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To Dr. A. Vitorino
European Commissioner for Justice and Home Affairs
Wetstraat 200
B-1049 Brussels

Reference CM03-02
Regarding Draft Directive on the right to Family Reunification
Date February 20, 2003

Dear Mr. Vitorino,

The aim of this letter is to convince you that the Draft Directive on the right to family reunification should not be maintained by the Commission, unless some of the amendments agreed by Member States are replaced by the texts proposed by the Commission. The Standing Committee is of the opinion that the Draft Directive in its present state[1] does not meet the minimum standards set by Article 8 ECHR.
The Standing Committee considers it unacceptable that an EC Directive would lend itself to be invoked by Member States for justifying a violation of the European Convention of Human Rights.
Moreover, the text of the Drafts Directive clearly fails to meet the standard set by the European Council in Tampere: *"The legal status of third country nationals should be approximated to that of Member State nationals".*

The provisions, taken together, will allow Member States to prevent third-country nationals legally residing in their territories from reuniting with their families for a very long period or even indefinitely, without being obliged to offer them an effective remedy. Marital and non-marital relationships may break down under the stress of such a long separation. Children may grow too old to be admitted at all, or at least too old to be admitted without having to meet aggravated conditions like a previous test of integration. When an application may at last be lodged, Member States are allowed a very long period before making a first decision on their request. The Standing Committee refers to the following provisions:

- Article 4 (1), last sentence, allowing a previous integration test for children aged over 12 years;
- Article 5 (4) allowing a term for deciding on the application of nine months, which may in exceptional cases be extended;
- Article 8, allowing Member States to introduce a waiting period of two or three years;
- Article 16, allowing the withdrawal and subsequent expulsion of admitted family members on the sole ground that the family income is no longer deemed to be sufficient;
- Article 18, offering the individuals concerned nothing more concrete but a *"right to mount a legal challenge".* This very weak, almost void, guarantee is not only less than the level of legal protection required by Article 8 ECHR but also far beneath the level required by Article 47 of the Charter of Fundamental Rights of the European Union.

Though the guarantees for respect for family life under the Draft Directive are already beneath an acceptable level, Member States are still not able to reach consensus and some have proposed amendments allowing even more restrictions. Children should apply for family reunification before reaching the age of 15 and the maximum waiting period should be stretched to at least (sic) five years.

[1] Amended proposal 3 February 2003, Interinstitutional file 1999/0258 (CNS), Council document 5881/03.

The relevant minimum standards of Article 8 ECHR under the most recent case law of the European Court of Human Rights may be summarised as follows:

- The choice of domicile for family members in a Member State must be accepted when this would be their only way for developing family life (ECHR 19 February, 1996, Gül, nr. 00023218/94, para. 39).
- If family members legally residing in a Member State are settled and integrated in that country, it is not allowed to put them in the position of choosing between giving up their acquired situation in the Member State or to renounce the company of a young child which they initially left behind in their country of origin (ECHR 21 December, 2001, Sen, nr. 31465/96, para. 40, 41).
- Family life encompasses children born of a marital union (*ipso jure!*), and as far as couples are concerned, both families based on marriage and *de facto* relationships. In general, the existence of family life is essentially a question of fact depending upon a reality in practice of close personal ties (ECHR 20 June 2002, Al-Nashif, nr. 50963/99, para. 112).
- Withdrawal of a residence permit, for reasons of public order, of a third-country national legally residing with a spouse having the nationality of a third country, who has been settled and integrated in a Member State, may not happen unless it is established whether the spouse could be expected to follow the person concerned to his or her country, in particular whether the spouse speaks the language of that country and maintained any links, other than the nationality, with that country. Further it must be established that the interference in family life is proportional with the gravity of the offences committed (ECHR 31 October, 2002, Yildiz, nr. 37295/97, para.43, 45; see also ECHR 2 August, 2001, Boultif, nr. 54273/00, para. 48, ECHR 11 July, 2002, Amrollahi, nr. 56811/00, para. 40 – 44).
- Interference in family life must be in accordance with the law, which implies that there must be a measure of legal protection in the Member State against arbitrary interference by the public authorities with the rights safeguarded by the ECHR. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference. There must be adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence. (ECHR 20 June 2002, Al-Nashif, nr. 50963/99, para. 119, 123).

Therefore, the Standing Committee strongly advises you to withdraw the Draft Directive unless the provisions expressly allowing a waiting period, allowing indefinite delay in decision-making, allowing refusal to renew a residence permit and expulsion on the sole ground of absence of sufficient income and allowing void legal remedies are dropped.

In any case, a general provision should be added, expressly and literally referring to the second section of article 8 ECHR:
"No restrictions to the right to family reunification may be imposed interfering with the right to family life guaranteed under Article 8 ECHR, unless they are in accordance with the law and are necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Yours sincerely,

C.A. Groenendijk

Prof. dr. C.A. Groenendijk
Chairman