

# Verifying the Family? A Comparison of DNA Analysis for Family Reunification in Three European Countries (Austria, Finland and Germany)

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## Abstract

This article explores and compares the legal frameworks and regulatory practices of the use of DNA analysis for family reunification in Austria, Finland, and Germany. Based on a document analysis, we first provide an overview of the international legislation for family reunification and analyse the situation in the European Union. We show that the three countries have significantly different legislative practices in place to regulate parental testing in immigration contexts and to verify family relations. We outline the key societal and political implications that are associated with these country specific forms of legislation and regulatory practices and highlight the ambivalent role of DNA analysis in family reunification.

## Keywords

DNA analysis, family reunification, verifying family ties, national legislations, regulatory practices

## 1. Introduction

Since the 1990s, many countries around the world have begun to use DNA analysis to establish biological relatedness in family reunification cases. In general, family reunification refers to the right of citizens or holders of a long-term residence permit in a given country to reunite with their family members living abroad. In the European Union, this right only concerns family members who are third-country nationals. While family reunification has been an integral part of many countries' immigration policies, and is meant to protect the family in accordance with the

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*Universal Declaration of Human Rights* (UDHR) and the *European Convention on Human Rights* (ECHR), family-related immigration is currently one of the major drivers of legal immigration to the European Union.<sup>1</sup> In order to harmonise the legal framework and administrative practise for family reunification in the EU in accordance with the fundamental right to family life as guaranteed in Article 8 of ECHR and Articles 7 and 9 of the *Charter of Fundamental Rights of the European Union*, all EU Member States except Denmark, Ireland and the UK ratified *Council Directive 2003/86/EC*. Family members who apply for family reunification have to prove their relatedness by official documents and other forms of evidence, but providing such information is often difficult, especially in countries that do not use official documents to establish identity or where those papers have been lost or destroyed due to politically unstable situations. Even if applicants possess the required documents their authenticity is sometimes questioned and the immigration authorities subsequently reject them. In this context, many countries resort to DNA analysis to resolve cases in which they consider the information from documents or interviews presented about family relations to be either invalid, incomplete or unsatisfactory.

Although exact DNA usage rates and statistics are unavailable in most countries, there is evidence that the use of DNA testing in the context of immigration is on the rise. Today, at least 20 countries around the world including 16 European countries have incorporated parental testing into decision-making on family reunification in immigration cases: Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Malta, the Netherlands, New Zealand, Norway, Switzerland, Sweden, the UK, and the USA.<sup>2</sup>

DNA analysis for family reunification cases certainly offers some advantages over traditional methods of identification such as blood testing,<sup>3</sup> as it is much more precise, less prone to errors, fairly cheap, and provides a basis for establishing biological relatedness not only between parents and their children but also siblings or more distant family members such as grandparents, aunts and uncles

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<sup>1</sup> European Migration Network (2008), *Family Reunification: Synthesis Report*. This and all following reports, ad-hoc queries and other resources from the European Migration Network are available online at <http://emn.intrasoft-intl.com/> (accessed 28 February 2013); Eurostat, 'Residence permits issued to non-EU citizens', 43 *Eurostat Statistics in Focus* (2011), 1–8; A. Müller (2012), *Misuse of the Right to Family Reunification: Marriages of convenience and false declarations of parenthood*, Nuremberg: Federal Office for Migration and Refugees; G. Ruffer, 'Pushed beyond Recognition? The Liberality of Family Reunification Policies in the EU', 37 *Journal of Ethnic and Migration Studies* (2011), 935–951.

<sup>2</sup> European Migration Network (2008), *supra* fn. 1; European Migration Network (2009), *Ad-Hoc Query on Conducting other investigation (using a DNA test) in family reunification*; T. Heinemann and T. Lemke, 'Suspect families: DNA kinship testing in German immigration policy', *Sociology*, in press, DOI: 10.1177/0038038512454352; E. La Spina, 'DNA Testing for Family Reunification in Europe: An Exceptional Resource?', 6 *Migraciones Internacionales* (2012), 39–74.

<sup>3</sup> A. Davis, 'Are you my mother? The scientific and legal validity of conventional blood testing and DNA fingerprinting to establish proof of parentage in immigration cases', 1 *Brigham Young University Law Review* (1994), 129–146.

or nieces and nephews. In other words, it allows for the examination of complex and distant family relations and achieves very high probability rates. It might also be considered an effective instrument to control immigration, to prevent child-trafficking and to limit fraudulent family reunification. While parental testing is a very precise way of determining biological relatedness, the technology itself also has some limits: for example, mutations may occur that lead to an exclusion of maternity or paternity even though a biological relation exists. Furthermore, human errors can occur both in taking samples in the countries of origin and when analysing them.<sup>4</sup> Those are rather technical issues that can be resolved or pragmatically dealt with. However, the use of DNA profiling for family reunification in immigration cases also raises serious concerns that have to be addressed. It reduces the socio-biological complexity of the family to a solely biological entity and has the potential to exclude family members that are only related socially and not genetically. Subsequently, it establishes a double standard for family recognition between EU citizens and immigrants. Parental testing may also show that family members are not biologically related and therefore pose ethical questions. Additionally, it can be used as another means of reducing legal immigration.

In this article, we analyse the use of DNA profiling for family reunification in three EU Member States, Austria, Finland and Germany, and outline the differences in their respective legal frameworks and regulatory practices. The focus is on family reunification as covered by the Council Directive 2003/86/EC, that is to say, the reunification of a third-country national residing lawfully in a Member State with a family member who is a third-country national. The article initially discusses the legislation of the European Union covering family reunification and notes its transposition to national law in Austria, Finland, and Germany. We then analyse the legislation for and administrative practice of the use of parental testing in family reunification cases in these three countries. The article concludes with an outline of the societal and political issues that result from the different regulations and administrative practices.

## 2. European Legislation for Family Reunification

The right to family reunification relates to the protection of the family as laid down in Article 16 of the UDHR and Article 8 of the ECHR.<sup>5</sup> Article 8 of the ECHR

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<sup>4</sup> See A.P. Dawid, J. Mortera and V.L. Pascali, 'Non-fatherhood or mutation? A probabilistic approach to parental exclusion in paternity testing', 124 *Forensic Science International* (2001), 55–61; A.O. Karlsson, G. Holmlund, T. Egeland and P. Mostad, 'DNA-testing for immigration cases: The risk of erroneous conclusions', 172 *Forensic Science International* (2007), 144–149; A. Mansuet-Lupo, J. Henke, L. Henke, C. Blank, A. Ernsting, P. Kozłowski, P. Rouger and V. Van Huffel, 'A paternity case with three genetic incompatibilities between father and child due to maternal uniparental disomy 21 and a mutation at the Y chromosome', 3 *Forensic Science International Genetics* (2009), 141–143.

<sup>5</sup> See also K. Jastram and K. Newland (2003), 'Family Unity and Refugee Protection, in: E. Feller, V. Türk and F. Nicholson (eds), *Refugee protection in international law. UNHCR's global consultations on international*

protects individuals from unlawful interference in ‘one’s private and family life, home and correspondence’. The Convention also establishes the European Court of Human Rights (ECtHR) with the authority to give binding judgments to the state parties. In its judgements, the court has ‘recognised that Article 8 places State Parties under a *positive* obligation to admit a family member in a situation where the family unit cannot be reasonably expected to relocate in the country of origin’.<sup>6</sup> In the European Union the right to family is laid down in the Charter of Fundamental Rights of the European Union, which stresses the right to have a family in Article 7, on the respect for private and family life, which is based on Article 8 ECHR, and Article 9 on the right to marry and to found a family.<sup>7</sup> However, beyond the general scope of these articles, the charter ‘is silent on the question of family reunification’.<sup>8</sup>

The *Treaty on the functioning of the European Union* states in Article 79 that ‘the Union shall develop a common immigration policy’. Article 79(2)(a) further specifies that the European Parliament and the Council shall adopt necessary measures in the areas of ‘the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, *including those for the purpose of family reunification*’. The details, consequences and administrative practices are not specified further, but they define a minimum standard that has to be guaranteed by all EU Member States. In the end, it is up to each Member State to implement procedures that are in line with the treaty.<sup>9</sup>

To align the regulations on family reunification stated in the Charter of Fundamental Rights of the European Union, Council Directive 2003/86/EC on the right of family reunification was ratified in 2003 by all EU Member States except for Denmark, Ireland and the UK. This is the most important European legal document with regard to family reunification. It not only contains legal information on the rights of the applicant and the family, but also provides a framework for administrative practice. But even this framework leaves considerable room for interpretation regarding the underlying concept of family, the right of minors to apply for family reunification, the age limits for minors and spouses, the status of marriage as a prerequisite for the application, and certainly the use of DNA analysis to verify biological family relationships.<sup>10</sup> Article 5(2) only states that ‘the

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*protection*, Cambridge: Cambridge University Press, pp. 555–603.

<sup>6</sup> R. Cholewinski, ‘Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right’, 4 *European Journal of Migration and Law* (2002), 271–290. Emphasis by authors.

<sup>7</sup> It has to be pointed out, that the charter is only applicable in terms of implementing EU law (see art. 51 TFEU) and does not extend beyond the bounds of the EU.

<sup>8</sup> A. John (2003), *Family Reunification for Migrants and Refugees – A Forgotten Human Right?*, M.A. Thesis. Human Rights Centre, University of Coimbra, Coimbra, available online at <http://www.fd.uc.pt/hrc/pdf/papers/arturojohn.pdf> (accessed 28 February 2013); see also Cholewinski (2002), *supra* fn. 6.

<sup>9</sup> Y. Schibel, Transposing EU Law on Legal Migration, 6 *European Journal of Migration and Law* (2004), 395–404.

<sup>10</sup> Schibel (2004), *supra* fn. 9.

application shall be accompanied by documentary evidence of the family relationship' and 'if appropriate, in order to obtain that a family relationship exists, Member States may carry out interviews . . . and conduct other investigations that are found to be necessary'. One of those other investigations or forms of documentary evidence may well be the result of a DNA kinship test but this is not specified.

While this scope for interpretation may be seen as a problem in establishing a common immigration and family reunification policy, it is especially important to emphasise that the Council Directive 2003/86/EC requirements are in fact lower than or similar to the regulations and laws governing family reunification in the Member States.<sup>11</sup> In other words, Council Directive 2003/86/EC does not actually guarantee new rights for those applying for family reunification but instead tries to align them among the Member States, and does this at a (sub)standard level. Most EU Member States seem to prefer a rather strict definition of the family where family reunification only applies to married couples and their children under the age of 18, or sometimes even 16.<sup>12</sup> Subsequently, the European Commission stated in a report on the application of Directive 2003/86/EC that the transposition and application of the Directive into national legislations had been incomplete.<sup>13</sup>

Beside the warrantable criticism it has to be noted, that '[t]he Directive has not only extended basic rights and legal securities to new immigration countries, but also secured them from future policy restrictions in all countries'.<sup>14</sup> This observation is related to the threats of the current restrictive trend in immigration policies.

In 2011, the Commission initiated a public debate on the Directive through a Green Paper in which all stakeholders – Member States, NGOs and individuals – were invited to respond to a number of questions and discuss issues related to the Directive. The questions were related to, first, the shortcomings mentioned above in the harmonisation and implementation of the Directive and, second, the restrictive turn in migration policies in general that had seen calls for amendments aimed at establishing further conditions to family reunification.<sup>15</sup> While the result of the public consultation was that most Member States did not advocate the modification of the Directive, discussions on the latter question are ongoing.

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<sup>11</sup> International Federation for European Law (2004), *Migration and Asylum Law and Policy in the European Union*, Cambridge: Cambridge University Press; Schibel (2004), *supra* fn. 9.

<sup>12</sup> European Migration Network (2008), *supra* fn. 1, European Migration Network (2009), *Ad-Hoc Query on Age limit for Family reunification*; European Migration Network (2010), *Ad-Hoc Query on Family Reunification for Minors*; European Migration Network (2010), *Ad-Hoc Query on the concept of family member*.

<sup>13</sup> European Commission (2008), *Report on the application of Directive 2003/86 on family reunification of third country nationals*, available online at [http://europa.eu/rapid/press-release\\_MEMO-08-611\\_en.htm](http://europa.eu/rapid/press-release_MEMO-08-611_en.htm) (accessed 28 February 2013).

<sup>14</sup> T. Huddleston, 'Right to family reunion: the dynamics between EU law and national policy change', 2 *MPG Briefings for the Green Paper on Family Reunion* (2011), 1–16.

<sup>15</sup> COM 2011 735. The Green Paper with the questions, responses and a summary of the stakeholder responses is available online at [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting\\_0023\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm) (accessed 28 February 2013); See also Huddleston (2011), *supra* fn. 14.

The restrictive turn is apparent from the first European Migration Network Focus Study *Misuse of the Right to Family Reunification* that was meant to inform the Green Paper on the issues related to marriages of convenience and false declarations of parenthood.<sup>16</sup> But already following the transposition of the Council Directive 2003/86/EC many Member States introduced strict regulations for family reunification. In this context, and as we will show in the next section, Austria, Finland, and Germany represent three distinct ways of adopting EU regulations for family reunification into national law and the use of DNA testing in this context.

### 3. The Transposition of Council Directive 2003/86/EC into National Law in Austria, Finland and Germany

As already noted, it is up to the Member States how they transpose the different directives into national law. The common regulations for family reunification as laid down in Council Directive 2003/86/EC had to be transposed into national law no later than 3 October 2005, which resulted in the introduction of several new laws regulating immigration and family reunification in all Member States. Austria and Germany introduced the new immigration laws in 2005, while Finland anticipated the provisions of the Council Directive 2003/86/EC in the new Aliens Act<sup>17</sup> in 2004 and subsequently made further amendments in 2006 to fully transpose the Directive.

#### 3.1. Austria

In *Austria*, family reunification is regulated by the so-called ‘*Fremdenrechtspaket*’<sup>18</sup> (Alien Law Package), comprising the Asylum Act, the Aliens’ Police Act and the Federal Act concerning Settlement and Residence in Austria. The Asylum Act regulates quota-free family reunification for asylum seekers and refugees – and, more importantly, is not subject to the scope and transposition of Council Directive 2003/86/EC into Austrian law. However, the Federal Act concerning Settlement and Residence in Austria allows family reunification only in the context of a certain quota, annually regulated by the so-called Residence Decree (*Niederlassungsverordnung*) and after several requirements mentioned in the Federal Act, which relate to Council Directive 2003/86/EC, have been fulfilled.<sup>19</sup> Article 46 of

<sup>16</sup> European Migration Network (2012), *Misuse of the Right to Family Reunification: Marriages of Convenience and False Declarations of Parenthood*, Luxembourg: Publications Office of the European Union.

<sup>17</sup> Ulkomaalaislaki, UlkL 301/2004. The English text is available online at <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> (accessed 28 February 2013).

<sup>18</sup> Especially the 2009 amendment of the Alien Law Package is relevant for DNA testing in family reunification cases as here, the issues of reimbursement of costs is addressed.

<sup>19</sup> J. Ecker (2008), *Familienzusammenführung. Die Umsetzung der Richtlinie 2003/86/EG in Österreich*, Wien: Verlag Österreich.

the Federal Act concerning Settlement and Residence in Austria regulates the right to family reunification. In this context ‘relatives’ are defined as ‘[a] spouse or an unmarried under-age child, including adopted and stepchildren (nuclear family), whereas the spouses, except spouses of Austrian nationals, EEA nationals and Swiss nationals must have reached 18 years of age’.<sup>20</sup> In addition to the definition in the Federal Act concerning Settlement and Residence in Austria, the Asylum Act mentions under Article 2 (1) 22 that the definition of relatives also includes persons living in a registered partnership, provided that this registered partnership already existed in the country of origin, a precondition that also applies to marriages.

Persons who want to be reunited with their family have to prove their family relation. Usually, this is done by interviews with officers of the respective authorities and by providing legal documents. Statements from subsequent interviews during the asylum procedure of the reuniting person are compared to statements in the current procedure for family reunification. In cases where no legal documents are provided, these documents are found to be inaccurate or the interviews lead to contradictory statements, the use of a DNA test is offered to the applicants instead.

### 3.2. *Germany*

In *Germany*, the most important piece of legislation with regard to family reunification is the 2005 Residence Act (*Aufenthaltsgesetz*, AufenthG) as part of the Immigration Act (*Zuwanderungsgesetz*, ZuwandG). The Residence Act, which replaced the Aliens Act, incorporated most of the regulations of Council Directive 2003/86/EC and adapted them to national law. Part 6 (Articles 27–36) is specifically concerned with family reunification. The Residence Act explicitly states that the right to family reunification is meant to protect the family in accordance with the Basic Law (*Grundgesetz*, GG). This right is based on a very narrow definition of the family, the so-called nuclear family.<sup>21</sup> Generally speaking, every spouse, either a German or a foreigner who is in possession of a temporary or unrestricted residence permit, can be the sponsor of an application for family reunification. The sponsor and his/her partner need to be married, and s/he also needs to provide an adequate level of income and sufficient living space for the prospective united family. Refugees and accepted asylum seekers do not need to provide a living wage and living space if they apply for family reunification within three months after they have been officially recognised by the Aliens Department. Children holding a temporary or unrestricted residence permit may serve as sponsors and apply to be reunited with their parents as well, but generally all the provisions assume that the sponsor is an adult. The right to family reunification is only legally recognised

<sup>20</sup> Article 2(1)(9) of the Federal Act concerning Settlement and Residence in Austria.

<sup>21</sup> European Migration Network (2010), *Ad-Hoc Query on the concept of family member*, *supra* fn. 12.

for spouses over 18 years old and their underage children. There are also some exceptions for adopted children and their parents. Under exceptional circumstances, so-called extraordinary hardship, the right of residence can also be granted to more distant relatives such as grandparents, children who have reached adulthood and siblings of any age.<sup>22</sup> However, in 2011 only 228 residence permits for family reunification were issued on this basis, which constituted only 0.4 per cent of all residence permits granted for family reunification.<sup>23</sup>

Persons who apply for family reunification have to prove their family status using official documents. However, with the introduction of biological tests for family relatedness, immigration authorities no longer trust these documents but opt for DNA parental tests. Even in cases where legal documents are provided, it is a common administrative practice to ask the applicants for a DNA kinship report.<sup>24</sup> Moreover, the German Federal Foreign Office has published a list of 46 countries whose documents are not acknowledged by German embassies at all because they assume that the system of identity registration lacks systematic and sound procedures.<sup>25</sup> Immigrants from these countries will find it extremely difficult to prove a family relationship by official documents only and to obtain permission to reunite with family members, they often have to resort to DNA testing.

### 3.3. Finland

In *Finland* the national legislation was fully compatible with the Directive by 2006, and the provisions and policies of family reunion are, according to Migration Policy Index, 'slightly favourable', ranking 7th in the comparison of 31 industrialised countries.<sup>26</sup> While the Aliens Act is in line with the Finnish concept of family, and the definition of the family mainly covers the members of the nuclear family, in some respects it is relatively inclusive: for example, the definition of a spouse is quite liberal. According to Article 37(2) of the Aliens Act, 'persons living continuously in a marriage-like relationship within the same household regardless of their sex are comparable to a married couple. The requirement is that they have lived together for at least two years. This is not required if the persons have a child in their joint custody or if there are other weighty reasons for it'. This means that

<sup>22</sup> A. Walter (2009), *Familienzusammenführung in Europa. Völkerrecht, Gemeinschaftsrecht, Nationales Recht*, Baden-Baden: Nomos

<sup>23</sup> Federal Office for Migration and Refugees (2012), *Das Bundesamt in Zahlen 2011. Asyl, Migration, ausländische Bevölkerung und Integration*, Nuremberg.

<sup>24</sup> Bundesregierung (2008), *DNS-Abstammungsgutachten im Rahmen von aufenthaltsrechtlichen Identitätsfeststellungen*, Drucksache 16/7698, available online at <http://dipbt.bundestag.de/dip21/btd/16/076/1607698.pdf> (accessed 28 February 2013); W. Frenz, 'Begrenzung ausländerrechtlicher Maßnahmen durch europäische Grundrechte', 28 *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2008), 385–388.

<sup>25</sup> The latest information is available online at <http://www.konsularinfo.diplo.de/> (accessed 28 February 2013).

<sup>26</sup> Migration Policy Index (2011), *Family Reunion*, Available at <http://www.mipex.eu/family-reunion> (accessed 28 February 2013).



unmarried couples, registered partnerships, and same-sex unions are included in the legal formulation covering marriage-like relationships. It is noteworthy that marriage-like relationships could in practice be verified through DNA analysis of filiation in cases where there is no official documentation on cohabitation or custody.

Pursuant to Article 37(1) of the Aliens Act, underage unmarried children ‘over whom the person residing in Finland or his or her spouse had guardianship are considered family members’. It is notable that the legal definition does not differentiate between ‘natural’ and ‘social’ filiation, i.e. between biological children, adopted children and stepchildren. Article 37(3) further states that a child (‘foster child’), who is under ‘his or her parent’s or guardian’s de facto care and custody [...] shall be treated as a child under subsection 1’, if there is reliable evidence on the death or disappearance of the ‘child’s previous parents or guardians’. Often the relationship between the child and the guardian de facto cannot be verified by official documents of adoption<sup>27</sup> but the tie of fosterage has to be investigated in interviews and by DNA analysis, too, in case they are biologically related to the child in question, for example as grandparents, aunts or uncles. Moreover, unaccompanied minors can be sponsors for reunification with their minor siblings under Article 52(3) of the Aliens Act, which also states that ‘[a] requirement for issuing a residence permit is that the children and their siblings have lived together and that their parents are no longer alive or the parents’ whereabouts are unknown’. This right to apply for family reunification for minor siblings is not available in either Austria or Germany. Even though Finland has a generally more liberal framework for family reunification, most of the latest amendments to the Aliens Act restrict the possibilities of family reunification, and there is pressure to further reduce the alleged ‘pull factors’. In this context DNA testing is seen as a suitable measure.

### 3.4. *The Limits of Harmonisation*

The different legislation and regulatory practices in the three countries have to be interpreted in their respective historical contexts. Germany and Austria have long histories of labour immigration, and the fairly strict regulations mentioned above have to be seen in this light.

In 1991, Germany introduced a strict policy on family reunification through its amendment of the Aliens Act,<sup>28</sup> which codified the nuclear family model as an ideal for family reunification, and set narrow guidelines for the maximum age of

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<sup>27</sup> The regulation of transnational adoption is codified in a separate piece of legislation, see Adoptiolaki 22/2012. It is differentiated from the Aliens Act in many respects, for example on the significance of legally valid contracts whereas the proof of fosterage is mainly based on unofficial and contingent proof of guardianship and care.

<sup>28</sup> K. Bade and L. Anderson, ‘Immigration and social peace in united Germany’, 123 *Daedalus* (1994), 85–106.

children to be reunited with their parents in Germany. It was also at that time that DNA analyses were first used in family reunification cases in Germany. Also, in the 1990s and in the context of the Balkan conflicts and a wave of immigration from former Yugoslavia to Austria, this led to a series of migration-related laws (Asylum Act, Aliens Act, Residence Act) in Austria.

What differentiates Finland from Austria and Germany and, indeed, from most West European countries, is the fact that Finland has historically been a country of labour emigration rather than immigration. In Finland, the link between international protection and family reunification is quite pronounced in the media and political debate, and this is also reflected in the tension between humanitarian concerns and alleged misappropriation of welfare benefits. These issues became matters of controversy in the light of the first group of asylum seekers, Somali refugees, who arrived in Finland after 1990. This is also why Somalis are central figures in discussions concerning family reunification and especially DNA testing, not only in Finland but also elsewhere.<sup>29</sup> This history of immigration is further reflected in the provisions of the Aliens Act on foster children, siblings, and death or disappearance of guardians, and DNA testing.

All in all, family reunification – regulated in national law – is not in all cases affected by Council Directive 2003/86/EC (for example, the Austrian Asylum Act). Also and importantly, the persons eligible for family reunification differ between Austria, Finland and Germany. In addition, the procedure in the course of applying for family reunification is not standardised or even uniformly regulated in the three countries. Hence, even though at the European level Council Directive 2003/86/EC provides a common basis for family reunification cases, in practice family reunification is regulated in quite different ways in the three countries and this has direct implications for persons applying for family reunion. The different procedures, requirements and decisions with regard to family reunification become even more noticeable when we look at the use of DNA analysis for verifying family ties in family reunification cases.

#### 4. DNA Testing for Family Reunification in Austria, Finland and Germany

As already mentioned, a general trend in immigration policies towards DNA analysis as a proof of family ties in cases of family reunification, is observable in

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<sup>29</sup> See P. Hautamäki (2007), 'Diasporic Authenticity: Connecting Genes and Building Families through DNA Testing in Somali Family Reunification in Finland', in A. Kusow and S. Bjork (eds), *From Mogadishu to Dixon: The Somali Diaspora in a Global Context*, Trenton, NJ: Red Sea Press, pp. 119–133; P. Hautamäki (2004), *Pojat! Somalipoikien kiistanalainen nuoruus Suomessa*, Helsinki: Nuorisotutkimusverkosto especially pp. 139–162. Somalis were singled out in the ad hoc query on DNA testing and they were also targeted by the policies of DNA testing in the USA. See European Migration Network (2009), *supra* fn. 2; S. Villiers, 'Brave New World: The Use and Potential Misuse of DNA Technology in Immigration Law', 30 *Boston College Third World Law Journal* (2010), 239–271.

many developed countries and especially in the European Union. Austria, Finland, and Germany exemplify three different approaches towards the practice of DNA analysis as a proof in family reunification cases when documents are missing or incomplete, or when authorities do not trust these documents.

#### 4.1. *DNA Testing for Immigration Purposes in the 1980s and early 1990s*

As long ago as 1985, the UK pioneered DNA profiling in the context of immigration.<sup>30</sup> Since the end of the early 1990s many European countries have responded to the growing numbers of applications for family reunification by developing efficient methods of identification, including fingerprints using the EURODAC database, biometric passports, and age assessment.<sup>31</sup> DNA testing for the verification of family ties can be placed in the context of these biometric technologies, and complements conventional methods of verification used in migration policies, namely documentary proof and personal interviews.

The use of DNA analysis for family reunification is not explicitly regulated by any European directive. Article 5 of the Council Directive 2003/86/EC only mentions ‘other investigations’ and DNA testing can be subsumed here. As pointed out previously, the Directive leaves considerable leeway to Member States, or, to quote the Green Paper, ‘A number of Member States have introduced the possibility of DNA tests to prove family ties. The Directive is silent on this type of evidence’.<sup>32</sup> In August 2009, the European Migration Network submitted an Ad-Hoc query to find out ‘whether any Member State conducts other investigations’, referring in particular to the use of DNA analysis.<sup>33</sup> 16 EMN Member States responded to the request and nine of them, including Finland and Germany, gave affirmative answers. Most of them highlighted the principles of voluntariness and the primacy of other methods of investigation, i.e., documents and interviews. Three of the responses were negative and a further three, among them Austria, did not want their responses to be disseminated further. It is evident that DNA analysis has been implemented country by country and thereby embedded in different and changing immigration regimes.

<sup>30</sup> R. McKie, ‘Eureka moment that led to the discovery of DNA fingerprinting’, *The Observer* (24 May 2009), 16; see also A.J. Jeffreys, V. Wilson and S.L. Thein, ‘Individual-specific “fingerprints” of human DNA’, 316 *Nature* (1985), 76–79.

<sup>31</sup> K.F. Aas, ‘“The body does not lie”: Identity, risk and trust in technoculture’, 2 *Crime, Media, Culture* (2006), 143–158; K.F. Aas, ‘“Crimmigrant” bodies and bona fide travelers: Surveillance, citizenship and global governance’, 15 *Theoretical Criminology* (2011), 331–346; K. Gates (2011), *Our biometric future: Facial recognition technology and the culture of surveillance*, New York, NY: New York University Press; H. Dijstelbloem and A. Meijer (eds) (2011), *Migration and the new technological borders of Europe*, Basingstoke: Palgrave Macmillan; E. Kruger, S. Magnet and J. van Loon, ‘Biometric Revisions of the ‘Body’ in Airports and US Welfare Reform’, 14 *Body & Society* (2008), 99–121.

<sup>32</sup> COM 2011 735, *supra* fn. 15.

<sup>33</sup> European Migration Network (2009), *supra* fn. 2.

In the Green Paper, use of DNA analysis is mentioned in question 10, which deals with ‘frauds, abuse, procedural issues’.<sup>34</sup> It is noteworthy that DNA testing is explicitly on the agenda and, even more so, that it is directly linked to the fraudulent use of family reunification as assumed by immigration management, instead of being an option offered to the applicants. In their responses, most Member States including Austria, Finland and Germany do not see any need for further regulation and harmonisation. Instead, they argue, that DNA testing is already sufficiently regulated on the national level. Both Austria and Germany highlight the voluntariness of parental testing in immigration cases and as an option offered to the applicants to prove their claims even if sufficient official documents are missing. They do not explicitly discuss it as a measure to prevent fraudulent uses of family reunification. However, in the Finnish response it is clearly stated that ‘the main way to combat abuse are by conducting oral interviews [...] or carrying out DNA tests.’<sup>35</sup> These different approaches in the use of DNA analysis in family reunification are also reflected by distinct ways of regulating it in the three countries. As will be shown below, in Austria, Finland and Germany, DNA testing has been a part of immigration management for years and has become established procedure.

#### 4.2. *DNA Testing in Family Reunification Cases in Finland*

As long ago as 1996–1997, Finland conducted a pilot research project on DNA testing, involving cooperation between the Refugee Office of the Ministry of Social Affairs and Health, the Finnish Directorate of Immigration, the Finnish Refugee Advice Centre, the Office of the Ombudsman for Foreigners, and the Department of Forensic Medicine at the University of Helsinki. The project followed the lead of other countries, and contacts with Canada, the UK and Denmark are mentioned in an internal report that summarised the findings and communications,<sup>36</sup> and which confirms that cooperation was based on informal and ad hoc communication during the early years. In the subsequent government proposal that introduced DNA testing as an amendment to the Aliens Act in 1999, it is stated that DNA analysis should not become a routine investigation.<sup>37</sup> However, this tool became important and normal especially but not only in processing applications submitted by growing numbers of Somali nationals.

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<sup>34</sup> COM 2011 735, *supra* fn 15.

<sup>35</sup> Finnish Ministry of the Interior (2012) *Replies to the questions in the Green Paper on Family reunification*, available online at [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/famreun/memberstatesnationalgovernments/finland\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/famreun/memberstatesnationalgovernments/finland_en.pdf) (accessed 28 February 2013).

<sup>36</sup> H. Kokkarinen, n.y., *Pakolaisten perheenyhdistäminen – DNA-tutkimuksen käyttö perheenyhdistämistapaüksissa*. Unpublished internal report of the Ministry for Social Affairs and Health.

<sup>37</sup> Hallituksen esitys laiksi ulkomaalaislain muuttamisesta, HE 88/1999; Ulkomaalaislaki, UlkL 378/1991. The two articles on DNA testing of the Aliens Act (Ulkomaalaislaki, UlkL 378/1991) were included as Articles 65 and 66 of the current Aliens Act with minor modifications. See *supra* fn. 17.

The amendments to the Finnish Aliens Act regarding DNA testing were passed with unambiguous consensus, and entered into force in 2000. Finland was one of the first countries to regulate DNA analysis through legislation, and it has to be pointed out that the testing was not used until the legislation was in force. The principle of voluntariness is emphasised in the government proposal, and also in statements made by the relevant authorities. It is an option offered and a last resort if, as stated in Article 65(1), '[...] no other adequate evidence of family ties based on biological kinship is available'. In addition, parental testing was justified as a measure that ensured non-discrimination against applicants whose documents were non-existent or considered invalid.

The Finnish system is not only legalistic and relatively transparent but also highly centralised: the tests are monitored by the Finnish Immigration Service and paid for from state funds. However, pursuant to Article 65(3) of the Aliens Act,

if the person concerned has deliberately given false information on his or her family ties, as a result of which the person and the family member indicated by him or her have been ordered to take a DNA test, the Finnish Immigration Service shall order the person concerned to reimburse the cost of the test to the State unless this is unreasonable under the circumstances.

This principle of public funding is also facilitated by the fact that no private laboratories are authorised to take the tests. Another law regulating DNA analysis, the law on forensic genetic paternity examination<sup>38</sup> and the related government decree,<sup>39</sup> specify the procedure in detail: the two authorised laboratories, legal rights, technical details, and even the maximum prices. The legislation and the administrative procedures have not changed, and even the prices are still the same: approximately €250 per person. The Aliens Act also includes provisions for data protection and informed consent. Pursuant to Article 65(2), 'results of the analysis must not be used for any other purpose than establishing the family tie required for issuing a residence permit in cases as specified in the person's consent'. It is further clarified in Article 66(1) that 'when the Finnish Immigration Service has issued a decision on the matter, it informs the person who carried out the test that the samples and the data concerning DNA identification shall be destroyed'. The procedures are described in the fact sheet of the Finnish Immigration Services in nine languages, and the information provided and the signed forms establish the basis of informed consent as regulated in Article 65(2) of the Aliens Act. The testing of biological kinship ties is not limited to relations between parents and children alone, but can also include testing of the relationship between a child and his/her grandparent, aunt, uncle or siblings, as these relations can in exceptional cases be the basis for a residence permit. Nevertheless, the extended paternity test in itself is not enough in decision-making: on the basis of

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<sup>38)</sup> Laki oikeusgeneettisestä isyystutkimuksesta 387/2005.

<sup>39)</sup> Asetus oikeusgeneettisestä isyystutkimuksesta 755/2005.

interviews, the nature of family life is assessed in each case. According to a press release issued by the Finnish Immigration Service, ‘A purely biological relationship is not, however, sufficient for a positive decision on residence permit without the background of a genuine, permanent family life’.<sup>40</sup> This clarification is followed by a reference to ‘a foster child’ who can obtain a residence permit if they are identifiable ‘as an integral member of the family’. Hence, adoption or fosterage are not *by definition* excluded as possible forms of relatedness in legislation or administrative guidelines. From the beginning, the verification of genetic ties and the proof of genuine family life – including permanence, intentions and, in many cases, also secure income – have been entwined in decision-making, which can lead to varied and conflicting interpretations of true family ties.

#### 4.3. *DNA Testing in Family Reunification Cases in Austria*

In Austria, the issue of DNA analysis in family reunification cases is highly controversial on a political level, but this conflict is mainly stirred up by right-wing parties (FPÖ/Austrian Freedom Party, BZÖ/Alliance for the Future of Austria).<sup>41</sup> Up until now, there has been no broader societal discussion of this topic in the country, as there is hardly any media coverage of the topic, and the issue is not discussed publicly. In practice, DNA analysis in family reunification cases has not been applied in many cases. This might be one reason why there is so little media coverage of this issue, and why even recent scholarly literature does not refer to DNA analysis for family reunification for more than a few short sentences.<sup>42</sup> The above mentioned 2009 amendment of the Austrian Alien Law Package introduced DNA analysis in the context of family reunification cases. But already before 2009, asylum seekers had the option to prove their family ties using a DNA analysis. Such an analysis should be used – as formulated in Article 18 (2) of the Asylum Act amendment 2009 – in cases where documents were deemed questionable or supposedly fake. The new subparagraph 18 (2) states that: ‘If a foreigner is unable to prove his/her claims for family ties [...] by providing credible documents or other appropriate and equivalent means of attestation, the Federal Asylum Office (*Bundesasylamt*) or the Court for Asylum (*Asylgerichtshof*) has to facilitate a DNA analysis on the foreigner’s request and on his/her costs.’ It is further specified that ‘[t]he Federal Asylum Office and the Court for Asylum have to refund the costs of the DNA analysis if the foreigner applies for it and if the family ties can be proved

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<sup>40</sup> Finnish Immigration Service (2008), *DNA Testing has United a Record Number of Immigrant Families*, available online at [http://www.migri.fi/for\\_the\\_media/releases/press\\_releases/press\\_releases/1/0/dna\\_testing\\_has\\_united\\_a\\_record\\_number\\_of\\_immigrant\\_families](http://www.migri.fi/for_the_media/releases/press_releases/press_releases/1/0/dna_testing_has_united_a_record_number_of_immigrant_families) (accessed 28 February 2013).

<sup>41</sup> For example, during the last years it has been addressed in parliamentary debates, and also in motions for resolutions (regarding the issue of DNA testing in family reunification cases in Austria) submitted by these political parties.

<sup>42</sup> J. Mourão Permoser (2010), *Redefining Membership: European Union Policy on the Rights of Third-Country Nationals*, PhD Thesis, University of Vienna, Vienna.

in the course of the DNA analysis by the expertise and if the foreigner stays within the federal territory'.<sup>43</sup> Hence, the applicants have to bear the costs of such a DNA analysis in advance. If the test results are positive and if the foreigner applies for a refund and stays in Austria, the authorities reimburse the costs. Such costs vary depending on the institution performing the DNA analyses; the analysis of three persons can cost anything from €500 to 950.

Article 12a of the Aliens' Police Act explicitly states that 'the absence of a request by the foreigner for such a DNA analysis cannot be assessed as a refusal to help to clarify the facts of the case'.<sup>44</sup> In addition, in the information sheet provided by the Federal Asylum Office for applicants, it is clearly stated that refusing the test will not be seen as harmful to the application.<sup>45</sup> Regarding data protection, the amendment of Article 18(2) in the Asylum Act also ensures this. In the course of the procedure, it is only permitted to use information about family ties; all other data has to be destroyed. It should be noted that in Austria, the procedure of taking DNA samples to verify family ties is more or less unregulated in relation to, for example, the duties of the relevant authorities, DNA labs, and embassies, and also the ways the sample travels from the person tested abroad to the DNA lab and then as a test result from the lab to the sponsor and/or to the Federal Asylum Office.

#### 4.4. *DNA Testing in Family Reunification Cases in Germany*

In Germany, the Immigration Act does not regulate the possibility of DNA analysis in family reunification cases at all. However, DNA kinship testing is explicitly provided for in the general administrative regulations for the Residence Act.<sup>46</sup> The Federal Foreign Office and the Federal Ministry of the Interior stress that DNA tests are not to be seen as a constraint but as an opportunity for the sponsors and applicants to prove the validity of their application. Furthermore, they emphasise the voluntary character of the DNA tests and argue that it is up to the applicants whether they wish to resort to this option. Finally, the authorities point out that DNA analyses are only used as a last resort to establish family links required if all other possible options to verify family relatedness have been exhausted. However, it is quite apparent that the constant recourse to DNA testing in current administrative practice is leading to a normalisation of this measure. It is not an ultimate ratio but becomes a standard tool for the verification of a family relationship in immigration cases. Also, it might be doubted how voluntary the use of DNA

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<sup>43</sup>) Translation by the authors.

<sup>44</sup>) Translation by the authors.

<sup>45</sup>) Bundesasylamt (2010), *Information für Antragsteller im Ausland zur Möglichkeit einer DNA-Analyse*, Handout of the Bundesasylamt.

<sup>46</sup>) No. 27.0.5 of the AVwV AufenthG, 2009.

analysis in this context can be if the application for family reunification will otherwise be rejected.<sup>47</sup>

In the past ten years DNA tests for family reunification in Germany have been conducted in a legal grey area. Although DNA kinship testing was not covered by any law, it has still been used widely in recent years. In the legal context, DNA testing for immigration purposes was first regulated via the Genetic Diagnostics Law (*Gendiagnostikgesetz*, GenDG) which entered into force in February 2010. The general focus of this law is on the right to informational self-determination, with the aim of protecting individuals from the abuse of their genetic information. It contains a section dealing exclusively with parental testing.<sup>48</sup> However, for the use of genetic data in the context of family reunification important legal guarantees are inoperative. For example, immigrants cannot demand that their DNA samples be destroyed, and their data can be used for criminal prosecution purposes if there is reasonable suspicion that a criminal offence has been committed.<sup>49</sup>

While the Federal Ministry of the Interior and the Federal Foreign Office make no secret of the fact that DNA tests are used to determine the legitimacy of applications for family reunification, they do not publish any statistics on the use of this measure.<sup>50</sup> At present there are no reliable figures on how many tests have been conducted so far in the application process for family reunification. This is also true for Austria, where no published statistics exist. The use of DNA tests for family reunification has been covered by the German press, and articles in several newspapers published some years ago have suggested that such tests are already being conducted in at least 600 cases annually.<sup>51</sup> Since then, the number has substantially increased.<sup>52</sup>

As the burden of proof is always on the applicant, it is up to him or her to find a laboratory for the parental test. The costs, approximately €200 to 250 per person tested, also have to be borne by the applicant. Once the applicant has authorised a DNA lab, samples will be taken from all family members. The applicant will receive the results in two to three weeks, and this is also one of the most important advantages of DNA testing for family reunification in Germany as applicants often have to wait for years before their documents are checked and verified by the authorities. With a DNA test, the decision is sometimes made within less than four months from the application to the final decision. This is also why immigration lawyers often advise their clients to take the test.

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<sup>47</sup> Heinemann and Lemke (2012), *supra* fn. 2.

<sup>48</sup> GenDG, Part 3, Sec. 17.

<sup>49</sup> GenDG, Part 3, Sec. 17, Paragraph 8, Clause 4.

<sup>50</sup> Bundesregierung (2008), *supra* fn. 10; Bundesregierung (2010), *Vorwürfe gegen Ausländerbehörden wegen Gentests bei binationalen Eltern*.

<sup>51</sup> V. Funk, 'Ausländerbehörden setzen auf Gentests', 63 *Frankfurter Rundschau* (12 November 2007), 6; V. Gaserow, 'Grenzen dicht für Birmaner', 63 *Frankfurter Rundschau* (22 October 2007), 8.

<sup>52</sup> Heinemann & Lemke (2012), *supra* fn. 2.



## 5. Societal Implications of DNA Testing for Family Reunification

When DNA testing is used to prove family ties, the definition of true families is based on biological ties, which stands in stark contrast to the multiple family forms that are presently acknowledged in the host countries. While DNA analysis can technically prove more extended ties of genetic relatedness, for example ties between siblings, this potential is seldom applied. Hence, the families that can be reunified are reduced to nuclear families with verifiable genetic ties. Non-biological familial ties – such as foster children or adopted children – are excluded. In the countries of origin, customary and varying familial relationships are known, including by the authorities, to be more extended, but these are not taken into account when DNA testing outweighs all other evidence. As has already been pointed out, the legislation on family reunification in Austria and Germany imposes a strict definition of the family that only includes married couples and registered partnerships over the age of 18 and their underage children. With the introduction of DNA testing in family reunification, the concept of the family is narrowed down to biological relatedness.<sup>53</sup> By emphasising the biological family as the standard for family reunification and the use of parental testing in this context, the family is mainly defined as a biological entity. This strong focus on a biological family model in family reunification cases contrasts with the social understanding and the legal framing of the family in European countries.<sup>54</sup> The routinisation of divorce and remarriage and the growing recognition of same-sex partnerships/marriages have generated heterogeneous patterns of family structures and a diversity of kin connections that are not necessarily based on genetic ties. The practice of family reunification in Germany, and also partly in Austria, displays a substantial legal and social difference between and contradictory treatment of native citizens and immigrants. The latter have to comply with a ‘traditional’ heterosexual biological family model in order to be officially recognised as a family in immigration cases. In Germany and also in Austria, the general double standard for family recognition is strengthened and enforced by the use of parental testing for family reunification, because it reduces the complexity of the socio-biological co-production of the family solely to the biological aspects.<sup>55</sup> As Finnish immigration law is based on a more extensive definition of the family, this double standard is not as pronounced in Finland though it still exists there. However, in Finland the decision on family reunification is based on other sources of evidence

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<sup>53</sup> See J. Villiers (2010), *supra* fn. 29.

<sup>54</sup> M.R. Anderlik and M.A. Rothstein, ‘DNA-based identity testing and the future of the family: a research agenda’, 28 *American Journal of Law & Medicine* (2002), 215–232.

<sup>55</sup> M.G. Weiss, ‘Strange DNA: The rise of DNA analysis for family reunification and its ethical implications’, 7 *Genomics, Society and Policy* (2011), 1–19; T.R. Murdock, ‘Whose Child Is This? Genetic Analysis and Family Reunification Immigration in France’, 41 *Vanderbilt Journal of Transnational Law* (2008), 1503–1534; M. Richards, ‘DNA Paternity Testing, Parentage and Kinship: Reflections on Some Tendencies in the UK and in the USA’, 21 *L’Homme* (2010), 101–105.

than the DNA test, such as interview protocols, and so family reunification is at least theoretically possible even if the result of the parental test is negative. In Austria and Germany, in contrast, a negative test result will virtually terminate all prospects of family reunification. Here, it is not ‘genuine family life’ that is verified, but the documented family relation. In addition, DNA tests in family reunification cases are increasingly being used for evidence production by the Austrian authorities to verify/falsify documents and/or narrations in consecutive interviews. Instead of being a piece of evidence in itself they become a proof of credibility of the person. As explained above, DNA test results alone are not enough in Finland and therefore a positive result does not necessarily lead to a positive decision if there is not enough proof of family life.

Evidently, social family ties cannot be tested in laboratories. There is an obvious paradox in the effort to ascertain true or *genuine* family ties while relying on DNA testing as evidence. The verification of the other pertinent criteria laid down in legal frameworks is quite intricate. For example, the ‘best interests of the child’ as laid down in the *Convention on the Rights of the Child, Council Directive 2003/86/EC*<sup>56</sup> and in national legislations, require interpretations about actual care. The reference to ‘extraordinary hardship’ in the German Residence Act or the ‘other weighty reasons’ in the Finnish Aliens Act, as well as the ‘dependency’ as outlined in Council Directive 2003/86/EC, clearly leave considerable room for interpretation. The verification of people’s intentions to continue their close family life in the new host country goes beyond the proof of biological relatedness.

DNA testing surely offers new opportunities for applicants to prove certain biological family links. Minor siblings could, for example, prove with a very high degree of scientific certainty that they are indeed biologically related. However, as reunification of siblings is not allowed in Austria or Germany the DNA test will not really make any difference. In Finland, DNA tests can indeed be used to verify these family bonds, that is, if the other requirements are met.

Another issue concerns the often-highlighted voluntariness of DNA testing. It may be seen as an option, but in the absence of other options it can become a necessity. This becomes especially apparent in the case of the blacklisted countries in Germany mentioned above. Applicants from those countries have to resort to a DNA test as their documents are per se deemed invalid or false. If the immigration authorities ask for a DNA test as proof of the family relation, there is virtually no way of avoiding it. Hence, the voluntariness of DNA testing is questionable. In this context we note a remarkable parallel to forensic DNA profiling. The refusal to provide a DNA sample for DNA profiling in a criminal case on a voluntary basis leads to a general suspicion against the person involved, since it is assumed that

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<sup>56</sup> The best interest of minor children is laid down in Article 5(5) of the Directive. Furthermore, Article 17 prescribes a balance of interests regarding family relationships in the Member State and with the country of origin, which entails evaluation of family life in its complexity.

someone will only reject the DNA test if s/he has something to hide.<sup>57</sup> There are several facets that complicate the procedure. The expense of the DNA test can become an obstacle for the people concerned,<sup>58</sup> especially in Germany where applicants have to bear the costs of the test themselves. The policies in Finland and Austria can be seen as two contrasting methods for dealing with alleged fraud through monetary sanctions. In Austria, the applicants have to pay the costs themselves but the expenses can be refunded if the test result is positive. In Finland, the costs are covered from state funds but if the applicants have *deliberately* given false information the costs may have to be repaid.

It can also be argued that the principles of free and informed consent are problematic in the case of people in dire situations with limited options and little knowledge of the risks involved, especially concerning unexpected results or potential use of the data for other purposes in the future.

The handling of personal genetic data is problematic in many respects. The destruction of samples and data from the test after the decision is made is required by law in Finland. In Germany the test results are stored in laboratory databases, and will only be destroyed after 40 years. The genetic profile of applicants for family reunification might even be used for criminal prosecution, as shown above. This again leads to a legal double standard between migrants and native citizens. In Austria, no regulations exist that directly apply to paternity testing. Laboratories also apply very different policies to sample storage and data storage and most seek guidance in general regulations on data storage of medical diagnoses in the Medical Professions Act (para. 51 (3) *ÄrzteG*) and the Criminal Procedure Code (paras 75, 124 *StPO*), which refer to different periods of storage.<sup>59</sup>

## 6. Conclusion

In this article we have outlined the different forms of regulation of DNA analysis in family reunification in three European countries. Even though family reunification is regulated on a European level with the aim of aligning immigration procedures throughout the European Union, the legal framework leaves considerable room for interpretation in national legislations and administrative practices.

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<sup>57</sup> B. Prainsack (2010) 'Key issues in DNA profiling and databasing: implications for governance', in: R. Hindmarsh and B. Prainsack (eds), *Genetic suspects: Global governance of forensic DNA profiling and databasing*, Cambridge: Cambridge University Press, pp. 15–39.; E. Zadok, G. Ben-Or and G. Fisman (2010), 'Forensic utilisation of voluntarily collected DNA samples: law enforcement versus human rights', in: R. Hindmarsh and B. Prainsack (eds), *Genetic suspects: Global governance of forensic DNA profiling and databasing*, Cambridge: Cambridge University Press, pp. 40–62.

<sup>58</sup> The cost of the DNA test is certainly not the only expense in family reunification cases. Applicants for family reunification have to pay for translating and certifying documents, visas and other travel documents, and the journey(s) to the embassy and to the host country.

<sup>59</sup> According to para. 51(3) *ÄrzteG* information regarding a diagnosis has to be stored for at least 10 years. According to *StPO*, samples have to be stored for at least 30 years.

In this context DNA testing for family reunification plays an ambivalent role. On the one hand, parental testing can indeed be an option for applicants for family reunification. They can prove their biological relatedness even if they do not possess the required documentary evidence. DNA analysis can also be seen as a measure to reduce the time from the application to the final decision because this type of evidence does not need to be laboriously verified as an official document. On the other hand, DNA analysis can be seen as another obstacle or constraint in the procedure. It can be used by the immigration authorities to prolong the procedure if they first try to verify the documents in an extensive procedure only to reject them and to offer the parental test as another voluntary 'option'. In addition, the introduction of DNA testing in such cases narrows the group of persons eligible for family reunification to biological relatives. Relatives that are related socially such as adopted children cannot make use of the test. Now when DNA analysis becomes a standard measure in administrative practice, those families will find it even more difficult to be reunited. The recourse to biological relatedness by DNA testing would certainly also be a possibility for opening up family reunification, for example to underage siblings in Austria and Germany or to unmarried partners that have a common child, but this possibility is currently not always covered by the respective national law and there are no attempts to change this. In Austria and Germany reunion with underage siblings, foster children or guardians is not possible even though the loss of parents is not uncommon in the war-ravaged and impoverished countries of origin. Legal and administrative concepts of the family in host countries are more extended and flexible than those applied in family reunification. The restricted notion of the family contradicts not only common understandings of family but also international and European legal frameworks and guidelines, and has the capacity to restrict the right to family reunification.

Via DNA testing in family reunification cases, authorities try to obtain reliable information when seemingly unreliable documents are provided. As such, DNA testing in family reunification cases is an 'administrative expression' of mistrust of people's statements and documents. DNA analysis for family reunification can be a useful instrument in some cases where no other evidence for a family relation can be provided. However, the tests need to be strictly regulated and it has to be guaranteed that they are indeed only used as a voluntary option and as a last resort. The decision of an applicant not to take the test cannot be a valid reason to turn down that application. Our comparison indicates that further regulation and coordination of the use of DNA testing for family reunification is needed at the EU and international level in order to establish and guarantee a comparable legislation for family reunification in all EU Member States and to ensure a fair and equal administrative procedure for all applicants.