



## UvA-DARE (Digital Academic Repository)

### Fortress Europe or Europe of Rights? The Europeanisation of family migration policies in France, Germany and the Netherlands

Bonjour, S.A.; Block, L.

**DOI**

[10.1163/15718166-12342031](https://doi.org/10.1163/15718166-12342031)

**Publication date**

2013

**Document Version**

Author accepted manuscript

**Published in**

European Journal of Migration and Law

[Link to publication](#)

**Citation for published version (APA):**

Bonjour, S. A., & Block, L. (2013). Fortress Europe or Europe of Rights? The Europeanisation of family migration policies in France, Germany and the Netherlands. *European Journal of Migration and Law*, 15(2), 203-224. <https://doi.org/10.1163/15718166-12342031>

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

*UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)*

## Fortress Europe or Europe of Rights?

### The Europeanisation of family migration policies in France, Germany and the Netherlands

Laura Block & Saskia Bonjour<sup>1</sup>

Forthcoming in the *European Journal of Migration and Law*

#### **Abstract**

Are the restrictive reforms of family migration policy recently implemented in France, Germany and the Netherlands a result of the introduction of the Family Reunification Directive in 2003? Most existing literature on the Europeanisation of migration policies suggests that restriction-minded national governments shift decision-making to the EU level to escape domestic political and judicial constraints. However, as the Treaties of Amsterdam and Lisbon have empowered the Commission and Court to constrain restrictive reform, this perspective is losing analytical validity. Also, this perspective fails to capture the intensifying processes of policy transfer among Member States, which have inadequately been labelled ‘horizontal’ Europeanisation. We therefore propose a new, actor-centred analytical framework of Europeanisation. We show that contrasting yet parallel dynamics of Europeanisation may emanate from a single legislative instrument and may constrain and empower national governments at the same time.

#### **Keywords**

Family reunification policy; horizontal Europeanisation; vertical Europeanisation; European Union

---

<sup>1</sup> We are indebted to Betty de Hart and to the editors and anonymous reviewers of the *European Journal of Migration and Law* for their constructive comments on previous versions of this paper.

## **1. Introduction**

Since the mid-2000s, there has been a wave of restrictive reforms of family migration policy in Europe. A large number of countries including Austria, Belgium, Denmark, Germany, France, the Netherlands, Sweden, and the UK have sharpened income and age requirements, reinforced controls on sham marriages, or – most innovatively – introduced integration conditions at entry for family migrants.

This restrictive policy turn has occurred in parallel to major steps in European integration in the field of family migration: for the very first time, the family migration policies of Member States have been subjected to EU law. The EU Family Reunification Directive (Directive 2003/86/EC), which was adopted in 2003 and entered into force in 2005, lays down minimum norms for the conditions under which third-country nationals living in a Member State must be allowed to bring their family members over. Member States are free to set less stringent conditions than those allowed by the Directive but they may not introduce more restrictive policies. The Directive is directly binding upon the Member States, and the Commission and Court see to it that national policies respect the boundaries it sets.

Based on existing literature on the Europeanisation of migration policies, one would expect the restrictive turn in family migration policies in Europe to be a result of Europeanisation. In this literature, the shift from the national to the European policy-making level has been interpreted as a strategic move by Member State governments aiming for stronger migration controls. Restrictive reforms opposed by parliaments or courts at the national level could be implemented more easily at the

EU level.<sup>2</sup> However, this literature mostly reflects the intergovernmentalist structure of the EU migration policy-making arena in the 1990s. Since then, the European asylum and migration policy field has been communitarised by the Treaty of Amsterdam. As a result, the balance of powers has shifted significantly from the Member States to the supranational EU institutions. Therefore, we may expect dynamics in the Europeanisation of migration policies today to be different from those in the 1990s.

In this paper, we investigate the dynamics of Europeanisation triggered by the introduction of the EU Directive on Family Reunification, so as to evaluate to which extent the restrictive turn in family migration policies is a result of Europeanisation. We propose an alternative analytical perspective on Europeanisation which allows us to identify both enabling and constraining dynamics of migration-policy-making at the European level.

Empirically, our analysis focuses on policy developments and debates in the Netherlands, Germany, and France. These three countries are bound by the Family Reunification Directive and have been at the forefront of the recent restrictive policy turn in family migration policies. Based on a detailed analysis of parliamentary documents, we investigate how political debates and policy-making processes in these three countries have been affected by the introduction of the Directive. .

## **2. Family Migration Policies in France, Germany and the Netherlands, 2003-2012**

---

<sup>2</sup> Guiraudon, V., 2000. European integration and Migration Policy: Vertical Policy-making as Venue Shopping. *Journal of Common Market Studies* 38(2), pp. 251-271; Lavenex, S., 2001. The Europeanization of Refugee Policies: Normative Challenges and Institutional Legacies. *Journal of Common Market Studies* 39(5), pp. 851-874; Luedtke, A., 2009. Uncovering European Union Immigration Legislation: Policy Dynamics and Outcomes. *International Migration* 49(2), pp. 1-27; Menz, G., 2011. Stopping, Shaping and Moulding Europe: Two-Level Games, Non-state Actors and the Europeanization of Migration Policies. *Journal of Common Market Studies* 49(2), pp. 437-462; Schain, M., 2009. The State Strikes Back: Immigration Policy in the European Union. *European Journal of International Law* 20(1), pp. 93-109.

This section summarises the most important changes in family migration policies after the adoption of the Family Reunification Directive (hereafter: the Directive) in France, Germany and the Netherlands. While the Directive only applies to family migration sponsored by third-country nationals (TCNs), many of the newly introduced restrictions affect family migrants joining citizens as well. Family migration sponsored by intra-EU migrants is governed by Community legislation on free movement (Directive 2004/83/EC) instead. Overall, intra-EU migrants enjoy more favourable family migration rights than TCNs - and often also than domestic citizens.

Article 4(5) of the Directive allows Member States to require both spouses to have reached a minimum age (at maximum 21 years) in order to 'ensure better integration and to prevent forced marriages'. All countries under consideration have introduced a minimum age for both the incoming and the sponsoring spouses. The Netherlands requires spouses to be 21 years since 2004, while France and Germany introduced the minimum age of 18 years in 2006 and 2007 respectively. In Germany and the Netherlands, the minimum age applies to spousal migration sponsored by citizens as well, while in France it only holds for foreign residents.

Income requirements were in place in all three countries prior to 2003. Reflecting this existing practice, Article 7(1)c of the Directive grants Member States the right to require sponsors to provide evidence of stable and regular resources to maintain the family. However, in all three countries, the income requirement has been further tightened since 2003. In France, where previously an individual assessment was made when the minimum income was not met, sponsors were required to prove they disposed of the minimum wage excluding social assistance as of 2006. Since 2007, up to 120% of the minimum wage can be demanded, depending on the family's size. In Germany, an income above the allowance of social assistance has traditionally been demanded of all TCNs sponsoring their family's migration. In 2007, this income requirement was extended to German citizens 'in exceptional cases'. The law commentary defines such exceptional circumstances as

situations where the couple can be 'reasonably expected' to settle together outside of Germany, for instance when the sponsor has dual nationality.<sup>3</sup> This clause was overruled by the Federal Administrative Court in a 2012 judgement.<sup>4</sup> Dutch policy prior to 2003 demanded 100% of the minimum wage of both TCN and Dutch sponsors who wanted to bring in foreign family members. In 2004, this requirement was increased to 120%. After the EU Court's *Chakroun* ruling of 2010, the Dutch government was forced to return to their previous income requirement of 100%.

Demanding sponsors to provide housing is enshrined in Article 7(1)a of the Directive. Like the income requirement, the housing requirement has long been one of the most common ways to control family migration. In France and Germany, 'adequate' or 'normal' housing was required prior to 2003 of TCN sponsors, but not of citizen sponsors. In 2006, France slightly tightened this requirement, by demanding sponsors to provide housing considered 'normal' in their region of residence. Germany has left the requirement unchanged. In the Netherlands, no housing requirement exists, but the government has been investigating the possibilities of introducing it since 2009.

Requiring a period of minimum legal residence (at maximum 2 years) in order to be able to sponsor family migration is allowed by the Directive's Article 8. While Germany lacks such a requirement, the Dutch government introduced a residence requirement of 12 months in 2012. In France, prior to 2003, sponsors were required to have resided a minimum of 12 months in France. This period was increased to 18 months in 2006.

Article 15 of the Directive sets a maximum of five years for the 'probationary period'. After this period, a family migrant must be granted an autonomous residence permit, independent of his or her relation with the sponsor. This probationary period was increased in all three countries since 2003. In France, where incoming family

---

<sup>3</sup> Bundestags-Drucksache (BT-Drs.) 16/5056, p. 171.

<sup>4</sup> BVerwG 10 C 12.12, judgement of 4 September 2012, para 30.

members previously acquired an autonomous residence permit immediately upon entry, a two-year probationary period was introduced in 2004, and extended to three years in 2006. The German two-year-period was extended to three years in 2011. The Netherlands, where the probationary period already used to be rather long with three years, went to the limit of what is legally possible according to the Directive: since October 2012, the probationary period is five years.

Most innovatively, in all three countries pre-entry integration requirements have been introduced for incoming spouses. The national governments refer to Article 7(2) of the Directive, which grants Member States the right to require TCNs' compliance with 'integration measures'. Whether this clause also allows for pre-entry integration requirements continues to be a debated issue.<sup>5</sup> Nevertheless, the Dutch government was the first in Europe to introduce an 'integration abroad' requirement in 2005, obliging incoming spouses to prove oral knowledge of the Dutch language equivalent to level A1-minus of the Common European Framework of Reference for Languages (CEFR) and to pass a test on society. In 2010, the requirement was expanded to include reading skills and the level increased to A1 CEFR. The German government introduced a language requirement for incoming spouses in 2007. Language skills equivalent to level A1 CEFR must be proven before an entry visa is granted. In France, incoming family migrants are obliged since 2007 to test their knowledge of French language and Republican values, and to follow a course in their country of origin if their knowledge proves insufficient. However, the requirement is much 'lighter' than in Germany and the Netherlands: the courses are organised and financed by the French state, and the granting of an entry visa depends on participation in a course rather than on passing a test. In all three states, the integration requirement applies equally to spouses of TCN and citizen sponsors.

---

<sup>5</sup> Groenendijk, K., 2006. Family Reunification as a Right under Community Law. *European Journal of Migration and Law* 8(2), pp. 215-230, on p. 225.

Clearly, since the adoption of the Family Reunification Directive in 2003, a restrictive turn in family migration policies can be observed in France, Germany, and the Netherlands, summarised in table 1 below. Is there a relation between this restrictive policy turn and the introduction of the Directive? The following section turns to the literature on Europeanisation of migration policies in order to establish a theoretical framework for the analysis presented in the fourth section.



	France		Germany		The Netherlands	
	Before 2003	Reforms (year)	Before 2003	Reforms (year)	Before 2003	Reforms (year)
<b>Age requirement</b>	None	18 (2006)	None	18 (2007)	18	21 (2004)
<b>Income requirement</b>	Minimum wage (individual assessment if below)	Minimum wage, excluding social assistance (2006)  Up to 120% minimum wage depending on size of family (2007)	Income above social assistance allowance for TCN sponsors	Income above social assistance allowance also for German citizens in exceptional circumstances (2007), overruled by BVerwG (2012)	100% minimum wage	120% of minimum wage (2004)  100% of minimum wage (2010, after <i>Chakroun</i> )
<b>Housing requirement</b>	Considered normal for comparable family	Considered normal in same region (2006)	'Adequate housing'	No changes	None	Plans to introduce
<b>Minimum residence sponsor</b>	12 months	18 months (2006)	None	None	None	12 months (2012)
<b>Probationary period</b>	None	2 years (2004) 3 years (2006)	2 years	3 years (2011)	3 years	5 years (2012)
<b>Pre-departure integration requirement</b>	None	Obligation to participate in course on language & Republican values offered by state (2007)	None	Language level A1 (2007)	None	Language level A1 minus (oral) & test on society (2005)  Level A1 incl. reading & test on society (2010)

**Table 1: Family migration policy reforms in France, Germany and the Netherlands since 2003**

### 3. The Europeanisation of Migration Policies

As the EU gradually became an important arena for migration policy-making from the 1990s onwards, an increasing body of literature has addressed ‘the domestic adaptation to European regional integration’, i.e. the impact of the construction of the European Union on domestic policies and political processes in the field of migration.<sup>6</sup> This literature on the Europeanisation of migration policies is dominated by intergovernmentalist perspectives, which assume that Member States are the primary actors in the construction of European asylum and migration policies.<sup>7</sup> The pervasive imagery of ‘Fortress Europe’ is largely built on the assumption that national governments have strategically used the EU policy level to introduce restrictive migration policies which they were unable to implement at the national level.

This perspective was first and most influentially formulated by Virginie Guiraudon in her ‘venue-shopping’ thesis: governments have shifted migration policy-making from the national to the European venue because it allows them to ‘circumvent national constraints on migration control’.<sup>8</sup> 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. 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 explained the creation of European asylum policies in a similar

---

<sup>6</sup> Vink, M. and Graziano, P. (2007). Challenges of a New Research Agenda, in: *Europeanization: New Research Agendas*. P. Graziano and M. Vink (eds.), pp. 3-20, Palgrave Macmillan, Basingstoke.

<sup>7</sup> Guiraudon; Lavenex 2001; Luedtke; Menz; Schain, *supra* fn. 1.

<sup>8</sup> Guiraudon, *supra* fn. 1.

manner, stating that 'Europeanization (...) was a means to legitimize restrictions of formerly liberal domestic asylum regimes in the face of domestic institutional and normative constraints'.<sup>9</sup> More recently, Schain stated that the EU arena 'was and remains a relatively protected space, 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'.<sup>10</sup> Luedtke argues that Member States' support for the Family Reunification Directive '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'.<sup>11</sup>

Certainly, this perspective captured crucial dynamics of European migration politics in the 1990s, which were indeed governed by intergovernmental mechanisms. However, the communitarisation of European asylum and migration policy through the Treaties of Amsterdam (1999) and Lisbon (2007) has shifted power from the Member States to supranational institutions to a very significant extent. In response, scholars have started to question whether intergovernmentalist theoretical approaches are still suited to understand the changed dynamics of Europeanisation of migration policies. Already in 2006, Lavenex suggested that the 'escape routes' for restrictive policy room which the EU offered in the 1990s 'may gradually become caught up in the process of constitutionalization. This process yields new limits on political action'.<sup>12</sup> More recently, Kaunert and Léonard have critically engaged with Guiraudon's venue-shopping thesis, stating that the judicialisation of EU migration policies which results primarily from the increased competences of the European Court of Justice have made the EU policy venue 'less

---

<sup>9</sup> Lavenex 2001, *supra* fn. 1.

<sup>10</sup> Schain, *supra* fn. 1.

<sup>11</sup> Luedtke, *supra* fn. 1.

<sup>12</sup> Lavenex, S., 2006. Towards the constitutionalization of aliens' rights in the European Union? *Journal of European Public Policy* 13(8), pp. 1284-1301.

amenable to the fulfilment of restrictive asylum preferences'.<sup>13</sup> Bonjour and Vink have also criticised the intergovernmentalist approach to the Europeanisation of migration policies for assuming that Member States have full control over the process and consequences of European integration.<sup>14</sup> Thus, migration scholars are divided as to whether European integration empowers or constrains national policy-makers with restrictive policy preferences.

In all of this literature, Europeanisation is predominantly conceived as a 'vertical' process revolving around formal European legislation. 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. As Bonjour and Vink have noted, this narrow conception fails to capture an increasingly important aspect of the Europeanisation of migration policies, namely the transfer of ideas and policies among Member States.<sup>15</sup> The development of asylum and migration policies at the EU level since the 1990s has created new networks and dynamics of interaction among civil servants, politicians, and non-state actors, as well as new channels for the circulation of information and policy perspectives. Such processes of exchange between Member States play an increasingly important role in domestic policy-making processes.

In the general literature on Europeanisation, 'the diffusion of ideas and discourses about the notion of good policy and best practice' through EU policies and politics 'where there is no pressure to conform to EU models' is commonly referred to as 'horizontal' Europeanisation.<sup>16</sup> The assumption here is that 'vertical'

---

<sup>13</sup> Kaunert, C. and Léonard, S., 2012. The Development of the EU Asylum Policy: Venue-shopping in Perspective. *Journal of European Public Policy*, DOI:10.1080/13501763.2012.677191.

<sup>14</sup> Bonjour, S. and Vink, M. (forthcoming). When Europeanization backfires: the normalization of European migration politics. *Acta Politica*.

<sup>15</sup> Bonjour and Vink, *supra* fn. 13.

<sup>16</sup> Vink and Graziano, *supra* fn. 5; Radaelli, C.M. (2003). The Europeanization of Public Policy, in: *The Politics of Europeanization*. K. Featherstone and C.M. Radaelli (eds.), pp. 27-56, Oxford University Press, Oxford.

Europeanisation is triggered by formal EU law such as Directives and Regulations, i.e. by European policies which are *binding* upon the Member States. In contrast, 'horizontal' Europeanisation is thought to involve *non-binding* EU policy instruments such as soft law and, in particular, the Open Method of Coordination.

However, we find that the analytical distinction between 'vertical' and 'horizontal' Europeanisation obscures the view to the complex and multiple dynamics of the current Europeanisation of migration policies. This distinction wrongly assumes that 'binding' and 'non-binding' EU policy-making involve different policy instruments and occur at different moments or in different (sub-)policy fields. It also assumes that transfer and learning among Member States only plays a role where EU policy is non-binding. However, binding EU law often contains non-binding 'may'-clauses: EU policies are usually binding and non-binding at the same time. Furthermore, the interpretation of such 'may'-clauses often involves exchange and mimicking among Member States. Negotiations on binding EU law are occasions for national civil servants and politicians to meet and learn about each other's policies, which can inspire them to introduce reforms at home. Thus, 'horizontal' exchanges between Member States occur 'up there' at the EU level: Europeanisation processes are both 'horizontal' and 'vertical' at the same time. In other words, the analytical distinction between 'horizontal' and 'vertical' Europeanisation is void.

In this paper, we therefore deploy an alternative, actor-centred framework to analyse the Europeanisation of migration policy. As a starting point, we assume that one single EU policy instrument can trigger different dynamics of Europeanisation at the same time. Furthermore, we argue that two types of Europeanisation dynamics can be distinguished. Both types refer to change in domestic policies and politics as a result of developments in the EU arena, but these changes are driven by different categories of actors. In the first type of Europeanisation, Member States are the main

actors of change, while the second type of Europeanisation is pushed by supranational institutions.

The impact of these different types of Europeanisation depends on whether the preferences of these different actors converge or diverge. If the preferences of Member States converge with those of supranational institutions, then both Member-State-driven and supranationally-driven Europeanisation may strengthen national governments' capacities to effectively pursue their policy objectives. However, in the cases selected for analysis in this paper, the preferences of Member States diverge from those of supranational institutions. In such cases, only Member-State-driven dynamics of Europeanisation are 'enabling' for national governments in the sense that their room for manoeuvre is enlarged. In contrast, supranationally-driven dynamics of Europeanisation are 'constraining' for national governments whose preferences diverge from supranational institutions, as their capacity to effectively pursue their policy goals is weakened.

In the following section, we identify 'enabling' and 'constraining' dynamics in the Europeanisation of Dutch, French, and German family migration policies. This analytical framework allows us to distinguish parallel dynamics of Europeanisation triggered by the same instrument – the Family Reunification Directive – but pulling in different directions. Only thus can we evaluate to which extent the restrictive turn in European family migration policies is a result of Europeanisation.

#### **4. Europeanisation of Family Migration Policies in France, Germany, and the Netherlands**

##### *4.1. Negotiating the Directive: Neither Enabling nor Constraining*

Negotiations on the Family Reunification Directive started in December 1999, when the Commission submitted a first proposal. After intensive discussions between Member States led to a deadlock in the Council, the Commission was forced to water down its original proposal in subsequent revised versions submitted in 2000 and 2002. After further revisions, the Council adopted the Directive in September 2003. The European Parliament was involved, but only in a consulting role.

On behalf of the Netherlands the negotiations were conducted by the government Kok II (composed of Social Democrats, Conservative Liberals and Liberal Democrats) until July 2002, and then by the governments Balkenende I (Christian Democrats, Conservative Liberals and the far-Right LPF) and Balkenende II (in which the Liberal Democrats replaced the LPF). France was represented in the negotiations by the left-wing Jospin government (PS) until May 2002, and by the right-wing Raffarin government (UMP) after that. On behalf of Germany, the left-wing Schröder governments (SPD and Greens) conducted the negotiations.

These different governments all had the same overarching goal in the negotiations: to ensure that the new Directive would require as little change to national family migration policies as possible.<sup>17</sup> For the Dutch delegation, this included making room in the Directive for the restrictive policy plans of the Balkenende governments. Thus, the positions adopted by France, Germany, and the Netherlands in the negotiations of the Directive reflected either existing policies, or imminent policy reforms which enjoyed ample domestic political support. This contradicts the proposition of scholars such as Guiraudon and Luedtke that Member States support the introduction of European legislation because it allows them to implement restrictive reforms which domestic opposition prevents them from implementing at the national level.<sup>18</sup>

---

<sup>17</sup> Strik, T. (2011). *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*. Boom Uitgevers, Den Haag; Groenendijk 2006, *supra* fn. 4.

<sup>18</sup> Guiraudon; Luedtke, *supra* fn. 1; cf. Bonjour and Vink, *supra* fn. 13.

Even though the Social Democrats and Greens were in power in Germany, the German delegation put forward the largest number of restrictive proposals, and fought hardest to retain maximum policy freedom for national governments. The German delegation was also the most successful in influencing the outcome of the negotiations. The Dutch positioned themselves close to the Germans and were also often able to get their way. Germany and the Netherlands contributed to barring the Commission's proposal that the Directive forbid discrimination of a Member State's own nationals compared to EU citizens, and – together with Austria – they successfully pled for the inclusion of integration measures in the Directive. Also, the German delegation was able to insert into the Directive the possibility to restrict the entry of children aged over 12 and over 15.<sup>19</sup> The Netherlands almost singlehandedly raised the minimum age requirement for spouses from 18 to 21 years.<sup>20</sup>

The French delegation took position on the other end of the spectrum. France was the main supporter of the Commission proposal – which aimed at strengthening migrants' family reunification rights – and pled for these liberal norms to be binding upon all Member States so as to ensure harmonisation.<sup>21</sup> The French were unable to impose their views in the negotiations however, mostly because they failed to win support among the Member States, but perhaps also because their defence of migrants' rights became somewhat less fervent after the UMP Raffarin government replaced the PS Jospin government in 2002.

Thus, Germany and the Netherlands left a stronger mark on the terms of the Directive than France. All three countries contentedly put their signature under the Directive however, because they were convinced that their main objective – to prevent modification of national laws and regulations – had been achieved.

In the 'venue-shopping' theory, EU negotiations have been presented as an 'enabling' moment for Member States, allowing them to implement reforms they were

---

<sup>19</sup> Groenendijk 2006, *supra* fn. 4.

<sup>20</sup> Strik, *supra* fn. 16.

<sup>21</sup> Strik, *supra* fn. 16.



unable to implement at home. However, our findings show that negotiations on the Family Reunification Directive were neither enabling nor constraining for the French, German, and Dutch governments. The proposals they put forward in the negotiations reflected existing policies, or impending reforms that enjoyed broad political support. What they pursued and obtained was not an enlargement of their room for manoeuvre, but a maintenance of the status quo.

#### *4.2. Europeanisation as an Enabling Dynamic*

The changes made by France, Germany, and the Netherlands at the moment of transposition of the Directive were minimal. The Netherlands and France introduced the right for isolated minor refugees to bring their parents over.<sup>22</sup> In Germany, the possibility to require refugees to provide means of subsistence for their incoming family members, previously handled at discretion of the authorities, was scrapped entirely. Thus, the immediate and direct effect of the Directive in these three countries was a small reinforcement of migrant rights.

##### *4.2.1. Formalising the Informal: Justifying Reform with Europeanisation*

However, all three Member States made further changes with reference to the Directive, even if these reforms were not *compulsory* under the Directive. Here, we observe a Member-State-driven dynamic of Europeanisation where national governments use the Directive to justify restrictive reform. In 2004, the Dutch government stated that the raise of the age requirement to 21 years was 'in keeping with the limit that can be set according to the Family Reunification Directive'.<sup>23</sup> Similarly, when presenting its proposal for pre-departure integration measures, the

---

<sup>22</sup> *Projet de loi N° 2986*, 3 April 2006; Groenendijk, K., Fernhout, R., Van Dam, D., Van Oers, R. and Strik, T. (2007). *The Family Reunification Directive in EU Member States; the First Year of Implementation*. Wolf Legal Publishers, Nijmegen.

<sup>23</sup> Tweede Kamer (further : TK) 19637 (852) Addendum, 28 September 2004.

Dutch government emphasised that ‘the new integration requirement fits with recent developments in European migration law’, such as the Family Reunification Directive.<sup>24</sup> Thus, it used its own negotiation success to strengthen the legitimacy of its reform proposals. In Germany, the 2007 law proposal related all family migration restrictions to the corresponding articles of the Directive.<sup>25</sup> Tellingly, the title of the law was ‘Directive Implementation Act’ (*Richtlinienumsetzungsgesetz*), implying very direct connections between the Family Reunification Directive and the proposed reforms. During the parliamentary debates, the responsible minister Schäuble used the Directive to create a sense of urgency. He emphasised the need to negotiate swiftly, since Germany was late in transposing the Directive and the Commission had already initiated treaty violation proceedings against Germany.<sup>26</sup> However, when put under pressure by sceptical Left MPs who denounced the references to the EU as hypocritical ‘exploitation’, the minister explicitly stated that the law not only consisted of EU requirements but was also informed by the evaluation of the Immigration Act 2005.<sup>27</sup>

The French government made the most extensive use of the Directive to justify restrictive reform. In 2006, French family migration law was restricted by raising the minimum residence period of the sponsor, tightening the housing and income conditions, and introducing an integration requirement for the sponsor. The government repeatedly emphasised that these measures were ‘perfectly compatible’ with the Directive.<sup>28</sup> The restriction of housing conditions was proposed by parliamentarians of the governmental majority party UMP, who said they had been ‘inspired’ by the Family Reunification Directive.<sup>29</sup> UMP parliamentarians also claimed

---

<sup>24</sup> TK 29700 (3) : p. 16-17, 21 July 2004.

<sup>25</sup> BT-Drs. 16/5065, 23 April 2007, *Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union*.

<sup>26</sup> Deutscher Bundestag (further: BT), Plenarprotokoll (Pp) 16/90 28 March 2007, p. 9065; BT Pp 16/94 26 April 2007, p. 9564.

<sup>27</sup> BT, Pp 16/90 28 March 2007, p. 9071.

<sup>28</sup> Assemblée Nationale (further: AN) 1<sup>st</sup> plenary session 10 May 2006; cf. *Projet de loi N° 2986*, 3 April 2006; AN 3<sup>rd</sup> plenary session 9 May 2006; Sénat plenary 15 June 2006.

<sup>29</sup> AN 2<sup>nd</sup> plenary session 2 May 2006.

that the restriction of the income requirement was 'no more than an adaptation' to the Directive.<sup>30</sup> As in Germany, the far-Left opposition was critical of this rhetorical use of the Directive as legitimation for restrictive reform however, pointing out that 'this legislative proposal goes beyond the recommendations of the Directive'.<sup>31</sup>

In 2007, the French government defended its proposal to introduce a pre-departure integration requirement by emphasising that it was 'fully in line with the Family Reunification Directive'.<sup>32</sup> Criticism from opposition parties was countered with the statement: 'One cannot ceaselessly claim harmonisation of European politics and stick to words: action is needed! If we really want European integration, progress will be needed on this subject'.<sup>33</sup> Thus the government presented pre-departure integration measures as a crucial feature of EU harmonisation.

These references to the Directive did not convince the French opposition of the legitimacy of the government's reform proposals, but the government passed the bills anyway. Thus, the Directive had no effect on the attitude of the opposition towards restrictive reform, but perhaps it was instrumental in changing the majority's approach to family migration policies. Strik notes that it is striking that France, which tried to block German and Dutch proposals to create room for restrictive national policies during the negotiation of the Directive, made extensive use of this room once the Directive was introduced.<sup>34</sup> Discussions about reform of family migration policy started only after the adoption of the Directive. It has been pointed out that the right to family life is a particularly strong norm in French public and political debates about family migration.<sup>35</sup> Perhaps the fact that the minimum norms in the Directive sanctioned stricter conditions contributed to convincing the French right-wing government and parliamentary majority that a restriction of this right was justified.

---

<sup>30</sup> AN 1<sup>st</sup> plenary session 10 May 2006; Sénat report Rapport n° 371 of 31 May 2006.

<sup>31</sup> AN 1<sup>st</sup> plenary session 17 May 2006.

<sup>32</sup> *Projet de Loi No 57*, 4 July 2007.

<sup>33</sup> Sénat plenary 2 October 2007.

<sup>34</sup> Strik, *supra* fn. 16.

<sup>35</sup> Bonjour, S., 2010. Between Integration Provision and Selection Mechanism. Party Politics, Judicial Constraints, and the Making of French and Dutch Policies of Civic Integration Abroad. *European Journal of Migration and Law* 12(3), pp. 299-318; Strik, *supra* fn. 16.

Thus, the Directive may have laid part of the ideological foundations for the restrictive reforms of 2006 and 2007.

The norms laid down in the Family Reunification Directive were meant to guarantee a minimum set of rights for migrants. However, the French, Dutch, and German governments reversed this goal by presenting convergence towards these minimum norms as a desirable form of European harmonisation. Thus, the Directive contributed to building legitimacy for a restrictive turn that resembled a 'race to the bottom'.

This Europeanisation process reveals the inadequacy of the analytical distinction between 'vertical' and 'horizontal' Europeanisation: it is neither a case of 'vertical' implementation of binding EU norms, nor of 'horizontal' non-binding coordination and learning. Rather, this is a process of domestic reform triggered by the Family Reunification Directive, a formal and binding piece of EU law, but shaped by the voluntary and strategic choices of Member States. This Member-State-driven dynamic of Europeanisation is clearly enabling for national governments: it strengthens the legitimacy of their reform proposals.

#### *4.2.2. Learning and Referring: Policy Transfer among Member States*

Another Member-State-driven dynamic of Europeanisation which we observe is related less to specific legislation, and more to the changes in domestic and European institutional settings. European integration has created new networks among national policy-makers or strengthened existing networks; it has created new channels for the circulation of information about other countries' family migration policies, ranging from the negotiation tables, to Commission reports, and to the European Migration Network; it has reinforced the tendency among national civil servants and politicians to compare their own policies to those of other Member States and to look across borders for inspiration when designing new policies. These

processes of policy transfer also enabled Dutch, French, and German governments to implement restrictive reforms of family migration policies.

The French government described the 2006 reform of the housing condition as 'merely following European countries' example'.<sup>36</sup> A UMP Senator stated that 'the Netherlands and the United Kingdom have showed us the way by fixing a minimum age for the spouse who desires family reunification'.<sup>37</sup> A year later, the raise of the income requirement was repeatedly defended by the UMP rapporteur with the statement that 'many European countries take the size of the family into account, such as Germany, Spain, or Italy'.<sup>38</sup> In comparison to other states, so the rapporteur argued, the modulation of the French income requirement to a maximum of 120% was 'particularly modest'.<sup>39</sup>

In Germany, the ruling Christian Democrats tried to increase the legitimacy of installing a minimum age for spousal migration by referring to the policies in other Member States:

A number of EU Member States are discussing a raise of the reunification age. In Denmark it has already been set at 24 years. The Netherlands intends to raise it to 21 years.<sup>40</sup>

Danish policies were a popular source of inspiration also among Dutch Right-wing Parliamentarians. As early as 2002, the Conservative Liberals inquired whether the Netherlands could raise the age requirement to the level applied in Denmark.<sup>41</sup> In 2009, Conservative Liberal MP Mark Rutte – who would become Prime Minister a year later – asked that the Netherlands adopt 'the Danish model' for family migration:

---

<sup>36</sup> Sénat plenary 15 June 2006.

<sup>37</sup> Sénat plenary 15 June 2006.

<sup>38</sup> AN meeting of the *Commission des lois constitutionnelles, de la législation et de l'administration générale de la République*, 25 July 2007.

<sup>39</sup> AN Report N° 160, 12 September 2007.

<sup>40</sup> BT Pp 16/24 p. 1838, 15 March 2006.

<sup>41</sup> TK 28195 (5): 5, 4 October 2002.

an age requirement of 24 years and no access to social assistance during the first ten years of residence. The Christian Democrats were also enthusiastic about the Danish age requirement.<sup>42</sup> The populist and anti-immigrant Freedom Party tirelessly sung the praises of Danish family migration policies, which they considered proof that immigration flows could effectively be contained through restrictive policies.<sup>43</sup> In 2010, the Conservative Liberals and Christian Democrats pled for increasing the probationary period from three to five years, arguing that ‘most other European countries apply a five year norm’ and that the more liberal Dutch norm might attract migrants to the Netherlands.<sup>44</sup> Once in office, the Conservative Liberal and Christian Democrat Rutte I government indeed raised the probationary period to five years, arguing that ‘about twenty other European countries’ applied the same norm.<sup>45</sup>

In all three countries, references to other countries’ practices were most common in discussions about pre-departure integration measure for family migrants. In France, Nicolas Sarkozy, then Minister of the Interior and candidate in the presidential elections, first presented his proposal to introduce pre-departure integration measures for family migrants as follows:

I want us to follow the example of the Netherlands, which has put in place an integration test for family migrants to take in their country of origin. Germany and Denmark plan to adopt a similar test, which marks a real European convergence.<sup>46</sup>

In the parliamentary debates minister Hortefeux declared that ‘by creating this test and this course, France joins the ranks of several large European countries’ such as the Netherlands and Germany.<sup>47</sup> Similarly, a UMP member of parliament stated:

---

<sup>42</sup> TK plenary 16 September 2009: 2-36.

<sup>43</sup> TK 19637 (1266): 28, 2 April 2009; TK 32317 (16): 15, 19 May 2010.

<sup>44</sup> TK plenary 10 February 2010, 53-4866; TK 32052 (22), 11 February 2010.

<sup>45</sup> TK 32175 (16): 32, 18 January 2011.

<sup>46</sup> N. Sarkozy, *Déclaration sur le bilan de la politique de l’immigration et de l’aide au développement*, Marseille, 5 March 2007 (<http://discours.vie-publique.fr/notices/073000867.html>).

<sup>47</sup> *Sénat*, plenary 2 October 2007.

This is not a leap into the unknown but an adaptation to the European norm: the Netherlands have put in place a pre-departure integration test for family reunification in March 2006, and Germany and Denmark plan to implement it.<sup>48</sup>

This quote illustrates clearly that what is perceived among politicians as 'the European norm' consists not only of formal EU law, but also and even primarily of what is common practice among EU Member States.

Also in Germany, MPs of the ruling Christian Democrats (CDU) repeatedly cast Germany as following a European trend regarding integration requirements for spouses by referring to similar policies in the Netherlands and France.<sup>49</sup> At other times, Germany was portrayed as a trendsetter, which other European states were following:

In the meantime, we are setting an example for many countries in Europe. The provision to require language skills prior to family reunification is part of the asylum and migration package that has been presented by the French EU presidency. (...) We are absolutely setting an example here.<sup>50</sup>

Both framings – Germany as a policy-imitator and as a policy-trendsetter – enhanced the overall legitimacy of restricting spousal migration by positing Germany squarely within a European trend. In contrast, the opposition attacked the government precisely for *not* following the majority of other European countries:

The federal government has no knowledge of other EU Member States (except France and the Netherlands) planning to subject the admission of spouses to

---

<sup>48</sup> AN, plenary 18 September 2007.

<sup>49</sup> BT, Pp 16/143 pp. 15127, 15132, 15 February 2008; BT Pp 16/209 p. 22640, 6 March 2009.

<sup>50</sup> BT, Pp 16/169 p. 17863, 19 June 2008.

language requirements. Thus the Federal Republic of Germany's immigration law once again follows a restrictive *Sonderweg*<sup>51</sup> in Europe.<sup>52</sup>

In response, Christian Democrat MP Grindel argued that 'This is not true. (...) The Netherlands! France! More and more countries are opting for this instrument!'<sup>53</sup>

In the Netherlands, Christian Democrat parliamentarians as well as the conservative Rutte I government argued that the raise of the tested language level from A1-minus to A1 could not be a breach of the right to family life guaranteed by the European Convention of Human Rights, since the A1 level was applied in Germany too. As a Christian Democrat MP put it: 'I honestly don't see why Germany could do it and not us, since we are dealing with the same ECHR'.<sup>54</sup> Thus, the Netherlands imported aspects of pre-departure integration policies from Germany – but above all, the Netherlands strived to export this policy instrument. The government presented the Netherlands as 'acting as a pioneer for other countries to follow'.<sup>55</sup> It argued:

The Netherlands are taking the lead in Europe when it comes to civic integration abroad. Many Member States are following these developments with great interest. (...) 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.<sup>56</sup>

Dutch politicians actively engaged in turning integration abroad into a common practice among Member States. They used the negotiations on the Directive as an

---

<sup>51</sup> The term *Sonderweg* literally means 'exceptional path'. It has been at the heart of strongly politicised debates among historians as to whether German history has followed a *Sonderweg* which has inevitably led to national-socialism.

<sup>52</sup> BT-Drs. 16/11997 p. 2, 16 February 2009.

<sup>53</sup> BT Pp 16/209 p. 22640, 6 March 2009.

<sup>54</sup> TK 32005 (4): 14, 9 November 2009; cf. TK 32175 (16): 27, 18 January 2011.

<sup>55</sup> TK 29700 (54) p. 4, 30 January 2008.

<sup>56</sup> TK 30308 (7) p. 15, 23 December 2005.



opportunity to promote the idea of pre-departure integration requirements. A member of the Dutch delegation stated that ‘in the course of the negotiations, the Dutch Law on Civic Integration Abroad took a clearer shape, and that was a shock to everybody. Now that the law is being finalised, they are all very positive about it’.<sup>57</sup> At a later stage, the Netherlands also played a crucial role in ensuring that Member States who wanted to introduce pre-departure integration measures received financial support from the European Integration Fund.<sup>58</sup> Having other Member States follow its lead gave Dutch civic integration policy the legitimacy of serving as a role model, rather than remaining an extreme and exceptional case.

When implementing the optional clauses in the Directive, Member States look at each other’s policies and learn from one another. The tendency to legitimise restrictive reform by referring to other Member States conducting similar policies is perhaps strongest where the compatibility of policy instruments with the Directive is controversial, as is the case with pre-departure integration requirements. Again, we observe Europeanisation processes that cannot be captured by the ‘vertical/horizontal’ metaphor: binding European integration strengthens domestic policy-makers’ tendency to engage in voluntary policy-learning.

Thus, national governments make strategic use of the opportunities offered to them by the introduction of EU law, by presenting restrictive reform at the minimum level allowed by the Directive as a desirable form of ‘European harmonisation’ and by learning from each other’s restrictive policy practices. These Member-State-driven, enabling dynamics of Europeanisation have strongly contributed to the restrictive turn in European family migration policies.

#### 4.3. *Europeanisation as a Constraining Dynamic*

---

<sup>57</sup> Strik, *supra* fn. 17.

<sup>58</sup> Groenendijk, K., 2011. Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy? *European Journal of Migration and Law* 13(1), pp. 1-30.

The dominant theories of Europeanisation of migration policies assume that shifting decision-making to the EU level is an ‘autonomy-generating’ escape route for national executives.<sup>59</sup> However, since the adoption of the Treaties of Amsterdam (1997) and Lisbon (2007), domestic governments’ autonomy in migration policies is increasingly constrained by EU institutions. The European Commission and the European Court of Justice (ECJ) now play important roles in ensuring the correct interpretation and application of Community legislation. Also in the field of family migration, important impulses have recently emanated from these institutions, largely going in a liberal direction. Since the supranational EU institutions limit Member States’ sovereign room of manoeuvre and have even obliged them to change their policies, we refer to these supranationally-driven dynamics of Europeanisation as constraining.

The ECJ has issued two judgements interpreting the Family Reunification Directive and the obligations it imposes on Member States. The first ruling concerned an action for annulment brought before the ECJ by the European Parliament, which considered a number of provisions in the Directive contrary to fundamental rights (Case C-540/03). The Court dismissed the action in 2006, but seized the opportunity to declare that the Family Reunification Directive 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 this implies that when applying concepts such as ‘public order’ or ‘sufficient income’, Member States have to conform to the Court’s definition of these concepts in other branches of Community law.<sup>60</sup> This

---

<sup>59</sup> Lavenex 2001, *supra* fn. 1.

<sup>60</sup> Groenendijk 2006, *supra* fn. 4.

Court interpretation has turned the Directive into a powerful tool to protect the family migration rights of migrants.

The second case was the *Chakroun* case of 2010 (Case C-578/08) in which the ECJ ruled that the income requirement of 120% minimum wage in the Netherlands was too high. Reluctantly, the Dutch government reverted back to its former policy of demanding 100% of the minimum wage in order to sponsor family migration, but at the same time, increased the minimum age for all spouses to 21.<sup>61</sup> The ECJ is thus playing an increasingly active role in constraining Member States' room for restrictive manoeuvre.

As mentioned earlier, the compatibility of integration abroad requirements with the Directive is disputed.<sup>62</sup> The European Commission has recently taken a strong stand in this dispute. In a statement issued in 2011 in the context of the *Bibi Mohammed Imran* case (Case C-155/11 PPU), the Commission clearly stated that it considered the Dutch pre-entry language requirement to be incompatible with the Directive's Article 7(2).<sup>63</sup> 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. As a result, no European judicial decision on pre-entry integration requirements has yet been issued. While the Commission's statement is not legally binding, it has been important for the interpretation of domestic courts and could potentially influence a future ECJ decision. In Germany, the Federal Administrative Court (*Bundesverwaltungsgericht*), which had explicitly defended the pre-entry integration requirement as compatible with both the German constitution and EU law in 2010,<sup>64</sup> revised this position in October 2011. Citing the Commission's *Bibi Mohammed Imran* statement, the

---

<sup>61</sup> The Dutch policy had distinguished between 'family formation' (minimum age 21 years and 120% income) and 'family reunification' (minimum age 18 years and 100% income), depending whether the marriage had existed prior to the foreign sponsor's immigration. The ECJ overruled both this distinction as unlawful and the 120% minimum income as too high.

<sup>62</sup> Groenendijk 2006, *supra* fn. 4.

<sup>63</sup> Document Sj.g (2011) 540657, 4 May 2011.

<sup>64</sup> BVerwG, 1 C 8.09, judgement of 30 March 2010.

German judges stated that the ECJ should indeed be consulted regarding the German language requirement. In the actual case however, the judges did not refer the case to the ECJ, because the German authorities, just like the Dutch in the *Bibi Mohammed Imran* case, granted a visa to the plaintiffs prior to the case's final hearing. The national administration's covert strategy of selective lenience (i.e. granting visas to the few individuals per year who decide to initiate legal proceedings) may postpone an EU Court decision, but it cannot permanently diffuse the 'liberal constraint' emanating from the EU judiciary.

The constraining influence of the Directive is perhaps most clearly apparent in recent political debates in the Netherlands, where it has prevented a series of restrictive reforms which enjoyed broad political support. The center-Left Balkenende IV government (2006-2010) would have introduced integration and education requirements for the sponsor if this had not been prohibited by the Directive.<sup>65</sup> The 'Support Agreement' signed in 2010 by the Rutte government, composed of Conservative Liberals and Christian Democrats with minority support by the Freedom Party, listed no less than seven reforms of family migration policies which could only be implemented if the Family Reunification Directive were modified, such as a raise of the age requirement to 24 years, a raise of the income requirement to 120% of the minimum wage, and education requirements for sponsors and family migrants.<sup>66</sup> The current Rutte II government (Conservative Liberals and Social Democrats) wants to raise the income requirement and the age requirement above the level allowed by the Directive. These three successive Dutch governments have been lobbying actively to convince Member States and the Commission to modify the Directive.

The European Commission has recently launched a Green Paper public consultation on the Family Reunification Directive, to which all Member States have

---

<sup>65</sup> TK 32175 (1), 2 October 2009.

<sup>66</sup> TK 32417 (15): 22, 7 October 2010.

issued statements.<sup>67</sup> Besides the Netherlands, no Member State was willing to amend the Directive. It appears that negotiations on the Directive will not be re-opened in the foreseeable future, although the Commission has agreed to issue a document clarifying how the clauses of the Directive should be interpreted.

Constraining dynamics in the field of family migration have recently emanated from ECJ rulings based on other legislative sources besides the Family Reunification Directive as well. These judgements have decreased Member States' sovereignty in the field of family migration not only for TCNs, but also for other groups. For instance, the family migration rights for intra-EU migrants were strengthened by the ECJ in its *Metock* judgement (Case C-127/08) in 2008 – much to the dismay of the German and Dutch governments who fear 'abusive' and 'fraudulent' practices.<sup>68</sup> Furthermore, through expansive interpretations<sup>69</sup> of Association Law's standstill clause (Article 13 of Decision 1/80), the ECJ is increasingly supporting the rights of Turkish migrants, also in the field of family migration. Accordingly, a Dutch administrative court ruling on the standstill clause in 2011<sup>70</sup> has led the government to exempt incoming Turkish spouses from the pre-departure integration requirement. Finally, even the rights of non-moving European citizens, might be strengthened by the ECJ in the future. In the recent *Zambrano* case (Case C-34/09) the judges implied that Union citizens who had never exercised their right to free movement could also access EU citizenship rights. It thus even seems possible that the ECJ will substantially expand non-moving citizens' possibilities to claim family migration rights based on EU citizenship rights in the future.

---

<sup>67</sup> COM(2011) 735 final. Responses to the Green Paper consultation are available at: [http://ec.europa.eu/home-affairs/news/consulting\\_public/consulting\\_0023\\_en.htm](http://ec.europa.eu/home-affairs/news/consulting_public/consulting_0023_en.htm).

<sup>68</sup> BT-Drs. 16/12013 18 February 2009, p. 8; TK 31884 (546), 10 March 2009.

<sup>69</sup> ECJ, Case C-92/07, *European Commission v. Kingdom of the Netherlands*, judgement of 29 April 2010; ECJ, Joined Cases C-300/09 and C-301/09, *Staatssecretaris van Justitie v. F. Toprak and I. Oguz*, Judgement of the Court (Second Chamber), 9 December 2010.

<sup>70</sup> Centrale Raad van Beroep, LJN: BR4959, 10/5248 INBURG + 10/5249 INBURG + 10/6123 INBURG + 10/6124 INBURG, 16 August 2011.

While at the time of its adoption, the Family Reunification Directive was criticised by NGOs and academics for staying far behind the ambitious goals of the Tampere program to establish a strong code of family migration rights for TCNs, it currently provides a minimum threshold of rights protection that, for instance, Dutch politicians intent on further restriction cannot erode.

In contrast to the predictions of earlier work on the Europeanisation of migration policies, which focused on the possibilities for restriction-minded national executives to escape domestic liberal constraints by shifting decision-making to the EU level, recent developments in the field of family migration reveal new, supranationally-driven dynamics of Europeanisation which constrain rather than enable national governments. EU law and its interpretation by the Commission and ECJ are increasingly hampering restriction-minded national governments by protecting family migration rights. Thus, the 'Fortress Europe' dynamics dominant in the 1990s have now been complemented with new Europeanisation dynamics that tend towards a 'Europe of Rights'.

## **5. Conclusion**

This paper explored to which extent various Europeanisation processes triggered by the introduction of the 2003 Family Reunification Directive can offer explanations for the recent restrictive turn of family migration policies in France, Germany, and the Netherlands.

In order to answer this question, we have critically engaged with existing literature on Europeanisation. We contend that the common analytical distinction between 'horizontal' and 'vertical' Europeanisation falsely assumes first that EU policies are either binding or non-binding, and second that transfer and learning among Member States only occur in non-binding policy contexts. The implementation

of the Family Reunification Directive shows that binding EU law which contains non-binding clauses may trigger voluntary processes of transfer among Member States. Therefore, we deploy an alternative, actor-centred framework of analysis which distinguishes between Member-State-driven and supranationally-driven dynamics of Europeanisation. Our analysis shows that both types of dynamics may occur in parallel as a result of a single EU policy instrument.

Existing literature on the Europeanisation of migration policy assumes that Europeanisation is purely Member-State-driven and that it is enabling for national governments, as they are assumed to shift to the EU level to avoid domestic constraints. However, we observe that in negotiating the Family Reunification Directive, national governments sought not to enlarge their room for manoeuvre, but to change as little as possible to existing policies or policy plans.

We did however observe Member-State-driven Europeanisation dynamics of a new and different kind. While the norms laid down in the Directive were meant to guarantee a minimum level of rights, French, German, and Dutch politicians presented convergence towards these minimum norms as a desirable form of European harmonisation. Thus, the Directive indirectly contributed to a race to the bottom among Member States. Also, our analysis showed that interaction, inspiration, exchange of information and referencing of each other's policies among Member States played a major role in the restrictive turn of family migration policies in France, Germany and the Netherlands. In all three countries, references to parallel developments in neighbouring EU states were an important part of the political legitimisation of restrictive family migration policies. Thus, Member-State-driven dynamics of Europeanisation enabled Member States to justify restrictive reform.

On the other hand, we observe increasingly significant supranationally-driven dynamics of Europeanisation. Since the Treaty of Amsterdam, power in the policy-making process has partly shifted from national governments to EU institutions, which are asserting themselves as strong protectors of family migration rights. By

expansively interpreting the family migration norms codified in the Family Reunification Directive, the Commission and the ECJ have taken an ever stronger stance against all-too harsh instances of family migration restriction.

Our cases are specific, in that French, Dutch, and German governments' policy preferences diverge from the positions adopted by supranational institutions. Only in such cases are supranationally-driven Europeanisation dynamics likely to constrain national governments. In cases where Member State governments' preferences converge with the preferences of supranational institutions, supranationally-driven Europeanisation may also be enabling for national governments. Further research, preferably also in other policy fields, would allow for refining and strengthening our actor-centred analytical approach to Europeanisation.

This analytical approach allows us to identify the multiple and contradictory dynamics of Europeanisation triggered by the EU Family Reunification Directive. It allows us to go beyond both overly pessimistic accounts focusing on 'Fortress Europe' and overly optimistic accounts of a 'Europe of Rights'. The introduction of EU law has created more opportunities for Member States to exchange and justify restrictive policy practices. However, it has also empowered supranational institutions such as the Commission and ECJ to maintain a minimum level of rights protection and thus limit restrictive reform. Europeanisation has both facilitated and constrained the restrictive turn in family migration policies in France, Germany, and the Netherlands.