusing on family reunification, Article 14 of the ECHR, aiming to provide protection from discrimination in the enjoyment of the rights and freedoms safeguarded by the Convention, also needs to be considered in conjunction with Article 8 ECHR.<sup>62</sup> In the *Biao* case, concerning the compliance of a Danish legislation on family reunification with the ECHR, the Strasbourg Court found that even when immigration control measures might be compatible with Article 8 (2), they were not necessarily in compliance with Article 14 and amounted to unjustified discrimination.<sup>63</sup> In this case the Court focused on the legitimacy of the aim pursued by the Danish rules and not their proportionality.<sup>64</sup> It required from Denmark to provide evidence for justification of the differential treatment that would not amount to discrimination among nationals depending on national and ethnic origin.<sup>65</sup> Furthermore, the Court’s assessment went beyond the individual impact of a particular measure and covered also any group effects. In line with this it can be concluded, that the ECtHR needs to move consistently beyond a strict proportionality test to one where the legitimacy of national

<sup>54</sup> ECtHR 19 February 1996, Case of *Gül v. Switzerland*, Application No. 23218/94, ECLI:CE:ECHR:1996:0219JUD002321894.

<sup>55</sup> ECtHR 29 May 1985, Case of *Abdulaziz, Cabales and Balkandali v the United Kingdom*, Application Nos. 9214/80, 9473/81, 9474/81, ECLI:CE:ECHR:1985:0528JUD000921480.

<sup>56</sup> Carrera and Vankova, op. cit., p. 10.

<sup>57</sup> ECtHR 21 December 2001, Case of *Şen v the Netherlands*, Application No. 31465/96, ECLI:CE:ECHR:2001:1221JUD003146596.

<sup>58</sup> ECtHR 1 March 2006, Case of *Tuquabo-Tekle and Others v the Netherlands*, Application No. 60665/00, ECLI:CE:ECHR:2005:1201JUD006066500.

<sup>59</sup> Carrera and Vankova, op. cit., p. 10.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> S. Carrera and Z. Vankova (2019), “Human rights aspects of immigrant and refugee integration policies: A comparative assessment in selected Council of Europe member states”, Issue Paper published by the Special Representative of the Secretary General on migration and refugees, Council of Europe, Strasbourg, March, p.11.

<sup>63</sup> ECtHR 24 May 2016, Case *Biao v. Denmark* (Grand Chamber), No. 38590/10, ECLI:CE:ECHR:2014:0325JUD003859010.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.



provisions is examined instead and supported by evidence that they do not have any discriminatory effects over specific racial, ethnic and religious minorities.<sup>66</sup>

After considering the ECtHR’s cases having bearing to family reunification, the scope of application of the right to private and family life in free movement must be sought in the CJEU’s case law. The recent case *SM v Entry Clearance Officer, UK Visa Section* presents a good case in point, as it combines the free movement right of mobile Union citizen with right to family life (Art. 7 EU CFR/Art. 8 ECHR) and best interests of the child (Art. 24 (2) EU CFR). As already noted in section 4.1, in this case, the Court stresses the obligations for Member States arising from the Charter (and the ECtHR’s case law) in Article 3(2)(a)-cases. In the *SM case*, the CJEU refers to the ECtHR’s Article 8-cases concerning children placed under the *kafala* system,<sup>67</sup> which “may fall under the definition of family life, having regard to the time spent living together, the quality of the relationship, and the role which the adult assumes in respect of the child.”<sup>68</sup> Where such tie has been established, Member States’ authorities have “to enable that tie to be developed and to establish legal safeguards that render possible the child’s integration in his family” as well as, at the same time, consider the best interests of the child.<sup>69</sup> In Article 3(2)(a)-cases, the best-interest-of-the-child consideration requires a balanced and reasonable assessment of all the current and relevant circumstances of the case. In the context of the *SM case*, these include for instance the age at which the child was placed under the Algerian *kafala* system, whether the child has lived with its guardians since its placement under that system, the closeness of the personal relationship and the extent of dependency which has developed between the child and its guardians, as well as assessment of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking as weighed against all other relevant elements.<sup>70</sup>

To sum up, the Member States’ discretion in family reunification cases is limited by free movement and human rights rules.<sup>71</sup> As already mentioned above, the CJEU case law demonstrates that assessments in light of Article 7 and Article 24 (2) of the Charter may result in an obligation for Member States to admit family members pursuant to Article 3(2)(a) Directive 2004/38 in order to enable them to continue to enjoy their family life in the host Member State.<sup>72</sup> A national decision pursuant to Article 3 (2) “must not have the effect of unjustifiably impeding the exercise by the Union citizen of his right of free movement and residence within the territory of the Member States.”<sup>73</sup> Such a serious impediment could exist if a Union citizen was forced to leave the territory of the host Member State or to leave the territory of the European Union altogether, “since the genuine enjoyment of the right of residence of the Union citizen effectively confers a right of residence on the members of his family”.<sup>74</sup> Furthermore, while the ECtHR’s case law does not generally confer a right to admission of family members, ‘the

<sup>66</sup> S. Carrera and Z. Vankova (2019), “Human rights aspects of immigrant and refugee integration policies: A comparative assessment in selected Council of Europe member states”, Issue Paper published by the Special Representative of the Secretary General on migration and refugees, Council of Europe, Strasbourg, March, p. 12, p.48.

<sup>67</sup> ECtHR 4 October 2012, Case of *Harroudj v France*, Application No. 43631/09, ECLI:CE:ECHR:2012:1004JUD004363109; ECtHR 16 December 2014, Case of *Chbihi Loudoudi and Others v Belgium*, Application No. 52265/10, ECLI:CE:ECHR:2014:1216JUD005226510.

<sup>68</sup> C-129/18 *SM*, paras. 66.

<sup>69</sup> C-129/18 *SM*, paras. 66-67.

<sup>70</sup> C-129/18 *SM*, paras. 68-69.

<sup>71</sup> E. Guild, S. Peers and J. Tomkin (2014), “The EU Citizenship Directive. A Commentary”, Oxford University Press, p.76.

<sup>72</sup> C-129/18 *SM*, paras. 71-72

<sup>73</sup> See for instance McCarthy, Paras 49 to 53.

<sup>74</sup> See Dereci and others, C-256/11, para 66-67. Also C-83/11 *Rahman*, opinion A-G Bot, para 69.



combination of the right of residence attached to Union citizenship and protection of private and family life, as implemented by EU law, may therefore effectively establish a right of residence for members of the family of the Union citizen.”<sup>75</sup> And this rights is not limited to “core “family members.”<sup>76</sup>

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<sup>75</sup> C-83/11 *Rahman*, opinion A-G Bot, para 74.

<sup>76</sup> E. Guild, S. Peers and J. Tomkin (2014), “The EU Citizenship Directive. A Commentary”, Oxford University Press, p.76.



## 5. Entry and residence of extended family members of Union citizen under Articles 20 and 21 TFEU

Before examining the manner in which the EU Member States have transposed and implemented Article 3(2)(a) of Directive 2004/38, it is important to take note of the potential wider implications of this provision in the context of the free movement of Union citizens.

The following considerations result from the wider effect of Union citizenship (more specifically, the Union citizenship right to move and reside freely within the EU) based on the CJEU’s case law. The CJEU’s case law on Union citizenship may have wider implications for the obligation of Member States to ‘facilitate’ the entry and residence of extended family members of Union citizens. Specifically, this section will briefly examine the entry and residence of extended family members of Union citizens in two situations:

- a) Extended family members of mobile Union citizens ‘returning to’ their Member State of nationality after having made use of their free movement rights (the so-called *Singh*-type cases)<sup>77</sup>;
- b) Extended family member carers of (minor) Union citizens residing in a Member State other than the State of nationality (in analogy to the *Chen*-ruling)<sup>78</sup>;
- c) Extended family member carers of (minor) Union citizens residing in their Member State of nationality (in the sense of the *Zambrano*-ruling)<sup>79</sup>;

*Ad. a)* The possibility of extending the application of Article 3(2) Free Movement Directive to extended family members of ‘returning’ mobile Union citizens (i.e. *Singh*-type cases) has unequivocally been confirmed by the CJEU in *Banger*.<sup>80</sup> In *Banger*, the CJEU first reiterated that, under certain circumstances, third-country national family members of ‘returning’ mobile Union citizens may be able to derive residence rights vis-à-vis the Member State of nationality of the ‘returning’ Union citizen under Article 21 TFEU,<sup>81</sup> and that the conditions for such a derived residence cannot be stricter than would be provided for to third-country nationals of mobile Union citizens under the Free Movement Directive.<sup>82</sup> More importantly, the CJEU notes specifically that the aforementioned *Singh*-doctrine applies equally to (the analogous application of) the obligation under Article 3(2) of Directive 2004/38 to ‘facilitate’ the entry and residence of other family members of, including partners in a durable relationship with, ‘returning’ Union citizens.<sup>83</sup> Essentially, therefore, *Banger* obliges Member States to facilitate the entry and residence of extended family members of their own nationals who have made use of their free movement rights to reside elsewhere in the EU.

*Ad b and c)* In both *Chen* and *Zambrano*, the question of whether a third-country national *parent* could derive a residence right from a minor mobile Union citizen (*Chen*) or a ‘static’ Union citizen (*Zambrano*)

<sup>77</sup> CJEU 7 July 1992, Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, ECLI:EU:C:1992:296.

<sup>78</sup> CJEU 19 October 2004, Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639.

<sup>79</sup> CJEU 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)*, ECLI:EU:C:2011:124.

<sup>80</sup> CJEU 12 July 2018, Case C-89/17 *Secretary of State for the Home Department v Rozanne Banger*, ECLI:EU:C:2018:570.

<sup>81</sup> C-89/17 *Banger*, para. 26-28.

<sup>82</sup> C-89/17 *Banger*, para. 29.

<sup>83</sup> C-89/17 *Banger*, para. 30-34.



was raised. In considering the analogous application of Article 3(2)(a) of Directive 2004/38 to extended family members other than parents of Union citizens (in *Chen* and *Zambrano*-like situations), it should be noted that, in both *Chen* and *Zambrano*, an essential aspect was the relationship of dependency between a minor Union citizen and his or her third-country national *parent*. Unlike *parent* caretakers of minor Union citizens (who would be able to rely on *Chen* or *Zambrano* directly), it is therefore unclear whether extended family members who would be in a similar caretaker-position would be able to derive a residence right in analogy to *Chen* or *Zambrano*, solely or in combination with an analogous application of Article 3(2)(a) of Directive 2004/38.

The answer to this dilemma will depend on whether the parent-child relationship is an essential part of a derived residence right on the basis of Article 20 and 21 TFEU, pursuant to *Chen* and *Zambrano*. Some guidance may be sought in the CJEU’s rulings with respect to derived residence rights pursuant to Articles 20 and 21 TFEU and Directive 2004/38.

Up to and including *Chavez-Vilchez and Others*,<sup>84</sup> the Court has mainly had to rule on ‘*Zambrano*-type’ derived residence rights in the context of parent-child relationships. In this context, the Court has repeatedly found that derived residence rights must be granted to (parental) family members of ‘static’ Union citizens where “the effectiveness of Union citizenship would otherwise be undermined, [where], as a consequence of refusal of such a right, that citizen would be obliged in practice to leave the territory of the European Union as a whole, thus depriving him of the genuine enjoyment of the substance of the rights conferred by that status”.<sup>85</sup>

In this regard, the Court identified relevant factors in assessing this ‘genuine enjoyment’ criterion, including “the question of who has custody of caring for the child and whether that child is legally, financially or emotionally dependent on the third-country national parent”.<sup>86</sup> While *Chavez-Vilchez and Others* does not clarify the necessity of the existence of a parent-child relationship in respect of derived residence rights under Article 20 TFEU, the Court does seem to primarily emphasise the relationship of dependency between a (minor) Union citizen and a third-country national, as well as the link of this dependency with the practical consequence of forcing a Union citizen to leave the EU territory (thus frustrating the genuine enjoyment of Union citizenship rights).

The CJEU seems to confirm the centrality of the relationship of dependency, rather than a parent-child relationship, in *K.A. and Others*.<sup>87</sup> Unlike in *Zambrano* and *Chavez-Vilchez and Others*, in *K.A. and Others*, the Court was required to explicitly consider the possibility of third-country nationals deriving residence rights (pursuant to *Zambrano*) where the familial relationship between the third-country national and the Union citizen is not a parent-(minor) child relationship. The Court emphasises that

“[...] a refusal to grant a right of residence to a third-country national is liable to undermine the effectiveness of Union citizenship only if there exists, between that third-country national and the Union citizen who is a family member, a relationship of dependency of such a nature that it would

<sup>84</sup> CJEU 10 May 2017, Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others*, ECLI:EU:C:2017:354.

<sup>85</sup> See C-133/15 *Chavez-Vilchez and Others*, para. 63.

<sup>86</sup> C-133/15 *Chavez-Vilchez and Others*, para. 68.

<sup>87</sup> CJEU 8 May 2018, Case C-82/16 *K.A. and Others v Belgische Staat*, ECLI:EU:C:2018:308.



lead to the Union citizen being compelled to accompany the third-country national concerned and to leave the territory of the European Union as a whole”.<sup>88</sup>

In respect of the possibility of *Zambrano* being applied to family relationship between adult Union citizens and third-country nationals, the CJEU noted that

“the identification of a relationship between two adult members of the same family as a relationship of dependency, capable of giving rise to a derived right of residence under Article 20 TFEU, is conceivable only in *exceptional cases*, where, having regard to all the relevant circumstances, there could be *no form of separation of the individual concerned from the member of his family on whom he is dependent*” (emphasis added).<sup>89</sup>

Notwithstanding the restriction of *Zambrano*-type derived residence rights between adult family members to exceptional cases, the Court’s ruling in *K.A. and others* recognises that circumstances exist in which (*Chen* and) *Zambrano* could apply to family relationships other than parent-child relationship (to the extent that the required degree of dependency is present). The fact that residence rights for family members of Union citizens derived from Article 20 (and 21) TFEU, in line with *Zambrano*, depends on the nature of the relationship of *dependency* between the Union citizen and his or her family member(s), in combination with the Court’s ruling in *Banger* (briefly discussed above), lends support to the argument for analogous application of Article 3(2) Free Movement Directive to extended family members of ‘static’ Union citizens who are dependent on the extended family member concerned.

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<sup>88</sup> C-82/16 *K.A. and Others*, para. 52.

<sup>89</sup> C-82/16 *K.A. and Others*, para. 65.





## 6. Entry and residence of extended family members of Union citizens in the EU Member States

This section will present an overview of the specific manner in which the EU Member States have transposed (Article 3(2) of) Directive 2004/38/EC, more specifically, how Member States ‘facilitate’ the entry and residence of extended family members. Section 6.1 will present a comparative overview of the manner in which the 27 EU Member States have transposed and implemented the obligation to ‘facilitate’ entry and residence of extended family members of mobile Union citizens pursuant to Article 3(2)(a) Directive 2004/38. The comparative synthesis sets out the findings in Annex 1 to this study concerning the broad category of method used by the Member States in ‘facilitating’ entry and residence, the personal scope and eligibility criteria for entry and residence of these extended family members, as well as the procedural guarantees applicable to the entry and residence procedures of extended family members.

Section 6.2 will examine in more detail the specific legislation and measures to facilitate the entry and residence of extended family members adopted by selected Member States.

### 6.1. Comparative overview

For this study, a preliminary examination of the 27 EU Member States’ legislation with respect to the entry and residence of extended family members of mobile Union citizens was conducted (see Annex 1 to this study). For each Member State, the relevant national legislation on free movement of Union citizens (and/or migration legislation) was identified. Furthermore, the following aspects of the relevant Member States’ legislation were examined:

- Whether Article 3(2)(a) of Directive 2004/38 has been transposed into national legislation;
- Whether the entry and residence of extended family members of mobile Union citizens is provided for as a right, or whether it requires an application subject to discretionary freedom;
- Whether extended family members of mobile Union citizens benefit from treatment equal to ‘direct family members’ of Union citizens after (first) entry;
- Whether any restrictions/conditions have been set in respect of the type of family member eligible;
- The conditions set (and evidence required) in respect of the entry and residence of extended family members of mobile Union citizens who are members of the same household, dependent on the Union citizen having the primary residence right, or strictly requires the personal care of the Union citizen due to serious health grounds;
- Whether an extensive examination is prescribed in the Member State’s legislation;
- Whether a negative decision on entry/residence of extended family members must be motivated (and in writing);
- Whether extended family members are entitled to seek review of or appeal against a negative decision on their entry/residence.

Based on the preliminary examination of these aspects, a number of observations can be made in comparative perspective.

Of the 27 EU Member States, only **Germany** has currently not transposed Article 3(2)(a) of Directive 2004/38 into national legislation, or otherwise explicitly provided in law for the facilitation of the entry and residence of extended family members of mobile Union citizens. **Twelve Member States** have



provided ‘in law’ for extended family members of mobile Union citizens to benefit from the same entry and residence rights as ‘direct’ family members, irrespective of their nationality.<sup>90</sup> **Ten Member States** require extended family members to first apply for ‘treatment’ as a family member (or apply for first entry or residence), following the approval of which they will fall within the scope of application of national legislation implementing the Free Movement Directive.<sup>91</sup> **Two Member States** provide for some form of legally enshrined procedure for extended family members to obtain entry and residence under the conditions of Member States’ immigration legislation, with differing degrees of ‘facilitation’ accorded to such applications for entry and residence.<sup>92</sup>

Finally, two Member States, namely Austria and Estonia, provide for differentiated treatment of extended family members of mobile Union citizens on the basis of their nationality. For **Austria**, this differentiated treatment consists of the fact that, while Union citizen extended family members have been granted entry and residence rights (as a family member of a Union citizen having the primary right of residence), third-country national extended family members are required to apply for a ‘settlement permit’.<sup>93</sup> **Estonia**, on the other hand, considers extended family members equally as ‘direct’ family members of mobile Union citizens for the purpose of entry and residence. The differentiated treatment consists in the fact that, under Estonian law, Union citizens have a (near) unqualified right to reside in Estonia, while the residence rights of TCN (extended) family members are derived from the primary residence right of their Union citizen family member.<sup>94</sup>

In terms of the types of (extended) family members eligible for ‘facilitated’ entry and residence, out of the 26 EU Member States with explicit provision, nearly all Member States seem not to have restricted the type of family members eligible for ‘facilitated’ entry and residence. Restrictions in the ‘types’ of extended family members eligible to accompany or join a mobile Union citizens have been found in the **Czech Republic**, where a judgment of the Supreme Administrative Court in 2010 (interpreting the same provision in a previous Czech law) restrict the scope of application of the ‘facilitated’ entry and residence foreseen in Article 3(2)(a) of Directive 2004/38 to family-like relationships as defined in §15a(1) of the Czech Aliens Act (i.e. spouses, minor (and dependent) children and dependant relatives in the direct ascending line), explicitly excluding from consideration for facilitation of entry and residence family relationships such as between brothers and sisters or between cousins.<sup>95</sup> For **Estonia**,

<sup>90</sup> Belgium, Bulgaria, Czech Republic, Denmark, Finland, Latvia, Lithuania, the Netherlands, Romania, Slovakia, Slovenia, and Sweden.

<sup>91</sup> Croatia, Cyprus, France, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, and Spain.

<sup>92</sup> Poland, and Portugal. See however the case study of Portugal (section 6.2.7 of this study), noting that, in practice, extended family members who meet the conditions stipulated in the relevant Portuguese legislation will likely be granted entry and residence.

<sup>93</sup> See §52(1)(5) and §56(1) *Niederlassungs- und Aufenthaltsgesetz (NAG)*.

<sup>94</sup> See §7(1) and 3(1) *Euroopa Liidu kodaniku seadus*.

<sup>95</sup> See P. Boučková and P. Kandalec (2015), “Czech Republic”, in Neergaard, Jacqueson & Holst-Christensen (eds.), op. cit., pp. 439-440, referring to the judgment of the Czech Supreme Administrative Court of 16 April 2010, case no. 5 As 6/2010. In particular, the Supreme Administrative Court interpreted the conditions of (Article 3(2)(a) Directive 2004/38 and) §15a, para. 4, under b, of the former Aliens Act (corresponding to 15a(2)(a) of the current Aliens Act) as follows (translated from Czech to English):

“It is therefore necessary to consider not only whether a foreigner lives in the same household as a citizen of the European Union, but also whether the relationship between them can be considered a family relationship. However, a family-like relationship must be defined as closely as the family relationship is defined, and therefore it must be a relationship analogous to the relationship between family members as defined by the law in accordance with the Directive. The relationship of parents-children, grandparents-children is undoubtedly considered a family relationship. In this context, the complainant’s view of assessing such relationships (similar to family relationships) can be accepted,



it has been found that same-sex couples in a registered partnership or durably attested relationship are not considered as a ‘family member’ for the purpose of the Estonian legislation transposing the Free Movement Directive.<sup>96</sup>

In respect of situations in which extended family member of mobile Union citizens may be eligible for ‘facilitated’ entry and residence, the overall finding is that the 27 EU Member States that have transposed Article 3(2)(a) of Directive 2004/38 have included all three situations provided for in the Directive (namely members of the same household, dependency, and personal care strictly required due to serious health grounds). Some variations can be noted, however, in a number of Member States’ legislations. For example, **Austria** requires dependant extended family member to have ‘actually received maintenance’.<sup>97</sup> The **Czech Republic** describes the required dependency of extended family members as ‘dependent on nutrition or other necessary care [...] in order to satisfy his basic needs’, and transposes ‘the country from which he or she has come’ as ‘the State of nationality or residence’.<sup>98</sup> The relevant national legislation of **Denmark** provides that an additional condition may be imposed, i.e. that the mobile Union citizen having the primary right of residence has sufficient resources for himself and his family members to not become a burden on the Danish social assistance system.<sup>99</sup> **Estonia** defines dependent (extended) family member as ‘a person who resides together with the Union citizen in a shared household and has *no personal income*’ (emphasis added),<sup>100</sup> and has transposed ‘serious health grounds’ as “permanently unable to cope independently due to health reasons”.<sup>101</sup> **Poland** restrict the ‘facilitated’ entry and residence for dependant extended family members to financial dependency.<sup>102</sup> **Slovenia** refers, in respect of ‘dependent’ extended family members to dependency

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if there are certain individuals with a certain long-term close emotional and other relationship with each other, and such relationships can be compared to a parent-child relationship, grandparents-grandchildren. For the family relationship, however, the Directive nor a national provision, taking into account Article 37 of the Directive, consider the which the complainant in the present case has with a citizen of the European Union citizen or of the Czech Republic respectively.

As mentioned above, a member of the family of a citizen of the European Union means his or her: a) spouse, b) parent, if he/she is a citizen of the European Union under the age of 21 and with whom he or she lives in the same household, c) child under the age of 21 or such a child of the spouse of a European Union citizen, (d) dependent direct relative in the ascending or descending line, or such a relative of the spouse of a European Union citizen.

The brother-sister relationship is therefore not considered to be a family relationship or a family-like relationship, even less so the cousin-cousin relationship.”

This restrictive interpretation of the Czech provision transposing Article 3(2) Directive 2004/38 has been upheld by the Supreme Administrative Court as recently as in 2019 (judgment of 18 December 2019, case no. 7 Azs 505/2018; see para. 32). Cf. on the restrictive interpretation of Czech law, Czech Supreme Administrative Court, judgment of 27 July 2018, case no. 5 Azs 102/2017, para. 24-26.

<sup>96</sup> Based on information obtained from the Estonian expert consulted, referring to current Estonian law, as interpreted (and found unconstitutional) by the Estonian Supreme Court. Cf. judgment of the Estonian Supreme Court of 21 June 2019, case no. 5-18-5, para. 55-63, where the Supreme Court found that the Estonian Alien Act does not provide a specific possibility for same-sex couples in a registered partnership to apply for a residence permit.

<sup>97</sup> See §52(1)(5)(a) NAG.

<sup>98</sup> §15a(2) of the Aliens Act, Act no. 326/1999 Coll, as amended.

<sup>99</sup> See Article 23(4) and 26(5) *EU-opholdsbekendtgørelsen*.

<sup>100</sup> See §3(1)(4) and 3(2) *Euroopa Liidu kodaniku seadus*.

<sup>101</sup> §3(1)(4) *Euroopa Liidu kodaniku seadus*. The conformity study conducted by Milieu and the Europa Institute has described this phrasing of “serious health grounds” as both less restrictive (by not requiring a *serious* health grounds) and more restrictive (with the requirement of permanent incapacity) than provided for in the Free Movement Directive; see Milieu & Europa Institute (2008-CS-EE), p. 32.

<sup>102</sup> See Article 160(1)(a) *Ustawa o cudzoziemcach*.



‘under the law of the country from which he or she is a national’ (as well as to ‘actual dependency’).<sup>103</sup> Furthermore, the relevant Slovenian legislation does not explicitly refer to ‘serious health grounds’.<sup>104</sup>

Most EU Member States have explicitly provided in their national legislation for the facilitation of entry and residence for extended family members of mobile Union citizens to be applicable to family members of EEA and Swiss nationals,<sup>105</sup> and to extended family members of their own (returning) nationals.<sup>106</sup> **Latvia** has expanded the application of facilitated entry and residence of extended family members of mobile Union citizens to extended family members of the Union citizen’s spouse.<sup>107</sup>

## 6.2. In-depth examination of selected Member States

In order to better identify the specificities in the methods chosen by Member States to facilitate the entry and residence of extended family members, a detailed examination has been conducted for select Member States. The Member States were selected based on the ‘broad category’ of implementation method (as set out in section 6.1 above),<sup>108</sup> with other factors complementing the selection criteria, such as geographic distribution. The Member States selected based on these criteria are Austria, Bulgaria, Estonia, Greece, Hungary, the Netherlands and Portugal.

### 6.2.1. Austria<sup>109</sup>

The rules governing the entry and residence of mobile Union citizens and their family members in Austria are set out in the *Fremdenpolizeigesetz 2005* (Alien Police Act 2005, hereinafter: *FPG*)<sup>110</sup> and the *Niederlassungs- und Aufenthaltsgesetz* (Settlement and Residence Act, hereinafter: *NAG*).<sup>111</sup> Specifically concerning the implementation and application of Article 3(2)(a) of Directive 2004/38 in Austria, the following observations can be made:

- **Method of ‘facilitation’:** the residence of extended family members, the facilitation of which is stipulated in Article 3(2)(a) of Directive 2004/38, has been provided for in respect of residence for a period longer than three months in §§52 and 56 *NAG*. Depending on the nationality of the

<sup>103</sup> See Article 127(1) *Zakon o tujcih* (ZTuj-2).

<sup>104</sup> Article 127(1) *Zakon o tujcih* (ZTuj-2) refers instead to ‘due to his or her health’.

<sup>105</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus (restricted to EEA nationals), Czech Republic, Denmark, Estonia, Finland, France, Greece (as stated in Circular No. 10 of the Ministry of the Interior, Public Administration and Decentralisation (Ministry of Interior) on P.D. 106/2007), Hungary (restricted to EEA nationals), Italy (through Circular 39/2007), Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia (restricted to EEA nationals), Spain, and Sweden (restricted to EEA nationals).

<sup>106</sup> Austria, Belgium, Bulgaria, Croatia (with the restriction that the family members must be EEA nationals themselves), Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Italy (to the extent the provisions are more favourable), Latvia, Lithuania, Luxembourg, the Netherlands (based on the Aliens Circular 2000 (B)), Poland (n.b. specifically on the entry and residence of extended family members, as Polish legislation on free movement of Union citizens does not apply to family members of Polish nationals), Portugal, Slovakia, Slovenia, and Sweden.

<sup>107</sup> See *Ministru kabineta noteikumi Nr.675, “Kārtība, kādā Savienības pilsoņi un viņu ģimenes locekļi ieeļo un uzturas Latvijas Republikā”*, para. 4.1. It must be noted that, according to this provision, the extended family member must still meet the conditions (i.e. dependency, belonging to the same household or personal care required due to serious health grounds) vis-à-vis the mobile Union citizen concerned.

<sup>108</sup> With the exception of Germany (in the category of ‘no transposition’), as no information could be found on the entry and residence of extended family members of mobile Union citizens in law or in practice.

<sup>109</sup> The analysis provided here in respect of the entry and residence of extended family members of mobile Union citizens in Austria is partly based on contributions by an Austrian legal expert.

<sup>110</sup> The text of the *Fremdenpolizeigesetz 2005* can be found (in German) at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004241>.

<sup>111</sup> The text of the *Niederlassungs- und Aufenthaltsgesetz* can be found (in German) at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242>.



extended family members, they may either have a residence *right* pursuant to §52 NAG (if they are themselves a Union citizen) or may be granted a residence permit (*Niederlassungsbewilligung – Angehöriger*) under §56 NAG if they are a third-country national.<sup>112</sup> As regards the entry and residence of extended family members for a period of up to three months, §15a FPG covers all Union citizens (and thus extended family members with the nationality of an EU Member State). No specific provision concerning the entry and residence for up to three months has been provided for in the FPG nor NAG for TCN extended family members.

- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** As indicated about, the provisions concerning entry and residence of extended family members clearly distinguish between family members who are themselves Union citizens and TCN extended family members. Thus, the FPG does not provide explicitly for the entry and residence for up to three months for TCN extended family members; they are therefore subject to the general rules for entry into Austria applicable to third-country nationals. Furthermore, Union citizen extended family members are *entitled* to accompany or join their mobile Union citizen family member in Austria for periods exceeding three months [§52 NAG], while TCN extended family members “may be issued” a residence permit “upon application” [§56 NAG].
- **Restriction in degree of kinship of ‘(extended) family members’:** To the extent that the FPG or NAG govern the entry and residence of extended family members, no explicit restrictions are made in terms of the degrees of kinship eligible for (entry and) residence pursuant to the relevant Austrian provisions.
- **Dependent family members and proof of dependency:** A ‘dependent’ (extended) family member of a mobile Union citizen is defined as a person who, in the country from which he or she has come (*Herkunftsstaat*), was actually dependent (*Unterhalt tatsächlich bezogen haben*) on the mobile Union citizen concerned [§52(1)(5)(a) NAG]. Where the dependent extended family member is a Union citizen, he or she is entitled to a residence right for more than three months [§52(1)(5)(a) NAG]. Where the dependent extended family member is a TCN, he or she may be entitled to a residence permit for more than three months [56(1) NAG]. This dependence is to be demonstrated by way of a ‘documentary proof of a competent authority’ of the country from which the extended family member has come (*ein urkundlicher Nachweis einer zuständigen Behörde des Herkunftsstaates*) [§§53(2)(7) (dependent extended family member is a Union Citizen) and 56(2)(2) (dependent extended family member is a TCN) NAG].
- **Members of the household and proof thereof:** Members of the household of a mobile EU citizen are those (extended) family members who, in the country from which they have come, were members of the household of the mobile Union citizen concerned [§52(1)(5)(b) NAG]. Where such a member of the household is a Union Citizen, he or she is entitled to a residence right for more than three months [§52(1)(5)(b) NAG]. Where such a member of the household is a TCN, he or she may be entitled to a residence permit for more than three months [56(1) NAG]. Proof of this ground must be demonstrated by submission of a ‘documentary proof of a competent authority’ of the country from which the extended family member has come [§§53(2)(7) (extended family member of the household is a Union Citizen) and 56(2)(2) (extended family member of the household is a TCN) NAG].

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<sup>112</sup> TCN extended family members may also be granted a “Red-White-Red Card plus” if the quota therefor has not been exceeded [§56(3) NAG].



- **Serious health grounds and proof thereof:** The rules on (extended) family members who require the personal care of the Union citizen based on serious health grounds are transposed by §52(5)(c) and 56(1) NAG. Where such an extended family member is a Union citizen, he or she is entitled to a residence right for more than three months [§52(1)(5)(b) NAG]. Where such an extended family member is a TCN, he or she may be entitled to a residence permit for more than three months [56(1) NAG]. As with dependency and belonging to the same household, proof of the serious health grounds strictly requiring personal care by the Union citizen is expressed in the NAG (for TCN extended family members) as a ‘documentary proof of a competent authority’ of the country from which the extended family member has come [§§53(2)(7) (extended family member requiring the care is a Union Citizen) and 56(2)(2) (extended family member requiring the care is a TCN) NAG].
- **Factors considered in exercising discretionary freedom:** As previously noted, extended family members who are themselves a Union citizen benefit from a residence *right* pursuant to §52 NAG; the residence (entitlement) of Union citizen extended family members who fulfil the conditions stipulated in §52 NAG is not subject to discretionary freedom [see §53(1) NAG]. On the other hand, a textual reading of the NAG, in particular §56 thereof, seems to support the existence of discretionary freedom of the Austrian authorities in assessing applications from TCN extended family members.
- **Procedural rights of extended family members:** It is surprising to note that neither the FPG nor the NAG explicitly provide for procedural rights for extended family members intending to join or accompany their mobile Union citizens family member. While some procedural rights may be found in general Austrian administrative law, more specifically the *Allgemeines Verwaltungsverfahrensgesetz* (General Administrative Procedure Law, hereafter: AVG), it can be questioned whether general Austrian administrative law meets the specific procedural guarantees provided for in Article 3(2) of Directive 2004/38.
  - **Right to an extensive examination:** Article 3(2) Directive 2004/38 requires that Member States’ authorities assess the entry and residence of extended family members based on an “extensive examination of the personal circumstances” of the applicants. While §37 AVG places upon Austrian administrative authorities the duty to ascertain all facts that are relevant for an administrative decision, and §56 AVG requires the determination of all relevant facts before an administrative decision is taken, this may not correspond fully with the required *extensiveness* of the examination nor the consideration of all *persona circumstances* of the extended family members concerned. This is particularly crucial for TCN extended family members, whose applications are (as noted above) subject to discretionary freedom of the Austrian authorities.
  - **Justification of denial of entry or residence:** Pursuant to §58(1) and (2) AVG, a negative decision on an application for entry and residence by a (TCN) extended family member must justify the decision taken by the competent authorities. In respect of the form of the decision on applications, §62(1) AVG states that administrative decisions may be made orally or in writing, unless otherwise provided for in other regulations. However, the NAG does not seem to require decisions on applications for residence (of extended family members) to be issued in writing.
  - **Right to judicial review:** Article 130(1)(1) of the Austrian Federal Constitution (*Bundes-Verfassungsgesetz*) seems to enshrine the right of appeal against decisions of administrative





authorities. The NAG does not seem to explicitly exclude such a right to appeal against a negative decision on applications for entry and residence by extended family members.

#### 6.2.2. Bulgaria<sup>113</sup>

The material law conditions for entry and residence of extended family members of EU citizens in Bulgaria are found in the Bulgarian *Law on Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and Their Family Members* (hereinafter, ‘LERD’).<sup>114</sup> Specifically concerning the implementation and application of Article 3(2)(a) of Directive 2004/38 in Bulgaria, the following observations can be made:

- **Method of ‘facilitation’:** Article 5, para.1, point 1 of LERD provides that the right to enter, reside in and leave Bulgaria is also recognized to “other” family members who in the country of origin have been financially dependent on the EU citizen or who have been members of the household, or if serious health considerations require the EU citizen to take personal care of that family member. Therefore, the Bulgarian law envisages three explicit situations, in which extended family members of mobile EU citizens would be allowed to enter and reside in Bulgaria. Extended family members of mobile EU citizens may apply to reside in Bulgaria by providing supporting documents enumerated in national legislation (alternative forms of supporting documents may be accepted, too).
- **Restriction in degree of kinship of ‘(extended) family members’:** Bulgarian law does not envisage restrictions in terms of categories of family members that are eligible for entry and residence as extended family members (e.g. relatives of first degree, second degree, third degree or higher, relatives not related by blood and marriage, etc.).
- **Dependent family members, members of the household, and serious health grounds, and proof thereof:** Extended family members of mobile EU citizens may apply to reside in Bulgaria by providing supporting documents enumerated in national legislation (alternative forms of supporting documents may be accepted, too).
- **Factors considered in exercising discretionary freedom:** The competent authorities<sup>115</sup> must undertake an extensive examination of the personal circumstances in the application, consider the implications of its decision for the fundamental rights of the extended family member (e.g., right to family life, best interest of the child) and for the fundamental rights of the mobile EU citizen (e.g. free movement rights, etc.). If the extended family member meets the eligibility criteria, the authorities may reject the application solely on grounds of fraud,<sup>116</sup> public policy, public security or public health.
- **Procedural rights of extended family members:** There are procedural guarantees in place. In case the applicant has failed to provide a required document, he or she shall be instructed as to what

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<sup>113</sup> This section on the entry and residence of extended family members in Bulgaria has been authored by Valeria Ilareva (PhD in International Public Law and practicing immigration lawyer in Bulgaria). To maintain consistency with the other sections on other Member States, the authors of the report have reorganised the contribution of Dr Ilareva. The integral text of Dr Ilareva’s contribution can be found in Annex 3 to this report.

<sup>114</sup> In Bulgarian: Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства.

<sup>115</sup> The Migration Directorate at the Ministry of the Interior and the Migration Units at the Regional Directorates of the Ministry of the Interior.

<sup>116</sup> Thus, Article 12a of LERD regulates the cases, in which the marriage has been concluded solely for the purpose of evading the immigration law rules.





they need to provide and are given a term of 14 days to do that.<sup>117</sup> The authorities must inform the extended family member in writing; any rejection of the application by the authorities shall be justified and motivated. The extended family member is informed of the right to appeal the decision in court or before the higher administrative authority. If applications for entry and residence of extended family members are rejected, the latter have a right to appeal the negative decision.<sup>118</sup> The institution that may be called upon to assess the appeal can be an administrative authority, different from the authority that took the negative decision, or a judicial authority (court), immediately following the initial negative decision. The deadline to submit the appeal is 14 days from the date of serving the decision to the applicant. The general rules for court cases under the Code on Administrative Procedure are applicable.

At least in theory, the law contains guarantees for equal treatment and prevention of arbitrariness in taking decisions to give or withdraw entry and residence rights. However, practice of implementing the law is extremely scarce. This conclusion is drawn both from the lack of any official statistical data collected and analyzed by the competent authorities with regard to extended family members and from the experience of immigration practitioners on the ground. There seems to be lack of awareness about the possibility for extended family members of EU citizens to enter and reside in Bulgaria as *family members*.

#### 6.2.3. Estonia<sup>119</sup>

The rules governing the entry and residence of mobile Union citizens and their family members in Estonia are set out specifically in the *Euroopa Liidu kodaniku seadus* (Citizen of the European Union Act; ELKS),<sup>120</sup> with the *Välismaalaste seadus* (Aliens Act; VMS)<sup>121</sup> applying as *lex generalis*. Specifically concerning the implementation and application of Article 3(2)(a) of Directive 2004/38 in Estonia, the following observations can be made:

- **Method of ‘facilitation’:** in transposing Directive 2004/38/EC, Estonia opted to include ‘other family members’, as defined in Article 3(2)(a) of Directive 2004/38/EC, under the definition of ‘family members’ of Union citizens [§3(1)(4), §3(2) and §3(3) ELKS]. Extended family members who meet the criteria set out in section 3 ELKS are thereupon treated as ‘direct’ family members for the purpose of entry and residence under the ELKS (but see remarks below, particularly concerning the in/exclusion of same-sex couples).
- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** Section 3(1) ELKS defines ‘family member of a citizen of the European Union’ as a family member, including extended family members, who is *not a citizen of the European Union*. This distinction on the basis of nationality further manifests itself in the conditions for residence in Estonia. Pursuant to section 13(1) ELKS, all Union citizens – including (extended) family members who are Union citizens themselves – are entitled to reside in Estonia for a period longer than three months upon registration of his or her residence.<sup>122</sup> On the other hand, TCN (extended) family members of mobile

<sup>117</sup> Article 12, para.5 LERD.

<sup>118</sup> Article Art.12, para.7 and Article 12a, para.3 LERD

<sup>119</sup> The analysis provided here in respect of the entry and residence of extended family members of mobile Union citizens in Estonia is partly based on contributions by Estonian legal experts.

<sup>120</sup> <https://www.riigiteataja.ee/en/eli/520032019014/consolide>.

<sup>121</sup> <https://www.riigiteataja.ee/en/eli/ee/523052019002/consolide>.

<sup>122</sup> Cf. Milieu & Europa Institute (2008-CS-EE), p. 31.



Union citizens in Estonia must meet the conditions stipulated in section 20 ELKS in order to obtain temporary residence in Estonia [see §18(1) ELKS].

- **Restriction in degree of kinship of ‘(extended) family members’:** The ELKS does not specifically circumscribe any restrictions in degrees of kinship for extended family members to join or accompany their mobile Union citizen family member. An important restriction in categories of extended family members eligible for entry and residence pursuant to the ELKS concerns same-sex couples otherwise than in a marriage. For same-sex couples not in a marriage, Estonian legal practice seems to exclude them from the definition of ‘family member’ for the purpose of the ELKS. TCN extended family members must therefore apply for entry and residence pursuant to the general Estonian immigration rules.<sup>123</sup>
- **Dependent family members and proof of dependency:** A ‘dependent’ (extended) family member of a mobile Union citizen is defined as ‘a person who resides together with the citizen of the European Union in a shared household and has no personal income’ [§3(2) ELKS]. In accordance with this definition of ‘dependent’, extended family members must determine both that they are *financially* dependent on the mobile Union citizen, as well as living in a *shared household* (see below concerning the definition under Estonian law of a ‘household’). Importantly, the qualitative research conducted has identified that the financial dependence must further be of a *permanent* nature.
- **Members of the household and proof thereof:** A member of the household of a mobile Union citizen is defined as “a person specified in subsection 4 of section 24 of the Official Statistics Act who resides with the citizen of the European Union in a shared household and has an independent income”, or as “a person who has a proven permanent and factual registered partnership with a citizen of the European Union” [§3(3) ELKS].<sup>124</sup> Section 24 of the Official Statistics Act defines a household as “persons who live together and are linked by a common use of all available household facilities”.<sup>125</sup> Pursuant to the ELKS, extended family members who are members of the household of a mobile Union citizen must therefore demonstrate being part of the *same household* as well as possession of *financial resources*.
- **Serious health grounds:** Section 3 of the ELKS includes in its definition of ‘family member’ a (TCN) person “who is permanently unable to cope independently due to health reasons” [§3(1)(4) ELKS]. In light of Directive 2004/38, two observations may be made in respect of this ground. First, the extended family member must demonstrate that he or she is *permanently* unable to cope independently. This implies both that the extended family member requires care by the mobile Union citizen, and that such inability to cope independently is of a ‘permanent’ nature.<sup>126</sup> Second, the ‘permanent incapacity’ must be attributable to ‘health reasons’.<sup>127</sup>

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<sup>123</sup> Cf. *ibid*.

<sup>124</sup> As regards the latter definition of a “proven permanent and factual registered partnership”, two observations may be made. First, in comparison to Article 2 and 3 of Directive 2004/38, the requirement of §3(3) ELKS is more restrictive than Article 2(2)(b) of Directive 2004/38 (as the Directive does not contain the requirement of a ‘permanent and factual’ registered partnership) as well as 3(2)(b) of Directive 2004/38 (as the language of §3(3) ELKS seems to exclude ‘durable relationships, duly attested’ other than registered partnerships). Second, information provided by the Estonian legal expert consulted notes that §3 ELKS is not applied (in practice) to same-sex couples in a registered partnership.

<sup>125</sup> The text of the *Riikliku statistika seadus* (Official Statistics Act, RStS) is available at <https://www.riigiteataja.ee/en/eli/ee/506012015002/consolide>.

<sup>126</sup> This has been confirmed by the Estonian legal expert consulted. See also Milieu & Europa Institute (2008-CS-EE), p. 32.

<sup>127</sup> See *ibid*.



- **Factors considered in exercising discretionary freedom:** From a textual analysis of the ELKS, it is clear that applications for accompanying or joining a mobile Union citizen in Estonia by extended family members is not subject to discretionary freedom by the Estonian authorities.<sup>128</sup> Extended family members who are themselves Union citizens are entitled to reside in Estonia for longer than three months merely upon the registration of their address. The application for (entry and) residence of TCN extended family members may only be refused if the requirements in the ELKS are not met or on grounds of public policy, public security, and public health, as well as on grounds of abuse of rights or deceit [§26(1) ELKS].
- **Procedural rights of extended family members:** procedural rights for the application for entry and residence by TCN extended family members of mobile Union citizens are contained, among others, in the ELKS and the Regulation implementing the ELKS (hereinafter: ETAP).<sup>129</sup> Furthermore, the procedural rules in the ELKS and ETAP are complemented by rules contained in *inter alia* the Administrative Procedure Act (HMS).<sup>130</sup>
  - **Right to an extensive examination:** the requirement for Member States’ authorities to decide upon an application for entry and residence of an extended family member of a mobile Union citizen based on an extensive examination of the personal circumstances has not been transposed by the ELKS. This may relate to the fact that, upon meeting the conditions stipulated for residence in the ELKS, family members of mobile Union citizens obtain a *right* of residence. The application is therefore not subject to discretionary freedom. The principles underlying the requirement of an extensive examination may be found in the Administrative Procedure Act, such as the principle of investigation (of all relevant facts) [§6 HMS].
  - **Justification of denial of entry or residence:** In accordance with §14(2) ETAP, a decision to grant residence to extended family members may be notified “via the website of the Police and Border Guard, by e-mail, telephone or in any other suitable manner”, while negative decisions on applications for residence must be notified in writing (“by post or in person against signature”) [§14(3) ETAP]. Pursuant to §2 ETAP and §56 HMS, the decision denying residence to extended family members must be accompanied by “written reasoning” including the factual and legal basis of the decision.<sup>131</sup>
  - **Right to judicial review:** According to section §52<sup>12</sup>(1) ELKS and §30(1) ETAP, extended family members are entitled to appeal against a negative decision on their application for entry and residence. Appeals against negative decisions must be submitted within 30 days of ‘becoming aware of’ the negative decision [§30(2) ETAP]. The (negative) decision must include references to the applicant’s “possibilities and place of and term and procedure for challenging” the refusal to grant (temporary) residence [§1(4) ELKS in conjunction with §57(1) HMS]. Extended family members are free to decide whether to seek review of the refusal

<sup>128</sup> This has been confirmed, with the caveat of the inapplicability of the ELKS for same-sex couples, by the Estonian legal expert.

<sup>129</sup> *Euroopa Liidu kodaniku ja tema perekonnaliikme elamisõiguse taotlemise, andmise ning selle pikendamise ja lõpetamise kord* (Procedure for applying for, granting, extending and terminating the right of residence of a citizen of the European Union and his/her family member; hereinafter: ETAP), RT I, 10.10.2017, 12, the text of which is available (in Estonian) at <https://www.riigiteataja.ee/akt/110102017012?leiaKehtiv>.

<sup>130</sup> See §1(4) ELKS and §2 ETAP for the application of the *Haldusmenetluse seadus* (Administrative Procedure Act, HMS); the text of the HMS is available at <https://www.riigiteataja.ee/en/eli/ee/506012015002/consolide>.

<sup>131</sup> According to §52<sup>11</sup> ELKS, the inclusion of factual grounds for ‘administrative’ decisions under the ELKS may be omitted “insofar as this is contrary to the interests of national security”.



decision with the administrative supervisory authority (i.e. the Minister of the Interior),<sup>132</sup> or to directly lodge an appeal before the administrative courts.<sup>133</sup>

#### 6.2.4. Greece<sup>134</sup>

The rules governing the entry and residence of mobile Union citizens and their family members in Greece are primarily set out in Presidential Decree (P.D.) 106/2007,<sup>135</sup> with clarifications provided in a number of Circulars<sup>136</sup> and Ministerial Decisions. Furthermore, certain provisions of the Greek “Code on Migration and Social Inclusion and other provisions” (*Κώδικας Μετανάστευσης και Κοινωνικής Ένταξης και λοιπές διατάξεις*, hereinafter: Act 4251/14)<sup>137</sup> are of relevance. With regard to the transposition of Article 3(2)(a) of Directive 2004/38/EC in Greece, the following observations can be made:

- **Method of ‘facilitation’:** Extended family members of mobile Union citizens who meet the conditions stipulated in Article 3(2)(a) of P.D. 106/2007 (as amended) shall be granted “a residence permit of two years [...] in accordance with the applicable Greek law”.<sup>138</sup> It should be noted that, according to Circular no. 3/2018, extended family members applying for entry and residence on the basis of Article 3(2) of P.D. 106/2007 will be issued with a residence permit, and *not* a Residence Card.<sup>139</sup>
- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** The text of Article 3(2)(a) of P.D. 106/2007 does not make a distinction between extended family members’ entry and residence on the basis of nationality.
- **Restriction in degree of kinship of ‘(extended) family members’:** Article 3(2) of P.D. 106/2007 does not contain any restrictions in the degree of kinship or ‘type of family member’ eligible for facilitation of entry and residence.<sup>140</sup>
- **Dependent family members and proof of dependency:** Article 3(2) of P.D. 106/2007 refers to the extended family member(s) being “maintained” (*συντηρείται*) by the Union citizen having the primary right of residence. Joint Ministerial Decision 31399/2018<sup>141</sup> refers to documented evidence

<sup>132</sup> Pursuant to the procedure provided in Chapter 5 of the HMS.

<sup>133</sup> Pursuant to §52<sup>12</sup>(1) ELKS and the Code of Administrative Court Procedure. The possibility for rejected applicants to opt for either administrative review or judicial appeal has been confirmed by the Estonian legal expert consulted. Cf. Milieu & Europa Institute (2008-CS-EE), p. 46.

<sup>134</sup> The information contained in this section concerning Greece is based on legal analysis conducted by the authors of this study, and confirmed by a Greek legal expert.

<sup>135</sup> As amended by Act 4540/2018. The consolidated text of P.D. 106/2007 is available (in Greek) at [https://www.kodiko.gr/nomologia/document\\_navigation/397827](https://www.kodiko.gr/nomologia/document_navigation/397827).

<sup>136</sup> Of particular relevance is Circular no. 3 of 2018 on the application of the provisions of Law 4540/2018 (91 A), available (in Greek) at <http://immigration.gov.gr/documents/20182/31268/egk3-06112018.pdf/2057d0b4-e59d-4b79-a064-06f1cda5b2f7>.

<sup>137</sup> Act 4251/14, Code on Migration and Social Inclusion and other provisions.

<sup>138</sup> Cf. the previous version of Article 3(2) of P.D. 106/2007, stating merely that the entry and residence of extended family members is to be ‘prioritised and generally facilitated’.

<sup>139</sup> See Circular no. 3/2018, p. 10. It is unclear how this statement in Circular no. 3/2018 is compatible with Article 9 of P.D. 106/2007, as the latter provision seems to include extended family members for the purpose of issuing a “Residence Card” (cf. Article 9(2)(e)).

<sup>140</sup> Cf. Circular no. 3 of 2018, part “B. ΣΥΜΦΩΝΟ ΣΥΜΒΙΩΣΗΣ”, under “2. Μέλη οικογένειας πολιτών της Ένωσης (π.δ. 106/2007)”, p. 10-11.

<sup>141</sup> Joint Ministerial Decision no. 31399 of 18 September 2018, amendment to Joint Ministerial Decision No. 30825/4.6.2014 (1528 B), “Determination of Required Documents for the Issuance of National Entry Visas and for the Issuance and Renewal of a Residence Certificate in accordance with the provisions of Law 4251/2014”, available (in Greek) at <http://immigration.gov.gr/documents/20182/31271/apof31399-18092018.pdf/117528f6-78f3-4c58-a343-6a5b63335121>.



of “material dependency” as well as a solemn declaration of continued maintenance.<sup>142</sup> Evidence of this ‘material dependency’ may be in the form of “a document issued by a competent authority” in the country of origin or habitual residence certifying such maintenance.<sup>143</sup>

- **Members of the household and proof thereof:** members of the same household is transposed by Article 3(2)(a) of P.D. 106/2007 as residing “under the same roof” as the Union citizen. Proof of the extended family member(s) being part of the household of the mobile Union citizen having the primary right of residence may be provided in the form of a document issued by the competent authority of the country of origin or habitual residence.<sup>144</sup>
- **Serious health grounds:** Extended family members of mobile Union citizens who, for serious health reasons, strictly require the personal care by the Union citizen concerned fall within the scope of Article 3(2)(a) of P.D. 106/2007. Proof of such serious health grounds requiring personal care may be provided in the form of a recent medical certificate or other official document “showing the serious health reasons that necessitate the personal care of the applicant by a Union citizen”.<sup>145</sup>
- **Factors considered in exercising discretionary freedom:** Article 3(2) of P.D. 106/2007, as amended, states that extended family members meeting the conditions stipulated in that provision *shall* be issued with a residence permit of two years, implying a ‘right’ of entry and residence. The language of Article 3(2) of P.D. 106/2007 does not therefore seem to leave discretionary freedom to the competent Greek authorities.
- **Procedural rights of extended family members:** The procedural rights of extended family members’ application for entry and residence in Greece are partly contained in P.D. 106/2007.
  - **Right to an extensive examination:** Article 3(3) of P.D. 106/2007 explicitly states that “in each case, a thorough examination of the personal situation shall be carried out”.
  - **Justification of denial of entry or residence:** Article 3(3) of P.D. 106/2007 requires any denial of application for entry and residence by extended family members to be justified.
  - **Right to judicial review:** The right to judicial review of a negative decision on an application for entry and residence of extended family members is provided for in Article 25(3) of Act 4251/14, directly or indirectly through the application of Article 21(1) and (3) and 24(1) and (2) of P.D. 106/2007.<sup>146</sup>

#### 6.2.5. Hungary

The rules governing the entry and residence of mobile Union citizens and their family members in Hungary are set out in the Hungarian Free Movement Act (*Szmtv.*)<sup>147</sup> and Government Decree

<sup>142</sup> Joint Ministerial Decision no. 31399/2018, pp. 17-18.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> It is unclear whether Article 25 of Act 4251/14 applies directly to extended family members (due to not falling within the scope of the exclusionary provision of Article 2a(2)(b) of Act 4251/14) or indirectly through the application of Article 21(1) and (3) and 24(1) of P.D. 106/2007.

<sup>147</sup> 2007. évi I. Törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról (Act I of 2007 on the Conditions of Entry and Residence of Persons with the Right of Free Movement and Residence, hereinafter: *Szmtv.*), available (in Hungarian) at <https://net.jogtar.hu/jogszabaly?docid=A0700001.TV>.



113/2007 (V.24).<sup>148</sup> With regards to the transposition of Article 3(2)(a) of Directive 2004/38/EC in Hungary, the following observations can be made:

- **Method of ‘facilitation’:** Article 1(1)(d) *Szmtv.* makes reference to the ‘right of free movement and residence’ of “a person accompanying or joining an EEA national who, in the country of origin, was a dependent or member of the household of the EEA national or who is personally cared for by the EEA national for serious medical reasons and whose entry and residence as a family member has been authorised”. Similarly, the Hungarian Free Movement Act includes extended family members under the definition of family member to the extent that their entry and residence as a family member has been authorised by the competent immigration authority [see Article 2(b)(bh), 3(3) and 8(1) *Szmtv.*]. Once their entry and residence have been authorised, they are considered to have the status of a family member of a mobile Union citizen (excluding for the purposes of retention of residence) [Article 8(3) *Szmtv.*].
- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** Act I of 2007 makes a distinction on the basis of nationality of extended family members in respect of the right of entry and residence for up to three months [cf. Article 3(1) and 3(3) *Szmtv.*].
- **Restriction in degree of kinship of ‘(extended) family members’:** Neither the Hungarian Free Movement Act nor Government Decree 113/2007 (V.24) set any conditions or restrictions in degrees of kinship for eligibility of extended family members accompanying or joining mobile Union citizens in Hungary.<sup>149</sup> Government Decree 113/2007 (V.24) enumerates the manner by which the status of ‘family member’ may be evidenced, including ‘in any other credible manner’ [Article 24(1)(e) Government Decree 113/2007 (V.24)].
- **Dependent family members and proof of dependency:** Extended family members applying for entry and residence in order to join a mobile Union citizen in Hungary on grounds of being dependent on the Union citizen concerned must provide evidence of dependency in the form of “a maintenance or annuity contract, a maintenance duty specified under a separate Act, a maintenance declaration pursuant to Article 25(1), or another statutory provision or contract” [Article 27(1)(a) Government Decree 113/2007 (V.24)].
- **Members of the household and proof thereof:** Extended family members applying for entry and residence in order to join a mobile Union citizen in Hungary on grounds of having resided, in the country from which they have come, in the same household as a mobile Union citizen must provide evidence thereof by means of “a document, in particular an official certificate issued thereto, or by any other credible means” [Article 27(1)(c) Government Decree 113/2007 (V.24)].
- **Serious health grounds:** Extended family member who, owing to serious health grounds, requires the personal care of a mobile Union citizen must provide, with their application for entry and residence, evidence thereof by means of “a certificate issued by the attending physician, that he or she is in need of personal care by the EEA citizen for serious medical reasons” [Article 27(1)(b) Government Decree 113/2007 (V.24)].

<sup>148</sup> 113/2007. (V. 24.) Korm. Rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény végrehajtásáról (Government Decree 113/2007 (V.24) on the implementation of Act I of 2007 on the Entry and Stay of Persons with the Right of Free Movement and Residence), available (in Hungarian) at <https://net.jogtar.hu/jogszabaly?docid=a0700113.kor>.

<sup>149</sup> The lack of restrictions in degrees of kinship (or ‘types of family members’) has been confirmed by the Hungarian expert consulted.





- **Factors considered in exercising discretionary freedom:** The use of the term “may authorise” in Article 8(1) *Szmtv.* seems to imply discretionary freedom for the competent immigration authorities to approve or refuse application for entry and residence by extended family members of mobile Union citizens. Qualitative information gathered for this study seems to indicate, however, that the competent immigration authorities may refuse entry or residence applications only on grounds that the conditions have not been met, or on grounds of public policy, public security or public health.
- **Procedural rights of extended family members:** Most of the procedural rights applicable to extended family members applying to accompany or join a mobile Union citizen are contained in the Hungarian Free Movement Act and Government Decree 113/2007 (V.24). Furthermore, Article 69 *Szmtv.* declares Chapter IX of the Aliens Act (*Harmtv.*)<sup>150</sup> on the rules of procedure applicable to procedures concerning the entry and residence of mobile Union citizens and their family members.
  - **Right to an extensive examination:** The requirement for the competent authorities to undertake “an extensive examination of the personal circumstances” of the extended family member, as contained in Article 3(2) of Directive 2004/38, has not been provided for in the *Szmtv.*, the *Harmtv.*, nor their implementing government decrees.
  - **Justification of denial of entry or residence:** In accordance with Article 87/M(1) *Harmtv.* (in conjunction with Article 69 *Szmtv.*), a (negative) decision on an application must contain, among others, a statement of reasons, including the facts and evidence, upon which the competent authority’s decision was based. The decision must be issued to the applicant in writing (“by service”) [Article 87/N(4) *Harmtv.*]. While the *Harmtv.* prescribes that the applicant must be informed of the decision in a language he or she understands, it is restricted to information given orally [Article 87/N(5) *Harmtv.*].
  - **Right to judicial review:** The right to appeal a negative decision on a visa for entry by TCN (extended) family members is explicitly provided for in Article 7(5) and 12(1) Government Decree 113/2007 (V.24). The right to appeal a negative decision on an application for residence (of longer than three months) of an extended family member can be derived from Article 88/P(1) *Harmtv.* (made applicable by Article 69 *Szmtv.*), as neither the *Harmtv.* nor the *Szmtv.* preclude appealing against a negative decision.<sup>151</sup>

#### 6.2.6. Netherlands

The rules governing the entry and residence of mobile Union citizens and their family members in the Netherlands are set out in the *Vreemdelingenwet 2000* (Foreigners’ Act 2000, hereinafter: *Vw 2000*),<sup>152</sup> *Vreemdelingenbesluit 2000* (Foreigners’ Decree 2000, hereinafter: *Vb 2000*),<sup>153</sup> and *Vreemdelingencirculaire 2000 (B)* (Foreigners’ Circular 2000 (B), hereinafter: *Vc 2000 (B)*),<sup>154</sup> with the majority of legal provisions transposing Directive 2004/38/EC in the aforementioned *Vreemdelingenbesluit 2000*. With regards to the transposition of Article 3(2)(a) of Directive 2004/38/EC in the Netherlands, the following observations can be made:

<sup>150</sup> 2007. évi II. Törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról (Act II of 2007 on the Conditions of Entry and Residence of Third-Country Nationals; hereinafter: *Harmtv.*), available (in Hungarian) at <https://net.jogtar.hu/jogszabaly?docid=A0700002.TV>.

<sup>151</sup> The right to appeal against a negative decision is also confirmed by the Hungarian expert consulted.

<sup>152</sup> <https://wetten.overheid.nl/BWBR0011823/>

<sup>153</sup> <https://wetten.overheid.nl/BWBR0011825/>

<sup>154</sup> <https://wetten.overheid.nl/BWBR0012289/>





- **Method of ‘facilitation’:** in transposing Directive 2004/38/EC, the Netherlands decided to include ‘other family members’, as defined in Article 3(2)(a) of Directive 2004/38/EC, under the definition of ‘family members’ of Union citizens [Article 8.7(3) *Vb 2000*].<sup>155</sup> This entails that, to the extent that the criteria under Article 3(2)(a) of Directive 2004/38/EC, as transposed in the *Vb 2000*, are met, ‘extended family members’ enjoy entry and residence *rights* on the same level as for ‘direct’ family members of Union citizens in the Netherlands.
- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** the *Vb 2000* makes a clear distinction between (extended) family members of Union citizens on the basis of whether they are a citizen of an EU Member State themselves or a third-country national.<sup>156</sup> This distinction, reflecting the provisions of Directive 2004/38/EC, primarily concerning entry conditions and residence for up to three months<sup>157</sup> as well as the obligation to register with the Dutch immigration authorities for residence exceeding three months.<sup>158</sup>
- **Restriction in degree of kinship of ‘(extended) family members’:** While the *Vb 2000* is silent as regards any restrictions in degrees of kinship, the working instructions of the Dutch immigration authorities (IND) in this regard explicitly notes that “there are no restrictions in the degree of kinship with respect to [extended family members]”.<sup>159</sup>
- **Dependent family members and proof of dependency:** According to the *Vc 2000 (B)*, ‘dependency’ is established when it is determined that the (extended) family member seeking to reunite with a mobile Union citizen was being ‘materially’ supported (“*materiële ondersteuning*”). This ‘material support’ must both be ‘real’ and ‘necessary’.<sup>160</sup>
  - Material support is only considered ‘*necessary*’ for extended family members, if the family member is not (wholly) self-sufficient in his or her basic needs as a result of his or her economic or social conditions.<sup>161</sup> The working instructions of the IND further specify in this respect that the (extended) family member must demonstrate what his or her economic and social condition is. In this regard, the working instructions note that a mere declaration, without further substantiation, is not sufficient;<sup>162</sup>
  - Material support is only considered ‘*real*’ for extended family members of mobile Union citizens, if the Union citizen concerned has, during an uninterrupted period of at least one year, regularly made payments to the relevant family member to the amount required by the latter to foresee in his or her basic necessities in the ‘country of origin’;<sup>163</sup>

<sup>155</sup> See Milieu & Europa Institute (2008-CS-NL), p. 23; M.A.K. Klaassen (2015), p. 192; K. Zwaan et al. (2018), p. 190.

<sup>156</sup> See Zwaan et al. (2018), p. 198.

<sup>157</sup> See Article 8.11 *Vb 2000*, which notes that all Union citizens (including ‘extended family members’) may enter and reside in the Netherlands for up to three months with a valid passport or valid ID, or provide evidence of their possession of the nationality of an EU Member State; whereas for TCN (extended) family members, they are only entitled to entry and residence in the Netherlands for up to three months with a valid passport.

<sup>158</sup> See Article 8.13(2) *Vb 2000*. See also Zwaan et al. (2018), op. cit., p. 202, noting that this duty to register with the IND rests solely on TCN family members of Union citizens, and should be distinguished from the general duty for all residents in the Netherlands to register their address with the municipality.

<sup>159</sup> WI 2018/4, p. 18.

<sup>160</sup> *Vc 2000 (B)*, Chapter B.10 (“EU-recht en Internationale Verdragen”), para. 2.2.

<sup>161</sup> Ibid.

<sup>162</sup> WI 2018/4, p. 18.

<sup>163</sup> *Vc 2000 (B)*, Chapter B.10 (“EU-recht en Internationale Verdragen”), para. 2.2.



Notwithstanding the documents required by (extended) family members when applying for entry and residence as a family member of a mobile Union citizen,<sup>164</sup> the working instructions of the IND do note that dependency may be evidenced by “any suitable means”.<sup>165</sup>

- **Members of the household and proof thereof:** the legislation and policy documents in the Netherlands are less clear concerning the concrete interpretation of what constitutes a household (or the documentary evidence thereof). The only indications can be found in Article 8.13(3)(e) *Vb 2000*, which notes that extended family members of Union citizens applying for residence must submit *inter alia* a document issued by the relevant authority in the country of origin certifying that they are members of the household of the Union citizen.
- **Serious health grounds:** the Dutch legislation and policy in this area does not explicitly specify what is to be considered as “serious health grounds which strictly require the personal care of the family member by the Union citizen”. Some indication may be found in the application form “Application for Verification against EU Law (certificate of lawful residence)”, which provides, as an example, that serious health grounds strictly requiring personal care of a mobile Union citizen may be evidenced by a declaration issued by the competent authorities in the country of origin (or country of former residence).<sup>166</sup>
- **Factors considered in exercising discretionary freedom:** as noted above, once the criteria on the basis of Article 8.7(3) *Vb 2000* are met, ‘extended’ family members are considered on the same level as ‘direct’ family members for the purpose of entry and residence (i.e. the Dutch immigration authorities do not have discretionary freedom to accept or refuse entry and residence for extended family members of mobile Union citizens);
- **Procedural rights of extended family members:** procedural rights concerning the entry and residence of extended family members are in Dutch law are quite complex. While the *Vw 2000* and *Vb 2000* govern certain aspects of procedural rights,<sup>167</sup> it is clear from these provisions that they function as *lex specialis* to general Dutch administrative law (*Algemene wet bestuursrecht*, General Administrative Law Act, hereinafter: *Awb*).<sup>168</sup> In light of Article 3(2) of Directive 2004/38/EC and the CJEU’s case law in *Rahman* and *Banger*, the Dutch legislation govern the following procedural rights and safeguards as follows:
  - **Right to an extensive examination:** general Dutch administrative law, and in particular Article 3:2 *Awb*, partly codifies the obligation to undertake an extensive examination, as the relevant Dutch authorities are required to consider all relevant facts and interests involved. While this does not correspond fully to an extensive examination, it can be noted that, as

<sup>164</sup> More specifically, “a document issued by the relevant authority in the country of origin [...] certifying that they are dependants [...] of the Union citizen”; see Article 8.13(3)(e) *Vb 2000*; similarly, see Article 10(2)(e) Directive 2004/38/EC.

<sup>165</sup> WI 2018/4, p. 18. See similarly *Vc 2000 (B)*, Chapter B.10, para. 2.4, which notes that, unless explicitly stated otherwise in the Dutch legislation, the general rule is that all forms of evidence is accepted.

<sup>166</sup> IND, “Aanvraag Toetsing aan het EU-recht (bewijs van rechtmatig verblijf)” [Application for Verification against EU Law (certificate of lawful residence)], <https://ind.nl/Formulieren/6006.pdf>. Note that the English version of the application form (available at <https://ind.nl/en/Forms/5005.pdf>) slightly differs in wording; the Dutch version refers to “a declaration by the competent authorities, or other supporting documents, showing that you require personal care from your sponsor for serious health grounds”. The English version of the form does not make reference to the possibility of proving eligibility through other supporting documents.

<sup>167</sup> See for example Chapter 7, section 2, *Vw 2000*, for ‘regular’ procedures under Dutch migration law and Chapter 7, section 5, for procedural aspects concerning detention measures.

<sup>168</sup> <https://wetten.overheid.nl/BWBR0005537>. See also Klaassen (2015), op. cit., p. 156; Zwaan et al. (2018), op. cit., pp. 34-35.



noted previously, once the eligibility criteria have been satisfied, the ‘extended’ family members are *entitled* to entry and residence; Dutch authorities therefore do not enjoy any form of discretionary freedom (within which an extensive examination would have to occur);<sup>169</sup>

- **Justification of denial of entry or residence:** as with the right to an extensive examination, the duty for the competent authorities to justify any denial of entry or residence for extended family members under Article 8.7(3) *Vb 2000* follows from general Dutch administrative law, in particular Articles 3:46 and 3:47 *Awb*.<sup>170</sup>
- **Right to judicial review:** In accordance with general Dutch administrative law (specifically Chapters 6, 7 and 8 *Awb*), as further specified by Chapter 7 of the *Vw 2000*, ‘extended family members’ as defined in Article 8.7(3) *Vb 2000* are entitled to administrative review (*‘bezwaar’*) against decisions taken by the competent authorities as regards their entry and residence as a family member of a mobile Union citizen. Judicial review (*‘beroep’*) is available against a negative decision in administrative review.<sup>171</sup>

#### 6.2.7. Portugal<sup>172</sup>

The rules governing the entry and residence of mobile Union citizens and their family members in Portugal are set in Law no. 37/2006, of 9 August 2006,<sup>173</sup> which was adopted specifically for the transposition of Directive 2004/38/EC. Any aspects not covered by Law no. 37/2006 are governed by the general immigration act – Law no. 23/2007, of 4 July 2007, last amended by Law no. 28/2019, of 29 March 2019<sup>174</sup> – and by Regulatory Decree no. 84/2007, of 5 November 2007, last amended by Regulatory Decree no. 9/2018, of 11 September 2018.<sup>175</sup> For the implementation of Law no. 37/2006, the Portuguese Immigration and Borders Service (SEF) has issued an internal procedures manual. With regards to the transposition of Article 3(2)(a) of Directive 2004/38/EC in Portugal, the following observations can be made:

- **Method of ‘facilitation’:** in transposing Directive 2004/38/EC, Portugal stayed close to the letter of the Directive and therefore kept ‘any other family members’ as a separate category from that of ‘family members’ as defined in Article 2(2) of the Directive. The ‘facilitation’ of entry and residence to ‘any other family members’ is to take place under the terms set by the general immigration law,

<sup>169</sup> See Milieu (2008-CS-NL), p. 23; cf. J.A. Raukema, A. Baas and J.A. Winter, “Commentaar op art. 3 Richtlijn 2004/38/EG” [Commentary on Article 3 Directive 2004/38/EC] (updated to 30 June 2017), in: A. Baas et al. (eds.), *Lexplicatie Europese regelgeving*, digital edition, Deventer: Wolters Kluwer.

<sup>170</sup> Ibid.

<sup>171</sup> See Milieu (2008-CS-NL), p. 40; cf. J.A. Raukema, “Commentaar op art. 15 Richtlijn 2004/38/EG” [Commentary on Article 15 Directive 2004/38/EC] (updated to 4 August 2015), in: A. Baas et al. (eds.), *Lexplicatie Europese regelgeving*, digital edition, Deventer: Wolters Kluwer.

<sup>172</sup> This section on the entry and residence of extended family members in Portugal has been authored by Patricia Jerónimo.

<sup>173</sup> Lei n.º 37/2006, de 9 de Agosto (Regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento e do Conselho, de 29 de Abril), available at <https://dre.pt/application/conteudo/538604> [18.11.2019].

<sup>174</sup> Lei n.º 23/2007, de 4 de Julho (Aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional); consolidated version available at [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=920&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=920&tabela=leis) [18.11.2019].

<sup>175</sup> Decreto Regulamentar n.º 84/2007, de 5 de Setembro, consolidated version available at <https://dre.pt/application/conteudo/116382281> [18.11.2019].



per Article 3(2) of Law no. 37/2006.<sup>176</sup> Neither the applicable legislation nor SEF’s internal procedures manual provide specific criteria for the ‘facilitation’. It is, in any case, reported by SEF officials that, as a general trend, if the applicants submit documents attesting to dependency or serious health conditions, practically all requests made under Article 3(2) of Law no. 37/2006 are granted by SEF.

- **Distinction of entry and residence of ‘extended family members’ on the basis of nationality:** Law no. 37/2006 does not distinguish between family members of Union citizens on the basis of whether they are a citizen of an EU Member State themselves or a third-country national, except for the requirement that third-country national family members present a valid passport upon entry and inform the Portuguese authorities of their presence in Portugal [Article 4(2) to (5) of Law no. 37/2006].<sup>177</sup>
- **Restriction in degree of kinship of ‘(extended) family members’:** Both Law no. 37/2006 and SEF’s internal procedures manual are silent on any restrictions in degrees of kinship with respect to extended family members. SEF’s manual offers some clarifications on the scope of Article 2(e) of Law no. 37/2006 – which replicates Article 2(2) of Directive 2004/38/EC – which can shed some light on the way the concept of extended family members is being interpreted. According to the manual, 1) the expression ‘direct descendant’ in Article 2(e)(iii) of Law no. 37/2006 is not limited by degree of kinship and therefore covers children, grandchildren and great-grandchildren; 2) direct descendants over the age of 21 who are no longer dependant lose their status as ‘family members’ under Article 2 and cannot claim to fall under the category of ‘other family members’ under Article 3 of Law no. 37/2006; 3) the expression ‘direct relatives in the ascending line’ in Article 2(e)(iv) of Law no. 37/2006 does not cover stepfathers and stepmothers (who, it is to be assumed, fall under the category of ‘other family members’ whose entry and residence is to be facilitated if they meet the requirements of Article 3 of Law no. 37/2006).
- **Dependent family members and proof of dependency:** Articles 14(6)(e) and 15(4)(e) of Law no. 37/2006 prescribe that proof of dependency is made by means of a document issued by the competent authorities of the country of origin or country of former residence attesting that the ‘other family member’ is a dependent of the Union citizen. These provisions do not clarify the meaning of ‘dependant’, however. SEF’s internal procedures manual is silent on the criteria to establish dependency of ‘other family members’, but the clarifications provided *a propos* the dependant descendants and relatives in the ascending line, for purposes of Article 2(e) of Law no. 37/2006, apply. According to the manual,
  - Dependant is the family member who needs material support (*‘apoio material’*) in order to meet basic needs (*‘necessidades essenciais’*). Dependency is established when the EU citizen ensures the livelihood (*‘garanta o sustento’*) of the family member, irrespective of the reasons why that is so and even if the dependant family member is in conditions to ensure his or her own livelihood by taking on a paying job. It is also clarified that a person can be financially independent and still be de facto dependant of a Union citizen for the purposes of Law no. 37/2006.

<sup>176</sup> It is worth noting that the general immigration act already includes underage siblings under guardianship of the foreign resident in the definition of ‘family members’ for purposes of family reunification – Article 99(1)(g) of Law no. 23/2007.

<sup>177</sup> The deadline for informing the Portuguese authorities is three work days, per Article 14(1) of Law no. 23/2007.



- Proof of dependency can be made by means e.g. of the Union citizen’s fiscal income statement in which the family member is listed as a dependant and/or of a medical certificate attesting to the family member’s serious (physical or psychological) health problems. Lack of dependency is attested e.g. by the fact that the family member has made payments to Social Security, that his or her salary is above minimum wage or that he or she has started his or her own family. According to reports by SEF officials, it is common to accept/demand as proof of dependency the presentation of bank statements attesting to regular transfers from the Union citizen to the family member in the latter’s country of origin, and to ask the state authorities in the family member’s country of origin to confirm whether the he or she has any assets or sources of income.
- **Members of the household and proof thereof:** Articles 14(6)(e) and 15(4)(e) of Law no. 37/2006 prescribe that proof that a person is a member of the Union citizen’s household is made by means of a document issued by the competent authorities of the country of origin or country of former residence. Neither Law no. 37/2006 nor SEF’s manual provide any clarification on the meaning of the expression ‘members of the household of the Union citizen’ (*‘que com este viva em comunhão de habitação’*).
- **Serious health grounds:** Neither Law no. 37/2006 nor SEF’s manual provide any clarification on what are to be considered ‘serious health grounds which strictly require the personal care of the family member by the Union citizen’. As for the means to prove such serious health grounds, it is to be assumed that a medical certificate is required. Articles 14(6)(e) and 15(4)(e) of Law no. 37/2006 seem to allow a broad range of evidentiary means, since they only require proof of the existence of serious health grounds. SEF’s manual makes a reference to a medical certificate attesting to serious physical and psychological problems albeit in connection with proof of dependency for purposes of Article 2(e) of Law no. 37/2006.
- **Factors considered in exercising discretionary freedom:** Portuguese immigration authorities enjoy discretion when deciding on applications made under Article 3(2) of Law no. 37/2006, but, as noted above, reports by SEF officials indicate that, in practice, most requests made under Article 3(2) of Law no. 37/2006 are granted once there is proof of dependency or serious health conditions.
- **Procedural rights of extended family members:** Keeping close to the letter of the Directive, Article 3(3) of Law no. 37/2006 prescribes that decisions pertaining to the entry and residence of ‘other family members’ can only be reached after examination of all relevant personal circumstances, and that any denial of entry or residence must be justified. Further procedural rights are provided by Law no. 37/2006 to mobile EU citizens and their family members (extended or otherwise) in Articles 23, 25 and 26, concerning respectively the aspects to be considered before taking an expulsion decision (e.g. age, state of health, family and economic situation), the mandatory notification in writing of expulsion decisions, and the access to administrative and judicial redress procedures. These provisions are supplemented by the procedural safeguards provided for in the general immigration act, which include the right of foreigners to be heard before the immigration authorities decide not to allow their entry to the territory [Article 38(1) of Law no. 23/2007]; the right of non-admitted foreigners to contact the diplomatic or consular authorities of their countries of origin, as well as to be provided assistance by interpreter, medical assistance and material support, while staying at a temporary reception centre awaiting removal [Article 40(1) of Law no. 23/2007]; the right of non-admitted foreigners to have prompt access to legal assistance [Article



40(2) of Law no. 23/2007]; the right to be notified in writing of all negative decisions with mention of the right (and deadline) to appeal to the administrative courts [Articles 38(2), 82(4) and 106(6)(7) of Law no. 23/2007, for non-admission decisions, refusal of residence permit and refusal of family reunification, respectively];<sup>178</sup> the right to have a decision on a request for a residence permit issued within 90 days and to have the residence permit granted if the deadline is not met by the immigration authorities [Article 82(1)(3) of Law no. 23/2007].

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<sup>178</sup> The appeal does not have suspensive effect, however [Articles 39 and 106(7) of Law no. 23/2007, for non-admission decisions and refusal of family reunification, respectively].





## 7. Concluding remarks

The purpose of Article 3(2)(a) of Directive 2004/38 can best be expressed with reference to recital 6 of the Directive, namely “to maintain the unity of the family in a broader sense”. It is with this unity of family in mind that the European legislators have included the provision in Directive 2004/38 requiring Member States to facilitate the entry and residence of those family members who do not benefit from entry and residence rights pursuant to the Directive.

Article 3(2) Directive 2004/38, read in light of the CJEU’s case law in *Rahman*, *Banger* and *SM*, as well as other provisions of EU law, including the EU Charter of Fundamental Rights, clearly sets out the boundaries in the form of core obligations that Member States must respect in transposing and implementing their duty to ‘facilitate’ entry and residence for extended family members.

In respect of the scope *rationa personae* of Article 3(2)(a) of Directive 2004/38, the following observations have been made (see section 2):

- Article 3(2)(a) Directive 2004/38 should be interpreted as being applicable to *all family members who do not derive automatic entry and residence rights* pursuant to Article 2(2) and 3(1) of the Directive. Family member should be interpreted in a broad sense as any person who has established *family life* with a mobile Union citizen (per *SM*, such as in the case of legal guardianship);
- The three grounds for eligibility under Article 3(2)(a) Directive 2004/38 (dependency, same household, and serious health) are *not cumulative* conditions (per *Rahman*), and Member States cannot therefore require extended family member to meet more than one of these grounds for eligibility;
- Per *Rahman*, Member States can also not interpret ‘the country from which they have come’ as to mean the country from which mobile Union citizens concerned have come prior to exercising their free movement rights;
- The conditions stipulated in Article 3(2)(a) Directive 2004/38 – as well as any additional conditions imposed by Member States which do not frustrate the effectiveness of aforesaid provision – must be met *at the time of application for entry and residence*.

The core obligations on Member States pursuant to Article 3(2)(a) of Directive 2004/38, as read in light of the CJEU’s case law, are as follows (see sections 3, 4 and 5):

- *Procedurally*, Member States must provide in their national legislation *at least for a procedure to be in place for extended family members to submit an application* for entry and residence in order to join or accompany a mobile Union citizen;
- In assessing applications for entry and residence of extended family members, Member States must base their decision on an *extensive examination* of the *personal circumstances* of the applicant(s);
- Extended family members are *entitled to procedural rights and guarantees* in the application process, including *receiving a decision* on their application and, in the case of a refusal, *justification* must be provided. Furthermore, extended family members must have access to *judicial review* of a negative decision. The procedural guarantees in Directive 2004/38 are also applicable to the entry and residence of extended family members (per *Banger*);
- Substantively, Member States must ensure that their national legislation and implementation to individual cases of entry and residence of extended family members respect the principles of





*effectiveness* and *legitimacy*. In terms of effectiveness, Member States must confer a certain advantage to extended family members’ entry and residence (compared to the entry and residence of other third-country nationals). In terms of legitimacy, Member States’ authorities must take into consideration all personal circumstances, including fundamental rights (such as the right to family life and, in the case of a minor extended family member, the best interest of the child);

- The application of *fundamental rights* in individual cases may result in Member States being *obliged* to grant entry and residence to extended family members (cf. *SM*);
- The obligation to facilitate the entry and residence of extended family members also applied (on the basis of Article 20 TFEU) to extended family members of ‘returning’ nationals, under conditions that cannot be more restrictive than provided for in Article 3(2)(a) for mobile Union citizens’ family members (per *Banger*);
- Similarly, extended family members who have the primary care of a minor Union citizen (whether ‘static’ or ‘mobile’ in analogy to *Chen* and *Zambrano*) who do not already benefit from entry and residence rights pursuant to EU law (including Articles 20 and 21 TFEU) should also have their entry and residence facilitated under the conditions of Article 3(2)(a) Directive 2004/38 (applied in analogously).

A comparative analysis of the manner by which Member States have opted to meet their obligations under Article 3(2)(a) Directive 2004/38 reveals the following findings:

- A majority of EU Member States have transposed their ‘duty to facilitate’ by equating extended family members (who meet the conditions in Article 3(2)(a)) with ‘direct’ family members, thereby granting extended family members entry and residence *rights*;
- Other EU Member States have opted to introduce procedures for extended family members to apply for *treatment as* (‘direct’) *family members* or for *entry and residence* under specific (more advantageous) conditions;
- A few Member States have adopted national provisions which require extended family members to apply for entry and residence pursuant to their general immigration laws. The extent to which these applications are actually facilitative will depend on practical implementation (e.g. in Portugal, where most applications by extended family members who meet the conditions are granted as a matter of practice);
- Two Member States differentiate between extended family members on the basis of whether they themselves are Union citizens or third-country nationals, namely Austria and Estonia;
- Germany does not have an explicitly provision in its legislations transposing its obligation under Article 3(2)(a) Directive 2004/38;
- Member States have given *different interpretations* to the eligibility conditions under Article 3(2)(a) Directive 2004/38 (such as interpreting ‘dependency’ as solely financial dependency, or requiring applications to meet both conditions of dependency and residing in the same household) or introduce *additional conditions* for eligibility (such as requiring the mobile Union citizen having the primary right of residence to have sufficient resources for her/himself as well as the family members). Some of these conditions may be in contravention of Member States’ core obligations, as set out in this study.



Based on the analysis in this study of Article 3(2)(a) and the obligations on Member States pursuant thereto, and in light of the comparative overview of Member States’ implementation of their obligations under Article 3(2)(a), the following recommendations can be made.

**First**, the Union must ensure that Member States correctly implement their obligation under Article 3(2)(a) Directive 2004/38 by ensuring regular monitoring and, where necessary, initiating infringement proceedings. This entails not only that Member States, at the minimum, provide an explicit procedure for extended family members to apply for entry and residence to join or accompany their mobile Union citizen family member, but also that this procedure respects the core obligations of Article 3(2)(a) Directive 2004/38 and respects the principles of effectiveness and legitimacy.

**Second**, the European Commission should supplement its guidelines on the transposition and application of Directive 2004/38,<sup>179</sup> in order to provide clarity and guidance to Member States as to their obligations under Article 3(2)(a) Directive 2004/38. The updated guidelines should reflect the approach taken in other sections of the guidelines, where the case law of the Court of Justice of the EU is summarised, and practical examples are given.

**Third**, there may be the necessity to move towards more harmonised (or at least common minimum) standards for interpreting the criteria set out by Directive 2004/38. This will be particularly crucial to prevent the situation where an extended family member is permitted to accompany or join a mobile Union citizen in a host Member State, but would not be granted entry and residence to accompany the mobile Union citizen upon return to the home Member State.

**Fourth**, Member States should exchange knowledge and practices amongst each other, specifically with the aim to adopt promising practices, such as equating extended family members to ‘direct’ family members for the purpose of entry and residence (either *de jure* or upon application) or expanding the scope of facilitation to extended family members of a mobile Union citizens’ spouse. This could take place, for example, at the European Commission’s FREEMO Network.<sup>180</sup>



<sup>179</sup> COM(2009) 313 final.

<sup>180</sup> European Commission Expert Group on the right to free movement of persons (Directive 2004/38/EC) (E02397).



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## Annex 1. Overview of MS’ transposition and application of Article 3(2) Directive 2004/38

This Annex provides an overview of the transposition of Article 3(2)(a) Directive 2004/38/EC by the EU Member States. The starting point for the overview is the most recent national legislation (and regulations) of the EU Member States governing the free movement and residence of (mobile) Union citizens and, where relevant, national immigration legislation. The interpretation of these EU Member States’ legislation is complemented by the information sourced from the conformity assessment studies commissioned by the European Commission, and conducted by Milieu and the University of Edinburgh in 2008,<sup>181</sup> as well as findings from subsequent (academic) contributions for specific Member States.<sup>182</sup> Where possible, the continued validity of these findings are cross-checked with currently applicable legislation in the relevant Member States.

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<sup>181</sup> Milieu & Europa Institute (2008), “Conformity studies of Member States’ national implementation measures transposing Community instruments in the area of citizenship of the Union. Final Report I. 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. Horizontal Synthesis Report”, Brussels/Edinburgh, Milieu/University of Edinburgh, December, available at: <https://200438ecstudy.wordpress.com/>.

<sup>182</sup> These include Klaassen (2015), op. cit; A. Valcke (2016), “A Comparative Study on the Implementation of the Free Movement Directive: Transposition, Application and Enforcement in Belgium, Italy and the UK Compared”, Doctoral thesis, Palermo, Università degli Studi di Palermo, January; as well as various country-specific contributions in U. Neergaard, C. Jacqueson & N. Holst-Christensen (eds.) (2014), *Union Citizenship: Development, Impact and Challenges*, The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 2, Copenhagen:DJØF Publishing.

Member State		Austria	Belgium
Main legislation		<ul style="list-style-type: none"> <li>• <a href="#">Aliens Police Act 2005</a> (FPG);</li> <li>• <a href="#">Settlement and Residence Act</a> (NAG);</li> <li>• <a href="#">General Administrative Procedure Act</a> (AVG);</li> <li>• <a href="#">Aliens Employment Act</a> (AuslBG);</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">Loi des étrangers 1980</a> / <a href="#">Vreemdelingenwet 1980</a> (LdÉ 1980)</li> <li>• <a href="#">Arrêté royal des étrangers 1981</a> / <a href="#">Koninklijk besluit vreemdelingen 1981</a> (AR 81)</li> </ul>
Article 3(2)(a) transposed?		<u>Entry or residence &lt; 3 months</u> : no transposition of Article 3(2)(a) Directive 2004/38/EC; <u>Residence &gt; 3 months</u> : Article 3(2)(a) Directive 2004/38/EC transposed by §47, §52 and §56;	Article 3(2)(a) Directive 2004/38/EC transposed by Articles 47/1 – 47/4 LdÉ 1980; Article 58 AR 1981;
Right or discretionary?		For extended family members who are Union citizens: <i>right</i> to entry and residence; For TCN extended family members: <i>discretionary</i> application for entry/residence;	Extended family members of mobile Union citizens must prove the (family) relationship with the Union citizen (see Art. 47/1 LdÉ 1980; Art. 58 AR 81), but seems to imply a <i>right of entry and residence</i> once proven;
	<i>Equal treatment after entry?</i>	No explicit provision in NAG; AuslBG seems to grant ‘unlimited access to labour market’ to both EU and TCN (extended) family members (see §17 AuslBG);	Extended family members whose family relationship with mobile Union citizens is proven, are treated equally to Union citizens (See Art. 47/2 LdÉ 1980; Art. 58 AR 81);
Which family members?		Any other (family) member <i>not falling under definition corresponding to Article 2(2) and 3(2)(b) Directive 2004/38/EC</i> (see §52(1)(5) NAG)	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC or Chen-carers</i> (see Art. 47/1 LdÉ 1980)
Conditions for	<i>Members of the same household</i>	Other family member who, in the ‘country of origin’, have actually lived with the Union citizen (§52(1)(5)(b) NAG); <i>note: TCN extended family members may be granted an ‘establishment permit’ upon application (§56(1) NAG)</i>	Members of the same ‘family’ ( <i>gezin</i> )/ household ( <i>ménage</i> ) (Art. 47/1(2) LdÉ 1980); in principle, supporting documents from competent authorities in ‘country of origin’; if not possible, any suitable means of evidence accepted (Art. 47/3(2) LdÉ 1980) <sup>183</sup>
	<i>Dependent family members</i>	Other family member who, in the ‘country of origin’, have actually received maintenance from the Union citizen (§52(1)(5)(a) NAG); <i>note: TCN extended family members may be granted an ‘establishment permit’ upon application (§56(1) NAG)</i>	Dependent on Union citizen in ‘country of origin’ (Art. 47/1(2) LdÉ 1980); in principle, supporting documents from competent authorities in ‘country of origin’; if not possible, any suitable means of evidence accepted (Art. 47/3(2) LdÉ 1980)
	<i>Serious health grounds</i>	Other family member who, on serious health grounds, require the personal care of the Union citizen (§52(1)(5)(c) NAG); <i>note: TCN extended family members may be granted an ‘establishment permit’ upon application (§56(1) NAG)</i>	Serious health grounds which strictly require personal care of Union citizen (Art. 47/1(3) & 47/3(3) LdÉ 1980);
Extensive examination?		Requirement of an extensive examination of the personal circumstances is not contained in the FPG or NAG; however, general Austrian administrative law prescribes a duty on administrative authorities to ascertain the state of facts relevant for administrative decision (§37 AVG)	Entry and residence of extended family members granted after ‘personal and extensive examination’ of the application (Art. 58 AR 81); CCE (see below) seems to confirm that general principles of Belgian administrative law, including due diligence, requires authorities to take into account all relevant facts of the case. <sup>184</sup>
Motivated rejection?		General Austrian administrative law requires (administrative) decisions to be justified (see §58(2) and §60 AVG); however, neither the FPG, NAG nor general Austrian administrative law require notification of decisions in writing (cf. §62 AVG);	Implicit in Art. 46(2) LdÉ 1980 (in combination with Art. 47/2); more clarity in Art. 52 and Artt. N19quinquies & N20 AR 81; However, incomplete transposition of according to Valcke (2016: 271-276); As regards notification of decisions in writing, Milieu & Europa Institute (2008-CS-BE) notes this requirement in absent;
Right to appeal?		The right to appeal against a negative decision of an administrative authority seems to be guaranteed by Article 130 Austrian Federal Constitution.	Right to appeal at <i>Conseil du Contentieux des Étrangers</i> (Art. 39/1 LdÉ 1980); however, unclear whether CCE has competence to review facts of the case.

<sup>183</sup> See “Project de loi portant dispositions diverses en matière d’Asile et de Migration et modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers”, Doc. No. 53 3239/001, 9 December 2013, Exposé des motifs, Article 25, p. 21, seemingly indicating that the equal treatment of extended family members to direct family members of Union citizens only applies after the entry and residence of said extended family members have been approved.

<sup>184</sup> See e.g. Conseil du Contentieux des Étrangers 29 May 2019, case no. 222 118, para. 2.2.



Member State		Bulgaria	Croatia
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Act on the Entrance, Residence and Departure of Citizens of the European Union and Members of their Families of the Territory of the Republic of Bulgaria</a> (AERD);</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Act on nationals of the Member States of the European Economic Area and their family members</a> (EEA Nationals Act);</li> <li><a href="#">Regulation on the method of determining the conditions of entry and residence in the Republic of Croatia, for the European Economic Area nationals and their family members and family members of Croatian nationals</a> (Reg. EEA);</li> <li><a href="#">Act on General Administrative Procedure</a> (AGAP);</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC transposed by Article 5(1) AERD	Article 3(2)(a) Directive 2004/38/EC transposed by Article 4(2) EEA Nationals Act
Right or discretionary?		Extended family members seem to have the same <i>rights as regards entry and residence</i> as direct family members of Union citizens (Art. 5(1) AERD), but must prove the family relationship (Art. 5(2) AERD)	Extended family members of Union citizens may be considered as a ('direct') family member, seemingly implying a <i>discretionary</i> competence (see Article 4(2) EEA Nationals Act, which seems to 'derogate' from general definition of EEA family member);
	Equal treatment after entry?	Extended family members of mobile Union citizens are treated equally to 'direct' family members for the purpose of entry and residence (see Art. 5(1) AERD);	After treatment as an (extended) family member is approved (pursuant to Article 4(2) EEA Nationals Act), they enjoy the same rights of entry and residence;
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2)(a) Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2) and 3(2)(b) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Member of household, in country from which he has come, of a Union citizen having the right of free movement (Art. 5(1)(1) AERD);	Other family member who, in the country from which they arrived, are members of household of the national of an EEA Member State (Art. 4(2)(2) EEA Nationals Act)
	Dependent family members	Person who, in country from which he has come, is a dependant of a Union citizen having the right of free movement (Art. 5(1)(1) AERD);	Other family member who, in the country from which they arrived, are dependent of a national of an EEA Member State (Art. 4(2)(1) EEA Nationals Act)
	Serious health grounds	Where serious health grounds strictly require the personal care of the family member by the Union citizen (Art. 5(1)(1) AERD);	Other family member who, serious health-related reasons, is dependent on a national of an EEA Member State for his personal care (Art. 4(2)(3) EEA Nationals Act)
Extensive examination?		Entry and residence of extended family member is based on extensive examination of personal circumstances (Art. 5(2) AERD);	Requirement of an extensive examination of the personal circumstances is not contained in EEA Nationals Act; <sup>185</sup> however, general Croatian administrative law (seems to) require(s) administrative authorities to 'determine all the facts and circumstances relevant to the decision on an administrative matter' (Article 47(1) AGAP);
Motivated rejection?		Denial of entry or residence of extended family member must be justified (Art. 5(2) AERD);	(Negative) decision concerning entry (and residence) of extended family members are issued in writing (cf. Article 9 EEA Nationals Act, Article 4 Reg. EEA and Article 97(1) AGAP); As regards the motivation/justification of a (negative) decision, general Croatian administrative law provides requires administrative decisions to contain the reasons thereto (see Article 98 AGAP);
Right to appeal?		Negative decisions are subject to review in accordance with Bulgarian administrative law (see Art. 5(2) AERD);	EEA Nationals Act provides that appeal is not open to negative decisions on entry/residence of extended family members; however, an 'administrative dispute' procedure may be initiated against such a negative decision (see Articles 9(3) and 23(7) EEA Nationals Act);

<sup>185</sup> The requirement of an individual assessment was contained in Article 162(1)(7) Aliens Act 2013; however, it was unclear whether this equates to 'extensive examination of personal circumstances' pursuant to Art. 3(2) Dir. 2004/38/EC. This provision has been abrogated by the aforementioned EEA Nationals Act, adopted and entered into force in 2019.





Member State		Cyprus	Czech Republic
Main legislation		<ul style="list-style-type: none"> <li><a href="#">The Right of Union Citizens and their Family Members to Move and Reside Freely within the Territory of the Republic Law of 2007</a>, L. 7(I)/2007;</li> <li><a href="#">Aliens and Immigration Law</a>, Cap. 105;</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Alien Act</a>, Act no. 326/1999 Coll., as amended;</li> <li><a href="#">Code of Administrative Procedure</a>, Act no. 500/2004 Coll., as amended (CAP);</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC transposed by Article 4(2)-(4) L. 7(I)/2007;	Article 3(2)(a) Directive 2004/38/EC transposed by § 15a(2) Alien Act;
Right or discretionary?		Entry and residence of extended family members of Union citizens are granted in accordance with the Aliens and Immigration Law, Cap. 105; Art. 4(2) L. 7(I)/2007 notes that this entry and residence is to be <i>facilitated</i> ; the use of the word ‘shall be allowed to enter and reside’ may imply a right of entry and residence;	Extended family members of Union citizens in accordance with § 15a(2) Alien Act are equated to ‘direct’ family members for the purposes of entry and residence;
	Equal treatment after entry?	The issuance of a residence card for family members of Union citizens pursuant to Article 12 L. 7(I)/2007 seems to indicate that extended family members benefit from equal treatment after entry.	Once family relationship with extended family members are proven, they are treated as family members for the purpose of entry and residence;
Which family members?		Any other family members <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) Directive 2004/38/EC</i>	Text of Alien Act: Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) Directive 2004/38/EC or Chen-carers</i> ; <b>Note:</b> see judgment of Supreme Administrative Court (5 As 06/2010 of 16 April 2010), which states that ‘other family member’ in §15a(4) Alien Act (corresponding to current §15a(2)) must be interpreted narrowly and analogously to family relationships defined in Art. 2(2) Dir. 2004/38/EC (therefore <i>excluding</i> brothers and sisters, cousins, etc.)(see Neergaard, Jacqueson & Holst-Christensen (eds.) 2014)
Conditions for	Members of the same household	Other family member who, in the country of origin, cohabitates in the same household as a Union citizen having the primary right of residence (Article 4(2)(a) L. 7(I)/2007);	Family member living in a common household with Union citizen in <i>the State of nationality or residence</i> (§ 15a(2)(a)(1) Alien Act)
	Dependent family members	Other family member who, in the country origin, is a dependant of a Union citizen having the primary right of residence (Article 4(2)(a) L. 7(I)/2007);	Family member who is or has been dependent on nutrition or other necessary care provided by Union citizen in order to satisfy his basic needs <i>prior to entering the territory of his State of nationality or residence</i> (§ 15a(2)(a)(2) Alien Act)
	Serious health grounds	Other family member who, on serious health grounds, strictly requires the personal care by the Union citizen (Article 4(2)(a) L. 7(I)/2007);	Family member who is unable to take care of himself for serious health reasons without the personal care of the Union citizen (§ 15a(2)(a)(3) Alien Act)
Extensive examination?		Entry and residence applications of extended family members are based on extensive examination of their personal ‘condition’, including interviews with relevant individuals where appropriate (Art. 4(3) L. 7(I)/2007)	No explicit provision stating that entry or residence of extended family members must be based on extensive examination of personal circumstances; however, extended family members have a <i>right</i> of entry and residence equally to direct family members of Union citizens (Milieu & Europa Institute (2008-CS-CZ));
Motivated rejection?		Rejections of entry and residence for extended family members must be justified (Art. 4(3) L. 7(I)/2007), and must be notified in writing (cf. Article 18AA(5) Aliens and Immigration Law);	On the basis of general Czech administrative law (see § 168 Aliens Act, which does not exclude decisions concerning entry or residence of Union citizens and their family members; cf. Milieu & Europa Institute (2008-CS-CZ)), (negative) decision must be given in writing (§ 67(2) & 72 CAP) and must contain the reasons for the (negative) decision (§ 68 CAP);
Right to appeal?		(Negative) decisions concerning entry and residence of extended family members may be appealed to the Supreme Court (Article 18AH Aliens and Immigration Law);	Right to appeal (negative) decision concerning entry or residence of extended family members is governed by general Czech administrative law (§ 81 et seq. CAP), as it has not been excluded by the Aliens Act;



Member State		Denmark	Estonia
Main legislation		<ul style="list-style-type: none"> <li>• <a href="#">Aliens Act</a>, LBK nr. 239 of 10/03/2019;</li> <li>• <a href="#">Executive Order on Residence in Denmark for Aliens</a> (EU Residence Order), BEK nr. 318 of 27/03/2019;</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">Citizen of the European Union Act</a> (CEUA);</li> <li>• <a href="#">Procedure for applying for, granting, extending and terminating the right of residence of a citizen of the European Union and his / her family member</a> (RT I, 22.12.2015, 47) (EU Residence Procedure Regulation);</li> </ul>
Article 3(2)(a) transposed?		Transposed by Article 2(1)(5) and (6) EU Residence Order	Transposed by Article 3(1)(4) CEUA for TCN extended family members
Right or discretionary?		Extended family members of Union citizens are equated to (direct) family members, and therefore have a <i>right</i> of entry and residence (see Article 2(1) EU Residence Order);	All <b>Union citizens</b> (incl. extended family members) have a right to enter and reside in Estonia (see Art. 7(1) CEUA); <b>TCN extended family members</b> as defined in Art. 3(1)(4) CEUA are equated to (direct) TCN family members of Union citizens;
	Equal treatment after entry?	Extended family members of Union citizens are treated as family members for the purpose of entry and residence;	TCN extended family members are treated as family members for the purpose of entry and residence (Art. 3(1) CEUA);
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>	Any other family member <i>not falling under definition of Article 2(2)(a), (c) and (d) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family members living in household of Union citizen in country from which they have come (Art. 2(1)(5) EU Residence Order); additional condition may be imposed, i.e. proof that primary mobile Union citizen has sufficient resources for himself and his family members to not become a burden on social assistance system (see Art. 23(4) and 26(5) EU Residence Order)	Other (TCN) family member who, in the <i>country of origin of the citizen of the European Union</i> , is a member of his or her household (Art. 3(1)(4) CEUA); <sup>186</sup> ‘Member of the household’ is defined in Art. 3(3) CEUA as a person residing with Union citizen in shared household and who has an <i>independent income</i> or a person who has proven permanent and factual registered partnership with Union citizen;
	Dependent family members	Other family members who are dependent on the Union citizen in the country from which they have come (Art. 2(1)(5) EU Residence Order); additional condition may be imposed (i.e. sufficient resources, see above for members of household)	Other (TCN) family member who, in the <i>country of origin of the citizen of the European Union</i> , is a <i>dependent</i> of the Union citizen (Art. 3(1)(4) CEUA); A ‘dependent’ is defined in Art. 3(2) CEUA as a person who <i>resides together with the Union citizen in a shared household</i> and has <i>no personal income</i> ;
	Serious health grounds	Other family members who on serious health grounds strictly require the personal care of the Union citizen (Art. 2(1)(5) EU Residence Order)	Other (TCN) family member who is <i>permanently unable to cope independently</i> due to health reasons, and with respect to whom it is necessary that the Union citizen personally cares for him or her (Art. 3(1)(4) CEUA);
Extensive examination?		Unclear; no reference to ‘extensive examination’, possibly owing to the fact that extended family members have a <i>right</i> to entry and residence;	‘Extensive examination of personal circumstances’ not explicitly transposed in Estonian Law (Milieu & Europa Institute (2008-ToC-EE), but administrative acts are subject to general Estonian administrative law (including principles of administrative procedure, such as proportionality of administrative acts and measures (Art. 3(2)) and duty to establish relevant facts <i>ex officio</i> (Art. 6 Administrative Procedures Act [APA]));
Motivated rejection?		(Negative) decisions concerning entry and residence must be notified in writing and justified in accordance with Danish Public Administration Act (LBK nr. 433 of 22/04/2014) (Art. 34(5) Aliens Act; see also Art. 22-24 Public Administration Act)	General Estonian administrative law, cf. Art. 2 EU Residence Procedure Regulation: (negative) decision must be issued in writing (Art. 55(2) APA) and must contain the reasoning of the decision (Art. 56 APA);
Right to appeal?		No explicit provision in Aliens Act or EU Residence Order (but cf. Art. 33(3) EU Residence Order, implying appeal against (negative) decision is possible to <i>Immigration Board</i> ); right to appeal may be based on Danish ‘legal tradition’ and general Danish administrative law (Milieu & Europa Institute (2008-CS-DK));	(Negative) decisions taken (concerning entry and residence) of TCN extended family members may be challenged in accordance with Code of Administrative Court Procedure (Art. 52-12(1) CEUA);

<sup>186</sup> EE: A ‘shared household’ is defined as “persons who live together and are linked by a common use of all available household facilities [...]” in accordance with Art. 24(4) Official Statistics Act.



Member State		Finland	France
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Aliens Act</a> 301/2004;</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Code de l'entrée et du séjour des étrangers et du droit d'asile</a> (CESEDA);</li> <li><a href="#">Circulaire du 10 septembre 2010 sur le droit de séjour des citoyens européens et suisses ainsi que des membres de leur famille</a>, (Circulaire 10/09/2010);</li> </ul>
Article 3(2)(a) transposed?		Transposed by § 154, subsection 4, Aliens Act	Transposed by Articles R. 121-2-1, R. 121-4-1 and R. 121-14-1 CESEDA
Right or discretionary?		Extended family members of Union citizens are equated to (direct) family members, and therefore have a <i>right</i> of entry and residence	Extended family members of Union citizens may be treated as a family member; this is a <i>discretionary</i> competence (see Articles R. 121-2-1 and R. 121-4-1 CESEDA)
	<i>Equal treatment after entry?</i>	Extended family members of Union citizens are treated as family members for the purpose of entry and residence (see § 154, subsection 4, Aliens Act);	After examination and approval, extended family members are treated as family members of Union citizens (see Artt. R. 121-2-1, R. 121-4-1 and R. 121-14-1 CESEDA)
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2) and 3(2)(b) Directive 2004/38/EC or Chen-carers</i>	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>
Conditions for	<i>Members of the same household</i>	Other family members who, in the country of departure, lived in the same household as a Union citizen (§ 154, subsection 4 under (1), Aliens Act)	Other family members who, in the country from which they have come ('pays de provenance'), are members of the household of the Union citizen ('partie du ménage') (Art. R. 121-2-1 (1) CESEDA);
	<i>Dependent family members</i>	Other family members who, in the country of departure, was dependent on a Union citizen (§ 154, subsection 4 under (1), Aliens Act)	Other family members who, in the country from which they have come, are dependent on the Union citizen (Art. R. 121-2-1(1) CESEDA);
	<i>Serious health grounds</i>	Other family members of a Union citizen who, on serious health grounds, absolutely requires personal care from the Union citizen concerned (§ 154, subsection 4 under (2), Aliens Act)	Other family members who, on serious health grounds, strictly require the personal care of a Union citizen (Art. R. 121-2-1(2) CESEDA)
Extensive examination?		<p>'Extensive examination' of personal circumstances not explicitly transposed to Aliens Act; however:</p> <ul style="list-style-type: none"> <li>Extended family members of Union citizens have a <i>right</i> of entry and residence (no discretion for Finnish authorities);</li> <li>General Finnish Administrative Law (especially the Administrative Act (434/2003)) contains provisions requiring <i>inter alia</i> that authorities "conduct sufficient and appropriate examination of the matter at hand by obtaining all necessary information and explanations" (see § 31 Administrative Act; cf. Milieu &amp; Europa Institute (2008-CS-FI))</li> </ul>	<p>Art. R. 121-2-1 CESEDA refers to 'examination of his / her personal circumstances', but does not make explicit reference to an 'extensive examination'. Some additional details are found on the website of the French government:<sup>187</sup></p> <ul style="list-style-type: none"> <li>For dependents or members of the household, the assessment of their applications will include their financial and social circumstances, their need for material support and support provided by the Union citizen; this can be evidenced by any supporting documents (including official documents from the authorities in the country 'of origin' or 'private' documents);</li> <li>For extended family members requiring personal care owing to serious health reasons, a medical certificate determining the gravity of the state of health of the applicant is required;</li> </ul>
Motivated rejection?		General Finnish administrative law (more specifically, Administrative Act) stipulate that decisions must be given in writing (§ 43 Administrative Act) and must clearly justify the decision concerned (§ 44 and 45 Administrative Act);	No explicit provisions in CESEDA; general French administrative Law (more specifically, <i>Code des relations entre le public et l'administration</i> , CRPA) requires negative decisions to be made in writing, providing the legal and factual circumstances justifying the decision (Art. L. 211-2, L. 211-5 CRPA)
Right to appeal?		The right to appeal a (negative) decision taken in accordance with the Aliens Act to the Administrative Court (as provided for in the Administrative Proceedings Act, 850/2019) is provided for in § 190 Aliens Act;	No explicit provisions on the right to appeal (negative) decision concerning entry or residence of extended family members in CESEDA; appeal right is likely subject to general French administrative law (cf. <i>Code de la justice administratif</i> );

<sup>187</sup> <https://www.service-public.fr/particuliers/vosdroits/F2653>.

Member State		Germany	Greece
Main legislation		<ul style="list-style-type: none"> <li>• <a href="#">Act on the General Freedom of Movement of Union Citizens</a> (<i>FreizügG/EU</i>);</li> <li>• <a href="#">Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory</a> (<i>AufenthG</i>);</li> <li>• <a href="#">Administrative Procedure Act</a> (<i>VwVfG</i>);</li> <li>• <a href="#">Code of Administrative Court Procedure</a> (<i>VwGO</i>);</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">Code on Migration and Social Inclusion and other provisions, Law (L.) No. 4251/2014</a>;</li> <li>• <a href="#">Presidential Decree (P.D.) No. 106/2007</a>, as amended;</li> <li>• <a href="#">Circular no. 3 of 2018 on the application of the provisions of Law 4540/2018 (91 A)</a>;</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC has not been transposed (see Milieu & Europa Institute 2008-CS-DE; Neergaard, Jacqueson & Holst-Christensen (eds.) 2014); only provision potentially covering entry/residence of extended family members of mobile Union citizens is §36(2) <i>AufenthG</i> ; <i>Note: it is unclear to what extent §36(2) ‘facilitates’ entry and residence of extended family members; Milieu &amp; Europa Institute (2008-CS-DE) state this will depend on practical application of said provision;</i>	Article 3(2)(a) Directive 2004/38/EC transposed by Article 3(2) P.D. 106/2007, as amended;
Right or discretionary?		If entry/residence of extended family members is based on §36(2) <i>AufenthG</i> , it is of a discretionary nature;	Extended family members of Union citizens meeting the conditions stipulated in Article 3(2) P.D. 106/2007 <i>shall</i> be issued with a residence permit of two years, implying a non-discretionary nature.
	Equal treatment after entry?	As no regulations have been made for extended family members of Union citizens, their equal treatment as family members of Union citizens is not provided for;	Unclear; extended family members issued with a residence permit under P.D. 106/2007 are entitled to (self-)employment (Circular 3/2018). If Article 20 P.D. 106/2007 is applicable, extended family members benefit from equal treatment.
Which family members?		Neither <i>FreizügG/EU</i> nor §36(2) <i>AufenthG</i> specify which family members are eligible for family reunification;	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member if the grant of a residence permit for family reunification is necessary to avoid ‘extraordinary hardship’ (§36(2) <i>AufenthG</i> );	Other family member who, in the country from which he arrived, resided under the same roof as a Union citizen (Art. 3(2)(a) P.D. 106/2007)
	Dependent family members	Other family member if the grant of a residence permit for family reunification is necessary to avoid ‘extraordinary hardship’ (§36(2) <i>AufenthG</i> );	Other family member who, in the country from which he arrived, is maintained by a Union citizen (Art. 3(2)(a) P.D. 106/2007)
	Serious health grounds	Other family member if the grant of a residence permit for family reunification is necessary to avoid ‘extraordinary hardship’ (§36(2) <i>AufenthG</i> );	Other family member of a Union citizen who, owing to serious health reasons, strictly require the personal care of a Union citizen (Art. 3(2)(a) P.D. 106/2007)
Extensive examination?		Requirement of extensive examination of personal circumstances not contained in <i>FreizügG/EU</i> or §36(2) <i>AufenthG</i> ; however, §79(1) <i>AufenthG</i> requires decisions on residence to be taken on the basis of ‘circumstances known in Germany and accessible information’; general German administrative law further requires that administrative authorities ‘take into account all circumstances which are relevant for the individual case, including the circumstances favourable to the parties involved’ (§24(2) <i>VwVfG</i> );	The application for entry and residence of an extended family member is considered on the basis of a thorough examination of the personal circumstances (Art. 3(3) P.D. 106/2007)
Motivated rejection?		(Negative) decisions concerning entry/residence of extended family members pursuant to §36(2) <i>AufenthG</i> must be issued in writing, and must include the motivation for the decision (§77(1)(1) <i>AufenthG</i> );	Negative decisions concerning entry or residence of extended family members will be justified (Article 3(3) P.D. 106/2007);
Right to appeal?		Appeal against a (negative) decision concerning entry/residence of extended family members have not explicitly been excluded (cf. §83 <i>AufenthG</i> ), except for <i>inter alia</i> refusals to issue a visa entry at the border (§83(1) <i>AufenthG</i> )	Appeal against a negative decision on entry or residence of extended family members is possible under Article 25 L. 4251/2014, taking into account Article 15 of Law (L.) No. 3068/2002.



Member State		Hungary	Ireland
Main legislation		<ul style="list-style-type: none"> <li>• <a href="#">Act I of 2007</a> (FMA);</li> <li>• <a href="#">Government Decree 113/2007 (V. 24), implementing Free Movement Act</a> (G.D. 113/2007 (V. 24));</li> <li>• <a href="#">Act II of 2007</a> (Aliens Act);</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">European Communities (Free Movement of Persons) Regulations 2015</a>, S.I. No. 548/2015;</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC is transposed by Articles 1(1)(d), 3(3) (for stay of up to 3 months) and 8 (for stays longer than 3 months) FMA;	Article 3(2)(a) Directive 2004/38/EC is transposed by SI 548/2015, Reg. 3(6) and 5;
Right or discretionary?		Entry and residence of extended family members of mobile Union citizens seems to be of a <i>discretionary nature</i> , as their entry and residence is subject to authorisation of the competent authorities (see Article 8(1) FMA);	Entry and residence of extended family members of mobile Union citizens (‘permitted family members’) is subject to discretionary approval (SI 548/2015, Reg. 5);
	Equal treatment after entry?	After their entry/residence has been approved, extended family members are treated as family members of Union citizens (Article 8(3) FMA); <sup>188</sup>	Once approval has been granted for treatment as ‘permitted family member’, they are treated as family member for the purpose of entry and residence (SI 548/2015, Reg. 7);
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member who, in the country from which he arrived, resided in the same household as a Union citizen (Article 1(1)(d), 3(3) and 8(1) FMA); <sup>189</sup>	Other family members of a Union citizen and who in the country from which the person has come is a member of the household of the Union citizen (SI 548/2015, Reg. 5(1)(a)(ii));
	Dependent family members	Other family member who, in the country from which he arrived, was dependant on a Union citizen (Article 1(1)(d), 3(3) and 8(1) FMA); <sup>190</sup>	Other family members of a Union citizen and who in the country from which the person has come is a dependant of the Union citizen (SI 548/2015, Reg. 5(1)(a)(i));
	Serious health grounds	Other family member who on serious health grounds requires the personal care of a Union citizen (Article 1(1)(d), 3(3) and 8(1) FMA), certified by means of a certificate issued by the attending physician (§ 27(1)(b) G.D. 113/2007 (V. 24));	Other family members of a Union citizen and who, in the country from which the person has come, on the basis of serious health grounds strictly requires the personal care of the Union citizen (SI 548/2015, Reg. 5(1)(a)(iii));
Extensive examination?		The requirement of an extensive examination of the personal circumstances is not contained in the FMA (cf. Milieu & Europa Institute 2008-CS-HU);	Application to be treated as a ‘permitted family member’ of a Union citizen is based on an extensive examination of the personal circumstances of the applicant (SI 548/2015, Reg. 5(3));
Motivated rejection?		Negative decisions on entry and residence of extended family members pursuant to Free Movement Act must be justified (Article 87/M(1) Aliens Act, in conjunction with § 73/A of G.D. 113/2007 (V. 24)); decision is notified to applicants in writing (by ‘[postal] service’); summary notification in language understood by applicant is given orally (Article 87/N(4) and (5) Aliens Act);	Negative decisions to treat extended family members as ‘permitted family members’ of Union citizens must be notified to the applicant in writing, and must include the reasons for the negative decision (SI 548/2015, Reg. 6);
Right to appeal?		Right to appeal against a negative decision on entry/residence of extended family members with the Immigration Authorities (Article 88/P(1) and 88/Q Aliens Act, in conjunction with § 73/A of G.D. 113/2007 (V. 24));	Right to seek review of a negative decision concerning treatment as ‘permitted family member’ with the Minister [of Justice and Equality] (SI 548/2015, Reg. 25);

<sup>188</sup> Cf. Article 2(b), under (bh), in conjunction with 1(1)(d) Free Movement Act, stating that extended family members are considered as family members of EEA nationals after their entry/residence has been authorised.

<sup>189</sup> HU: Residence in the same household shall be evidenced by means of an official document thereto or other credible means (§ 27(1)(c) G.D. 113/2007 (V. 24)).

<sup>190</sup> HU: Dependency shall be evidenced by a document demonstrating the existence of a maintenance or annuity contract, or a maintenance duty under a separate Act, pursuant to a declaration by the EEA national under § 25(1) or other statutory provisions or contract (§ 27(1)(a) G.D. 113/2007 (V. 24)).



Member State		Italy	Latvia
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Legislative Decree of 6 February 2007, n. 30 on the transposition of Directive 2004/38/EC</a> (D. Lgs 2007/30);</li> <li><a href="#">Circular of the Ministry of the Interior n. 39 of 18 July 2007</a> (Circular 39/2007);</li> <li><a href="#">Legislative Decree of 25 July 1998, n. 286, consolidated text of the provisions concerning immigration regulations and rules on the status of foreigners</a> (D. Lgs. 1998/286);</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Immigration Law</a>;</li> <li><a href="#">Cabinet Regulation No. 675 of 30 August 2011 on the procedures for Citizens of the Union and their Family Members Entering and Staying in the Republic of Latvia</a> (R. 675/2011);</li> <li><a href="#">Administrative Procedure Act</a>;</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC literally transposed by Article 3 of D. Lgs. n. 2007/30);	Article 3(2)(a) Directive 2004/38/EC transposed by R. 675/2011, para. 4.1;
Right or discretionary?		Entry and residence of (TCN) extended family members of mobile Union citizens is to be facilitated; per judgment of the Supreme Court of 7-9-2011 n. 18384 and 16-9-2013 n. 21108, extended family members meeting conditions of D. Lgs. 2007/30 may be refused entry/residence only on grounds of public policy/security/health.	Extended family members of mobile Union citizens enjoy the same rights of entry and residence as for ‘direct’ family members (R. 675/2011, para. 6), and therefore have a <i>right</i> of entry and residence; <i>exceptionally, they are issued a TCN residence permit in accordance with Regulation (EC) 1030/2002 (see R. 675/2011, para. 11);</i>
	Equal treatment after entry?	Extended family members whose entry to Italy has been granted is treated as a ‘family member of a Union citizen’ (Perin and Bonetti 2013)	Extended family members are treated equally in terms of entry and residence (R. 675/2001, para. 5), except for the residence document for TCN (R. 675/2001, para. 11);
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member who, in the country from which they have come, are members of the household of the Union citizen having the primary right of residence (Article 3(2)(a) D. Lgs. 2007/30);	Other family member of a Union citizen <i>or his/her spouse</i> who, in his or her former country of residence, has a common household with the Union citizen (R. 675/2011, para. 4.1);
	Dependent family members	Other family member who, in the country from which they have come, are a dependant of the Union citizen having the primary right of residence (Article 3(2)(a) D. Lgs. 2007/30);	Other family member of a Union citizen <i>or his/her spouse</i> who, in his or her former country of residence, is dependent on the Union citizen (R. 675/2011, para. 4.1);
	Serious health grounds	Other family member who, on serious health grounds, strictly require the personal care of the Union citizen (Article 3(2)(a) D. Lgs. 2007/30);	Other family member of a Union citizen <i>or his/her spouse</i> who requires personal care due to a serious medical condition, and the Union citizen declares that he or she will provide said care (R. 675/2011, para. 4.1);
Extensive examination?		Entry and residence of extended family members assessed based on an extensive examination of the personal circumstances of the applicant (Article 3(3) D. Lgs. 2007/30); In assessing applications for entry/residence (permit) of extended family members, authorities shall take into account <i>inter alia</i> the nature and effectiveness of family ties (Article 5(5) D. Lgs. 1998/286);	Requirement of extensive examination of personal circumstances not contained in R. 675/2011; while Latvian administrative law sets standards for consideration of administrative acts (Article 65-66 Administrative Procedure Act), no reference to an extensive examination of applicant’s personal circumstances is stipulated;
Motivated rejection?		Negative decisions concerning entry and residence of extended family members shall be justified (Article 3(3) D. Lgs. 2007/30);	Requirement to justify rejection of entry/residence of extended family members is not contained in R. 675/2011; however, according to Latvian administrative law, (negative) decisions must be issued in writing and justify the decision, including rejection (Article 67 Administrative Procedure Act) (Milieu & Europa Institute 2008-CS-LV);
Right to appeal?		Appeal against a negative decision concerning entry and residence of extended family members is available at the competent ordinary court ( <i>autorità giudiziaria ordinaria</i> ) (see Article 8 D. Lgs. 2007/30);	Administrative review against a negative decision concerning entry and residence of extended family members is available at the head of the Office of Citizenship and Migration Affairs (R. 675/2011, para. 53); judicial appeal against aforementioned review is available at the courts (R. 675/2011, para. 54);





Member State		Lithuania	Luxembourg
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Act IX-2206 of 29 April 2004, Act on the Legal Status of Aliens</a>;</li> <li><a href="#">Ministerial Order No. 1V-594 of 28 June 2019, Description of the Procedure for issuing a temporary or permanent residence permit to family members of Union citizens</a> (Order No. 1V-594 of 2019);</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Law of 29 August 2008 on the Free Movement of Persons and Immigration</a> (Loi LCPI);</li> <li><a href="#">Grand-Ducal Regulations of 5 September 2008 implementing certain provisions relating to the administrative formalities provided for by the Law of 29 August 2008 on the Free Movement of Persons and Immigration</a> (RDG 2008);</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC is transposed by <i>inter alia</i> Article 2(11 <sup>1</sup> ), 97(3) and 101 Act on the Legal Status of Aliens;	Article 3(2)(a) Directive 2004/38/EC is transposed by Article 12(2) Loi LCPI;
Right or discretionary?		Extended family members of mobile Union citizens are generally treated on par with ‘direct’ family members as regards entry and residence, and therefore enjoy the <i>right of entry and residence</i> (Article 97(3) Act on the Legal Status of Aliens);	Extended family members of mobile Union citizens may be granted entry and residence (Article 12(2) Loi LCPI), implying a discretionary power of the competent authorities;
	Equal treatment after entry?	Provisions for entry/residence of (‘direct’) family members are extended to extended family members (see Article 97(3) Act on the Legal Status of Aliens);	After approval of entry/residence of extended family members (pursuant to Article 12(2) Loi LCPI), extended family members seem to be treated equally to (‘direct’) family members (see Article 22 Loi LCPI);
Which family members?		Any other family member <i>not falling under definition of Article 2(2) Directive 2004/38/EC</i> (defined as ‘other persons enjoying free movement rights under EU law’)	Any other family member <i>not falling under definition of Article 2(2) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member who have a common household with a Union citizen (Article 2(11 <sup>1</sup> ) Act on the Legal Status of Aliens);	Other family member who, in the country from which they came, was part of the household of the Union citizen with main residence right (Article 12(2)(a) Loi LCPI);
	Dependent family members	Other family member who are dependent on a Union citizen (Article 2(11 <sup>1</sup> ) Act on the Legal Status of Aliens);	Other family member who, in the country from which they came, was dependent on the Union citizen who has the main residence right (Article 12(2)(a) Loi LCPI);
	Serious health grounds	Other family member who, due to serious health grounds, strictly require the personal care of a Union citizen (Article 2(11 <sup>1</sup> ) Act on the Legal Status of Aliens);	Other family member who, on serious health grounds, strictly require the personal care of the Union citizen (Article 12(2)(b) Loi LCPI);
Extensive examination?		The requirement of an extensive examination of the personal circumstances of extended family members’ applications for entry/residence is not transposed (Milieu & Europa Institute 2008-CS-LT); general Lithuanian administrative law prescribes that individual administrative acts must be based on objective data (facts) and legal norms (Article 8(1) Act on Public Administration);	Application for entry and residence of extended family members of mobile Union citizens are assessed based on an extensive examination of the personal circumstances of the applicant (Article 12(2), second paragraph, Loi LCPI);
Motivated rejection?		General Lithuanian administrative law requires that negative individual administrative acts be motivated, and applicants must be informed of the decision in writing (Article 8(1) and (4) Act on Public Administration);	(Negative) decisions on entry and residence of extended family members must be notified (to the applicants) in writing in such a way that they are able to comprehend its content and the implications for them (Article 31 Loi LCPI); (Cf. Chapter 4, sections 1 and 2 of Loi LCPI);
Right to appeal?		Negative decisions concerning extended family members’ entry and residence may be appealed (Article 136 Act on the Legal Status of Aliens) to the administrative courts (Article 137(1) Act on the Legal Status of Aliens);	Negative decisions concerning entry and residence of extended family members may be appealed at the Administrative Tribunal (see Articles 105(2) and 113 Loi LCPI); decisions on appeal may be further appealed at the Administrative Court (Article 113 Loi LCPI);





Member State		Malta	Netherlands
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Immigration Act</a>, Cap. 217;</li> <li>Legal Notice 191 of 2007, Subsidiary Legislation (S.L.) 460.17, <a href="#">Free Movement of European Union Nationals and their Family Members Order</a>;</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Aliens Act 2000</a>;</li> <li><a href="#">Aliens Decree 2000</a>;</li> <li><a href="#">Aliens Circular 2000 (B)</a>;</li> <li><a href="#">General Administrative Law Act (Awb)</a>;</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC transposed by Article 2, under “other family members”, 3(5), 7(5), 8(6), 9(3), 10(4) and 11(3) of S.L. 460.17	Article 3(2)(a) Directive 2004/38/EC transposed by Article 8.7(3) Aliens Decree 2000;
Right or discretionary?		The provision in Article 3(5) and others (see above) of S.L. 460.17 implies a discretionary power of the competent authorities in examining applications for entry and residence of extended family members;	Extended family members of mobile Union citizens are treated equally to ‘direct’ family members, and therefore enjoy a <i>right of entry and residence</i>
	<i>Equal treatment after entry?</i>	After approval of entry and residence pursuant to Articles 3(5) and 7(5), 8(6), 9(3), 10(4), or 11(3) of S.L. 460.17, extended family members seem to be treated equally to (‘direct’ family members of) Union citizens (cf. Article 3(1) of S.L. 460.17);	The provisions on free movement rights of Union citizens are equally applicable to extended family members of mobile Union citizens (see Article 8.7(3) Aliens Decree 2000);
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) of Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>
Conditions for	<i>Members of the same household</i>	Other family member who, in the country from which he has come, is a member of the household of the Union citizen having the primary right of residence (Article 2, under “other family member”, sub (a) of S.L. 460.17);	Other family member who, in the country from which he has come, is lived in the same household as the Union citizen having the primary right of residence (Article 8.7(3)(a) Aliens Decree 2000);
	<i>Dependent family members</i>	Other family member who, in the country from which he has come, is a dependant of the Union citizen having the primary right of residence (Article 2, under “other family member”, sub (a) of S.L. 460.17);	Other family member who, in the country from which he has come, is dependent on the Union citizen having the primary right of residence (Article 8.7(3)(a) Aliens Decree 2000);
	<i>Serious health grounds</i>	Other family member who, for serious health reasons, strictly requires the personal care by the Union citizen (Article 2, under “other family member”, sub (b) of S.L. 460.17);	Other family member who, on serious health grounds, strictly require the personal care of the Union citizen (Article 8.7(3)(b) Aliens Decree 2000);
Extensive examination?		Applications for entry and residence of extended family members shall be given ‘due and proper consideration’ by the Director for Citizenship and Expatriate Affairs by undertaking an extensive examination of the personal circumstances (Article 3(5) of S.L. 460.17);	The requirement of an extensive examination of the personal circumstances is not provided for by the Aliens Decree 2000; however, general Dutch administrative law requires that administrative decisions are based on all necessary information concerning the relevant facts and interests to be weighted (Article 3:2 Awb) (Milieu & Europa Institute 2008-CS-NL); <i>note also that extended family members have a right of entry/residence, with no discretionary competence of the Dutch authorities</i> ;
Motivated rejection?		Denial of entry or residence of extended family members shall be justified (Article 3(5) of S.L. 460.17); Furthermore, (assuming that denial of entry or residence of extended family members is considered as a ‘restriction of free movement’), the decision must be issued in writing (Article 14(1) S.L. 460.17);	Requirement to justify denial of entry or residence of extended family members is based on general Dutch administrative law (Article 3:46 & 3:47 Awb); pursuant to general Dutch administrative law, the (negative) decision must also be notified to the applicant in writing (see Article 3:40 & 3:41 in conjunction with Article 1:3(1) Awb)
Right to appeal?		(Assuming that denial of entry or residence of extended family members is considered as a ‘restriction of free movement’): Right to appeal contained in Article 14 of S.L. 460.17);	General Dutch administrative law provides for a right to administrative review of a negative decision concerning entry or residence of extended family members (see Article 7:1 Awb); negative decision on administrative review may be appealed – in first instance – at the (administrative) court in The Hague (see Article 8:1, 8:7(3) Awb and Article 6:6 <i>Bevoegdheidsregeling bestuursrechtpraak</i> (Annex 2 to the Awb)) and – on further appeal – at the Administrative Jurisdiction Division of the Council of State (see Article 8:104 & 8:105(1) Awb);



Member State		Poland	Portugal
Main legislation		<ul style="list-style-type: none"> <li>• <a href="#">Act of 14 July 2006 on the Entry into, Residence in and Exit from the Republic of Poland of nationals of the European Union Member States and their Family Members</a> (EREA);</li> <li>• <a href="#">Foreigners Act</a> (FA);</li> <li>• <a href="#">Code of Administrative Procedure</a> (CAP);</li> </ul>	<ul style="list-style-type: none"> <li>• <a href="#">Law 37/2006, of 9 August 2006, governing the exercise of the right of citizens of the European Union and their families to move and reside freely in the national territory and transpose to national law Directive 2004/38/EC</a>;</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC is transposed by Article 160 FA (for temporary residence); as the entry of extended family members is not explicitly provided for, the general rules on the issuance of a visa under Chapter IV, section 1 of FA apply;	Article 3(2)(a) Directive 2004/38/EC has been literally transposed by Article 3(2) and (3) of Law 37/2006 (see also Articles 14(6) and 15(4) Law 37/2006);
Right or discretionary?		The (entry and) residence of extended family members is obtained upon application; the use of the word ‘may’ implies a discretionary competence (cf. Article 58 and 160 FA)	The entry and residence of extended family members is facilitated ‘under the general terms of law’ (Article 3(2) Law 37/2006), implying a discretionary power of the competent authorities;
	Equal treatment after entry?	As the EREA is not applicable to extended family members of Union citizens, their status after approval of entry/residence does not seem to be equal to (‘direct’) family members;	Unclear whether Article 19 and 20 of Law 37/2006, extending employment rights and equal treatment to family members of Union citizens, also apply to extended family members; (presumably yes, as they are issued the same residence document as ‘direct’ family members; cf. Article 14(6) and 15(4) Law 37/2006);
Which family members?		(For residence): Family member <i>falling under definition corresponding to Article 3(2)(a) Directive 2004/38/EC</i>	Any other family members <i>not falling under definition of Article 2(2) or 3(2)(b) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member of a Union citizen residing in Poland who, in the country from which he has come, lives in the same household as the Union citizen (Article 160(1)(a) FA); <sup>191</sup>	Other family members who, in the country from which they have come, are members of the household of the Union citizen having the primary right of residence (Article 3(2) Law 37/2006);
	Dependent family members	Other family member of a Union citizen residing in Poland who, in the country from which he has come, is financially dependent on the Union citizen (Article 160(1)(a) FA); <sup>191</sup>	Other family members who, in the country from which they have come, are dependants of the Union citizen having the primary right of residence (Article 3(2) Law 37/2006);
	Serious health grounds	Other family member of a Union citizen residing in Poland who, for serious health reasons, requires the personal care of the Union citizen (Article 160(1)(a) FA); <sup>191</sup>	Other family members who, on serious health grounds, strictly require the personal care by the Union citizen (Article 3(2) Law 37/2006);
Extensive examination?		The requirement of an extensive examination of the personal circumstances is not transposed in the FA (or EREA);	Decisions on entry and residence of extended family members are taken after an extensive examination of all relevant personal circumstances of the applicant (Article 3(3) Law 37/2006);
Motivated rejection?		On the basis of general Polish administrative law, (negative) decisions concerning entry and residence of extended family members must be issued in writing (Article 14(1) CAP) and must include the reasons for the decision (Article 107(1)(6) and 107(3) CAP);	Denial of entry or residence of extended family members shall be justified (‘grounds shall be given’ for the denial) (Article 3(3) Law 37/2006); As regards notification in writing, Law 37/2006 is silent;
Right to appeal?		General Polish administrative (seems to) provide(s) for the right to appeal against a (negative) decision on entry and residence of extended family members (see Article 127(1) CAP) before the Head of the Foreigners Office (cf. Article 104(1) in conjunction with 22(2) FA);	Law 37/2006 does not indicate whether appeal is possible against (negative) decisions on entry/residence of extended family members; (assuming that ‘general terms of law’ refers to Portuguese immigration law, i.e. Law 23/2007): appeal is possible before the administrative courts (cf. Art. 106(7) Law 23/2007)

<sup>191</sup> Extended family members must further meet the requirements of having health insurance and sufficient income (Article 160(1), second sub-sentence in conjunction with Article 159(1)(2) FA).



Member State		Romania	Slovakia
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Governmental Emergency Ordinance no. 102/2005 on the free movement of citizens of the Member States of the European Union and the European Economic Area on the Romanian territory</a> (GEO 102/2005), as amended;</li> <li><a href="#">Governmental Decision no. 1864/2006 approving the Methodological Norms implementing OUG 102/2005 and establishing the form and content of the documents to be issued to the European Citizens and their family members</a> (GD 1864/2006), as amended;</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Act No. 404/2011 Coll. of 21 October 2011 on the Residence of Aliens and on Amendments to Certain Acts</a> (Aliens Act n. 404/2011);</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) of Directive 2004/38/EC transposed by Article 2(1), point 6, and 3(2) of GEO 102/2005;	Article 3(2)(a) of Directive 2004/38/EC transposed by Article I, § 2(5), (d)-(f), of Aliens Act n. 404/2011.
Right or discretionary?		Extended family members of mobile Union citizens benefit from the same rights as ‘direct’ family members, and therefore enjoy a <i>right of entry and residence</i> (Article 3(2) GEO 102/2005);	Extended family members of mobile Union citizens are generally treated equally to ‘direct’ family members (see Article I, § 2(5) of Aliens Act n. 404/2011), and therefore enjoy the <i>right of entry and residence</i>
	Equal treatment after entry?	(see above)	Extended family members are treated as (‘direct’) family members for the purpose of entry and residence;
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) of Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2)(a), (c) and (d) of Directive 2004/38/EC</i>
Conditions for	Members of the same household	Any other family member who, in the country from which they have come, is dependent on the Union citizen (Article 2(1), point 6, GEO 102/2005);	Any other family member who belongs to the household of the Union citizen (Article I, § 2(5)(e) of Aliens Act n. 404/2011);
	Dependent family members	Any other family member who, in the country from which they have come, is in the care of the Union citizen (Article 2(1), point 6, GEO 102/2005);	Any other family member who is dependent on the Union citizen in the country of origin (Article I, § 2(5)(d) of Aliens Act n. 404/2011);
	Serious health grounds	Any other family member who, due to serious health grounds, require personal care by the Union citizen (Article 2(1), point 6, GEO 102/2005);	Any other family member who relies on the care of the Union citizen for serious medical reasons (Article I, § 2(5)(f) of Aliens Act n. 404/2011);
Extensive examination?		GEO 102/2005 does not contain the requirement for entry and residence of extended family members to be assessed following an extensive examination of the personal circumstances; <i>however, this may not be relevant in light of the fact that extended family members have a right of entry and residence</i>	Aliens Act n. 404/2011 does not require the competent authorities to assess the entry and residence of extended family members on the basis of an extensive examination of the personal circumstances; <i>however, this may not be relevant in light of the fact that extended family members have a right of entry and residence</i>
Motivated rejection?		(Negative) decisions concerning entry and residence of extended family members must be notified in writing (see Articles 6(4) and 16(8) GEO 102/2005, cf. Article 2(2) GD 1864/2006 for entry visa) and must provide the justification for the (negative) decision (see Articles 6(5) and 16(8) GEO 102/2005);	<p>Negative decisions concerning entry and residence of extended family members must be notified in writing (cf. Article I, § 120(1) Aliens Act n. 404/2011);</p> <p>As regards the justification of refusals of entry and residence and/or the right to appeal against a negative decision on entry and residence of extended family members, the Aliens Act n. 404/2011 is silent;</p> <p>Furthermore, the application of general Slovakian administrative law is excluded for the issuance of residence documents for family members of Union citizens (see Article I, §70(16) Aliens Act n. 404/2011);</p>
Right to appeal?		Appeal against a negative decision concerning entry and residence of extended family members is available before the competent administrative courts (see Articles 6(7) and 16(9) GEO 102/2005);	



Member State		Slovenia	Spain
Main legislation		<ul style="list-style-type: none"> <li><a href="#">Foreigners Act</a> (ZTuj-2);</li> <li><a href="#">General Administrative Procedure Act</a> (ZUP);</li> </ul>	<ul style="list-style-type: none"> <li><a href="#">Royal Decree 240/2007 of 16 February on entry, free movement and residence in Spain of citizens of Member States of the European Union and other States party to the Agreement on the European Economic Area</a> (RD 204/2007);</li> <li><a href="#">Instructions of the Ministry of Labour and Social Affairs no. DGI/SGRJ/03/2007, on Royal Decree 240/2007</a> (Instructions 03/2007);</li> </ul>
Article 3(2)(a) transposed?		Article 3(2)(a) Directive 2004/38/EC is transposed by Article 127(1), second paragraph, ZTuj-2.	Article 3(2)(a) Directive 2004/38/EC is transposed by Article 2bis RD 204/2007
Right or discretionary?		Extended family members of mobile Union citizens are equated to ('direct') family members, and therefore enjoy a <i>right of entry and residence</i>	Extended family members may apply for treatment as a family member of a Union citizen, in accordance with RD 204/2007; this implies a discretionary competence; <sup>192</sup>
	Equal treatment after entry?	Extended family members of mobile Union citizens are equated to ('direct') family members (see Article 127 ZTuj-2);	After approval of treatment as a family member (pursuant to Article 2bis RD 204/2007), provisions of RD 204/2007 apply equally to extended family members (see Article 3(1) RD 204/2007);
Which family members?		Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>	Any other family member <i>not falling under definition corresponding to Article 2(2) Directive 2004/38/EC</i>
Conditions for	Members of the same household	Other family member who resided with a Union citizen as a member of the household in another EU Member State or in a third country (Article 127(1), second paragraph, ZTuj-2);	Other family member accompanying or joining a Union citizen who, in the country from which he has come, resides with him (Article 2bis(1)(a)(1) RD 204/2007);
	Dependent family members	Other family member who is dependent on a Union citizen under the law of the country of which he or she is a national, or is actually dependent on his or her (Article 127(1), second paragraph, ZTuj-2);	Other family member accompanying or joining a Union citizen who, in the country from which he has come, is dependent on him (Article 2bis(1)(a)(1) RD 204/2007);
	Serious health grounds	Other family member who, owing to the state of his or her health, is personally cared for by a Union citizen (Article 127(1), second paragraph, ZTuj-2);	Other family member accompanying or joining a Union citizen who, on serious health grounds or incapacity, strictly requires the personal care by the Union citizen (Article 2bis(1)(a)(1) RD 204/2007);
Extensive examination?		The Foreigners Act (ZTuj-2) does not contain the requirement of an extensive examination of the personal circumstances; however, general Slovenian administrative law requires that (administrative) decisions be taken only after 'all the facts and circumstances that are relevant to the decision' are identified (Article 138(1) ZUP); <i>Note: requirement for extensive examination may not be relevant in light of the fact that extended family members have a right of entry and residence</i>	According to RD 204/2007, the (competent) authorities shall 'individually' examine applications for entry and residence of extended family members the personal circumstances of the applicant(s) (Article 2bis(4) RD 204/2007), including degree of financial or physical dependence, degree of kinship, and severity of the illness or incapacity requiring personal care or the period of prior cohabitation;
Motivated rejection?		According to general Slovenian administrative law, (negative) decisions on entry and residence of extended family members must be notified in writing and must contain the reasons underlying the decision (Article 210(2) and (3), and 214 ZUP);	(Negative) decisions concerning entry and residence of extended family members must be motivated (Article 2bis(4) and (5) RD 204/2007); general Spanish administrative law (applicable through RD 204/2007, 2 <sup>nd</sup> additional provision) further requires notification (see Article 36 of Royal Decree 39/2015);
Right to appeal?		(Negative) decision on entry and residence of extended family members may be appealed before the ministry responsible for internal affairs (for refusal of entry: Article 127(5) ZTuj-2; for decision concerning residence: Article 131 ZTuj-2);	(Negative) decisions concerning entry and residence of extended family members are subject to administrative remedies (RD 204/2007, 2 <sup>nd</sup> additional provision, in conjunction with Article 21 Organic Law 4/2000 and Title IV, Chapter II, RD 39/2015);

<sup>192</sup> Cf. preamble to Royal Decree 987/2015 of 30 October, which introduced Article 2bis.

<b>Member State</b>		<b>Sweden</b>
<b>Main legislation</b>		<ul style="list-style-type: none"> <li>SFS 2005:716: <a href="#">Aliens Act</a>;</li> <li>SFS 2006:97: <a href="#">Aliens Regulation</a>;</li> </ul>
<b>Article 3(2)(a) transposed?</b>		Article 3(2)(a) Directive 2004/38/EC transposed by Chapter 3a, §2(4) Aliens Act (2005:716);
<b>Right or discretionary?</b>		Extended family members of mobile Union citizens are considered as (‘direct’) family members, and therefore enjoy a <i>right of entry and residence</i>
	<i>Equal treatment after entry?</i>	Extended family members of mobile Union citizens are considered as (‘direct’) for the purpose of free movement provisions of Aliens Act (2005:716);
<b>Which family members?</b>		Any other family member <i>not falling under definition of Article 2(2) Directive 2004/38/EC</i>
<b>Conditions for</b>	<i>Members of the same household</i>	Other family member who, in the country from which he or she comes, is part of the household of the Union citizen (Chapter 3a, §2(4) Aliens Act (2005:716));
	<i>Dependent family members</i>	Other family member who, in the country from which he or she comes, is dependent on the Union citizen for his or her livelihood (Chapter 3a, §2(4) Aliens Act (2005:716));
	<i>Serious health grounds</i>	Other family member who, for serious health reasons, strictly requires the personal care of the Union citizen (Chapter 3a, §2(4) Aliens Act (2005:716));
<b>Extensive examination?</b>		Aliens Act (2005:716) does not contain the requirement for entry and residence of extended family members to be assessed following an extensive examination of the personal circumstances; <i>however, this may not be relevant in light of the fact that extended family members have a right of entry and residence</i>
<b>Motivated rejection?</b>		(Negative) decisions concerning <i>inter alia</i> entry and residence of extended family members of Union citizens must be issued in writing and justify the grounds for the decision (Chapter 13, §10 Aliens Act (2005:716));
<b>Right to appeal?</b>		(Negative) decisions concerning entry and residence of extended family members of Union citizens may be appealed to a migration court (Chapter 14, §5a and 5b Aliens Act (2005:716));



## Annex 2. List of questions in e-questionnaire (extended family members)

Q0. Please Indicate the Member State your answer to this questionnaire will be based. This Member State will be referred in the rest of the questionnaire as “your country”.

*[List of EU Member States]*

### Section A. Questions on entry and residence of extended family members of Union citizens

#### Sub-section “On whether extended family member can join or accompany their Union citizen family member”

Q1. Are family members of mobile Union citizens residing in your country – other than spouses, registered partners, and direct descendants (children) and dependant direct ascendants (parents) – able to accompany or join their Union citizen family member in your country?

*In other words, are they able to enter and reside in your country because they are family members of a mobile Union citizen?*

*[Yes/No]*

Q1bis. If not, are there any other grounds for extended family members of mobile Union citizens to apply for entry or residence in your country?

*[Yes/No]*

Q2. Please indicate the general conditions that apply to extended family members based on your answer to the question(s) above.

*Please also refer to the legal provisions that apply.*

*[Open question]*

#### Sub-section “The situations under which extended family members could accompany or join a mobile Union citizen”

Q3. Which of the following situations would allow for extended family members of mobile Union citizens to apply for entry and residence in your country?

*Please choose all situations that are applicable (or choose 'all of the above').*

*[Multiple choice]*

- *In the country from which he or she came, the extended family member lives in the same household as the mobile Union citizen.*
- *In the country from which he or she came, the extended family member is financially or physically dependent on the mobile Union citizen.*
- *Due to serious health grounds, the extended family member strictly requires the personal care of the mobile Union citizen.*
- *All of the above.*
- *None of the above.*





**Q4. Which of the following types of family members are eligible for entry or residence as an extended family member of a mobile Union citizen in your country?**

*Please choose all applicable categories, or choose 'No restrictions in terms of types of family members'.*

*[Multiple choice + open question]*

- *First-degree relatives not in the ascending or descending line (i.e. siblings)*
- *Second-degree relatives not in the ascending or descending line (e.g. aunts/uncles, nieces/nephews)*
- *Relatives in the third degree or higher (e.g. great uncles/aunts, first cousins)*
- *Family members not related by birth or marriage (e.g. foster children)*
- *No restrictions in terms of categories of family members*
- *Others: [please specify]*

**Q5. Do extended family members of mobile Union citizens who wish to enter and reside in your country enjoy any form of special treatment?**

*Please choose all applicable responses.*

*[Multiple choice]*

- *Yes, they enjoy a right to enter and residence as a family member of a mobile Union citizen*
- *Yes, their application for entry and/or residence will be treated with priority*
- *Yes, they may provide any form of evidence suitable to prove their eligibility*
- *Yes, their application fee may be waived*
- *Yes, they may apply for entry and residence from while already in your country*
- *No, they do not enjoy any form of special treatment*
- *I do not know whether they enjoy any form of special treatment*

**Q6. Which of the following conditions or requirements apply to extended family members who wish to accompany or join a mobile Union citizen in your country?**

*Please choose all conditions or requirements that apply. Questions concerning requirements of dependency, same household and/or medical grounds will be addressed in section C of this survey.*

*[Multiple choice]*

- *The mobile Union citizens – who have the primary right of residence – must be employed or self-employed*
- *The mobile Union citizens – who have the primary right of residence – must have sufficient resources for themselves and their family members*
- *The extended family member must have comprehensive sickness insurance cover in your country*
- *The extended family member must meet certain (non-)criminality conditions (e.g. no criminal record for enumerated types of crimes)*
- *The extended family member must meet certain language and/or civic knowledge requirements*



### Sub-section “On differentiated treatment on the basis of nationality”

Q7. Do your responses to the preceding questions (questions 1 to 6) differ depending on the nationality of the extended family member?

[Yes/No]

## Section B. Questions on procedural aspects of entry and residence for extended family member of mobile Union citizens

### Sub-section “Procedure related to first entry”

Q8. Which of the following statements best describes the character of the entry and residence of extended family members of mobile Union citizens in your country who meet the conditions in your responses above?

[Multiple choice]

- *They have a right to be treated/registered as a family member of a mobile Union citizen.*
- *They may apply to be treated/registered as a family member of a mobile Union citizen.*
- *They may apply for an entry and/or residence permit to enter your country as a family member of a mobile Union citizen.*
- *They may apply for an entry and/or residence permit to enter your country as a foreigner/alien.*

Q9. Which of the following statements best describes the evidential nature of the registration or application of your response above?

[Multiple choice]

- *The registration/application must be accompanied by supporting documents enumerated in legislation or regulations (no other forms of evidence accepted).*
- *The registration/application must be accompanied by supporting documents enumerated in legislation or regulations; alternative forms of supporting documents may be accepted.*
- *The registration/application may be accompanied by any suitable forms of supporting documents.*

### Sub-section “Assessment by the competent authorities and procedural safeguards”

Q10. For each of the following statements, please indicate whether it applies to extended family members applying for (registration for) entry and residence:

[Matrix – Single choice responses (Yes/No/Don’t know)]

- *The competent authorities must undertake an extensive examination of the personal circumstances of the extended family member*
- *The competent authorities must consider the implications of its decision for the fundamental and human rights of the extended family member (e.g. right to family life, best interest of the child)*
- *The competent authorities must consider the implications of its decision for the fundamental and human rights of the mobile Union citizen having the primary right of residence (e.g. right to family life, free movement rights)*



**Q11. Assuming that the extended family member meets the conditions/requirements for registering or applying for entry and residence, can the competent authorities of your country reject the registration or application?**

*In other words, do the competent authorities in your country have discretionary freedom to approve or reject the entry and residence of extended family members of mobile Union citizens?*

*[Single choice responses]*

- *Yes, the authorities may reject the registration or application based on their discretion*
- *Yes, the authorities may reject the registration or application solely on grounds of fraud, public policy, public security or public health*
- *No, the authorities must register or approve the application for entry and residence*

**Q12. Which of the following procedural guarantees are applicable to extended family members applying for registration or entry and residence?**

*Please choose all applicable answers. If none of the procedural guarantees apply, choose 'None of the above'.*

*[Multiple choice]*

- *The authorities must inform the extended family member of the decision in writing*
- *The authorities must inform the extended family member of the decision in a language understood by him or her*
- *Any rejection by the authorities to register or approve entry and residence of the extended family member must be justified/motivated*
- *The extended family member must be informed of the possibility to seek review of or appeal a rejection /negative decision*
- *None of the above*

**Sub-section “Recognition of other Member States' decision on entry and residence of extended family members”**

**Q13. If extended family members of mobile Union citizens have been granted entry and residence in another EU Member State (i.e. other than your country) as a family member of a Union citizen, and the mobile EU citizen concerned intends to move to your country with his or her extended family members, is the previous assessment by the other Member State taken into account by the authorities in your country?**

*[Single choice]*

- *Yes, the other Member State's previous assessment is wholly taken over.*
- *Yes, the other Member State's previous assessment is to be considered in the competent authority's own assessment.*
- *No, previous assessments by other Member States are not relevant.*

**Sub-section “Recognition of other Member States' decision on entry and residence of extended family members”**

**Q14. If applications (to register) for entry and residence of extended family members of mobile Union citizens in your country are rejected, are they able to seek review of or appeal the negative decision(s)?**

*[Yes/No]*



**Q14bis. If yes, which institution or authority assesses the review or appeal?**

*Please choose all applicable answers.*

*[Multiple choice + open question]*

- *Administrative authority, the same authority who took the negative decision*
- *Administrative authority, different from the authority who took the negative decision*
- *Judicial authority/tribunals/courts, immediately upon the negative decision*
- *Judicial authority/tribunals/courts, upon review of a negative appeal decision*
- *Others: [please specify]*

## Section C. Status of extended family members after (first) entry

### Sub-section “Residence titles of extended family members”

**Q15. For extended family members who meet the conditions for entry into your country and who are third-country nationals who are not exempt from having a visa for entry, which of the following statements describe their situation?**

*Please choose all applicable answers.*

*[Multiple choice]*

- *The extended family members may apply for a Schengen visa as a family member of a Union citizen*
- *The extended family members may apply for a Schengen visa as a (general) foreigner*
- *The extended family members may apply for a national visa as a family member of a Union citizen*
- *The extended family members may apply for a national visa as a (general) foreigner*

**Q16. For extended family members whose residence in your country have been approved, which of the following (residence) documents will they be issued with?**

*Please choose all applicable answers.*

*[Multiple choice + open question]*

- *A certificate of registration as a Union citizen*
- *An EU residence card as a third-country national*
- *A residence document under national law as a family member*
- *A residence document under national law other than as a family member (e.g. residence permit for workers, settlement permit)*
- *Other: [please specify]*

### Sub-section “Status and rights of extended family members”

**Q17. Are extended family members of mobile Union citizens legally residing in your country treated equally to direct family members of mobile Union citizens other than as regards residence?**

*[Yes/No]*



**Q18. Which of the following rights do extended family members of mobile Union citizens legally residing in your country enjoy?**

*Please choose all applicable answers.*

*[Multiple choice]*

- *The right to take up employment*
- *The right to take up self-employment*
- *The right to equal treatment with nationals of your country (excluding social assistance)*
- *The right to equal treatment with nationals of your country in access to contributory social assistance*
- *The right to equal treatment with nationals of your country in access to non-contributory social assistance*
- *None of the above*

**Q19. Can extended family members legally residing in your country retain the right of residence after their mobile Union citizen family member's death or departure from your country?**

*This question relates to the retention of residence provided for in Article 12 of Directive 2004/38/EC.*

*[Yes/No]*

**Sub-section “Extension of residence and permanent residence”**

**Q20. Can extended family members legally residing in your country apply for extending their residence and /or residence document?**

*[Yes/No]*

**Q21. Are extended family members legally residing in your country eligible for permanent residence after a continuous period of residence of five years?**

*This question relates to the right of permanent residence provided for in Chapter IV of Directive 2004/38/EC.*

*[Yes/No]*

**Sub-section “Retention of residence and protection against expulsion”**

**Q22. Can the (temporary) residence of extended family members be restricted or withdrawn on the following grounds?**

*[Matrix – Single choice responses (Yes/No)]*

- *Abuse of rights or fraud (including marriages of convenience)*
- *Public policy*
- *Public security*
- *Public health*
- *Grounds other than the above-mentioned*



**Q23. For restriction of residence of extended family members of grounds of public policy and public security, which of the following statements apply?**

*Please choose all applicable answers.*

*[Multiple choice]*

- *Measures taken on grounds of public policy or public security against extended family members must be proportionate*
- *Measures taken on grounds of public policy or public security against extended family members must be based exclusively on his or her personal conduct*
- *Considerations of general prevention may be used by the competent authorities decision on measures on grounds of public policy or public security*
- *Previous criminal convictions of the extended family members are sufficient to justify measures on grounds of public policy or public security*
- *None of the above*

**Q24. Which of the following statements most closely describe the expulsion of extended family members from your country?**

*Please choose all applicable answers.*

*[Multiple choice]*

- *Before taking a decision to expel extended family members, the competent authorities must take account of their personal circumstances  
(such as how long they have resided in your country, their age, state of health, family and economic situation, social and cultural integration in your country and the extent of their links with the country of origin)*
- *Extended family members with a right of permanent residence in your country may not be expelled, except on serious grounds of public policy or public security*
- *Extended family members who have resided in your country for more than ten years cannot be expelled except on imperative grounds of public security*
- *None of the above*

**Q24. Which of the following procedural guarantees do extended family members have against expulsion decisions and/or decisions restricting their residence?**

*Please choose all applicable answers.*

*[Multiple choice]*

- *The expulsion decision and/or decision restricting their residence must be notified to them in writing*
- *The expulsion decision and/or decision restricting their residence must be notified to them in such a way that they are able to comprehend its content and the implications for them*
- *They must be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken is based*
- *They have a right to seek review of or appeal against the expulsion decisions and/or decisions restricting their residence*
- *None of the above*





## Final section

Thank you for completing this survey. Your responses will contribute to the research being conducted by the EU-CITZEN Network and to recommendations on how to improve the free movement rights of Union citizens and their family members.

If there are any remaining comments or issues which have not been addressed in the questionnaire, please feel free to indicate them here below.

*[Open question]*



## Annex 3. Report on entry and residence conditions for extended family members of EU citizens in Bulgaria

Report by Valeria Ilareva<sup>193</sup>

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1. Introduction
2. Eligibility criteria for entry and residence of extended family members of EU citizens
3. Procedural aspects of entry and residence of extended family members of EU citizens
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#### 1. Introduction

This report looks at the conditions under which Union citizens may be accompanied or joined by their extended family members according to Article 3(2)(a) of *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* in the Republic of Bulgaria. More specifically, the report summarizes the material law eligibility criteria for entry and residence of extended family members of EU citizens, the procedural aspects of obtaining permission to enter and reside (or to be denied so) in Bulgaria and the scope of rights that the residence status of extended family members entails.

In order to obtain a comprehensive overview of the implementation of this aspect of Directive 2004/38 in Bulgaria, the author of the report submitted a freedom of information request to the Bulgarian Ministry of Interior as the responsible institution with regard to allowing entry and residence of extended family members of EU citizens. The researcher also conducted tailor-made interviews with legal practitioners on the ground.

In its official reply<sup>194</sup> to the freedom of information request on extended family members of EU citizens, the Bulgarian Ministry of the Interior replied that it does not collect and does not process statistical data with regard to extended family members of EU citizens. Therefore, the Ministry of Interior has been unable to answer any of the questions it was asked. Legal practitioners on the ground shared extremely limited experience with extended family members. The few cases other than spouses, children and parents that practitioners have dealt with concern registered partners (falling outside the scope of this study) and au-pairs. Therefore, the information in the report is predominantly based on the stipulations of the law and their analysis by analogy with similar cases concerning free movement rights of EU citizens in Bulgaria.

#### 2. Eligibility criteria for entry and residence of extended family members of EU citizens

The material law conditions for entry and residence of extended family members of EU citizens in Bulgaria are found in the Bulgarian *Law on Entry, Residence and Departure of the Republic of Bulgaria*

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<sup>193</sup> Valeria Ilareva holds a PhD in International Public Law and is a practicing immigration lawyer in Bulgaria.

<sup>194</sup> Ministry of the Interior of the Republic of Bulgaria, Letter No.812100-17215/15.11.2019



of *EU Citizens and Their Family Members*<sup>195</sup> (hereinafter, ‘LERD’). Article 5, para. 1, point 1 of LERD provides that the right to enter, reside in and leave Bulgaria is also recognized to “other” family members who in the country of origin have been financially dependent on the EU citizen or who have been members of the household, or if serious health considerations require the EU citizen to take personal care of that family member. Therefore, the Bulgarian law envisages three explicit situations, in which extended family members of mobile EU citizens would be allowed to enter and reside in Bulgaria. The first situation is when, in the country from which he or she came, the extended family member is financially dependent on the mobile EU citizen. The second situation is when the extended family member lives in the same household as the mobile EU citizen. The third situation is when, due to serious health grounds, the extended family member strictly requires the personal care of the mobile EU citizen. Bulgarian law does not envisage restrictions in terms of categories of family members that are eligible for entry and residence as extended family members (e.g., relatives of first degree, second degree, third degree or higher, relatives not related by blood and marriage, etc.). The mobile Union citizens who have the primary right of residence must have sufficient resources for themselves and their family members.

### 3. Procedural aspects of entry and residence of extended family members of EU citizens

Extended family members of mobile EU citizens may apply to reside in Bulgaria by providing supporting documents enumerated in national legislation (alternative forms of supporting documents may be accepted, too). The competent authorities<sup>196</sup> must undertake an extensive examination of the personal circumstances in the application, consider the implications of its decision for the fundamental rights of the extended family member (e.g., right to family life, best interest of the child) and for the fundamental rights of the mobile EU citizen (e.g. free movement rights, etc.). If the extended family member meets the eligibility criteria, the authorities may reject the application solely on grounds of fraud,<sup>197</sup> public policy, public security or public health. There are also procedural guarantees in place. In case the applicant has failed to provide a required document, he or she shall be instructed as to what they need to provide and are given a term of 14 days to do that.<sup>198</sup> The authorities must inform the extended family member in writing; any rejection of the application by the authorities shall be justified and motivated. The extended family member is informed of the right to appeal the decision in court or before the higher administrative authority.

If extended family members of mobile EU citizens have been granted entry and residence in another EU Member State *as a family member of an EU citizen*, and the mobile EU citizen moves to Bulgaria with his/her family members, the previous assessment by the other Member State is taken into account by the authorities in Bulgaria in the own assessment of the country’s competent authority.

As mentioned above, if applications for entry and residence of extended family members are rejected, the latter have a right to appeal the negative decision.<sup>199</sup> The institution that may be called upon to

<sup>195</sup> In Bulgarian: Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства.

<sup>196</sup> The Migration Directorate at the Ministry of the Interior and the Migration Units at the Regional Directorates of the Ministry of the Interior.

<sup>197</sup> Thus, Article 12a of LERD regulates the cases, in which the marriage has been concluded solely for the purpose of evading the immigration law rules.

<sup>198</sup> Article 12, para.5 LERD.

<sup>199</sup> Article Art.12, para.7 and Article 12a, para.3 LERD



assess the appeal can be an administrative authority, different from the authority that took the negative decision, or a judicial authority (court), immediately following the initial negative decision. The deadline to submit the appeal is 14 days from the date of serving the decision to the applicant. The general rules for court cases under the Code on Administrative Procedure are applicable.

#### 4. Status of extended family members

Extended family members who meet the conditions for entry into Bulgaria may either apply for a *Schengen visa* as a family member of a mobile Union citizen (before the consular representation of a Schengen State)<sup>200</sup> or for a *national visa* as a family member of a Union citizen before a Bulgarian consular office.

Extended family members whose residence has been approved are issued with an EU residence card as a third-country national who is a family member. The term to issue the residence card is 3 months from lodging the application.<sup>201</sup>

With regard to status and rights of extended family members, they are treated equally to direct family members of mobile EU citizens. According to Article 9, para.1, point 6 of the Law on Labour Migration and Labour Mobility,<sup>202</sup> third country nationals who are family members of EU citizens are exempted from the requirement of a work permit in order to access the Bulgarian labour market. Extended family members of EU citizens have both the right to take up employment and to be self-employed. In principle, they have the right to equal treatment with Bulgarian nationals. However, there are also some exception to the latter rule with regard to access to state-funded health care and social assistance during the first five years of legal residence in Bulgaria.

Extended family members legally residing in Bulgaria retain the right of residence after their mobile Union citizen family member's death, provided that they have resided in Bulgaria for at least one year prior to the EU citizen's death in the capacity of his/her family member. Article 15, para.2 of LERD, however, does not recognize the right to retain one's residence in case of departure from Bulgaria by the EU citizen. In the latter case, only the EU citizen's children who study in Bulgaria and the survived parent respectively have a right to retain their residence.

Extended family members legally residing in Bulgaria can apply for extending their residence. Respondents in the field interviews for this study have noted a certain degree of arbitrariness on the part of the authorities when deciding on the duration of the residence permit term of the mobile EU citizen and their family members respectively, especially in cases of a first residence permit. Thus, duration may be from 6 months to 5 years. Article 19 of LERD provides that third country national family members of EU citizens are entitled to a permanent residence permit following the completion of five years of lawful residence. The permanent residence card is re-issued automatically every ten years, unless the person has been absent from Bulgaria for more than two consecutive years.

Residence of extended family members can be restricted or withdrawn on the grounds of abuse of rights or fraud (including marriages of convenience), public policy, public security, public health and other grounds, provided in Article 24 of LERD. "Other grounds" provided in the law are absence for

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<sup>200</sup> Bulgaria is not yet part of the Schengen area.

<sup>201</sup> Art.12, para.4 LERD.

<sup>202</sup> In Bulgarian: *Закон за трудовата миграция и трудовата мобилност*



more than two consecutive years from Bulgaria and cases in which the grounds for residence have ceased to exist. According to Article 23, para.2 of LERD, the imposition of the measure is based solely on the personal conduct of the person and is determined according to the degree to which that conduct threatens national security, public order or public health (principle of proportionality). The authorities shall take into account “the length of residence in the Republic of Bulgaria, age, health, economic and family situation, social and cultural integration and the degree of connection with the country of origin of the person concerned”.<sup>203</sup> Bulgarian law explicitly provides that withdrawal of the residence permit, expulsion and entry ban “may not be based on economic considerations, resort to the social assistance system, job search or expiry of the identity card or passport on the basis of which the person has entered the Republic of Bulgaria”.<sup>204</sup> Extended family members with a right of *permanent* residence in Bulgaria may not be expelled, except on serious grounds of public policy or public security.

Extended family members dispose of procedural guarantees against arbitrary expulsion decisions and restrictions of their residence. The decision by which the restrictive measure is imposed must be notified to the person concerned in writing. The factual grounds for imposing a specific coercive measure, if they contain classified information, shall be indicated in a separate document prepared by the respective officials in accordance with the Law on Classified Information Protection. The person concerned may have access to the file with the classified information upon appeal of the decision and the provision of the whole administrative file to the court. Article 27, para.4 of LERD provides that the person subject to the enforcement administrative measure shall be acquainted with the contents of the order “in a language understandable to him” by the authorities competent for the execution of the order. This notification shall be documented in a protocol. However, interview respondents and the practical experience of the author reveal that, unless the person concerned speaks English, currently the authorities rarely, if ever, provide language interpretation. Article 27 of LERD provides that the restrictive order shall specify the time limit for appealing it and the competent administrative court. It shall also state the period given for voluntary departure of the Republic of Bulgaria. The latter term may not be shorter than one month, unless “the person continues to endanger national security, public order or public health”.<sup>205</sup> During the process of judicial review, the general rules for court cases under the Code on Administrative Procedure are applicable. Article 28, para.2 of LERD stipulates that the appeal suspends the execution of the restrictive measure, “except when the order was issued on grounds of national security”.

## 5. Conclusion

Bulgaria has transposed in its national legislation Article 3, para.2 (a) of Directive 2004/38<sup>206</sup> regarding “other” family members. At least in theory, the law contains guarantees for equal treatment and prevention of arbitrariness in taking decisions to give or withdraw entry and residence rights. However, practice of implementing the law is extremely scarce. This conclusion is drawn both from the lack of any official statistical data collected and analysed by the competent authorities with regard to extended

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<sup>203</sup> Article 23, para.3 LERD.

<sup>204</sup> Article 23, para.4 LERD.

<sup>205</sup> Article 27, para.3 LERD.

<sup>206</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC



family members and from the experience of immigration practitioners on the ground. There seems to be lack of awareness about the possibility for extended family members of EU citizens to enter and reside in Bulgaria as *family members*. Therefore, the question remains how the law would be applied when more extended family members decide to avail of their rights in Bulgaria.