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## **When Europeanization backfires: the normalization of European migration politics**

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### **Abstract**

This paper investigates the impact of European cooperation on the dynamics of domestic policy-making in the field of migration policy. While European migration policy has gradually communitarized since the Amsterdam Treaty, member state governments have not yet fully caught up with the new reality. This is also reflected in a state of the art that, in contrast with the developing EU studies literature at large, is still dominated by intergovernmentalist analyses which assume that member states have full control over the integration process. The paper zooms in on the Family Reunification Directive of 2003 and its domestic political impact in the Netherlands. The Dutch case illustrates that the realities of EU migration politics are increasingly at odds with intergovernmentalist assumptions and that it is high time for scholars of migration politics to broaden their theoretical perspective.

### **Keywords**

Family Migration; European Union; Europeanization; Intergovernmentalism; Netherlands

## **1. Introduction**

The claim that national migration policies in European countries are increasingly influenced by an ongoing process of legal, socioeconomic and political integration within the European Union (EU) will not raise many eyebrows. Notwithstanding the variable geometry of enhanced cooperation and opt-outs, the Treaties of Amsterdam and Lisbon have opened the door to the development of a set of European minimum standards which increasingly constrain national immigration and asylum policies. Yet while European migration policy has gradually communitarized since the Amsterdam Treaty, it seems that member state governments are slow to catch up with this new reality. The European arena continues to offer an attractive platform to diffuse ideas across European states, and thereby legitimize national policy reform. However, in contrast with the situation under the intergovernmental framework of the Maastricht Treaty, talk now no longer comes cheap. The strengthened role of the Court of Justice of the European Union increasingly confronts domestic policy-makers with the unanticipated consequences of Europeanization. Mirroring the reluctance of policy-makers to face this new reality, the state of the art is still largely dominated by intergovernmentalist analyses characterized by a ‘vertical’ perspective on domestic-international interactions, such as Guiraudon’s venue shopping perspective (Guiraudon, 2000). The pervasive imagery of ‘Fortress Europe’ is largely built on such intergovernmentalist perspectives, which posit that member state governments strategically use EU-level negotiations to introduce restrictive policies which they are unable to implement at the national level and that European policies have few, if any, unanticipated consequences. However, as Lavenex (2006) and Kaunert and Léonard (2012) have observed, member state control is becoming increasingly porous as a result of the communitarization or ‘normalization’ of migration policies. From the perspective of multilevel governance (Marks *et al*, 1996) or historical institutionalism (Pierson, 1996),

unanticipated and unintended consequences of Europeanization come as no surprise, but these perspectives have been all but ignored in migration studies until now. We argue that it is time for scholarly analyses to acknowledge the new realities of European migration politics and broaden their theoretical perspectives accordingly.

In this paper we focus on the Family Reunification Directive of 2003 and its domestic political impact in the Netherlands. We explore the motivations which brought Dutch policymakers to support the introduction of EU law on family migration, as well as the consequences of the Directive for policy development and political dynamics. The Dutch case, in our view, is a most likely case to test the validity of intergovernmentalist arguments in the field of European migration policies. First, it is one of the cases most frequently mentioned by scholars discussing the strategic use of European cooperation in the context of the Family Reunification Directive (Groenendijk, 2006; Groenendijk and Minderhoud, 2004; Strik, 2011; Luedtke, 2009; Menz, 2011). Second, in the context of strong domestic politicization of migration and integration policy in the Netherlands, there is an intuitively plausible case to make for European ‘venue shopping’ by domestic policy-makers seeking to legitimize restrictive policy reform (Guiraudon, 2000).

However, our empirical analysis of the domestic actor constellation reveals that the Dutch case contradicts the intergovernmentalist hypothesis that governments engage in European integration to avoid domestic obstacles to restrictive reform of migration policies. First, there was no domestic opposition in the Netherlands to be avoided. Second, the Directive created more significant constraints at the EU level than the Dutch government had ever faced at the domestic level.

Our interpretation of these events is that in states such as the Netherlands, actors who are exploring the boundaries of what is admissible national practice in the light of international law and normative principles attempt to use European cooperation to legitimize controversial national policy decisions. Such Europeanization strategies are not motivated by the ‘vertical’ circumvention of domestic constraints, as intergovernmentalist theory would predict, but by legitimacy seeking through the ‘horizontal’ diffusion of ideas. However, policy-makers tend to neglect the possibility of unintended consequences arising in the longer term as a result of the empowerment of supranational institutions and shifting government preferences (Marks *et al*, 1996; Pierson, 1996). The example of the Family Reunification Directive clearly shows the unpredictable domestic ‘feedback’ effects of intensified European cooperation. Our paper traces the domestic debate and international negotiations and discusses what happens when Europeanization backfires.

## **2. Europeanization and the normalization of European migration politics**

While the research agenda of Europeanization that has developed since the 1990s has led to a plethora of definitions, Europeanization is generally understood as a process of domestic adaptation to regional integration in Europe (Vink and Graziano, 2007: 7). This process of adaptation is manifested both in terms of connecting domestic political, administrative, and judicial institutions to a developing European political system, as well as in terms of changes in the structural and ideological environment in which domestic decisions take place. Europeanization, as a consequence, is first of all a vertical process where domestic actors aim to ‘upload’ their preferences to the European level in order to determine the content of European norms, and ‘download’ these policies in order to transpose European norms into

national policy. Börzel and Risse (2003) have conceptualized these vertical processes as ‘top-down’ and ‘bottom-up’ Europeanization, respectively. Europeanization, however, is not only a vertical process but also a horizontal or sideways process where actors – politicians, civil servants, lobbyists, entrepreneurs, civil society – exchange information and expertise within an increasingly connected social system (Vink and Graziano, 2007: 10). Such horizontal Europeanization involves ‘the diffusion of ideas and discourses about the notion of good policy and best practice’ (Radaelli, 2003: 30, 41). Hence even where there is no strong pressure for harmonization or, as is often the case in politically sensitive areas of national competence, where there are strong pressures *against* formal harmonization, national policymakers may still be locked into a process where they experience political pressure – particularly from their peers in other states, expert consultants and interest group representatives – to legitimize national policy choices in the light of what happens elsewhere in Europe. The Open Method of Coordination (OMC) is the best example of an explicit ‘horizontal Europeanization’ strategy, but in a more general sense what we know from the Europeanization literature is that for adaptation pressures we should look beyond ‘overly hierarchical, vertical’ mechanisms (Bulmer, 2007: 56).

In the field of migration studies, however, scholars have so far focused almost exclusively on vertical processes of Europeanization, stressing in particular the intergovernmentalist dynamics of the integration process (Guiraudon, 2000; Lavenex, 2001; Luedtke, 2009; Menz, 2011; Schain, 2009; for some contrasting perspectives see Geddes, 2000; Caviedes, 2004; Niemann, 2008). In Moravcsik’s liberal intergovernmentalist approach (1993), Europeanization (understood as the impact of European integration on the domestic realm) is a key factor driving the macro-process of European integration: national governments support European integration because it empowers them in relation to other domestic actors. The fact

that governments operate both in the European and the national arena gives them advantage over purely domestic actors in terms of agenda-setting, decision-making, information, and legitimation. European cooperation is seen as a two-level game which ‘redistributes domestic power resources between state and society’, allowing national executives to ‘loosen domestic constraints imposed by legislatures, interest groups, and other social actors’ (Moravcsik, 1994: 1; cf. Putnam, 1988).

In the migration literature, this approach was first and most influentially applied by Guiraudon (2000). While critical of Moravcsik’s assumptions on domestic preference formation, Guiraudon similarly argues that national governments have shifted migration policy-making to the European level because it allows them to ‘circumvent national constraints on migration control’. As obstacles to restrictive migration policies at the domestic level increased in the late 1970s and 1980s, national government officials sought ‘policy venues where the balance of forces is tipped in their favour’. At the European level, these officials were not hindered by the ‘judicial constraints’ and ‘opposition from other ministries, parliamentarians, or migrant aid groups’ which they faced at the national level (2000: 251-252). This explains, Guiraudon argues, why the institutional framework for European asylum and migration policy-making which member states created in the 1990s left maximum decision-making power to the member states and attributed very limited competences to EU institutions. Lavenex (2001: 862-863) explains the creation of European asylum policies in a similar manner, stating that ‘the opaque nature of transgovernmental co-operation strengthened the domestic position [of ministries of the interior], enabling them to present European agreements to their national parliaments as *faits accomplis* and to frame domestic concerns in terms of European integration. Thus, ‘Europeanization (...) was a means to

legitimize restrictions of formerly liberal asylum regimes in the face of domestic institutional and normative constraints’.

Certainly, this perspective captured crucial dynamics of European migration politics in the 1990s, which were indeed governed by intergovernmental mechanisms. However, the intergovernmentalist two-level game perspective remains dominant also in recent accounts of the Europeanization of migration policies. Thus Schain (2009: 102, 106) states that the EU arena ‘was and remains a relatively protected space, chosen by ministries of the interior and justice to avoid many of the national constraints which had become evident by the 1980s. (...) Thus, the European context, rather than constraining states in Europe, has enhanced their abilities both to control immigrant entry and to develop more forceful policies on integration’. Luedtke (2009: 15) argues that member states’ support for the Long Term Residents’ Directive and Family Reunification Directive, both adopted in 2003, ‘stemmed from a desire to scale down generous domestic legislation that could not be scaled down domestically, due to institutional constraints at the national level’. Finally, in an analysis of the adoption of the Directives on family reunification, asylum qualification, and labour migration, Menz (2011: 458) maintains the assumption that member states are in full control of the Europeanization of migration policies: ‘governments attempt to maximize room for national manoeuvre and defend national regulation, delaying EU regulation or suggesting their own regulation idea as blueprints. In the migration and asylum policy domain, these efforts are remarkably successful’. The argument that member states have strategically used the EU Family Reunification Directive of 2003 to legitimize restrictive policies at the national level can be found in several other studies (Goodman, 2011; Groenendijk, 2011; Strik, 2011).



Intergovernmentalist two-level game theory provides a stylized and often intuitively plausible account, which remains relevant to understand interactions between domestic and EU politics. However, already in 2006, Lavenex suggested that the room for national governments to play two-level games might be decreasing: ‘drawing a parallel with other areas of European integration, one may assume that the autonomy-generating effects of Europeanization are a transitory phenomenon and will be caught up by supranational dynamics suggested by historical institutionalists or neofunctionalists’ (2006: 1286). Most recently, Kaunert and Léonard (2012) have critically engaged with Guiraudon’s venue-shopping thesis, stating that the judicialization of EU migration policies which results primarily from the increased competences of the EU Court of Justice have made the EU policy venue ‘less amenable to the fulfillment of restrictive asylum preferences’ (2012: 1410). We concur with these calls for alternative theoretical perspectives to take into account the changed dynamics of Europeanization in the migration policy field.

In the broader EU literature, the intergovernmentalist perspective lost its dominant position more than a decade ago. Multi-level governance theorists such as Marks *et al.* (1996) and historical institutionalists such as Pierson (1996) have criticized the intergovernmentalist perspective’s assumption that member states have full control over the European integration process, pointing to the autonomous influence of supranational institutions, shifting preferences of national governments, and unintended consequences. These have become classic references in EU studies but have until recently been all but ignored in studies of the impact of European integration on domestic politics and policy-making (Bulmer, 2007: 56). This neglect has been even more pronounced in studies on the Europeanization of migration policy, where the ‘exceptional’ intergovernmentalist form of EU migration politics for a long time determined both political practice and scholarly analysis. We argue that, now that EU

migration politics have increasingly become subject to ‘ordinary’ decision-making and scrutiny by supranational institutions such as the Commission and the Court, it is high time for scholars to catch up with the ‘normalization’ of EU migration politics and to broaden their theoretical perspectives accordingly.

### **3. Beyond uploading: the horizontal diffusion of innovative policy ideas**

In this section we discuss the position of the Netherlands in the negotiations on the EU Family Reunification Directive. Whereas there was no apparent need to Europeanize family migration policy, successive Dutch governments actively contributed to the Directive. We argue that Dutch support for EU legislation was motivated not by any need to circumvent domestic constraints, but by the desire to diffuse ideas among other member states in order to build legitimacy for radical and innovative domestic policy reform.

The Dutch, while careful to avoid potential constraints on the politically sensitive family migration policy, were enthusiastic supporters of the Family Reunification Directive, and they played an active role in shaping it. According to insider accounts, the Netherlands was one of the four member states – along with Germany, France, and Belgium – which were most influential in the negotiation of the Directive (Strik, 2011: 126). This proactive attitude was in line with longstanding European policy in the Netherlands, which over the last decades has been among the most enthusiastic supporters of the development of a European asylum and migration policy. In the run-up to the Treaty of Amsterdam (1997), for example, the Netherlands actively pushed for bringing asylum and migration policy within the ambit of Community Law by shifting the policy field from the intergovernmental Third Pillar to the supranational First Pillar (Moravcsik and Nicolaidis 1999: 78-79). Among Dutch politicians,

the broadly shared view was that asylum and migration were European problems that required solutions at the European level, for instance through mechanisms of burden sharing (Vink, 2005: 103-113). In the early 2000s, there was all but consensual support among Dutch politicians for the development of EU policies on immigration and asylum, even among Eurocritical parties such as the *ChristenUnie* or the Socialist Party (ChristenUnie, 2002; SP, 2002).

Negotiations on the Family Reunification Directive started in December 1999, when the Commission submitted a first proposal (COM(1999) 638 final). After intensive discussions between member states led to a deadlock in the Council, the Commission was forced to water down its original proposal. The Commission submitted subsequent revised versions in 2000 (COM(2000) 624 final) and in 2002 (COM (2002) 225 final). The latter version was adopted by the Council after further revisions in September 2003. The European Parliament was involved, but only in a consulting role.

On behalf of the Netherlands the negotiations were conducted by three successive governments: the governments Kok II (composed of Social Democrats, Conservative Liberals and Liberal Democrats), Balkenende I (Christian Democrats, Conservative Liberals and the far-Right LPF) and Balkenende II (in which the Liberal Democrats replaced the LPF). When explaining why the introduction of a Directive on family reunification served the Dutch interest, the Kok government argued in 2000: ‘family migration is the most common ground for admission in the Netherlands. Harmonization of policy in the EU is therefore desirable’ (TK 1999-2000 22112 (161): 2). In 2003, the Balkenende government similarly stated that harmonization of family migration policies was ‘extremely important’, because family

migration 'produces the largest flow of migrants' (EK 2002-2003 23490 (8w): 4). Thus, controlling inflow was the main motivation for supporting Europeanization.

The Dutch input in the negotiations was aimed at ensuring that the Directive fit Dutch policies as closely as possible. In negotiating EU asylum and migration law, this is a common attitude among national governments, which tend to be unwilling 'to trade in known national certainties for unknown policy tools in the name of a vague ideal of harmonization' (Ackers, 2005: 2; cf. Niemann & Lauter, 2011: 138). The Netherlands presented twenty proposals for modification of the Directive, seventeen of which were aimed at restricting possibilities for family migration (Groenendijk and Minderhoud, 2004: 144). With the support of Denmark, Germany, and the UK, the Kok government succeeded in eliminating the Commission's proposal that the Directive forbid discrimination of a member states' own nationals compared to EU citizens. The Balkenende governments added a number of points to the Dutch wish list, to ensure the Directive allowed for implementing the measures foreseen in their coalition agreements. For example, in its coalition agreement of July 2002, the first Balkenende government announced its intention to increase the age requirement for spouses to 21 years (TK 2001-2002 28375 (5): 16). In December 2002, a parliamentary motion asking the government to introduce integration measures before entry for family migrants was adopted with a majority of 84 per cent (TK 2002-2003 27083 (25); TK 2002-2003 Plenary 17 December 2002: 2538). Since the Commission's proposal for the Directive allowed neither for integration measures nor for age requirements of more than 18 years, the Dutch delegation had to make an active effort in the last months of negotiations to create room for these reforms. It took strong pressure from Austria, Germany and the Netherlands to introduce the clause allowing for integration measures. The situation was even more difficult with regard to the age requirement, since the Dutch were the only delegation which wanted to raise it above

18. With last minute support from Belgium and Denmark, the Netherlands managed to have its way. One of the few liberal proposals, defended by both the Kok and the Balkenende governments, was for the Directive to allow for equal treatment of married and non-married couples, including same-sex partnerships. While this plea was successful, the Netherlands did not succeed in making such equal treatment obligatory (Groenendijk and Minderhoud, 2004:144-145; Strik, 2011: 95-104).

Thus, successive Dutch governments actively supported and shaped the Family Reunification Directive. Drawing on intergovernmentalist two-level game theory (Moravcsik, 1994), we might expect that they did so in order to implement reforms that lacked domestic political support. In the Dutch case, however, the government did not need to revert to this type of two-level game – using ‘Europe’ as a scapegoat – to gain political support for its policy reforms. The classic intergovernmentalist two-level game hypothesis cannot explain Dutch support for Europeanization of family migration policy.

Until the entry into force of the Family Reunification Directive, the Dutch courts followed the European Court of Human Rights in Strasbourg and left a great deal of leeway for the government to conduct restrictive family migration policies. Increasingly strict income, housing, age or integration conditions for family migration did not meet with objections from Dutch courts. Neither were there political constraints: family migration policies in the Netherlands are generally supported by very broad majorities (Bonjour, 2009). Table 1 shows that as a rule, the successive restrictive reforms of Dutch family migration policy implemented since the 1990s were supported by all political parties except those on the left of the Social Democrats (PvdA), i.e. the Greens (GL) and the Socialist Party (SP). The trend of slightly smaller majorities in the 2000s compared to the 1990s apparent in Table 1 is

explained first of all by the increased electoral success of the far-Left (the Greens and Socialist Party together won 7 seats in 1994 and 32 in 2006).

**Table 1: Most important reforms of Dutch family migration policies, 1991-2011**

Year	Reform	Coalition	Opposed	Seats in favour/ %
1993	Income requirement reintroduced (70 percent of welfare level)	CDA PvdA	GL	144 seats / 96%
1993	Law on Prevention of Sham Marriages	CDA PvdA	GL D66	133 seats / 89%
1998	Family migration allowed only if Provisional Entry Permit (MVV) was obtained abroad	PvdA VVD D66	GL SP Unie 55+	142 seats / 95%
2000	Income requirement raised to 100% welfare level	PvdA VVD D66	GL SP	143 seats / 95%
2004	In case of family formation: income level raised to 120 percent minimum wage and minimum age raised to 21 years	CDA VVD D66	PvdA GL SP	91 seats / 61%
2005	Law on Integration Abroad	CDA VVD D66	GL SP	133 seats / 89%
2009	Level integration abroad raised from A1- to A1; Reading test added to oral language test in integration abroad exam; Requirement of integration and education for applicant	CDA PvdA CU	GL SP	118 seats / 79%

*Note:* where the reform consisted of legislative change, the two last columns in this table present the votes cast in the House of Representatives. However, Dutch family migration policies are to a large extent laid down not in law but in regulations, which can be changed without a formal parliamentary vote. In these cases, the two last columns in this table represent the views of the political parties in the House of Representatives as expressed in the Committee or plenary meeting where the government's reform proposal was discussed. Sources: TK 1992-1993 22809 (19); TK 1993-1994 Plenary 19 October 1993: 837; TK 1997-1998 Plenary 30 September 1997: 388-389; TK 1999-2000 26732 (5); TK 1999-2000 27111 (8); TK 1999-2000 Plenary 7 June 2000: 5423; TK 2004-2005 19637 (873); TK 2004-2005 Plenary 5 April 2005: 4283-4285; TK 2009-2010 32005 (4).

Since the beginning of the negotiations on the Directive in 1999, the only reform which enjoyed more narrow support was the increase of the income requirement in 2004. This reform was opposed not only by the Greens and the Socialist Party, but also by the Social Democrats. Even though previous restrictive reforms of the income requirement (in 1993 and 2000) were implemented by the Social Democrats themselves, when they were in office, income requirements tend to be a sensitive issue for the Social Democrats, since they exclude those in the weakest socio-economic position. However, even this restriction of the income requirement still rested comfortably on a majority of more than 60 percent of the parliamentary votes.

This is not to say that, in a more subtle fashion, the Dutch government has not sought to make strategic use of Europeanization. In particular, Dutch support for Europeanization of family migration policies was motivated by a desire to enhance the legitimacy of domestic policy reforms by spreading innovative ideas about what are acceptable conditions for family migration. In particular, the Dutch Europeanization strategy was aimed at convincing European counterparts that integration requirements may be legitimately linked to family migration. While European harmonization was not a *sine qua non* for domestic reform, given sufficient parliamentary support, the restriction of the right to family life did imply a paradigmatic shift away from a purely 'rights' oriented discourse. We understand this strategy as one aimed at horizontal diffusion, where the EU-level discussions on the Directive were used to explain the rationale behind domestic reform, rather than to achieve a harmonized minimum norm. This is illustrated by political debates about the introduction of pre-departure integration requirements for family migrants in 2005 by the second Balkenende government. In these parliamentary debates, the main question was not whether these new integration requirements were justified by the Directive, but rather how they related to the policy

practices of other European countries. Dutch politicians thus measured the legitimacy of integration requirements not so much against the letter of European law, as against an informal, unwritten European norm which they distilled from other member states' practices.

In an early stage of debates about the integration abroad requirement the Greens pointed out that if the Netherlands went through with this reform, it would be 'the only country in the whole world to require language skills as a condition for the admission of family migrants' (TK 2003-2003 27083 (44): 12), implying that this was an all too extreme measure which the Netherlands should refrain from implementing. Minister Verdonk, a Conservative Liberal, confirmed that the Netherlands would be the only country in the European Union to impose such a condition, but added that 'I can assure you that my colleague ministers are observing this with great interest' (TK 2003-2003 27083 (44): 42). Thus the government turned the argument around, presenting the Netherlands as 'acting as a pioneer for other countries to follow' (TK 2007-2008 29700 (54): 4).

Table 1 shows that the Law on Civic Integration Abroad was adopted with the support of all political parties, except the far-Left. Even if only the coalition parties had voted in favour, the Law would still have enjoyed comfortable majority support. Thus, reference to the EU was not necessary to get the Law through Parliament. However, submitting the right to family reunification to an integration exam was a very innovative and radical reform, and its political acceptance as a legitimate measure was not self-evident. It took months of intensive parliamentary debates to craft the broad majority which eventually voted in favour.

Even after the Law was adopted, the government coalition continued working on the acceptance of this new policy instrument. A Christian Democrat MP stated: 'We are pleased



to learn that imposing integration requirements before entry – the “Dutch model” of the Law on Civic Integration Abroad – appears to enjoy broad support at the European level. How far have the other member states progressed in this respect?’ (TK 2005–2006 30308 (6): 9). The government answered that: ‘The Netherlands are taking the lead in Europe when it comes to civic integration abroad. (...) I expect that other member states will follow our example after we have gained some experience with it and that our system of civic integration abroad will serve as an example for other member states’ (TK 2005–2006 30308 (7): 15).

The Dutch government went beyond mere talk and engaged in active efforts to diffuse the practice of integration requirements at entry in other member states. The European Integration Fund introduced in 2007, to give just one example, subsidizes the development of pre-departure integration measures for third-country nationals. According to Groenendijk (2011: 8), ‘the Netherlands was instrumental in extending the fund’s scope’ to these measures. The Netherlands was the very first country in the Union to introduce integration requirements for family migrants and it did not feel comfortable in this outlier position. Dutch politicians therefore actively engaged in turning integration abroad into a common practice among member states. The fact that France, Germany, the UK, Denmark, and Austria have indeed followed its lead (Bonjour, forthcoming) gave Dutch civic integration policy the legitimacy of serving as a role model. These subtle, horizontal processes of legitimacy seeking are often overlooked by traditional intergovernmentalist perspectives.

Thus, the Balkenende II government had something to gain in the short run by introducing European legislation, as it could implement the reforms it wanted and justify them as ‘common European practice’. The government should have realized that in the future, any government’s room for manoeuvre to implement restrictive reforms would be reduced by the

new Directive. However, as Marks *et al.* (1996: 349) predict, political leaders tend to have a short time horizon, looking barely beyond the next national elections. Hence, it comes as little surprise that for the Balkenende II government the short-term benefits of supporting the Directive outweighed the long-term costs.

#### **4. Beyond downloading: changing domestic circumstances and unexpected constraints**

The Balkenende II government happily put its signature under the Family Reunification Directive in September 2003. It was pleased with its successes in the negotiation process and convinced that implementing the Directive would neither require substantive change to existing policies nor prevent the reforms announced in its coalition agreement. Contrary to this expectation, as well as to what might be expected on the basis of intergovernmentalist theory, Europeanization has created much greater constraints on policy reform in the Netherlands than the Dutch government had ever faced in the domestic arena. How can we explain these unexpected consequences of Europeanization?

The Directive 2003/86 on the Right to Family Reunification is directly binding upon the member states since 3 October 2005. It applies to third-country nationals with a permanent residence permit living in the European Union and wishing to bring over family members. It stipulates that foreign family members shall be admitted if the applicant has a sickness insurance, appropriate accommodation, and stable and sufficient resources. Foreign family members who pose a threat to public order may be refused admission. Member states may require family members to comply with integration measures, and may set a minimum age for both partners of no more than 21 years and a minimum residence period for the applicant of no more than two years. All norms set by the Directive are minimum norms: member states are free to set less stringent conditions.

Member states' compliance with the Directive is controlled by the Commission and the Court of Justice of the European Union (CJEU). Dutch policies have been subject to criticism by both. The Court was first asked to pronounce itself on the Family Reunification Directive in

response to an action for annulment brought before the CJEU by the European Parliament, which considered a number of provisions in the Directive contrary to fundamental rights (Case C-540/03 *Parliament v Council*). The Court dismissed the action in 2006, but seized the opportunity to clarify the implications of the Directive. The Family Reunification Directive, the Court stated, grants third-country nationals a subjective right to family reunification. If an applicant fulfils the conditions laid down in the Directive, member states are obliged to admit his or her family members. Furthermore, the Court declared, the general principles of the Community's legal order apply to the Directive. According to Groenendijk (2006: 221, 226-227) this implied that when applying concepts such as 'public order' or 'sufficient income', member states would have to confirm to the definition the Court has given to these concepts when interpreting other branches of Community law.

In 2008, the Commission presented its first report on the application of the Family Reunification Directive. It emphasised that the Directive recognises the right to family reunification, and that this 'imposes a precise and positive obligation on the Member States'. The Commission explicitly criticised the Netherlands for failing to fulfil this obligation, *inter alia* in setting a high income requirement for young people, in failing to grant facilitated access to visas, in failing to assess applications on an individual basis, and in fighting marriages of convenience in a manner that reflects 'generalized suspicion'. Without explicit condemnation, the Commission cast doubt on the admissibility of the integration requirement and administrative fees implemented in the Netherlands (COM (2008) 610 final). The Dutch government rejected this criticism as lacking 'proper judicial foundation' and emphasised that it fulfilled all the criteria of the Directive (EK 2008-2009 Appendix to the Proceedings 2).

Two years later, however, the Netherlands were condemned by the European Court of Justice in a case that revolved primarily around the Dutch interpretation of ‘sufficient income’. In its *Chakroun* judgment, the Court found that the Dutch income requirement of 120% of the minimum wage was in breach of the Directive (Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken*). The Dutch government’s argument that 100 percent of the minimum wage was not sufficient to prevent applicants from qualifying for special forms of social assistance or tax refunds were of no avail. The Dutch government has adapted its policies to conform to the Court’s judgment.

In March 2011, a new case pertaining to the Family Reunification Directive was brought before the Court: once again it concerned the Netherlands (Case 155/11 PPU *Imran v Minister van Buitenlandse Zaken*). The question put to the Court was whether the Dutch policy of requiring family migrants to pass an integration exam before admission was compatible with the Directive. However, in the course of the proceedings the Dutch government granted a permit to the Afghan woman whose husband had initiated the case, after which the Court deemed a ruling unnecessary. The case was dropped, but not before the Commission had presented its opinion to the Court. This opinion was unequivocal: the Commission advised the Court to rule that ‘(...) the directive doesn’t allow for a family member (...) to be denied entry and stay only because this family member has not passed the integration exam abroad (...)’ (Sj.g(2011)540657). As long as there is no binding Court ruling, however, the Dutch government maintains that ‘the Law on Civic Integration Abroad is not incompatible with the Directive’ (TK 2010-2011 Appendix to the Proceedings 3334).

Under the Amsterdam Treaty, the competence of the Court of Justice in the migration policy field was limited. Most notably, only national courts of last instance were allowed to request

preliminary rulings. However, even when it was thus reigned in, the Court was able to exert significant influence on the Europeanization of family migration policy, as illustrated by the Chakroun case which was brought before the Court by the Dutch Council of State in 2008. With the entry into force of the Lisbon Treaty in 2009, the restrictions on the competences of the Court in this field have been lifted. The constraining dynamics of the Court's jurisprudence in this field may therefore be expected to accelerate and intensify even further in the following years.

Based on the EU literature, we propose two explanations for why the Directive -which Dutch politicians had supported so warmly- turned out to be a major constraint on domestic policy-making. First, the jurisprudence of the Court turned a text which appeared to leave member states a great deal of leeway into a precise and constraining legal instrument. This fits the predictions of Pierson (1996: 132) and Marks *et al.* (1996: 346, 369) that supranational institutions, in particular the Court, will autonomously influence European integration in a way that may not reflect the wishes of (all) member states. Second, Pierson (1996: 140) reminds us that institutional arrangements once wholeheartedly agreed to may later turn out much resented constraints, if national governments' preferences shift after changes in government or in circumstances. Indeed, the policy preferences of Dutch politicians have shifted way beyond the limits of what the Directive will allow. At the time they signed the Directive, Dutch policy-makers foresaw neither this development in jurisprudence, nor this development in their own preferences.

Groenendijk (2006: 220-221) states that negotiators from all member states seriously underestimated the consequences of the Directive. While member states representatives naturally aimed at formulating the text of the Directive in such a way that no domestic policy

reform would be required, they lost sight of the fact that European policy-making often does not end when a legislative text is adopted. The precise implications of European legislation emerge only at the time of its implementation and – in particular – its interpretation by the Court (Groenendijk, 2006; Joppke, 2001). It was, of course, difficult to predict which attitude the Court would adopt in this new and politically sensitive policy field. The initial satisfaction of Dutch politicians, convinced that they had succeeded in making sure the Directive did not force them to make significant policy changes, was reflected in the initial disappointment of many interest organizations and legal scholars at the result of the negotiations. They felt the Directive left too much room for member states to impose additional conditions on family reunification (cf. Schaffrin, 2005; Walter, 2004).

The Directive's clause about the income requirement, upon which the Court based its condemnation of Dutch policies in its *Chakroun* judgment, is a case in point. In its initial proposal, the Commission had sought to approximate the income requirement in the Family Reunification Directive to existing Community law governing the free movement of persons. This approach was far too liberal however to the member states' taste. The Netherlands, calling for a guarantee that the applicant would dispose of sufficient income also in the foreseeable future, were only one among many member states asking for modification. Years of negotiations and multiple text proposals by member states resulted in 'a formulation which had become so vague as to allow multiple interpretations' (Strik, 2011: 108).<sup>2</sup> The Directive states that sponsors should have sufficient income to maintain their family 'without recourse to the social assistance system'. Dutch policy-makers interpreted this clause as allowing for an income requirement of 120 percent since any income below that level allowed for recourse to certain forms of municipal allocations. However, in its *Chakroun* ruling, the Court stated that the level of the income requirement could be set to exclude only welfare replacing regular

income, not forms of aid allocated to cover specific unforeseen expenses. The Court ruled that ‘recourse to the social assistance system’ should be interpreted according to the jurisprudence on the free movement of persons – thus returning to the spirit of the Commission’s original proposal.

The developing inclusive jurisprudence at the EU level was mirrored in the Netherlands by a trend towards more exclusive policies at the domestic level. These contrasting trends widened the gap between European requirements and domestic preferences. Current Dutch family migration policies are the result of a series of restrictive reforms which started in the early nineties. In response to increasing concern about the effects of migration on Dutch society, policy-makers raised the income requirement for family migration, introduced structural control on marriages of convenience, and tightened the visa requirement (Bonjour, 2009: 192-229). This restrictive trend radicalized after the turn of the century, as a result of the electoral successes of populist anti-immigrant parties Pim Fortuyn Party (LPF) and, currently, the Freedom Party. Since 2002, all successive governments – regardless of whether they represented centre-Right or centre-Left coalitions – have further restricted the conditions for family migration. As a result, Dutch family migration policies are currently among the most restrictive in the European Union (Carrera and Wiesbrock, 2009; Groenendijk *et al*, 2007). It is important to note that the radicalization of restrictive reforms of Dutch family migration policies since the turn of the century reflects a significant shift in preferences of *all* political parties towards the restrictive end of the policy spectrum. The electoral rise of the populist Right had an unmistakable effect on the policy positions of traditional parties, particularly in the field of migration and integration policies. While some differences remain between left- and right-wing parties, especially with regard to income requirements, on the whole the politicization of the issue of family migration has led to a convergence of standpoints.



The Balkenende II government that signed the Family Reunification Directive was composed of Christian Democrats and Liberals. The policies it implemented made almost full use of the room for manoeuvre which the Directive allows for imposing conditions on family migration. Since then, the policy preferences of Dutch politicians have continued shifting towards the restrictive end of the spectrum. By 2009, all parties except the far Left favoured policies that lay beyond the scope of what the EU Directive would allow.

In 2009, the centre-Left Balkenende IV government – composed of Christian Democrats, Social Democrats and the small *ChristenUnie* – presented a set of reform proposals for family migration policy, which included tightening the control on sham marriages as well as the integration abroad exam (TK 2009-2010 32175 (1)). The government presented both measures as compatible with the Directive, notwithstanding the critical evaluation of the Commission in its 2008 report. In addition, the reform proposal included new integration and education requirements for the applicant living in the Netherlands which the government admitted were prohibited by the Directive. This proposal enjoyed very broad support, not only with the coalition parties, but also with the Conservative Liberals and the populist Freedom Party. The Balkenende government therefore promised to plead for the necessary modification of the Directive in the EU.

In 2010 the Rutte government composed of Conservative Liberals and Christian Democrats with minority support by the populist Freedom Party, entered office. The ‘Support Agreement’ signed by these three parties listed no less than seven reforms of family migration policies which could only be implemented if the Family Reunification Directive were modified. Striving to make these changes in the Directive was an integral part of the Support

Agreement (TK 2010-2011 32417 (15): 22). In its Action Plan Implementing the Stockholm Programme (COM (2010) 171 final: 52), the Commission promised to present a proposal for modification of the Family Reunification Directive in 2012. Prime Minister Rutte and minister of Immigration Leers have been at pains to convince the House of Representatives that they have actively worked towards building support for their proposals within the European institutions and among member states (TK 2010-2011 Plenary 1 December 2010: 16-17; EK 2010-2011 Plenary 7 December 2010: 61).

The policy proposals of the Rutte I government were not mere reflections of the ‘extreme’ positions adopted by the Freedom Party, but represented a common program shared by the mainstream centre-Right. Of the seven measures in the Coalition Agreement that require modification of the Directive, two had already been included in the reform plans of the previous government Balkenende IV in which the Christian Democrats participated: the denial of family reunification to applicants convicted for certain violent crimes and introducing education requirements for family migrants (TK 2009-2010 32715 (1): 8). The measure to raise the age requirement was mentioned in the Christian Democrat electoral program of 2010 (CDA, 2010). Two other measures were policy options that the Christian Democrats had been pleading for in Parliament for years: limiting the number of partners admitted per applicant (TK 2008-2009 Plenary 2 December 2008: 2651-2652) and raising the income requirement to 120 percent again (TK 2009-2010 32317 (16): 8). In other words, five of these seven measures were on the Christian Democrat wish list for family migration policy reform. This illustrates once again that the shift in Dutch policy preferences beyond the scope of the Directive concerns not only the populist Right, but also mainstream political parties.

## **5. When Europeanization backfires**

In this paper we examined the paradoxical relation between the introduction of European family migration policies and Dutch domestic politics. In contrast to what might be expected on the basis of intergovernmentalist theory, Dutch politicians did not use Europeanization to avoid domestic constraints. There was no need to play that game because support for restrictive reforms was far from lacking at the domestic level. Nevertheless, the new Family Reunification Directive was introduced with active support of the Netherlands and turned out to represent a major constraint on policy-making. To this double paradox we propose a double explanation. Dutch politicians supported the creation of an EU family migration policy not to avoid domestic constraints, but to enhance the normative legitimacy of domestic policies by stimulating other European countries to copy national practices. The Directive came to have an unexpected constraining effect, first as a result of the Court's jurisprudence, and second because the preferences of Dutch politicians have shifted ever further beyond what the Directive will allow.

What we observe is a process of 'lock-in', where EU legislation freezes the status quo and limits the scope of possible reforms significantly. Dutch politicians have found out that seeking legitimacy at the European level comes at a cost. After the populist-supported minority government Rutte proposed to further restrict family migration, Europeanization has become a double-edged sword. The Freedom Party has been vocal in its rejection of any EU interference with Dutch immigration policies, since it believes it is 'due to that club in Brussels that Europe is quickly turning into Eurabia' (PVV, 2010). The Conservative Liberals, who used to be warm supporters of a European migration and asylum policy, have come to criticize EU law and jurisprudence as an obstacle to national sovereignty, stating that

‘we want a restrictive immigration policy. We want all elements in European regulations which obstruct such a policy eliminated before we even consider a huge new pack of rules from Brussels’ (TK 2009-2010 23490 (583): 13). This contrasts with the Social Democrats, who remain convinced that ‘what we stand to gain (...) in a European framework is much bigger than if we would muddle on our own’. They argue that the Netherlands should continue steering a European course, ‘also if this means we can’t have it our way completely’, because ‘that is European democracy’ (TK 2009-2010 32317 (16): 15, 17). The government however has become increasingly interested in a Danish scenario, opting out of EU migration law. In the words of Prime Minister Rutte: ‘if we can obtain an exception, we shall do so’ (EK 2010-2011 Plenary 7 December 2010: 61).

While the Netherlands is the first and so far only member state to be convicted by the Court of Justice for breaching the Family Reunification Directive, it is most certainly not the only member state where restriction-minded governments have been confronted with the constraining impact of the Directive and its interpretation by the Court. In France, the UMP government watered down its proposal for a pre-departure integration requirement for family migrants in 2007, to prevent condemnation by the Court (Bonjour, 2010). The German government appears to have adopted a strategy of ‘selective lenience’, delivering entry permits to family migrants deemed liable to challenge the pre-departure integration requirement in court so as to prevent a negative Court ruling (Block, 2012: 280). In Belgium, the increase of the income requirement in 2011 was highly controversial, mostly because its critics deemed it contrary to the Court’s Chakroun jurisprudence (Adam, 2012). Thus, it is becoming apparent throughout Europe that the introduction of the Family Reunification Directive has decisively changed the dynamics of family migration politics, to a degree that none of the member state governments negotiating the Directive intended or anticipated.

From an EU studies perspective, such unintended consequences of European integration surely ring a familiar bell. Yet in the field of migration policy, where theories have so far predominantly focused on the strategic use of European opportunities by national governments resulting in a Europe-cum-national process of restriction of policies, it seems we have arrived at a new reality. The case of the Netherlands illustrates how the normalization of European migration politics, with the increasing influence of supranational actors such as the European Commission and Court of Justice, confronts member state governments with unanticipated consequences of their Europeanization strategies. Broadening the theoretical scope beyond intergovernmentalism is a necessary condition for understanding the current and future dynamics of Europeanized migration policies.

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## **Endnotes**

<sup>1</sup> The Commission report questioning the legitimacy of integration requirements unless they served exclusively to facilitate integration was published only in 2008. The compatibility of the Dutch policy of integration abroad with the Directive had been questioned before by law scholars (cf. Groenendijk *et al*, 2007) but this had not yet been picked up in political debate.

<sup>2</sup> Article 7.1.c of the Directive stipulates that member states may require evidence that the sponsor has ‘stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the member state concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members’.

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