



IOM International Organization for Migration
IOM Internationale Organisation für Migration

SMALL-SCALE STUDY IV

FAMILY REUNIFICATION IN AUSTRIA

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Preface

This Study on Family Reunification Policy in Austria was compiled by the International Organization for Migration (IOM) Vienna in its function as National Contact Point (NCP) Austria to the European Migration Network (EMN). The country study follows a common outline and methodology, which was prepared by the European Migration Network.

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The reference period of this study complies with the period from 2002 to 2006. A first version was already produced in 2007, which constituted the basis for the Synthesis Report on Family Reunification published by the European Commission in January 2008. The final version of the Austrian study was submitted in August 2008.

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1. Executive Summary

The fourth Small Scale Study compiled by the Austrian National Contact Point (NCP) to the European Migration Network (EMN) focuses on Family Reunification in Austria. The study gives an overview of national rules and regulations for family reunification regarding third country nationals, policy changes including public debates and the size and composition of family reunification during the reference period 2002-2006.

The entry into force of the new Aliens' Law Package on the 1st of January 2006, in particular the Settlement and Residence Act 2005 (Niederlassungs- und Aufenthaltsgesetz, NAG) entailed changes of the rules for family reunification. These changes were mainly due to the transposition of the Council Directive 2003/86/EC on the right to family reunification into national law. In Austrian legislation, the main element of all constellations of family reunification is that the right to residence is derived from the sponsor's right to residence. Thus, dependants are not necessarily admitted after their sponsor, but can also be admitted together with him/her.

Chapter three provides an overview on family reunification policy and the legal conditions for family reunification as stipulated by the Settlement and Residence Act (NAG). The Council Directive 2003/86/EC builds the framework for the analysis of national family reunification rules. After outlining the conditions for granting entry and residence, the study looks at the policies and practices with regard to specific articles, e.g. the conditions for submitting an application for family reunification, assessment of family ties, waiting periods, requirements for receiving a residence title, access to employment, possibilities to be granted an autonomous permit, rejections of applications and judicial review. In addition to the provisions for family reunification according to the NAG, the study also explains the procedures for family reunification of recognised refugees. If their family relationships existed prior to their entry to Austria, they are entitled to family reunification according to the Asylum Act (AsylG) and are exempt from the requirements as stipulated by the NAG (e.g. proofs for accommodation, insurance, stable and regular resources etc.).

Furthermore, this Chapter also emphasises the transposition of optional clauses of the Council Directive 2003/86/EC. In general, Austria did not make use of the option of opening opportunities for family reunification to a wider circle of persons, e.g. unmarried partners or first-degree relatives in direct ascending line. In the case of recognised refugees, family reunification is confined to the nuclear family, if family relationships predate the entry of the sponsor. Concerning autonomous residence titles, Austria transposed the option to issue an autonomous residence title to dependants in difficult circumstances (e.g. widowhood) which is independent from the sponsor's right to residence. Assessing the transposition of Directive

2003/86/EC into national law, researchers argue that the provisions for family reunification are hence more liberal, and that complexity of family reunification legislation was reduced. On the other hand, criticism was put forward by authors such as Groenendijk et al. (2007) and Ecker (2007) whether some provisions of the Directive were correctly transposed. When analysing the public debates on this topic, it is interesting to see that the transposition of the Directive attracted little attention; public debates on family reunification for third country nationals were rather rare and debates mainly concentrated on waiting periods and the exhaustion of the quota.

Although third country nationals are the focus of this study, we briefly outline the conditions for family reunification of dependants of Austrian, other EEA and Swiss nationals, as with the entry into force of the new NAG, particularly the provisions for the admission of these groups were changed. The NAG introduced a distinction that refers to the use of a person's freedom of movement; sponsors who do not qualify accordingly, face more severe conditions regarding the admission of their (third country national) dependants. The effects of the new provisions, which mainly affect Austrian sponsors, are visible in the statistics on issued residence titles: the number of settlement permits issued to this group of people declined significantly. Contrary to the family reunification of third country nationals, the policies referring to Austrian nationals attracted far more public attention and were more comprehensively debated in the media discourse.

The study also sheds light on the developments of family reunification policy in the period 2002 to 2006. In this framework, the study takes a view with a comparative perspective at the legal provisions which were in place before the NAG entered into force in the context of policy debates. To give an example, a controversial issue was the confinement of the admission of minors only until the age of 14, which was abolished by the Constitutional Court. Comparing the NAG with the conditions as stipulated by the old Aliens' Act (Fremdengesetz, FrG), the provisions of the NAG on family reunification are more favourable, e.g. on the access of dependants to employment. Yet, the principle that family reunification is regulated by a quota which is fixed annually was retained by the NAG. Because the number of applications for family reunification exceeded the number of quota places available, applicants have been confronted with waiting periods during the past years.

Chapter four gives an overview of statistics on the admission of dependants. Data source are the yearly statistics compiled by the Ministry of the Interior on residence titles which were issued from 2002 to 2006. During this period, the number of issued permits generally declined, while the strongest decline was registered from 2005 to 2006. This decline can be attributed to changes in the legislation. The share of dependants in the total number of persons who are granted a first residence title has been considerably high between 2002 and 2006; at least 70% of first residence and settlement permits were issued to dependants, the

number being even higher in recent years. Yet, it is important to highlight that the number of permits which were issued to dependants of third country nationals remained more or less stable during the past years. The general decline of issued residence titles is primarily a result of the decline of permits which are issued to the dependants of Austrian nationals.

2. Introduction: Family Reunification in Austria

2.1 Background information

The fourth Small Scale Study compiled by the Austrian NCP to European Migration Network (EMN) deals with family reunification of third country nationals in the EU. Besides Austria, another eight countries participated in this study, namely Estonia, Germany, Greece, Latvia, Romania, Sweden, the Netherlands and the United Kingdom.

Today, in some EU Member States, a considerable share of immigrants are admitted in the framework of family reunification. This Small Scale Study on Family Reunification aims at giving an overview of national rules and regulations, changes of family reunification policy, public debates and the (development of the) size and composition of family reunification during the period 2002-2006. The target audience for this study are policy makers at national and European level (including the Commission), institutions, non-governmental organisations and research institutions working on migration related issues.

Concerning the legal framework of family reunification, the transposition of the EU Directive 2003/86/EC¹ on the right to family reunification is of particular relevance for this study. For Austria, full transposition of the Directive was reported in 2006.

Based on the main results of the country studies, the European Commission produced a comparative Synthesis Report, summarising the trends and developments and identifying similarities and differences in the approaches of Member States towards family reunification for the participating countries. Although the study includes information regarding the 'sponsor' (the person, who brings his/her family members along with him/her to Austria), the focus will be laid on his/her family members, referred to as 'dependant' in this study.

2.2. Definitions

This study mainly refers to definitions which are laid down in EU Directive 2003/86/EC. The exception builds the definition of the term "dependant", which was agreed upon by the participating National Contact Points (NCPs) to the EMN during the preparations of this study. Thus, a 'dependant' is defined by the EMN as *"any person, who is granted entry and residence by a Member State (MS) to stay with their family member (i.e. the person referred to as 'sponsor' in Directive 2003/86/EC) and who has explicitly filed an application for reasons of family reunification"*.

¹ Council Directive 2003/86 EC of 22 September 2003 on the right to family reunification, Official Journal of the European Union L 251/12, 3 October 2003

In addition, the following terms as defined in EU Directive 2003/86/EC were used:

A 'nuclear family' consists of the spouse and the minor children (2003/86/EC recital nr. 9).

A 'third country national' is *"any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty"* (2003/86/EC Article 2(a)). Although this study focuses on family reunification of third country nationals, reference is made to (third country national) dependants of Austrian nationals and other EEA nationals where feasible. One intention of the new Settlement and Residence Act (NAG) was to curtail family reunification of Austrian nationals, which has significantly increased during the past decade.

A 'refugee' *"means any third country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967"* (2003/86/EC Article 2(b)).

A 'sponsor' *"means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her"* (2003/86/EC Article 2(c)).

'Family reunification' *"means the entry into and residence in a Member State by family members of a third country national residing lawfully in a Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry"* (2003/86/EC Article 2(d)). Strictly speaking, the term family reunification implies that dependants immigrate to a country where the sponsor has already been admitted. Even though this term is being used in the Austrian legislation, it is to some extent misleading. Although the majority of dependants of third country nationals are admitted to Austria after the sponsor has settled down (*"family reunification" within the yearly quota*)², it is possible that dependants are admitted at the same time with their sponsor (e.g. the dependants of key professionals). It is important to mention that statistics on residence titles do not allow for a clear distinction about a dependant being admitted together or after his/her sponsor. However, according to Austrian legislation, the right to residence/settlement of a dependant is derived from the sponsor's right to residence/settlement. This fact can be seen as the main element of all constellations of family reunification in Austria is the fact that the right to (Kutscher et al. 2006: 48).

A 'residence permit' *"means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals"* (2003/86/EC Article

² Within the yearly quota for settlement permits, the largest share of permits is foreseen for family dependants of those third country nationals, who are already residing in Austria and hold a settlement permit.

2(e)). According to the Austrian legislation, there are two different categories of residence titles: the settlement permit (Niederlassungsbewilligung) allowing long-term settlement and the residence permit (Aufenthaltsbewilligung, formerly Aufenthaltserlaubnis) providing a limited time of residence. More often than not the study speaks of 'residence titles', which is used as umbrella term for these two types of permits.

An 'unaccompanied minor' *"means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States"* (2003/86/EC Article 2(f)).

2.3. Methodology

The methodological approach of this study was desk research. National legislation (e.g. the Settlement and Residence Act 2005, the Asylum Act 2005, the EU-Directive 2003/83/EC), scientific literature (books, reports and scientific articles), online resources, statistics, press releases and newspaper articles were used as sources of information.

In general, scientific literature on family reunification policy in Austria is scarce. Mostly, family reunification is dealt with in a broader and more general context of immigration and admission policy in Austria. Concerning legal developments and the transposition of the EU Directive 2003/836/EC, scientific articles (e.g. in the journal *Migralex*) as well as the study published by Groenendijk et al. (2007) on "The Family Reunification Directive in EU Member States" were of utmost relevance. Statistics on issued residence titles as well as on registered valid residence titles are published by the Ministry of the Interior on a monthly and on a yearly basis. In addition to the publicly available statistics, the Ministry kindly provided additional statistics on issued residence permits, which added some interesting aspects to this study (see Chapter 4). In addition, specific questions on administrative practices were addressed to the provincial governments of Upper Austria and Tyrol by phone. A systematic query to all provincial government administrations was not possible due to the short timeframe foreseen for this study.

3. National Family Reunification Policy in Austria

3.1. Introduction – Aliens’ Law Package 2005

In the framework of the adoption of the Aliens’ Law Package (Fremdenrechtspaket) the Council Directive 2003/86/EC on family reunification was transposed into Austrian law: The new Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz (NAG)), the new Aliens’ Police Act 2005 (Fremdenpolizeigesetz, FPG) and the new Asylum Act 2005 (Asylgesetz, AsylG) entered into force on the 1st of January 2006³. One aim of the adoption of these new laws was the transposition of EU legislation into national laws, next to more fundamental changes of the asylum and immigration system.⁴ Chapter three describes the legal situation for family reunification in Austria as of 2006, whereas the EU Directive 2003/86/EC serves as a framework for this analysis.

Directive 2003/86/EC applies for a sponsor holding a residence title for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence (Art. 3). According to Ecker (2007: 44), the Directive does not apply to family dependants of sponsors who have a residence permit (Aufenthaltsbewilligung), but only to holders of a settlement permit (see also Comments to the NAG, RV 952 BlgNR. 22 GP: 146). However, the author argues that the crucial element as stipulated by the Directive is not the limited period of validity of the permit, but the option its renewal. Following Ecker’s interpretation, the Directive could also be applied to certain categories of residence permits which can be renewed and consequently allow a stay exceeding one year. In order to get a more complete overview, the present study will also cover the legal possibilities of family reunification for sponsors holding a residence permit.

Basically, there are two different kinds of residence titles in Austria: the settlement permit intending long-term settlement and the residence permit for temporary residence. The dependants of third country nationals holding a settlement permit are entitled to settlement, but their admission is subject to a quota. There are different quotas as well as different settlement permits for dependants, contingent upon the type of settlement permit the sponsor holds. In special cases, family reunification for settlement permit holders is not subject to a quota. This is rather the exception than the rule (Kutscher/Poschalko/Schmalzl 2006: 54-55).

Although a residence permit does not entitle to settlement (§ 2 par 3 NAG), family reunification is indeed possible (to secure family community as stipulated in Art. 8 of the

³ Besides those which were newly adopted, the Aliens’ Law Package also changed other laws, e.g. the Federal Care Act (Bundesbetreuungsgesetz).

⁴ To read more about these legal developments as well as the policy debates on the Aliens’ Law Package, consult the „Policy Report on immigration and integration 2005“, available at <http://www.emn.at>.

European Convention for Human Rights (ECHR))⁵, but restricted to certain groups such as students, artists, intra-corporate transferees (Rotationskräfte)⁶ or researchers. Other groups are explicitly exempted from the possibility of family reunification.⁷ If the sponsor holds a residence permit, the family relationship with the spouse must predate the entry and admission of the sponsor (§ 69 par 1 NAG). This is a major difference compared to holders of a settlement permit, as for them this condition does not apply.

3.2. Overview of the current state of national family reunification policy

3.2.1 Conditions for granting entry and residence

In Austria, only members of the nuclear family, comprising the spouse and unmarried minor children (up to the age of 18 years) can be admitted to Austria for the purpose of family reunification (§ 2 par 1 lit 9 NAG). The law does not stipulate a maximum age for children when filing their application for family reunification.⁸ Partners, first-degree relatives in direct ascending line and adult married children are not entitled to be admitted for family reunification. For the spouse, a minimum age of 18 years is required, for the reason of preventing forced marriages (Kutscher/Poschalko/Schmalzl 2006: 49). Entry and residence can be granted to a minor child of a further spouse and the sponsor, if the sponsor has the parental care.

In the case of recognised refugees, family reunification (for the nuclear family) is regulated by the Asylum Act (see below). But if the family relationship does not predate the entry of the refugee, family reunification is subject to the quota regulations of the Settlement and Residence Act (NAG). In the case of unaccompanied minors, a legal guardian or any other family member is not to be admitted for family reunification. The Asylum Law explicitly states this to be only possible for dependants, i.e. the nuclear family (§ 2 par 1 lit 22 AsylG).

In Austria, there are general admission criteria for entry, residence and settlement, which apply to all third country nationals. These requirements include the fulfilment of the integration agreement, but with exemptions for certain groups (see below). Most important, the right to residence/settlement of a dependant is deducted from the sponsor's right to residence/settlement.

⁵ The European Convention for Human Rights (ECHR) is constitutional law in Austria.

⁶ Intra-corporate transferees (Rotationskräfte) are employees working for an international company and who change their place of employment within the company (rotation), e.g. managers, qualified employees for the purpose of training, employees of representations of interest.

⁷ These are dependants of pupils, self-employed persons, persons working in social services (Sozialdienstleistende), and business delegates (Betriebsentsandte) who work for their employer in another company (§ 69 par 2 NAG).

⁸ Article 4(6) 2003/86/EC allows that Member States restrict the filing of applications for family reunification to children under the age of 15 if this had already been legal practice before the Directive entered into force.

3.2.2 Policy and practice with regard to specific articles of Council Directive 2003/86/EC

Submission and examination of the application (Art 5 2003/86/EC)

As for residence titles in general, applications for family reunification must be submitted in person. For persons who are not capable of acting (e.g. minors under the age of 14 years), their legal representative may file the application (§ 19 par 1 NAG). In case of minor children aged over 14 years, the residence title will be consigned directly to them.

In general, applications for first residence titles have to be filed at the locally responsible Austrian embassy or consulate abroad⁹ (§21 par 1 NAG). The applicant is not entitled to enter Austria before the decision has been taken. In line with Article 5(3) of the Directive, applications for family reunification may in exceptional cases be filed in Austrian territory¹⁰. The embassy or representation abroad has to verify the correctness of the given information and its completeness (§ 22 par 1 NAG). After the application was filed at the embassy or representation abroad, it will be submitted to the responsible provincial governor. The application is then entered into a register and ranked according to its date of submission. The responsible district commission (Bezirkshauptmannschaft) or, in cities with own statute and Vienna, the municipal authority (Magistrat) takes the decision and if approved, issues the residence title. If a settlement permit is subject to the quota system, it can only be granted if a place within the yearly quota is available.

If the district administration or municipal authority takes a positive decision, the embassy or the consulate abroad will be authorised to issue an entry visa. Then, the applicant can file a visa application within a period of three months. If the applicant misses this time limit, the authorisation to issue a visa lapses. In case the applicant does not collect the residence title at the district administration or the municipal authority within a period of six months, the procedure will be closed (§ 23 par 3 NAG). In this case that title is not collected, the respective place within the yearly quota can be passed on to the subsequent case (a quota place is only considered to be taken, if the person collects the residence title) (§ 23 par 2,3 NAG).

⁹ Usually this is the embassy/consulate in the applicant's country of residence.

¹⁰ Exempted from the obligation to apply from abroad are family dependants of Austrian, other EEA and Swiss nationals if they entered Austria legally (§ 21 par 2 lit 1), those non-nationals who were granted permission to reside in Austria (§ 21 par 2 lit 2), non nationals who were Austrian or EU citizens and who lost their citizenship (§ 21 par 2 lit 3 NAG), third country nationals who are exempted from visa obligations (§21 par 2 lit 5 NAG), as well as newborn children (in Austria) of legally residing third country nationals (within a period of six months after their birth) (§21 par 2 lit 4 NAG). In addition, researchers and their family dependants are eligible to file the application in Austria (§ 21 par 2 lit 6; § 67 NAG). Groenendijk et al (2007: 49) also point out that if there are humanitarian reasons justifying a further stay in Austria, the application within the territory might be eligible. Referring to case law, this applies in the case that the right to family reunification is derived from Article 8 ECHR.

The application and admission procedure only involves public institutions. Civil society organisations offer counselling on admission and labour market access¹¹, but are not officially involved in the proceeding.

It is possible that dependants of third country nationals are admitted to Austria together with their sponsor, e.g. key professionals and their dependants. In this case it is important to mention that settlement for the purpose of work is restricted to key professionals since 2003. There is a special quota for key professionals (employed and self-employed) including their dependants. Regarding residence permits, the law does not stipulate time limits before the entrance of dependants to Austria.

According to § 73 of the Act on General Administrative Procedural Rules (Allgemeines Verwaltungsverfahrensgesetz, AVG), the Austrian public administration authorities are obliged to decide within six months from the date of the lodging of the application. If no official notification of the decision is released within this time frame, the applicant can file a motion taking the application to the competent superior administration authority, which in this case is the Ministry of the Interior.

Assessment and proof of family ties

To prove an existing family relationship, the applicant has to submit the respective documents testifying the marriage or parenthood (e.g. marriage certificate, birth certificate). The law does not contain further rules concerning the nature and form of the documents; the executive order to the Settlement and Residence Act (NAG-Durchführungsverordnung, NAG-DV) states that the authority can request a translation of the documents as well as their notarisation (§ 6 NAG-DV; BGBl. II 451/2005). To give an example, the municipal authority of Vienna requests a certified translation of documents¹². If a family relationship cannot be proven by documentary evidence, the authorities shall permit a DNA analysis upon request of the applicant and on the costs of the applicant. However, the refusal to request a DNA analysis does not contradict the applicant's obligation to contribute to the procedure (§ 29 par 2 NAG). In case of polygamous marriages, only one spouse can be admitted to Austria (§ 2 par 1 lit 9 NAG).

The Settlement and Residence Act (NAG) does not mention more details about the disruption of family relationships. The Marriage Act (Ehegesetz, EheG) stipulates that if the spouses are separated for three years, they have the right to file for divorce because of

¹¹ NGOs who provide counselling for migrants are e.g. the Counselling Centre for Migrants (Beratungszentrum für Migrantinnen und Migranten) in Vienna, the Counselling Centre for Migrants in Upper Austria (Migrare), the Association for Counselling and Support of Foreigners in Salzburg (Vebbas), Centre for Migrants in Tyrol (ZEMIT) or the Centre for social-medical, legal and cultural Support of Foreigners in Austria (Zebra) in Graz.

¹² See Website of the City of Vienna <http://www.wien.gv.at/verwaltung/personenwesen/einwanderung/aufenthalt/unterlagen.html> (accessed in September 2007)

disruption (§ 55 EheG). In this case, common family life as stipulated by Art 8 ECHR does no longer persist.

Requirements to receive a residence title (Art 7 2003/86/EC)

Among the general requirements for residence titles (which include applications for family reunification) lies the obligation of an applicant that s/he must demonstrate appropriate accommodation, a sickness insurance according to Austrian standards as well as sufficient means for living (§ 11 par 2 lit 2, 3). The same applies to stable and regular resources: the law explicitly states that the residence of non-nationals shall not cause any financial burden for the respective local authorities (§ 11 par 5 NAG).¹³

The Directive foresees the option of requiring third country nationals to comply with integration measures (Art 7(2)). To receive a residence title according to the NAG, applicants are obliged to conclude and fulfil the integration agreement (Integrationsvereinbarung, IV) (§ 11 NAG par 2 lit 6). The integration agreement is the obligation to prove a certain level of German language knowledge, usually by attending a German language course and successfully passing a German language exam. The integration agreement is compulsory for all immigrants who were admitted after 1 January 2006 (§§ 14-16 NAG).¹⁴ The following groups are not obliged to fulfil the integration agreement: EEA nationals and their dependants, key professionals and their dependants¹⁵, persons who do not have a residence title according to the NAG (e.g. asylum seekers, persons with subsidiary protection status, recognised refugees), children under the age of nine years, old and sick persons, and persons, who declare that their residence will not exceed a period of 12 months within two years (accordingly, they must declare that they will not file an application for the renewal of their residence title) (§ 14 par 3 NAG). The integration agreement has to be fulfilled after a period of residence of five years. If the applicant files an application for renewal of a settlement permit, at least one module of the agreement has to be fulfilled unless a postponement was granted (§ 11 par 2 lit 6 NAG).

¹³ The sponsor and its family shall dispose of stable and regular resources, which allow them to maintain themselves without depending on social aid. The required amount of means of subsistence is calculated according to the standard rates of pensions laid down in § 293 General Social Insurance Act (Allgemeines Sozialversicherungsgesetz, ASVG) (§ 11 par 5 NAG). Thus, compared to the old Aliens' Act (FrG) the required means of subsistence were raised and harmonised throughout the federal territory. As stated by Schumacher (2008: 5), the required monthly means of subsistence in 2008 for a single person were at least € 747, for a couple at least € 1,120 and for each child an additional € 78,29 (see also Bundesministerium für Inneres 2008).

¹⁴ Besides attending a course and passing the exam, persons who already speak German can prove the compliance with the Integration Agreement (IV) also by other means, e.g. German language diplomas which were acquired abroad. For more detailed information related to the IV, see the Austrian Policy Report for Immigration and Integration for the years 2004, 2005 and 2006 (NCP Austria 2005; 2006; 2008) accessible at www.emn.at.

¹⁵ For key professionals and their dependants, the Integration Agreement (IV) is considered to be fulfilled *ex lege* (by act of law) (§ 14 par 5 lit 8 NAG), regardless of their German skills (see also Schumacher 2008: 6).

Time limits and waiting periods (Art 8 2003/86/EC)

Basically, Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having the family join him/her. The maximum period is fixed at three years, if Member States already had a legislation in place before the Directive entered into force, which took into account its reception capacity (Art 8 2003/86/EC). In Austria, the law does not explicitly stipulate such a waiting period, but family reunification for dependants of legally residing third country nationals who hold a settlement permit, is subject to a yearly quota (§ 46 NAG). Because the number of applications for family reunification is higher than the number of available quota places, the consequences are waiting periods (see Chapter 3.3.).

If the quota for family reunification is exhausted, the authority in charge must not reject the application, but keep it for consideration for the following year. If the application cannot be processed within three years, the quota obligation lapses and a further delay of the decision is no longer allowed (§ 12 par 7 NAG) (Kutscher/Schmalzl/Poschalko 2006: 37ff.). This rule was introduced to comply with the Directive and only applies to family reunification and not to any other category of settlement permits.

In addition, the authorities may grant a settlement permit for humanitarian reasons for cases of family reunification, when the yearly quota is already exhausted and the admission of the family members cannot be postponed because the sponsor has a right to family reunification according to Art. 8 ECHR (§ 73 par 4 NAG). The possibility of obtaining such a settlement permit for humanitarian reasons in cases of family reunification is only open to dependants of sponsors as defined by § 46 NAG par 4, who settled in Austria for a longer time and have fulfilled the Integration Agreement (consolidation of residence), e.g. sponsors who are long term residents or sponsors who hold a 'settlement permit – unrestricted' (Niederlassungsbewilligung – unbeschränkt). As stated by Ecker (2007: 43), only for this group of sponsors the Directive has been transposed comprehensively into national law.¹⁶

Family reunification for recognised refugees (Art 12 2003/86/EC)

Recognised refugees and persons with subsidiary protection have a right to family reunification according to the Asylum Act 2005 (AsylG), if the family relationship existed prior to their entry into Austria. In any other case, family reunification is subject to the Settlement and Residence Act (NAG). For family reunification according to the AsylG, the requirements of the NAG do not apply (e.g. proofs for accommodation, insurance, financial means, integration agreement, quota etc.) (see also Chapter 3.2.3). Although Art 12(1) of the

¹⁶ In general, residence titles for humanitarian reasons are granted ex officio, which means that there is no possibility for the individual person to apply for such kind of permit and as a consequence, there are no legal remedy against the respective decisions (see Schumacher 2008: 9-10).

Directive allows Member States to apply such requirements if the application for family reunification is not filed within a certain period, the Austrian Asylum Act does not contain such provisions. By all means, the Directive explicitly interdicts that Member States fix a minimum period of residence before the family can join the refugee (Art 12 par 2). In case of subsidiary protection, family reunification can be realised only after the first temporary residence permit of the sponsor was renewed, which is usually the case after one year of residence (§ 35 par 4 AsylG). There are no special provisions foreseen in the case that an applicant has special links to a third country, where family reunification is possible.

Duration of the first permit granted to the dependant (Art 13 2003/86/EC)

Usually, the first settlement permit is valid for one year with the exception of key professionals and their dependants, for whom a first settlement permit is issued for a period of max. 18 months. For residence permits, the period of validity last for up to one year (also for renewals). In no case may the duration of validity of the dependant's permit exceed the validity of the sponsor's permit.

Access to employment (Art 14 2003/86/EC)

In principle, the Directive stipulates that the sponsor's dependants shall be entitled to education, employment and self-employed activity, access to vocational guidance, initial and further training and retraining in the same way as the sponsor (Art. 14 par 1). Relating to the access of the labour market, Member States are allowed to apply restrictions for a period of 12 months after the admission depending on the situation on the national labour market (Art. 14 par 2).

In Austria, dependants have the possibility of employment, but with restrictions. Depending on the type of residence or settlement permit, family dependants may have access to the labour market from the moment of their admission to Austria, provided that the Public Employment Service (Arbeitsmarktservice) issues an employment permit (Beschäftigungsbewilligung) to the respective employer.¹⁷ On the contrary, dependants are generally allowed to be self-employed. However, after a period of 12 months the dependant must be granted the same access to the labour market as the sponsor, following the Directive (Kutscher/Poschalko/Schmalzl 2006: 54).

The dependants of third country nationals who are key professionals receive a 'settlement permit – restricted' (Niederlassungsbewilligung beschränkt). In principle, this kind of permit allows the access to the labour market, provided that the person is issued an employment

¹⁷ Before an employment permit is issued, the office in charge of the Public Employment Service (Arbeitsmarktservice, AMS) examines the situation on the labour market (the so-called 'Ersatzkraftverfahren'). This procedure determines the necessary requirement of employing a foreigner or if any other Austrian national or integrated foreign national would be available for this particular job.

permit according to the Aliens' Employment Act (Ausländerbeschäftigungsgesetz, AuslBG) (§ 8 par 2 lit 4 NAG).¹⁸

If the sponsor holds a 'settlement permit – unrestricted', the permit 'long-term residence – EC' (according to Directive 2003/109/EC), his/her dependants will receive a 'settlement permit – restricted'. However, this group of dependants will be issued a 'settlement permit – unrestricted' after a period of 12 months which grants unlimited access to the labour market (§ 8 par 2 lit 4 NAG; § 46 par 5 NAG). The same applies if the sponsor holds another kind of settlement permit¹⁹ and has already fulfilled the integration agreement. Exempted from this rule are dependants of sponsors who do not have access to the labour market holding a 'settlement permit – excluding employment' (Niederlassungsbewilligung - ausgenommen Erwerbstätigkeit). Their dependants will receive the same type of permit and therefore do not have access to employment. If these dependants want to be employed, they need to apply for the change of their residence purpose or get an autonomous settlement permit that is not derived from the sponsor's right to residence. In any case after five years of settlement a settlement permit 'Long-term residence – EC' is granted also to third country nationals (irrespective of the category of settlement permit they hold), which then will provide for unlimited access to the labour market (Kutscher/Poschalko/Schmalzl 2006: 54-55).

Dependants of immigrants holding a residence permit (Aufenthaltsbewilligung), will receive a 'residence permit – family community', which is not subject to a quota. As stated above, not all residence permits grant the possibility of family reunification. Additionally, the family relationship must predate the admission of the sponsor (with the exception of minor children). The NAG does not specify if a residence permit for dependants allows for employment.

To sum up, compared to the legal situation prior to the NAG and the Directive 2003/86/EC, dependants of third country nationals, although contingent upon the sponsor's right to employment, now have a more liberal access to the labour market (Groenendijk et al. 2007: 34).

Concerning social benefits, there are no deviant provisions for dependants. Likewise, the principle of 'consolidation of residence' applies to all types of residence titles and there are no special provisions for dependants. In general, the question of to what extent foreigners are entitled to receive social benefits is very extensive and goes beyond the scope of this study. Overall, benefits such as social aid which is granted by provinces, depends to a certain extent on the citizenship. Other benefits are connected to the Social Security System and are consequently linked to employment in Austria (e.g. unemployment benefits).

¹⁸ In general, the right to residence/settlement and the right to work in Austria are regulated separately by two different laws, the Settlement and Residence Act (NAG) and the Aliens' Employment Act (AuslBG).

¹⁹ The purpose of this settlement permit is not specified by the NAG; most possibly these are settlement permits which were issued according to earlier legislation.

Autonomous residence titles for dependants (Art 15 2003/86/EC)

The right to residence/settlement of family dependants is derived from the right to residence/settlement of the sponsor. Only dependants who hold a settlement permit, can acquire an autonomous settlement permit after five years of settlement, or even earlier, if they fulfil the general conditions for settlement permits by themselves (§ 27 NAG). For residence permits, these provisions do not apply. There are special rules in the case of family relations breaking down before this five-year-period has ended (see below).

Reasons to reject applications for residence titles (Art 16 2003/86/EC)

Art 16 of the Directive allows Member States to reject an application for entry and residence for various reasons, e.g. if the family relationship no longer exists, in the case that misleading information was given or if a marriage/adoption was for the sole purpose of receiving a residence title.

The NAG contains provisions against “fictitious marriages”. This is an issue, which the new Aliens’ Law Package aimed to address specifically. A spouse who does not live in a real marital relationship according to Art 8 ECHR, cannot refer to their marriage for the sake of keeping or receiving a residence title (§ 30 par 1 NAG). The same counts for adoptions where the hidden intention is to get a residence title (§ 30 par 2 NAG). The responsible authority for examinations related to such cases is the Aliens’ Police.

In general, the NAG stipulates the obligation for the applicant to cooperate during the application procedure (§ 29 par 1 NAG). The legal consequence of the unwillingness of cooperation from the applicant is not explicitly mentioned by the law. However, generic procedural and material law stipulates that a non-cooperation of the applicant has the consequence that the file may be rejected, since non-cooperation is subject to free consideration of evidence.

To facilitate investigations, the duty of cooperation for special administrative authorities (e.g. civil registry offices) to transfer data to the Aliens’ Police was included in the new Aliens’ Police Act 2005 (Fremdenpolizeigesetz, FPG). To give an example, the civil registry offices are obliged to inform the Aliens’ Police if a foreign national submits an application for marriage, regardless of any concrete suspicion. The same applies to applications for adoptions and changes of names (§ 105 par 4 FPG; § 38 PStG (Civil Status Act, Personenstandsgesetz)). In addition to the usual data transfer, courts and administrative authorities are obliged to inform the Aliens’ Police if there is any concrete suspicion about such an adoption or marriage (§ 109 FPG). If an authority, which is in charge for issuing residence titles, informs the Aliens’ Police about a concrete case, the latter has to inquire the

case and inform the respective authority about the results within a period of three months. If there is no notification, the authority can assume that the investigation had no concrete results (§ 110 FPG, § 37 par 4 NAG). In addition according to administrative and criminal law, sanctions are foreseen for both partners if a marriage or adoption was contracted for the sole purpose of receiving a residence title (§§ 117-118 FPG). Such an action is also qualified to be a criminal offence of the sponsor, regardless if he/she receives any benefits following the consent to a fictitious marriage/adoption.

Rejections of applications for residence titles and refusals to renew residence titles (Art 17 2003/86/EC)

In Article 17, the Directive stipulates that when deciding on the rejection of an application for a residence title, the withdrawal or refusal to renew a residence title, or the issuance of a removal order, Member States have to take certain aspects into account. These would be the nature and solidity of the family relationships, the duration of residence in the Member State and the existence of family, cultural and social ties with the country of origin. This article has not been explicitly transposed into Austrian legislation. However, as Groenendijk et al. (2007: 54) point out, provisions regarding the respect for private and family life already existed before the entry into force of the Directive and relate to Art. 8 ECHR. As stated by the authors, *“It seems that the Austrian legislator did not see any incentive for particular implementation of Article 17 Directive 2003/86/EC. It is of the opinion that Article 17 does not contain any stricter requirements than Article 8 ECHR”* (ibid.).

Judicial Review of administrative procedures (Art 18 2003/86/EC)

According to Art 18 of the Directive, Member States shall ensure that the sponsor and/or his/her dependants have the right to mount a legal challenge, if an application for family reunification is rejected, or a residence permit is not renewed or withdrawn, or in case a removal order was issued. Neither the Directive nor the NAG enables the sponsor to act as a party in the procedure (Ecker 2007: 42; Groenendijk et al. 2007: 57). According to Ecker, this provision is in contradiction to Art 8 ECHR as the sponsor as well as other family dependants have the right to family life and therefore all dependants as well as the sponsor should be enabled to be a party to the proceeding. Being a party to the proceeding entitles them to additional rights, such as filing a claim and accessing records (ibid.).

In general, an administrative review precedes court proceedings in Austria. For residence and settlement permits, the authority of appeal is the Ministry of the Interior. However, the decision concerning the ranking in the register relating to the exhaustion of the quota can directly be appealed to the Administrative Court (Verwaltungsgerichtshof) or the Constitutional Court (Verfassungsgerichtshof) (Groenendijk et al. 2007: 57).

If a consulate or embassy abroad rejects an application for the reason of not being the responsible authority²⁰, there is no ordinary judicial review to this rejection. The only review the applicant has, is to appeal to the Administrative or Constitutional Court (Kutscher/Poschalko/Schmalzl 2006: 25-27). If the application seems to be manifestly inadmissible because of not corresponding to the already determined form and mode of the application, the procedure is to be ceased by the consulate or embassy abroad. In this case there is no official legal remedy to appeal against the decision. The only possibility is a claim invoking public liability at an ordinary court. After the consulate forwarded the application to the competent authority in Austria, there are general judicial remedies offered by the Act on General Administrative Procedural Rules (Verwaltungsverfahrensgesetz, AVG) against official decisions of a public authority (ibid.).

There are a number of different legal challenges especially regarding the Association agreement with Turkey before the Constitutional Court, the Administration Court as well as before the Independent Administrative Senate (Unabhängiger Verwaltungssenat).

3.2.3. Practice followed for optional clauses

The following section elaborates the Austrian practice of transposition of optional clauses ('may'-clauses) of the Directive 2003/86/EC. For the sake of clarity, the study only focuses in detail on those provisions which have not been dealt with so far.

Persons entitled to family reunification

By fixing the minimum age of the spouse at 18 years, Austria followed the option outlined in Art. 4(5) of the Directive. However, Austria did not implement the option to allow first-degree relatives in the direct ascending line nor adult unmarried children nor unmarried partners to enter and reside in the country. Regarding minor children, there are no restrictions such as an age limit below for submitting the application.

Requirements for entry and residence/settlement for family reunification

Art. 6 (1,2) of the Directive allows to reject applications for entry and residence of dependants as well as renewals of permits on grounds of public policy, public security and public health. Basically, the general requirements for residence titles apply to all third country nationals in Austria including dependants. One of these requirements is the condition that the residence of an alien must not contradict public interest, meaning that the person does not endanger the public order or security or that s/he is not linked to a terrorist or extremist group

²⁰ E.g. if the application is filed at an embassy/consulate in the wrong country (usually the embassy/consulate in the country of origin of the applicant is the competent authority where the application has to be filed).

(§ 11 par 2 lit 1 NAG; § 11 par 4 NAG). However, a residence title might be granted even if not all general requirements are fulfilled to secure private and family life according to Art. 8 ECHR (§ 11 par 3 NAG). The general requirements for residence titles also apply to renewals of permits.

It has also to be taken into account that the Austrian Aliens' Law (Settlement and Residence Act (NAG), Aliens' Police Act (FPG)) entails the principle of 'consolidation of residence'²¹. Consequently, after a longer period of settlement (5, 8, 10 years) the renewal of a permit must not be refused, even though the applicant would no longer comply with certain basic conditions for the granting of a settlement permit (§ 55 FPG). The same applies to expulsions and removals. In addition, the right to protection of private and family life according to Art. 8 ECHR has to be considered.

Rules for family reunification of recognised refugees/ persons with subsidiary protection status

The Directive 2003/86/EC also covers the family reunification of recognised refugees and persons with subsidiary protection. In Austria, this issue is regulated by the Asylum Act (§§ 34-35 AsylG). The usual procedure for family reunification of dependants of recognised refugees and persons with subsidiary protection is to file their asylum application at an Austrian embassy or consulate abroad. This application is then submitted to the Federal Asylum Office (Bundesasylamt), who notifies the embassy or consulate if the granting of asylum is probable. Subsequently, the dependants receive a visa and can file their asylum application in Austria, where asylum or subsidiary protection is then granted. In case of subsidiary protection, dependants will be admitted to Austria only after the permit for subsidiary protection of the sponsor was once renewed (which is usually the case after one year). If the preconditions for subsidiary protection no longer persist or if it can be assumed that this will be the case within a period of three months, family reunification is denied (§ 35 par 2 AsylG). If the refugee status cannot be granted to the dependants, they have the right of being granted a 'settlement permit – restricted' (§ 46 par 4 lit b NAG), which is subject to quota regulations.

Austria implemented the option to confine the admission of spouses of refugees to family relationships which predate the sponsor's entry (§ 2 par 1 lit 22 AsylG; Art 9(2) 2003/86/EC). If a recognised refugee marries at a later stage, family reunification is only possible according to the rules of the Settlement and Residence Act (NAG) and is therefore subject to quota regulations.

²¹ 'Consolidation of residence' only applies to holders of a settlement permit, not to holders of a residence permit.

Generally, family reunification according to the Asylum Act is restricted to the nuclear family (spouses, unmarried minor children as well as parents of minor children). Family reunification was not extended to other dependants as (optionally) allowed for by Art. 10(2,3) of the Directive (§ 2 par 1 lit 22 AsylG). If the refugee is an unaccompanied minor, Austria does not authorise the family reunification for any other person (e.g. legal guardians) than the first-degree relatives in direct ascending line.

Autonomous residence title (Art 15 2003/86/EC)

As stated above, the right to settlement of dependants is deducted from the right to settlement of the sponsor during a period of five years. Yet, in case of breakdown of family relationships before the five-year period ends, dependants do not lose their right to settlement if they are able to sustain themselves and more precisely, if they fulfil the general requirements for residence titles (§ 27 par 2 in corroboration with § 11 par 2 lit 2-4 NAG). The Directive (Art 15(3)) stipulates, that Member States may issue an autonomous residence permit for persons entering for the purpose of family reunification, in the event of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line. According to the NAG, in case of death of the sponsor, divorce (if due to the fault of the sponsor) and in circumstances, which require special consideration (§ 27 par 3 lit 1-3 NAG), the dependants will not lose their settlement permit. On the contrary, persons who hold a residence permit lose their right to residence if the family relationships no longer consist. Ecker (2007: 53) argues that the clause was not correctly transposed into national law, because the Directive does not envisage any specification regarding the person who bears the responsibility for the divorce.

3.2.4 Family reunification of other groups of non-nationals

Article 3 of the Directive 2003/86/EC also stipulates the groups to which the Directive does not apply, e.g. asylum seekers, persons under temporary protection or dependants of EU citizens.

In Austria, there is no possibility for family reunification for dependants of asylum seekers, whose application is pending and not yet decided. The same is the case for persons authorised to reside in the country on the basis of temporary protection.²²

²² Regarding temporary protection, §76 NAG stipulates the possibility to grant temporary residence to displaced persons, meaning groups affected by an armed conflict or other conditions which endanger the security of a whole population group in the case that no other form of protection applies to them. To grant temporary protection, the government in consultation with the main committee of the National Council of the Austrian parliament enact a decree. The right of residence is valid for one year and can be extended for one more year.

The rules for the admission of (third country national) dependants of Austrian, other EEA and Swiss nationals changed with the entry into force of the Settlement and Residence Act (NAG). The law distinguishes between those sponsors who exercise their right to free movement to another EU Member State, and those who do not.²³ While it will usually be the case for other EEA and Swiss nationals who are residing in Austria²⁴ to have used their freedom of movement, Austrian nationals residing in Austria have rather not exercised this right. For the latter group, the conditions for family reunification are consequently more severe, e.g. concerning the financial means required for the admission of the dependants (Schumacher 2008: 15-18; Bundeskanzleramt/Frauen 2007:47-49).

In 2007, the Constitutional Court rejected concerns about the fact that this distinction according to the use of one's freedom of movement constitutes a discrimination and stated that these legal provisions are not unconstitutional (VfGH B 1462/06; see also Schumacher 2008: 17). A main reason for the introduction of these rules was the high number of dependants of Austrian nationals who were admitted to Austria, particularly from 2003-2005 (see Annex table 6). This development is also linked to the increasing number of naturalisations in the past decade, because among those admitted were many dependants of naturalised persons (Lebhart/Marik-Lebeck 2007: 146).²⁵ In order to provide a complete picture of the admission of family dependants to Austria, in the following section we elaborate on the conditions for family reunification regarding the (third country national) dependants of Austrian, other EEA, and Swiss nationals.

Regarding the admission of (third country national) dependants of EEA/Austrian/Swiss nationals who exercise their right to free movement, the NAG distinguishes between two groups of family dependants. The first one is the 'narrow family' – these are spouses, relatives in direct descending line until the age of 21 (children, grand children), other relatives in direct descending line, as well as relatives in direct ascending line if they are subsidised by the sponsor). The second one is the 'wider family', encompassing unmarried partners in permanent relationship and others such as brothers and sisters, nephews and nieces etc. While members of the narrow family are granted a 'permanent residence card' (Daueraufenthaltskarte) (§§ 54 par 1 NAG), the wider family can receive a 'settlement permit – dependant' (Niederlassungsbewilligung – Angehöriger) (§ 56 par 1 NAG). The 'permanent residence card' is the documentation of a right to residence, which is granted by EU law. For them, the general conditions for being granted a residence title do not apply, such as the requirement of having enough financial means according to § 293 ASVG (see Chapter 3.2.2 page 15). The holders of a 'permanent residence card' which is valid for a period of ten

²³ The NAG does not exactly define the criteria when a person is considered to have used his/her freedom of movement.

²⁴ EEA and Swiss nationals do not have the right to freedom of movement in the case that they do not fulfil criteria as defined by European law (e.g. employment, insufficient financial means, sickness insurance) (Biff/Bock-Schappelwein 2006: 70).

²⁵ In 2006, an amended version of the Citizenship Act (Staatsbürgerschaftsgesetz, StBG) was adopted, stipulating stricter rules for naturalisations (see NCP 2008).

years, have access to the labour market without any restrictions. The 'settlement permit – dependant', which is quota-free and valid for one year, will be issued to members of the wider family if they fulfil the general requirements for residence titles and if the sponsor signs a declaration of liability. While the narrow family dependants are not obliged to fulfil the Integration Agreement, the wider family is obliged to do so. Similarly, holders of the 'settlement permit – dependant' do not have access to the labour market (§ 8 par 2 lit 5 NAG). However, they can apply for a 'settlement permit – restricted' under certain circumstances (e.g. if a place within the quota is available) (§ 56 par 3 NAG) or wait until they receive the title 'permanent residence – EC' after a period of settlement of five years. There is another major difference between the 'permanent residence card' and the 'settlement permit – dependant' when it comes to filing the application: while the narrow family can file their application for documentation of their right to residence in Austria within a period of three months after their entry, the wider family can only file an application for their settlement permit in Austria if no visa obligations apply to them. Those nationals, who would need a visa to enter Austria have to apply from abroad.

Concerning the admission of (third country national) dependants of Austrian/other EEA/Swiss nationals, who do not exercise their right to free movement, the NAG distinguishes between family dependants (Familienangehörige) and dependants (Angehörige) (§§ 47-48 NAG). Family dependants are spouses, minor unmarried children including adopted children and stepchildren: they have to be granted a 'residence title – family dependant' (Aufenthaltstitel Familienangehöriger) if they fulfil the general requirements for residence titles. This title is not a settlement permit in a strict sense, but a residence title *sui generis* and not subject to quota regulations (see Kutscher/Poschalko/Schmalzl 2006: 57). Its period of validity is at first for 12 months and can then be renewed for 24 months (§ 47 par 2). Like all dependants in general, they have to verify the family relationship to the sponsor with the appropriate documents. Holders of the 'residence title – family dependant' have access to the labour market without any restrictions. However, among the general requirements for residence titles they have to fulfil lies the obligation to have sufficient funds according to § 293 ASVG (see Chapter 3.2.2 page 15). If family dependants entered the country lawfully (whether with a valid entry visa or without when originating from a country which is not subject to visa obligations), they are allowed to file their application in Austria. In any other case, the application has to be filed at the embassy/consulate abroad in the country of origin (§ 21 par 2 lit 1). As pointed out by Schumacher (2008: 8), in many cases this rule sets a barrier for former asylum seekers who married Austrian nationals as oftentimes they have entered Austria illegally or are no longer residing legally in Austria if their asylum application has been rejected. In order to apply for their residence title, they would have to return to their country of origin (see also der

Standard, 22.5.2006). The possibility to apply for a settlement permit in Austrian territory based on humanitarian reasons (§ 74 NAG) is only granted in exceptional cases.

In contrast to the family dependants of EEA nationals, family dependants of Austrian nationals are obliged to fulfil the Integration Agreement (IV). After five years of settlement, upon completion of the IV, and under the precondition that the person still meets the general requirements for residence titles, family dependants can be granted the residence title 'permanent residence – family dependant' (Daueraufenthalt – Familienangehöriger) (§ 48 NAG). Other dependants (Angehörige) of Austrian nationals (those not comprised in the group of 'family dependants') can be granted a 'settlement permit – dependant' as for the wider family circle of other EEA nationals and under the same conditions as outlined above.

Looking at statistics on issued residence titles for family reunification of dependants of Austrian/other EEA/Swiss nationals, it is apparent that these stricter provisions which mainly affect the dependants of Austrian nationals have had a significant effect: compared to the year 2005 where alone 23,444 settlement permits were issued to dependants of Austrian nationals, in 2006 only a total number of 8,595 'residence titles – family dependant' and 3,417 'settlement permits – dependant' were issued (see also Schumacher 2008:17).²⁶

3.3. Development of family reunification policy between 2002 and 2006

The transposition of Directive 2003/86/EC into national law was completed with the adoption of the Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz, NAG) in the framework of the Aliens' Law Package, which entered into force on the 1st of January 2006. Thus, the transposition of EU Directives²⁷ into national law was part of a more general revision of the laws relating to migration and asylum.

Transposition of Directive 2003/86/EC into national law

In view of the adoption of the new NAG and the FPG and the amended Asylum Act there was a comprehensive public discussion in 2005. However, family reunification of third country nationals only attracted little attention, compared to the provisions of family reunification for (third country national) dependants of Austrian nationals (NCP Austria 2008: 19-20). By the same token, there has not been a public debate on the Family Reunification

²⁶ Data source: Ministry of the Interior; publications available online: www.bmi.gv.at/publikationen

²⁷ Besides the Directive 2003/86/EC, others such as 2003/109/EC, 2004/81/EC, 2004/82/EC, 2004/83/EC, 2004/114/EC, 2005/71/EC were transposed into national law in the framework of the adoption of the Aliens' Law Package (see Policy Report 2005 (NCP 2006) available at www.emn.at).

Directive itself, similarly to many other Directives in this area which had to be transposed into national law.

Before the entry into force of the Settlement and Residence Act (NAG), immigration was regulated by the Aliens' Act 1997 (Fremdengesetz, FrG)²⁸. Compared to the situation before 2006, the rules for family reunification of third country nationals are today to some extent more favourable (Schumacher 2008: 14; Bundeskanzleramt/Frauen: 49). According to Gronendijk et al. (2007: 60), the transposition of the Directive resulted in a reduction of complexity regarding the provisions for family reunification in Austria. Besides inducing more liberal rules e.g. concerning the access to employment or the reduction of waiting periods, the new national legislation also contains less favourable rules in other areas, e.g. with regard to the raise of income requirements (ibid.).

Regarding the question whether the Directive was correctly transposed into national law or not, this study can only give examples as such an analysis would go beyond the study's scope. Gronendijk et al. (2007: 68) raise several arguments where a correct transposition is doubtful, e.g. the fact that there is no ordinary legal remedy against the rejection of an application for family reunification by the consulates (see Chapter 3.2.2). The opinion that some articles of the Directive were not correctly transposed is also articulated by Ecker (2007). Giving an example, she argues that the settlement permit granted to family dependants varies depending on the settlement permit of the sponsor. As a consequence, some groups of family dependants are privileged compared to others. According to Ecker this is not in line with the Directive (Ecker 2007: 43).

Legal amendments with regard to family reunification in recent years

The main aim of the FrG of 1997 was to control immigration while at the same time securing the right of residence of foreign nationals who have been residing in Austria for a longer time (following the principle of 'consolidation of residence'). Although the adoption of the Aliens' Law Package in 2005 brought a variety of changes, there is also continuity considering the principles on which the two laws FrG and NAG are based. The FrG stipulated a quota system for settlement permits regulating the admission of immigrants (including family reunification), which was retained in the new NAG. In addition, the distinction between settlement permits (long term; 'Niederlassung') and residence permits (temporary; 'Aufenthalt') was kept.²⁹

²⁸ For more details on the legal situation before 2006 consult the Policy Report for the year 2004 (NCP 2004b) and the Pilot Study on 'The impact of immigration on Austria's Society' (NCP2004a), available online at www.emn.at.

²⁹ The quota is regulated by the yearly Settlement Decree (Niederlassungsverordnung) which is enacted by the Government in consultation with the Main Committee of the National Council of the Austrian Parliament (Hauptausschuss des Nationalrats), upon the proposal by the Minister of the Interior. In this respect, the development of the labour market and the situation in the

In general, the quota for family reunification has remained more or less stable during the period 1998-2005 at approximately 5,500 settlement permits a year³⁰ (See Annex, table 1). In 2005, the government of the Austrian People's Party (Österreichische Volkspartei, ÖVP) and the Alliance for Austria's Future (Bündnis Zukunft Österreich, BZÖ) agreed to reduce the quota for family reunification in the yearly Settlement Decree for 2006 (BGBl. II 246/2005) from 5,460 to 4,480. This reduction provoked criticism by the Green Party (Die Grünen) and the Socialdemocratic Party (Sozialdemokratische Partei Österreichs, SPÖ) (Parlamentskorrespondenz/02/13.12.2005/1026; Der Standard, 7.11.2005; Die Presse, 9.11.2005). The Freedom Party (Freiheitliche Partei Österreichs, FPÖ) supported this reduction (e.g. Die Presse 6.9.2005). However, the quota for family reunification was raised again in 2007 and 2008 (see Annex table 1).

Contrary to the new NAG, the FrG 1997 (§ 21 par 3) initially restricted the family reunification of minor children: children of foreigners, who have already settled in Austria before the 1st of January 1998, could only be admitted until the age of 14 years. Yet, this restriction of the admission of minors was abolished in 2000 by the Constitutional Court (VfGH 15836/2000). In the framework of an amendment of the FrG in 2002, the rules for admission of minors were then eased: children, who filed their application already before the age of 15, could be admitted until their majority (König/Stadler 2003: 232). With the adoption of the new NAG, this provision was abolished and the admission of children is hence no longer restricted until the age of 18 years.

During the period 1998-2005, at the moment of application for a settlement permit third country nationals (who were admitted after the 1st of January 1998) had to declare their intention of family reunification. In addition, they had to provide personal information about their dependants to the authorities before their admission. As of 2003, this rule was changed when the admission to settlement for the purpose of work was generally restricted to key professionals. From then, family dependants of third country nationals (admitted after the 1st of January 2003) could apply for family reunification within one year after the sponsor's admission even if the sponsor had not indicated this intention earlier (Biffli/Bock-Schappelwein 2003: 58-59). On the contrary, the new NAG does not stipulate such restrictions on time limits for the filing of an application for family reunification.

Concerning the access of family dependants to the labour market, the NAG (following the transposition of the Directive 2003/86/EC into national law) is more favourable compared to the old FrG 1997 (Schumacher 2008: 14-15): family dependants of sponsors who were

provinces has to be taken into account. To be more precise, the provinces have the right to propose the number of settlement permits to be issued and the representations of interests have to be consulted during this procedure.

³⁰ Before 1998, the quota used to be much larger, e.g. 9,890 permits in 1997 (König/Stadler 2003: 232). From 1998 to 2000 there was an additional quota for mature minors (minors between the age of 14 and majority, approx. 550 permits) which was abolished as of 2001. But as the family reunification quota was enlarged as of 2001, the abolishment of this special quota did not cause a reduction of the total number of available quota places for family reunification.

working in Austria only received a 'settlement permit – excluding employment' which did not grant access to the labour market. Only after a waiting period of four years a 'settlement permit – unrestricted' had to be issued upon application (§ 21 par 4 FrG 1997). Exemptions were made, if the family dependant qualified as key professional and was granted an employment permit (§ 23 par 3 FrG 1997). Criticism was put forward that these provisions aggravate the dependency of spouses from the sponsor (König/Stadler 2003: 234; Appelt 2003: 159-160). According to the NAG, after one year of settlement dependants of third country nationals now have unrestricted access to the labour market, if the sponsor also has access to the labour market (which is mostly the case) (§ 46 par 5 NAG; § 17 AuslBG).

The legal provisions of the NAG are also more favourable in the means of possibilities to receive an autonomous residence title. Regarding the latter, contrary to the old FrG, spouses and minor children can now receive an autonomous settlement permit in case of death of the sponsor, divorce (due to the fault of the sponsor) and in circumstances, which require special consideration (Bundeskanzleramt/Frauen 2007: 49).

On the contrary and as elaborated above (see Chapter 3.2.4), the rules for the admission of (third country national) dependants of Austrian nationals are less favourable compared to the legal situation before the NAG entered into force. By introducing a distinction in reference to the use of a person's right to freedom of movement, (third country national) dependants of Austrian nationals are facing more severe conditions for family reunification than other EEA and Swiss nationals (Bundeskanzleramt/Frauen 2007: 47-48; Schumacher 2008: 15-17). These new legal provisions were subject to criticism, particularly raised by NGOs³¹ (see e.g. Der Standard, 22.5.2006).

Waiting periods and backlog of applications for family reunification

During the past decade, dependants of third country nationals were confronted with waiting periods prior to their admission, as the number of applications for family reunification exceeded the number of places available within the yearly quota. Particularly NGOs and opposition parties called for the exemption of family reunification from the yearly quota for settlement permits. In particular it was criticised that even those third country nationals who have a legal right to family reunification were confronted with waiting periods.

In October 2003, the Constitutional Court ruled that the provisions on the quota for family reunification were unconstitutional (VfGH 17013/2003). The Constitutional Court did not revoke the quota system for family reunification in general, but the circumstances on how the provisions were applied, e.g. the lack of transparency on how quota places are to be

³¹ See e.g. statements of the initiative 'Marriage without Borders' (Ehe ohne Grenzen) www.ehe-ohne-grenzen.at

distributed, the fact that there is no right to appeal against such a decision, and the circumstances that it is unclear for the applicants, how long they have to wait until their admission (Die Presse, 8.10.2003; Die Presse, 9.10.2003; Der Standard 11.7.2003). Those rules which were declared unconstitutional, had already been changed in the course of the amendment of the Aliens' Act in 2002 (BGBl. I 134/2002), which entered into force on the 1st of January 2003. Although the amendment of the law took place before the Court announced its judgement, the latter was of relevance for those orders on family reunification, which were issued based on the old legislation. Concerning the transparent distribution of quota places, the new NAG – contrary to the old FrG – stipulates that applications for settlement permits within the quota have to be strictly ranked according to the date when the applications were filed and have to be recorded in a specific register by the provincial authorities (§ 12 NAG; see also Schumacher 2008: 7). Following Directive 2003/86/EC, the waiting periods for family reunification must not exceed three years; if then there is still no place available within the yearly quota, family reunification has to be granted quota-free (§ 12 par 7 NAG).

Although the legal situation has changed in recent years, applicants for family reunification are still confronted with waiting periods and the authorities register a backlog in applications. Since 2003, Biffi/Bock-Schappelwein analyse the backlog of applications for family reunification in their yearly analyses for the Ministry of the Interior. Every year by the end of June, the Ministry of the Interior requests the number of pending applications for family reunification from the provinces, which presumably cannot be approved because of the exhaustion of the yearly quota. According to the authors, the backlog of applications for family reunification significantly dropped in recent years, but increased again in 2006 when 2,024 applications for family reunifications were pending (meaning that the quota was exhausted) (Biffi/Bock-Schappelwein 2006: 75). As stated above, the government limited the available quota places for 2006. In 2007, the backlog was again lower with 1,776 pending applications (Biffi/Bock-Schappelwein 2007: 76). This development corresponds to the increase of the quota for family reunification in the Settlement Decree for 2007 (see Annex table 1). Yet, the backlog in earlier years was much more severe with e.g. 11,300 pending applications in June 2001 (Biffi/Bock-Schappelwein 2006: 80). Worth mentioning is that the backlog of applications varies depending on the province – while the largest share of pending applications are reported for Upper Austria (42% of the total number of pending applications in 2007) and Vienna (30% of the total), the backlog is lower in other provinces (Biffi/Bock-Schappelwein 2007: 81).

As the quota for family reunification has remained at a quite stable level between 1998 and 2005, Biffi/Bock-Schappelwein (2004: 3-4) argue that the main reason for the declining backlog is an explicit policy implemented by the Ministry of the Interior as well as a decline in applications for family reunification following the EU enlargement. It also has to be taken into

consideration that since 2003 immigration for the purpose of employment has been restricted to key professionals; their dependants are included in the quota for key professionals (not in the quota for family reunification) and can be admitted together with the sponsor. Concerning the policy to reduce the backlog, the Ministry of the Interior enacted a decree (in view of the transposition of the Directive 2003/86/EC) stipulating that a settlement permit for humanitarian reasons according to § 19 par 2 lit 6 FrG should be granted if applications for family reunification have been pending for at least three years. The intention behind this decree was a reduction of the backlog as well as to balance the varying backlog between the provinces (Biffel/Bock-Schappelwein 2004: 63). Another explicit aim was to particularly reduce the backlog of applications of unmarried minors in order to promote their integration (Biffel/Bock-Schappelwein 2004: 4-5).

Although the NAG stipulates new rules for the registration of applications for settlement permits to increase transparency, Schumacher (2008: 7-8) criticises that the quota system still lacks flexibility: in case of appeal against a negative decision on the application for a settlement permit, the quota place (if a place was available) has to be reserved until a final decision is taken. To give an example, he points to the fact that at the end of the year 2006 the quota for family reunification was de facto not exhausted (there were 904 places left) although the number of applications exceeded the number of quota places available. By the end of June 2006 the provincial authorities had reported that 2,024 applications for family reunification could not be taken into consideration in this year due to the lack of quota places (see also Biffel/Bock-Schappelwein 2006: 75; Der Standard 9.6.2006).

4. Size and Composition of Family Reunification

4.1. Introduction

The Ministry of the Interior is the main data provider that collects and analyses data about residence titles in Austria. The Population Register which is the basis for population and migration statistics and which is maintained by Statistics Austria, does not include this kind of information and is therefore not of relevance for this Chapter.

Statistics on the number of issued residence titles as well as the number of registered valid residence titles are published by the Ministry of the Interior on a monthly and yearly basis and are therefore available for the whole reference period of this study (2002-2006). Statistics on applications for residence titles as well as negative decisions on applications are only published since 2006.³² However, these statistics are not disaggregated by the specific category of residence title for which the applicant applied (e.g. family reunification, key professional etc.). As a consequence, the study cannot give information on the number of applications which were filed by family dependants. For the purpose of this study, the Ministry of the Interior provided additional statistics about issued residence titles to the NCP Austria which are usually not published.

4.2. General trends

As a general trend, the total number of issued first residence titles (settlement permits and residence permits) declined during the reference period 2002-2006 (see Annex table 2). Compared to the year 2002 when a total of 65,967 titles were issued, the total number of issued titles declined to 22,966 in 2006 (-65%) with a preliminary peak of 69,969 issued residence titles in 2003.³³ The decline was strongest from the year 2005 to 2006. Similarly, the number of permits which were issued to dependants nearly halved when comparing 2005 to 2006. The main reason for this decline was the adoption of the Aliens' Law Package in 2005, in particular the new Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz, NAG), which entered into force on the 1st of January 2006.

³² See annual and monthly reports, available online at www.bmi.gv.at/publikationen.

³³ The figures for 2006 include the 'settlement permit - dependant' as well as the 'residence title - family dependant' which are issued to dependants of Austrian/other EEA/Swiss nationals. On the contrary, 'documentations' issued to EU nationals as well as to (third country national) dependants of Austrian/other EEA/Swiss nationals who make use of their freedom of movement ('permanent residence card'), are excluded from these figures (as these are documentations of a right to residence and not a residence title in the strict sense).

The figures for the years 2002-2005 also include settlement permits which were issued to Austrian/other EEA/Swiss nationals.

As explained above, data on applications for residence titles is only available for the year 2006: in this year, 41,983 first applications for residence titles were registered in addition to 127,858 applications for renewals of residence titles and 1,550 applications to change the purpose of a residence title (see Annex table 3).

Dependants either follow their sponsor who is already residing in Austria or they can be admitted at the same time with him or her. However, the statistics do not clearly distinguish whether a dependant is admitted together with the sponsor or some time after the sponsor's admission. In addition, the statistics for the year 2006 also include quota-free settlement permits, which are issued to children who are born in Austria and whose parents hold a settlement permit.

In recent years also the number of (third country national) dependants of Austrian nationals who were admitted to Austria was considerably high. With the new provisions for family reunification as stipulated by the NAG which particularly affect dependants of Austrian nationals, their numbers significantly declined in 2006. In order to complement what was explained above on the admission of dependants of Austrian, other EEA, and Swiss nationals (see Chapter 3.2.4), these figures are presented below in order to provide the reader with a complete picture on the admission of family dependants to Austria (see Annex table 6). It also has to be mentioned that the general decline of permits which were issued to dependants is basically caused by the decline of permits for dependants of Austrian/other EEA/Swiss nationals.

Looking at the share of residence titles issued to dependants in the total number of residence titles, it is evident that the admission of dependants is a main gate of entry to Austria. In recent years, the share of settlement permits which were issued to dependants in the total number of settlement permits³⁴ even exceeded 90%. Likewise, the share of residence permits which are issued to dependants in the total number of issued residence permits has significantly grown (2006: 10%) (see Annex table 4). Summing up residence and settlement permits, the share of permits which were issued to dependants makes up approx. 70% in 2006. Yet, the high numbers of dependants of Austrian/other EEA and Swiss nationals play an important role in this respect. Of the total number of permits which were issued to dependants in 2006, only approx. 37% were issued to the dependants of third country nationals³⁵. However, considering just the settlement permits issued within the quota (which

³⁴ In this study, the total number of issued settlement permits also contain the 'residence title – family dependant' (Erstaufenthaltstitel Familienangehöriger) which is issued to the dependants of Austrian, other EEA and Swiss nationals who did not make use of their freedom of movement. Although this title is not named 'settlement permit', its quality is similar (e.g. regarding the requirements and the duration of validity). The inclusion of this title into the category settlement permits is also for reasons of consistency and comparability with preceding years.

³⁵ Including 2,330 settlement permits which were issued to Austria-born children of third country nationals who hold a settlement permit.

are issued to the dependants of third country nationals only), their share in the number of settlement permits subject to the quota was 83%³⁶ (see Annex table 5).

4.3. Admission of dependants

Similar to the decline of the total number of issued residence titles, the number of residence titles which were issued to dependants has decreased during the period 2002-2006 (see Annex table 6). Compared to the year 2003, when the peak was reached with 31,181 issued titles, it decreased by 48% to 16,200 titles³⁷ which were issued to family dependants in 2006. In 2002, the number was lower than in 2003 with 23,544 titles, but still considerably higher than in 2006.

Analysing the statistics for 2006 (see Annex table 6), the residence titles which are issued to dependants are mainly settlement permits (96% of 16,200 titles). The share of settlement permits which is issued to the (third country national) dependants of Austrian/other EEA/Swiss nationals is larger (63%)³⁸ than the share of settlement permits which are issued to dependants of third country nationals (37%).

With regard to the settlement permits which are issued to dependants of third-country-nationals (in total 5,800 settlement permits), more than half of these are settlement permits – family community (family reunification) which are subject to quota regulations (3,093 settlement permits). These permits are issued to the dependants of third country nationals who are already residing in Austria. In 2006, their number was considerably lower than in preceding years; in 2003 for example, a total of 6,517 of these permits were issued. Another 302 settlement permits which are subject to the quota were granted to the dependants of key professionals (employed and self-employed) in the year 2006. These dependants are admitted together with the sponsor. In addition, settlement permits can also be issued quota-free to children of third country nationals who were newly-born in Austria and whose parents hold a settlement permit. A total of 2,330 of these permits was issued in 2006. In addition, 61 quota-free settlement permits for humanitarian reasons were issued to dependants of third country nationals in 2006³⁹ (see Annex table 6).

Besides the settlement permits, another 661 residence permits were issued to dependants of third country nationals. Compared to the preceding years, their number increased following the legal changes since 2006 (2005: 382 permits). Before, family reunification for holders of residence permits was only possible for students and intra-corporate transferees. In 2006, the most important groups within this category were dependants of sponsors holding a permit

³⁶ This number includes dependants admitted in the framework of „family community“ (family reunification) as well as dependants of key professionals admitted together with their sponsor.

³⁷ This figure does not include the 1,337 permanent residence cards, which are issued to the dependants of Austrian/other EEA/Swiss nationals who made use of their freedom of movement, as it is not a settlement permit, but only a documentation of a right to residence.

³⁸ As stated above, documentations of a right to residence are not included here.

³⁹ See Chapter 3.2.2 (p. 16) for the conditions of being granted a settlement permit for humanitarian reasons as dependant.

'special Case – employment' (318 residence permits), family dependants of students (160 residence permits) and family dependants of intra-corporate transferees (136 residence permits) (see Annex table 6).

Despite of the general decline of issued residence titles as well as the decline of permits issued to dependants (which is mainly caused by falling numbers of permits for dependants of Austrian nationals), it is interesting to see that the number of residence titles which were issued to the dependants of third country nationals even increased comparing 2005 to 2006 (6,101 compared to 6,461 residence titles).

Concerning the settlement permits which were issued to the dependants of Austrian/other EEA/Swiss nationals, 8,595 'residence title – family dependant' were granted to the family dependants (Familienangehörige)⁴⁰ of (mainly) Austrian nationals.⁴¹ Another 1,144 'settlement permits – dependant' were granted to dependants (wider family circle) of Austrian/other EEA/Swiss nationals. Both categories are quota-free. Not included in these figures are another 1,337 'permanent residence cards'⁴², which are issued to dependants of (mainly) other EEA nationals (narrow family cycle)⁴³. Following the adoption of the Settlement and Residence Act (NAG), the number of permits which are issued to those dependants declined in 2006. Likewise, the percentage of these permits in the total number of settlement permits fell as a consequence of the legal amendments (see Chapter 3.2.4). To give an example, in 2005, 23,444 settlement permits alone were issued to the dependants of Austrian nationals. The share of settlement permits which were issued to the dependants of Austrian/EEA/Swiss nationals in the total number of settlement permits was higher in 2005 with 81%. Yet, compared to the number of permits for dependants of Austrian nationals, the number of permits for dependants of EEA nationals were rather low (655 permits) (see Annex table 6).

4.4. Composition regarding family reunification

After a more general analysis, in the following chapter we will elaborate in more detail to whom residence titles for family reunification were issued. The Ministry of the Interior does not publish statistics on issued residence titles disaggregated by gender, age and citizenship. Such statistics are only available for the total number of registered valid residence permits. However, the required statistics were kindly provided to IOM Vienna by the Ministry of the Interior upon request.⁴⁴

⁴⁰ See Chapter 3.2.4 on the distinction between "family dependant", "dependant", "narrow family cycle" and "wider family cycle".

⁴¹ As explained above, the NAG does not distinguish between Austrian/other EEA/Swiss nationals but distinguishes according to a person making use of his/her freedom of movement (see Chapter 3.2.4).

⁴² Strictly speaking, this is not a residence title, but rather the documentation of a right to residence as granted by EU law.

⁴³ i.e. Austrian/other EEA/Swiss nationals who made use of their freedom of movement (which is usually not the case for Austrian nationals residing in Austria), (see Chapter 3.2.4).

⁴⁴ The data presented in this chapter is slightly different from that presented in the Ministry of the Interior's yearly publication because the analyses were compiled at two different points of time.

We will focus our analysis on first settlement permits which were issued to dependants of third country nationals in 2006⁴⁵, thus excluding dependants of Austrian/other EEA and Swiss nationals. To be more precise, we will look at two categories of settlement permits: settlement permits for family community and dependants of key professionals.

In principle a clear distinction between spouse and children is not possible. However, age is a good indicator in this regard, as children are only admitted until the age of 18 years, which is at the same time the minimum age for spouses. Furthermore, the residence titles are not linked to one another, so it is not possible to provide data on the sponsor and the other family members belonging to one family.

Settlement permits for family community are either issued within the quota (family reunification) to dependants of third country nationals who are residing in Austria or quota-free in the case of children, who are born in Austria and whose parents hold a settlement permit (see Annex table 7/1). The majority (59%) of these 5,633 settlement permits⁴⁶ were issued to women in 2006. Looking at citizenship, these settlement permits are issued to “traditional” nationalities of immigrants in Austria. The main nationalities are Serbia, Turkey, Bosnia-Herzegovina, Croatia, and Macedonia. Other nationalities among the Top-15 are e.g. India, Egypt, the Philippines or China.

Concerning the age-range, the majority of those admitted were younger than 19 years (60%, most of them even younger than 15), so mainly children of the sponsor. According to the yearly publication of the Ministry of the Interior about 2,330 quota-free settlement permits family community were issued to new-born children, which distorts the calculation. Leaving these children aside, the percentage of minors in the total number of persons subject to the quota for family reunification can be estimated to be considerably lower with around 30-35%. So the majority of dependants admitted in the framework of the quota for family community are then spouses. With regard to age from a more general point of view, approx. 80% of the settlement permits family community subject to quotas are issued to persons, who are younger than 35.

Concerning the admission of dependants of key professionals, a total of 25 settlement permits were issued to dependants of self-employed key professionals in 2006: 13 male dependants and 12 female dependants (see Annex table 7/2). Among those men, 11 persons are below the age of 19 years, while the females are distributed more equally over the age categories (only two being younger than 19 years). This indicates that male dependants are more often children than spouses. For woman, the opposite holds true. This

⁴⁵ Besides first permits, the data also includes changes of the purpose of settlement permits.

⁴⁶ Of these 5,633 settlement permits for ‘family community’ approx. 59% were issued for family reunification within the quota, the remaining 41% were issued to Austria-born children. The data provided by the Ministry of the Interior summarises these two categories into one.

is sustained by the trends among sponsors: in 2006 only five settlement permits were issued to female employed key-professionals compared to 22 permits which were issued to men.⁴⁷

In addition to dependants of self-employed key professionals, another 314 dependants of employed key-professionals were admitted in 2006 (101 males, 213 females) (see Annex table 7/3). Among male dependants, 80% are younger than 19 years, among females this percentage is only at 38%, which indicates again that there are significantly more spouses and less children among the group of female dependants. Certainly, the gender distribution among the sponsors has to be taken into account here as well: there were 403 men admitted as employed key professionals and only 118 women in 2006.

An interesting aspect is that the nationalities of family dependants of key-professionals are different and more diversified compared to the admission category 'family community', with nationalities such as Korean, Indian, American, Russian etc. among the main nationalities (see Annex table 7/2 and 7/3).

⁴⁷ Dependants of key professionals are admitted together with their sponsors. In the publications of the Ministry of the Interior dependants and sponsors are listed separately.

5. Conclusion

This study is the result of a desk research, carried out by the International Organization for Migration (IOM) Vienna in its function as National Contact Point to the European Migration Network (EMN).

The admission of dependants, referred to as 'family reunification' in this study, is a main gate of entry of third country nationals to Austria. Discussing the legal provisions, the term family reunification is to some extent misleading, as it implicates that dependants enter Austria after their sponsor, which is not necessarily the case, as they may also be admitted together. Family reunification of dependants of third country nationals for the purpose of settlement has been for over a decade subject to a quota system. Within this framework, settlement permits are issued for the purpose of "family community" (family reunification), meaning that dependants of third country nationals join the sponsor who is already residing in Austria. In addition, dependants of employed and self-employed key professionals who are admitted together with their sponsor, are included in the quotas for key professionals.

Although the Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz, NAG) introduced changes for the family reunification of third country nationals, which were mainly due to the obligation of transposing Council Directive 2003/86/EC on the right to family reunification, its basic parameters remained more or less unchanged, i.e. the quota system or the dependency on the sponsor's right to residence. Researchers have argued, that the transposition of Council Directive 2003/86/EC reduced complexity of the provisions for family reunifications; in addition, the rights of dependants of third country nationals were improved, e.g. referring to the access to employment or possibilities for being granted an autonomous settlement permit. Contrary to the preceding law, the NAG allows the admission of minors until the age of 18. Restrictions on the admission of minors in the framework of family reunification as stipulated by the Aliens' Act (Fremdengesetz, FrG) were abolished, also following the earlier rulings of the Constitutional Court.

During the reference period of this study, family reunification of third country nationals was not a focus of extensive public debates. An aspect that was raised by media from time to time in recent years were the waiting periods and the backlog of applications for family reunification due to the exhaustion of the yearly quota that dependants were confronted with. Yet, this backlog significantly declined since 2003, with a preliminary increase in 2006. Overall, the quota for family reunification remained more or less stable with the exception of the year 2006, when the respective quota was reduced to 4,480 settlement permits (before 5,460). Since 2007, the quota was extended again.

Looking at the admission of dependants from a quantitative perspective, a large share of the number of residence titles which were issued during the period 2002 to 2006 was issued to dependants. Among the settlement permits, the percentage was even exceeding 90%. Although the focus of this study is family reunification of third country nationals, in order to complete the picture this study also gives an overview of the conditions for family reunification of dependants of Austrian, EEA and Swiss nationals as well as an overview of its dimension. When looking at the number of settlement permits issued to dependants, one has to bear in mind that the majority of permits are issued to the latter group, particularly Austrian nationals. Their admission is exempt from quota regulation. In addition, (Austria-born) children of third country nationals holding a settlement permit are granted a quota-free settlement permit. Their number has also been considerable in 2006. Taking into account just those settlement permits, which are issued to dependants of third country nationals within the quota, the percentage of permits that were granted to dependants was 83% in that year after all. Concerning nationality of admitted dependants, the dependants of third country nationals originate mainly from the traditional countries of origin of immigrants in Austria (e.g. Serbia, Turkey, Bosnia and Herzegovina etc.). When looking at the dependants of key professionals, their composition with regard to nationality is more diversified.

To sum up, family reunification is the most important category of admission of third country nationals to Austria, particularly in the topic of settlement with a long-term perspective. This phenomenon has to be interpreted holding in mind the background of immigration flows to Austria in the past decades. In addition, the admission of dependants of Austrian nationals, which gained relevance in recent years, is to some extent also a result of past immigration and linked to naturalisations of former immigrants.

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Annex

Table 1: Settlement Decrees 1998-2008

Purpose of settlement permit	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Key professionals (employees) and dependants	1.860	1.130	1.010	1.613	1.905	2.185	2.030	1.440	1.125	1.790	2.545
Key professionals (entrepreneurs)	-	-	-	-	-	220	170	160	140	145	190
Employment and dependants	950	1.120	1.000	815	495	-	-	-	-	-	-
Family reunification	4.550	5.210	5.000	5.490	5.490	5.490	5.490	5.460	4.480	4.540	4.755
Private (no intention to work)	630	660	490	420	390	175	360	440	260	140	165
Others*	550	1.445	878	-	-	-	-	-	-	-	-
Long-term residents (other EU MS)	-	-	-	-	-	-	-	-	350	165	165
Change of purpose of permit	-	-	-	-	-	-	-	-	645	90	230
TOTAL	8.540	9.565	8.378	8.338	8.280	8.070	8.050	7.500	7.000	6.870	8.050

Source:

Settlement decree 1998 (Niederlassungsverordnung (NLV) 1998), BGBl. II 371/1997
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 Settlement decree 2006 (Niederlassungsverordnung (NLV) 2006), BGBl. II 426/2005
 Settlement decree 2007 (Niederlassungsverordnung (NLV) 2007), BGBl. II 54/2007
 Decree to amend the settlement decree 2007 (Änderung der Niederlassungsverordnung 2007), BGBl. II 314/2007
 Settlement decree 2008 (Niederlassungsverordnung (NLV) 2008), BGBl. II 371/2007

Comments:

Key Professionals: With the amendment of the Aliens Act in 2002 (entry into force: 01/01/2003), categories of purposes for settlement permits have changed: the category 'employment' was completely replaced by two new categories of key professionals (employees and entrepreneurs). Dependants of entrepreneurs are included in the first category 'key professionals (employees) and dependants'.

Family reunification: these permits are issued to dependants of third country nationals who are residing in Austria.

Others: In 2000, there was an exceptional quota for minor unmarried children of those third country nationals who have legally settled down in Austria before 01/01/1998. Furthermore, a special quota for refugees from Kosovo (which was introduced in 1999) was extended to the year 2000.

Changes since 2006: With the new Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz, NAG), which entered into force on the 1st of January 2006, two new categories were introduced:

- A quota for third country nationals who are long-term residents according to Directive 2003/109/EC in another EU MS and wish to immigrate to Austria.
- A quota for third country nationals, who intend to change the purpose/title of their settlement permit.

Table 2: Issued first residence titles 2002-2006

Year	Settlement Permit	Residence Permit	Total
2002	27.166	38.801	65.967
2003	34.564	35.405	69.969
2004	31.835	32.209	64.044
2005	32.166	21.200	53.366
2006	16.353	6.613	22.966

Source: Federal Ministry of the Interior

Comments:

The figures for **2006** include the 'settlement permit - dependant' as well as the 'residence title - family dependant' which are issued to dependants of Austrian/other EEA/Swiss nationals. On the contrary, 'documentations' issued to EU nationals as well as to (third country national) dependants of Austrian/other EEA/Swiss nationals who exercise their right to free movement ('permanent residence card'), are excluded from this table (as these are no residence titles, but documentations of a right to residence).

Figures for **2002-2005** include settlement permits which were issued to Austrian/other EEA/Swiss nationals.

Table 3: Applications for residence titles by gender 2006 (first permits, renewals and change of title)

Type of application	Male	Female	Total
First residence title	19.941	22.042	41.983
Renewal of residence title	61.376	66.482	127.858
Change of Purpose of residence title	692	858	1.550
Total	82.009	89.382	171.391

Source: Federal Ministry of the Interior

Table 4: First residence titles issued to dependants in relation to total number of issued residence titles 2002-2006.

	2002	2003	2004	2005	2006
Total settlement permits	27.166	34.564	31.835	32.166	16.353
Settlement permits issued to dependants	23.258	30.824	28.875	29.831	15.539
in % of total settlement permits	85,6%	89,2%	90,7%	92,7%	95,0%
Total residence permits	38.801	35.405	32.209	21.200	6.613
Residence permits issued to dependants	286	357	355	382	661
in % of total residence permits	0,7%	1,0%	1,1%	1,8%	10,0%

Source: Federal Ministry of the Interior

Comments:

The figures include settlement permits issued to (third country national) dependants of Austrian/other EEA/Swiss nationals. Documentations are not included in the figures for 2006 (see comments to table 2 as well as table 6 for details).

Table 5: Overview on issued first permits in 2006 (includes all categories of permits)

Category of Permit	Male	Female	Total
Settlement Permits total	7.016	9.337	16.353
Subject to Quota	1.616	2.453	4.069
Employment	429	129	558
Family community (Family reunification)	1.143	2.252	3.395
Private/No access to labour market	44	72	116
Quota-free	5.400	6.884	12.284
Employment	17	7	24
Family Community	5.321	6.823	12.144
Private/No access to labour market	12	13	25
Humanitarian Reasons	50	41	91
Residence Permits total	2.902	3.711	6.613
Residence permits - employment	916	1.550	2.466
Residence permits- family community	252	409	661
Residence permits - study	1.579	1.619	3.198
Residence permits - other	155	133	288
TOTAL ISSUED PERMITS	9.918	13.048	22.966

Source: Federal Ministry of the Interior

Comments:

Renewals of permits, changes of permits and documentations of the right of residence of EU nationals and their dependants are not included in this table. Each category summarises several types of permits, namely:

1. Settlement permits

1.1 Settlement permits - restricted by quotas

- Settlement permits - employment: employed key professionals, self-employed key-professionals, mobility cases (Mobilitätsfall)
- Settlement permits - family community: family reunification, family community of key professionals (employed + self-employed)
- Settlement permits - private/no access to labour market: settlement permit excluding employment, settlement permit excluding employment (mobility cases)

1.2 Settlement permits - quota-free

- Settlement permits - employment: EU convention cases
- Settlement permits - family community: residence title - family dependant (nuclear family; dependants of Austrian/other EEA/Swiss nationals who do not exercise their right to free movement), settlement permit - dependant (wider family circle; dependants of Austrian/other EEA/Swiss nationals), family community - EU convention, family community - quota-free (children born in AT), family community - mobility cases, family community - humanitarian reasons;
- Settlement permits - private/no access to labour market: settlement permit excluding employment
- Settlement permits - humanitarian reasons: humanitarian reasons (except family community for humanitarian reasons)

2. Residence permits

- Residence permits - employment: business delegates, researchers, self-employed persons, employees (special cases), intra-corporate-transferees
- Residence permits - family community: Family community of researchers, family community of artists, family community of intra-corporate-transferees, Family community/special cases of employment, family community of students
- Residence permits - study: students, pupils
- Residence permits - other: humanitarian cases, social services, artists

Table 6: First residence titles issued to dependants 2002-2006

Residence titles - categories	2006		
	Male	Female	Total
Settlement Permits (Quotas)			
Family Community (Family Reunification)	1.043	2.050	3.093
Family Community of Key professional (employed)	87	190	277
Family Community of Key professional (self-employed)	13	12	25
Total	1.143	2.252	3.395
Settlement Permits (exempt from quota)			
Settlement Permit - Dependant	555	589	1.144
Residence Title - Family Dependant	3.560	5.035	8.595
Family Community quota-free (TCN born in Austria)	1.179	1.151	2.330
Humanitarian Reasons - Dependants	23	38	61
Mobility Cases - Dependants	2	4	6
Family Community (European Convention)	2	6	8
Total	5.321	6.823	12.144
Residence permits			
Family Community of Researcher	9	17	26
Family Community of Artist	11	10	21
Family Community of Intra-corporate transferees	42	94	136
Family Community of Special Case - employment	114	204	318
Family Community of Student	76	84	160
Total	252	409	661
TOTAL PERMITS ISSUED TO DEPENDANTS	6.716	9.484	16.200

Source: Federal Ministry of the Interior

Comments:

Settlement permit - dependant: issued to dependants beyond nuclear family (wider family) of Austrian, other EEA or Swiss nationals

Residence title - family dependant: issued to nuclear family of Austrian, other EEA or Swiss nationals, who do not exercise their right to free movement (this would usually apply to AT nationals). Although not referred to as 'settlement permit', it was decided to include this title into the category of quota-free settlement permits for reasons of comparability and consistency.

Dependants of EEA nationals exercising their right to free movement are issued a permanent residence card which is not a residence title, but a documentation of a right to residence and thus not contained in this table. In 2006, a total number of 1,337 permanent residence cards were issued.

Residence titles - categories	2005		
	Male	Female	Total
Settlement Permits (Quotas)			
Family Community (Family Reunification)	1.524	3.378	4.902
Family Community of Key professional (employed)	106	203	309
Family Community of Key professional (self-employed)	10	20	30
Total	1.640	3.601	5.241
Settlement Permits (exempt from quota)			
TCN dependants of AT nationals	11.009	12.435	23.444
TCN dependants of EEA nationals	272	383	655
TCN dependants of Swiss nationals	4	9	13
Family Reunification, § 20 FrG (dependants of long-term resident TCN)	229	249	478
Humanitarian reasons - dependants	-	-	-
Total	11.514	13.076	24.590
Residence permits			
Family Community of Intra-corporate transferees	54	105	159
Family Community of Student	88	135	223
Total	142	240	382
TOTAL PERMITS ISSUED TO DEPENDANTS	13.296	16.917	30.213

Residence titles - categories	2004		
	Male	Female	Total
Settlement Permits (Quotas)			
Family Community (Family Reunification)	1.284	2.736	4.020
Family Community of Key professional (employed)	97	182	279
Family Community of Key professional (self-employed)	9	17	26
Total	1.390	2.935	4.325
Settlement Permits (exempt from quota)			
TCN dependants of AT nationals	11.050	12.258	23.308
TCN dependants of EEA nationals	215	244	559
TCN dependants of Swiss nationals	6	10	16
Humanitarian reasons - dependants	339	328	667
Total	11.610	12.840	24.550
Residence permits			
Family Community of Intra-corporate transferees	42	105	147
Family Community of Student	92	116	208
Total	134	221	355
TOTAL PERMITS ISSUED TO DEPENDANTS	13.134	15.996	29.230

Source: Federal Ministry of the Interior

Residence titles - categories	2003		
	Male	Female	Total
Settlement Permits (Quotas)			
Family Community (Family Reunification)	2.183	4.334	6.517
Family Community of Key professional (employed)	106	261	367
Family Community of Key professional (self-employed)	16	28	44
Total	2.305	4.623	6.928
Settlement Permits (exempt from quota)			
TCN dependants of AT nationals	10.365	12.336	22.701
TCN dependants of EEA nationals	220	332	552
TCN dependants of Swiss nationals	6	10	16
Humanitarian reasons - dependants	313	314	627
Total	10.904	12.992	23.896
Residence permits			
Family Community of Intra-corporate transferees	51	119	170
Family Community of Student	81	106	187
Total	132	225	357
TOTAL PERMITS ISSUED TO DEPENDANTS	13.341	17.840	31.181

Residence titles - categories	2002		
	Male	Female	Total
Settlement Permits (Quotas)			
Family Community (Family Reunification)	1.309	2.550	3.859
Family Community of Employees	180	370	550
Family Community of Key professionals	118	250	368
Total	1.607	3.170	4.777
Settlement Permits (exempt from quota)			
TCN dependants of AT nationals	7.970	10.084	18.054
TCN dependants of EEA nationals	165	262	427
Humanitarian reasons - dependants	-	-	-
Total	8.135	10.346	18.481
Residence permits			
Family Community of Intra-corporate transferees	37	69	106
Family Community of Student	73	107	180
Total	110	176	286
TOTAL PERMITS ISSUED TO DEPENDANTS	9.852	13.692	23.544

Source: Federal Ministry of the Interior

Table 7: Issued settlement permits to dependants of third country nationals by gender, age and citizenship (Top-15 countries)

7.1. Settlement permits restricted - family community

Gender: Male

Citizenship	Age Groups (years)												Total
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	>=65	
Serbia	490	28	18	39	58	46	34	16	7	5	2		743
Turkey	428	23	27	54	28	13	7		1				581
Bosnia-Herzegovina	218	10	8	16	10	8	5	3	2	2		1	283
Croatia	195	7	6	8	8	2	3	1	1	1	1		233
Macedonia	90	3	4	14	3	1							115
Romania	57	1	2	10	8	3	1	2					84
India	32	3	1	4	5	2							47
Egypt	37	1		1									39
Philippines	16	2	2	2	4	4	1	1					32
Bulgaria	12				1				1			1	15
China (People's Rep.)	8		2	1	3	1							15
Bangladesh	6			2				1					9
Nigeria	7												7
Pakistan	6			1									7
Ukraine	4				2								6
Other	55	1	1	2	2	1	3	2	0	1	0	0	68
Total	1.661	79	71	154	132	81	54	26	12	9	3	2	2.284

Comments:

This table includes 'settlement permits - family community' (family reunification) issued within the quota as well as quota-free 'settlement permits - family community' which are issued to children (born in Austria) of third country nationals holding a settlement permit. This table includes first permits as well as changes of the purpose of a settlement permit (approx. 200 permits).

Gender: Female

Citizenship	Age Groups (years)												Total
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	>=65	
Serbia	429	17	118	133	127	76	31	23	14	6	3	1	978
Turkey	426	28	212	113	48	30	24	23	27	13	2	1	947
Bosnia-Herzegovina	219	7	50	44	47	16	9	9	5	1	1		408
Croatia	181	7	20	41	24	11	17	7	4	4	1		317
Macedonia	70	7	35	16	11	11	15	6	1				172
Romania	58	2	15	28	20	14	6	2	1				146
Egypt	27	1	4	10	8	1	1						52
Philippines	17		7	9	9	5	3		1				51
India	14	3	3	12	6	3	3	1					45
China (People's Rep.)	19	4	2	3	4	1							33
Pakistan	15	1	1	6	5	1		1					30
Bulgaria	11	1	2	4	7	1		1	1				28
Nigeria	16			1		1							18
Russian Federation	4	1		2	1	2							10
Ukraine	5			2	2		1						10
Other	54	3	13	15	11	4	3	1	0	0	0	0	104
Total	1.565	82	482	439	330	177	113	74	54	24	7	2	3.349

Source: Federal Ministry of the Interior

Comments:

This table includes 'settlement permits - family community' (family reunification) issued within the quota as well as quota-free 'settlement permits - family community' which are issued to children (born in Austria) of third country nationals holding a settlement permit. This table includes first permits as well as changes of the purpose of a settlement permit (approx. 200 permits).

7.2. Settlement permits Family Community with Key Professionals (self-employed)

Gender: Male

Citizenship	Age Groups (years)												Total
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	>=65	
Albania	2												2
Bosnia-Herzegovina	1	1											2
Brasil	1												1
Iran	1												1
Israel	2												2
Korea (South, Rep.)	1							1					2
Croatia					1								1
USA	1	1											2
Total	9	2		0	1	0	0	1	0	0	0	0	13

Gender: Female

Citizenship	Age Groups (years)												Total
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	>=65	
Albania						1							1
Bosnia-Herzegovina					1								1
Brasil									1				1
Bulgaria				1									1
Iran											1		1
Israel	1				1								2
Korea (South, Rep.)						1							1
Romania	1			1									2
Serbia								1					1
USA						1							1
Total	2	0	0	2	2	3	0	1	1	0	1	0	12

Source: Federal Ministry of the Interior

7.3. Settlement permits Family Community with key Professionals (employed) (Top-15)

Gender: Male

Citizenship	Age Groups (years)											Total	
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64		>=65
Bosnia-Herzegovina	9			1		2							12
Korea (South, Rep.)	6				1	1			1				9
Romania	4	2		1	1		1						9
India	3			2	2	1							8
USA	6	1		1									8
Serbia	5	2											7
Russian Federation	4	1						1					6
Canada	5												5
Australia	3					1							4
Philippines	3				1								4
Ukraine	2	1			1								4
Bulgaria	2	1											3
China Rep. (Taiwan)	3												3
China (People's Rep.)	3												3
Israel	1				1								2
Other	11	3	0	0	0	0	0	0	0	0	0	0	14
Total	70	11	0	5	7	5	1	1	1	0	0	0	101

Comments:

This table includes first permits as well as changes of the purpose of a settlement permit (approx. 35 permits).

Gender: Female

Citizenship	Age Groups (years)											Total	
	0-14	15-18	19-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64		>=65
Romania	8			3	5	2	2			1			21
USA	5	2	1	2	1	3	3		2		1		20
Russian Federation	7	1		2	4	2	2	1					19
Croatia	4	2		4	4	1	1						16
Serbia	7			1	6	1	1						16
Bosnia-Herzegovina	7	1		1	3	1							13
Canada	5	1		1	2	3							12
India	2		2	3	1	1							9
Korea (South, Rep.)	3				2	2	1	1					9
China (People's Rep.)				1		4	2						7
Turkey	1		1		3	2							7
Bulgaria	3	1				1	1						6
Macedonia	4				1		1						6
Philippines	2			1	2			1					6
China Rep. (Taiwan)	2				2	1							5
Other	13	1	0	6	8	4	3	3	3	0	0	0	41
Total	73	9	4	25	44	28	17	6	5	1	1	0	213

Source: Federal Ministry of the Interior

Comments:

This table includes first permits as well as changes of the purpose of a settlement permit (approx. 35 permits).