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Family Reunification in Germany, Netherlands and the EU since 2000: Reciprocal Influence and the Role of National and EU Actors

Kees Groenendijk & Tineke Strik*

I. Introduction: Klaus Barwig and Europe

Klaus Barwig, as father and custodian of the “Hohenheimer Tage zum Ausländerrecht”, always had an open eye for developments outside Germany. He invited participants and speakers from neighbouring countries, even if they were not German speakers. We both learned a lot about the German policies and case-law, but also learned to speak (not write) German in public in Hohenheim. Klaus stimulated young students and researchers from other European countries to participate in the Network Migrationsrecht, the next generation of immigration law experts he nurtured from its inception. Klaus also had an early eye for the growing relevance of EU migration law for the legal practice in Germany and other EU states. Our contribution reflects the European perspective in the activities of Klaus: how does the law and practice regarding family reunification in Germany and the Netherlands influence developments in the other state since the start of the negotiations on the EU Family Reunification Directive in 2000?

I.1 European Harmonization and Mutual Influence

Since the beginning of this century, the European Union has been working towards common rules on legal migration and a European Common Asylum System. Now, seventeen years later, the process of harmonization has been strengthened in two ways: first, many asylum directives have been revised with a view to further harmonization and second, the Court of Justice has developed case-law which sets clear limits and obligations for Member States while applying the directives and regulations. The directive 2003/86 on the right to family reunification, like most other directives on legal migration, has not been subject to a review process. However, the directive, the case law of the CJEU on its interpretation as well as the guidelines for its application released by the Commission in 2014, may have contributed to a further convergence of national family reunification rules in the Member States.¹

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1 CJEU, C-540/03 (*Parliament against Council*); CJEU, C-578/08 (*Chakroun*); C-153/14 (K. and A.); C-558/14 (*Khachab*); Guidelines on the Application of the Family Reunification Directive, COM (2014) 210, 3 April 2014; K. Groenendijk et al., *The Family Reunification Directive in EU Member States: the first year of implementation*, Nijmegen: Radboud University, Centre for Migration

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These types of norm-setting have influenced the national policies merely by limiting the national discretion. Member States within the margins allowed by the Family Reunification Directive on purpose or unconsciously influence national political choices of other Member States. This mutual influence can take place through different channels and at different stages of the harmonization process. In our contribution, this process of mutual influence is explored and analysed with regard to Germany and the Netherlands. One of the sources of this article is the dissertation of Tineke Strik, concerning the decision making process and the implementation of the Family Reunification Directive and the Asylum Procedure Directive, with a focus on the policies and positions of Germany and the Netherlands.² For her study, Strik interviewed policy makers, negotiators and other actors in Germany, the Netherlands and Brussels. In this article, we first investigate the possible channels for this mutual influence. Secondly, we look for the issues where this mutual influence between the two neighbouring states actually occurred. Thirdly, we try to describe the relevant processes in more detail in a case study on the German language test and the Dutch integration test abroad. In the final part, we draw some more general conclusions.

II. Channels of Influence

II.1 During the Negotiations on the Directive

The first stage of mutual influence concerns the negotiation process, during which Member States tried to insert their national rules and policy plans in the Family Reunification Directive. Germany and the Netherlands, like other Member States, initially only aimed for the preservation of their national legislation. The formal aim of harmonisation was considered as a desirable effect, but not as an independent ambition. In the course of the negotiations, both states increasingly also aimed at preserving national sovereignty with a view to shaping their family reunification policy at their discretion. We identify three reasons for this change of emphasis. First, the proposals of other delegations inspired them to instigate policy changes in their own Member State. Second, the awareness of the binding character of the directives grew among the delegations, which motivated them to make several clauses in the directive more permissive. Finally, the long duration of the negotiations led to new political plans and aspirations arising at home, as a result of changes of government or new national debates and plans. In the Netherlands, the right-wing coalition Balkenende I (CDA, VVD, LPF) announced restrictive measures on family reuni-

Law 2007; Odysseus Academic Network, *Conformity checking of the transposition by Member States of 10 EC directives in the sector of Asylum and Immigration*, Brussels: European Commission 2007; Y. Pascouau & H. Labayle, *Conditions for family reunification under strain*, Brussels: European Policy Centre 2011. See also the recent EMN comparative report, *Family Reunification for Third Country Nationals in the EU Member States and Norway: national practices*, Brussels: European Commission 2017.

2 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische uitgevers 2011.

fication in its coalition agreement of 2002, which forced the Dutch delegation in Brussels to change its position and to bring in new proposals at a relatively late stage of the negotiations. In Germany, the report of the Zuwanderungskommission presented in July 2001 as well as the legislative proposal for the *Zuwanderungsgesetz* submitted by the government to the Bundestag in November 2001, made the German delegation even more reluctant to agree on any issue out of fear of reducing the room the discretion of the national legislator.³

As legal safeguards for asylum seekers or migrants create obligations for Member States and thus limit their sovereignty, Germany and Netherlands like most other Member States aimed at lowering the proposed level of protection and maintaining discretion to adapt their legislation to a minimum level.

To this end, they submitted many amendments to the Commission's proposal, frequently proposing to delete provisions, weaken the text from shall- to may-clauses or to add derogation clauses.⁴ Most delegations applied the non-intervention principle, taking a neutral position regarding proposals from other delegations lowering the standards or widening national discretion. The negotiation table thus transformed into a 'market of optional provisions', where delegations mutually supported each other's proposals.

Both Germany and the Netherlands were successful in getting their proposed amendments accepted, although they used different strategies.⁵ The German delegation benefitted from its negotiation weight at all negotiation levels, from the working group, to the ministerial level, using a lot of speaking time and displaying in the eyes of other delegations a rather surly and intimidating attitude. For more than a year, the delegation blocked the negotiations and was unreceptive to proposals from the Commission or the Presidency. Although this often led to an isolated position, the political weight of Germany finally resulted in acceptance of its objections and proposals. The German delegation could afford to persevere in its resistance until their text proposal was accepted in full. This was important to Germany, because it needed the certainty that the national rules of the *Zuwanderungsgesetz* under preparation would fit within the directives in order to convince governments of the *Länder*, which were co-responsible for the implementation of that legislation.

The Dutch delegation realised it had to compensate its relatively light political weight in order to be successful. As it was more dependent on the support of other Member States, the Dutch delegation frequently organised bilateral consultations and invested in its personal relations with other negotiators. The Dutch negotiators

3 R. Süsmuth et al., *Zuwanderung gestalten, Integration fördern*, Bericht der Unabhängigen Kommission 'Zuwanderung', Berlin: Bundesministerium des Innern 2001; *Entwurf eines Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*, BT-Drs. 14/7387 und BT-Drs. 14/7987.

4 C. Hauschild, 'Neues europäisches Einwanderungsrecht: Das Recht auf Familienzusammenführung', *ZAR* 2003: 266-273. For an analysis of all factors determining the negotiations result, see T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische uitgevers 2011, Chapter 9.

5 See also A. Walter, *Familienzusammenführung in Europa*, Baden-Baden: Nomos 2009.

also bolstered their opportunities to influence the directives by acting as an expert or a mediator, or by making the German delegation present or defend a proposal. The Dutch had to content themselves with compromises more often than the German delegation, but found a solution by interpreting the formulation in a way that did not require adaptation of its national legislation.⁶ It accordingly accepted the risk that this interpretation would be overruled by a Dutch court or the CJEU at a later stage.

The strategy of mutual support by the national delegations for restrictive amendments resulted in a more permissive character of the directives. A number of precise requirements were replaced by optional provisions, including references to the national system or international obligations or by the obligation to make national rules on certain issues.⁷ The Family Reunification Directive furthermore includes a number of derogation clauses and many vague and open formulations, leaving Member States room for interpretation. A number of issues were deleted from the directives and some provisions were transposed to the preamble. As a result of these active interventions by Member States, the Family Reunification Directive now mirrors many elements of national legislation, which Member States are allowed or even obliged to apply. In this way, the Europeanisation process led to a mutual influence of the national legislation on family reunification, even though the origin of the clauses may not always be clear. However, the directive essentially reflects the national legislation of northern Member States: the southern Member States were relatively passive in their involvement as their legislation on migration was not yet that developed or detailed, and the eastern Member States did not take part in the negotiations, which took place before their accession date.

Apart from this more indirect influence, the process of Europeanisation offered Germany and the Netherlands many avenues to become mutually inspired by their national policies. During the negotiation process, the national delegations met and exchanged views and information. While trying to get support for their amendments, they explained why they had or wanted this policy and how it worked or would work. Especially during the last stage of the negotiations on the Family Reunification Directive, Germany and the Netherlands showed mutual interest in their policies, as they both looked for ways to make the national family reunification rules more restrictive.

II.2. After Adoption of the Directive

After adoption, Member States used the transposition by another state as a source of inspiration. As the Netherlands partially transposed the Family Reunification Di-

6 K. Groenendijk & P. Minderhoud, 'De Nederlandse invloed op nieuwe Europese regels betreffende migratie en asiel', in: W. Asbeek Brusse, D. Broeders & R. Griffiths, *Immigratie en asiel in Europa. Een lange weg naar gemeenschappelijkheid?*, Utrecht: Lemma 2004, p. 137-161.

7 Ph. De Bruycker, 'Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile', in: F. Julien-Lafferrière, H. Labayle & Ö. Edström (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Brussels: Réseau Odysseus Network 2005, p. 54-76.

rective already one year after adoption,⁸ the German government made a thorough assessment of the way the Netherlands had implemented the optional clauses of the directive. The Dutch government actively advocated for the export of their policies, in order to gain support from other Member States during conformity discussions with the Commission. The German Ministry of Interior was in favour of adopting parts of the Dutch implementation and used the Dutch legislation as an argument to overcome hesitations of the Ministry of Justice about the constitutionality of the proposed implementation. As the Netherlands is a constitutional state, the implementing act should thus be in line with the rule of law, was the line of reasoning of the Ministry of Interior in Berlin.⁹

Also after the transposition stage, national civil servants exchanged information on their policies during the so-called contact-committees, convened by the European Commission in Brussels. The Commission organized these meetings to promote a harmonized and correct application of the directive. However, officials at those meetings also gained new ideas on how to restrict their family reunification policies. The Dutch government in 2010-2012 actively looked for national examples to restrict family reunification within the limits of the directive, after the Commission had refused to present a proposal to review the directive. This refusal had blocked the Dutch aspiration to introduce an education requirement and an age-limit of 24 years for spouses, both clearly incompatible with Directive 2003/86. During its assessment of other restricting measures such as an accommodation requirement, the Dutch government closely looked at German practices as well.¹⁰ These types of mutual inspiration also occurred at the ministerial level, during Council Meetings or bilateral meetings, but also during discussions and exchanges within the European political parties.

II.3 Case Law as Channel of Mutual Influence

Another channel, through which national policies of Member State can mutually influence each other, is the case law on the Family Reunification Directive, which has led to a clear standard setting by the Court of Justice on the interpretation of the directive and the way Member States have to apply its provisions. Through these judgements, which merely follow from a specific question of interpretation or a conformity issue in one Member State, policies and legislation of other Member States are affected as well. This is for instance the case with the *Chakroun* judgement, where the Court of Justice made clear that on the basis of the definition of the term family reunification in the directive, Member States are not allowed to make a distinction between (the rules for) family formation and family reunifica-

8 *Staatsblad* 2004, nr. 496, 12 October 2004.

9 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische uitgevers 2011, p. 163.

10 *Kamerstukken II* 2009-2010, 32 175, nr. 1; *Kamerstukken II* 2011-2012, 32 175, nr. 32, with attachment.

tion.¹¹ With the implementation of the directive, the German legislator had diminished this distinction by reducing the waiting period for family formation from five to two years, in line with Article 8 of the directive, with the condition that the residence permit is renewable in view of the purpose of residence.¹² With this implementation, the German legislator still maintained a different treatment of formation and reunification in two ways, as for reunification only one year of residence is required and no additional condition on the prospect of residence applies. Through the *Chakroun* case, the difference in treatment between family reunification and family formation in the Netherlands was subject to a judicial debate that ended up in Luxemburg. We now know from the answer of the Court of Justice that the relevant German rules do not comply with the directive, even though this difference in treatment was not questioned during or after the German implementation.

The other element of the *Chakroun* judgement, the level of the income requirement, has had an impact on the German legislation as well. Two years before the CJEU judgment in *Chakroun*, the *Bundesverwaltungsgericht* had decided that only in exceptional, atypical circumstances, there could be very weighty reasons to derogate from the income requirement.¹³ Eight months later the same court confirmed its judgement, considering that the law does not grant any discretion to the immigration authorities to derogate from the legal income requirement. It was only up to the national court to assess if a derogation from the rule was justified, in the light of Article 6 GG or Article 8 EMRK.¹⁴ The *Bundesverwaltungsgericht* referred to the income requirement of Article 7 (1) of the directive, but not to the obligation of an individual assessment of Article 17. That the *Bundesverwaltungsgericht*, three years after the first CJEU judgement on the directive, had reduced instead of enlarged the room for an individual assessment, was heavily criticised in Germany.¹⁵ The arguments for this criticism were reflected in the *Chakroun* judgement one year later.¹⁶ So even without a reference from a German court or an infringement procedure against Germany, the German legislation had to create more discretion for the individual assessment of whether sufficient income was available, because the Dutch legislation provoked a referral by a Dutch court and a decision of the CJEU. The referral by the Dutch court was triggered by the critical remarks on the Dutch

11 CJEU, C-578/08 (*Chakroun*), paragraph 59 and 62. See Article 2 sub d Directive 2003/86 for the definition.

12 See § 30 paragraph 3, sub d AufenthaltG.

13 BVerwG, 1 C 32.07, paragraph 27.

14 BVerwG, 1 C 3.08, paragraphs 10-14.

15 K. Dienelt, *BVerwG: Versagung des Ehegattennachzugs bei fehlender Sicherung des Lebensunterhalts mit Anmerkung*, at: www.migrationsrecht.net; K. Dienelt, *Das Bundesverwaltungsgericht versagt Familiennachzug wegen fehlender Lebensunterhaltssicherung*, at: www.migrationsrecht.net.

16 K. Dienelt, *EuGH legt Anforderungen an die Lebensunterhaltssicherung beim Familiennachzug fest- Unvereinbarkeit mit den deutschen Vorgaben im AufenthaltG*, at: www.migrationsrecht.net.

income requirement in the 2008 Commission's report on the application of the directive in Member States.¹⁷

II.4 The Directive is Binding Law After All

These examples illustrate that the Family Reunification Directive also had its impact on the national policies of the northern Member States, despite their (perceived) successful negotiations. Transposition studies show that the directive has both strengthened and weakened the right to family reunification, but that the number of liberalisations outweigh the restrictions.¹⁸ Especially in Member States where the national rules on family reunification were vague, offering broad discretion to the national authorities, the directive led to the codification of the right to family reunification in national law. This strengthening effect becomes clear in comparison with Member States who are not bound by the directive: an interdisciplinary study on family reunification policies across six EU Member States shows that the requirements in Denmark, Ireland and the United Kingdom are clearly exceeding the limits set by the Directive.¹⁹ Denmark requires an age-limit of 24 years for both spouses, an integration assessment for children who travel to their parent(s) residing in Denmark (if they travel later than two years after the parent became entitled to family reunification) and family reunification may be refused if the common ties of the spouses with another country prevail over their ties with Denmark.²⁰ The income requirements in Ireland and the UK are significantly higher than those in the Member States bound by the directive.²¹ In the UK, very high fees for family reunification have to be paid.²² Some governments bound by the directive envisaged the same policy measures, but were constrained by the directive. For those countries, the directive meant that the *race to the bottom* was stopped by its minimum standards.²³ Within the limits of the Family Reunification Directive however, Member

17 COM(2008) 610 of 8 October 2008, p. 7, published 3 months before the reference in *Chakroun*.

18 K. Groenendijk et al., *The Family Reunification Directive in EU Member States: the first year of implementation*, Nijmegen: Radboud University, Centre for Migration Law 2007; Odysseus Academic Network, *Conformity checking of the transposition by Member States of 10 EC directives in the sector of Asylum and Immigration*, Brussels European Commission 2007; Y. Pascouau & H. Labayle, *Conditions for family reunification under strain*, Brussels: European Commission 2011.

19 T. Strik, B. de Hart & E. Nissen, *Family Reunification: a barrier or facilitator of integration? A comparative study*, Nijmegen: Wolf Legal Publishers 2013.

20 See for the European case-law on the Danish policies ECtHR of 24 May 2016, *Biao v Denmark*, application no. 38590/10 on the compliance with Article 8 and 14 ECHR; CJEU 12 April 2016, *Caner Genc v Integrationsministeriet*, C-561/14 on the compliance with the standstill clause of Decision no. 1/80, EEC-Turkey Association Agreement.

21 See H. Becker, C. Cosgrave & M. Labor, *Family Reunification: a barrier or facilitator of integration? Country Report Ireland*, Dublin: Immigrant Council of Ireland 2013, and E. Sibley, E. Fennel & N. Mole, *Family Reunification requirements: a barrier or facilitator of integration? United Kingdom Summary Report*, London: Aire Centre 2013.

22 M. Gower & T. McGuinness, *The financial (minimum income) requirement for partner visas*, Research briefing papers SN06724, London: House of Commons Library 2017.

23 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische uitgevers 2011, para 10.2.1.

States have used their discretion to introduce restrictive measures. Their move towards the bottom, de facto leads to a harmonisation at the level of the minimum standards set by the directive.²⁴

The developing case law on the Family Reunification Directive however, contributes to a further limitation of the national discretion and the rise of the minimum standards, as the Court of Justice imposes a strict interpretation of the optional clauses.²⁵ This trend has been fuelled since lawyers and judges became acquainted with European Migration Law and its implications, and national courts started submitting requests for a preliminary ruling from the Court of Justice. One important implication of this case law is that the directive not only affects national policymaking, but also the decision-making by immigration authorities in individual cases. The Union law requirement of conformity with the proportionality principle requires assessing all individual interests and circumstances in the light of the EU Charter of Fundamental Rights and the other principles of Union Law. This implied the abolishment of a standardised decisionmaking system with a more or less automatic rejection in case not all requirements are fully met. Furthermore, since the CJEU case law on the directive, a marginal judicial scrutiny is no longer sufficient: national judges are required to do a full judicial review and scrutinize the merits and the facts of a case.²⁶ These effects confirm the assumption of migration scholars that “policy makers (...) have lost power to the courts”.²⁷

Therefore, despite the national reflexes described previously, the norms of the Family Reunification Directive have undoubtedly strengthened the legal safeguards for third country nationals who want to reunite with their family members. The Family Reunification Directive has, unlike art. 8 ECHR, established a subjective right to family reunification. This limits the margin of appreciation of the Member States while applying the permitted conditions for admission, withdrawal or (non-) renewal. Furthermore, the legal position of admitted family members had not been laid down in such a concrete manner in other European or international instruments before. Moreover, with the adoption of the directive, family reunification legislation has become part of the Union law. As courts interpret the norms within the framework of European Union law, the textual compromises between national delegations may have a more far-reaching or binding meaning than the negotiators had in mind.

24 See f.i. L. Block & S.A. Bonjour, ‘Fortress Europe or Europe of Rights? The Europeanisation of family migration policies in France, Germany and the Netherlands’, 2013 *European Journal of Migration and Law* 15 (2): 203-224.

25 CJEU, C-578/08 (*Chakroun*), paragraph 43.

26 COM(2014)210, paragraph 7.5.

27 S. Bonjour, ‘The Power and Morals of Policymakers. Reassessing the Control Gap Debate’, 2011 *The International Migration Review* 45(1): 89-122; S. Bonjour, ‘Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany’, 2016 *Law & Policy* 38 (4): 328-348; L. Kavar, *Contesting immigration Policy in Court. Legal activism and its radiating effects in the United States and France*, Cambridge: Cambridge University Press 2015.

III. Which issues?

There are several similarities in the transposition of the directive by the Dutch and German governments. In both countries the legislator strengthened the rights to family reunification as a result of the directive and was restrained from introducing certain restrictions, proposed by right-wing parties (in the Netherlands) or some *Länder* (in Germany). We will highlight three issues where the mutual influence of the governments became clear: the age-limit, the language requirement and the time limit for applications by refugees.

III.1 Age-limit

As previously mentioned, the Dutch government had already transposed the directive in 2004, together with the implementation of certain elements of the coalition agreement. Two of these elements concerned restrictions on family formation, namely the rise of the income requirement from 100 to 120 per cent of the national minimum wage and raising the age-limit from 18 to 21 years. The Dutch government argued that these restrictions would bring both spouses in a more favourable starting position, and therefore be beneficial to their integration. As this proposal was part of a coalition agreement, which was supported by a majority of the parliament, it was only contested by a few left-wing opposition parties. The criticism of scholars that the changes were incompatible with the directive was therefore hardly taken into account.

The officials of the German Ministry of Interior had supported the Netherlands in creating this possibility in the directive, and as they knew their minister's preference for restrictions, they proposed to adopt this age-limit. The ministers of interior of the *Länder* already advocated the same age-limit at their *Innenministerkonferenz* of 2005. As the *Länder* were represented in the German delegation during the negotiations on the directive, they were well informed about the proposals and policies of other Member States. CDU Minister of Interior Schäuble incorporated this idea in his legislative proposal, with the argument that the age-limit, combined with a requirement of knowledge of the German language before admission, would prevent young migrants from arranged or forced marriages and would promote their emancipation and integration.²⁸ The age-limit however was heavily criticized by the Ministry of Justice and by coalition partner SPD, as it would violate the constitutional right to family life, as enshrined in Article 6 of the German Constitution. Two experts were asked for their opinion, but the expert requested by CDU/CSU concluded that the proposal was constitutional, while the expert requested by the SPD concluded it was not.²⁹ Finally, in the political compromise between the two coalition

28 Referentenentwurf BMI, 3 January 2006, www.fluechtlingsrat-nrw.de/2256.

29 Ch. Hillgruber, 'Mindestalter und sprachliche Integrationsvorleistung-verfassungsgemäße Voraussetzungen des Ehegattennachzugs?', ZAR 2006: 304-317; Th. Kingreen, 'Verfassungsfragen des Ehegatten- und Familiennachzugs im Aufenthaltsrecht', ZAR 2007: 13-20. See also L. Block, *Policy Frames on Spousal Migration in Germany: Regulating Membership, Regulating the Fami-*

parties, minister Schäuble preferred to introduce the language requirement, which was equally contested, rather than the age-limit. The age-limit that was finally introduced, was therefore set at 18 years, with a possibility for exemptions in case of hardship.³⁰

III.2 Language Requirement

The introduction of knowledge of the language as a condition for admission was also based on the Dutch legislation. Germany had supported the Netherlands in creating room for this requirement in the directive. The German delegation had only the intention to guarantee that Germany could maintain its integration requirement after admission, but it was aware of the intention of the Dutch delegation to apply an integration test abroad. After adoption of the directive, the Dutch civil servants actively approached their German colleagues to promote the new Dutch legislation on integration requirements. Although this new requirement was just as sensitive and contested as the age-limit, the two coalition parties agreed to introduce the language requirement in their implementation legislation. According to respondents, the SPD decided to accept the test in exchange for the *Bleiberechtsregelung*, with the idea that courts would probably hold that the language requirement was unconstitutional. In the third part of this article, we will take the language or integration test abroad as a case study for a more in-depth analysis of the mutual influence in family reunification policies.

III.3 Time Limit for Refugees

The directive leaves Member States the option of introducing a threemonth time limit for refugees to apply for family reunification after the granting of refugee status.³¹ If this time limit is exceeded, Member States are allowed to require that the refugee fulfills the income and housing requirements of Article 7(1) of the directive. This time limit had been successfully advocated by the Dutch government. Although the Netherlands was the only Member State applying such a time limit in their national law, the proposal was accepted by the Council.³²

At the time the directive was adopted, the German legislation had only recently, with the adoption of the *Zuwanderungsgesetz*, introduced the possibility for family reunification to refugees and subsidiary protected persons. Since then their family members were entitled to an *Aufenthaltserlaubnis*. The new law granted the right to family reunification to both holders of a permanent residence permit and migrants who hold a temporary status if there is a prospect of one more year legal

ly, Heidelberg: Springer 2016, for an analysis of the political debate on family reunification in Germany.

30 § 30 lit 2 AufenthG., Hinweise H IV, 1, paras 197 and 199.

31 Article 12(1) FRD.

32 In the meantime, fifteen EU Member States have applied the time-limit of three months, see the synthesis report European Migration Network, *Family reunification for third country nationals in the EU Member States and Norway: national practices*, Brussels: EMN 2017, para 4.5.

residence.³³ Previously, immigration authorities had discretion to waive the requirements on income and accommodation if refugees or subsidiary protected persons applied for family reunification. Since the directive became binding, they are obliged to do so.³⁴ Thus, the directive has strengthened the right to family reunification for refugees, but at the same time, the German government restricted it by adopting the time limit of three months, introduced at Dutch insistence in the directive.

During the preparation of the bill implementing directive 2003/86 and other directives, German officials were concerned about the feasibility of lodging the application in time and discussed the consequences of exceeding the time limit. However, granting the sponsor the possibility to submit the application was considered a sufficient guarantee, and the legislation does not provide for a hardship clause. From the Dutch practise, it appears that the time limit is exceeded in a limited number of cases, even if the sponsor is allowed to submit the application. Failures are often related to insufficient or incorrect advice of volunteers or professionals assisting refugees, combined with the refugee's limited knowledge of the Dutch language and rules. In 2016, a case about exceeding the application time limit was discussed before the highest Dutch administrative court in the light of the Family Reunification Directive. The Council of State decided to submit a question to the Court of Justice on the need for an individual assessment within the framework of the Directive and Union law if the time limit of Article 12 is exceeded.³⁵ The answer of the Court will also be relevant for Germany, as the German authorities apply the time limit strictly, just like their Dutch colleagues. Until now, the Dutch government had refused to follow the recommendation of the Advisory Committee on Migration Affairs to include a hardship clause in the legislation.³⁶ Considering its case law, the Court of Justice will probably repeat that Member States have to make an individual assessment of the concrete circumstances and interests (in the light of the Articles 7 and 24 of the EU Charter and the Union law principle of proportionality) in case the three-months requirement is exceeded with a few days or weeks.

In response to many complaints by the Dutch Refugee Council and lawyers about the disproportional harsh effects of a refusal in case of exceeding the time limit, the Dutch Secretary of State has proposed to prolong the legal time-limit to six months.³⁷ Although this new time limit may still lead to disproportional effects, it will offer more protection to the family unity. However, the initial Dutch three-months time limit maintains to be applied in fourteen other Member States, including Germany, as a 'transposition' of the directive.

33 § 30(1)(3)(e) AufenthG.

34 Richtlinienumsetzungsgesetz, Artikel 1, nr. 21: § 29(2)(2) AufenthG.

35 ABRvS 21 June 2017, ECLI:NL:RVS:2017:1609.

36 ACVZ, *Na de vlucht herenigd*, Den Haag: ACVZ 2014.

37 See the legislative proposal submitted to Parliament at 19 September 2016, *Kamerstukken II* 2016-2017, 34 544.

IV. Case Study: Language or Integration Test Abroad

Germany and the Netherlands were the first EU Member States requiring the passing of a language test as a condition for admission of family members. The Netherlands introduced a language and knowledge test abroad in 2006 and Germany introduced the German language test abroad in 2007. Austria and the UK are the only other Member States actually applying a language test as a condition for admission. In Denmark and France there was political pressure to follow the 'Dutch model', but for different reasons (costs in Denmark and the constitutional right to family life in France) that model was not adopted in the end.³⁸

IV.1 The German Model Pushed in the Netherlands

Germany made passing a German language test a precondition for the admission of Aussiedler in 1997 as part of a general policy to reduce the number of Aussiedler families admitted in Germany. According to the Süßmuth Kommission the test had 'an important filtering effect',³⁹ resulting in a 67 percent drop decrease of ethnic Germans coming to Germany within the first year. In 2000, fewer than half of the applicants for the status of ethnic German passed the language test.⁴⁰ In 2005, the language test requirement was extended to the non-German family members of Aussiedler.

In the Netherlands CDA politicians since 2000 argued for the introduction of language test abroad as way of starting the integration process already before entry.⁴¹ Dutch CDA politicians may well have heard from their CDU colleagues about the experiences with the German language test abroad at their regular meetings or during meetings on immigration policy.⁴² In 2002, the CDA mentioned this issue explicitly in its electoral programme. The issue was not mentioned in the coalition agreement of the short-lived CDA-VVD-LPF government. However, the Immigration Minister of the populist LPF party, the forerunner of the Party of Geert Wilders,

38 K. Groenendijk, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policies?', 2011 *European Journal of Migration and Law* (13): 1-30; T. Strik, A. Böcker, M. Luiten & R.van Oers, 'The Intec project: Integration and Naturalisation Tests: the new way to European Citizenship, a comparative research on the effects of integration and naturalization tests in nine Member States', synthesis report of 2010, in: Y. Pascouau & T. Strik (eds), *Which Integration for Migrants? The relation between the EU and its Member States*, Nijmegen: Wolf Legal Publishers 2010. For an overview of the national policies and their impact see T. Strik, *Integration tests: helping or hindering integration?*, Parliamentary Assembly Council of Europe, report doc. no. 13361, Strasbourg: Council of Europe 2013.

39 Süßmuth Kommission (Unabhängige Kommission Zuwanderung – Independent Commission on Immigration), *Zuwanderung gestalten, Integration Fördern*, Berlin: Bundesministerium des Innern 2001.

40 I. Michalowski, 'Integration Tests in Germany: A Communitarian Approach?', in: R. van Oers, E. Ersbøll & D. Kostakopoulou, *A Re-definition of Belonging? Language and Integration Tests in Europe*, Leiden/Boston: Brill 2010, p. 1185-1210.

41 S.A. Bonjour, *Grens en gezin, Beleidsvorming inzake gezinshereniging in Nederland 1955-2005*, Amsterdam: Aksant 2009, p. 262-263.

42 See e.g. *NRC* 7 June 2002.

supported this idea and under his responsibility, Dutch officials introduced the issue in Brussels.

IV.2 Negotiations in Brussels

In October 2002, during the late stages of the negotiations on the Family Reunification Directive, the Netherlands obtained support from Germany and Austria for an amendment to replace the non-discrimination clause in Article 7(2) of the proposal by a clause allowing Member States to require third-country family members to comply with integration measures in accordance with national law.⁴³ The Dutch government intended to oblige newcomers to follow integration tests before being allowed entry in the Netherlands. The German government at that time was only considering the introduction of the obligation for family members to attend German language courses after admission.⁴⁴ In the Council Working Group the amendment met with opposition from Belgium, France and Sweden. In December 2002, a motion by a CDA MP in favour of a pre-admission integration test for family migrants was adopted in the Second Chamber of the Dutch Parliament with the support of all major political parties. The Dutch delegation used this motion as an argument in the negotiations in Brussels. In the final phase of the negotiations at the beginning of 2003, the opposition of other member states was overcome. A sentence was added stipulating that integration measures could only be applied to the family members of refugees after they had been granted family reunification. This sentence later provided the basis for the argument that other family members could be required to comply with integration measures before admission.

IV.3 National Legislation Implementing the Family Reunification Directive

Only after the Netherlands had succeeded in getting the integration measures included in Article 7(2) of the directive, the issue was explicitly mentioned in the coalition agreement of the new centre-right government of May 2003.⁴⁵ The room for pre-entry tests had been created in Brussels, but realising this idea at home was another matter. After the adoption of the directive, it took several years to overcome the opposition against the introduction of the pre-entry tests. In 2005, the Dutch Minister for Immigration Verdonk visited the European Commission for a consultation on the compatibility with EU law of the bill introducing the integration exam abroad. The Commission in reply wrote to the minister that there was generally no problem of compatibility with Directive 2003/86 if in the application of Article 7(2) the proportionality principle and human rights would be respected. However, the Commission held that the new requirement could raise legal problems when applied to third-country national family members reuniting with nationals of other Member States resident in the Netherlands and to Turkish nationals considering the

43 Council document 13053/02 of 23 October 2001, p. 12.

44 T. Strik, *Besluitvorming over asiel- en migratierichtlijnen. De wisselwerking tussen nationaal en Europees niveau*, Den Haag: Boom Juridische uitgevers, p. 108-110.

45 *Kamerstukken II 2002-2003*, 28637, n. 19, p. 14.

standstill clauses in the EEC-Turkey association law. The Commission stressed that the Court of Justice would have the last word.⁴⁶ In the Netherlands the integration test abroad after a lot of opposition both in parliament, from NGOs and within the Ministry of Justice was introduced in 2006. During the debate in the Senate the social-democratic party PvdA referred to the German language test abroad for Aussiedler applying for admission on the basis of their German ethnic origin, hence serving a different aim than admission for family reunification. In Germany, the language test abroad was introduced in 2007 as part of the legislation implementing a series of EU migration and asylum directives. In those years the Dutch government repeatedly countered critical parliamentary questions about the integration test abroad by stating that other Member States, such as Denmark, Germany and France were following the 'Dutch model' or considering to do so.⁴⁷

In 2008, the issue of raising the level of the Dutch integration test abroad from A1minus to A1 was discussed in the Second Chamber of the Dutch Parliament. The responsible PvdA Minister in order to overcome opposition declared that she would explore the possibilities of involving the Goethe Institutes in offering Dutch language courses.⁴⁸ The Dutch government did and still today does not offer Dutch language courses for prospective immigrants abroad. Apparently, these explorations were not successful. The idea died a silent death.

IV.4 Influence through National Courts and the EU Court of Justice (*Imran Case Triggering the Debate*)

The first reference to the EU Court of Justice on the compatibility of the Dutch integration test abroad was made by the Aliens Chamber of the District Court in Zwolle in 2011 in the *Imran* case.⁴⁹ The case concerned a failed Afghan asylum seeker who, after many years of tolerated stay in the Netherlands, during the 2007 regularization campaign received a residence permit. After he managed to meet the income requirement (120 percent of the national minimum wage at that time) by working in two jobs, he asked for reunification with his wife and seven minor children who were living in Pakistan. At the Dutch embassy in New Delhi the children received a visa, but the mother was refused a visa because she had not passed the integration test abroad. On the detailed proposal of her lawyer in the appeal procedure, the District Court referred a series of questions on the compatibility of the refusal on this ground with Directive 2003/86 and with Articles 21 and 24 of the EU Charter of Fundamental Rights to the Court of Justice. The District Court also asked the CJEU to

46 Letter of the European Commission of 14 June 2005 to the Dutch minister, forwarded to both chambers of the Dutch Parliament by the minister, *Kamerstukken II* 2004-2005, 29700, no. 8 and *Kamerstukken I* 2004-2005, 29700, no. E.

47 *Kamerstukken II* 2007-2008, 31 268, nos. 1-2, p. 131 and reply to written questions *Kamerstukken II* 2007-2008, no. 2687 of 18 June 2008. See also *Aanh. Hand. EK* 2007-2008, no. 13 with written questions of 10 July 2008, replies received at 5 September 2008.

48 *Handelingen II*, 7 February 2008, p. 51-3726.

49 Rb Zwolle 31 maart 2011, AWB 10/9716, *JV* 2017/30, migratieweb ve11000798, annotation A.B. Terlouw.

deal with this case in the urgent procedure (PPU). The CJEU granted that request, which normally would have resulted in a judgment from the CJEU within three months. The European Commission in its written observations in this case concluded that a refusal of family reunification based solely on the ground that the spouse did not pass the integration test abroad, is non compatible with Article 7(2) of Directive 2003/86. After the Agent of the Dutch government convinced the Minister of Justice of the serious risk that the Court of Justice would come to a similar conclusion, the Afghan mother was granted a visa within a week after the Commission filed its conclusion. The Court of Justice then decided that there was no longer a need to answer the preliminary questions.⁵⁰ The statement by the European Commission in this case had effects both in the Netherlands and in Germany.

IV.5 Effects of the Commission's Position in *Imran* in Germany

In Germany, the written observations were translated in German and resulted within a month in parliamentary questions by a Member of the Bundestag about the compatibility of the German language test abroad with the directive. The German government in its answer referred to the judgment of the Bundesverwaltungsgericht (BVerwG) of 30 March 2010. In that judgment, the BVerwG held the German language test abroad to be compatible with the directive, three weeks after the CJEU judgment in *Chakroun*, the first reference concerning the directive. However, the BVerwG did not mention that important CJEU judgment. The German government in its answer stated that it agreed with the judgment of the BVerwG ("Die Bundesregierung teilt die in diesem Urteil zum Ausdruck kommende Rechtsauffassung des Bundesverwaltungsgerichts."), also without mentioning the *Chakroun* judgment of the CJEU.⁵¹ However, a few months later the BVerwG, after having read the observations of the European Commission, held that the issue of the compatibility of the language test abroad with Article 7(2) of Directive 2003/86 should be referred to the Court of Justice.⁵² The BVerwG could not make the reference itself in that case, because the Auswärtige Amt had granted the visa for the family member while the case was pending before the BVerwG. Thus, the court made its new position known in the decision on the costs in that case.

The hint of the BVerwG was understood by the Verwaltungsgericht Berlin, the only first instance court dealing with appeals in cases concerning visa in Germany. That court made three subsequent references to the CJEU on the compatibility with the standstill clause in the EEC-Turkey association law and with Article 7(2) of the directive. The first reference in October 2012 in the *Ayalti* case was withdrawn after a few months because the visa had been granted in the meantime.⁵³ In the second reference, made in February 2013 in the *Dogan* case, resulted in a judgment by the Court of Justice in 2014. The Court held the language test to be incompatible with

50 CJEU, C-155/11PPU (*Imran*), ECLI:EU:C:2011:387.

51 Questions by Mehmet Kilic (Greens), BT-Drs. 17/6712, nos. 11 and 12.

52 BVerwG 28 October 2011, 1 C 9.10, NVwZ 2012, 61.

53 CJEU, C-513/12 (*Decision Pres*), ECLI:EU:C:2013:210.

the standstill clause in Article 41 of the Additional Protocol to the EEC-Turkey Association Agreement, but did not answer the subsidiary question about the compatibility with Directive 2003/86.⁵⁴ In the third case, referred to Luxemburg three months after the *Dogan* judgment, the Berlin court repeated its question on Article 7(2). However, that reference in the *Oruche* case was withdrawn upon suggestion by the CJEU's Registrar, after the judgment of the CJEU in the *K&A* case on the Dutch integration test abroad.⁵⁵

Summaries of all three relevant judgments of the BVerwG on the German language test abroad were published in Dutch translation on Migratieweb, the specialized website for Dutch immigration lawyers.⁵⁶ The three references by the Verwaltungsgericht Berlin were made accessible in Dutch in the same way, using the translation provided by the Court of Justice on its website. These German judgments had relatively little effect in the Netherlands, due to a judgment of the highest Dutch court in social security matters. That court (Centrale Raad van Beroep) in 2011 held the obligation to pass the Dutch integration test after admission to be incompatible with the standstill clause and with the prohibition of discrimination on the ground of nationality in the EEC-Turkey association law.⁵⁷ According to the Dutch Aliens Act, Turkish nationals after that judgment automatically were exempt from the Dutch integration exam abroad as well.

IV.6 Effects of the Commission's Position in *Imran* in the Netherlands

In the Netherlands the position of the European Commission had clear effects in the case law. One of the District Courts explicitly held that it agreed with the opinion of the Commission on the incompatibility of the Dutch integration test abroad with Article 7(2) of the directive.⁵⁸ In the appeal filed by the government, the highest administrative court which in an earlier case summarily held that refusal of reunification for not having passed the exam was compatible with Article 5(5) of the Directive,⁵⁹ now had the choice between three options: also adopt the position expressed by the Commission, provide serious arguments why it did not agree with that opinion or make a reference to the EU Court of Justice. The court chose the last option, using as one its arguments that the Court of Justice in its *Dogan* judgment did not answer the question of the Verwaltungsgericht Berlin on Article 7(2) of Directive 2003/86.⁶⁰ This became the case *K&A* in Luxemburg. The CJEU judgment in *K&A* in the Netherlands resulted in a reduction of the costs of the integration exam abroad and in a reformulation and a clearly more serious and individual application

54 CJEU, C-138/13 (*Dogan*), ECLI:EU:C:2014: 2066.

55 CJEU, C-527/14 (*Decision Pres*), ECLI:EU:C:2015:599.

56 BVerwG 30 March 2010, 1 C 8.09, in the Netherlands: Migratieweb ve11000600, BVerwG 28 October 2011, 1 C 9.10, in the Netherlands: Migratieweb ve 11002774 and BVerwG 4 September 2012, 10 C 12.12, in the Netherlands: Migratieweb ve12001866.

57 CRvB 16 August 2011, ECLI:NL:CRVB:2011:BR4959.

58 Aliens Chamber District Court Den Bosch 23 November 2012, ECLI:NL:RSBGR: 2012:BY4171.

59 ABRvS 9 February 2009, ECLI:NL:RVS:2009:BH5761.

60 ABRvS 1 April 2014, ECLI:NL:RVS:2014:1196.

of the hardship clause.⁶¹ Other elements of the *K&A* judgment, such as the warning by the Court that the exam should not function as a selection mechanism, were taken less serious by the Dutch authorities. More than half of the applicants from certain countries of origin fail the test. After the testing method had been changed in 2015, the average pass rate has gone down from 66% to 57% for applicants who took the exam for the first time. For several nationalities, the pass rate was between 20 and 40%.⁶²

It is our impression that the effects of the *K&A* judgment in Germany so far are minimal, but still a point of dispute.⁶³ The Integrationsbeauftragte of the Federal Government in her report of December 2016 explicitly stated that the legislation on the German language test abroad in force since 2007 is incompatible with Union law ('Die Entscheidung zeigt aber auch, dass die seit 2007 geltende deutsche gesetzliche Regelung zum Spracherfordernis (§ 30 Abs. 1 Satz 1 Nr. 2 AufenthG) ohne Härtefallregelung unvereinbar mit EU-Recht war.'⁶⁴). This opinion was shared by the administrative appeals court competent to deal with visa cases and it was subject of an infringement procedure of the European Commission.

IV.7 Infringement Procedures Started by the European Commission

The Commission started three times a formal infringement procedure against *Germany* concerning the incorrect implementation of Directive 2003/86. In the first procedure in 2005, the Commission acted against the non-implementation of the directive. This case came before the Court of Justice in 2007, but was withdrawn by the Commission after the adoption of the Act implementing a series of EU migration and asylum instruments in the Aufenthaltsgesetz in that year.⁶⁵ The Commission started the second infringement procedure in 2013, when an informal Pilot begun in July 2012 with two series of questions on the actual application of Article 7(2) of the Directive in German legislation and practice did not result in satisfactory answers by the German government. This case was closed after two and a half years of correspondence and negotiations between the Commission and the German government.⁶⁶ The third case on the implementation of the *Dogan* judgment in Germany was started by the Commission again with an informal Pilot shortly after that CJEU judgement in 2014. When the reactions of the German government, that after several months it was still studying the meaning of the judgment, proved unsatisfactory, the Commission started a formal infringement procedure in 2015, con-

61 Letter of Minister of Social Affairs of 17 December 2015 to the Second Chamber, TK 32005, no. 8.

62 Ministry of Social Affairs, *Monitor basisexamen inburgering buitenland 2015-1*, Barneveld: Ministry of Social Affairs 2015.

63 See answers to parliamentary questions of Ulla Jelpke (Linke), BT 18/9651 of 16 September 2016 and of Sevim Dagdelen (Linke), BT-Drs. 18/10596, nr. 14 regarding a.o. the actual application of the hardship-clause and the costs of the courses.

64 BT-Drs. 18/10610, p. 282-284.

65 Infringement case 20050924 before the CJEU as case C-192/07, deleted from the Court's register by order of the President of the CJEU of 24 January 2008, ECLI:EU:C:2008:43.

66 Infringement case 20132009 closed on 19 November 2015.

sidering that Union requires the hardship clause not be in internal instructions (*Erlass*) but in regular legislation.⁶⁷ This view was shared by the Administrative Appeal Court Berlin-Brandenburg early in 2015.⁶⁸ In August 2015 a new hardship clause was introduced in the relevant legislative provision, § 30 I 3, 6 AufenthG, without any mention neither of the CJEU case law nor of the infringement procedure. The *Integrationsbeauftragte* considered that this new clause did not meet the standards required by the *K&A* judgment.⁶⁹ However, the Commission was satisfied and closed this infringement procedure in April 2017.

Against the *Netherlands*, the Commission started one formal infringement procedure on the untimely communication of the implementation of the Directive 2003/86 and several informal pilot procedures. The public debate on the implementation of the directive in the Netherlands was stimulated by the 2008 Commission's report on the implementation of the directive in Member States. In that report the Commission specified a series of conditions for integration measures before admission to be compatible with the directive. The Netherlands was not explicitly mentioned, but it was clear that this part of the report aimed at one or two Member States in particular, i.e. Germany and the Netherlands.⁷⁰ The Commission's report gave rise to several series of critical parliamentary questions by Dutch MPs.⁷¹ The Commission started its first Pilot regarding the Netherlands in November 2012 after the Dutch Refugee Council and the national organisation of Turkish immigrants IOT had filed complaints about the implementation of the Directive in the Netherlands.⁷² This Pilot concerned not only the Dutch integration tests abroad and its effect for illiterate family members, but also a range of other implementation issues considered problematic by the Commission, such as the high fees, the family reunification of refugees, the treatment of children during the interview after the visa applications and late applications. On several of these issues the rules or the practice in the Netherlands have been improved in recent years without any reference being made to the pressure exerted by the Commission. The Commission's pressure often coincided with pressure and actions by national institutions, such as the National Ombudsman, national courts and individual MPs. In 2015 the Commission asked the Dutch government how it had implemented the CJEU judgment in the *K&A* case on the integration test abroad.

There is no explicit relationship between the infringement procedures against the two Member States that first introduced the integration/ language test abroad. But there is an apparent implicit relationship. The Commission used the experience acquired in the discussions with one Member State in its discussions with the other

67 Infringement case 20154005, see Kleine Anfrage Ulla Jelpke (Linke) BT-Drs. 18/9651, no. 16 of 16 September 2016.

68 OVG Berlin-Brandenburg, ZAR 2015, 234.

69 See Report of December 2016, p. 283.

70 COM(2008) 610 of 8 October 2008, par. 4.3.4.

71 See e.g. the question by Tineke Strik (Green Party), *Aanh. Hand. EK 2008-2009*, nos. 1-2, written questions of 10 October, replies received at 4 December 2008.

72 The existence of this informal procedure became known through the answers to parliamentary questions of Schouw (D66) in June 2013, see *Aanh. Hand. TK 2002-2003*, no. 2562, point 4.

Member State. Some of the questions in the 2012 Pilot regarding the German language test abroad were based on experience with the Dutch integration test abroad. On the other hand, the position of the Commission on which integration measures abroad are compatible with Article 7(2) changed from a liberal stance in the Imran case in 2012, towards a more restrictive position in the Dogan case in 2014 and the *K&A* case in 2015, probably partly as a result of the changing political climate and partly of pressure from both Member States concerned.

IV.8 Little German Support for Dutch Efforts to Amend Directive 2003/86 and Directive 2004/38

In the coalition agreement of the right-wing minority government of VVD and CDA in power between 2010 and 2012, which depended for its majority in Parliament on the votes of Geert Wilders Party, the three parties announced to make the family reunification policy stricter on 17 points. When it became clear that most of these changes would be incompatible with directive 2003/86, the government decided to start a lobby for amending the directive. A position paper, proposing ten amendments of the directive, was published⁷³ and the Minister of Immigration visited (deleted: several) capitals of several Member States and gave interviews in the national press.⁷⁴ The minister reported positive reactions in Vienna and Prague but not in the capitals of major Member States. The European Commission reacted to the Dutch pressure by publishing in 2011 a Green Paper on the right to family reunification of thirdcountry nationals living in the EU and started a public consultation by formulating a series of questions to the Member States, NGOs and other stakeholders.⁷⁵ In their reactions several Member States stressed that integration was a national competence. Austria, Germany and a number of German Länder pleaded for an amendment of the Directive to explicitly allow for pre-entry measures, a desire that was fulfilled a few years later by the Court of Justice in the *K&A* judgment. The Netherlands was the only Member State proposing to allow revocation of residence permits when family members fail to meet integration conditions. Several Member States expressed a preference for less restrictive or non-compulsory integration measures.⁷⁶

The 2011 Dutch position paper also contained a proposal to amend Directive 2004/38 on the free movement of Union citizens in order to delete the right to family reunification with third-country family members of EU nationals from that directive and instead apply Directive 2003/86 to those family members. This pro-

73 Ministry of Interior, *The Dutch standpoint on EU migration policy*, Position Paper, The Hague: Ministry of Interior 2011, p. 8.

74 See Minister Leers in an interview in the *Frankfurter Allgemeine Zeitung* of 5 October 2011: "Wir müssen die Sache europäisch angehen. Es gibt immer noch 'Importbräute' und auch Menschen-schmuggel. Und es gibt noch viele Einwanderer aus der zweiten und dritten Generation, die jetzt ins Heiratsalter kommen."

75 COM(2011)735 of 15 November 2011.

76 European Commission, *Summary of stakeholder responses to the Green Paper on the right to family reunification of third-country nationals*, Brussels 11 May 2012, p. 11.

posal would have seriously reduced the right to family reunification of EU nationals. Implicitly, this proposal would have extended the possibility to require family members of nationals of other Member States to pass a language or integration test before being allowed to join their EU family member. That wish was expressed in political and administrative circles in Berlin and The Hague years ago. However, the issue was outside the scope of the Commission's Green Paper. The idea surprisingly returned on the agenda during the negotiations between the EU-27 and Cameron on the deal to prevent a Brexit concluded in the European Council in February 2016.⁷⁷ But the protection of the right to family reunification of EU nationals, resident in the UK after the Brexit was firmly embedded in the preparatory documents of the Commission for the negotiations that started in June 2017.⁷⁸ The departure of the UK will mean that a strong supporter for reducing the right to family reunification of Union citizens will no longer be present in the Council and that the Netherlands (and possibly Germany as well) will be more isolated in the EU on this issue. The two countries raised the issue of integration of EU nationals in the Council of Ministers in 2011 and organised a conference on this issue in Rotterdam in 2012.⁷⁹ Apparently, the two states did not receive much support for their views from other Member States so far.

V. Conclusion

The developments of national policies on family reunification clearly show that the Europeanisation has opened up more avenues for mutual influence between governments. The adoption of a directive is one source of convergence, but the many occasions for exchanges of information, experiences and views inherent to the Europeanisation process is most likely as important in bringing about convergence. The German and Dutch officials and politicians used these venues for cooperation to gain support for their policies and plans during the negotiations, and afterwards to learn about new restrictions and how to seek the limits of the directive. The case study on the language and integration requirement shows that this influence occurs in a dynamic and reciprocal process, but not only between state actors. National courts, lawyers, NGOs and members of parliament all influence the way their government applies the directive, and they also learn from their colleagues in the neighbouring country or in other Member States. Information about national policies, effects of policies, and case law in other Member States may serve as sources for advocacy, arguments for national courts, for controlling the government or filing complaints at the European Commission. This internal pressure may trigger EU Court of Justice judgments, and is needed afterwards to ensure compliance with those judgments. Practice shows that full compliance with the CJEU judgments does

77 See Annex VII to European Council conclusions of 18 and 19 February 2016, document EUCO 1/16, p. 35.

78 European Commission, Task Force for the Preparation and Conduct of the Negotiations with the UK under Article 50 TEU, Position paper 'Essential Principles on Citizens' Rights', Doc. no. TF50 (2017) 1/2 of 24 May 2017.

79 Council document 18296/11 of 12 December 2011.

not occur automatically, especially if the judgment concerns another Member State. So to ensure that the harmonization process of family reunification policies evolves within the framework of Union Law and the fundamental rights, sufficient checks and balances in that process are needed. This begs for more international channels of exchange for national and European actors involved in the right to family reunification. Furthermore, an intensified and interdisciplinary cooperation between migration scholars from different Member States contributes to comparative overviews, legal analyses and also information on effects of certain national measures, which should be taken into account while judging on their effectiveness. The “Hohenheimer Tage zum Ausländerrecht” bring all these actors together and therefore offer a unique venue for these exchanges and cooperation. We cannot overestimate how this contributes to the highly necessary checks and balances in the interplay between the European and national level. The network Klaus has founded in this way is solid and promises to be ever growing.