Family reunification

- Human right protection or Immigration policy?

Family reunification for the third country nationals in the European Union

Case study of two member states and a candidate country: France, Germany and Poland.

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Introduction

1. Introduction of the problem and some terminological clarifications.

Family reunification, apart from asylum seeking, is the most common form of legal immigration from the developing countries to the richer parts of the world. The European Union, being one of the most affluent regions in the world, receives huge numbers of immigrants admitted on family grounds. Although the phenomenon is difficult to measure by statistics, the estimates in some countries confirm that those numbers are exceptionally high[1].

The issue of family reunification for third country nationals can be considered within two frameworks. The first one is the human rights perspective, which views family unity as a part of the fundamental human right to protection of family life. On the other hand, it can be analysed as an aspect of immigration policy. In the second case it becomes subject to sovereign power of states to control and to restrict the number of third country nationals entering its territory. Both of the two frameworks have strong arguments to claim the competency in this matter and none of them can eliminate the other.
Before having a closer look at the debate between human rights approach and immigration policy, let's try to define the phenomenon in question.

Family reunification can be described as a procedure by which an individual, residing in a country of which he is not a national, reunites with his family members on the territory of the hosting state. The most common pattern consists of individual immigration of the head of the family (in majority of cases - a male worker), who after certain period of his legal residence in the receiving state can apply for admission of his/her closest family members – usually his/her spouse and children. The authorisation of the entrance and residence of family members is subject to some conditions, which, if not met, can be a reason to refuse family reunification.

The above definition excludes the situation, in which family members arrive to the receiving country at the same time as the migrant worker. In such cases we cannot speak of family reunification, since there was no previous separation. Moreover, the procedure of family reunification assumes that family members at the moment of filling in of the application reside outside of the territory of the country where they plan to settle. However, this condition

[1] E.g. in France the respective data for the year 2000 was estimated for around 21 000 Source: Dictionnaire Permanent Droit des Etrangers: Regroupment Familial Feuillets 17, 1 Février 2002, p.1779).

is not an absolute one. In practice of some countries exceptions can be made in the form of the so-called family reunification sur place. Furthermore, a distinction should be made between family reunification of foreign and mixed families. In the second situation at least one of the family members is a national of the state of where the family is planning to reunite. Such cases are approached differently in different countries. In this work I will limit myself to presenting the solutions on regularisation of mixed families in Germany France and Poland.

Finally, it is important to stress that the procedure of family reunification assumes that foreigner applying for admission of his/her family is residing legally on a territory of the hosting state. It can be argued that it is against human rights to exclude the category of illegal immigrants from the protection of their family life. In order to answer this question it would be necessary to go deeper into the discourse on universality of human rights, which could be useful also for interpreting the position of legally residing foreigners. However, due to space restrictions the rights of illegal immigrants will not be discussed in this work. For the same reasons the discussion will also not cover the issue of expulsion of the admitted family members.

As the final point of the terminological clarifications, I would like to note that for the purpose of this work both terms – family reunification and family reunion – will be applied interchangeably.

2. Aims and objectives.

In my work I will try look at three issues. Firstly, I will try to analyse the human rights component and the immigration policy aspect of family reunification. The aim of my analysis is to find out whether there is a legal basis for the right to family reunification for foreigners residing legally on a territory of a hosting state and, if so, to which extent states are free to impose limitations to this right. Secondly, I will look at the similarities and differences between the French, German and Polish provisions on family reunion and relate them to the European regional frameworks (the Council of Europe and the European Union). As a final conclusion I will try to assess the effects of the communitarisation of policies on family reunification for foreigners. In other words, I will try to assess to which extent the European Union has been successful in developing a harmonised approach in this aspect of immigration policy.

In order to look for answers to the above questions, the analysis will be performed at three different levels. I will start with looking at the international human rights conventions elaborated under the auspices of the United Nations. This element is important for sketching the fundaments of the right's approach to family unity and, possibly, also family reunion.

As a second step, I will refer to the European regional level, namely to the two principal institutions – the Council of Europe and the European Union. Since all the current Member States of the European Union and all the future members are also parties to the Council of Europe, these two organisations constitute the main points of reference for the national legislation in at least 25 European states. The different nature of the two institutions can result in different approach to the issue of family reunification. The aim of this part of the analysis is to see to which extent the positions taken by the two bodies overlap and support each other or whether there are any inconsistencies between the two frameworks.

The third level of analysis will consist of the comparative case study of legislation in three European countries: France, Germany and Poland. The aim of this part will be to see concrete examples of how the international and European human rights standards on protection of family unity for foreigners are applied in practice in national orders. It is interesting to note that although the three countries are parties to the same human rights treaties relevant to family protection, it did not prevent them from developing very different family reunification procedures. This exercise will give the chance to show the element of the states' discretionary power to authorise or refuse the entrance and residence of foreigners on its territory. It is also on the level of national legislation, where the human rights standards can be transformed into enforceable rights for individuals, which can be invoked before the national courts. As a final result of this part of my analysis I expect to find the answer whether it is possible to talk about the right to family reunification for third country nationals or whether this matter is just an aspect of state's policies on authorising the entrance of foreigners. Moreover, I would like to be able to point out the impact of the Council of Europe standards and the effects of communitarisation of the policy on family reunion for foreigners in the three countries.

There are several reasons which determined the choice of the countries which I am going to present in this thesis. Firstly, with respect to Germany and France, my intention is to present two systems of regulations on family reunification, which are functioning within the same European regional frameworks (the Council of Europe and the European Union). My aim is

trace the factors which determined the current form of those systems. Secondly, I chose the case of Poland as an example of a country, where the procedure family reunification is still in the stage of evolution. I will try to identify the motivation of the Polish legislator in pursuing certain type of policy. The objective is to assess the influence of Poland's future membership in the European Union on the evolution of the Polish policy towards third country nationals. Finally, in my choice I tried to select countries which, due to historical circumstances and their geographical location, were subject to different kinds of immigration pressures. Such selection allows for taking into account the historical, geographical and political factors. Moreover, it is worth mentioning that in each of those three countries the regulations on family reunification have been recently changed (France and Poland) or are likely to be amended in the nearest future (Germany). The observation of the modifications and tendencies in the respective national laws can be an interesting exercise in itself. However, the even more interesting aspect is to analyse the chances for a success in developing a harmonised European Union framework on family reunification.

3. Methodology

The method of work will consist of three types of analysis. First of all, the legal foundation for family reunification for third country nationals will be examined on the international, regional and national levels. The framework of the European Union and the Council of Europe will be compared and used as a point of reference for the national provisions. In the next stage, a comparative analysis of the German and the French legislation will be carried out. Finally, the Polish case study will be presented in the light of the French and German systems and with reference to the European framework.

Apart from the legal approach, I will try to look for the historical and political determinants of the present state of national systems. Finally, I will try to assess the possible future evolution of national and European approaches to the issue of family reunification in the context of political and economic situation in Europe.

Chapter 1 International and regional provisions related to family unity and reunification.

1.1. The right to family unity and reunification of alien migrants in the context of international human rights law.

The right to found a family and to the protection of family life have been recognised in most of the international human rights conventions and international agreements. The Universal Declaration on Human Rights[2] refers to this issue in articles 12 and 16. Article 12 contains a general provision on the protection of family and home (as well as privacy and correspondence) from arbitrary interference. Article 16 enshrines the right of adult men and women to marry and found a family without any limitation due to race nationality or religion (art.16.1). Moreover, art. 16.3 underlines that family is considered „the natural and fundamental group unit of society" and that the state is obliged to provide it an adequate protection.

Similar wording concerning family life can be found in the International Covenants on Civil and Political Rights and on Social Economic and Cultural Rights (ICCPR and ICESCR respectively)[3]. Article 10.1 of the ICESCR puts particular emphasis on protection by the wording „the widest possible protection and assistance (...) particularly for its [the family's] establishment and while it is responsible for the care and education of dependent children". Among the social rights in the ICESCR, article 11 accords to everyone – and his family - the right to „adequate standards of living (...) including food, clothing, housing" and that States Parties are obliged to take steps to ensure this right. This provision is relevant as far as the rights of the reunited family members are concerned (e.g. access to labour market, access to social benefits etc).

The wording in the two Covenants – e.g. everyone, no one, the family, etc. – implies that the rights accorded are not limited to specific categories of people. It suggests that they apply to all human beings. A question could be posed: does the right to family protection can be interpreted as the right to family reunification for foreigners residing legally in a state party to the Covenants?

The phrasing of the provisions on protection of family life can be interpreted in terms of protection of family unity. Such an interpretation will be certainly legitimate if at least one of

[2] UN GA Res. 217 A (III), UN Doc. A/810, at 71 (1948)

[3] Since the UD has not a status of an internationally binding treaty, repeating in similar wording some of the provisions from the Universal Declaration in the two Covenants had the effect that from 1966 on those provisions became binding on the signatory states.

the family members is a citizen. However, with respect to foreigners, the issue becomes more complicated. It can be argued that emigrants, who benevolently settle abroad, should acknowledge the consequence of being separated from his/her family. It is assumed that they are free to reunited with their families in the country of origin[4]. Moreover, it seems doubtful that an alien can demand the right of protection of his/her family life, if the family is not even physically present on the territory of the hosting state. Thus, firstly family members should be authorised to come and reside in a country were the family life is to be protected. However, the conditions of aliens' entry and residence fall under the domain of state's national legislation and immigration policy. Sovereign states have the right to control and to restrict the entry of third country nationals entering its territory.

In other words, although the two Covenants and the Universal Declaration they provide for protection of family life, they do not refer explicitly to the right to family reunification. The right to family unity can be derived more easily for nationals residing in a country. However, the argument that it should cover also the right to family reunification for foreigners is difficult to sustain in the light of those provisions.

A more explicit reference to family unity can be found in the Convention on the Rights of the Child (CRC) [5]. It provides that a child has the right „to preserve (...) his family relations as recognised by law without unlawful interference" (art. 8.1). In addition, it imposes the obligation to ensure that „a child is not separated from his or her parents against their will"[6] (art. 9.1). The instruction on how the parents-children relations should be preserved across states' boarders can be found under the article 10.1: "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner". Such a formulation leaves, however, a large margin of appreciation on the conditions and procedures regulating this matter.

Among the UN conventions, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (hereafter the 1990 Convention) is definitely the most progressive one in terms of protection accorded to legal migrant workers. As explained in the preamble, the 1990 Convention takes into account the particular problems

[4] See the opinion of the European Court in Chapter 2.1.1. It does not apply to refugees and asylum seekers who are constrained to seek protection in foreign states.

[5] UN GA Res. 20.11.1989, UN Doc A/44/25.

this category of workers can encounter with regard to family unity and it obliges states to "take appropriate measures to ensure the protection of the unity of the families of migrant workers" (art. 44.1). This provision does not only refer to a situation, in which family members are already in the hosting state, but also, in a situation of scattering of the family, the Convention imposes on the states parties the obligation to "take measures that they deem appropriate and that fall within their competence to facilitate the reunification" of the migrant workers' families.

The 1990 Convention can be considered a landmark in the development of the family reunification standards. Firstly, it is the first instrument (after the ILO Conventions) that focuses on the category of foreign workers, which has so far received little attention at the UN forum. Secondly, it regulates explicitly the issue of family unity and reunification. Although it does not recognise the right to family reunification, it stresses the moral obligation to facilitate family reunification processes as far as possible. It should be underlined that the Convention is very progressive in defining family members. The Conventional term family members refers not only to spouses and dependent minor children, but is extended to 'persons who have with the migrant workers a relationship that, according to applicable law, produces effects equivalent to marriage' (art. 4)[7]. In addition, art. 44.3 encourages the state to 'favourably consider' admitting other family members on humanitarian grounds. However, the progressiveness of the 1990 Convention was not enthusiastically received by the states. The very exigent standards of protection for third-country nationals explain why only very few states have singed and ratified the Convention[8]. It is worth noting that none of the countries, which are target for immigrants, signed the Convention. Among the signatories there are only less developed countries, which are potential senders of immigrants.

The protection of migrant workers has been elaborated in a range of recommendations and conventions of one of the UN specialised agencies – the International Labour Organisation (ILO)[9]. The instruments elaborated under the auspices of ILO refer to the issue of family reunion in the form of recommendations to facilitate the process of admission of family

[6] Unless "competent authorities subject to judicial review determine (...) that such separation is necessary for the best interest of the child" (art. 9.1 CRC).
[7] The equal treatment of the *de facto* spouses and married couples and their children has been recognised on international level in the European Union Directive on family reunification only in June 2003.
[8] So far 33 states have signed and 22 had ratified the 1990 Convention. The Convention gained enough ratifications to enter into force with the last ratification of Guatemala on 14 March 2003. It will enter into force on 1 July 2003.
[9] The ILO Conventions no. 97 and no.147 (1975); Recommendations no. 61 (1939), no.86 (1949), no.151 (1975)

members, but none of them imposes a strict obligation to ensure it. Moreover, the influence of the ILO conventions and recommendations is limited due to the lack of an effective enforcement mechanism. Nonetheless, the ILO remains definitely one of the most experienced experts in matters concerning migrant workers. To give an example, ILO Office can be asked by the governments to make explanatory statements concerning the 1990 Convention.

1.2. Regional level.

As far as the European level is concerned, the most pertinent frameworks for family reunification regulations are the ones of the Council of Europe and the European Union. The Council of Europe has been established for the purpose of promotion and protection of human rights and democracy, whereas the European Union was essentially an organism co-ordinating the economic dimension. Only recently the European Union took the initiative of co-ordinating and harmonising policies and legislation in the domain of immigration policy, which was traditionally reserved to the national authorities. The two institutions represent quite different approaches to the issue of family reunification for foreigners. Let's have a closer look at the relevant instrument and policies elaborated in the two frameworks.

1.2.1. Council of Europe

Council of Europe, as a human rights promoter in Europe, took a broad account of the protection of the third country nationals residing in the member states. Aliens have been of concern of many of the Recommendations issued by the Parliamentary Assembly and the Committee of Ministers[10]. In this section I will briefly describe the relevant provisions in the European Convention of Human Rights (1950) and in the European Social Charter (1961), the European Convention on the Legal Status of Migrant Workers (1977) and in the recent Recommendation 4 (2002).

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The European Convention does not contain any explicit provision on the family reunification of aliens, yet some of the articles can be invoked for the purpose of protection of family unity of aliens. Among them it is worth mentioning the Protocol no 4, which prohibits collective expulsion of aliens (which can be relevant for the preservation of family unity) and article 12

[10] Among them: Parliamentary Assembly Resolution (78) 33; Committee of Ministers Recommendation No. (99) 23; Recommendation (2000) 15;

of the Convention, which guarantees the right to marry and found a family. The right to the protection of family life is enshrined in article 8. Paragraph 2 of article 8 provides for conditions, in which the interference in family life can be legitimate[11]. As for the personal scope, there are no doubts that article 8 provides protection also for families of aliens, yet, this protection is limited by the state's power to control the entry of third-country nationals. The jurisprudence of the European Court gives some general rules on the way the Court approaches the issue of family life.

Firstly, the case law of the European Court[12] set some standards as to what constitutes family life. The Court examines the degree of consanguinity between the individuals and the existence of effective family life between them, i.e. living together, being financially dependent, etc. Family relations include those between spouses, parents and children (if the children are minor and not married), but also grandparents and grandchildren[13]. Moreover, article 8 does not make a distinction between the family life in marriage or outside marriage bond but checks the existence of *de facto* family life[14].

The Court pronounced its opinion many times in the matter of expulsion of foreigners, which could threaten the right to family life[15]. In examining the merits of each case, the Court paid special attention to three elements: the gravity of crime committed, whether there was a sufficiently close relationship between the alien-to-be-expulsed and his family in the country of residence, and whether it was possible for the family to develop family life elsewhere[16].

As far as family reunification is concerned, the Court until very recently avoided entering into the states' competencies in the field of immigration policy. The Commission held that „the refusal of entry of a husband does not prevent the wife (and children) from joining him abroad"[17]. If the situation in a country requires measures limiting immigration, states have the right to give priority to citizens coming from a foreign country with which they have closer links[18]. However, the Court also held that the discretionary power of a state on admitting (or expulsing) foreign family members is not unlimited. It stated that family members residing for

[11] The interference is legitimate if it is „(...) in accordance with the law and necessary in a democratic society, in the interest of national security and public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others" Art. 8.2 ECHR

[12] Until 1998 the decisions were also issued by the Commission.

[13] The Commission did not admit the family life quality to the relation between an uncle and his nephew or niece or that between 26 year old married woman and her parents.

[14] ECHR 20 June 2002, Al Nashif, no. 50963/99, para.112

[15] For example in the following cases: Moustaquim v Belgium February 1991, Beldjoudi v France, March 1992, Nasri v France July 1995; Boultif v Switzerland August 2001.

[16] ECHR 19 Feb. 1996, Gul, no. 00023218/94, para.39

[17] IGC *Report on Family Reunification*, Geneva, IGC, July 1997, p.363

[18] IGC *Report on Family*…, op. cit. p.364

a long time in a Member State, should not be forced to choose between staying in that country and seek reunification with their child who has been left initially in the country of origin[19]. The Court also pointed out the necessity of measures against arbitrary interference in the form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence[20].

The breakthrough judgement in the field of family reunion under the article 8 was passed in 2001 in the case Sen v the Netherlands, in which the Court ordered the admission of a 9-year-old daughter on family grounds[21]. The Court stressed the importance of the family bounds between the parents and their daughter and the fact that the best interest of the couple's other two children, born in the Netherlands and integrated in the Dutch society.

It should be stressed that with this judgement the Court for the first time ordered the admission and granting of residence right to a foreign. It can be expected that in the future the Court will pronounce itself more often on the right to family reunification for legally residing foreigners.

The European Social Charter (1961)[22]

Apart from the general provision on the right of the family to social, economic and legal protection (art.16), the Social Charter accords particular protection and assistance for migrant workers and their families (art. 19). Article 19.6 of the Charter the contracting parties assume the obligation to „facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory". The Appendix to the Charter specifies the term family as at least worker's wife and dependent children under the age of 21. The Revised version changed the phrasing from „worker's wife" to „worker's spouse", thus envisaging that also women can apply for admitting the entrance of their husbands on the basis of family reunification. The age limit for children has been modified in the Revised Charter[23] from 21 to what is recognised as the age of majority in a given state. However, children over the age of majority can be also eligible for family reunification as far as they're dependent on their parents. States can impose conditions of sufficient resources and adequate housing. As to the last point, the Committee of Independent Experts expressed its view, that contracting parties should, however, take measures to help foreign workers in fulfilling the condition of adequate

[19] ECHR 21 Dec. 2001, Sen, no.31465/96, para.40-41
[20] ECHR 20 June 2002 Al-Nashif, no.50963/99, para.119
[21] ECHR 21 December 2001, Sen, no.031465/96
[22] European Social Charter is a complementation of the European Convention in the sphere of economic and social rights. It was adopted in Turin in 1961 and came into force in 1965
[23] The Revised Social Charter was open to signature on 3 May 1996 and entered into force in 1999.

accommodation, unless the situation on the housing marker is such that no steps are needed[24]. Finally, the Committee pointed out that the health reason for refusing admitting third country nationals for family reunification can be accepted only in cases when the illness is serious enough to jeopardise public health[25]. The Committee criticised provisions of general nature on non-admitting on the basis of psychological disorders, drug addiction or disability. Such cases should be examined individually and refusal can be legitimate if these disorders pose threat to public order or security[26].

The Social Charter plays an important role in providing the guidelines for policies on family reunification in the member states of the Council of Europe. The yearly reports prove that countries try to comply with the recommendations of the Committee. However, some other countries notoriously ignore the criticism on the part of the Committee. The influence of the Charter would be much stronger if, like in the case of the Convention, there was a judiciary mechanism of enforcement. A partial improvement to this system was made by the 1995 Protocol, which introduced the possibility of collective complaints[27]. Yet, until today, there has been no case concerning article 19 before the European Committee of Social Rights. The Social Charter has one more weak point: since it is a territorial treaty, its provisions can be only applied to foreign workers who are citizens of other contracting parties.

Finally, it should be underlined that the article 19.6 of the Charter does not use the terminology of "the right to family reunification", but it employs the more soft formulation of recommendation and encouragement.

The European Convention on the Legal Status of Migrant Workers (1977)

The 1977 Convention focuses on regulating the rights of admitted migrant workers. On of the important aspects of it is certainly the possibility of family reunion on the territory of the hosting state. The 1977 Convention is very precise in defining the members eligible for this procedure and the conditions, which can be imposed by the states (art.12). It stands at the position that family members should be authorised entrance and residence on family grounds, once the conditions for it are met. Moreover, it sets the maximum waiting period for the

[24] European Social Charter Conclusions III, p.94; IV p.125

[25] The serious illnesses are provided on the list of the World Health Organisation's International Sanitary Regulation No. 2 of 25 May 1951. The Committee mentions in the Conclusions also other infectious or contagious illnesses such as tuberculosis or syphilis. European Social Charter Conclusions XV-1, CoE Publishing 2000, p.316

[26] European Social Charter "Conclusions XVI-1", CoE Publishing 2002 pp.227-228 and p.614.

[27] 1995 Additional Protocol came into force in 1998. By means of this procedure the organisations of employers and trade unions as well as recognised NGOs can bring collective complaint before the European Committee of Social Rights.

procedure for 12 months. It is worth noting that the 1977 Convention attached particular importance of family unity by not allowing for reservations to the article 12 (on family reunification). State Parties can make only temporary derogation from the rule set in article 12 for some parts of its territory. The notice of such a derogation is received by the Secretary General, who decides on its legitimacy. Although the provisions of the 1977 Convention are quite progressive, its impact on the national policies has been limited. It results from the lack of efficient control mechanism to ensure the proper implementation of this Convention.

Recommendation (2002) 4

The Recommendation (2002) 4[28] employed the broader meaning of family members applied by the European Court: aliens „who are authorised to reside on the territory of a member State for the purpose to recreate, to maintain or to form a family unit"[29]. The suggested age of the children eligible for family reunification is the same as in the Revised Charter – below the age of 18, unless countries set different age of majority.

The main focus of the Recommendation is the status of foreign family members admitted to a receiving country. It recommends that family members residing for longer period (more than four years - Section III) in the receiving state should be granted an autonomous status. Such regulations would permit to regulate cases of family disruption takes place and avoid situations in which the status of family members is still totally dependent on the principal. The Recommendation also stands for the possibly most favourable treatment of admitted families in their access to labour market, education and social rights, which should be at least at the level of the principal. The waiting periods on access to job marker should not exceed 2 years. Reunited families should enjoy the right to free movement on the territory of the State (Section VI) and should be able to participate in political life at local level (Section VII). Such a non-discriminatory approach can result in better integration of foreign families into the society of the receiving state and in the eventual stage can lead to naturalisation (Section VIII).

The Recommendation (2002) 4 presents the essence of on integration policy towards foreign workers promoted by the Council of Europe.

1.2.2. European Union Framework on family reunification

[28] Recommendation (2002) 4 has been adopted by the Committee of Ministers on 20 March 2002 at the 789 meeting of the Ministers' Deputies.

The EU citizens residing in a Member State other than their own have the right to be accompanied by their spouse and their dependent children under 21 years old, as well as dependent parents (irrespective of their nationality)[30]. However, family reunification of third country nationals residing legally on the territory of one of the EU Member states until recently was regulated entirely by national laws.

The initiative on the harmonisation of rules on family reunification has been taken on the Community agenda only in the early 90s. Since 1991, the Ad Hoc Group on Immigration served as a forum for a dialogue among the ministers responsible for immigration issues. These talks resulted in the text of the Resolution on Harmonisation of National Policies on Family Reunification,[31] adopted by the Council of Ministers in Copenhagen on 1 June 1993. The Resolution, as the title suggests, did not recognise the right to family reunion, but it proposed common conditions on admission of family members of foreigners, who are long term or permanent residents. At the same time very little has been said on the recommended status of admitted family members. As to the right to work, it is stated (point 12) that it should be granted "if appropriate". The provisions of the Resolution are quite restrictive and it is difficult regard it as a step forward in the harmonisation of national laws[32].

The next step on the way to harmonisation of national policies in the field of immigration took place only at the introduction of the Amsterdam Treaty[33]. As a result, asylum and immigration, rights of the third-country nationals, judicial co-operation in civil matters and the administrative co-operation in the aforementioned matters were transferred under the supranational authority of the Community institutions in the form of the so-called new Title IV, introduced into the EEC Treaty. The Council has been given the power to issue binding measures (regulations, directives and decisions) with the purpose of establishing "the area of freedom, security and justice". It includes inter alias „conditions of entry and residence and

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[29] Quotation from the Explanatory Memorandum, Ad Section 1 – Scope of Application

[30] Regulation no. 1612/68 of 15 October 1968 on the freedom of movement for workers. See also: Chapter 3 "Special systems".

[31] Doc. SN 28228/1/93 WDI 1497 REV 1; published in Plender, R., *Basic Documents on International Migration Law,* 2nd ed., The Hague, Martinus Nijhoff Publishers, 1997, p. 487

[32] The Resolution does not have a binding effect and cannot be invoked before national courts. For more details see: Groenendijk, K., *The legal status of persons admitted for family reu*nion, Council of Europe Publications, 2000, pp.21-22 and Peers, S., *Building Fortress Europe: Development of EU Migration Law*, Common Market Law Review 35, 1998, pp.1239-1242

[33] The Treaty of Amsterdam has been signed in 1997 and entered into force in 1999.

standards on procedures for the issuing of long term visas and residence permits, including for the purpose of family reunion..." (art. 63 (3) (a) of the EC Treaty) [34].

Tampere objectives

The European Council in Tampere (1999) took the decision on developing a common immigration and asylum policy at the European Union level and estimated the time framework for the realisation of this project for the period 1999 – 2004. The Member States agreed to use the method of co-ordination and consultation to achieve *inter alias* the following aims: to establish common standards in admission of refugees and legal migrants, to jointly combat illegal migration, to pursue common standards in integration of migrants, to develop co-operation with migration source countries.

Family reunification figured as one of the most important aspects and it was taken on the agenda immediately. The Commission submitted the first proposal of a directive already in December 1999[35] and in October 2000, the revised version of it[36]. The incorporated changes, however, did not satisfy some of the Member States. The impasse in negotiations was broken by the decision of the Leaken Council[37], which asked for another proposal. The Commission presented it on 2 May 2002[38]. Finally, the European Council in Seville (2002) set a deadline for the adoption of the directive for June 2003[39]. Eventually, after 3 years of negotiations, the the General Approach on the Directive have been agreed by the Council of Ministers responsible for immigration on 27 February 2003[40]. Although report submitted before the European Parliament by the Special Rapporteur[41] expressed quite a strong critique of the Directive and recommended coming back to the initial proposal of the Commission, the

[34] The Commission received the right of initiative (shared with the Member States) in the area covered by the new title IV. The ECJ strengthened its judicial competencies over the new title IV (although limited) and the European Parliament is to be consulted in the consultation procedure. see also: Hailbronner, K., *European Immigration and Asylum Law under the Amsterdam Treaty*, CMLR, vol.35, 1998, pp.1055-1057

[35] European Commission, *Proposal for a Council Directive on the right to family reunification*, COM (1999) 638 final, 1 December 1999

[36] European Commission, *Amended Proposal for a Council Directive on the right to family reunification,* COM (2000) 624 final, 10 October 2000

[37] Leaken European Council: *Presidency Conclusions*, 14-15 December 2001, Doc SN 300/01 para.41

[38] European Commission "Amended Proposal for a Council Directive on the right to family reunification" COM (2002) 225 final, 2 May 2002

[39] Sevilla European Council: *Presidency Conclusions*, 21- 22 June 2002, DOC/02/13 para.37

[40] Ferenczi, T., *Les Quinze parviennent à un accord sur le droit au regroupement familial des étrangers*, Le Monde, 1 March 2003 p.6. (No reference to the articles of the 2003 will be made since the text of the final text is not published yet (before 23.06.2003)

[41] The Report on the amended proposal for a Council directive on family reunification (COM(2002) 225 – C5-0220/2002 – 1999/0258(CNS)) was presented by the Special Rapporteur Ms Cerdeira Morterero before the European Parliamentary Assembly in Strasbourg on 8 April 2003, Final A5-0086/2003

Parliament in the consultation procedure accepted the proposal of the Directive, although suggesting some amendments[42].

2003 Directive: minimum standards for conditions on family reunification

The 2003 Directive has received a lot of criticism on the part of NGOs and international experts for setting too strict requirements, which, in practice, go against the principle of integration of the legally resident foreigners[43]. Among the most criticised provisions is the one, according to which states can restrict the admission of children over the age of 12 years, if they do not fulfil the so-called integration criterion[44]. What is more, the Member States can require that applications for reunification of children be deposed before they turn 16. In addition, a child over 12 years, who arrives to a member state to join his/her parents, can be subject to a test controlling his/her integration capacity. If the result of the test is not satisfactory, the child can be refused the right to reside with his parents. This rule does not apply to children over 12 who arrive together with their parents. In such cases the integration tests cannot be used as a reason to refuse the right to residence to children.

Furthermore, states can impose limits on admission of children older than 15-year-olds, if there are such provisions in the national law. In such cases the admission of children over 15 would be still possible on basis other than family reunification. The directive sets also the minimum age requirement for spouses eligible for admission on 21 years. This provision is designed to prevent the practice of arranged marriages.

The time limits for the application procedure to be completed are extended from six to nine months. It is also foreseen that in special cases it can be extended (infinitely). Such a change is definitely to a great disadvantage of the applicants[45]. As to the time requirement, the legally residing foreigner wishing to be joined by his family members, can apply for it during the first two years of his residence (or three years if the capacity of accepting immigrants in a given states permits). Finally, in addition to the adequate housing and sufficient resources requirement states can oblige foreigners to undergo integration programmes as a prerequisite for family reunification.

[42] The final consultation session, on took place at the plenary session of the European Parliament in Strasbourg on 9 April 2003 (source: the author's personal attendance at the debate – 8 April 2003; the voting on amendments on 9 April 2003)

[43] European Co-ordination for Foreigners' Right to Family Life: *Family reunification: a directive against the right to family life*, press release on 9 March 2003; the Standing Committee of Experts on International Immigration, Refugee and Criminal Law in the letter addressed to the JHA Commissioner Antonio Vitorino, 20 February 2003

[44] The integration criterion has not been defined in the Directive. Thus, states can use their own interpretation of the children's capability of integrating into the society of the receiving state.

[45] The 1999 Proposal the maximum period of application procedure was set for 1 year.

2003 Directive: minimal rights for family members

The Directive sets very low minimum standards on the status of admitted family members. They do not have to be received on the same conditions as the principal they're joining and the possibility of obtaining autonomous status can be postponed for up to 5 years of continuous residence on family grounds. The initial residence permit can be given for only one year (and subject to prolongation).

The Directive permits for limiting considerably the access to national labour markets for the reunited members. The minimum standard requires that the reunited family members can be precluded from access to labour market during the first year of their residence. Such a condition can hinder the family's chances for economic prosperity in the receiving country. Furthermore, the residency rights are subject to scrutiny and can be withdrawn if there is evidence that effective family life does not take place, especially in case of "marriages of convenience".

The Directive leaves to the states a large margin of appreciation in refusing family reunification for reasons of public order or internal security or public health. Unlike it was in the previous version of the proposal, family members can be refused admission if they committed some acts amounting to a threat to public order, but also if „they are perceived as potential danger". Finally, the prolongation of the residence status for family members can be refused if the conditions for it are no longer met. It means, that in case of temporary unemployment of one or both of the spouses, family members face the risk of expulsion.

The Directive simplifies the procedure on family reunification for refugees, however, persons with subsidiary protection status are exempted from possibility of family reunification.

1.2.3 Conflict of standards between the Council of Europe and the European Union?

The Directive on family reunification for foreigners legally residing in the EU Member States is the first legislative instrument in the sphere of immigration policy on the European Union level[46] and its role should not be underestimated. The undeniably progressive element of the Directive is the larger concept of family members, which comprises non-married couples and homosexual couples if the national laws provide for such a possibility. The Directive does not make a distinction between natural and adopted children. However, it is regrettable, that in the course of negotiations the objective of harmonisation of national laws has been abandoned and substituted with the one to set minimum standards for family reunification. The danger of such a formulation is that states can read it as an incentive to replace the already existing laws

[46] The Directive will be applicable in 13 Member States, since UK and Denmark opted out from the agreement.

with more restrictive ones. The stand-still clauses have been included only with respect to some conditions[47]. It creates the danger of lowering all the other remaining standards, which are not protected with this clause. Moreover, in case of incongruencies between the Directive and national laws, enables the states to derogate from some certain provisions for a period not exceeding 2 years, during which the national provisions should be adjusted[48]. According to the General Approach, the Member States are obliged to implement the directive within the two years after the final adoption by the Council of Ministers[49]. After two years the Commission will draw a report on the implementation of the agreement and if it appears necessary, some articles of the Directive can be subjected to change (the rendez-vous clause).

When comparing the standards on family reunification set by the European Union and the Council of Europe, one cannot overlook the big divergence between the two frameworks. The Council of Europe stands at the position that the family unity for the third country nationals residing legally in Member States should be facilitated as far as possible and that the limitations on the exercise of this right should be reasonable. The aim of the monitoring task by the European Social Committee is to control the legitimacy of those restrictions.
The inevitable achievement of the 2003 EU Directive is that it explicitly recognises the right to family reunification. However, at the same time it leaves to the Member States a very broad margin of manoeuvre for imposing restrictive conditions on the admission of family members, which might eventually render this right redundant. Even though the Directive is designed to establish the minimum for family reunification procedures, it can be interpreted by some states as a green light to restricting quite far the admission and the rights of reunited family members. The stand –still clause applies only to limited number of articles and it will not prevent states from changing their legislation before the Directive will be transposed into the national law

At this point it is worth posing a question: which of the two different set of standards will be pursued by the European states – members of both the Council of Europe and the European Union? An attempt to answer this question will be taken by analysing the legislation of family reunification in three countries: France, Germany and Poland.

[47] On the restriction of admission of children older than 12, on the admission of children over 15 years; on extending the requirement of the principal's residence permit prior to reunification to 3 years.
[48] By means of this provision Austria is able to keep the quota system establishing limits of persons who can be admitted on family grounds.

[49] The final adoption was initially foreseen for June 2003, but it will probably take place in September 2003. (Interview with Prof. Constanca Urbano de Sousa) It should be noted that some changes can be still introduced before the final adoption.

Chapter 2 Different approaches to family reunification in France and Germany.

2.1 Historical background

2.1.1 The colonial past and the French policy of assimilation.

The French immigration has a long tradition of employing foreigners and promoting integration of foreigners and their families. In 19th and early 20th century the labour market was expanding on French colonies, which stimulated the movement of people between the continental France and its "outre-mer" territories. Already in the mid-19th century censuses contain records on the numbers of foreign population in France, however, the first attempts to regulate the situation of foreigners in France were undertaken after the II world war. The first law on immigration was passed in November 1945[50]. The population loss during the two world wars, low fertility rate and shortages in male labour force were the reasons for which the French authorities encouraged recruiting workers from Belgium and Germany, later also from Poland, Russia, Italy and Spain[51]. The French policy included creating favourable conditions for the family members of foreign workers, in order to facilitate their integration into the society. The next wave of immigration to France came from the French colonies, which were gaining independence in the course of 50s and 60s. Among the new arrivals were not only the French colonisers but also the local population[52]. The bilateral agreements regulated also the procedure of admitting family members, however, the ultimate decision was taken always at the discretion of the Prefect. The French-Algerian Agreement in 1968 is an example of such arrangements.

The post-war economic boom permitted to handle the large number of immigrants in France until the early 70s. In the view of the economic crisis caused by the first oil shock and the rapid rise in unemployment, the French government put an end to the recruitment of foreign workers and suspended for 6 months the possibility of admission of family members[53]. Since then the policy of immigration remained quite restrictive.

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[50] Ordonnance n° 45 – 2658 du novembre 1945 relative aux conditions d'entrée et du séjour des étrangers en France (J.O. 4 nov. 1945) Among others, it established the National Bureau of Immigration (ONI).

[51] Hamilton, K., *The challenge of French diversity*, May 2002 http://www.migrationinformation.org/Profiles/display.cfm?ID=21

[52] E.g. after the independence war in Algeria in 1962 until 1968 around 470 000 of Algerians immigrated to the continental France. ibidem

[53] Memorandum concerning the suspension of recruitment of foreign workers – July 5, 1974; two memoranda on suspension of admission of family members of July 9, 1974 and August 9, 1974. As a result family reunification was suspended in France since July to December 1974. source: Guardiola, J.P., *Family Reunification in France*, paper presented at Meeting of Experts in Konstanz, 28 -29 June 1999 http://migration.uni-konstanz.de/german/veranstaltungen/workshp/france.htm, p.1

Family reunification has been shaped by multiple decrees enacted in the 70s. The decree of April 29, 1976[54] established for the first time a genuine right of residence for family members of foreigners who are legally residing in France. Yet, already in November 1977[55] the government suspended the execution of the decree for three years, for reasons of high unemployment, arguing that in a crisis situation it was necessary to restrict the entry of new immigrants, who were likely to supply the number of unemployed. The only way for being admitted was to give up the intention to work in France. The suspension of the 1976 decree has been denounced by GISTI[56] before the Council of State for violation of the Constitutional principle on "ensuring for individuals and families the conditions necessary for their development" (1946 Constitution). The Council of State agreed with the argument brought by GISTI and in the decree of December 1978 declared that the right to lead normal family life **a general principles of law** is applicable also to foreigners legally residing in France[57]. In addition, in the decision of 13 August 1993 The Council of State declared that the right of foreigners to lead normal family life is as **a constitutional principle**[58].

In the course of 80s, other decrees introduced changes to family reunification system. In July 1981 a new amendment established the possibility of partial family reunification, which allowed for bringing part of the family if the principal did not dispose of enough resources at a time[59]. On the basis of the amendment of July 1984 foreigners, who resided illegally in France prior to marriage, could not apply for the residence permit on family grounds[60].

In 1993 the conservative government took initiative in regulating the highly debated issue of immigration policy. The Pasqua law, named after the minister of interior, introduced a range of measures limiting immigration[61]. The zero immigration policy was officially meant to halt the illegal immigration, however, it restricted also the legal way of migration. In the field of family reunification, the length of the procedure was extended from 1 year to 2 years. The Pasqua law imposed strict prohibition of reunification of polygamous families. In addition, the regularisation of family members, who entered in France before formal application for

[54] Guardiola, J.P., *Family Reunification*…, op. cit., p.1
[55] Guardiola, J.P., *Family Reunification...,* op. cit., p.1
[56] Group for Information and Support of Immigrants www.gisti.org
[57] CE, ass., 8 dec. 1978, GISTI, SFDT et CGT: Rec. CE, p.493) The 1976 decree remained in force until 1993.
[58] Cons. const. 13 août 1993 n° 93 – 325 DC : JO 18 août
[59] Guardiola, J.P., *Family Reunification...,* op. cit., p.2
[60] Guardiola, J.P., *Family Reunification...,* op. cit., p.2
[61] Décision n° 93-325 DC du 13 août 1993 concernant la loi relative à la ‚matrîse de l'immigration et aux conditions d'entrée ; d'accueil et de séjour des étrangers en France (JO ; 18 août 1993). The 1993 law amended articles 29, 30 and 30 bis of the November 1945 law.

family reunion, was abolished. Family immigration did not disappear after the Pasqua law but it became much restricted - more than ever since 1945.

As a consequence of this legislation the number of immigrants coming to France decreased in the period 1995- 1997[62]. The situation of immigrants residing in France has deteriorated. The foreigners ordered to be expulsed had less protection and appeals in case of refuse of asylum were limited. Many of those, who resided in France for years, were refused a residence permit or its extension, and found themselves in irregular situation (the so called 'sans papiers'). The reactions of the society were two-fold. On the one hand, some protested on behalf of "the sans papiers" participating in the public manifestations. On the other hand the support for the anti-immigrant postulates of the extreme right party of Jean-Marie Le Pen was rising, too.

The socialist government formed in 1997 ordered a team of experts to examine the situation of immigration in France and to advise on the changes to be introduced. The Committee under the lead of Patrick Weil[63] criticised the Pasqua law that it had a negative impact on the labour capital in France. The recommendations of the Committee were incorporated in the two new laws passed in May 1998 – the Law on Nationality of March 1998 and the RESEDA Law[64]. It allowed for regularisation of more than half of the immigrants 'sans papiers' and eased the access of foreign students and specialist to employment. Among the important innovations of the new law was introducing the one-year residence permit authorising work and the explicit recognition of the protection of private and family life, as guaranteed by article 8 in the European Convention[65]. The new law softened slightly the proceedings for family reunion, although the basic requirements on for admission remained the same. The more favourable provisions caused a subsequent rise in immigration, of which family reunification remains one of the main motives.

[62] Hamilton, K., *The challenge of French...,* op.cit.
[63] Weil, P., *Mission d'études de législations de la nationalité et de l'intégration*, La documentation Française, Paris 1997
[64] Décision n° 98-399 DC du 5 mai 1998 loi relative à l'entrée et qu séjour des étrangers en France et au droit d'asile (JO, 12 mai 1998) ; called also the Chèvenement law after the Minister of Interior.
[65] Article 12 bis 7° of the November 1945 law as amended by the Chèvenement law.

2.1.2 Rotation principle as a tool for preventing permanent settlement of guest workers in Germany.

Until very recently the German politicians sustained that Germany is not a country of immigration[66]. This attitude was not, however, reflected in the data on the number of immigrant residing in Germany, which in the nineties increased to 7.3 million[67] (8.9% of the total population in the country). Aliens, who came to Germany for the purpose of reuniting with their families, as well as asylum seekers and repatriates, constitute the most numerous categories of legal immigrants[68]. To understand the position of the government refusing to recognise the immigration, in spite of the statistical data showing the opposite, it is worthwhile having a short look at the post-war pattern of immigration policy in Germany.

The roots of immigration to Germany reach back to the post war economic boom. In the 50s German economy expanded rapidly and additional workforce was necessary to fill in the gap in the industrial sector. German government signed a range of bilateral recruitment agreements – among others with Italy, Spain Greece, Turkey, Portugal and Yugoslavia[69]. The recruitment of mainly male, law skilled workers was based on contracts for a limited period. After one or two years guest workers (Gastarbaiter) were obliged to return home and they were replaced with a new wave of foreign workers. The **rotation policy** was designed to open the possibility to work in the industrial sector for as many workers from the sending countries as possible[70]. Yet, even more important was the reason was to prevent foreigners from settling permanently in Germany. The two years contracts did not foresee the possibility of bringing family members to Germany.

As a result of the oil shock in 1973 the situation on the German economy deteriorated rapidly. In the view of economic recession and high unemployment the government introduced measures to eliminate guest workers (non-EC nationals) from the labour market. The recruitment of foreign workers was banned and the already present guest workers were urged to return to their country of origin. Although many Gasterbaiters left, a considerable number of them stayed on the basis of the already issued residence permit, or, as in the case of

[66] *A double-edged policy: The new immigration law in Germany*
http://perso.wanadoo.fr/ciemi.org/p2quinteren.html

[67] In the 70s and 80s the immigrants who came as family reunified family members constituted more than a half the total immigration to Germany. Data for the year 2000. Report by the Independent Commission on Immigration to Germany, *Structuring Immigration, Fostering Integration*, Berlin, 4 July 2001, http://www.eng.bmi.bund.de/Annex/en_14625/Download.pdf p.185

[68] The Independent Commission on Migration to Germany, *Structuring Immigration*..., op.cit. p.184

[69] Concluded in the period 1955 – 1968.

[70] The Independent Commission on Migration to Germany, *Structuring Immigration*.., op.cit. p.13

Italians, on the basis of free movement of workers within the EC. In addition, the adverse reaction of the governmental policy was the permanent stay of those who originally intended to return home. Workers, who managed to remain for some period after 1973, were often constrained to stay, since upon their return home they would loose the possibility to ever come back to Germany. Many male workers in such a situation managed to bring their families to Germany. In the 80s the number of foreigners in Germany stayed at the level of 4 to 4.5 million[71].

The claim "Germany is not an immigration country" was at that time sustained by stopping further immigration[72] and promoting integration of the already residing aliens[73]. Yet, somehow contradictory this assumption, children born in Germany from immigrant parents were not given German citizenship. According the ius sanguinis rule, German citizenship could be acquired by being born from a German parent(s), thus, these children were treated as foreigners[74].

In the 80s the 1973 ban on recruitment has not been lifted, to the contrary, the immigration policy became even more restrictive. It was shaped by several decrees (administrative orders), which complicated significantly the procedures of dealing with foreigners. The first general law regulating entirely the foreigners' entry and stay in Germany has been adopted in 1990[75]. The main purpose of the Foreigners Act was to improve the integration of aliens legally residing on the German territory and to restrict further immigration. The restrictive policy did not, however, assume zero immigration policy. It created a procedure of family reunification, which was at that time used by numerous newcomers. The events in the early 90s posed great challenges to the newly established immigration system. After the fall of the Berlin wall (1989) huge numbers of German repatriates started returning to Germany. In addition, the Balkan war exposed Germany to thousands of refugees fleeing their countries in search of temporary protection. The movements of population (also internal movements from the east to

[71] Oezcan, V., *Germany: Immigration in Transition*, Migration Information, May 2002, http://www.migrationinformation.org/Profiles/display.cfm?ID=22

[72] The Western part of Germany was receiving immigration of Germans from GDR. the overall migration at that time is estimated for around 400 000[72]. These "immigrants" were well accepted both for as a political demonstration against communist system in GDR and as they could easily integrate in the expanding economy in the Federal Republic of Germany. Oezcan, V.,*Germany: Immigration...,* op. cit.

[73] They were obliged "to integrate fully as possible". The Independent Commission on Migration to Germany, *Structuring Immigration...*, op.cit. p.13

[74] This rule was modified only in 2000 by the new law granting citizenship to children born in Germany if one of the parents resided legally in the country for at least 8 years. Act to Amend the Nationality law 1 January 2000; see also: Chapter 3.

[75] 1990 Foreigners Act (Federal Law Gazette I, p. 1354) took effect on 1 Jaunary 1991 (Federal Ministry of Interior)

the west of Germany) exerted an enormous pressure on the German immigration system. The 1990 Foreigners Act proved to be not an adequate tool to deal with such huge numbers of incoming aliens.

The task to reform the German immigration system was undertaken by the coalition government of Social Democrats (SPD) and Green Party. In March 2002 Otto Schily presented a draft of a new Immigration Act[76]. The inevitable achievement of the discussion provoked by this proposal was that for the first time in the history of German policy towards the foreigners the parties admitted that Germany is a country of immigration and that it is necessary to introduce changes – in particular in education and training policy, family policy and social policy – that would allow the German society to benefit from this phenomenon. The proposal assumes the promotion of integration already resident aliens, however, the possibilities for the subsequent immigration of dependants have been considerably limited[77]. The reason behind it is that family immigration is perceived as a source of import of not qualified persons, who subsequently supply the already high numbers of the unemployment.

The new Immigration Act was approved by the Lower House of the Parliament (Budnestag) in March 1, 2002 and signed by the President Johannes Rau on June 20, 2002[78]. It would have entered into force on January 1, 2003 yet, due to the procedural error[79] the Federal Constitutional Court in Kalsrhue blocked the law in December 2002. Although the Court did not rule on the content of the law but on the omissions in legislative procedure, the opposition (CDU-CSU) took the chance to reintroduce the critical campaign against this law. The opposition parties announced that the upper house would not approve the new law because it does not take sufficient measures to restrict immigration. The success of the Christian Democratic party in Lower Saxony and Hesse in the local elections on February 2, 2003

[76] The main points of the proposal concerned the green card policy, which aims at facilitating immigration of highly qualified specialists in the field of high technology. It foresaw measures to limit immigration, fight illegal immigration and to decrease the possibility of abuse of the right of asylum. It also tries to simplify the procedures and to render the administrative process more swift. source: "Schily presents draft of an Immigration Act" web page of the Federal Ministry of Interior.
http://www.eng.bmi.bund.dewww.eng.bmi.bund.de

[77] The provisions on family reunification included in the June 2002 Immigration Act will be presented in together with the 1990 Foreigners Act rules.

[78] Oezcan, V., *Germany's High Court Strikes Down Planned Immigration Law,* 1 February 2003 source Migration Information Source www.migrationinformation.org/Feqture/print.cfm?ID=94

[79] During the Budnesrat voting the Brandenburg was counted as a state voting for the law, although consensus among the Land's officials has not been reached. Oezcan, V., *Germany's High ...,* op.cit.

makes the future of the Immigration Act questionable[80]. The legislative process was to be reintroduced January 2003 and the final adoption of the Immigration Act was foreseen for June 2003. However, during the last months the Shroeder's government has been primarily facing the debates on social reforms. It seems that the immigration law has been shifted to the second plan.

2.2 Current legislation on family reunification in France and Germany.

The structure of the current legislation in France and Germany is quite complex. The French legislation relevant to family reunification consists of the 1945 Law as amended by subsequent decrees. The major changes were introduced in 1993 by the Pasqua law and in 1998 by the RESEDA Law, which constitute the basis for the procedures currently in force. The conditions of the application of the amended 1945 Law have been specified in the decree of July 6, 1999 on family reunion of foreigners[81]. The Circular of March 1, 2000, the most recent document in this field, lists all the provisions introduced in the 1998 law[82].
In Germany, the conditions for family reunification at the moment of writing this thesis are regulated by the Foreigners Act of July 1990. However, the new Immigration Act, which is suspended at the moment, is likely to be finally adopted in the nearest future. Thus, to make a truthful analysis of the current of situation in the field of German policy of family reunification it is necessary to refer to both texts. It should be noted that some changes might be still introduced to the Immigration Act[83].

The first difference between the two countries consists of foundations of family reunification law. In France, the first regulations in this matter were issued shortly after the second world war, while in Germany the German Basic Law remained for a long time the prime source of reference[84]. It is worth having a look at how the issue of family life of foreigners was shaped by the German constitutional provision.

[80] In 1999 the CDU opposition managed to enforce changes in the citizenship law proposed by the ruling coalition SPD-Green. By means of a anti-foreigners campaign the CDU opposed the possibility of retaining original nationality by immigrants who are granted German citizenship.
[81] Décret n° 99-566 du 6 juillet 1999 relatif au regroupement des étrangers; pris pour l'application du chapitre VI de l'ordonnance n° 45-2658 du 2 novembre 1945 (JO 8 juillet 1999).
[82] Circulaire du 1 mars 2000 relative au regroupement familial des étrangers (JO 28 mai 2000).
[83] The facts presented in this work do not contain changes introduced after June 25, 2003.
[84] Basic Law of the Federal Republic (Grundgewetz der Budnesrepublik Deutschland) of Germany 23 May 1949.

The protection of family life is enshrined in article 6 of the Basic Law (Grundgesetz). This article prohibits interference with family unity by forcing spouses to live separately and it obliges the legislative authority to take positive measures to ensure the protection of family life. Although the content of article 6 refers to protection of family life in general (without specifying the personal scope), it cannot be interpreted as an unconditional right for admission of foreigner's family members on the German territory. Nonetheless, the legislative and executive authorities are obliged to give due consideration to the family bounds of foreigners, who wish to join their closest family members residing in Germany. The admission process is based on balancing the right to protection of family unity and making sure that admission of foreigners will not put excessive burden on the country of capacity to "absorb" immigrants. In this context a restrictive immigration policy can be viewed as a legitimate limitation designed to protect public interest. The authorities can require also that certain conditions are fulfilled to ensure the successful reception of the incoming members. These can include lenght of principal's residence, sufficient means for maintaining the family, accommodation etc. Yet, these requirements should not be in the form of quantitative restrictions such as quota systems or queuing of family members.

2.2.1 Family members eligible for reunification

Spouses

Both in French and in German legislation, a spouse is the first person on the list, authorised to apply for family reunification. It should be stressed that the phrasing in the German text talks about the right of a spouse to join a third country national residing legally on German territory (Section 18, par.1 no.1)[85]. In France the family reunification procedure is not available to concubines and fiancés. Only in some cases, the authorities can accord a residence card for unmarried partners of opposite sex, who shared a household for longer than five years and have together at least one child (art. 12 bis 7° de l'ordonnance du 2.11.1945). In Germany the term spouse does not cover the persons in non-marital unions. In case of homosexual partners, in the view of German law, the term spouse has been extended by means of the Partnership Law enacted on 16 Feb.2001 to cover also the same sex partners, although also under certain conditions. In France, a residence permit with a label „vie privée et familiale" can be admitted to a foreigner partner of a French national if the „the civil pact" lasted at least 3 years and if

[85] The new Immigration Act does not contain phrase it as a "right" but uses the words "the residence permit shall be granted" (art. 28 (1)). The explicit reference to the article 6 of the Basic Law is preserved in art. 27 (1). On French provision see above: p.21

the foreigner had a regularised stay in France during this period (art.12 de la loi PACS – Nov. 1999)[86].

In addition, German law applies particular provisions on the reunification of family members of the second-generation foreigners (Section 18, par.1 no.2). They are allowed to bring a foreign spouse only if their residence in Germany has been longer than 8 years and if the marriage existed for at least one year. This provision has been criticised by the European Social Committee as being arbitrarily restrictive and thus not in conformity of the article 19.6 European Social Charter.

The French rules on polygamy remain the same as introduced by the 1993 Law[87], which outlawed polygamous family reunification and imposed harsh penalties if such a case takes place. If a foreigner brings more than one spouse and their common children, his own residence permit can be withdrawn. This provision put an end to attempts of legalising polygamous relations on the basis of their legality of country of origin[88]. It should be stressed, however, that polygamy as such is not penalised in France, if a person entered in polygamous union before coming to France. It is possible that such a person is authorised to stay in France with one spouse. Children from the second spouse can be admitted to France on the condition that their mother died or she sheds the parental rights.

Germany, unlike France, does not receive many immigrants from the countries were polygamy is legalised[89]. Most of the Muslim immigrants in Germany are of Turkish origin where the polygamy is not lawful already since 1926. Thus, polygamous family reunification was never was never an issue in this country. In the view of the German law the cohabitation of a man with two women does not constitute a threat to the public order. Moreover, given the parental obligation of providing children with care and education, the German judiciary authorised several times the residence of a second spouse and her children (who were also children of a principal residing in Germany)[90]. The judiciary organs stressed however that it

[86] Loi PACS n° 99-944 du novembre 1999 sur le pacte civil de solidarité (art. 12). Interpreted by the Circulaire of 10 Dec. 1999 (Circ. NOR : INTD9900251C, 10 déc.1999, Ic)
[87] La loi n° 93-1027 du 24 août 1993
[88] The Council of State ruled in the case of Mrs Montocho in July 11, 1980 that polygamy can be considered legal in terms of human rights, if it is the law applicable in the country of origin. (CE, 11 juillet 1980, Montocho: Rev. crit. DIP 1981, p.658)
[89] The polygamy is maintained as a legal form of marriage in Maroco, Irak, Eypt, Algeria, Pakistan. (circulaire DPM/DM 2-3 n° 2000-114 du 1 mars 2000).
[90] Jault-Seseke, F., *Le regroupment familial en droit compare français et allemand,* E.J.A. et Fabienne Jault-Seseke , Paris 1996, p.104

took into account the family relation existing between parents and children. The marital bound with a second spouse in absence of common offspring is not enough ground to claim a regularisation of second spouse's residence in Germany.

In conclusion, the French and German legislation contain similar understanding of the term spouse as a person in civil union between opposite sex. France proves to be more liberal in according the right to residence to non married foreigners if they prove that an effective family union lasts for a longer period and if the couple shares parental responsibilities towards their common child. In both countries some provisions have been introduced to cover also the homosexual unions, although these reunion is subject to more strict conditions.

Children

With respect to the reunification of children the French law sets much less restrictive conditions compared to the German law. Children of foreigners residing in France who wish to reunite with their parent(s) should be below the age of majority (below 18 years of age), or, as in case of signatories of the European Social Charter (Turkey, Malta, Cyprus), below 21[91]. In both cases they must be dependent on their parents and not married. Under this procedure not only natural but also adopted children and those from the first marriage of one of the spouses are eligible, provided one of the parents holds exclusive custody rights[92].

The age limit for children eligible for family reunification in France meets perfectly the requirements of the European Social Charter. In case of Germany, the European Social Committee has persistently criticised the provision limiting the access of foreign children who are above 16 year of age (Section 20, par.2 and Section 29, par.2). What is more, the Committee declared as too restrictive the provision on admitting only children whose both parents reside stay legally in Germany. Although the provision in 1990 Foreigners Act has not been changed, in practice exception is made if the only parent residing in Germany holds a settlement permit. In such cases children are usually granted residence (Section 20, para.3-4; Section 29, par.2). Despite of this compromise the Conclusions of the Committee judged this requirement as not complying with the obligation imposed by article 19.6 of the Social

[91] CE, 29 juin 1990, n° 78519, GISTI : JCP éd. G 1991, II, p.61)
[92] Circ. 1 mars 2000, III, B-2.2.1 Some special rules are applied to children of the Algerian nationals on the basis of the Franco-Algerian Agreement 1968. It will be discussed in Chapter 3.

Charter[93]. Germany persistently ignored the Conclusions of the European Social Committee. What is more, in the new Immigration Act even lower age limit for children was proposed.

In the light of the Immigration Act the age limits for children joining their parents are not uniform but differ with respect to the different categories of immigrants. Children of highly qualified specialists who are in a possession of a settlement permit will be admitted to Germany if they are under 18 years of age (Section 32, par.1 no.2). The same rule will apply for children if they enter the country with their parents). However, if they will apply for joining their parents later, the general rule sets the age limit at 12 (Section 32, par.2). Children older than 12-year-olds can be still admitted after examination of their individual case, if they fulfil the so-called integration criterion (Section 32, par.4). Such policy is designed to ensure that family reunification takes place as soon as possible, in order to make the integration of children easier. The idea of the legislator was also to prevent immigrants from bringing older children, after years of separation, with the clear purpose to give them access to the German labour market. The official opinion is that such children usually do not have adequate language preparation nor are qualified enough and find it difficult to adapt to German reality. After reaching the age of majority, they are the first ones to supply the already exceptionally high number of unemployed. Using this line of argumentation, some political parties in the opposition proposed to lower the age of children accepted automatically for family reunion to 6 or 10 years to eliminate totally this practice. This proposal, however, has been judged as going against the constitutional standards. The aim of article 6 of the basic Law is to create conditions in which spouses can exercise their parental responsibilities in order to enable physical and psychological development of children. Precluding children at 7 or 11 years of age from cohabiting with their parents would affect severely the normal functioning of family life. In the opinion of the authors of the new Immigration Act, setting the age limit at 12 and applying the integration criterion to older children creates the best conditions for integration of these children. However, one can pose a question whether indeed rejecting a 13-year-old on the basis of language criterion is at the child's best interest? Apparently, the debating parties at the European Council who negotiated in February 2003 the European Directive agreed that this age limit can be accepted as a minimum standard.

It is worth pointing out that children of nationals of the EU Member States hold the right of residing abroad with their parents until they reach the age of 21 (they can be even older than

[93] European Social Charter Conclusions XVI-1, vol.1 Council of Europe Publishing, November 2002, p.263

21, provided they are still not married and dependent on their parents). It is an undeniable fact that the nationals of the Member States have the right to preferential treatment on the territory of the European Union. Nonetheless, the discrepancy of standards for children of the EU citizens and the legally residing third country nationals seems to be particularly big. The provision in the 2003 Directive and in the Immigration Act are definitely drifting far away from the Tampere objective to bring the status of long term residents in the EU as close as possible to the one of the EU nationals.

Other family members

The proposal and the current law gives the possibility of granting stay for family members other than spouses and children (i.e. parents, children-in-law; Section 36 of the Immigration Act and Section 22 of the Aliens Act). This clause could be invoked in situations where those family members are exposed to particular hardship in the country of origin. The admission would depend on the circumstances of individual case and the decision could be taken after closer examination of each case by a competent authority (at its discretion). The status of family members admitted through this procedure would have humanitarian status.

This issue is solved in a similar way in France. Parents, grandchildren, children-in-law cannot be in principle granted residence permits on family grounds. However, in practice some exceptions were made for parents of foreigners residing in France. The authorisation of their residence was based on difficult situation upon their return to the country of origin – especially if they were left with no other relatives and had no means for maintaining themselves[94]. The clause on admitting parents of Algerian nationals in exceptional circumstances is mentioned also in the 1985 Protocol to the Franco-Algerian Agreement[95].

2.2.2 Conditions for family reunification

The conditions on family reunification in France and Germany are of similar nature but they differ in the extent of demands. Those differences result from two different concepts of integration of the immigrant population. The main assumption of the French policy is the one of favouring integration of immigrants: the aim of family reunification procedure is to check whether the principal has the means to guarantee his family the standards living considered normal by the French standards. Once these criteria are fulfilled, the family can be admitted and can start functioning in the French reality. German policy, on the other hand, assumes that

[94] Jault-Seseke, F., *Regroupment familial...,* op.cit. pp.132-133

the family will not be able to integrate if the principal did not himself/herself had the chance to get used to the German life style. Let's have a closer look at the details of the French and the German system.

Length of the residence permit of the principal

In order to apply for family reunion in France, the principal should be able to provide a proof of legal residence for at least one year, be it in the form of a residence permit or a residence card[96]. In Germany the length of residence required differs with respect to the status of the principal. The general rule enshrined in the Foreigners Act says that the principal residing in Germany should hold a resident permit for unlimited period or have the perspective of receiving permanent residence status (Section 18m par.1 no.1). Immigrants holding a temporary residence (*Aufenthaltsbefugnis* - residence for exceptional circumstances), who have the perspective of permanent residence, can apply for reunification if at the application for the first residence card they signalised that they were married and if the marriage was concluded before their arrival to Germany (Section 18, par.1 no.3). Otherwise, the authority can decide on the admission at its discretion.

In addition, German law applies particular provisions on the reunification of family members of the second-generation foreigners. They are allowed to bring a foreign spouse only if their residence in Germany has been longer than 8 years (Section 18 par.1. no.2). The requirement of a residence permit for unlimited period applies as well[97]. The German Constitutional Court (*Budnesverfassungsgericht*) pronounced its opinion that the requirement of 8 years of residence preceding family reunification is not excessive. In the view of the Court it ensures that such an immigrant became familiar with the rules governing societal life and permits to presume certain success in meeting the social standards in Germany. It guarantees that the family will dispose of sufficient resources and that the children will be well introduced to the German lifestyle[98]. This argumentation of the Court seems to be, however, contradictory to the opinion of the same Court that the interest of the child to live with his/her parents should be always of the greatest priority. In addition, given the difficulty in obtaining the residence

[95] See: the Protocol to the French-Algerian Agreement of December 27, 1968. The Protocol was annexed in December 22, 1985 (D. n° 86-320; 7 mars 1986; JO 8 mars)

[96] Ord. n° 45-2658, 2 nov. 1945, art. 29, I : JO, 4, nov., rect.7 nov. et 13 déc.

[97] Until recently, marriage union had to last at least for one year. Some landers imposed longer waiting periods: e.g. 3 years in Bavaria and Bade-Wurtemberg, 2 years in Berlin. The Constitutional Court issued the opinion that such a requirement is disproportional. The Independent Commission on Migration to Germany "Structuring Immigration..." op.cit. p.186

[98] For more details on the opinion of the German Constitutional Court see: Jault-Seseke, F., *Le regroupment ..,* op cit. pp. 152 –157.

permit for unlimited period, it is hard to understand why it is the precondition for family reunification. The above argumentation by the Court does not provide explanation for insisting on this requirement.

Sufficient resources and adequate accommodation

Both in France and in Germany the principal must able to maintain financially his/her family members, who are to join him/her, and provide them with sufficient living space.

In France, the law formulates those two conditions in the following way: the foreigner should prove steady and stable resources[99] and dispose of housing considered as normal[100]. In France the income requirement is evaluated in reference to the minimum salary (SMIC). It should be first of all higher than SMIC and it is up to the authorities to assess if it is sufficient. The German legislation specifies that the resources can be in the form of salary or revenue from property but the cannot comprise unemployment benefit or family allowances (Section 18, par.4). The admission will be rather refused if the family members are likely to become reliant on social assistance. The French practice is similar.

The practice proves that immigrants tend to live in overcrowded places. It results often from the need to economise. Moreover, big percentage of the immigration population in France and Germany come from climate zones, most of daily life takes place on the outside and dwellings serve mainly as a place to sleep during the nights. Thus, the provision of proper accommodation constitutes a very important element of integration of the family in the new reality. It is worth noting that the in France if the principal does not possess an accommodation fulfilling the space requirement, according to the prefect can also accept, if a proof that he is able to acquire one at the time family members arrive.

Public order and health reasons

In both countries, application can be refused invoking the threat to public order (Section 8 of the Aliens Act and the law n° 93-1027 of 24 August 1993). The refusal of admission can

[99] Ord. n° 45-2658 2 nov. 1945 art. 29, I, 1°: JO, 4 nov., rect. 7nov. et 13 nov.

[100] Ord. n° 45-2658 2 nov. 1945 art. 29, I, 2°: JO, 4 nov., rect. 7nov. et 13 nov. – as amended by the 1998 law. In the German law the accommodation requirement is regulated in the Section 17, par.4 of the Aliens Act.

motivated also for reasons to protect public health: it applies to family members suffering from diseases which are serious enough to endanger public health[101].

Prohibition of partial reunification in France

It is should be pointed out that the French legislation (introduced in 1993 and taken over by the 1998 Law) prohibits partial family reunification. The idea behind this rule is to ensure better conditions for integration of arriving family, which would be more difficult if the members were arriving one by one. At the same time it is also designed to deter the phenomenon of bringing children at the moment when they allow them access to the labour market in France. However, this prohibition is not absolute: partial family reunification is possible in special circumstances if the best interest of the child requires so[102]. The reasons related to health, education or the inability to provide sufficient housing by the parent in France is examined on a case-by-case basis. Since in practice the prohibition of partial family reunion is not absolute, it is provision is not in breach of the obligation undertaken under the European Social Charter[103].

Reunification sur place

It should be noted that although the French law envisages the procedure for family residing abroad, the prefect has the power to take such a decision at his discretion to regularise the status of family members who are already in France. The procedure of regularisation is applied to around 15% of all the applicants. It is especially useful for example in cases, when for medical reasons the head of the family needs to be provided with a constant care. Moreover, the procedure of regularisation is available for foreigners who got married during their legal stay in France. At the expiry of one of the spouse's residence permit it is possible to invoke family reasons to legalise his/her stay. This procedure does not require that the applying family member leaves from France – it is called family reunion "sur place". The conditions of housing; resources and residence permit of the principal (as well as lack of threat to health and public order) are maintained.

The German Immigration Act creates the possibility of regularisation of stay for family members who are already present on the territory of the Federal Republic. It is possible if one

[101] The list of illnesses which require quarantine are listed in the WHO International Sanitary Regulations No.2 of 25 May 1951. Tuberculosis or syphilis are also examples of diseases considered dangerous.
[102] Ord. n° 45-2658, 2 nov. 1945, art.29, I: JO, 4 nov., rect 7 nov. et 13 déc.
[103] European Social Charter, Conclusions XV-1 vol.1, Council of Europe Publishing, April 2000, pp.285-286.

of the spouses can prove that he/she is employed and disposes of sufficient resources (Section 9 par.2 and 3) and if he/she has the perspective of permanent stay in Germany.

To conclude, the admission requirements concerning children and spouses are clearly much stricter in Germany than in France. The German legislator did not take note of the Conclusions of the European Social Committee criticising especially the length of residence prior to reunification and the age of children. To the contrary, the new Immigration Act is likely to introduce further restrictions, which are beyond the standards of the Social Charter. The proposed changes reach the minimum level of standards enshrined in the 2003 Directive. Will Germany use this line of argumentation to further tighten the requirements in order to limit immigration?

Chapter 3 Which rights for reunited family members? The French policy of assimilation and the new policy of integration in Germany.

The aim of family reunion is to enable foreign families to enjoy the right to family life in the country of immigration. If the family members fulfil certain conditions of admission, they should be able to live normal life and to integrate in the social structures of the hosting state. In reality, however, the authorisation of residence is not always equivalent to opening access to all social structures available to the citizens, such as labour market, social security, political rights, etc. Status accorded to family members can differ with respect to the status held by the principal. It depends also on the generosity of the immigration policy in a given country. The following chapter examines several aspects of social reality of foreign families in France and Germany. In the second part of this chapter I will present some derogatory rules for certain categories of immigrants, who receive more favourable treatment on the basis of bilateral or international agreements. The intention of this comparison is to see how different regulations and practices can facilitate or obstruct the integration of foreigners.

3.1 Status of reunited family members

Residence for family members

In France foreign family members can be granted a temporary residence permit called „vie privée et familiale" (valid for one year) or a residence card (10 years validity)[104]. Both of those titles are renewable. The first category of permit is accorded to family members of a principal who holds a temporary residence permit. The second category – residence card – can be admitted to family members who join a principal in possession of a long-term residence permit. It is in generally granted if the family members entered legally to France[105].

German authorities avoid granting too long-term residence permits to the newly arrived family members. They usually receive a temporary residence permit for a period of one year (Section 17-27 of the Foreigners Act). The permit is subject to prolongation, as long as the principal maintains his/her residence permit and there is a continuation of family life. Only in special cases a longer residence title is accorded if the principal has a residence permit for a

[104] Carte de résidente (Ord. n° 45-2658, 2 nov. 1945; art.15,5° : JO, 4 nov.); carte de séjour temporaire portant la mention "vie privée et familiale" (Ord. n° 45-2658, 2 nov. 1945; art.12 bis, 1°: JO, 4 nov)

[105] In some circumstances, the illegally resident foreign family members can be granted this permit on the basis of family reunification sur place. (see: Chapter 2.3.2 Reunification sur place)

specific period related to his activity in Germany (e.g. studying; Section 31 par.1). This title can be extended if the conditions of the principal's activity require so.

A foreign spouse residing in Germany becomes eligible for unlimited residence permit (*unberfristete Aufenthartserlaubnis*) after 5 years (Section 19 par.4). He/she must also meet the requirements of command of German language, sufficient resources, adequate housing and lack of grave criminal record. These conditions are much harsher compared to the French ones: foreigners, who hold temporary residence permit („vie privée et familiale"), can apply for a residence card after 3 years of their residence in France[106]. Children of immigrants do not receive any residence document before they reach the age of majority, or if they want to work at the age of 16 (they are granted residence card)[107].

According to the German law, **children**, who are 16 years old and resided in the territory of the Federal Republic for longer than 8 years have access to unlimited residence permit, without any additional conditions (Section 26, par.1). If however the eight-year residence is achieved later than at 18 years of age, the requirements of language and sufficient resources are kept[108]. In both cases, children are not eligible if they were given unconditional sentence for having committed a crime. If a child is under suspended sentence, he/she can apply for unlimited permit at the expiry of probation period. The unlimited permit can be later changed into settlement permit, under condition of adequate employment and lack of criminal record[109]. According to the Immigration Act, the unlimited residence permit will be accorded to a child over 16 years of age after 5 years of legal residence, provided he/she will have adequate command of German language, sufficient resources and will not be liable for expulsion (Section 35 par.1 nos.1-3). The other regulations concerning the status of children remain unchanged (Section 34 par.1 and 2).

In both countries the first residence is more generous if family members join a French or a German national. In Germany they receive residence permit for 3 years and after 5 years of residence they can apply for unlimited residence. In France they receive a renewable

[106] Ord. n° 45-2658, 2 nov. 1945; art.15,1° : JO, 4 nov.
[107] Le Regroupment familial „Si vous venez en France au titre du regroupement familial, pouvez-vous obtenir un titre de séjour et lequel ?" © Carine et Serge DIEBOLT - "*Droit pour Tous*" - 2000 http://sos-net.eu.org/etrangers/interne/regroup.htm
[108] Groenendijk, K., *The legal status of persons admitted for family reunion* Council of Europe Publishing, January 2000 p.26
[109] Groenendijk, K., *The legal status*... op.cit. p.26

residence card for 10 years[110]. It is interesting to notice that foreign family members who wish to join a French citizen in France do not make use of the family reunification procedure but are following the general procedure for foreigners. They can enter France with a visa and after two months of residence should apply for regularisation of their residence.

Autonomous status of family members

In case of a marriage breakdown (divorce or separation) or death of the principal the autonomous residence permit can be accorded if the family life in France lasted longer than 1 year. If the marriage breakdown takes place before one year of common residence in France, family members can be refused to have their temporary residence prolonged[111]. In Germany, this provision is much stricter: autonomous status can be conferred if the family lived together in Germany for longer than 4 years (Section 19 par, 1 nos. 1 and 2). Yet, in exceptional cases, when the spouse or children would be exposed to serious difficulties in the country of origin or if the separation takes place for reasons of domestic violence, family members can be granted autonomous status.

The new Immigration Act will introduce less radical measures in this matter. If marital cohabitation will be interrupted after at least 2 years of residence, the reunited spouse has the right to have his/her residence extended for one year (Section 31, par.1 no.1). In individual cases, if the spouse has compelling reasons, the residence can be granted even if the cohabitation lasted less than 2 years. The one-year autonomous residence will be offered also in cases when the principal died after the family reunification took place (Section 31 par.1 no.2)[112]. If the spouse, who separated from his principal, disposes of sufficient resources, he/she will be eligible for receiving settlement permit.

Access to labour market

Access to labour market is one of the most crucial elements in successful integration of immigrants. Without the possibility to work it is difficult to imagine that they can provide the family with decent conditions of life or proper education for children. Access to work enables

[110] In the marriage with a French citizen is interrupted after less than one year, the foreigher spouse is accorded only one year residence permit, which can be later extended. It also applies to spouses who entered in France illegally, even if their marriage lasted longer than one year. Residence card is also admitted to parents of French nationals. Groenendijk, K., *The legal status* .. op.cit. p.43

[111] Le Regroupment familial „Vous êtes venu en France au titre du regroupement familial, et vous désirez savoir si votre admission au séjour peut être remise en cause et pourquoi? La remise en cause après la délivrance du titre de séjour" © Carine et Serge DIEBOLT - "*Droit pour Tous*" - 2000
http://sos-net.eu.org/etrangers/interne/regroup.htm

contact with other people outside of the family circle and thus a better insertion in the social reality of the hosting country. However, if the situation on the labour market deteriorates, states tend to immediately impose constraints on access to work for for foreign family members. Let's have a look at how France and Germany regulated this matter.

In France, both residence card and temporary residence permit called "vie privée et familiale" give access to the labour market. Family members can then become employed or exercise independent professional activity[113]. The automatic right to work for family members does not apply to Tunisian and Moroccan nationals. On the basis of the agreements concluded between those countries and France, reunited family members are accorded residence title called „membre de famille" which can be subsequently transformed into one called „salarié" if they present a work contract offered by an employer in France. The Algerian nationals are subject to the general order (i.e. immediate right to work) after the entering into force of the avenant to the agreement of July 2001[114].

Although many of the holders of a residence permit and residence card have access to employment, immigrants in France encounter many obstacles. The employment in public sector is conditioned upon nationality, but also in private sector many professions are not available practice third country nationals, e.g. lawyer, notary, owner of care tabac, and some others. Such requirements are clearly contrary to the principle of non-discrimination.

The new Immigration Act in Germany tries to compensate the stricter conditions on admitting foreigner's children (lower age limit and integration criteria), by granting the children access to labour market on the same basis as their parents. Access to jobs on equal ground as the one of principal foreigner will be also granted to the spouses[115]. This provision can be considered an improvement compared to the present regulation. According to the Foreigners Act spouse and children of a foreign with a temporary residence permit are not allowed to work during the first year of their residence in Germany (*Duldung* - Section 55). Only if the principal holds an unlimited residence permit or settlement permit, no transition period is imposed[116].

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[112] The 1990 Law authorises temporary residence of family members despite of principal's death. Thus in this case the Immigration Act is more severe.
[113] Ord. n° 45-2658, 2 nov. 1945; art.30bis : JO, 4 nov.
[114] see: Chapter 3.1.2 Bilateral Agreements
[115] The Federal Ministry of Interior, *Subsequent immigration of dependants* http://www.eng.bmi.bund.de/frame/sonstige/sonstiges/www.eng.bmi.bund.de/Major_Topics/ix7146_55668.htm?language=en&schwerp=%20&verknuepfung=&behoerde=%20&Thema=%20
[116] The Code of Social Law III, art. 294 (1.2)

Nonetheless, a family member is still obliged to apply for a working permit, which can be refused if the situation on the labour market is difficult[117]. At present, due to high unemployment rate in Germany, many landers do not grant at all work permits for foreigners. Thus, in the present circumstances only the reunited family members holding unlimited residence permit have the secure right to work.

Social benefits

Both, family members in a possession of temporary residence and those granted a „card de séjour" can benefit automatically from social security. It applies to all the family members – spouses, concubines (of the French citizens), and children up to the age of 20 if they're continuing their studies or are not able to start gainful employment. Foreigners residing legally in Germany in principle have access to social security on the same conditions as the German nationals[118]. Some exceptions however made at the landers' level. Some landers do not grant access to some child benefits if the foreigners enjoy only temporary residence status. In addition, if a foreigner looses access to social benefits it can have negative impact on the possibility of extending his/her residence permit.

Political rights

France is not a party to the Convention on the Participation of Foreigners in Public Life at Local Level and thus the right to vote and be elected is reserved to French citizens. In May 2000 the Green Party proposed a law granting the long-term residents from third countries the right to vote in local elections. One year later, associations protecting immigrants right organised demonstrations for the right to vote for foreigners. The partial success of this initiative was the introduction of councils of non-EU nationals residing in France on a district level. In December 2002 the National Assembly voted against voting rights for foreigners outside of the EU. The prime minister Raffarrin, in a comment on this decision, said that foreigners who wish to acquire voting rights and other privileges can do so by obtaining French citizenship. He insisted that naturalisation should remain the main way of integration of foreigners into the French society[119].

[117] Groenendijk, K., *The legal status ...*, op.cit. pp.27-28
[118] Groenendijk, K., *The legal status …*, op.cit. p.30
[119] Simon, P., *French Integration Policy: Old Goals in New Bottles?,* 1 January 2003 www.migrationinformation.org/Feature/display.cfm?ID=87

The German legislation proves to be more open in this matter. On the basis of the Convention on the participation of Foreigners in Pubic Life at Local Level (to which Germany is a party), it guarantees to foreigners residing in Germany for longer than 5 years the right to participate (as a voter and as a candidate) in local elections[120].

Access to citizenship

French nationality is acquired at birth, if one of parents is French[121]. French citizenship can be also acquired after a period of residence in France. This possibility is open to individuals who can prove at least a five-year period of legal residence in France and fulfil some additional criteria. A candidate has to also meet the condition of "being assimilated in the French society" (i.e. have sufficient knowledge of French language and life style analogue to the one of the French among whom he/she lives) and have no criminal records. Children of immigrants born in France can, at the age of 18, choose French nationality without additional requirements. A child of immigrant, who reaches the age of majority, has the right not to choose French citizenship, or to retain the nationality of his parents. Thus the category of foreigners applies to individuals born abroad and their children born in France who are not yet of age or became major and chose to remain foreigners[122].

In Germany the access to citizenship is subject to a more demanding criterion of period of residence, even if the new Law on citizenship introduced in 2000[123] it has become easier to for immigrants to acquire German nationality. Citizenship is accorded automatically to children born of immigrant parents, if one of the parents resided legally in Germany since the age of 14 or was born in Germany. It applies also to a child of an immigrant parent, who holds an unlimited residence permit, provided the child lived with his parent at least for five years. In both cases children can retain in addition the nationality of their parents until the age of 23. If they become older than 23 they are obliged to declare which of the two nationalities they wish to keep. The process of naturalisation for the first generation of immigrants lasts 8 years. However, if a foreigner is married to a German citizen, he can apply for citizenship as soon as after three years of common life in Germany (if the marriage lasted at least two years). For all of those categories mentioned, except from the first one, two requirements have to be met: the legality of residence and lack of criminal record. It should be underlined that with this

[120] Art.6 of the European Convention on the Participation of Foreigners in Public Life at Local Level.
[121] France applies the ius sanguinis rule thus it does not matter if the child was born in France or abroad.
[122] Kimberly Hamilton, K., *The Challenge of French*…, op.cit.
[123] Act to Amend the Nationality Law [Gesetz zur Reform des Staatsangehörigkeitsrechts] January 1, 2000

amendment finally children born in Germany to long term residence were given the guarantee that they will not be expulsed as a punishment for a criminal acts. It solved a controversial problem of children born and raised in Germany who could be punished with expulsion to a country, where they had no social and cultural links.

The French policy of assimilation and the new German integration policy

In the French model of integration, the French national identity is being placed above any ethnic identities. It was believed that the equality of treatment enshrined in French constitution was sufficient to protect naturalised immigrants from discrimination. In reality, however, such policies tended to hide mechanism of discrimination, since no statistics were available for the French of foreign origin. Only in mid-1990 new approaches were undertaken to learn more about the second generation of immigrants. More data on the French population of foreign origin permits to trace discrimination practices and provide some remedies.

In the beginning of 2003 France launched a new program of integration of immigrants, consisting of three aspects: revising the existing integration policies, introducing an active campaign against discrimination, and more open but selective immigration policy[124]. This program is based to a large extend on the previous policies, which were focused on adaptation rather than integration.

Among the new initiatives is the one extensive program of language classes and courses introducing the French life style. The courses are to target especially the newly arrived immigrants. The participation is not obligatory but highly encourage on the part of the administration.

The focus points of German integration policy envisaged by the current government is to help immigrants in mastering German language, to introduce them to vocational training and other courses enhancing their qualifications, as well as to provide them with social counselling. It is worth pointing out that the process of successful integration of immigrants involves both, an active effort on the immigrant's part, but also an acceptation attitude on the part of the hosting society. In order to create more favourable atmosphere for immigrants, the SPD/Green government is planning to launch a campaign "Decade of Integration"[125].

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source: web page of the Federal Ministry of Interior

[124] Simon, P., *French Integration Policy: Old Goals in New Bottles*?, 1 January 2003 www.migrationinformation.org/Feature/display.cfm?ID=87

[125] Dettke, D., *Germany's New Immigration Policy*, Washington Office of the Friedrich Ebert Foundation, October 11, 2001 source: http://www.fesdc.org/DD%20Speeches%20+%20Articles/Germany's%20New%20Immigration%20Policy.doc

Among the innovative practices envisaged in the new law, it plans to create a Federal Migration Office with the task to develop a national integration program (this task would be undertaken in co-operation with lander's authorities and the local society). The role of this institution would be to provide immigrants with support and to take measures to enhance wide participation of foreigners in the integration programs on the federal level. The integration programs would be in principle voluntary, however, some language courses can be obligatory. In particular, language courses would be compulsory for immigrants residing in Germany for more than six years and who still have language difficulties. The authorities can condition the prolongation of their residence permit on participation in integration or language courses. Foreigners who would successfully accomplish language and integration courses could be admitted to a shorter the naturalisation procedure of naturalisation after 7 years of residence (instead of 8 years).

Immigrants wishing to receive settlement permit will be required to fulfil the condition of mastering of German language, being familiar with the basis of German legal and social system and have the general knowledge of living conditions in Germany.

In conclusion, the French and the German systems differ significantly with respect to the rights accorded to the reunified family members. The French approach is to create conditions for the best assimilation of admitted family members. The German law confers very limited rights to foreigners residing on the basis of temporary permit. Only foreigners who fulfil the demanding conditions of receiving unlimited residence permit can enjoy the status comparable to German citizens.

3.2. Special systems.

3.2.1 Rules applying to the European Union citizens and nationals of countries belonging to the European Economic Area

The family reunion for EU citizens is related to the freedom of movement and residence for citizens of the 15 Member States[126]. The freedom of movement for community workers has been established already in 1968, yet at that time it applied only to persons economically active on one of the Member States other than his own. Since the Maastricht Treaty, which established the European Union citizenship, freedom of movement and residence is no longer conditioned on a gainful employment in a foreign (EU) country. Member States can condition the right of residence for foreign EU citizens on sufficient resources and health insurance, to make sure that they will not become a burden on the local social assistance. The only condition that is persisted since the 1968 directive is the necessity of crossing the border of one's own country.

The EU-nationals are authorised to exercise the right to family reunification in respect to their spouses, children younger than 21 or, older if they are still dependent on parents and relatives in ascendant line (parents, grand parents of both of the spouses), provide the spouses maintain them. The age limit for children at 21 for EU nationals paradoxically is more generous for EU nationals residing in Germany than for German citizen in their own country (they can apply for reunification of children who are not older than 18). However, if a German reunites with his family in another Member State he can invoke this privileged treatment under EU law also after return to Germany. As a result Germans who exercised their right of freedom of movement have more advantages in the field of family reunification than those who stayed in the country. This situation will change after entering into force of the European Directive, which prohibits discrimination (against nationals in this case)[127]. What is more, foreigners wishing to join their German family members will be subject to the same rules as applied to EU nationals residing in a Member State other than their own[128].

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[126] The Council Regulation of October 1968 was implemented in Germany by the law on the Entry and Residence of EEC nationals (July 22, 1969) and the Freedom of movement Decree (July 17, 1997). The decree of March 11, 1994 is the most recent act implementing the Community regulations on entry and residence of the EU nationals in France. In Germany they have been implemented by means of the Law of July 17, 1997.

[127] Proposal for a *Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,* art.4, COM(2001)257 final, 23 May 2001

[128] ibid. art.1 and art.2

The conditions applying to EU-nationals are limited to minimum: and comprise adequate accommodation and lack of threat to the public order, security and public health. The Court of Justice pronounced its opinion that the last limitation has to be applied very cautiously and only in very serious cases could it amount to an obstacle to accord residence to the EU nationals. The Directive 64/221/CEE provides, for example, that social or economic situation cannot be a sufficient reason to refuse residence for an EU national on the territory of other Member States. In cases when the principal is unemployed, sufficient resources must be also proven. Family reunification can be also invoked by the EU students studying in one of the EU Member states, on the condition they dispose of financial means sufficient to maintain the reunited family.

The residence card accorded to the family members is in general of the same length as the one of the principal, which can be renewed without particular requirements. The reunited family members in France receive a residence card labelled "European Community", which is valid for 10 years. Such a card authorises its holder to immediate access to the labour market.

The reunification of family members, who are third country nationals, is executed on the same basis as of the EU nationals. The nationality of reference is always the one of the principal. The only difference concerns the entry to the EU Member State: for some third country nationals a visa can be required.

3.2.2 Bilateral agreements

Agreements concluded by France:

„Afrique Noir"

At the beginning of decolonisation era France attempted to create Franco-African Community to which the newly independent colonies could adhere. On the basis of agreements signed by countries such as Mali, Mauritania, Senegal, Congo, Gabon, Central African Republic Chad nationals of those countries could enjoy the freedom of movement – they could come to France without the need of visa or work permit. This system proved very soon to be too liberal and was replaced by the requirement of employment contract, before workers could be admitted to France. This modification did not affect the subsequent arrival of family members who could enter freely to France. In 1974 this issue was partially corrected by subjecting persons coming from Black Africa to a general law. Still, until recently nationals of Central Africa, Burkina Faso, Mauritania, Gabon and Togo applying for family reunion were treated in a privileged way – they could exercise freedom of movement and bring their families

without prior authorisation. At the moment bilateral agreement still has not been signed with Togo. Togo citizens are subject to the same rules as the EU nationals.

Algerian nationals

Algerian nationals represent the most numerous group of immigrants in France. This situation results from historical links between the two countries. After the war of independence, the Evian agreements of 1962 gave Algerian nationals the freedom of movement and establishment in France. At that time family reunion was not subject to any conditions. In the view of a large influx of Algerians to France this liberty had been later limited. Nonetheless, on the basis of the Franco-Algerian agreement in 1968 some special preferential rules were established for family members wishing to join an Algerian legally resident in France. Algerian nationals are not required to prove one year of residence in France prior to applying for reunification – they can apply as soon as they receive their residence permit in France. The family is obliged to submit a proof of medical examination and a certificate of adequate accommodation in France. A spouse and children (under 18) will be accorded residence permit of the same duration as the one of the principal. It is interesting to note that Algerians are the only group of immigrants who are allowed to bring more than one spouse. However, this exception is to be lifted after the entrance into force of the Franco- Algerian Agreement signed on July 11, 2001.

Another particularity of Algerian immigrants is that they can apply for reunification of minors, who are not their own children nor have they parental responsibility over them in the view of the French law. This provision respects the Algerian tradition of Kafala, that is a commitment expressed voluntarily to take the responsibility over a minor child. „The father" becomes responsible for the maintenance, education and protection of the adopted child. Decision on this kind of adoption is taken by a judicial authority in Algeria[129].

As to the sufficient resources requirement, until recently Algerians could combine their salary and the social allowances as a part of their income in order to qualify for the sufficient resources requirement. This exemption has been lifted only by the amendment to the 1968 Agreement in July 2001. The conditions for reunification of Algerian families resemble quite closely the general requirements for third country nationals. Still the some of the historical privileges towards the ex-colony have been preserved.

[129] L'accord franco-algérien, signé le 11 juillet 2001 (v.n° 12)

Marocco and Tunisia

In 1964 France signed another agreement on recruitment of workers from Marocco, which assumed to facilitate the subsequent immigration of family members. Nonetheless, the Council of State in its interpretation in 1992[130] of this agreement did not derive any derogatory consequence with respect to family members, since it did not contain any concrete obligation[131]. Moroccan nationals are thus subject to the general rules enshrined in the Law of 1945. The Tunisian nationals benefit from the agreement signed in 1988, which accords them the residence permits of 10 years validity. It affects the reunited family members in that, after being admitted to France, they can receive a residence permit equivalent to the one of the principal.

It can be concluded that the derogatory rules for nationals coming from the former French colonies play less and less important role in admission of family members. On the one hand, the responsibilities to ex-colonies became outdated. At the same time, the objective to restrict immigration could be only achieved by erasing preferential treatment and introducing common rules for all. At the moment only Algerians, Tunisians (as for the length of residence permit) and Togo nationals enjoy more privileged status than other immigration-source countries.

Agreements concluded by Germany:

Germany is a part to some friendship agreements but none of them gives rise to preferential treatment in the field of family reunification. As to the Agreement signed with Greece (1960) the Administrative Court of Hesse declared that it does not have a derogatory effect over the general law on foreigners[132]. The agreement signed with Turkey (1927), although any case was not designed to regulate the matters of Turkish workers families, the judiciary also pronounced its opinion that was not an obstacle to the application of German law on foreigners.

[130] Jault Seseke, F., *Le regroupement familial...,* op.cit. p.207
[131] The text of the agreement used the phrasing „toutes facilités seront accordées à cet effet par le gouvernement fraçais dans la cadre de la législation et de la réglementation en vigeur". Quoted after: Jault Seseke, F., *Le regroupement familial...,* op.cit. p.207
[132] Jault Seseke, F., *Le regroupement familial...,* op.cit. p.209

Association Agreements concluded by the European Community:

Agreements between EEC and Maghreb countries

The European Community signed agreements with three countries of Maghreb – Tunisia, Algeria and Marocco[133]. The intention of the European was to contribute to the economic and social development of those countries, yet, already at the beginning there was no mention on the future possibility of establishing the free movement for Maghrebian workers. The access to labour market or the right of residence on the territory of CE countries were not taken into account in the texts of the agreements. The only relevant provision concerned that those workers who will gain access to European labour market shall be guaranteed fair remuneration and access to social benefits. The issue of family reunion of workers from Maghreb was not covered at all. Nonetheless, if family members were admitted through the regular procedure for foreigners, the non-discrimination clause in the agreements guarantees them access to social security and allowances for children brought to one of the Member State on the same basis as to the nationals of that state.

The Association Agreement with Turkey[134]

The text of the Turkish Association agreement with CEE does not contain any explicit reference to the right of residence for family members. However, this issue has been elaborated by the Association Council in one of its decisions (Decision 1/81 of May 25, 1983). The decision does not confer the right to free movement of Turkish workers, but accords more favourable treatment in renewing the work permit for workers who already resided and worked legally in one of the Members States. In the same decision the Council pronounced itself that the family members should be also guaranteed the access to labour market and to education (for children admitted on the basis of family reunion). Thus, the decision of the Council does not affect the procedure of admission of family members regulated by the national laws, but accords certain rights to family members already authorised to join the head of the family.

Association Agreements with Eastern European countries

The European Agreements signed in the early 90s with the Central and Eastern European[135] countries were meant to be the first step on the way to their future accession to the European

[133] The agreements were signed separately with Tunisia, Algeria and Marocco in 1976.
[134] The association agreement between Turkey and CEE was signed in 1963.

Union. The texts of those agreements contained some regulations concerning the status of the nationals of those countries exercising economic activity (be it employed or independent workers) and establishment in the EU Member States. However, in any case do those provision confer the right to free entry and stay in the Member States. When it comes to the right of family reunification, the agreements did not stipulate any particular privileges as to the entry of family members. The Member states preserve the competencies as to the admission of family members, which, as in case of other foreigners, is governed by national legislation. The only relevant provision in these agreements deals with social security: it provides for certain co-ordination in social security, in particular for payment of family allowances on children residing legally with their parent in the Member States. The weakness of these clauses is that they do not have direct effect[136] and cannot be invoked before the national tribunals.

To sum up the Association Agreements concluded by the EEC with the countries mentioned above do not confer particular privileges in the field of family reunification. The nationals of the associated countries willing to reunite with their families have to follow the general procedure of admission. Only at the moment of being granted a residence permit in one of the Member States can they be offered more preferential treatment in terms of access to labour market (as in the case of Turkish spouses) and to social security and family allowances. These provisions in general apply the principle of non-discrimination.

3.2.3 Refugees

The Geneva Convention of 1951 imposes the obligation to give protection to persons who were forced to leave from their country of origin for reasons of persecution, but none of the articles of the Convention guarantees the right to asylum for family members of a person recognised as a refugee. However, the final act to at the conference, during which the Convention was signed, contains the recommendation to the signatory states to ensure that family unity of a refugee should be maintained and that special protection should be given to minor children recognised as refugees, especially in respect to guardianship and adoption[137]. Although this recommendation has been adopted unanimously there is no legal obligation on

[135] Agreements were signed with Poland (1991), Hungary (1991), Czech Republic (1993) and Slovak Republic (1993), Romania (1994) and Bulgaria (1993).
[136] The Association Councils for each of agreements did not issue implementation decisions which would guarantee their directive effect. In addition this disposition does not apply for self-employed workers.
[137] France Germany and Poland are parties to the Geneva Convention 1951 and all three of them did follow the recommendation of the adopted at the Conference.

the signatory states to follow it. An attempt to fill in this vacuum was taken under the auspices of the Council of Europe in 1980 in the form of an agreement on facilitating the admission of family members to the territory of a state, where the principal was granted refugee status. However, neither France nor Germany signed this agreement. It is worth noting that persons forced to flee their countries often can encounter difficulties in providing legal documents certifying their marital status or birth certificates of their children. In such a situation the Conventional procedure remains the only and the most certain way to obtain refugee status.

The French legislation offers to political refugees the possibility of family reunification on the same conditions as to the French citizens. A refugee recognised in France is granted a residence card of 10 years validity (art. 15, no 10 and 11 of the 1945 Law), on the basis of which family can be admitted. The obligation of sufficient resources is lifted. In Germany according to the Asylum Procedure Act (*Asylverfahrensgesetz*) of October 1990 accords the status of refugees to all the family members of a person who was admitted this status (par.26 of the Asylum Procedure Act). Nonetheless, this provision does not give a collective right to asylum once it is granted to the principal. It is only after each of the family members applies individually that the provision creates privileged conditions in examination of their cases.

Chapter 4 Evolution of regulations on family reunification in Poland

4.1 Freedom of movement – foreigners in Poland after the fall of communism.

The immigration situation in the post-war era in Poland was determined by the broader political situation in the region. Poland and other Eastern European countries found themselves under the influence of the Soviet Union. The Soviet regime not only imposed socialist political system but also decided on the break up of relations with the capitalist Western Europe. The construction of the Berlin Wall was the culmination of the policy of isolationism designed to prevent "the capitalist ideas" from endangering the development of the communist society. The first limitation consisted of denying the free access to travel documents: passports were not a common good available to Polish citizens[138]. As a result of this policy, the official movement between the East and the West during the Cold War was minimised. Nonetheless, numerous Poles were leaving – to Germany, to France, and above all to the United States of America, in search for better political and economic conditions. These emigrants were often followed by their families.

The movement of population was more free within the communist block. Nonetheless, since the situation in the Eastern European countries was comparable, there were no tendencies of migration for political or economic purposes. The exception to this rule, was the Eastern German Republic, where the economy was in better conditions and attracted Polish seasonal workers. In other words, migration during the communist period can be described in terms of Polish emigration for political and economic reason. To the contrary, the phenomenon of immigration to Poland was virtually non-existent[139].

The political change initiated in Poland in 1989 and the collapse of the Soviet block brought the new ideology of democracy and liberty, including the freedom of movement. The borders became open not only for Poles, but also for foreigners, who wish to enter Polish territory.

Foreigner in nowadays Poland can be divided into several categories. The first category, which was especially numerous during the first years after 1989[140], consists of immigrants

[138] The issuing of a passport was proceeded by a complicated procedure and required detailed explanation of one's motives for travelling abroad.

[139] Milosinski, C., *Developing Immigration Policies in Post-Communist Poland: the Role of EU Expansion, Western Examples and Pressures*, http://www.cerc.unimelb.edu.au/IHRconf/abs/Milosinski.htm

[140] According to the estimates around 100 000 asylum seekers came to Germany passing through Polish territory in 1991. Another 15 000 were camping around the Polish western border, waiting for good occasion to cross. For

transiting across the Polish territory on their way to the west. The second group comprises immigrants engaged in small-scale trade (mostly illegal). Those immigrants come usually from the former Soviet republics where the economic situation is worse that in Poland. During those short-term 'trips to Poland' they can earn some money and go back to their families in the East. The group of immigrants employed in small-scale trade has been recently enlarged to cover also traders from the Far East (Vietnam, China). Those immigrants stay for longer periods due to the large distances they travel. The most successful eastern migrants settle down in Poland with their families and open more stable businesses - mainly restaurants. The third category covers illegal immigrants from former soviet republics, who are engaged in organised criminal activity. For obvious reasons there are no official data on how large this group is. Finally, there is a small group of refugees, who seek asylum on Polish territory. During the last decade, following the foreign investment in Poland, also Western Europeans and Americans (from Canada and the United States) started coming to Poland for work purposes. Some of them come for not longer than few days with a specific task to be accomplished at the branches of foreign companies established in Poland. Others – a growing group of western foreigners – are being employed in those firms on permanent basis. Some of those managers or other professionals occupying the highest positions are likely to settle in Poland for longer period with their families.

To sum up, a great percentage of immigrants, who find themselves on the Polish territory, do not intend to stay in Poland for long period. Large proportion of the immigrants from the East can be better described as transmigrants, since Poland is not a real destination but a transit country on the way to „the richer Europe". They are not likely to apply for family reunification. Only few of them, who were not successful in Germany and who decide to apply for asylum might want to be joined by their family members. Among those, only the petty traders from Far East are likely to settle for longer with their families. The highly qualified professionals hired on high positions in foreign firms are also accompanied by their family members, however their stay is rarely longer than 3 – 4 years.

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more details see: Milosinski, C., *Polish Responses to immigration and transmigration,* Euro-Asia Bulletin, vol. 5, no 11, 1997 http://www.cerc.unimelb.edu.au/bulletin/bulnov97.htm

4.2 Evolution of immigration policy in Poland after 1989.

The development of immigration system in the post-communist Poland can be divided into three periods: lack of major changes in 1989 -1993 and more active policy making after 1993[141]. The third period dates since the beginning of the negotiation of accession to the European Union and can be characterised by particularly intensive work on adjusting the Polish system to the *acquis communautaire*.

The period following the fall of communism was characterised by great uncertainty resulting from the historical changes in the region. Not only Central Eastern European countries were following the Polish example, but the Soviet Empire itself was at the verge of collapse. Poland was observing the evolution of events and feared that the lack of stability could have negative consequences on the situation in Poland. There was a political awareness that, if the internal tensions in USSR became violent, Poland was likely to face a massive migration from the East. Poland would not be able handle on its own such a huge inflow of immigrants, but closing of the boarders was also not a feasible option[142]. At the same time, the Western position towards the Central Eastern Europe was not certain either. Poland counted on foreign aid in case of possible crisis, but feared that the Western allies could remain indifferent, as it already took place in history. Fortunately, the Soviet Union dismantled in a relatively peaceful manner (described often as implosion) and the Western Europe declared its interest in helping in the development of the region.

When the European Community/Union declared that it was going to pursue the policy of openness towards the post-communist states, it had an immediate interest in encouraging the creation of new immigration policies, in order to protect itself from excessive immigration from the former Soviet block. Member States started exerting pressure on the Polish government to take actions aiming at halting the migration flows, which were reaching the West through the Polish boarder. Poland, driven by its ambition to join the European family, appeared to be a very receptive interlocutor.

The first results of the interplay of those two factors were visible very soon. In 1993 the Polish Minister of Foreign Affairs, Skubiszewski declared that Poland must develop its immigration system in accordance with the humanitarian principles and in line with the

[141] The two stages of the evolution of Polish immigration system was described by Milosinksi, C.*, Polish Responses to immigration*…, op. cit.

[142] It would be especially difficult to refuse the entry to the ethnic Poles residing in the ex-USSR, estimated for 1.2 to 4 millions. C. Milosinski, C., *Polish responses to* ..., op. cit.

European Community policies. He stressed that „every failure, each appearance of inconsistency (...) evokes negative repercussions abroad and weakens our [Polish] position"[143]. The statement can be interpreted as a political will to comply with the human rights standards enshrined in the international conventions recently ratified by Poland[144] and the determination of Poland to meet the expectations of the European Union. Both objectives were at the time closely associated, if not indistinguishable. The compliance with the western standards became the main imperative in Polish politics in each field, including immigration. This orientation was followed through the 90s, irrespective of changes of governments.

The first actions consisted of improving the border control and signing of readmission agreements. First such an agreement was signed with Germany in 1993 and was followed by other agreements with the neighbouring countries. The agreements were based on a mutual exchange: Polish consent on receiving returned migrants and its partners offering assistance in developing the immigration system. Germany – country which could benefit most from the co-operation with Poland in the field of immigration – offered its aid in form of expertise and financial resources[145]. Although training sessions, consultations as well as financial assistance were provided by different EU Member States, the input of the German partner was the biggest. These sessions resulted in better familiarity with the German immigration system and certainly remained not without an impact on the Polish officials and policy makers[146].

The main changes in the Polish system of dealing with the foreigners took place in the second part of the 90s. The first piece of legislation regulating the situation of foreigners in the post-communist Poland has been adopted in June 1997 and was further amended in 2001. In January 2003 the Council of Ministers adopted a new proposal of law on Foreigners. The Proposal was subsequently approved by the Polish Parliament on 13 June 2003 and at the moment is awaiting the final approval of the President. It is expected to enter into force in September 2003[147]. Another weak point of the Polish immigration system was the lack of appropriate infrastructure, which either did not exist or was outdated. In response to new

[143] Defused by the Polskie Radio Warszawa 29 April 1993 (after C. Milosinski, C., *Polish responses to*.., op. cit.)
[144] Poland signed the European Social Charter in 1991, to the European Convention on Human Rights in .., the Geneva Convention on Refugees in August 1991.
[145] In 1993 Poland received financial assistance from Germany in the form of 120 million German marks for the purpose of developing boarder controls and reforming legal system in the field of immigration. Milosinski, C., in *Polish Responses to immigration*..., op.cit.
[146] Information received during an interview with Ms E. Breda – official at the Polish Ministry of Interior and Administration.
[147] The information on the adoption of the new law comes from the Polish Ministry on Foreigners and Repatriation. The text of the new law will be published in the Journal of Laws in the coming weeks.

demands, a separate department was created in June 2001, replacing the old Department for Migration and Refugees. The new Bureau for Repatriates and Foreigners (a sub-unit of the Ministry of Interior) is responsible for managing asylum applications and regulating the situation of foreigners and repatriates residing in Poland[148].

The mobilisation in the late 90s and after 2000 can be explained in the context more and more close perspective of accession to the EU, especially since March 1998, when Poland together with other 5 candidates began the official accession negotiations. The best example of priority of the EU oriented goals is the change in the attitude towards the eastern neighbours. Initially, Poland launched a policy aiming at establishing free movement and encouraging economic relations with its eastern neighbours and Russia. These objectives were abandoned when the EU demanded stricter control at the eastern border. On the basis of the EU Regulation on visa requirement to third country nationals[149], Poland was obliged to introduce visa obligation to the nationals of Belarus, Ukraine and Russia.

4.3 Current provisions on family reunification – the situation in July 2003.

The 1997 Aliens Act did not contain any specific provision related to family reunification for foreigners. The general rules related to foreign workers were thus applied also to their families: they could apply for visa and residence permit for one year but they would not be accorded a working permit. The applications were examined on a case-by-case basis following the general procedure for admission of foreigners. More favourable treatment could be granted only at their discretion of the authorities. The 2001 Amendment introduced a new chapter dedicated specifically to the family reunion[150]. The provisions were formulated in order to comply with the Social Charter. The European Social Committee to the Charter in the XVI Conclusions (2002) Conclusions appreciated the improvement but still asked for some explanations concerning procedural aspects.

In the following paragraph the changes concerning family reunification included in the 2003 law will be discussed together with the legislation currently in force.

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[148] It has been created following the model of some of the EU Member states (Denmark, Finland, Luxembourg, Italy, the Netherlands, Sweden, Belgium, Portugal).

[149] Règlement (CE) n° L 081 539/2001 du Conseil du 15 mars 2001 fixant la liste des pays tiers dont les ressortissants sont soumis à l'obligation de visa pour franchir les frontières extérieures des Etats membres, Journal Officiel n° L 081 du 21.03.2001 p.0001-0007

[150] Section 3a of the 1997 Aliens Law.

Family members eligible for reunification

Both the current law and the 2003 Law make an explicit reference to the European Social Charter as the legal grounds for granting residence permit to family members, who wish to accompany a migrant worker[151].

The 1997 law (as amended in July 2001) provides that family members eligible for reunification include migrant's spouse and their dependent, minor children (below 18 years of age)[152]. It is interesting to note that the provision does not talk about the right to family reunification but about the possibility to accord a residence permit to family members of foreigners legally residing in Poland. Such phrasing distinguishes the Polish approach from the French or the German ones[153].

The provision specifies further that only spouses who concluded marriage recognised under the Polish law can be considered for family reunification. It is most probably intended to exclude non-marital unions (concubines) and civil pacts between the same sex partners, none of which is legalised under the Polish law. However, the phrasing of the provision is not sufficiently clear, which was pointed out by the European Social Committee[154]. Moreover, the provision on children specifies that it applies to children of both or one of the spouses as well as to adopted children, provided the adoption took place before the principal had arrived on Polish territory. Such a formulation is discriminatory towards children, who were adopted during foreigner' residence in Poland. It is difficult to think of a motivation for including such a limitation[155]. The 2003 Law does not introduce any changes to the definition of family members.

Although there is no explicit reference in the 1997 law on admission of parents of the foreign worker residing legally in Poland, such a possibility (in special circumstances) was mentioned in the Conclusions of the European Social Committee[156]. It places the Polish system in conformity with the practice common in other European Union states. As mentioned in the Chapter 2, in France it is practised in cases where foreigner's parents suffer from particular

[151] Art.17.2 (6) of the Aliens Law and art. 52.1 (5) of the 2003 law.
[152] Art. 24a.1 (1-2) of the Aliens Law and art. 53.2 (1-2) of the 2003 law.
[153] See footnote 84 in Chapter 2.
[154] European Social Charter, *Conclusions XVI-1*, vol. 2, Council of Europe Publishing, November 2002, p.553
[155] *Conclusions XVI-1*, op. cit. p.553
[156] *Conclusions XVI-1*, op. cit. p.553

hardship in their country of origin and a similar provision is included in the new Immigration Act in Germany.

Conditions for family reunification

Foreigners residing in Poland can apply for reunification with their family members on the basis of a settlement permit or a temporary residence permit, if they prove at least three-year residence in Poland prior to the application for reunification[157]. This requirement is in between the German requirement (unlimited residence permit) and the French one (1 year of residence). According to the European Social Committee the optimal time of postponing family reunion should be not longer than one year. The new law approved in 2003 did not reduce this requirement - the length of the principal's residence before family reunification can take place is maintained at three years (art. 53.1(1) and (3)). In addition, both texts stress that the application must be filled when the family is still outside of the Polish territory. No possibility of reunification sur place is envisaged[158].

Furthermore, the foreigner residing in Poland must be able to prove sufficient resources and housing suitable for accommodating the reunited family. The aim of this provision is to avoid that foreigners will become dependent on the social assistance. The principal should also show that he/she is can provide the rest of the family with health insurance. The above conditions do not apply to foreign family members of Polish citizens nor to family members of refugees, who were accorded asylum on Polish territory. These conditions are the same in both the 1997 and the 2003 law.

Finally, in the view of the new 2003 law a foreigner, who applies for a prolongation of his/her residence permit, can be refused residence permit if he/she does not comply with the tax obligations of the Polish Fiscal Bureau (art. 56.1 (9)). The last provision does exist neither in the French nor in the German legislation. The admission can be also refused if the applying family members can pose a threat to public order[159] or public health[160]. These requirements are common for all three countries. They are also in line with the margin of manoeuvre in the foreseen in the Social Charter.

[157] Art. 24a.1. of the Aliens Law.
[158] Art. 24.1 of the Aliens Law and art. 53.1of the 2003 law.
[159] Art. 24d.1 (3) of the Aliens Law and art. 56.1(5) of the 2003 law.
[160] Art. 24a.2. (1) of the Aliens Law and art. 56.1 (8) of the 2003 law.

Residence rights for the family members

Currently the reunited family members receive a residence permit valid for one year, which can be later renewed as long as the conditions for it are met (art. 24b.1 and 24b.2). If the principal holds a settlement permit, both spouse and children can be granted residence permit for up to two years (art. 24b.3). The 2003 law changes significantly the modalities of residence for family members. It suggests that children joining their parent(s) should be accorded residence permit for the period of residence of the parent residing already in Poland (art. 55.2(2)). A spouse could be accorded a residence permit valid for two years and subject to prolongation, if the principal holds a settlement permit or is authorised to stay in Poland for longer than two years (art. 55.2(1)).

According to the 1997 legislation, family members can apply for settlement permit after three years of residence on family grounds (art.19.1 (3)). This title is accorded for unlimited period. Apart from the residence requirement, the candidates need to prove means of maintenance and proper accommodation, and, most importantly they must demonstrate the existence of permanent bonds with Poland: be it on the family or on the professional grounds. The settlement permit is granted automatically to a child born on Polish territory of foreigner parents, if one of them held a settlement permit at the moment of the child's birth (art.19a of the Aliens Law and art. 63.1 (2) of the 2003 law).

The 2003 law maintains the privileged treatment to foreign family members, who must prove 3 years of legal residence before applying for settlement permit (art. 63.1(1c), while other foreigners must reside for at least 5 years. This provision is more generous than in the German law (in the Foreigners act 5 years of residence on family grounds is required before unlimited residence can be granted). Yet, both the German and the Polish system of granting settlement permit are more restrictive than the French one (usually 10 years residence permit).

Family members, who hold a residence permit or a settlement permit, receive a document called residence card[161]. This document specifies foreigner's identity, the legal grounds of his/her stay in Poland and the type of permit accorded. The particularity of this system consist of the fact that although settlement permit is granted for unlimited period, the residence card confirming this status must be renewed each 10 years. It makes the procedure more complex and questions the certainty of the settlement permit.

[161] Art.20 of the Aliens Law and art.71.1(1-4) of the 2003 law.

The Polish system of family reunification does not regulate the status of the reunited family members in case of interruption of family life. The law provides only that "residence permit shall be withdrawn or its extension shall be denied if the reasons for which such permit has been issued ceased to exist"[162]. Such a phrasing suggests that in a situation of divorce, separation or principal's death, the reunited family members will not be able to apply for prolongation of their residence permit. It is unclear what happens to family members who are in a possession of a settlement permit, since no such mention is made as a reason to revoke a settlement permit. It is likely that family members can remain on the Polish territory until the expiry of their residence card (10 years since issuing). It is also probable that after this period they will be able to prove family links or economic links in Poland and qualify for the autonomous settlement permit. The above interpretation is based on a logical analysis of the current provisions. However, it is necessary that the legislator establishes precisely the conditions for autonomous status of family members without giving place to doubtful interpretations. It is disappointing that the 2003 law did not tackle this issue.

Status of admitted family members:

1997 Aliens Law (art. 25) provides that the foreigners residing legally in Poland should enjoy the same rights as Polish citizens unless the present text specifies otherwise. Similar non-discrimination clause is included in the Polish constitution of 1997[163]. Although the Aliens act does not provide for limitations on social rights of immigrants, some other legislation acts impose limits to the rights and liberties available to foreigners. The next paragraph will show that in reality the status of a foreigner holding a temporary residence permit puts him in a disadvantaged position in many fields of the social reality.

Access to labour market

The access to labour market for foreigners in Poland is rather discriminatory. The unlimited right to undertake a paid employment or other type of activity bringing financial profits is accorded to foreigners who hold a settlement permit[164]. Given the fact, that it is necessary to prove stable economic links to receive a settlement permit, it is already clear that both are quite difficult to accomplish. The access to labour market is easier if a foreigner is granted unlimited residence permit on family grounds.

[162] Art. 22.2 (1) of the Aliens Law and art. 56.1(1)
[163] art.37.1 of the Polish Constitution of 2 April 1997, Journal of Laws, no. 78 issue 483, of 16.07.1997
[164] This provision is included in the Law on employment and on measures against unemployment of December 14, 1994, Journal of Laws no. 25 issue 128, 1997

The temporary residence permit does not exclude the holder from access to employment but the procedure in his/her case is much more complex. It requires that employer who offers a job to a foreigner asks for work the permit to the local authorities[165]. The authorities can refuse granting such a permit if the employer cannot prove that he is not able to find a candidate for the same position among Polish citizens. This criterion from the start diminishes the chances for obtaining a work permit by a foreigner if he/she does not have special qualifications. Yet, it is not usually an obstacle in employing highly qualified and experienced management staff in big enterprises. The second category of workers does not have a problem with access to employment in Poland. To the contrary, some recent changes in the Polish law authorise foreigners employed at high management positions to undertake employment in Poland for a period not exceeding 30 days during the year without any kind of residence permit or work permit[166].

The above regulations clearly show that Polish system is quite reluctant to accord foreigners the right to work. Such a situation is understandable in the context of high unemployment, which is one of the main social problems for the Polish citizens. The particularly difficult situation at the labour market and the discriminatory provisions towards foreigners make the access to work for not highly qualified foreign workers extremely difficult.

Social security and health insurance

Similarly to the previous aspect, access to social security is determined by the quality of residence title. The holders of settlement permit enjoy the same rights to social security and health insurance on the same conditions as the Polish citizens[167]. Foreigners whose residence in Poland is not of permanent character are guaranteed access to none of the two benefits. Those foreigners have to look for insurance in the private sector. In this aspect, the Polish law proves to be much less generous to foreigners than the French or the German ones.

Acquisition of citizenship

The procedure of naturalisation of foreigners residing in Poland is a long-term process. Foreigner residing in Poland can apply for citizenship after 5 years of residence on the basis

[165] Only some categories of workers are exempted from this procedure, it includes students if employed less than 3 moths during year, language teachers and family members of diplomats. op. cit.
[166] Resolution of December 19, 2001, Journal of Laws no. 153 issue 1765, 2001
[167] Law on systems of social security of October 13, 1998 Journal of Laws no. 137, issue 887, 1998 and the Law on universal health insurance of February 6, 1997, Journal of Laws no. 28 issue 153, 1997

of a settlement permit[168]. It should be remembered that settlement permit is admitted after 5 years of temporary residence for foreigners and after 3 years – to their family members. It takes around 8 or 10 years and thus, it is closer to the German procedure than to the French one (5 years and criteria of adaptation in the French culture). It is worth mentioning that in exceptional circumstances citizenship can be granted to foreigners who do not fulfil residence criterion[169].

The naturalisation procedure is much easier in case of a foreigner married to Polish citizen (art.10 of the Regulation on Polish citizenship). Here, the applicant must hold a settlement permit and be in the marital union for at least 3 years. It is interesting to note that the generosity of this provision is limited by providing very short period for applying. The application should be deposed during 6 months after both conditions are met (i.e. within 6 months after receiving settlement permit or after 3 years and 6 months after contraction of marriage). Although it is not explicitly mentioned in the Law, it can be assumed that after passing of this limit foreigners are subject to the regular procedure.

The citizenship accorded to both of the parents is automatically extended to their children. In case the child is over 16 years old the child's consent is taken into account. The child who is over 16 can choose to retain the citizenship of his/her parents. It differs from the French and German solutions, in which all minor children can retain dual nationality too eventually choose between them (at the age of 18 in France and at the age of 23 in Germany). In Poland, in such a situation, parents are obliged to decide for their young children, without the possibility to change it if later the child would have other preference.

Finally, the Polish citizenship law is strictly based on the ius sanguinis and it does not envisage granting citizenship to children born in Poland of foreign parents or who resided in Poland with their parents for a long time. In such situations children are subject to the general procedure. The lack of separate regulations for second generation of immigrants probably results from the fact that not many immigrants in Poland need this procedure. The recent cases of immigrants from the Far East to settle in Poland are not so numerous and they comprise only they usually comprise only the first generation. However, if this tendency will continue, it is obvious that in the future it will be necessary to create more privileged

[168] Art. 8 of the Regulation on Polish citizenship issued by the President of the Polish Republic, March 14, 2000; Journal of Laws no. 18, issue 23, 2000.

provisions for children who, although being brought up in Poland, are likely to face discrimination in the social realm on the basis of their nationality.

To sum up, the 2003 Law modifies the procedure of family reunification in few details. The main change consists of extending the period of the first residence permit granted to family members. Moreover, the formal structure of the text has been changed: family reunification is no longer regulated in a separate chapter, but is included under the general regulations on granting residence and settlement permits for foreigners. Although the scope of rights conferred by both documents is similar, the new structure seems much less clear, since the provisions relevant to family reunification are spread across three chapters of the law.
Another interesting point is that for the first time the legislator did not take into account the suggestions of the European Social Committee. Does it mean that Poland is loosing its enthusiasm to improve the human rights standards advocated by the Council of Europe and starts following the minimum approach of the European Union? The analysis of only one aspect of immigration policy may be not enough to draw such a conclusion. Nonetheless, it is probable that it is the first sing of a new tendency in the Polish immigration policy.

4.4 Between humanitarian standards of the Council of Europe and restrictive immigration policy of the EU – which standards will prevail?

The Polish legislation on family reunification for foreigners has been created only very recently. The practice based on the Aliens Act amounts to around six years, while the amended version containing a separate chapter on family reunification is into force for less than two years. Given such a short experience of Polish authorities in according right to family reunification and not so numerous applications, one can understand why many provisions are not sufficiently clear or why the some other aspects have not been taken into account at all. Nonetheless, it can noted that the intention of the Polish legislator was to meet the standards enshrined in the international human rights treaties, to which Poland became party in the last decade[170]. The membership in the Council of Europe and the signing of the European Social Charter provided the incentive for Poland to elaborate a set of regulations on family reunification, which would be compatible with the requirements of the article 19 of the

[169] The decision to grant Polish citizenship (according to the regular procedure or in exceptional circumstances) is taken by the President.
[170] Poland signed the European Social Charter in 1991 and ratified in 1997. It took six years to adapt the Polish social legislation to the provision of the Charter.

Charter. The definition of family members, the age of children and the conditions of admission in principle meet the expectations of the Social Charter, although the European Social Committee asked for explanations with respect to some details, which were not sufficiently clear.

From the analysis of the current laws it appears, that the real difficulty for a foreign family member starts when he/she is already allowed to reside on the Polish territory but does not qualify yet for a permanent settlement status. The status of temporary residence is subject to many restrictions in the realm of social and economic rights, such as access to labour market, social security and even health care or education for children[171]. The status of non-permanent residence appears rather discriminatory. One can imagine that in such circumstances it can be more convenient to stay illegal. The tendency not to accord full rights to short term migrants makes the Polish law closer to the German one. Although German government did not try to influence overly the Polish immigration system, it is highly probable that the German model exerted an impact during the training sessions, consultations and expertise provided to Poland. Undeniably, the German neighbour was and is the closest example to observe, to learn and to follow. In addition, if Poland does not manage to reduce the unemployment rate, it is not likely that in the nearest future short term immigrants will have a more open access to the labour market.

The Polish system is still in the phase of development. So far Poland has made a great effort to adjust the legislation on family reunification to the standards enshrined in the European Social Charter. However, at the moment when the accession to the European Union is already certain[172], it is possible that the EU law will have more influence on Polish internal system than the standards set by the Council of Europe. The 2003 Directive, which will soon become binding as a part of the *acquis communautaire* is likely to become the most relevant point of reference in the field of family reunification.

The above interpretation seems to be supported by the general perception of immigrants in Poland. It is interesting to note, that although only relatively small number of foreigners reside in Poland, one can already sense the negative attitude towards immigrants, especially towards those coming from the East. Paradoxically, the nation, which was for a long time

[171] Foreign children residing temporarily in Poland do not have access to public (unpaid) education as it is the case for Polish children and foreigners holding a settlement permit. Regulation of the Minister of Education of September 8, 1993, Journal of laws no. 88 issue 409, 1993

migrating all over the world for political motives or in search of improvement of social and economic conditions, now becomes hostile towards aliens, who come to Poland for exactly the same reasons. The source of such an attitude can be explained in various ways. Many attribute it to the difficult economic situation. In the context of unemployment rate reaching in some regions up to 20%, foreigners can be perceived as a competition for the scarce employment opportunities. Poland is also used to the homogeneity of its population, thus every new group of different culture is treated with suspicion. It is the fear of unknown rather than prejudices based on experience of dealing with the foreigners. Yet another possible explanation is that the negative attitude towards immigrants has been transmitted to Poland by the Western neighbours (paradoxically together with the humanitarian standards!). Indeed, it is difficult disclaim the legitimacy of this explanation. The phenomenon of immigration has been portrayed in the media and in political discourse as a threat and burden to the society. The extreme right politicians in many western countries try to present immigrants as a damaging force to the social fabric and a matter that should be controlled and restrained at any price. Those images for sure did not remain without an impact in the perception of immigration in Poland. The Helsinki Group Human Rights Watch reports, that the Polish police too often fails to observe the law when dealing with immigrants and refugees. The Helsinki Group noted in its report that foreigners receive very little protection in the view of Polish national law and that the international conventions are often not well enough transposed into domestic provisions and not well applied by the judges.

If the experiment of Eastern enlargement proves to be an economic success, Poland and other countries in the Central Eastern Europe are likely to become destination for numerous immigrants from Ukraine, Belarus and Russia. The existing immigration system in Poland is absolutely not prepared for such an alternative. Measures of integration of aliens are very poor and family reunification is a perfect illustration of it. If in the future following enlargement Poland will become an attractive target for immigration, it will be as unprepared receiving and integrating aliens it as is the case nowadays in Italy or Greece. The German model of policy towards immigrants, which is likely to remain vital for the Polish conception, can lead to problems faced nowadays by the German society: poor integration of immigrants and social reluctance towards foreigners on the part of the native society.

[172] The referendum among Polish population on June 8, 2003 has successfully approved the accession of Poland to the EU. Gazeta Wyborcza, 9 June 2003 p.1

Conclusions

The discussion on family reunification carried out in this work examined the tension between the fundamental human right to the protection of family life and the state interest in the field of immigration policy. Let us try to answer the main questions in the discussion in the following points.

1. Is there a basis for the right to family reunification in the international human rights conventions?

The analysis of the principal international human rights treaties revealed that the provisions on the right to the protection of family life do not explicitly confer the right to family reunification for foreigners residing legally in a hosting state. It is undeniably true that individuals can claim their right to family unity in a country of which they are nationals. However, the residence permit of one family member in a hosting state does not automatically guarantee the authorisation of entry and residence for his/her family members. The later (as well as the principal at the moment of his arrival to the hosting state) have to follow the procedure of admission and regularisation of residence. Countries are encouraged to grant privileges in admission on family grounds, however, they are also free to set certain conditions in order to protect the interest of the society.

The Convention of the Rights of the Child, the ILO Conventions and the Conventions on the Status of Migrant Workers contain more explicit references to the preservation of family unity across international boarders. However, none of these provisions confers the unlimited right to family reunification. None of them imposes more than a moral obligation to establish favourable conditions for admission of family members. Yet, it should be stressed that the ILO conventions played an important role in shaping states policies towards migrant workers, including promoting family reunion.

2. Conflict of standards between the Council of Europe and the European Union frameworks?

At the regional level, the approaches to family reunification for third country nationals represented by the Council of Europe and by the European Union are clearly divergent. The instruments elaborated by the Council of Europe (above all the European Social Charter and the 1977 Convention) impose on the signatory states the obligation to facilitate as far as possible the process of family reunion. This provision is incorporated in the broader structure

of article 19, in which migrant workers and their family members are given the right to protection and assistance.
It should be underlined that the phrasing of the Charter's does not permit to view family reunification itself as "a right", nonetheless the formulation "facilitate as far as possible" can be used to eliminate practices in national orders imposing arbitrary limits on this process. The European Social Committee in its yearly Conclusions reviews the national laws and practice. The Conclusions of the Committee serve to gradually eliminate the conditions restricting unreasonably the access of family members to the hosting states. Moreover, the Council of Europe in the recent Recommendation (2002) 4 encouraged the states to aim at equating the rights of the long-term residents and their family members with the ones of the EU nationals.

The European Directive on family reunification is very progressive in recognising explicitly the right to family reunification or applying the broader concept of the family (including non-married couples and homosexual couples). However, it is regrettable that the initially intended objective to create a basis for harmonisation of national policies has been abandoned. The eventual result of negotiations took the form of an instrument setting the minimum standards for national legislation. The worrying fact is that the minimum standards have been set at a very low level, which gives a very broad margin of appreciation to the states in setting the conditions for admission. The danger of such a situation is it can provide an incentive to lower the standards of protection below the requirements of the European Convention. The greatest risk of human right violation lies in the possibility of restricting the entry of children older than 12 and the possibility of indefinite extension of the examination procedure. What is more, the Directive permits for expulsion of admitted family members on the sole basis of not sufficient resources.

As far as the status of admitted family members is concerned, the provisions of the 2003 Directive are definitely a product of the current political and economic situation in Europe. The Directive allows for imposing significant limitations on the access to social and economic rights for reunited family members. Such policy clearly contrasts with the Council of Europe policy of according at least the status equal to the one of the principal, or of the objectives set in Tampere – to approximate as far as possible the status of long term residence to the one of the EU nationals. A careful observer must notice that the political climate in Europe has changed since the Tampere Council. The humanitarian objectives of integration of immigrants gave place to the concerns of security and to overcoming the economic recession. The high

unemployment rate in some of the Member States creates negative climate for foreigners, who are perceived as additional burden to the labour market and social security system. In such situation the states receiving huge numbers of immigrants were concerned to preserve their powers to control the situation on the internal market.

3. National solutions in France, Germany and Poland

Although the German and the French systems on family reunification have been anchored in the same European framework, their general approach and particular regulations appear to be quite different. The reasons for such divergence of policies can be found in the history of the two counties and their political traditions in policies towards incoming migrants.

In the post-war boom both countries opened their labour markets for foreign labour force, however, on different conditions. The French policy from the very beginning assumed the goals of assimilation of immigrants and their families. In addition, since most of the immigrants in France were coming from the former French colonies, their adaptation to the new environment was facilitated by the familiarity with the French language and with the French model of administration. Although the cultural differences were still there, family reunion was certainly enhancing the integration of newcomers into the society. To the contrary, the German policy based on the rotation principle, aimed at preventing foreign workers from staying longer than two years in Germany. It did not eliminate totally the phenomenon of settlement of foreigners with their families, but diminished it significantly. These historical determinants proved to play an important role in the later approaches towards immigrants.

In the course of decades following the oil crisis France and Germany adopted policies limiting the access of foreign workers to their national labour markets. The asylum procedure and family reunification became, thus, the only legal ways of settling in those two countries. In both countries the conditions on family reunification became stricter. France was gradually abolishing the preferential treatment to nationals of its former colonies and German government focused on the integration of the already present migrants, and on limiting the entrance of new ones. The most important acts in the field of immigration policy at that time were the 1993 Pasqua law in France and the 1990 Foreigners Act in Germany. Although the Pasqua law is famous for its restrictive policy, in reality, the family reunification procedures were not greatly affected. Compared to the French legislator, the German one imposed more

restrictive conditions, especially with respect to the maximum age of children and to the access to social and economic right of foreigners residing on the basis of a temporary permit.

The current French provisions on family reunification prove to be in accordance with the requirements of the European Social Charter. To the contrary, German law not only is not in conformity with the article 19.6 and the Conclusions of the European Social Committee, but the newly proposed Immigration Act goes even further in restricting the admission and the conditions of foreign family members. There is a risk that the right to family reunification guaranteed in the German law can be rendered redundant by the requirements conditioning the possibility to exercise it. The German policies on admission and residence of foreign family members are very close to the minimum requirements of the 2003 Directive.

The political situation in Poland before the fall of the communist regime did not require any sophisticated immigration system. In the post-1989 Poland the immigration policy and legislation had to be created. The motivation for the development of immigration policy in Poland – both external and internal was boiling down to the Polish preparation for accession to the western structures. The ambition of Poland was to fulfil all the necessary conditions to enter the elite club of the European Union. At the same time, the European Union Members States were willing to offer financial and help in order to protect themselves from the inflow of immigrants from the east, transiting across the Polish territory. The immediate neighbour of Poland – Germany – which was mostly exposed to these flows– offered the greatest support in terms of financial means and expertise. The assistance on the part of Germany played a role in shaping the Polish immigration policy. Although there was no overt pressure on the Polish legislator, the influence took place via informal channels during the consultations and training sessions. The Polish provisions on family reunification have much more in common with the German ones than with the French one.

Polish system on family reunification resembles the German model in requiring longer period of residence of the principal before the reunification is possible, while it is more open in that it sets a more favourable age limit for children (similar age limit is recognised in France). In Poland, the admitted foreign family members are treated in a discriminatory way as long as they hold a temporary residence permit. Their access to the labour market and to social security benefits is significantly limited, unless they obtain a settlement permit. Here again the similarity to German system is striking.

The particularity of the Polish system, unlike the German or the French ones, is that it does not recognise the right to family reunification. The phrasing used is "foreigners can be granted" admission and residence on family grounds. It is interesting to note that also the newly prepared German Immigration Act replaces "the legal right to..." with the phrasing "shall be granted". The lack of explicit recognition of the right of foreigners to family unity will be incongruent with the 2003 Directive, thus is likely both the Polish and the German legislators will be obliged to introduce relevant changes. Moreover, the Polish system fails to regulate some important aspects of family reunification process (such as the autonomous status of family members) or contains provisions, which are not sufficiently clear. It is highly regrettable that the new 2003 Law did not make an effort to improve those aspects. For the first time also the comments included in the Conclusions of the European Social Committee have not been taken into account when changing the legislation. It can be interpreted as a sign that Poland is reorienting its goals: the Council of Europe Standards are becoming less relevant than the framework of the European Union law.

4. Is common European policy on family reunification possible?

The policy of family reunification, as other aspects of immigration policy, remains among the prerogatives of national legislation. It is also up to the national legislation to recognise the right to family reunification or to approach it as a special type of procedure on admission of foreigners. The international and regional human rights treaties provide some guidelines for how the conditions on admission and reception of family members should be shaped. The European Social Charter played an important role in setting the standards for national provisions in many Member States of the Council of Europe, even if some other countries, like Germany, ignored persistently the comments of the European Social Committee.

The 2003 Directive constitutes a breakthrough in establishing the legal basis for family reunification on the level of the European Union. It will soon become binding law in twelve EU Member States and, since May 2004, also in the candidate countries. Nonetheless, the contribution of the Directive to the harmonisation of national provisions in Member States will be minimal. Apart from the fact that finally the right to family reunification will be recognised on the European level, the minimum standards on admission and residence of foreign family members are extremely low. As a result, states maintain a very broad margin for manoeuvre in establishing the final details as to the conditions for according the entry and residence on their territory. Paradoxically, the "soft" provision of the European Social Charter

with its imperfect control mechanism contributed more to the harmonisation of national policies than it will be the case of the binding law of the 2003 Directive.

The great danger of the 2003 Directive is that it can provide an incentive for lowering the standards of protection already established in national legislation (some of the provisions can potentially give place to violations of human rights guaranteed by the European Convention of Human Rights!). The example of the about-to-be-introduced German Immigration Act, which contains stricter conditions on admission, is the first symptom of this tendency. Moreover, countries like Greece, Italy, Spain and Portugal, which only recently became destination for immigrants, have a green light to establish restrictive rules in aspects, which are not yet regulated. The same will apply in the future Member States. The candidate countries, which do not receive many foreigners and immigration is not a social problem, seem to quickly adopt the generally negative attitude towards immigrants. The Polish law on family reunification is still in the phase of development. The recent changes show the tendency to follow the German model.

The overall impression resulting from the above analysis is that the right to family reunification is a highly volatile issue. The national legislation in this matter is influenced to great extent by the internal factors such as situation on the labour market or security concerns. In the political discourse immigrants are very often accused to play a major role in the social and economic problems. The policy on restricting immigration most of the time leads to imposing more restrictive conditions on family reunion for third country nationals, and in such cases the human right standards become a secondary concern.

The current diversity and the most recent changes in immigration show that it is too early to talk about a common policy in the field of family reunion. The attempt to create grounds for harmonisation of the policy on family reunion in the European law was not very successful. The difficult negotiations in the preparation of the European Directive proved that the Member States are not willing to shed their foreign rights in controlling means of legal immigration. The Member States were trying to defend national norms and export them onto the European level. Poland and other countries in the region have already attained the objective of joining the western structures. The integration of the standards in human rights protection into the national legal orders has been practically completed, although some minor improvements are still necessary – of which family reunification can be an example in case of

Poland. The most recent development in the Polish law proves that Poland looses its interest in complying with the ambitious standards of the Council of Europe and starting to follow the minimum rights approach of the 2003 Directive. It is not surprising, since the 2003 Directive will be the most essential point of reference after Polish accession to the European Union in 2004. The fact that the new law (adopted in June 2003) did not implement the recommendations of the European Social Committee seems to support this tendency.

Finally, apart from failure of the attempts to create a harmonised approach to family reunion on the European level, the very worrying symptom of the recent developments is that the already established standards of protection of foreigners can be contested. The great risk of such situation is that the European Union Law can, at some point, come into conflict with article 8 of the European Convention of Human Rights. It can lead to a paradoxical situation in which the two legal orders – the European Union law and the European Convention will become not compatible. It will be the task of the European Court of Justice to provide an interpretation to avoid this kind of conflicts.

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Abstract

Family reunification for third country nationals residing legally in a hosting state can be viewed as an integral part of the fundamental human right to family life, but also as a mean of legal migration, over which states are entitled to excercise control. The aim of this work is to examine the interaction between the two components. For this purpose I look for the basis for the right to family reunification in the interantional human right treaties and in the context of the regional European framework. At the European level, the treaties developed under the auspicies of the Council of Europe and the recent developments in the field of immigration policy on the European Union are taken into account. Subsequently, the national provisions on family reunification in three countries – France, Germany and Poland - are examined. The three case studies show the diversity of approaches to this phenomenon at the national level. The diversity in national systems on family reunification can be attributed traditional responses to immigration, the particularity of geographical location of those countries and to the political factor. The comparative analysis of national provisions of family reunification is also intended to check the compatibility of those systems with the frameworks of the Council of Europe and of the European Union. Finally, I try to assess to which extent the European Union has been successful in developing a harmonised approach in this aspect of immigration policy.