Right to family reunification in the European Union:

A comparison with the Norwegian legal system

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1. Introduction

In this paper, I will make a comparison between the EU legislation and the current Norwegian legislation on the field of family reunification, and point out the differences between those two systems. Such comparison has not been carried out before, neither by scholars from the European Union or Norway. I found this surprising, since the legislation and interpretation on the current rules on the field of family migration are developing fast. Further, there is little information about Norway´s connection to the EU legislation on the field of family reunification. Therefore, the comparison of the two legal systems is my own, based on the available legal sources for the two systems.

1.1 Relation between Norwegian Immigration Act and international law

The Norwegian law relies on a dualistic principle. This means that Norwegian and international law are two separate systems. International law and rules has to be implemented before they are counted as a part of Norwegian law. In cases of contradiction between Norwegian and international law, the main rule is that Norwegian law stands. This rule will be modified by presumption rule, which says that Norwegian law should be interpreted according to the international rule, as far as possible[1]. The presumption rule is a binding rule upon the state, and can have influence on how the rule is interpreted. This principle is explicitly stated in Immigration Act § 3[2]: "*The Act shall be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual*."[3].

In this context, "*international rules*" means every international rule that Norway is bound to or will be bound to in the future[4]. Further, the rules must intend to strengthen the position of the individual, which implies that the rules must give a special protection or rights to the individual[5]. The law should be interpreted in accordance with the human rights law. This means that in

[1] Rt. 2000 s.1811, Rt. 2001 s1006, Rt. 2007 s.234
[2] Lov 15 mai 2008 nr 35: Lov om utlendingers adgang til riket og deres opphold her, (Utlendingsloven).
[3] Draft bill on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm (Immigration Act), section 3, text translated by justice- and public security department.
[4] Ot.prp. nr. 75 s. 401
[5] Ot.prp. nr. 75 s. 401

cases where Norwegian law contradicts the human rights law, the human rights law is applicable. This principle follows from the Norwegian Constitution § 110 c according to which, the authorities shall ensure and respect human rights[6].

There are two sets of rules applicable in family reunification cases. The Immigration Act chapter 6, which apply to third country nationals, and the rules according to the European Economic Area agreement (EEA agreement), which can be found in Immigration Act chapter 13.

1.2 The issue and limitations

The issue of family reunification is very complex and extensive. I will in no way attempt to discuss and identify all of the many differences between those two legal systems on the field on family reunification. Therefore I have chosen the most problematic aspects within the directives and Norwegian legislation, which I will discuss extensively.

There are two forms of immigration. *Forced migration* where a person is forced to leave his or hers country because of the conditions and *voluntary migration,* which is based on the purpose of economic activity, research, family reunification and receipt of services (often medical)[7]. Family reunification will therefore be considered as voluntary form of migration.

A right to family life is one of the most fundamental human rights, which has it´s basis in The European Convention on Human Rights[8] Article 8. This article has served as a basis for the development of a set of rules regulating the exercise of this right within the European Union.

The most important directives that contains rules regarding family reunification is the family reunification directive 2003/86/EC, and directive 2004/38/EC. The first directive contains rules for family reunification on the territory of a Member State where the sponsor is a third country national. The directive 2004/38/EC regulates right of free movement for EU nationals. Those right are extended to the family members of EU citizens, and regulates therefore the right to

[6] Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814 (Grunnloven), § 110c.
[7] Pieter Boels, Maarten den Heijer, Gerrie Lodder and Kees Wouters *European migration law,* 2009 Intersentia Antwerp – Oxford – Portland, Volume 3 – Leiden institute of immigrant law, page 3.
[8] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

family reunification between EU citizens and their family members, in case where the sponsor reside in another Member State than the one he is a national of.

The family reunification for EU citizens is a right deriving form the right of free movement of persons, while the possibility for family reunification for third country nationals is not a right[9], but a power of the Community to extend to Europe´s third country nationals as it choose.

Norway has ratified directive 2004/38, and the rules are applicable for EEA/EU nationals residing in Norway. The main point is that the directive should be interpreted in the same extend in Norway as in other EU Member States. Still there are some differences I would like to point out in this paper.

First of all I will restrict myself to only write about family reunification, and not the right to establish a family relationship. I will discuss the right to family reunification where the sponsor is an EU/EEA national, and where the sponsor is third country national, separately, since the legal basis is different for those two groups. The legal basis for family reunification for Community nationals is found in Title III EC/Title III Chapter I EU Treaty, while the legal basis for third country nationals is to be found in Title IV EC/Title III Chapter IV EU Treaty.

Under the chapter "dependent family members" I will discuss the opportunity for family reunification with family members who are not able to take care of themselves in their home country, and who does not fall within the meaning of "core" family members. I will also show the difference in how unmarried partners are treated by those legislations under the chapter "durable relationship". Further, I will discuss the topic of the difficult situations the family members are put in to in the event of death, departure or divorce from the sponsor.

My other point of focus is the Family reunification Directive[10], which is not implemented in the Norwegian legislation. After the Immigration Act came into force, it became much easier for the EEA members to reside in Norway. This is not the case for third country nationals (or Norwegian citizens married to a third country national).

[9] Elsbeth Guild, *The Legal Elements of European Identity- EU Citizenship and Migration Law*, University of Nijmegen, Partner, Kingsley Napley, Kluwer Law International, London 2004, Page 95.
[10] Directive 2003/86/EC

The income requirement for the sponsor, which is implemented in both Family reunification directive and the Immigration Act, make a great barrier for family reunification.
I will show how this requirement is practiced in the EU Member States and in Norway.

By the end of each issue, I will make a conclusion and express my own thoughts around the subject.

1.3 Influence on decisions of ECJ by Article 8 of European Convention on Human rights

The ECHR and European law works parallel with each other. A member state´s denial of entry of a family member will touch upon both the right to family life, and the EU citizen´s free movement right.

In the case *Eind*[11], the European Court of Justice (ECJ) recognised the importance of ensuring protection for family life of nationals of the Member States[12]. European Union law would not force the EU national to choose between right to family life and continued exercise of the right of free movement[13].

After the directive 2004/38/EC came into force, the ECJ placed the right to family life as a core right within the directive; this right had also a strong value in the ECJ´s view prior the directive. The case law illustrates the determination of ECJ to ensure the protection of family life, in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty[14]

1.4 The relation between Norwegian- and EU legislation

Norway is not a member of the EU, but is a party to the EEA agreement. This agreement has been implemented in the Norwegian legislation by law[15]. The core aspect of the EEA agreement is that the Member States have bound themselves to the internal marked of the European Union[16]. From 1992 The European Union has developed from being only an economic Union, to be a far

[11] *Eind*, Case C-291/05
[12] Rogers and others, *Free movement of persons in the enlarged european union* Page 159 para 9-18.
[13] Rogers and others, *Free movement of persons in the enlarged european union* Page 158 para 9-16.
[14] Rogers and others, *Free movement of persons in the enlarged european union* Page 160 para 9-20.
[15] Lov 27.11.1992 nr. 109, Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområdet (EØS) m.v. (EØS-loven).
[16] NOU 2012:2, page 64.

more extensive and deeper political cooperation[17]. This development has affected the EEA Member States, including Norway, directly and indirectly[18]. Directly, since Norway is bound to some of the EU legislation through single agreements. The precondition for such single agreements is that the Norwegian legislation is in accordance with EU law. Still, the interpretation of the directive will happen slower in Norway than in other Member States.

Norway is also indirectly affected by the EU legislation, since there is a wish of harmonization between the legal systems. The principle of dynamic development is essential in order for the EEA agreement to work, even though this principal is not legally binding upon the state. This principle is of such fundamental character, that it would be difficult for the EEA states to refuse to implement new and relevant EU rules. In the political view, the EEA states are obligated to adapt to the EU law´s development[19].

The Norwegian government expressed in the preparatory work from 2010 the wish of harmonization with the EU law. The government stated that they value and "*emphasizes cooperation with the EU on the field of migration and refuge*"[20]. "*As a small country, Norway is served by a coordinated and harmonized global migration policy*"[21]. "*If such ambitions are to be realized, The European Union has to play the key-part*"[22].

Further, the EEA agreement has also developed, because of the interpretation of the law and through judgements. Those aspects change the view of the law, even though the law itself does not change[23]. The EFTA court regulates the problems that rise through the EEA agreement. The judgements form EFTA and EU courts are in theory of equal value, but in reality, it is the EU court´s judgements are the most important, also regarding the development in EEA countries[24].

The interpretation of the directives changes in tact with new judgement from the EU court. In order for those judgements to be bounding upon Norway, the directive must be implemented in the law. If it´s not, then Norway is not bound to follow such interpretations. Still, it is likely that

[17] NOU 2012:2, page 79.
[18] NOU 2012:2, page 79.
[19] NOU 2012:2, page 92
[20] Meld.St.9 (2009-2010), Page 21.
[21] Meld.St.9 (2009-2010), Page 21.
[22] Meld.St.9 (2009-2010), Page 21.
[23] NOU 2012:2, page 91.
[24] NOU 2012:2, page 92.

the EFTA court will follow on the EU courts interpretation with time. In result, such judgement will be binding upon Norway, but it will take more time than in other EU countries. Therefore the interpretation of the law will change, but not as fast as in EU Member States.

By the EEA agreement Article 6[25], it is stated that the EU court guide the interpretation. It is presumed that the EU court will lead the interpretation, and the EEA law must follow those lines. In this light, the EU court is much more important in the issue of interpretation of the law, than the EFTA court[26]. Norway will in the end more or less follow the EU legislation with time.

The most problematic aspect for Norway is that the state has in reality bound itself to follow the political and legal rules from the European Union over a large field, even though Norway is not a part of the EU and cannot vote on the issues[27].

1.5 Development and the sources of law by Norwegian legislation

The first law restricting foreigner's access to the territory of Norway came in 1901 (Fremmedloven[28]), which required the foreigner to give a notification to the authorities if the person wished to stay permanently. This law gave also an opportunity to return a foreigner to the state of origin. During and after the First World War, Europe experienced a mass influx of refugees; therefore a law regulating the access was needed. Fremmedloven from 1901 was revised in 1927 and the law regulated right to take up employment, right to residence permit and return. This was the first complex law[29]. The law developed in line with needs and the growth of international law, and became much more detailed. Today, the access, stay, return and other aspects of immigration are regulated by Utlendingsloven (the Immigration Act) of 2008, which is the main source of law. This law regulates the non-Norwegian nationals access to the territory and residence[30], and applies to every person who is not a Norwegian citizen[31].

[25] Agreement on the European Economic Area
[26] NOU 2012:2, page 92.
[27] NOU 2012:2, page 19.
[28] Lov 4 mai 1901 Fremmedloven.
[29] Øyvind Dybvik Øyen (Red), *Lærebok utlendingsrett*, Universitetsforlaget, Oslo 2013, Page 25
[30] Immigration Act § 2
[31] Immigration Act § 5

Immigration law is a part of Norwegian administration law[32]. In order to fully understand the meaning of the text, the Immigration act and administration law must be red together[33].

The Immigration Regulations[34] contains detailed rules, which supply the law. Preparatory work is also an important source. They are: NOU 2004:20, Ot.prp. nr. 75[35] and Innst. O. 42[36].

1.6 Development of family migration in Norway

Family reunification is the most common form of immigration in Norway, by 60%[37] of the total immigration from 1990 to 2008. After the new law came into force in 2008, the numbers have increased, since EEA and EU citizens were no longer required to obtain residence permit in order to join their family in Norway. Children and spouses are the groups that get most permissions to be reunited in Norway by 89% of the total[38].

12 243 third country nationals got residence permit granted on the basis of family reunification in 2012[39], while in 2010 the number of family reunification permits was 9988 in total for both EU and non EU nationals[40].

[32] Lov 10. Februar 1967 om behandlingsmåten i forvaltningssaker (Forvaltningsloven).
[33] Øyen (Red), *Lærebok utlendingsrett*, Page 31-32
[34] Forskrift 15.oktober 2009 nr. 1286 om utlendingers adgang til riket og deres opphold her.
[35] Ot.prp. nr. 75 (2006-2007) Om Lov om utlendingers adgang til riket og deres opphold her (Utleningsloven).
[36] Innst. O. 42 (2007-2008) fra kommunal – og forvaltningskomiteen om lov om utlendingers adgang til riket og deres opphold her (utleningsloven).
[37] Øyen (Red), *Lærebok utlendingsrett*, Universitetsforlaget, Page 199.
[38] UDI årsrapport 2011 (UDI annual report), Furuseth in Øyen (Red), *Lærebok utlendingsrett*, Page 120.
[39] UDI (Norwegian Directorate of migration) : *Innvilgede familieinnvandringstillatelser for tredjelandsborgere i 2012.*
[40] UDI (Norwegian Directorate of migration) : *Innvilgede familieinnvandringstillatelser i 2010.*

2. EU citizens right to free movement

2.1 Basis in TFEU

The directive 2004/38 has it´s basis in TFEU[41], where the Article 21(1) states:

"Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

Article 20(1) TFEU contains a definition of who fall within the meaning of "citizen of the Union":

" Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

Further, Article 20(2)(a) TFEU confirms the right of free movement of citizens of EU citizens.

"Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States;"

Within this meaning, every person who is a national of a country, which is a Member of the European Union, is a Union citizen. This person is entitled to move and reside freely on the territory of the Member States.

2.2 Who is a national of the Union?

It is up to national legislation of every Member State to determinate who is a national of their country, as ECJ held in *Micheletti*[42]*:*

"Under international law, it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality"[43]*.*

The Member State is free to change the laws of acquisition of nationality without reference to EU law. So in practice there are differences in how easy or difficult it is to acquire nationality in different Member States[44], and become an EU citizen.

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41 The Treaty On The Functioning Of The European Union.
42 *Micheletti v Delegacion del Gobierno en Cantabria* C-369/90.
43 *Micheletti* Para. 10
44 Nicola Rogers, Rick Scannell and John Walhs *Free movement of persons in the enlarged European union* 2nd edition, (Sweet & Maxwell, London 2012) Para. 5-05.

2.3 Right to access and residence under Directive 2004/38/EC and Immigration Act

The directive gives right to the citizens of the Union and their family members to move and reside freely within the territory of the Member States. Directive came into force 30. April 2006, and replaced Regulation 1612/68. This directive applies to EU citizens, but extends also to citizens of EEA and EFTA member states.

Norway has implemented this directive in national legislation, so the directive is binding upon Norway. § 110 of the Immigration Act states that citizens of countries which are a part of EU or EEA agreement, falls within regulation of chapter 13. This chapter regulates right to entry and residence for foreigners who are a national EU or EEA State. Further it states that the King and his council can decide if citizens of countries who are a part of EFTA agreement, but not EEA agreement will fall under regulation of this chapter.

The directive 2004/38 give rise to three respective rights of residence, provided that certain conditions are fulfilled. The first right of residence is written down in Article 6 of the directive. This Article gives right to residence for up to three months. Right of residence for more than three moths is regulated in Article 7 of the directive, and the right to permanent residence is regulated in Article 16 – 18.

All union citizens have a right to residence in another Member State for up to three months without any further conditions, beside a valid identity card or passport[45]. It is also forbidden to impose further formalities or visa by the Member State[46]. Still, the right of short-term residence is only valid as long as the person does not become an unreasonable burden to the society and the social security system of the host Member State[47]. Workers and job seekers are exempted form this rule[48].

The persons who wish to extend their residence for more than three months are subject to certain conditions. Three groups of Union Citizens can enjoy those rights[49];

[45] Article. 6 (1) Directive 2004/38
[46] Article. 4 (2) Directive 2004/38
[47] Article. 14 (1) Directive 2004/38
[48] Article. 14 (4) Directive 2004/38
[49] Article. 7 (1) Directive 2004/38

(a) Union citizens who are economically active in the host state. (Workers and self employed)
(b) Union citizens who have sufficient resources for themselves and family members, so they do not become a burden on the social security system in the host Member State. The Union Citizen and family members are also required to have sickness insurance cover.
(c) Union citizens who are students and have sickness insurance. They are also required to have sufficient resources so they don´t become a burden on the social security system of the host Member state.

After five continuous years of legal residence in the host Member State, the Union citizen is entitled to permanent residence, and is not subject to the conditions mentioned above[50].

For workers and self – employed persons who become pensioners or have to stop working due to permanent incapacity, a period of less then five years is sufficient to obtain the right of permanent residence[51]. The same applies to workers and self employed, who after three years of continued work and residence in the host Member State, work in an employed or in self – employed capacity in another Member State. Such person must retain their place of residence in the first host Member State, to which they return each day, or at least once a week[52].

2.4. Family members of EU citizens

The rights mentioned above do also extend to the family members of EU citizens, irrespective of their nationality[53]. In the Norwegian Immigration Act § 110, the rights are extended to family members as long as they accompany or are reunited with EEA/EU national.

The definition of "family members" is to be found in Article 2 (2) of directive 2004/38. Right to family reunification with the "core" family members is also to be found in Article 2(2) of the directive. Such core family members have automatic right to accompany and join EU nationals. In the Norwegian Immigration Act, family members who can join are to be found in § 110(2). There

[50] Article. 16 Directive 2004/38
[51] Article. 17 (1) (a) (b) Directive 2004/38 in Pieter Boels, Maarten den Heijer, Gerrie Lodder and Kees Wouters *European migration law,* 2009 Intersentia Antwerp – Oxford – Portland, Volume 3 – Leiden institute of immigrant law, Page 53.
[52] Article. 17 (1)(c) Directive 2004/38, in Boels, *European migration law*, Page 53.
[53] This is not expressly confirmed in EC Treaty.

is no explicit distinction between core family members and other family members, but a list of persons who fall within the definition of "family members" within the law. This list of family members is extended by immigration regulations § 19-7.

Article 3(2) provides for other family members[54]. This provision "*does not lay down any restrictions as to the degree of relatedness when referring to other family members*"[55]. Family members who are allowed to reside in a Member State have also a right to take up employment or self-employment, irrespective of their nationality[56]. The rights of family members derives directly form the EU citizens right of freedom of movement[57], and this right is reinforced in recital 5 of the directive:

> *"The right of all Union citizens to move and reside freely within the territory of the Member States, should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality."*

Recital 6 of the Preamble emphasises the importance of family unity. "Family" should be interpreted in broad term. Also, recital 6 gives the Member States a right to examine right to family reunification on basis of national legislation, where there is no right to family reunification on the basis of the directive. This shows that the directive gives only minimum rights, which the member states can extend if they wish.

ECJ have at many occasions stressed the importance of ensuring protection for the family life of EU nationals in order to eliminate obstacles to the exercise of fundamental freedoms within the TFEU[58].

Freedom of movement is one of the most important aspects within the European community. To not allow the Union Citizen to bring family with him or her to the host Member State will cause an obstacle in the right to freedom of movement. In the *Carpenter*[59] case the court noted:

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[54] Rogers and others, *Free movement of persons in the enlarged european union* Page 161 para 9-23.
[55] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final (para 2.1.3).
[56] Article. 23 Directive 2004/38
[57] Article. 45 TFEU (Article. 39 TEC)
[58] Rogers and others , *Free movement of persons in the enlarged european union* Page 155 para 9-03.
[59] *Carpenter*, Case C-60/00

"[T]he Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community"[60].

Already before the directive 2004/38 came into force, the court sought the legal basis for residence rights of family members in secondary legislation. The court tried to remove obstacles for exercising fundamental Treaty freedoms enjoyed by EU citizens[61]. Now, the rights of family members are lied down in Article 3 read together with Article 2(2) of directive 2004/38

2.4.1 The spouse

A spouse falls within the meaning of family members, under Article 2(2)(a) of the directive. However, the regulation raises two problems.

First, the definition of spouse is not the same in every Member State. This is the problem in same sex marriage, since not all Member State acknowledge same sex marriage, therefor they will not be seen as spouses before the law. The free movement approach lead to the solution that such marriage should be acknowledge in the member state, if they are legally married in the state of origin[62].

The Norwegian Immigration Act do not include Article 2(2) (b) of the directive in the legislation, since marriage of the same sex is allowed by the Norwegian legislation by Marriage act § 1 [63]. Gay persons with registered partnership or marriage will fall under the definition of "spouse" in § 110 (a) of the Immigration Act.

The second problem is that unmarried partners will fall outside the definition. Their right will probably not be fully covered by Article 3 (2)(b) of the directive. This Article obligates the Member States to facilitate entry and residence to other family members, beside those mentioned in Article 2, including "*the partner with whom the Union citizen has a durable relationship with, duly attested*". The conditions must be lied down in national legislation[64].

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[60] *Carpenter*, Para. 38
[61] Boels and others, *European migration law*, Page 72.
[62] Boels and others, *European migration law*, Page 53.
[63] Lov 04.07.1991 nr. 47 Lov om ekteskap, Ekteskapsloven.
[64] Boels and others, *European migration law,* Page 54.

There has been used the same wording of this regulation in the Immigration Act, § 110 (b). This paragraph refers to § 41 of the Immigration Act, which explains the conditions further. This problem will be discussed in the next chapter.

2.4.2 Durable relationship

The partner to whom the Union Citizen has a durable relationship with shall also be authorized to entry the Member State. The relationship has to be duly attested[65]. The wording will include same and different sex couples who are in a relationship not legalized by law[66].

In the case *Alim v Russia* the court stated that by Article 8 of the ECHR *"is not confined to marriage-based relationships and may encompass other de facto `family´ ties where the partners are living together out of wedlock"*[67]. A family bond can exist between two persons, even though there is not an official title to their relationship.

There is no clarification what kind of attest the partners must show to the authorities. It is not clear if a statement form the partners is enough, or if they need other documentation such as that they live under the same address, have children together, or have join bank account[68]. Further, there is no explanation to the meaning of "durable relationship" in the directive. It seems like it is up to each member state to define the meaning of "durable". As the Commission has pointed out in its report to the European Parliament: "*the relationship must be assessed in the light of the objective of the Directive to maintain the unity of the family in a broad sense*"[69]. The Member States will have to take into account relevant aspects as well as personal circumstances[70].

Some of the Member States have two years of living together as a requirement. If the parties have a child together, but have not lived together for two years, it would clearly be incompatible with the Directive to require two years of relationship. Under Article 3 (2)(b) the Member States

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[65] Article 3(2) (b)
[66] Rogers and others, *Free movement of persons in the enlarged european union* Page 173 para 9-75.
[67] *Alim v Russia*, 27.09.2011, No. 39417/07, Para 49.
[68] Ahluwalia Navtej Singh, *Directive 2004/38 and the Right of Free Movement*, 29 November 2006, Tooks chambers.
[69] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final. Page 4, reffering to recital 6 of the directive.
[70] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final.

must take an extensive examination of the circumstances, and justify any denial of entry. There must be room for exception from the two years rule, in order for the national law to be compatible with the directive[71].

The same regulation as in the directive is to be found in § 110 (b) of the Immigration Act. There must be a durable relationship, and the relationship must be duly attested. By the Immigration Regulation § 19-6 the same requirements as in § 41 of the Immigration Act must be fulfilled on this point. The parties must have lived together for at least two years in a permanent and established relationship of cohabitation, and wish to continue to live together in Norway.

Since it is up to each Member State to define how long the relationship has to be in order to fall within the meaning of "durable", the Norwegian legislation fulfill this requirement. Still, there need to be some room for exception from the two-year requirement in order to satisfy the objective of the Directive. The only exception given by the Norwegian Immigration Act is when the parties are expecting a child. The Child must have been conceived before the family reunification took place[72], but after the sponsor entered territory of the state[73]. The law does not contain any other exceptions, which allows to considering a case on personal circumstances. Therefor, in my opinion, the exclusion of such regulation is incompatible with the Commissions wish to be able to consider such cases individually, and take personal circumstances in the case into account.

The principal of equal treatment[74] is an important aspect within the European Union. In the judgement *Reed*[75], the court came to the conclusion that in cases where the Member states allow their own nationals to live in an unmarried relationship with a partner from another state on their territory, the Member State cannot refuse to grant the same benefit to migrant workers who are nationals of another Member State[76]. The migrant workers should be treated the same as nationals of the Member State in this aspect, to the extend the national legislation allows to do

[71] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2009/0313 final chapter 2.1.1.
[72] § 41 (2)(b) Immigration Act
[73] § 41 (2)(a) Immigration Act
[74] Article 12 and 39 of the TFEU Treaty. Article 12 of the regulation 1612/68 (which is now replaced by directive 2004/38EC).
[75] *Reed*, Case 59/85
[76] Boels and others, *European migration law*, Page 54.

so. As I will discuss later in this paper, it is more difficult for a Norwegian citizen to be reunited with a third country national family member on the Norwegian territory than it is for EU/EEA nationals who has made use of the freedom of movement rights to be reunited with his or hers third country national family member. This leads to the conclusion that Norway does not breach the principal of equal treatment upon the EU/EEA nationals who are making use of their free movement right.

2.4.3 Other family members

The Member States shall authorize entry and residence for family members who are "*dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen*"[77]. The Member States shall take an extensive examination of the circumstances in such situation, and justify any denial of entry[78].

As mentioned in chapter 2.4, there is no distinction between core family members and other family members in § 110 in the Immigration Act. Still, in Para. 5 of the § 110 the King and his council can decide to include other family members than those mentioned in Para 2. In the Immigration Regulation § 19 – 7[79] the list of family members is extended.

2.4.4 Dependent family members

Article 3(2)(a) of the directive have a general wording which allows family reunification with other family members who are dependent on the sponsor, or had the same household as the sponsor. This wording opens for family reunification with for example cousins, uncles and aunts. The court points out in the cases Lebon[80] and Jia[81], the status of a dependent family member is determinate not by the emotional bond between the family members[82], but on the need of material support. The concept of dependency should be whether, on the basis of personal circumstances, the financial means of the family members allows them to live at a minimum level of subsistence in the country they normally reside[83].

[77] Article 3(2) (a)
[78] Article 3(2)
[79] Immigration Regulations § 19-7
[80] Lebon Case C-316/85, Para 22
[81] Jia C-1/05, Paras. 36-37
[82] *Zhu and Chen*, C-200/02, Para. 84
[83] *Jia,* Para 96

The wording in Article 3 (2) of the directive points out that Member states *shall* facilitate entry and residence if the requirements are fulfilled, in accordance with their national legislation. That does not mean that Member States are obliged to grant every application for entry and residence submitted by person who can show that they are "dependent" family member of a Union Citizen within the meaning of Article 3(2)(2) of the directive 2004/38/EC. The court came to that conclusion in the *Rahman* case[84].

The court points out in the same judgment that interpretation of this Article should be seen in light of recital 6 of the preamble, which states that

> *"in order to maintain the unity of the family in a broader sense …the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen".*

The obligation that lies upon the Member states is to examine the applicant's personal circumstances and take into account the factors that may be relevant in the particular case.
On the basis of those arguments, the court came to conclusion in *Rahman* judgement:

> "the Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen"[85].

> "However, it is incumbent upon the Member States to ensure that their legislation contains criteria which make it possible for those persons to obtain a decision on their application, on the basis of extensive examination of the personal circumstances"[86].

The Norwegian legislation has a strict line for which family members the list is extended to. That means the legislation do not include every family member, but only those who are expressly defined in the Immigration Regulation § 19 – 7.

[84] *Rahman*, Case C–83/11.
[85] *Rahman*, Para. 26.
[86] *Rahman*, Para 26.

This gives rise to the question if Norway violates the right given by the directive 2004/38/EC by not implementing a right to entry and residence for other family members that mentioned in Immigration Regulation § 19-7, who might be dependent on the sponsor. Even though the authorities would not be obligated to grant such right, it is important to implement it in the legislation. As the law stands today, such persons who do not fall within the list are automatically excluded from the opportunity to seek family reunification. The objective of the directive point in the direction of such opportunity to be implemented, even though the state will not be obligated to grant a residence permit on the basis of family reunification.

With that follows, that the EU legislation is more general, and therefor include a possibility to family reunification with for example with uncles or cousins, as long as they fulfill the requirements. Still, it is up to the Member States to decide if they wish to facilitate the entry and residence for such family members. The only requirement, as mentioned above is to have an extensive examination of the facts in the particular case. The wording of *shall* in the Article does not mean that the Member States have to facilitate the entry even though the conditions are fulfilled. In my opinion there will therefore not be a big differences in practice between Norway and the other Member States. Even though the EU legislation opens up for such reunification, the Member State´s restrictive view on such family reunification with extended family members will be an obstacle for a reunification to take place. If Norway implemented this rule in the Immigration Act, it would only give a right in theory. It is likely that none, or a really small amount of such applications will came through, because of the restrictive view on immigration by the Norwegian government.

2.4.5 Health grounds

Article 3 (2) of the directive covers both dependent family members and family members who require personal care on serious health grounds. The requirements that lie upon the Member States are therefore equal in both circumstances. Those requirements are discussed in the chapter above.

There is no explanation in case law or literature what falls in under definition of "*serious health grounds*"[87]. The wording of the Article indicates that the condition must be serous enough, so the

[87] The definition is not included in the directive. The ECJ has not concidered any cases discussing this provision so far. This problem is mentioned in Rogers and others, *Free movement of persons in the enlarged european union* Page 172 Para. 9-72.

person concerned is not able to take care of them selves. A stroke or Alzheimer´s could be counted as such conditions. There is also a question if the condition must be lifelong, or will it also fall under the definition if the family member has a chance make full recovery.

In letter b of the Immigration regulation § 19-7, family members who need personal care are included. The requirements for getting residence permit on such grounds are strict. First of all, there need to be documentation of the person´s serious health issues, and there is an absolute need for the sponsor to take care of the sick family member. Further, there cannot be other family member in the state of origin who can take care of the person. The last requirement is that the family member must have sickness insurance, which covers all risks during the stay.

UDI´s (Norwegian Directorate of Immigration) circular about the immigration Act section 100 and the immigration Regulations §19 – 7[88], express more or less the same requirements for examination of the particular case as within Article 3 (2). The authorities must take under consideration the personal and economical connection between family member and the EU citizen. Further there is a requirement that the EU citizen have sufficient funds to provide for the family member.

Those requirements are in my view no stricter than the requirements expressed in Article 3 (2) (a). Within the meaning, this Article must also include an assumption that the sick person must have full sickness insurance in order to not become burden on the Member State. Wording of both regulation are strict, but the Norwegian regulation is more explicit. It must be assumed that also under Article 3 (2) (a) the sponsor is the only person who is able to take care of the family member.

[88] Circular: *Familieinnvandring med EØS-borger-utlendingsloven § 110 og utlendingsforskrift § 19 -7.*

2.5 Death or departure of the sponsor from the host state

The rights that family members have in case of death or departure of the sponsor from the host state depends on if the family members themselves are EU citizens or third country nationals.

By the directive 2004/38/EC if the family member is a EU citizen, the death or departure of the sponsor will not have affect on their right of residence[89]. If the family member wishes to require permanent residence permit, they must meet the conditions set out in Article 7(1) of the directive.

By the wording in § 113 of the Immigration Act the main rule is that the family members have a right to residence permit on the territory of the state as long as the sponsor reside there as well. If the sponsor leaves, the family members have to fulfil the requirements on personal basis in order to require a permanent residence permit.

The preamble of the directive points out that human rights and right to family life must be taken into account in cases where the sponsor dies, leaves the country or when the partners do no longer wish to be together[90]. Therefore, the legal system has created a safeguard for those groups of persons.

By the Norwegian legislation, in case of departure, death of the sponsor or divorce, the family members who are EEA/EU citizens keep their right to residence as long as they fulfil the requirements in § 112 (1) on a personal basis. Either way, the child and the parent who has custody of the child, will have a right to residence permit, as long as the child is enrolled in an approved educational institution[91]. There have been some discussion if the parent should get residence permit for the whole time the child is enrolled in the educational system, including university studies, but the legislator came to the conclusion that the parent can get a residence permit until the child is 21 years old[92], even if the child is still enrolled in education system. The argument behind this decision is that by 21 years of age a person is more independent and is not in need of a care giver as much as a minor[93]. The child itself has a right to reside in Norway as

[89] Article. 12(1) directive 2004/38EC.
[90] Preamble, recital 15 directive 2004/38.
[91] immigration regulations § 19-15 (1).
[92] Immigration regulations § 19-15.
[93] Circular: Familieinnvandring med EØS-borger-utlendingsloven § 110 og Utlendingsforskrift § 19 -7, Para 4.1.1.

long as he or she is enrolled in the school system[94], no matter if the child is attending obligatory education, or have chosen to take a university degree.

If the family member is a non EU national, his or her right to residence by directive 2004/38/EC will not be withdrawn in case of the sponsors death, provided that the applicant has been residing in the host Member State for at least one year as family member[95]. The family member must show that they satisfy the criteria for residence permit on a personal basis (worker, self employed or sufficient resources) so they do not become a burden on the social assistance system of the host Member state[96]. The right of residence is retained on an exclusively personal basis, and cannot be passed on to other family members[97]. This safeguard will give extensive right to the third country national, which the person could not obtain otherwise. In practice the third country national is treated as an Union Citizen.

These requirements are also enforced in Norwegian Immigration Act § 114 (3). The family member will not lose the residence permit in case of the death of the sponsor, provided that he or she has resided in Norway as a family member for at least one year. This will also in practice lead to that the third country national is treated as a Citizen of the Union.

It is important to notice where the family member is a third country national, both legislations regulate the family member´s legal status only in case of the sponsor´s death, and not in case of his departure from the Member State. It seems like the third country national family member will have an individual right to residence in case of the sponsor´s departure in case where children are involved. Article 12(3) of the directive gives an individual right to children or parent of children of a Union citizen in case of sponsors death or departure. This event will not result in loss of right to residence for that family member if the child is enrolled in school, and until the child complete the studies[98]. The same will apply by the Immigration Act § 114 (3).
A family member who is an EU/EEA national can continue residence on the territory of an EU/EEA Member State in both situations, where the sponsor dies or where the sponsor leave the

[94] Immigration Act § 112 (3).
[95] Article 12(2), directive 2004/38/EC.
[96] Article 12 (2)(2) directive 2004/38/EC.
[97] Rogers and others, *Free movement of persons in the enlarged european union* Page 204 para 10-109.
[98] Rogers and others, *Free movement of persons in the enlarged european union* Page 204 para 10-110.

country. While a third country national family member is only protected in case where the sponsor dies, unless the sponsor leaves behind his child (who is enrolled in educational system).

There is a possibility for family members to obtain permanent residence permit before the 5 years period in event of death or departure of the sponsor. By Article 17(4)(b) the family members can obtain permanent residence in case where the Union citizen was a worker or self-employed person, where his death resulted form accident at work or occupational disease[99] or, by the time of death has resided continuously on the territory of the Member State for two years (Article 17 (4)(a)).

Such exception from the 5 years period is also to be found in Immigration act. By § 115 (5), the family member can obtain a permanent residence permit after the sponsor death if the family member lived with the sponsor who resided legally in Norway for two continuous years or[100] where the death resulted form accident at work or occupational disease[101]. The same rights will be applicable to family members who are not EEA/EU nationals, by the wording of § 116 (2).

2.6 Divorce and separation

The wording of "spouses" in Article 2(2), has a very narrow definition. Only as long as the persons are legally married they will be included within the definition.

In *Diatta*[102], the German authorities sought to deport Ms Diatta back to Senegal because she was no longer living with her husband and the couple intended to divorce. They also held that Article 10(3) of regulation 1612/68 refers to a requirement for the EU national to have adequate accommodation for family members[103]. As an answer to those questions, the court held that the marriage has not yet been dissolved, and could not be considered as dissolved until the relevant authorities has terminated the marriage. Further, the requirement of accommodation could not be seen as a requirement of the spouses living together. Separation, and intention of divorce will

[99] Rogers and others, *Free movement of persons in the enlarged european union* Page 204 para 10-110.
[100] § 115 (5)(a) Immigration Act.
[101] § 115 (5)(b) Immigration Act.
[102] Diatta v Land Berlin, C-267/83.
[103] Article. 10(3) of Regulation 1612/68 is not repeated in Directive 2004/38/EC.

still count as marriage. When the marriage is legally dissolved, the parties will no longer be regarded as spouses under the EU law[104].

Article 13 of directive 2004/38/EC provides individual right for the family member who is not an EEA national, to remind in the Member state in the event of divorce or annulment of marriage in certain circumstances: where the marriage has lasted at least three years, one of which was in the host Member State[105], by agreement between the parents or by the courts order that the non EU parent have the custody of the Union Citizen´s child[106], in cases of domestic violence (or other difficult circumstances)[107], or, where the spouse or partner who is not EU national have a right to access to the minor child on the territory of the Member State by an agreement between the parents or the courts order[108]. Such person can only achieve permanent residence permit if the person is a worker, self-employed or has sufficient resources[109]. To achieve temporary residence permit, the person must only fulfil one of the conditions mentioned in Article 13 (2) a-d.

By the Norwegian Immigration Act § 114 (4) a non- EEA family member can require residence permit on individual basis after a divorce in case where they fulfil the requirements in § 112 a (the person is a worker), b (the family member provide services) or c (have sufficient resources). In addition to that, the divorced non-EEA national must fulfil one of the requirements listed below:

(a) The marriage have lasted for at least tree years, within one year in Norway before the separation took place (b) by the judgement or agreement between the parents, the non EEA parent have the custody over the child of EEA national, (c) the non EEA national or the child has been victim of domestic violence or other serious abuse within the marriage or (d) the spouse have, by judgment of the court or agreement between the partners a right to access to the children on the territory of Norway.

The list of events for when third country national can require residence permit after a divorce by the Directive seems the same as in the Norwegian legislation, but by Immigration Regulation

[104] Rogers and others, *Free movement of persons in the enlarged european union* Page 164 para 9-32.
[105] Article 13 (2)(a)
[106] Article 13 (2)(b)
[107] Article 13 (2)(c)
[108] Article 13 (2)(d)
[109] Rogers and others, *Free movement of persons in the enlarged european union* Page 205 para 10-114 footnote 127.

§19-15, the right is extending to cohabitants when the partners decide they no longer wish to continue their relationship. In the same circumstances, the Directive gives only right to the non-EU national when the marriage or registered partnership dissolves.

Further, by the Norwegian legislation the person must fulfil the requirement of being a worker, service provider/self employed or have sufficient resources also if the person wants to require a temporary residence permit. This differs form the Directive, since such requirement must be fulfilled only if the person seeks permanent residence permit.

If the family member is an EU citizen, the divorce will not affect on his or hers right to residence, as stated in Article 13 (1) of directive 2004/38/EC. By § 113(4) of the Immigration Act, in the event of divorce the EEA/EU national spouse will have a right to residence in Norway if she or he fulfils the requirement in §112 (1) on a individual basis.

3. Reunification with third country national family member in the EU/EEA

3.1 Family reunification directive 2003/86/EC

The Family reunification directive[110] determinates the conditions for the exercise of family reunification by a third country national residing lawfully in a Member State[111].

Article 2 (a) of the directive characterizes a "third country national" as a person who is not a Union Citizen within the meaning of Article 20 (1) (Article 17 TEC) of the TFEU treaty[112]:

> *"Every person holding the nationality of a Member State shall be a citizen of the Union"*

Within this meaning, every person who is a national of a country, which is not a member of the European Union, is a third country national.

[110] Council directive 2003/86/EC of 22 September 2003 on right to family reunification.
[111] Article. 1 directive 2003/86/EC.
[112] Treaty on the functioning of the European Union.

The Norwegian legislation does not differ between EU citizens and third country national in it´s definition. Therefore, in the Immigration Act § 5 (1) there is a general definition of "foreigner". A foreigner is a person who is not a Norwegian citizen. Who falls within the meaning of "Norwegian citizen" is regulated in the Citizen Act[113].

3.1.1 Personal scope of the directive

In accordance with Article 249 TEC, the directive is binding upon the member states. The directive had to be transposed into national law by 3. October 2005[114]. After this date, the directive will apply with direct effect in the member states[115]. Shortly after the directive entered into force, the European Court of justice explained how the directive should be applied and interpreted[116]. It was acknowledged by the court that the directive imposes precise and positive obligations by the clearly defined individual rights, and requires the Member States to authorise family reunification, without being left a margin of appreciation.

Norway is not a part of this directive; therefore the directive is not binding upon Norway. Still, the need of harmonization of the legal system between EU Member States and Norway is important. The Directive has an influence on the Norwegian legislation[117], as explained in the introducing chapter.

3.2 Definition

The definition of family reunification by the directive is:

"The entry into and residence in a Member State by family members of a third country national residing lawfully in that Member state in order to preserve the family unit, whether the family relationship arose before or after the resident´s entry"[118].

It is important to notice that within this definition, family reunification is possible in both situations; where the family unit was pre-existing before the person's arrival to the Union, and family formation, which was made after the arrival.

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[113] Lov 10. Juni 2005 nr. 51 om norsk statsborgerskap (Statsborgerloven).
[114] Boels and others, *European migration law* p. 179.
[115] Van Duyn, Case C-41/74.
[116] Parliament v. Council, Case C-540/03.
[117] Furuseth in Øyen (Red.) *Lærebok i Utlendingsrett,* page 125.
[118] Article. 2 (d) Directive 2003/86 EC

Chapter 6 in the Norwegian Immigration Act regulates family reunification with third country nationals. This chapter covers family reunification as well as family formation. In this paper, I will only discuss the issue of family reunification, where the family unity was pre existing before the sponsor´s arrival in the host state.

3.2.1 Who is excluded from the scope of the directive

The directive includes only third country nationals who are residing lawfully on the territory of a Member State. That excludes unlawful immigrants from privileges stated by the directive.

By "third country national" the definition aims to every person who is not a citizen of the European Union, within the meaning of Article 17 (1) of the EU Treaty. This is also confirmed by the directive´s Article 3 (3), which states explicitly that family reunification directive shall not apply to family members of a European Union citizen. The directive is also not applicable for Union citizen who wishes to be reunited with family member who is third country national. This issue is regulated by directive 2004/38/EC, which was discussed above.

If the third country national wishes to be reunited with a family member residing in member state of his nationality, this directive will not be applicable. Situation in such case is purely internal, which is regulated by national legislation, with few exceptions. Another group of persons who cannot apply for family reunification under this directive are persons who applied for refugee status and await a final decision[119].

Family reunification directive does also not apply to persons residing in the territory of the Union on basis of temporary protection awaits the final decision[120]. The reason of this limitation for those groups of people is the uncertainty if the person will be granted residence permit. The case is the same if the person is recognized by Member State on temporary basis. His rights to family reunification are dealt with in the Temporary Protection Directive[121].

[119] Article. 3. (2) of Directive 2003/86/EC
[120] Article. 3 (2)(b) Directive 2003/86/EC
[121] Article. 15 Directive 2001/55/EC

Family reunification directive excludes family reunification for persons residing in a Member State on the basis of subsidiary protection[122]. This issue is dealt with in Qualification Directive[123], which also deals with determination of refugee status.

The Family reunification directive will be applicable to the refugee once he is recognized by the Member State, and have a resident permit[124].

3.3 Minimum conditions

Family reunification directive contains minimum conditions[125]. The Member States are free to impose less strict conditions for family reunification, while they cannot impose stricter requirements than those mentioned in the directive.

3.3.1 The sponsor

The definition of "sponsor" is to be found in Article 2 (c) of the Family reunification Directive and § 39 of the Norwegian Immigration Act.

By the directive, the "'*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;*"[126].

Sponsor by the Norwegian legislation is a person with who the applicant wishes to be reunited with. Within this meaning both third country nationals and EU citizens fall within the meaning of sponsor. The applicant must have particular connection to the sponsor, and the sponsor must have particular connection to Norway[127].

[122] Article. 3 (2) Directive 2003/86/EC
[123] Directive 2004/83/EC
[124] Article. 9 Directive 2003/86/EC
[125] Article. 3(5) Directive 2003/86/EC
[126] Article. 2 (c) Directive 2003/86/EC
[127] Immigration Act §§ 40 - 53

3.3.2 Conditions in the directive

The "sponsor" must meet conditions mentioned in Article 3 of the Directive 2003/86/EC in order to be granted family reunification.

Article 3 of the Family reunification directive states;

> *"This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status."*

This Article restricts the right to family reunification in two ways. First, the sponsor must have a residence permit that is valid for one year or more. This excludes persons who are residing temporarily, such as seasonal workers, from applying for family reunification. Second, the sponsor must have reasonable prospects of obtaining the right to permanent residence. This wording may exclude third country nationals who resides lawfully in a Member State for several years, but do not fulfil the conditions to obtain permanent residence permit, such as students or workers in non-permanent employment situations[128]. Blue-card holders are an example of sponsors who have reasonable prospect of obtaining a permanent residence permit, and are therefore entitled to family reunification.

By the Norwegian Immigration Act § 40 (a)(b) and (c), there is a requirement for the sponsor to be Norwegian/Nordic citizen, have permanent residence permit or have a residence permit, which can result in permanent residence permit. The preparatory work suggested that children should have right to family reunification with parents without requirement for prospect for permanent residence permit for the parent, since children are vulnerable to separation from their caregivers. On the other hand, security and predictability is important for children[129]. Therefore the requirement for the sponsor is the same for family reunification between spouses as for family reunification between parents and children[130].

By § 60 of the Immigration Act, a first time residence permit can be given for up to 3 years, but no less than a year, unless the law states otherwise. Such residence permit gives reasonable prospect of obtaining a permanent residence permit, and fulfil therefore the requirement in § 40(1)(c).

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[128] Boels and others, *European migration law*, page 187.
[129] *Del 19. Kapittel 8 - Familieinnvandring (del av UDIs høringsuttalelse til NOU 2004-20)* Para. 19.7.1.
[130] Immigration Act § 42

§ 40 of the Immigration Act and Article 3 of the directive have the same requirement for the sponsor´s residence before family reunification can take place.

3.4 Optional conditions in the directive

There are several conditions Member States may impose on the sponsor. First, the Member States may impose a minimum age restriction for both the sponsor and the spouse. This maximum age for restriction is 21 years before the spouse can join the sponsor[131]. This restriction is to be found in Article 4 (5) of the Family Reunification Directive. By the Immigration Act § 40(2), both spouses must be 18 years old before the family reunification can take place, and the residence permit can be given.

The second condition that may be imposed is a waiting period before family reunification can be granted. The waiting period cannot exceed two years after the sponsor have resided lawfully in the Member State[132]. Such condition does not seem to be imposed directly by the Immigration Act, but the sponsor still need to be granted a residence permit before the family reunification can take place[133], it may take a longer period of time before such permit is granted.

The material conditions that can be imposed on a sponsor seeking family reunification are optional. Those material conditions are to be found in Article 7 (1) of the Family Reunification Directive. The material conditions assure that family members does not become a burden on the social security system, but also that the family members will enjoy a certain standard of living. The Member States cannot impose more or stricter conditions than those stated in Article 7 (1), but interpretation of those rules can vary between the Member States.

3.4.1 Income requirement

By Article 7 of the directive the Member State concerned may require documentation that the sponsor has accommodation (Article 7 (1)(a)), sickness insurance (Article 7 (1)(b)), stable and regular resources which are sufficient to maintain himself and members of the family (Article 7 (1)(c)). Member States shall evaluate those resources on the basis of their nature and regularity and may take the minimum national wages and pension into account, as well as the number of family members.

[131] Article 4 (5) Directive 2003/86/EC
[132] Article 8 Directive 2003/86/EC
[133] Immigration Act § 40

By the wording of this Article, it is the sponsor who must have accommodation, sickness insurance and sufficient resources to maintain himself and his family members. However, Member States are free to take into account the earnings of family members to alleviate the financial burden on the sponsor, though the Member States are not allowed to impose income obligation on family members of the sponsor[134].

There is an exception to this rule where the Member States are obligated to take the family member´s contribution to household into account by Article 16 (1)(a) in the Directive. In case where the residence permit is to be renewed, and the sponsor does not have sufficient resources for maintaining the household without seeking help from the Member States social security system, *"the Member State shall take into account contributions of the family members to the household income"[135].*

3.4.2 Sufficient resources

There is not much information in the law, preparatory work or regulation on how sufficient resources should be interpreted within the Directive. The Migration Board has also not given any directions regarding resources. The only criteria mentioned are that the resources should be of certain duration, certain amount and that there is a reasonable ground to believe that the sponsor will be able to support himself and family members in the future[136]. Therefore the Member States have room for manoeuvre on how to interpret the criteria on national basis.

3.4.3 How Member States define "sufficient resources" requirement in their own legislation?

A comparative study in nine EU Member States took place, and resulted into a report in November 2011[137]. One of the topics was how the Member States interpreted the requirement for income. This study showed that most of the Member States have implemented the optional condition for sufficient resources by Article 7 (1)(c).

Most of the Member States base this criterion on number of family members and the amount of

[134] Boels and others, *European migration law*, page 195.
[135] Article 16(1)(a) Directive 2003/86/EC
[136] Conditions for family reunification in the European Union: Sweden National Report to the European Policy Centre on the Family Reunification Project 2011, page 22.
[137] Yves Pascouau in collaboration with Henri Labayle, *CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN - A comparative study in nine EU member states*, page 77.

minimum national income, below which persons are entitled to apply for social assistance[138]. Some of the Member States define this rule as an amount of resources required, while some base the decision on general rule.

	Sponsor/minimum income	couple	+ 1 child	+2 children	+3 children	+4 children
SW		1637 + 491 (housing)	2180 + 491 (housing)	2180 + 491 (housing)	2190 + 491 (housing)	
NL	1550 for couple 1395 for single parent	1550	1550	1550	1550	1550
FR	1070	1070	1070	1177	1177	1232
BE		615	1231	1231	1231	1231
SP	532	798	1064	1330	1596	1862
ST	422	422	548	674	800	926
SLO	226	452	678	904	1130	1356
PL	120	210	300	390	480	570

Figure 1 approximate resource conditions required for family reunification (parents + children) in the different Member States[139]. The amount is given in Euros.

This figure shows the huge gaps between the minimum income requirement between the Member States. The requirement of income will increase with the size of the family. It might be difficult for the sponsor to reach this requirement if he wishes to be reunited with his 4 children, if his income is modest. This is the case in Spain, where a sponsor of a four-child family must earn 3,5 times the minimum wage in order to be reunited with his family[140].

3.4.4 "sufficient resources" requirement in Norwegian legislation

The income requirement is imposed in Norwegian Immigration Act § 58, which contains a general rule about a requirement for income and accommodation in order for the family reunification to take place. This must be read together with immigration regulations §10-8 to

[138] Yves Pascouau in collaboration with Henri Labayle, *CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN - A comparative study in nine EU member states*, page 77.
[139] Yves Pascouau in collaboration with Henri Labayle, *CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN - A comparative study in nine EU member states,* page 80.
[140] Yves Pascouau in collaboration with Henri Labayle*, CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN - A comparative study in nine EU member states,* page 81.

§10-12. The aim of the requirement was to ensure that the family members will not become a burden on the social assistance system, and to prevent forced marriage.

There are two income requirements set out by immigration regulations § 10-8 to §10-12. Firstly, there is a requirement for the sponsor to show that he will have sufficient income in the future[141]. There is also a requirement for the sponsor to be able to show the authorities that he had adequate income the year before, and that he has been able to maintain this level of income[142].

In 2013, the future income requirement was set to 246 136 NOK, which is 88% of the salary scale 19 of the national wage scale. The same year the previous income requirement was set to 242 440 NOK. This amount does not differ between numbers of family members, as in other Member States as pictured above. Both of those income requirements are the minimum income requirements.

3.4.5 What kind of resources will not count?

For the future income, the social security assistance which a person receive during unemployment will not count within the meaning of "income" by the Immigration Act, since such help will not be given once the sponsor starts to work[143], and is seen as unpredictable. The previous income must be taxable income, which means that student scholarships and loans cannot be seen as a part of this amount.

The next requirement is that the sponsor did not receive any help from the Norwegian social security system (NAV)[144] the year previous to the application for family reunification. If the sponsor´s income is below 300 000 NOK, he or she is obligated to show documentation from the social security system that no help was received from the social assistance system. There is an exception to the rule if the person received social assistance while waiting for Social Security benefits that may be included in future income, such as: sickness benefits, maternity benefits, parental benefits, disability or retirement pension.

[141] §10-8 immigration regulations
[142] § 10-9 immigration regulations
[143] UDI: Krav til inntekt og bolig (underholdskravet).
[144] except form housing support, and support given in the force of Lov om introduksjonsordning og norskopplæring for nyankomne innvandrere (introduksjonsloven) Lov av 2013-09-01.

3.4.6 The courts view on how to define "sufficient resources" by directive 2003/86/EC

The Directive states in Article 7(1)(c) that the sponsor should have sufficient resources without seeking help from the social assistance system of the Member State concerned.

The question in the judgement *Chakroun*[145] was whether an application for family reunification should be rejected if the sponsor does not fulfil the minimum income requirement in the host Member State.

The court stated that family reunification is the primary goal under the directive 2003/86/EC. The room for rejection of application provided by art 7 (1)(c) must therefore be interpreted strictly. The room for interpretation (*margin for manoeuvre)* that Member States have, must not be used in manner that would undermine the objective of the directive, which is to promote family reunification[146].

Mr Chakroun´s income was below the minimum income level set out by the Netherland´s legislation. Still, it was proven by the court that he is able to maintain himself and his family members and that his resources are stable and sufficient. The court pointed out in Paragraph 48 that needs of the individual can vary, and are dependent on the individual. The states may indicate a certain sum of income as a reference, but they are not entitled to impose a minimum income level below which all family reunifications will be refused. Therefore, every case has to be considered on an individual level, even if the income is below the indicated amount.

Mr Chakroun received unemployment benefits. The second question was if family reunification could take place, even if the sponsor is entitled to claim social benefits.

The court confirmed this question. In Paragraph 52 of the judgment the court came to the conclusion that Member States can not adopt rules which result in refusing family reunification to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and his family members, even though he is entitled to claim social assistance. The court also underlines that the wording of "*social assistance system" refers to "a concept which has its own independent meaning in European Union law and cannot be defined by reference to*

[145] *Chakroun v Minister van Buitenlandse Zaken*, Case C-578/08.
[146] *Chakroun* Para. 43

concept of national law"[147]. This concept should therefore be interpreted within the lines drawn by the Court, which made a distinction between two types of social assistance.

Firstly, social assistance defined as assistance granted by public authorities to a person who has not stable and regular resources to maintain himself and his family members, and who is likely to become a burden to the social assistance system of the host state during his period of residence[148]. In such case the family reunification may be refused. Secondly, social assistance granted to a applicant who has sufficient resources, but who will still be entitled to special assistance in order to meet exceptional, individually determined, essential living cost, should not be automatically excluded from family reunification, since it is not likely that the applicant will become a burden on the social assistance system of the host Member State. In other words: the sole fact that the applicant may be entitled to receive special or exceptional assistance cannot constitute a ground to refuse family reunification.

The judgement gave great explanation for how the requirements of Article 7(1)(c) should be interpreted. To sum up: the objective of the directive is to promote family reunification, the host state can not refuse a family reunification just on the basis that the sponsor do not meet the minimum level of income set out by the member state, when he can prove that his resources are stable and regular. The income condition can only be seen as a reference, and every case has to be evaluated individually due to Article 17 of the directive, which states stat Member States shall take solidity and duration of the family relationship into account. Receiving social benefits cannot automatically lead to refusal of application.

3.4.7 Exceptions from the income requirement in the Norwegian legislation

There are exceptions in the Norwegian legislation regarding both the future- and previous income requirement. Regarding the future income requirement, there is an exception where the sponsor is a refugee[149], or is under collective protection[150] and wishes to be reunited with his family (spouse, cohabitant or child below the age of 18). In such case, the sponsor will not fall under the requirement to have sufficient resources to maintain himself and his family members[151]. Persons with refugee status or who is under collective protection cannot be reunited with his family members in the state of origin. Therefore it is likely that the person will

[147] *Chakroun* Para. 45
[148] *Chakroun* Para. 46, by analogy from Case C-291/05 *Eind* Para. 29.
[149] Definition by § 28 of the Immigration Act
[150] Immigration Act § 34
[151] Immiration Regulations § 10 – 8 (4)

not be able to see his or hers family again, if he is denied family reunification in the host state. Such a denial could lead to violation of Article 8 ECHR, and as a result, lead to breach of Norway's international law obligations. Application for family reunification in such cases must be filed within a year after the sponsor got residence permit[152]. There is also an exception if the sponsor wish to be reunited with his or hers child under the age of 15, if the child does not have a caretaker in the state of origin[153]. Such reunification is not dependent on the sponsor´s residence status.

Future income requirement will not be required if the sponsor wish to be reunited with his minor child, who has been a victim of human trafficking[154]. The income requirement will also not be requested if the sponsor is a minor child[155]. This is also the case if the sponsor has a permanent residence permit in Norway by § 62 of the immigration act[156]. If he though becomes a citizen of Norway, he will have to fulfil the requirement again. The last exception is a safeguard where the income requirement does not have to be fulfilled on compassionate grounds[157].

By Immigration Regulation § 10-9 (3), the sponsor does not have to satisfy the income requirement for previous year if the sponsor is: 1: A Norwegian or Nordic citizen, or a person with permanent residence permit and have taken higher education with normal progression for the last year. 2: The sponsor has completed compulsory military service. 3: Sponsor can document that his assets has been beyond 1 million NKR, for the two last years, 4: Have been paid out disability - and age pension which is at least the same amount as minimum pension. A sponsor who got residence permit as a researcher[158] or specialist[159] will also be excluded from the requirement.

For others than mentioned in the exceptions, the income requirement is strict. If the requirement is not fulfilled, it will lead to refusal of application.

[152] Immiration Regulations § 10 – 8 (5)
[153] Immiration Regulations § 10 – 8 (4)(e)
[154] immigration act § 38, Immiration Regulations § 8-4 see also § 9-6
[155] Immiration Regulations § 10 – 8 (4)(d)
[156] Immigration Regulations 10-8 (4)(c)
[157] Immigration Regulations 10-11
[158] Immigration Regulations § 6-1
[159] Immigration Regulations § 6-2

3.4.8 Differences in how the "sufficient resources" requirement is practiced in Norway and EU

The main difference between the directive and the Immigration Act is that there is only one income requirement specified in the Directive, while Norway has two. The requirement of previous income points to show the stability of the income. The directive specifies that the resources have to be stable. The two requirements imposed by the Norwegian legislation ensure this principle, since it is possible to control if the sponsor's resources have changed during the last year. On the other hand the waiting period before family reunification can take place will be extended, since the sponsor has to wait a year in order to be able to show that he has sufficient previous income, while in Member States it is sufficient to show that he has the income required. In reality, the income requirements by Immigration Act will make it more difficult to be reunited with family members than it would in a Member State.

The required amount of income in Norway will stand in the way for many family reunification cases, as seen in various articles in the newspapers. One of such cases (published 07.09.2013, NRK) was about 5 year old Ella who has never seen her father, because her Norwegian mother do not fulfil the income requirement during her incapacity to take up employment. She is a recipient of work assessment allowance, which cannot count as income allegeable for family reunification[160]. The girl's father was deported back to Tanzania few days before the girl´s birth. Father of the child has worked in Norway previous to the deportation, and it is likely that he will be able to work for the same employer if he is allowed family reunification in Norway.

In another article[161], a Norwegian citizen was refused family reunification with her Cuban husband, since she did not fulfil the requirement of future income the year she submitted the application. Even though her salary on the date of final appeal from the decision was twice as much as the requirement for minimum income. Her appeal was rejected by UNE (Immigration appeal board). To be able to live with her husband she was forced to move to Sweden. By moving to a Member State of the Union, she made use of the free movement provision, and could therefore use the EU rules regulating the family reunification, which are less strict than the Norwegian legislation for family reunification with a third country national. This is the case for many Norwegian citizens who wish to be reunited with a third country family member.

[160] Kristine Hirsti: *"Ella (5) Må leve uten sin far fordi moren er syk og ikke tjener nok"* http://www.nrk.no/valg2013/ella-_5_-har-aldri-mott-faren-sin-1.11216078
[161] Kristine Hirsti, *"Nordmenn strømmer til Sverige for å være sammen med sin utenlandske ektefelle"* http://www.nrk.no/valg2013/_-flytter-til-sverige-for-familien-1.11219916

3.5 My opinion and conclusion

It is clearly that the income requirements are a difficult barrier to overcome for many sponsors. In my opinion, there must be a more flexible solution within the Norwegian law for family reunification regarding the income requirement, if the purpose of the legislation is to prevent that the sponsor and his or hers family members become a burden on the social security system. In a comparison of the income requirement between Sweden, Denmark, Finland, The Netherlands and Great Brittan, Norway has the highest income requirement among the states compared[162]. This could be explained by the high living costs in the country. But the numbers are clear, it is more difficult to meet the income requirement in Norway than it is in other states compared.

The Norwegian legislator should take the points made by the court in the *Chakroun* judgement into consideration. Every situation should be considered individually, even though the sponsor does not fulfil the income requirement, because the needs of an individual may vary. It is strange that the income requirement is set for the same amount no matter how big the family is.

Member States are obliged to follow the guidelines of the court, so it is clearly that they will have to implement the court´s view in their practice. As stated in the introducing chapter, Norway wishes to have a harmonized immigration system with the Member States. This principle suggests that Norway should also move along with the courts interpretation. Since Norway has implemented the directive´s income requirement rule in Immigration Act the authorities should also interpret the same rule in the same way as the rest of the Member States are obliged to do, and as a result, introduce changes regarding the income requirement.

The spouse's income and saving should also be taken into consideration so the authorities have a full picture of the family resources, as it is practiced in France, where both the sponsor´s and his spouse income is taken into consideration[163].

Further, the authorities should take the family member´s opportunity to be involved in employment into account. Especially where there is a solid ground to believe that he or she will be employed short after the arrival, or at least when the family member already have an employment contract, and is able to start to work at once he or she get the work and residence

[162] Meld. St. nr. 9:23

[163] Yves Pascouau in collaboration with Henri Labayle *CONDITIONS FOR FAMILY REUNIFICATION UNDER STRAIN - A comparative study in nine EU member states*, page 78.

permit. By immigration regulation § 10-8(3), the applicant´s salary shall be taken into account if he is involved in legitimate employment in Norway. That must be seen as exceptional case, since the presumption is that the applicant already has a residence- and working permit in Norway. In most of the cases the applicant apply for family reunification from the home state, in order to get a residence permit with his or hers spouse in Norway. If the sponsor has an employment contract for one year or more, and the sponsor´s income is sufficient to maintain himself and the family members in the future is proof enough to show that the income will be stabile.

If the sponsor have a chronically illness, and it is unlikely that the person will be able to take up employment in the nearest future, the social security benefits that the sponsor is receiving should count as income, since the authorities have solid grounds to believe that this income will continue in the future. This kind of income is also stable, since the person receive the same amount each month.

Further, the failure to fulfil the income requirement should not lead to rejection of the application without consideration of the case of an individual basis, as it is expressed in the *Chakroun* judgement. Of course the system as it is today, saves the authorities a great amount of work, if they can reject an application right away, without an individual consideration. This reason alone is not an argument that should lead to derivation from the objective of the law, which is family reunification.

The very specific exceptions that are made in the Norwegian legislation are not enough to fulfill the main objective of the law, which are a right to family reunification and right to family life.

4 Final conclusion and remarks

On basis of the comparisons I have made through this paper I found out that the Norwegian legislation differ greatly between rights of the EEA/EU citizens and third country nationals. Regarding EEA/EU citizens the legislation is far more favourable in cases of family reunification than chapter 6 of the Immigration Act, which is regulating third country national´s right to family reunification. The EEA/EU sponsor does for example not have to fulfil the income requirement, as the third country national sponsor has to[164].

The rules are most difficult for third country nationals who wish to be reunited with a family member who is also a third country national, and third country nationals married to a Norwegian national. Both situations will be regulated by chapter 6 of the Immigration Act, which contains stricter rules than those in chapter 13, regarding EEA/EU citizens.

The only loophole in such cases is when a Norwegian citizen make use of the free movement provision, and bring their third country family member back to Norway, after residing in another Member State[165].

It is not a good solution when Norwegian citizens are forced to move to another EEA/ Member State in order to be able to be grounded family reunification after they make use of their free movement rights. Those persons have to give up their lives in Norway, move away from other family members just to be together with their spouses, even though they are Norwegian citizens. There is an express need to benefit the Norwegian citizens in such situations. In comparison, it would be much easier for a Union Citizen residing in Norway to be granted family reunification with his or hers third country national family member, since the sponsor is not a subject of an income requirement in such cases.

In my opinion, the threshold of the legislation for family reunification where one of the spouses is a Norwegian citizen should be reduced to a level that correspond with requirements for family reunification set out for the EEA/EU nationals residing in Norway. It is discriminatory on the Norwegian citizen´s that the EEA/EU nationals have better benefits through the directive

[164] This is confirmed by the judgement of EFTA Court, *Arnulf Clauder,* Case E-4/11. This decistion is also binding upon Norway.
[165] Immigration Act § 110 (2)(2)

2004/38/EC.

There are some differences between directive 2004/38/EC and the Norwegian Immigration Act, regarding EEA/EU nationals, even though the legislations (in theory) should be the same. The differences are regarding the interpretation of the directive. Since Norway is not bound to follow ECJ´s interpretation of the judgements, the differences are more visible, than among Member States. Norway has to await EFTA Courts decisions in order for the interpretation to be binding; still, the government can implement the interpretation on it´s own initiative.

The biggest differences are to be seen between the directive 2003/86/EC and the Immigration Act. In this situation, Norway is picking out the rules that are most favourable for the government, without preforming the whole way thought, as seen in the income requirement element. If the state wishes to have more harmonized conditions, they should take it as a whole in order for the legislation to function properly.

I believe that the Immigration Act will be object for changes in the nearest future. As mentioned above, the EU legislation is evolving fast. That should also be reflected in the national legislation, within the wish of harmonization between the legislation. I also believe that the Norwegian government will reduce the threshold to a level that correspond with EU regarding the requirements for it´s own nationals, so the rules will match the level of directive 2004/38/EC.

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