

PART III: SPECIFIC RULES RELATING TO APPLICANTS WHO ARE FAMILY MEMBERS OF EU²⁶ CITIZENS OR SWISS CITIZENS

(This chapter only covers issues of relevance to third-country nationals subject to a visa requirement under Regulation 2018/1806)

Operational instructions addressed to the consulates of Member States except Switzerland

Legal basis: Article 21 of the Treaty on the Functioning of the European Union and Directive 2004/38/EC, Visa Code, Article 1(2)(a) and (b)

Under Article 21 of the Treaty on the Functioning of the European Union, every EU citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. These limitations and conditions are primarily set out in Directive 2004/38/EC²⁷ on the rights of Union citizens and their family members to move freely within the territory of the Member States.

The right of free movement of EU citizens would not have any useful effect without accompanying measures guaranteeing that this right is also given to their families. The Directive therefore extends the right to free movement to family members of EU citizens. The second subparagraph of Article 5(2) of the Directive provides that *‘Member States shall grant [family members covered by the Directive] every facility to obtain the necessary visas. Such visas must be issued free of charge as soon as possible and on the basis of an accelerated procedure.’*

Article 21 TFEU and Directive 2004/38/EC prevail over the Visa Code. They represent a *lex specialis* with regard to the Visa Code (*see Article 1(2)(a) of the Visa Code*) so the Visa Code fully applies where the Directive does not provide an explicit rule but refers to general *‘facilities’*^{28, 29}.

This means that the provisions of the Visa Code that negatively impinge on the rights of family members of EU citizens specifically protected by the Directive do not apply (*e.g. the requirement set by Article 12 (c) of the Visa Code according to which a travel document should not have been issued more than 10 years prior to the visa application because it only requires the travel document to be valid*).

²⁶ By virtue of the EEA Agreement, Directive 2004/38/EC applies also in relation to the EEA Member States (*Norway, Iceland and Liechtenstein*). The derogations to the Directive, foreseen in the EEA Agreement, are not relevant for the visa procedure. Consequently, where this part refers to the EU citizen, it must be understood as referring to EEA citizens as well, unless specified otherwise.

²⁷ OJ L 158, 30.4.2004, page 77.

²⁸ These guidelines are without prejudice to national legislation and administrative rules that Member States are obliged to adopt in order to transpose Directive 2004/38/EC.

²⁹ Member States decided to apply the same *lex specialis* to family members of Swiss citizens. Consequently, where this part refers to EU citizens, it must be understood as referring to Swiss citizens as well, unless specified otherwise.

This part of the handbook provides the consulates with operational instructions on the particular rules relating to visa applicants who are family members of EU citizens in accordance with Article 1(2)(a) and (b) of the Visa Code. It aims to cover the most common situations but is not exhaustive. On the application of other aspects of Directive 2004/38/EC, see Commission Communication COM(2009) 313 final³⁰.

Point 1: how to assess whether the Visa Code should be applied in full or whether the specific rules laid down in the Directive apply.

Point 2: the specific rules on exemption from the visa requirement of third-country nationals who are family members of EU citizens.

Point 3: the specific derogations from the general rules of the Visa Code that are to be applied when it is ascertained (*under point 1*) that the visa applicant falls under the Directive and that there is no exemption from the visa requirement (*under point 2*).

1. DOES DIRECTIVE 2004/38/EC APPLY TO THE VISA APPLICANT?

This point provides instructions for assessing whether the specific rules relating to visas laid down in the Directive apply.

If any of the questions below are answered in the negative, the applicant is not entitled to the specific treatment under the Directive (*cf. point 4.11*).

If, on the contrary, the three questions are answered in the affirmative, it has been established that the specific rules laid down in the Directive indeed apply to the visa applicant. Consequently, the guidelines in points 2 and 3 apply.

Question 1: Is there an EU citizen from whom the visa applicant can derive any rights?

Third-country nationals who are family members of EU citizens derive their rights under the Directive from EU citizens, the holders of the primary status. In principle, they do not enjoy any autonomous right to move and reside freely³¹.

The very first test is therefore whether EU citizens find themselves in a situation covered by the Directive.

In principle, the Directive applies only to those EU citizens who travel to a Member State other than the Member State of their nationality or already reside there (*i.e. the EU citizen exercises or has already exercised his/her right of free movement*).

The Directive offers facilitations to:

- EU citizens wishing to leave one Member State to travel to another Member State (*Article 4(1)*);
- EU citizens entering the host Member State (*Article 5(1)*);
- EU citizens residing in the host Member State for a short time (*Article 6(1) – this includes tourist travel*);
- EU citizens settled in the host Member State (*Article 7(1)*); and

³⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>

³¹ This is without prejudice to individual rights granted by EU law, in particular by the Schengen rules or by the Long Term Directive 2003/109/EC.

- EU citizens residing permanently in the host Member State (*Article 16(1)*); or
- frontier workers who pursue an activity in a Member State in which they do not reside.

EU citizens residing in the Member State of their own nationality do not normally benefit from the rights granted by the Directive (as there is no element of free movement). There are several exemption:

1) dual nationals – persons with dual nationality (*nationality of the Member State of residence and another Member State*) whether by birth or by naturalisation are covered by EU law on free movement of EU citizens provided they have exercised free movement and residence rights in the Member State of residence of which they hold the nationality, while also retaining their nationality of origin. As ruled by the Court of Justice in case C-165/16 *Lounes*, the rights of their non-EU family members shall be equivalent to those provided in the Directive.

2) in line with the case-law of the Court of Justice, the application of EU free movement law extends to EU citizens who return to their Member State of nationality after having resided in another Member State, as well as to those EU citizens who have exercised their right to free movement in another Member State without establishing their residence (settling) there – for example by providing services in another Member State.

In such situations, the Directive does not apply as such, but only *by analogy*. This means that the applicable rules should not be more strict than those provided for by the Directive for granting a derived right of residence to a third-country national who is a family member of an EU citizen who has exercised his/her right of freedom of movement by settling in a Member State other than the Member State of which he is a national.³²

For further information on these issues, see Commission Communication COM(2009) 313 final³³.

Examples:

- *French national residing in Cyprus travels to Italy – the Directive applies.*
- *Czech national living in the Czechia travels (or wishes to travel) to Sweden – the Directive applies.*
- *Hungarian national living in Bolivia travels to Poland – the Directive applies.*
- *Polish national living in Bolivia travels to Poland – the Directive does not apply.*
- *Latvian national residing in Greece returns to Latvia – the Directive applies by analogy.*

Question 2: Does the visa applicant fall under the definition of ‘family member’?

‘Core’ family members have an automatic right of entry and residence, irrespective of their nationality. Their right of entry is derived from the Directive and the national transposition measures may restrict neither these rights, nor the scope of the term ‘core’ family members.

The following persons are defined in Article 2(2) of the Directive as ‘core’ family members:

- the spouse³⁴;

³² Judgment of the Court of Justice in case C-456/12 *O and B*.

³³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>

- the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of any Member State, if the legislation of the host Member State treats registered partnership as equivalent to marriage;
- the direct descendants who are under the age of 21 or are dependant as well as those of the spouse or partner as defined above; or
- the dependant direct relatives in the ascending line and those of the spouse or partner as defined above.

In addition to persons defined in Article 2(2) of the Directive, the Court of Justice ruled in case C-200/02 *Zhu and Chen* that third-country nationals who are primary carers of minor EU citizens are also beneficiaries of the Directive (*such parents are not dependent on the minor EU citizen, but the minor EU citizen is dependent on such parents*).

Primary carer(s) of dependent EU citizens can also derive rights from Article 12(3) of the Directive if the EU citizen is studying in the host Member State and residence of primary carer(s) is required to allow the student to study effectively³⁵.

In such cases, case-law clarified that minor EU citizens enjoy full free movement rights, despite the fact that they cannot decide for themselves where to reside or where to travel. Such decisions are taken by their parents/primary carers who have the rights of custody of the EU child. Account must always be taken of the best interests of the child, which should be a primary consideration, as required by the United Nations Convention on the Rights of the Child of 20 November 1989 and Article 24 of the Charter.

In order to maintain the unity of the family in a broad sense, Member States must also facilitate entry and residence of so-called ‘extended’ family members of EU citizens (*for more details, see Commission Communication COM(2009) 313 final*³⁶).

The following persons are defined in Article 3(2) of the Directive as ‘extended’ family members:

- any other (*i.e. those not falling under Article 2(2) of the Directive*) family members who are:
 - dependants;
 - members of the household of the EU citizen;
 - strictly require the personal care by the EU citizen on serious health grounds; or
- partners with whom the EU citizen has a durable relationship, duly attested.

Article 3(2) of the Directive stipulates that ‘extended’ family members have the right to have their entry facilitated in accordance with national legislation. In contrast with ‘core’ family members, ‘extended’ family members do not have an automatic right of entry. Their right of entry (*and the rights related to an entry visa*) is derived from the national legislation transposing the Directive where the consulates should find detailed rules on this category of visa applicants.

³⁴ The Court of Justice ruled in case C-673/16 *Coman* that Member States cannot refuse entry and residence to spouses who contracted a marriage between persons of the same sex in another Member State on the ground that the law of the host Member State does not recognise such marriages.

³⁵ Similar rules apply with regard to parents of EU citizens whose right of residence is based on Article 10 of Regulation (EU) No 492/2011 and relevant case law (*see case C-529/11 Alarape for more details*).

³⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>

In accordance with Article 3(2) of the Directive, Member States have a certain degree of discretion in laying down criteria to be taken into account when deciding whether to grant the rights under the Directive to ‘extended’ family members. However, Member States do not enjoy unrestricted liberty in laying down such criteria. In order to maintain the unity of the family in a broad sense, the national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence, as stipulated in Recital 6 of the Preamble to the Directive.

For further information on these issues, see Commission Communication COM(2009) 313 final³⁷.

Question 3: Is the visa applicant accompanying or joining the EU citizen?

The Directive seeks to facilitate and promote free movement of EU citizens. It does not apply to mobility of the family members if there is no link to a mobile EU citizens, for example when the family member travels alone to a Member State in which the EU citizen does not reside and will not travel to.

Article 3(1) of the Directive stipulates that the Directive applies only to those family members, as defined above, who accompany or join the EU citizens who move to or reside in a Member State other than that of which they are a national. The Directive does not make the rights of family members conditional upon them residing ‘with’ the EU citizen – they need to reside (*or travel to*) a Member State in which the EU citizen resides (*or will travel to*).³⁸

For further information on these issues, see Commission Communication COM(2009) 313 final³⁹ and point 4.7 c) below.

Examples where the family member accompanies (i.e. travels together with) an EU citizen:

- *French national living in Ireland travels together with Pakistani spouse to Italy – the Directive applies.*
- *Czech national living in Czechia travels together with Russian spouse to Sweden – the Directive applies.*
- *Slovak national living in Romania travels together with Burmese spouse to Slovakia – the Directive applies (by analogy) as the EU citizen is returning to the Member State of nationality.*
- *Spanish national living in Indonesia travels with Afghan spouse to Hungary – the Directive applies.*

Examples where the family member joins (i.e. travels later than) an EU citizen:

- *Nigerian national travels to join her French spouse residing in Spain – the Directive applies.*
- *Maltese national living in Malta travels to Sweden where his Russian spouse wants to join him later – the Directive applies.*

³⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>

³⁸ Judgment of the Court of Justice in case 267/83 *Diatta*.

³⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:EN:PDF>

- *Estonian national living in Bulgaria with a Peruvian spouse travels to Estonia where her spouse wants to join her later – the Directive applies by analogy.*

2. CAN DIRECTIVE 2004/38/EC EXEMPT EU CITIZEN FAMILY MEMBERS FROM THE VISA REQUIREMENT?

This point provides for the specific derogations from the visa requirement that apply when it is ascertained that the visa applicant falls under the Directive (*see point 1 – questions 1, 2 and 3*).

The Directive provides for a visa exemption rule that is specifically bound to a particular type of residence card.

It is therefore essential that consulates properly identify the relevant residence cards.

2.1 Relevant residence cards

Article 5(2) of the Directive provides that possession of a valid residence card referred to in Article 10 of the Directive exempts third-country family members from the visa requirement.

‘Article 10’ residence cards are issued to family members of those EU citizens who have moved to a Member State other than that of their nationality and therefore fall under one of the categories defined in point 1 above (*question 1*).

The same visa exemption must also be extended to those third-country family members who hold a valid permanent residence card issued under Article 20 of the Directive (*replacing the 5-year residence card issued under Article 10 of the Directive*).

Examples:

- *German ‘Article 10’ residence card issued to the Chinese spouse of a Slovak citizen is relevant under Article 5(2) of the Directive.*
- *Dutch ‘Article 20’ permanent residence card issued to the Moroccan spouse of a Belgian citizen is relevant under Article 5(2) of the Directive.*

To be relevant under Article 5(2) of the Directive, residence cards or permanent residence cards do not have to be of a specific format or do not have to bear a particular title⁴⁰.

Residence cards relevant under Article 5(2) of the Directive exempt their holders from the visa requirement only when they travel to the host Member State together with EU citizens or are joining EU citizens there (see further Schengen specific rules on visa exemption in [point 2.3](#)).⁴¹

⁴⁰ Notwithstanding the obligation of Member States to issue residence cards under the Directive with the specific title indicated by Article 10 of the Directive.

⁴¹ To be noted that the Commission Services are currently assessing the interpretation according to which residence cardholders are only exempted from the visa requirement where they accompany or join the EU citizen or whether they would always be exempted independently of whether they accompany or join the EU citizen.

2.2 Non-standard residence cards that are nevertheless relevant

As described in question 2 of point 1, the Directive applies primarily to family members falling under Article 2(2) and 3(2) of the Directive. Such family members are issued with ‘Article 10’ residence cards or ‘Article 20’ permanent residence cards.

In certain situations, family members finding themselves in a different situation can still be issued with a residence card that is relevant under Article 5(2) of the Directive and exempt their holders from the visa requirement, as Article 10 and Article 20 residence cards do.

- a) residence cards issued to ‘Zhu and Chen parents’ (see question 2 of point 1); and
- b) residence cards issued to family members of EU citizens who have returned to the Member State of their nationality (see question 1 of point 1).

Residence cards that are not relevant:

Any other residence cards issued to family members of EU citizens do not exempt their holders from the visa requirement under Directive 2004/38/EC.

Typically, the most common type of residence card issued to family members of EU citizens that is not relevant under Article 5(2) of the Directive are residence cards issued under national legislation concerning family reunification with own nationals (*who have not exercised the right of free movement*).

Example:

Finnish residence card issued to the Libyan spouse of a Finnish citizen living in Finland.

Some Member States have decided to issue family members of their own nationals residence cards issued under the Directive. Other Member States have considered that this complicates their assessment of whether the residence card held by the family member concerned is relevant under the Directive or not⁴². Where the residence card is not relevant under the Directive – and where it does not exempt the holder from the visa requirement under the Schengen Borders Code (*Article 2(16)*) – the family member concerned should apply for an entry visa in accordance with the applicable rules.

2.3 Visa exemption under the Schengen Borders Code

In addition, third-country family members holding a valid residence document issued by a Member State applying the Schengen *acquis* in full may also be exempted from the visa requirement under Article 6 of the Schengen Borders Code, read in conjunction with Article 2 point 16 of the Schengen Borders Code (see [Annex 2](#)).

Residence cards issued by Schengen Member States to family members of EU citizens in accordance with Article 10 or 20 of Directive 2004/38/EC exempt the holder from the visa requirement under the Schengen Borders Code, even if they travel alone.

Residence cards issued to family members of EU citizens under national legislation concerning family unification with own nationals can also exempt their holders from the visa requirement under the Schengen Borders Code

⁴² The situation where the presented residence card is not relevant under the Directive in principle cover only situations where third-country family members accompany or join an EU citizen who is national of the country that issued the residence card.

In any case, the more favourable provisions should apply.

Examples:

- *A Slovak citizen resides with her Chinese spouse in Germany. They travel to France. As the Chinese spouse has a German residence card issued under Article 10 of the Directive, there is no need for an entry visa.*
- *A German citizen resides with his Chinese spouse in Germany. They travel to Spain. As the Chinese spouse holds a German residence permit issued under national law by a Schengen Member State (note that this card is not relevant under Article 5(2) of the Directive), there is no need for an entry visa under the Schengen Borders Code.*
- *A Slovak citizen resides with her Chinese spouse in Romania. They travel to France. As the Chinese spouse has a Romanian residence card issued under Article 10 of the Directive, he is exempted from the visa requirement under the Directive (but not under the Schengen Borders Code as Romania does not yet apply the Schengen acquis in full).*
- *A Slovak citizen resides with his Chinese spouse in Ireland. The Chinese spouse holding a residence card, issued by Ireland under Article 10 of the Directive, travels alone to France. As she travels alone, she needs to apply for a visa to enter France.*

3. TERRITORIAL COMPETENCE FOR VISA APPLICATIONS BY THIRD-COUNTRY FAMILY MEMBERS OF EU CITIZENS

Articles 6 and 7 of the Visa Code govern consular territorial competence, i.e. the conditions under which visa applicants can lodge their applications in a particular EU and non-EU country.

The rules of Articles 6 and 7 of the Visa Code apply to all visa applicants, regardless of whether they are family members of EU citizens or not. However, the Directive, as interpreted by the Court of Justice, requires certain adjustments in relation to applications lodged by family members in countries with which they have no link or where the link is irregular.

Given the privileges third-country family members of EU citizens enjoy, consulates must carry out the test to identify whether the applicant is a beneficiary of the Directive before applying Articles 6 and 7 of the Visa Code.

3.1 Article 6

The Directive requires Member States to grant every facility to third-country family members applying for an entry visa but this obligation does not require Member States to accept visa applications made by third-country family members in countries in which they are not lawfully resident (*for example, if they do not hold a valid residence document issued by that country or are not entitled to one*) or lawfully present. This is reflected in the structure of Article 6, notably in paragraph 2.

Article 6 of the Visa Code cannot be used to automatically refuse to accept the visa application – consulates may refuse to accept a visa application pursuant to Article 6 if the justification provided by the visa applicant for lodging the application at that consulate is considered insufficient.