AGF Arbeitsgemeinschaft der deutschen Familienorganisationen e.V.

Statement of AGF

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

COM (2011) 735 final

Objective of Consultation (Summarized introduction of the Green Paper)

The Consultation refers to the EU Directive on family reunification (Directive 2003/86/EG), adopted in 2003. The Directive defines the conditions of entry and residence for non-EU family members joining a non-EU citizen already legally residing in a Member State. EU citizens are not concerned by this directive.

For a couple of reasons the European Commission considers a discussion about the Directive as necessary: 1. There is a rather low level of harmonization between the member states on this issue, 2. Some Member States have called for stricter regulations according to some national rules which have been made more restrictive in the past years. They claim that such changes would be necessary in order to tackle abuse and better manage the large inflow of migrants.

Relevance: Family reunification accounts for a large although decreasing share of legal migration. From more than 50 percent of the total legal immigration, this share declined to about one third. When considering solely those persons/group targeted by the Directive – i.e. third country nationals joining non-EU citizens – the share is only 21 % of the overall permits (about 500.000 migrants) in the EU.

In its first report on the implementation (COM 2008/610) of the Directive, the European Commission itself identified national implementation problems and shortcomings of the Directive. On the one hand a few cross-cutting issues of incorrect transposition were identified (the provisions on visa facilitation, granting autonomous residence permits, taking into account the best interest of the child, legal redress and more favourable provisions for the family reunification of refugees). On the other hand the report concluded that the Directive itself allows Member States too much discretion when applying some of its optional provisions (the "may"-clauses).

General comments

The AGF emphasizes the need of family unification for migrants as well as for people who permanently reside within a state of the European Union and have made a transnational partner choice. Reliable and transparent regulations are necessary to enable an unhindered family life.

The EU's Directive on family reunification aims to affirm the right to family reunification and to facilitate the integration of third country nationals. The AGF underlines this focus, as the implementation of this European legislation into national law is not always visible. As a result, in certain family constellations infringements of the inalienable right to family life can be observed.

The AGF supports the statements of the European Commission on the Green Paper. In Germany too, the proportion of family reunification falling under the Directive on family reunification, is decreasing. In 2010, only 24% of all residence permits for third country nationals fell under the relevant Directive. The majority of cases, approximately 60%, involved the reunification with Germans (Bundesamt für Migration und Flüchtlinge: Das Bundesamt in Zahlen 2010, Nürnberg 2011, S. 92; www.bamf.de). I.e. besides third country nationals, the majority of people falling under this Directive are Germans and their foreign family members.

In what follows, the AGF takes position on the Commission's questions based on the experiences of the association's work. Thereby, the AGF covers mainly a German perspective and points out that the transposition of the European directive into national law is of crucial importance and still needs significant improvement in Germany according to families.

For a better comprehension of the statement, in the following text there is a short explanation of each question before it is answered. For further information and for the questions that are not mentioned here, please refer to the Green Paper on the Website of the European Commission.

Answers of AGF to the questions of the Green Paper

Question 2:

Explanation: Generally, the Directive requires Member States to authorize the entry and residence of the nuclear or core family (spouse and minor children). However, a minimum age may be fixed (21 years is the maximum threshold) irrespective of whether this corresponds to the age of majority in the given Member States. The reason behind this provision was a worry about an abuse of the rule for forced marriages.

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

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

Answer of AGF: A relationship between the setting of the minimum age and forced marriage cannot be observed. Until today, there is no valid data that could demonstrate a connection. The common assumption that especially young women are being forced into marriage contradicts the experience of numerous counselling services. Many older women and even men are also affected by forced marriages.
Neither could a non-representative study that was commissioned by the Federal Ministry for Family Affairs and published in November 2011, provide any evidence for such a relationship. Instead, the study revealed that various other factors including social background, the level of education or traditional patriarchal structures, create a social environment that promotes forced marriages.

The AGF points out that a resetting of the minimum age for spouses cannot prevent forced marriages, but only delays the family unification. The age setting has no bearing on marriage, as couples are already married when the reunification is applied for.

The AGF, furthermore, stresses that the Directive only applies to people wishing to join their spouse in a European member state. It does not apply to people that are sent abroad from a European member state by their parents to be married. The problem of forced marriage cannot be effectively addressed by restrictive regulations, but only through sustained educational measures and counselling support.

Question 3:

Explanation: So called „stand-still clause". For minor children, two further restrictions are allowed: 1. Member States may ask unaccompanied children over 12 years to prove that they meet integration conditions. 2. Children older than 15 may be required to enter a Member State on grounds other than family reunification. No. 1 has only been used by one Member State, No. 2 has not been used at all.

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

Answer of AGF: The European directive should not give any opportunity to the Member States to make the bringing in of minors subject to any kind of integration criteria. The AGF defends an unhindered family life, which includes children naturally.

If joining the family is made subject to certain integration criteria, this would strongly affect families and could even lead to jeopardising the welfare of the child in difficult situations.

The German example illustrates the problem:

Germany has adopted restrictive regulations on the family reunification of minors with third-country nationals. Immigration requirements for children from the age of 16 include an adequate command of the German language – commensurate with level C1 of the GER – or a positive integration prognosis. Level C1 corresponds to the language skills required to enter higher education in Germany. In practice, this means that children from the age of 16 cannot reunify with their family as the legal requirements for immigration usually cannot be met.

It must also be criticized that children are only permitted to join their family, in addition to the requirement of a written consent by the other parent, if the parent residing in Germany has sole custody. Evidence for the latter requirement must be submitted to the relevant authority (preferably a judiciary). In countries that only recognize joint custody, however, this criterion is virtually impossible to meet. Why would the criterion of sole custody be used in the first place? Since the reform of child law in 1998, the principle of joint parental care, as opposed to single custody, has become the rule.

The AGF considers this practice a violation of children's rights to live with the parent and is therefore contrary to their best interest. In individual cases, a danger to the child's well-being can occur when, for instance, the other parent does not or cannot care for the child. In such cases, the child is often required to live with other relatives or ageing grandparents who are unable to care adequately for the child's welfare concerns.

Question 4:

Explanation: The Directive only refers to the nuclear family, Member States are free to decide whether to include other family members in their national legislation. More than half of the Member States include parents of the applicant and/or his/her spouse. The Directive suggests that Member States that recognise same-sex marriages within their national family law should also do so in application of the Directive. In the same vein, Member States who recognize same-sex registered partnerships under national family law and who apply the "may" clause of the Directive for registered partners should also include same-sex partners under the directive.

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

Answer of AGF: The Directive merely contains a "may" clause for the reunification of family members beyond the core family. This regulation should be more obligatory for Member States, because the case of Germany shows that the non-use of the regulation prevents numerous families from assuming their responsibility of taking care for ageing parents. Serious concerns for the well-being of family members who are left behind in the home countries absorbs much time, energy and strength that could be invested into improving their life in their new home country and thereby enhancing the overall integration process.

The AGF sees the need to modify existing regulations in a way that enables families to actually live together and take responsibility for one another.

Germany has made no use of this clause. According to the Law of Residence, parents of third-country nationals residing in Germany are defined as "other members of the family" and can only migrate to avoid extreme hardship. The term "extreme hardship" is not defined by German immigration law. A situation of extreme hardship may occur when, for instance, support for parents in need of care is not guaranteed by their home country. This regulation is so restrictive that in practice parents can rarely reunify with their family. In 2010, only 306 residence permits were issued to migrating parents, which amounts to approximately 0.6% of all residence permits issued in the same year (see Bundesamt für Migration und Flüchtlinge: Das Bundesamt in Zahlen 2010, Nürnberg 2011, S. 92).

Question 5:

Explanation: The Directive enables Member States to require third-country nationals to comply with integration criteria, even in case of family reunification (without any precise indication what these integration measures should entail and how they should be applied). Some Member States use such measures as a condition before admission to the territory (language tests, knowledge tests of the host society, civic, integration or language courses).

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

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

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

Answer of AGF: The AGF rejects mandatory immigration requirements that could prevent family reunification. It is certainly advisable to learn the respective language as quickly and proficiently as possible. This should not be, however, a condition for people wishing to pursue a family life. The AGF rejects the proof of a certain language level for migrants wishing to join their spouse. Couples must be allowed a timely reunification and enable them to live their marriage and family lives. Language skills are developed more effectively and fruitfully within the respective language-speaking environment, as the skills acquired in the language courses can be used and practiced in everyday life.

The AGF considers the integration measures that are adopted after the migration has taken place as sufficient. These should be further improved and study groups differentiated according to language proficiency levels.

As an example the regulations in Germany shows occurring problems:

The German regulation requires for spouses to demonstrate a basic knowledge of German – commensurate with the level of A1 of the GER - before allowing them to migrate. Evidence should normally be provided in the form of a certificate issued by the Goethe Institute or other recognized language institutes. Such evidence must also be submitted in cases of illiteracy or other learning disabilities such as ADHS. A general hardship clause is missing. Long distances to the language institute do not constitute an exception, neither do the care and treatment of relatives or financial difficulties.

Exempted from these language requirements are those recognized as refugees by the GFK, spouses who are officially determined to be either mentally or physically unfit to provide the evidence, as well as spouses of citizens from countries listed under § 41 of the ordinance on residence. The latter include citizens from Australia, Israel, Japan,

Canada, the Republic of Korea, New Zealand, the United States of America, Andorra, Honduras, Monaco and San Marino.

This regulation takes account of individual educational backgrounds and therefore favours couples / families that are financially well situated. Spouses that do not meet the requirements are kept from a timely reunification and enjoyment of married life. Additionally, the administrative procedure to check documents and important papers is time consuming and unclear to the person concerned.

This delays the integration process in Germany. It can virtually only begin once the spouse has entered the country – in certain cases this may take one year or longer. In some individual cases, couples had to remain separate from between two to five years and could only spend their annual leave together – even when they had mutual children. Serious psychological stress is often accompanied by financial problems, as one income tends to finance two households and expensive language courses. This often obliges the spouse living in Germany to go into debt.

The difficulty in explaining the current regulation to couples and families should not be underestimated. It is incomprehensible why a family life requires German language skills and why citizens from specific countries are exempted from this rule. Why, for instance, is an Indian who follows a Canadian citizen living in Germany not required to provide evidence of German language skills? He is required to do so, however, if he reunifies with a German citizen?

This regulation is thus perceived as a defence mechanism against people of certain backgrounds, and therefore does not form a good basis for the following integration process.

The AGF knows from counselling services of the German family organisations that in many cases after the immigration, migrants have to relearn their basic knowledge of German. The low level of A1 is easily forgotten when the acquired language skills cannot be regularly practiced. In addition, after the immigration there tend to be difficulties in the transition to the compulsory integration courses in Germany. In the integration course the attendant begins by learning German in every sense of the word. A range of different integration courses that correspond to different language proficiency levels do not usually exist. Despite having obtained a language certificate in their home country under great psychological stress and financial effort, many couples cannot develop their language skills in the integration courses.

Question 8:

Explanation: Third-country nationals who are beneficiaries of subsidiary protection are excluded from the scope of the Directive. However, it is generally recognized that protection needs of refugees and of beneficiaries of subsidiary protection are the same. The aim, therefore, is to increase the approximation of the rights of beneficiaries of subsidiary protection to those provided to refugees, as underlined in the recast of the Qualification Directive. The question thus arises whether such an approximation should also take place as regards family reunification, which would necessitate the adjustment of the personal scope of the Directive.

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

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

Answer of AGF: The AGF demands the right to an unrestricted marriage and family life, including for people who are granted subsidiary protection. For them too, more favourable provisions regarding the requirements for their livelihood, health insurance and accommodation should apply, as they tend to have only limited access to the labour market.

The German regulations on family reunification differ substantially depending on the legal status of the relative living in Germany. Refugees who have a residence permit under §25 para. 4 or 5, have no legal right to have their spouse or children follow them. Due to their legal status, these people are denied a family life even if they have health insurance, accommodation and a regular income.

Question 9:

Explanation: The Directive provides some more favourable rules for refugees. However, Member States may limit the application of these more favourable rules to certain situations. For example to family relationships which were established prior to the entry of the refugee to a Member State, or to the applications for family reunification submitted within a period of three months after the granting of the refugee status. Refugees encounter practical difficulties linked to their specific situation which are of a different nature than those faced by other third country nationals (e.g.: problems maintaining the contact with the family left in the country of origin). In addition, refugees may have spent long periods in exile or on the territory of a Member State waiting for the outcome of the asylum procedure and may have founded a family during this time. Refugees may also be unaware of family members who are still alive or unable to produce information regarding their location or to provide the necessary documentation for an application for reunification within a short period after receiving a protection status. Their family members may have undergone similar situations of conflict, trauma and extreme hardship as the refugees have suffered themselves.

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

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

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

Answer of AGF: After recognition of the refugee status, the deadline for the application for family reunification is three months. The AGF considers this to be too short and questions the need for such a deadline. The life situation of refugees is very difficult and extremely challenging. They have to process the experiences of their flight, the reasons that led to their decision to flee and deal with a restricted access to the labour market. During consultations it is often evident that refugees have little or no knowledge about the three month deadline.

The AGF considers a suspension of the deadline to be reasonable.

Question 10:

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

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

Answer of AGF: People affected often report about demands for DNA tests to prove family ties. This gives the impression that these tests are routinely taken at the expense of the people affected when, for instance, natural children or parents still living abroad intend to join their family in Germany. The validity of certificates and documents from countries in sub-Saharan Africa and the Indian subcontinent is (generally) not trusted and parents are advised to take a DNA test. There is, however, no compelling evidence of such abuse that could justify such invasions into people's privacy. The proceedings for the reunification with a child include additional requirements. The long-term financial security of the parent living in Germany, for instance, is of great significance. The question is whether it is realistic that people are willing to finance and take responsibility for a larger number of children that are not their own.

Question 11

Explanation: In addition to its general procedural rules the Directive provides for the possibility to conduct specific checks and inspections where there is reason to suspect fraud or marriage of convenience. Every national system has such rules. Nevertheless, it is difficult to estimate if this is a big problem for Member States and if it is linked to the Directive.

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

Answer of AGF: Couples from the aforementioned countries in particular, are suspected to have married for convenience. No reliable data to show the scope and scale of the so-called marriages of convenience has been obtained. How is a "marriage of convenience" supposed to be proven? Couples who have made a transnational partner choice naturally require a residence permit to live in a normal marital relationship. This is obvious. Not as obvious, however, are the motives for getting married. If state authorities intend to investigate the motives through enquiries and investigations they invade people's privacy. The latter, however, needs to be protected. It must not be violated in order to avert perceived abuses of the system.

The AGF sees a clear danger for bi-national couples to come under general suspicion and therefore calls for every case to be considered individually. It points out that requirements for investigations run the risk of facilitating the arbitrariness of state authorities and of undermining existing legal entitlements.

Question 13:

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

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

Answer of AGF: Germany has set no deadline by which the administrative decision must be made. Particularly in the context of family reunification this is problematic. Time and again, couples or parents are required to provide documents and evidence in order to authenticate their certificates. This may result in long waiting periods for couples without an administrative decision being made against which a couple could take legal action.