The EU Family Reunification Directive Revisited

An analysis of admission policies for family reunification of Third Country Nationals in EU Member States

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ADMISSION POLICIES FOR FAMILY REUNIFICATION OF THIRD COUNTRY NATIONALS IN THE EU

After more than a decade of implementing the Family Reunification Directive 2003/86/EC and in times when regional migration policies in the EU are being questioned, this fact sheet aims to provide insight in the commonality of the 'common' European framework for family reunification for Third Country Nationals. By studying the variety in national application of the Directive's optional provisions, it looks into the extent to which national Member States form part of and co-shape regional EU migration policy. Family reunification policy is a critical case to study the multi-levelness of migration policies and the interactions between the different (regional and national) governance levels, policy processes which are most relevant to gain insight into contemporary EU migration policy-making.

1. The EU Family Reunification Directive within the overall family migration governance in the EU: fragmentation of legal frameworks

The European Union has adopted two Directives to create common standards for family reunification in the European territory. The Family Reunification Directive (Directive 2003/86/EC) applies to the admission of Third Country Nationals (TCN) who join Third Country Nationals in one of the Member States, while the Free Movement Directive (2004/38/EC) for EU-citizens and family members concerns Third Country Nationals joining EU-citizens who reside or have resided in another Member State (different from their State of citizenship). Family reunification with non-mobile EU-citizens (citizens who have not (yet) enjoyed the freedom of movement within the EU) is not managed on the European but on the national level, as an exclusive competence of the Member States. This fragmentation of family migration governance for Third Country Nationals is visualised in the first table below. However, this does not include the complexity of exception rules for specific categories of TCN sponsors (a sponsor being a person who is joined by his/her family), such as holders of the Blue Card and Long-Term Residents (through the respective EU Directive), as well as sponsors with Turkish nationality, enjoying more favourable regulations. For clarification purposes, this fact sheet does not look into the mobility rules for family members who are EU citizens (whether they join a TCN or a mobile or non-mobile EU citizen), which falls completely under the Free Movement Directive.

If we look into the share of family reunification as official migration channel for Third Country Nationals in the EU (figure 1), different patterns unfold. Depending on the Member State, the share of first residence permits issued to TCN vary between less than 1% (Poland) to 58% (Croatia), according to Eurostat data of 2014. Belgium shows a high rate of family reunification: more than half of the first residence permits issued to TCN has been issued for family reasons. Only Croatia, Luxembourg, Greece and Spain have slightly higher rates.

TCN & TCN →	**EU: Family Reunification Directive (2003/86/EC)** **NAT: National legislation of 25 MS** (not bound: UK, DK & IR: national law)
TCN & EU/mob NAT →	**EU**: Free Movement Directive (2004/38/EC) **NAT**: National legislation of 28 MS
TCN &(non-mob)NAT →	**NAT**: National legislation of 28 MS
EU & TCN/EU/NAT →	**EU**: Free Movement Directive (2004/38/EC)

Table 1: Fragmentation of legal frameworks for family migration governance in the EU

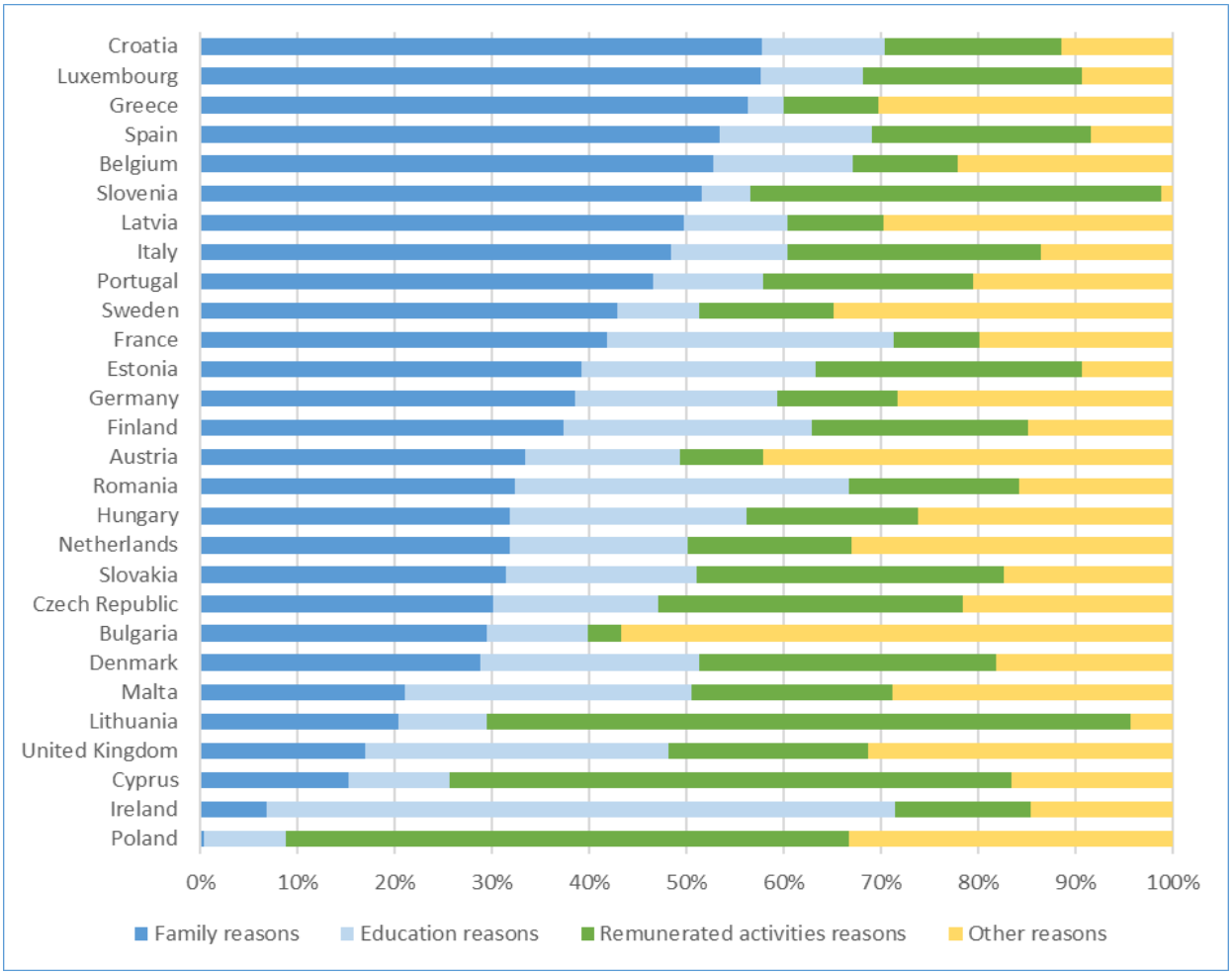


Figure 1: Share of first residence permits for TCN immigrants – by reasons (2014). Source: Eurostat

2. The EU Family Reunification Directive revisited: analysis of the current implementation of its optional provisions

Legal framework

This study looks into the application of the EU Family Reunification Directive (2003/86/EC) in the 25 Member States that are bound by this Directive. The United Kingdom, Denmark and Ireland are not bound by the Directive, but manage family reunification of Third Country Nationals as an exclusive national competence (Considerations, n° 17 & 18, Directive 2003/86/EC). As such, they are not considered in this study.

This Directive confers a right to family reunification to Third Country Nationals with a regular stay in an EU Member State (Art. 1 & Art. 3), who need a permit for at least one year with reasonable prospects of permanent residence (Art. 3) in order to be joined by TCN family members. It is mandatory that spouses and minor unmarried children are considered as eligible family members (Art. 4§1). Apart from mandatory criteria which are expected to be shared by all bound Member States The Directive further establishes various optional provisions for the admission of TCN family members, left to the discretionary competences of the Member States. This study looks into the contemporary national variation in the application of key optional provisions for the admission of Third Country National family members.

Firstly, we consider three **optional provisions** that give Member States the possibility to exercise their discretionary competences to **extend** the right to family reunification. More specifically three provisions extend **eligibility** onto other family members:

- 1: unmarried partners (Art 4§3)
- 2: dependent parents (Art 4§2)
- 3: dependent unmarried adult children (Art 4§2)

Secondly, we analyse four **optional provisions** that allow Member States to **restrict** the right to family reunification for TCN through requirements prior to admission. The Directive does not impose any mandatory admission criteria an sich but allows the Member States to do so within their discretionary competences:

- 4: accommodation requirements (Art 7§1)
- 5: economic resources (Art 7§1)
- 6: integration or language requirements (Art 7§1)
- 7: minimum residence period for sponsor (Art 8§1)

These optional provisions under scrutiny can be considered as the most relevant optional provisions, in terms of their potential effect in limiting or extending family reunification patterns. However, they do not comprise all optional provisions in the Directive. Due to data limitations (cfr. description of data source below) we do not look into the minimum age for sponsor and partner (which can be set at a maximum of 21 years)(Art. 4§5) for example, nor the eligibility of adopted children or children of whom custody is shared (Art. 4§1) or the requirement for the sponsor to have a health insurance for the family (Art. 7§1). Moreover the Directive refers to public policy, security or health grounds to be taken into consideration for refusing family reunification (Art. 6 §1&§2), provisions which are in

practice applied by all Member States. Furthermore, the Directive indicates clearly that more favourable national regulations are allowed, stating that *"this Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions"* (Art. 3 §5). This is the case in Portugal - to name just one example - where other family members including brothers and sisters are allowed.

Analysis

To map the national variation in application of the selected optional provisions as outlined above, this study is based on the Migrant Integration Policy Index (MIPEX) data of 2014[1] and additional verification by national experts[2].

We classify the 25 Member States that are bound by the Directive (i.e. all MS except UK, Ireland and Denmark) according to the country's national regulations. If the MS does apply the optional provision as main rule for one or more major categories of TCN family reunification, it is codified as 'YES', if it does not (or only exceptionally or by discretion) apply the provision, it is defined as 'NO'. This division has to be understood as a general direction in which the country tends to apply the provision. The study identifies but does not further analyse different subcategories (gradations) that nuance the application of the provision. This illustrates that policy measures cannot easily be reduced to black-and-white situations.

The maps below show for each of the seven identified optional provisions the application in the 25 Member States ('YES' or 'NO' – indicated by the colours in the map): three provisions extending the family reunification right to additional family members and four provisions restricting the family reunification right by establishing admission criteria. For all the discussed provisions, potential variation in application is mentioned. However, these subcategories should not be interpreted as a complete overview of national variation, which is unfeasible in the scope of this study. The countries stated by each of these subcategories are listed by way of example, but do not comprise exhaustive lists of Member States applying such regulations.

[1] Information was obtained from the following MIPEX indicators, which score MS's application into 3 categories (0%, 50%, 100%)(http://www.mipex.eu/download-pdf): Indicator 24a: Eligibility of partners other than spouses; Indicator 26: Eligibility of dependent parents/grandparents; Indicator 27: Eligibility of dependent adult children; Indicator 30a: Accommodation conditions; Indicator 30b: Economic resources requirement; Indicator 28: Pre-entry integration requirement (i.e. pre-departure language measure or Pre-departure integration measure e.g. social/cultural); Indicator 21: Required residence period of sponsor. This study has reconsidered this information into a binary system of YES and NO.

[2] About 60 national experts have been contacted, of which 23 have provided a response that verified or corrected our information and/or provided additional information for 18 of the 25 studied Member States. In other words, 72% of the used MIPEX data has been verified by national experts. In addition, we have consulted secondary information (publications). In follow-up, 2 responses were marked 'unknown/unclear' because MIPEX-info and additionally consulted sources were unclear or contradictory, and 9 responses were given a different value, because sufficient confirmation for alternative coding was obtained from additionally consulted sources.

COUNTRY ABBREVIATIONS

AT - Austria	FI - Finland	MT - Malta
BE - Belgium	FR - France	NL - Netherlands
BG - Bulgaria	HR - Croatia	PL - Poland
CY - Cyprus	HU - Hungary	PT - Portugal
CZ - Czech Republic	IT - Italy	RO - Romania
DE - Germany	LT - Lithuania	SE - Sweden
EE - Estonia	LU - Luxembourg	SI - Slovenia
EL - Greece	LV - Latvia	SK - Slovakia
ES - Spain		

Extending family reunification rights

Optional provision 1: eligibility of unmarried partners (Art. 4§3)

YES:
Austria, Belgium, Croatia, Czech Rep., Finland, Germany, Lithuania, Luxembourg, Netherlands, Portugal, Slovenia, Spain, Sweden

(* Malta= unclear/unknown)

Variation
- Including unregistered partners in a stable long-term relationship *(e.g. BE, ES, FI, NL, PT, SE, SI)*
- Only registered partners *(e.g. AT, CZ, DE, LT, LU)*
- Only same-sex partners *(e.g. AT, DE)*

TCN family reunification with TCN unmarried partners is accepted in the majority of the Member States. However, also a large group of countries refuses to include unmarried partners in the scope of family: apart from France, Italy & Greece, mainly Eastern European countries are opposed.

Optional provision 2: eligibility of dependent parents (Art. 4§2a)

YES:
Czech Rep., Estonia, Hungary, Italy, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden

Variation
- Criteria of dependency, such as financial status, health status, pension age and marital status
(e.g. *ES, EE, IT, LT, SE)*

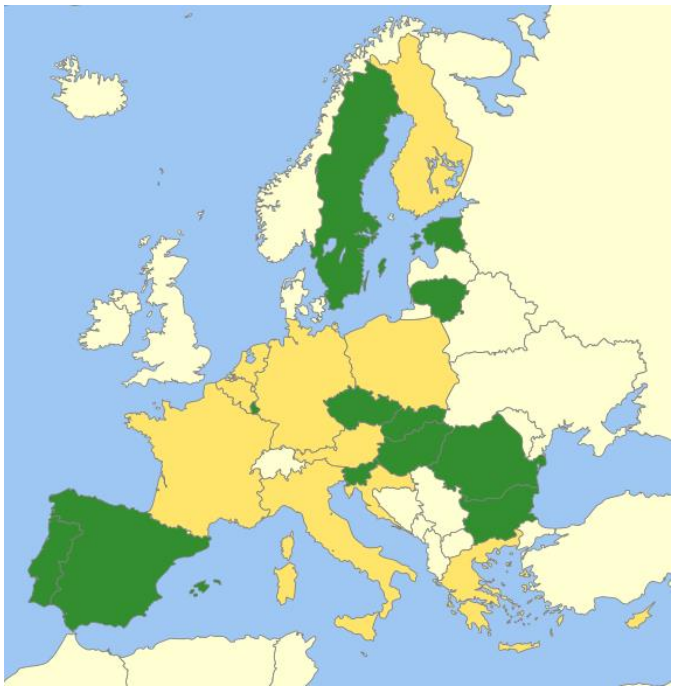
The majority of the Member States does not consider TCN dependent parents eligible for family reunification with a TCN sponsor.

Optional provision 3: eligibility of dependent unmarried children (Art. 4§2b)

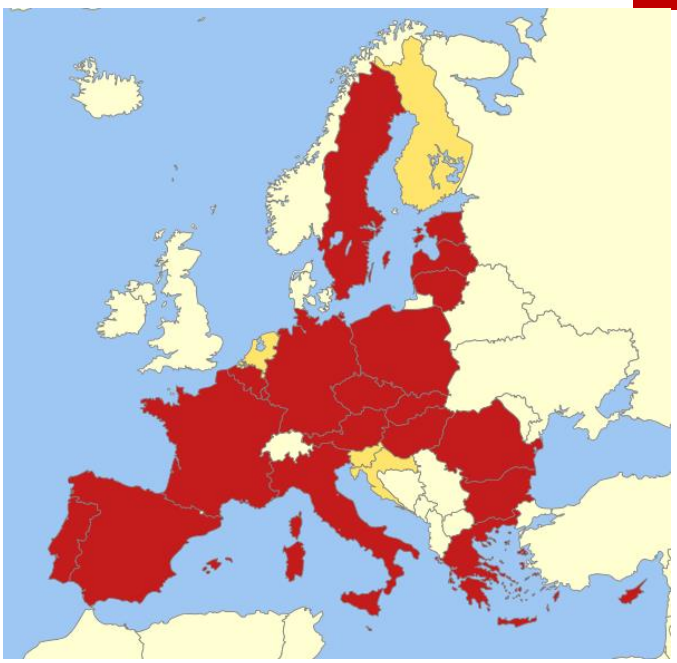
YES:
Bulgaria, Czech Rep., Estonia, Hungary, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden

(* Latvia= unclear/unknown)

Variation
- Criteria of dependency, such as marital status, financial dependency and health status
(e.g. BG, CZ, EE, ES, HU, LU, RO, SK)



Only a minority of the Member States considers TCN dependent adult children eligible.



Optional provision 4: requirement of adequate accommodation (art. 7§1a)

YES:
all Member States except Croatia, Finland, Netherlands and Slovenia

Variation
- Complying with general health and safety or housing standards
(e.g. AT, BE, BG, CY, CZ, DE, EE, FR, IT, LU, MT, RO)
- Size requirements
(e.g. FR)

The large majority of the Member States applies accommodation requirements as a condition for TCN family reunification.

Optional provision 5: requirement of sufficient economic resources (Art. 7§1c)

YES:
All Member States

Variation
- In relation to amount of minimum support, minimum income or minimum subsistence level
(e.g. BE, ES, FR, FI, HR, MT, NL, RO, SK)

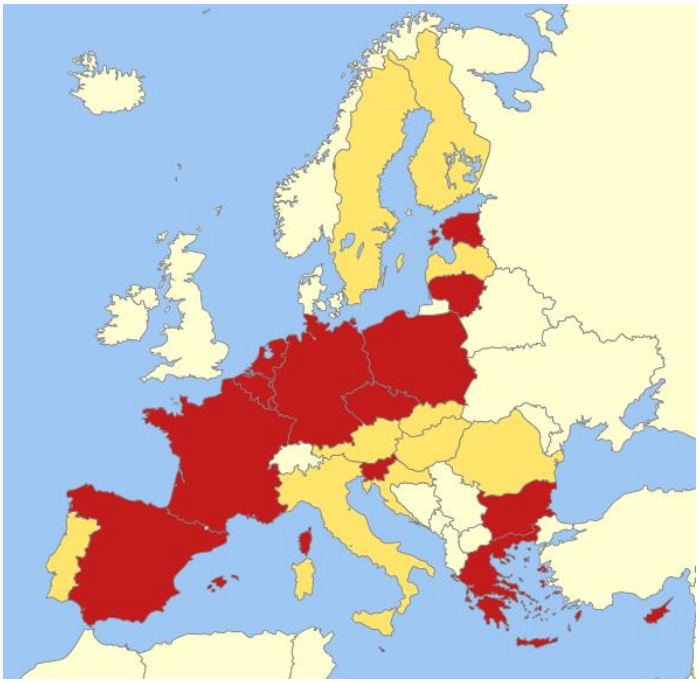
All Member States impose certain economic resources requirements related to self-subsistence or stable and regular economic resources of the family. However there is a large variation in required proof, excluded income sources (such as welfare benefits) and economic reference level (if specified), often related to number of family members.

Optional provision 6: requirement of prior integration or language knowledge (Art. 7§2)

YES:
Austria, France, Germany, Netherlands

Variation
- Binding civic integration test *(e.g. NL)*
- Binding language test or proof of language knowledge *(e.g. AT, DE, NL)*
- Non-binding verification of civic integration or language knowledge *(e.g. FR)*

Only some Member States require from the TCN family member to fulfill prior (civic) integration and/ or language requirements for family reunification.



Optional provision 7: requirement of minimum period of residence sponsor (Art. 8)

YES:
Belgium, Bulgaria, Cyprus, Czech Rep., Estonia, France, Germany, Greece, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovenia, Spain

Variation
- Differences in length:
from
3 months > … ≤ 1 year
(e.g. BE, NL 1 year)
to
≥2 years
(e.g. CY, EE, EL, PL 2 years)

A large group of Member States requires a minimum period of residence of the TCN sponsor prior to the reunification with a TCN family member.

First conclusions

This analysis of the application of optional provisions in the EU Member States shows that in this common legal framework for TCN family migration, Member States use the optional provisions to exercise discretionary competences in very diverging ways, most likely according to diverging national policy preferences. With regard to the seven provisions under scrutiny in this study, Member States differ most with regard to the eligibility of dependent parents, the eligibility of dependent unmarried adult children, the pre-departure integration or language requirements and the minimum period of prior residence of the sponsor. Further qualitative research is needed to better understand the patterns of the individual Member States.

Despite the common legal framework of the EU Family Reunification Directive already in vigour for more than ten years, the application of the optional provisions for TCN family migration still shows a strong variation among the Member States. On the one hand, this illustrates an absence of uniformity. On the other hand, the extent to which the Directive initially aimed to create a strong common legal framework on family migration can be questioned. Regional migration policy reflects and is based on the interests of the individual Member States, which form an inherent part of the EU policy. From the beginning, the common framework goes hand in hand with the request for national discretionary competences, as illustrated in the paragraph below on positions in the public consultation on this Directive. As such, the policy implementation can be read as a continuation or mirror of the policy-making processes in force in establishing the Directive. In both developments, interactions have been taking place between the EU and the Member States as well as between the Member States among each other.

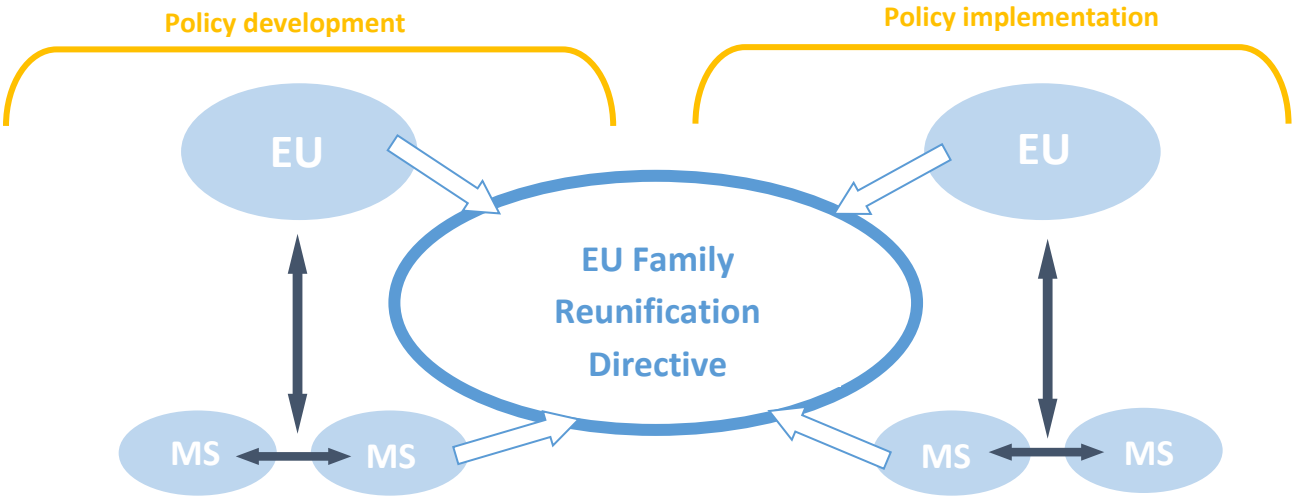


Figure 2: Multi-levelness of the EU Family Reunification Directive in policy development and implementation

3. Understanding the commonality of EU family migration policy for TCN: Multi-levelness and relations between governance levels conceptualised

Regulation of international migration has traditionally been a competency of the Nation State, yet as this fact sheet shows, in current times this competence has become dispersed over various government levels. In parallel, we find a recent literature surge on **multilevel governance of migration policies**, involving a line of scholars studying how levels interact with each other and how various patterns of relations between national and EU institutions take shape (Geddes & Scholten, 2014; Scholten & Penninckx, 2016; Zincone & Caponio, 2006; Luedtke, 2009; Givens & Luedtke, 2004). Geddes and Scholten (2014a) distinguish three **patterns of Europeanisation** of immigration, which are summarised in Scholten & Penninxk (2016, p. 96) as:

- ***centralist*** *Europeanisation* (loss of control for Nation States);
- ***localist*** *Europeanisation* (intergouvernmentalism)
- ***transgovernmentalist*** *Europeanisation* (balancing)

The latter authors add ***decoupling*** *Europeanisation* (absence of coordination) as a fourth type.

The case of the Family Reunification Directive confirms the description of **transgovernmentalist Europeanisation**: "*governments seek cooperation in a European setting, even ceding some power and control to EU institutions, in order to gain a firmer grip on immigration, to the benefit of the Nations as well […] the national and European levels systematically connected rather than one or the other being in control.*" (Scholten & Penninxk, 2016, p. 96). In other words, the TCN family migration policy in the EU is neither top-down, nor bottom-up, but a delicate balancing of national and supranational interests.

Indeed, the mere adoption of a common Directive in itself stands as a clear example of ceding control to the EU level, whereas the wide variation in national rules as a consequence of a large number of optional provisions, shows that discretionary competences situated at the national policy level are just as important for the outcome. Concomitantly, EU Member States are strongly involved in the development of the common framework, to push forward national policy preferences and incorporate opt-out or op-in provisions. For example, in the case of the discussed Family Reunification Directive, there are accounts of strong influence of a number of Member States on the adoption of the clause on integration measures (Art 7§1), such as Groenendijk's (2004) research finding that integration as a condition for residence rights was introduced to the European agenda by a select group of Member States, most notably the Netherlands, Germany, and Austria.

Another example of Member State driven policy processes is the - unsuccessful - attempt led by the Dutch government to re-open the Family Reunification Directive in order to realign national and EU interests in this policy area: " *[…] the Netherlands is lobbying other Member States for a renegotiation that leads to more restrictions, less harmonisation, and a fundamental change of scope"* (Huddleston, 2011). The context of this matter is the public consultation process organised by the European Commission between November 2011 and March 2012 in order to collect opinions on how to have more effective rules on family reunification at EU level and to provide factual information and data on the application of

the Directive. The questions for this consultation were formulated in the Green paper on Directive 2003/86/EC of 15 November 2011 (COM(2011) 735 final). In the summary of stakeholder responses to this public consultation, we observe conflicting positions affecting the outcome of the consultation process, i.e. the decision not to re-open the Directive. Most Member States did not advocate reopening the Directive (only the Netherlands explicitly did so), some Member States stating that there were no major problems with current provisions and some expressing concern that any modifications might limit the competence of Member States. It was generally felt that the discretion of Member States on family reunification given in the Directive should not be reduced. Integration was highlighted by the majority of Member States as a policy issue of national competence, opposing to bring rules on this matter on EU level. However, a few Member States suggested changes to give Member States more flexibility to introduce restrictive provisions or explicitly allowing pre-entry measures (on which the respective provision is unclear). The Netherlands advocated a series of amendments involving additional restrictions and a more binding integration policy stressing migrants' responsibility (European Commission, 2012).

In the literature, Europeanisation is predominantly conceived as a **vertical** process in which Member State governments strive to 'upload' their preferences to the European level in the negotiation of European norms, and 'download' these norms when transposing European regulation into national policy (Bonjour & Vinck, 2013). This traditional view ignores the importance of transfer among Member States. Such exchange of ideas, discourses, and policies where there is no pressure from the EU, is commonly referred to as **horizontal** Europeanisation (Bonjour & Vinck, 2013, Dolowitz & March, 2000). For example the application of optional clauses as well as the interpretation of mandatory and optional provisions, often involves exchange and 'mimicking' among Member States (where certain MS take the lead and others follow). The case of the Family Reunification Directive again provides a clear example of this process. For example, research (Bonjour, 2014) shows a domino effect in the adoption of integration measures as a condition for residence. The Netherlands was the first to introduce 'civic integration abroad' policies in relation to residence rights, its example has been followed by Austria, Denmark, France, Germany, and the UK. Through qualitative discourse analysis, Bonjour shows clearly how Member States influenced each other and concludes that: "*The only actors promoting the transfer of pre-departure integration measures were national governments. For these governments, representing such measures as a 'common practice' among Member States was a strategy to build legitimacy for restrictive reform*." (Bonjour, 2014, p.203). It should however be underlined that this statement has regard to pre-departure integration measures as an admission condition, and not (pre-departure) integration measures in general, for example as incorporated in the EU Integration Action Plan. In any case, the influence Member States might have on each other regarding the application of optional clauses or interpretation of provisions, deserves more research attention. For example, from data of the research projects MIPEX[3] and DEMIG[4], we observe at first sight some indications of possible trends, such as the evolution of broadening the scope of partnerships from marriage to unmarried partners *(e.g. Spain 2009, Austria 2010 and Slovenia 2011)* and a trend of introducing or raising economic resources requirements *(e.g. Netherlands 2004, Finland 2004, Greece*

[3] http://www.mipex.eu/

[4] http://www.imi.ox.ac.uk/data/demig-data

2006, Austria 2006, France 2007, Luxemburg 2008, Italy 2008/2009, Poland 2009, Sweden 2010, Belgium 2011, Czech Republic 2013). This information and potential trends are however in need of confirmation based on solid empirical info of all Member States.

The analytical distinction between vertical and horizontal Europeanisation is somewhat contested by Block & Bonjour (2013). According to their analysis, so-called 'horizontal' exchanges between Member States occur 'up there' at the EU level, as the development of migration policies at EU level is exactly a catalyst opening up networks, interaction dynamics and new channels for the circulation of information and policy perspectives. Negotiations on binding EU law are occasions for national civil servants, politicians and non-state actors to meet and learn about each other's policies, which can inspire them to introduce reforms at home (Block & Bonjour, 2013, pp. 2010-2011).

The Family Reunification Directive is an exemplary case of the complex mechanisms at play in transgovernmental Europeanisation of migration policies, and shows how a single legislative instrument can **both constrain and empower** national governments at the same time (Block & Bonjour, 2013). The Directive has undeniably constrained the Members States from completely closing the door on TCN family migration, by guaranteeing a basic right to family life and setting minimum standards. On the other hand, this study has shown how much the door is left open for national control through optional provisions ('may clauses') and room for interpretation. As a result, there is a *"[…] constant **struggle between national governments and the EU** about the amount of discretion states have in interpreting EU directives"* (Scholten & Penninckx, 2016, pp. 91). This can be observed in various cases in which the EU puts clear limits to the national competence and room for interpretation. Rulings by the European Court of Justice on the case Chakroun in 2010 (C-578/08) and the case K & A in 2015 (C-134-14), both regarding optional provisions of the Family Reunification Directive, illustrate this ongoing struggle. In the case Chakroun, the Court of Justice ruled that a differentiated income requirement for newly formed families in comparison to reunified families in the strict sense (previously existing family ties), as was applied by the Netherlands at the time, was not in compliance with the Directive. Consequently, the Netherlands adapted national law to comply with the ruling. In the case K & A, the Court interprets the lawfulness of a test on the host State's language and society as application of the provision on integration requirements with reference to proportionality considerations.

From the processes discussed in this section, **questions for further research** arise, such as *'How do Member States exactly influence each other in transposition or interpretation of the provisions?'; 'Where and how do EU institutions draw the line of the EU legal framework and national competence for TCN family reunification?'* or *'(How) Do Member States continue co-shaping this legal framework to this day?'.* More empirical research and theoretical contributions would complement insights of scholars we have introduced here. In conclusion, the commonality of the EU Family Reunification Directive has to be understood in continuous relation to the national entity. National interests and regulations form an inherent part of regional policy, in which both governance levels are interconnected and a delicate balancing of national and supranational interests is sought, as an illustration of transgovernmentalist Europeanisation.

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