



Ad-Hoc Query on the practices in the European Community regarding application of Directive 2004/38/EC

Requested by BG EMN NCP on 24th July 2012
Compilation produced on 5th September 2012

Responses from Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovak Republic, Spain, Sweden (20 in Total)

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1. Background Information

The question arose in connection with a TCN who has been residing in Bulgaria since 2008 as a family member of a BG citizen. The TCN was granted a 1-year residence permit (in accordance with the Bulgarian Aliens Act) that has been extended every year on the same ground. At the end of 2011 the TCN applied for a 5-year residence permit in Bulgaria and wanted to benefit from the provisions of Directive 2004/38/EC. He referred to the fact that his spouse is a BG citizen and the latter has obtained the right to reside in another EU member-state for a period longer than 3 months. The TCN has respectively obtained a residence card in that second member-state. Thus the TCN wanted to be allowed residence under the Bulgarian Act on “EU citizens and Families Entry, Stay and Departure”.

We would be very grateful for your responses sent by **3rd August 2012**.

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2. Responses¹

		Wider Dissemination?²	<ol style="list-style-type: none"> 1. Is it possible a TCN to reside in your MS as a family member of a citizen of your MS, on the grounds given in Directive 2004/38/EC? 2. If so, in what cases? 3. Could such a TCN be a beneficiary as defined in Art.3, Para. 1 from Directive 2004/38/EC, taking into account that his/her spouse being a citizen of your MS has obtained a residence permit in another MS?
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Belgium	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Bulgaria	Yes	<ol style="list-style-type: none"> 1. According to the national legislation the TCNs reside in Bulgaria in accordance with the Bulgarian Aliens Act. 2. N/a. 3. No. In this specific case the TCN should not benefit from the provisions of Art.3, Para.1 from Directive 2004/38/EC (respectively from the Bulgarian Act on "EU citizens and Families Entry, Stay and Departure") and should be treated under the Bulgarian Aliens Act.
	Czech Republic	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Estonia	Yes	<ol style="list-style-type: none"> 1. No. TCN (the third country national person), who is married to citizen of Estonian, must submit an application for temporary residence permit for settling with a spouse under the Estonian Aliens Act. 2. – 3. No. The fact that TCN spouse has obtained a residence right in another EU Member-State, does not give to TCN additional benefit from Directive 2004/38/EC in Estonia. TCN still must apply residence permit under the Estonian Aliens Act . TCN may apply residence right as a family member in another EU Member-State (and then gets benefits from Directive 2004/38/EC) but

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

² A default "Yes" is given for your response to be circulated further (e.g. to other EMN NCPs and their national network members). A "No" should be added here if you do not wish your response to be disseminated beyond other EMN NCPs. In case of "No" and wider dissemination beyond other EMN NCPs, then for the Compilation for Wider Dissemination the response should be removed and the following statement should be added in the relevant response box: "This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further."

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			not in Estonia..
	Finland	Yes	<p>1. Yes, family member of a Finnish citizen may reside in Finland on the grounds given in Directive 2004/38/EC.</p> <p>2. The above mentioned directive applies only if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland.</p> <p>3. See above.</p> <p>Aliens Act 3012/2004</p> <p>Residence of citizens of the European Union or comparable persons Section 153 (360/2007) Scope of application of the Chapter</p> <p>(4) The Chapter applies to family members of a Finnish citizen if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later. (432/2010)</p>
	France	Yes	<p>1. In accordance with the European Court of Justice's case-law, a family member of a French citizen can not exercise his/her right to reside in France as a family member of a MS citizen. Directive 2004/38/EC only applies to Union citizens who move to or reside in a Member State of which the citizen is not a national, which is not the case of a French citizen who resides in France. In this case, spouses can not benefit from the provisions of Directive 2004/38/EC.</p> <p>However, a family member of a French citizen can benefit in France from the Directive 2004/38/EC in one case (see below).</p> <p>2. As recognised by the case-law of the Court of Justice (in particular Case C-109/01 - Akrich – 23 September 2003), there is an exception. A TCN who acquired the right to reside in a Member State as a family member of a Union citizen can exercise rights of freedom of movement and residence when returning to the Member State of which the Union citizen is a national.</p> <p>Thus the TCN married to a French citizen is allowed to reside and to work in France after having first exercised his/her right to reside in another Member State as a family member of this French citizen. If these conditions are fulfilled, the TCN obtains a residence permit for family members of Union citizens.</p> <p>3. Yes, the TCN can benefit from the provisions of Art.3, Para.1 from Directive 2004/38/EC, as a residence permit was obtained in another member state.</p>
	Germany	Yes	<p>1 + 2. A German citizen is not to be regarded as citizen of the Union in terms of the Directive 2004/38 EC, if he has not yet exercised his right to free movement. That means as long as a German citizen did not leave the Federal Republic of Germany for the purpose of exercising his right of free movement (and has then returned to Germany), for the movement of his third-country- national spouse, the general rules of right of residence will be applied.</p> <p>3. When the German citizen has exercised his right to free movement, the third-country national shall be a beneficiary according to the Directive 2004/38 EC.</p>
	Greece	Yes	1. Is it possible a TCN to reside in your MS as a family member of a citizen of your MS, on the grounds given in Directive

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			<p align="center">2004/38/EC?</p> <p>No, TCNs who are family members of a Greek citizen are covered on the grounds of special national provisions provided by migration legislation for “family members of Greek citizens who are TCNs”. However, these provisions are applied in proportion to the respective provisions of the Directive 2004/38/EC. Therefore in such cases, TCNs are granted with the same type of residence cards issued to family members of EU citizens, with the indication though that they are family members of a Greek citizen.</p> <p>2. If so, in what cases?</p> <p>3. Could such a TCN be a beneficiary as defined in Art.3, Para. 1 from Directive 2004/38/EC, taking into account that his/her spouse being a citizen of your MS has obtained a residence permit in another MS?</p> <p>In cases that Greek citizens - and the members of their family who are TCNs - exercise their right to free movement in another MS according to the provisions of Directive 2004/38EC, and therefore have obtained a registration certificate - and a residence card respectively – in that MS, then the members of their family who are TCNs fall under Art.3, Para. 1 from Directive 2004/38/EC.</p>
	Hungary	Yes	<p>1. Yes, national legislation extends the right of free movement to TCN family members of Hungarian citizens. Thus, it is possible for TCN family members of Hungarian citizens to reside in Hungary in accordance with Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence.</p> <p>2. If the TCN family member is accompanying or joining the Hungarian citizen. Also, TCNs who are dependants or members of the household of a Hungarian citizen for a period of at least one year, or who require the personal care of a Hungarian citizen due to serious health grounds are granted the right of free movement in accordance with the abovementioned Act.</p> <p>3. It does not having a bearing whether the Hungarian citizen has obtained a residence permit in another MS since in this case the right of the TCN to reside in Hungary is granted on the ground that he/she is a family member of the Hungarian citizen.</p>
	Italy	Yes	<p>1. Is it possible a TCN to reside in your MS as a family member of a citizen of your MS, on the grounds given in Directive 2004/38/EC?</p> <p>Yes, family members of Italian citizens may reside in Italy according to national legislation (the right to seek the reunification with third country family members is recognized, in addition to nationals and EU nationals, to nationals of third Countries holding in Italy a EC long-term residence permit or holding a residence permit valid for a period not less than one year issued for subordinate employment or self employment, or for asylum, study, religious grounds or family reasons).</p> <p>After the abrogation of the Presidential Decree no. 1656 of 1965 (amended by Presidential Decree no. 54 of 2002) by the Legislative Decree n.30 of 2007 (implementing the Directive 38/2004/EC), the family reunification of third-country relatives of an Italian citizen is now regulated by this Legislative Decree, as in the case of third-country relatives of a UE citizen, as specified by Art. 23 of the Legislative Decree no. 30 of 2007. The only case which remains under the provisions of the Consolidated Act on Immigration (art. 30 par. 1 letter d) is that of the Italian minor whose parent (including the biological one), regardless of the irregularity of his/her stay, may apply for the reunification, provided that he/she was not previously deprived of his/her parental authority.</p> <p>2. If so, in what cases?</p> <p>Categories of persons entitled to enter Italy for reunification are as follows: (a) the spouse not legally separated and no younger than 18</p>

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			<p>years of age, (b) the minor children, including those of the spouse or born outside of marriage, unmarried, on condition that the other parent, if alive, has given his/her consent (children adopted, fostered, subject to protection plans are also included), (c) the dependent children aged over 18, if for objective reasons they are unable to support themselves because of their health conditions causing total disability, (d) the dependent parents, if they have no other children in their country of origin or provenance, or parents aged over 65, if their other children are unable to support them for serious health reasons.</p> <p>Third-country national relatives, as defined by Art. 2 of the Legislative Decree no. 30/2007, may enter into the territory of the State as long as they hold a valid passport and a regular Visa, if needed.</p> <p>Restrictions to the right to reside are provided for only due to public order or national security reasons; these measures must be undertaken according to principles of proportionality and after the evaluation of the actual dangerousness of the subject, as well as his/her personal conditions (art. 20 of the Legislative Decree no. 30/2007).</p> <p>3. Could such a TCN be a beneficiary as defined in Art.3, Para. 1 from Directive 2004/38/EC, taking into account that his/her spouse being a citizen of your MS has obtained a residence permit in another MS? Yes, according to Art. 1 of Legislative Decree no. 30/2007.</p>
	Latvia	Yes	<p>The general rule stipulates that family members (TCN) of citizens of Latvia enter and reside in Latvia according to the national rules. Directive 2004/38 is applied only in exceptional cases – if a citizen of Latvia has exercised his/her right to free movement and has been resided in other EU country or if a citizen of Latvia carries out commercial activities in Latvia and provides services to enterprises in other countries of the EU. We have a number of cases where citizens of Latvia together with their family members (TCN) return to Latvia after they have been resided (worked or studied) in Cyprus, Ireland, or Great Britain. They are asked to prove their residence outside of Latvia and if they are able to do it, their family members are treated under the directive 2004/38.</p>
	Lithuania	Yes	<p>1. Yes. 2. If the TCN family member comes to Lithuanian with a mobile LT citizen. 3. In the TCN who is a spouse enters together with a mobile LT citizen then article 3 is not applied. In such a case the TCN is issued a residence permit of an EU citizen family member.</p>
	Luxembourg	Yes	<p>1. No. In Luxembourg a third country national who is a family member of a Luxemburgish national can reside legally in accordance with article 15(1) of the Law of 29 August 2008 on free movement of persons and immigration and not under the Directive 2004/38/EC. 2. N/A No. In Luxembourg the fact that the Luxemburgish national has a resident permit in another Member State is irrelevant. Article 15(1) of the Law of 29 August 2008 covers only the case that a TCN who is a family member of a Luxemburgish national is going to establish in Luxembourg with the Luxemburgish national.</p>
	Malta	Yes	<p>1. The provisions of the said directive do not apply to family members of Maltese citizens except in the circumstances which are deemed to be similar to the relative rulings given by the European Court of Justice 2. Please see above. 3. Please see above.</p>

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	Poland	Yes	<ol style="list-style-type: none"> 1. No, it is not possible. According to the Polish legislation a TCN resides in Poland as a family member of a Polish citizen in accordance to the Act on Foreigners. 2. N/a 3. No. In this case the TCN should not benefit from the provisions of Art.3, Para.1 from Directive 2004/38/EC (and the Act on the entry, residence in and exit from the Republic of Poland of nationals of the European Union Member States and their family members that implements this directive) and should be treated under the Act on Foreigners. In practice however, the TCN is issued at first a visa and then the permit for a fixed period without any problems. The Euid judgement referring to this problem (C-291/05) will be implemented by the new Act on foreigners that is being prepared now.
	Portugal	Yes	<ol style="list-style-type: none"> 1. Yes. 2. Under the principle of equal treatment, any rules of Act 37/2006, August 9th (transposing to the internal juridical framework Directive 2004/38/CE) applicable to EU family members is extended to family members of Portuguese citizens, irrespective of their nationality – art. 3 (5). 3. Not relevant.
	Slovak Republic	Yes	<ol style="list-style-type: none"> 1. No. In the situation as it is mentioned in the text above the conditions for entry and stay of foreigners in the territory of the Slovak Republic are regulated by the Act No. 404/2011 on Residence of Aliens Coll which is influenced by the case – law of the Court of Justice of the European Union. 2. N/a. 3. The Act on Residence of Aliens in its Title Two regulates the right to stay in the territory of the Slovak Republic for the EU citizens and their family members who accompany or join them. According to the Act on Residence of Aliens a family member of the EU citizen is understood as a TCN with the right of residence of the family member of the Union citizen in the Member State in which the Slovak Republic national is the EU citizen with whom the third country national returns or joins him/her to reside back in the Slovak Republic territory and fulfils some of the conditions in relation to the Slovak Republic national.
	Spain	Yes	<ol style="list-style-type: none"> 1. Yes, according to article 2 of Royal Decree 240/2007, of 16 February, on entry, free movement and residence in Spain of citizens of European Union (EU) Member States and other States belonging to the Agreement on the European Economic Area (EEA). Entry in Spanish territory must fulfil the requirements established in article 4 of said Royal Decree: valid passport or ID document and visa (if applicable). The family member of an EU Card issued by other Member State or State belonging to the EEA is also accepted as valid ID document. 2. For lengths of stay inferior to 3 months, they must hold a valid and non expired passport and fulfil the entry requirements. However, for stays longer than three months, those members of the family non nationals of a member state must fulfil the requirements established in article 7 of Royal Decree 240/2007: being a salaried or independent worker, or have adequate resources for his/her living in Spain together with a health insurance for the period of stay; or being registered in a Spanish education centre to study in Spain (and having adequate resources together with health insurance). 3. According to article 2.a) of Royal Decree 240/2007, the spouse of a EU Member state citizen or of a citizen of another state

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			belonging to the EEA is considered as a family member and, as so, beneficiary of family reunification.
	Sweden	Yes	<p>1. Yes.</p> <p>2. If a Swedish citizen activates his/her right of free movement by residing in another MS fulfilling the provisions as a worker/student etc, his or her TCN family members can reside in Sweden as family members of an EU citizen according to the directive, when accompanying or joining their Swedish family member when he or she returns to Sweden. According to Swedish praxis, the family connection between the Swedish citizen and a TCN must have originated or existed during the stay in another MS or immediately after the Swedish citizen returning to reside I Sweden.</p> <p>A TCN could be a beneficiary as defined in Art.3, Para. 1 from Directive 2004/38/EC, if his/her Swedish family member MS has obtained a residence permit in another MS. But only if the provisions for free movement are fulfilled, i.e. the Swedish citizen must have had a right to free movement as an employee, self-employed, student or person with sufficient means. If the Swedish citizen does not fulfill the provisions for free movement but has a residence permit (on some other ground) in another MS, his or her family members have to apply for a residence permit according to national legislation.</p>
