

### **“Good/bad” migrant families and their integration in the European Union<sup>1</sup>** **“Buenas/malas” familias migrantes y su integración en la Unión Europea**

Encarnación La Spina<sup>2</sup>

#### ABSTRACT

Family migration is one of the most important sources of human mobility across Europe. Directive 2003/86/EC has harmonized family reunification rules for third-country nationals in order to ensure family life and social integration in each Member State. However, the European family reunification have consistently developed measures to control or “refuse” indirectly a specific profile of unwanted families. Thus, this paper seeks to take a critical approach on the legal protection of migrant families, looking mainly at how several legal conditions promote an ideal model of “good family” as the only form of effective integration in the EU context.

*Keywords:* 1. family reunification, 2. integration, 3. family members, 4. European Union, 5. Member States

#### RESUMEN

La inmigración familiar es una de las fuentes más importantes de movilidad humana hacia Europa. La Directiva 2003/86/CE ha armonizado el régimen jurídico de la reagrupación familiar de los nacionales de terceros países para garantizar la vida familiar y la integración social en cada Estado Miembro. Sin embargo, se han desarrollado medidas para controlar o “rechazar” indirectamente un perfil específico de familias no deseadas. Por lo tanto, esta propuesta hace una aproximación crítica a la protección jurídica de las familias migrantes, analizando si ciertas condiciones promueven un modelo ideal de “buena familia” como la única forma de integración efectiva en el contexto de la UE.

*Palabras claves:* 1. reagrupación familiar, 2. integración, 3. miembros de la familia, 4. Unión Europea, 5. Estados Miembros.

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<sup>2</sup> University of Deusto, [elaspina@deusto.es](mailto:elaspina@deusto.es), ORCID 0000-0003-0423-0674



## INTRODUCTION

Despite family is conceived as the usual notes on universality and comprehensiveness, from a *stricto sensu* legal approach, the definition of family or families is an open concept in transition (Van Bueren, 1995, p. 733). Moreover it has no single meaning about what a family should be understood to be or how one is composed (Human Rights Committee, 1990a, p. 140; Human Rights Committee, 1990b, p. 149). UN documents promote a general consideration of the family being a natural and fundamental value of civil society (Grillo, 2008, p. 132; Suárez-Orozco & Suárez-Orozco, 2013, p. 283) but paradoxically is reserved an explicit definition for a particular family model: the “migrant family”. The International Convention on the Rights of Migrant Workers and their Families on 18th December 1990, circumscribes the families of documented migrants and describes family members in article 44.2 as “married spouses or two people who have a relationship which, in accordance with applicable law, produce effects equivalent to marriage along with their unmarried minor charge”. And, there is similar agreement on a regional European level where Member States of the Council of Europe and EU institutions (Stalford, 2002; Kofman, 2004) tend to treat the notion expressly in its nuclear form or in the strictest sense of Directive 2003/86/EC. This nuclear family paradigm (Mustasaari, 2015, p. 360) is imagined as modern, emancipated, and egalitarian in the EU Directive, in opposition to the “migrant” family which is associated with tradition, patriarchy, oppression, and even violence (Bonjour & de Hart, 2013; Van Walsum, 2008). Consequently, families affected by immigration control should have less choice in the organization of their personal lives in order to define those that are good and bad members for European and national interests. This negotiation of family reunification collides with a marked turn toward securitization and protection and converges with unified European migration policies that suggest a hardening line of immigration policy, and the deployment of liberal and repressive policies of immigration (Lo, 2015, p. 2675; Ruffer, 2011, p. 938).

The legal prevision of more (and more complex) admission conditions and overlapping legal regimes are governing family migration explain why the proportion of third-country nationals admitted for family reasons is around 47 percent of all immigration in the Netherlands and 60 percent in France. Whereas in Italy, Spain, and UK the recorded share of family-related migration is lower, reflecting the high proportion of irregular migrants who might be *de facto* reunified but do not have legal

status (Kraler, 2010; Mazzucato, Schans, Carls & Beauchemin, 2015). During the 1970s, while labour migration policy in Europe was registering a more restrictive turn, family reunification started to become a more important migration channel. Since then, the share of family-based migration flows has continued to increase. Today, overall in the EU, more than 440.000 first permits for family reasons were issued to TCNs (reuniting with a TCN sponsor) in the EU Member States plus Norway. The vast majority of the first permits for family reasons granted to TCNs in 2015 were issued by Germany, Italy, Spain, France, UK (EMN, 2016, pp. 47-88).

Migration policies do not describe family reunification as an immigration route that is open to families who simply decide to migrate and are allowed to enter. There is a right to family life but this is a privilege that is applied to a group of people whose entry is permitted because of a recognized familial relation to another person or people, whereby non-citizens who enter under the family route may be family members of settled migrants or EU nationals. They can also be dependent family members entering with workers who are only temporary residents. In contrast to the independence and self-sufficiency of the worker, dependence is perceived as a fundamental characteristic of family life. In this regard, the preservation of the conditions in host societies increasingly requires legal protection from outsiders who do not have these so-considered “right” values or who do not share all these values (Anderson, 2013, pp. 3-5).

Consequently, immigration law is a central organizing principle for understanding immigrant families’ composition and organization, and it has immediate implications for family members’ well being as well as longer-term implications for immigrant integration. A few European studies provide a glimpse into how immigration laws could affect family composition and how these policies, enforced in various European countries, appear to overemphasize the biological determinism of family, confined to a heteronormative and nuclear family grid (Enchautegui & Menjívar, 2015, p. 33-35). In this article I unveil the mechanisms embedded in European immigration laws that, far from contributing to reunite immigrant families, create conditions for keeping family members apart. My working premise is that the implementation of European family migration rules structure and restructure immigrant families by determining who is allowed to come in legally, and how many, and under what conditions.

My methodological strategy is focused on the legislative aspects of the

immigration system that contribute to *maintain* families separated for undetermined periods of time and hence affect the composition, structure, and organization of immigrant families. Firstly, I describe provisions in European immigration laws that I argue keep immigrant families separated and that affect the composition of such families. Secondly, I review the quantitative and qualitative literature. Many articles document the impact of recently introduced restrictive family reunification policies in different countries Canada, USA, UK, France, Netherlands and Scandinavian countries (Enchautegui & Menjívar, 2015; Bragg & Wong, 2016; Ambrosini, 2015, p. 443; Bonjour & Kraler, 2015, Glick, 2010; Faist, Fauser & Reisenauer, 2013; Fresnoza-Flot, 2015; Lo, 2015; Bech, Borevi, & Mouritsen, 2017).

I aim to focus on the scope of exclusion for “good/bad” migrant families in European family reunification rules under the Directive 2003/86/EC. Different family members can slip in and out of the community, especially concerning Islamic families. In 2014, between 15 and 20 million Muslims, a number that is expected to double by 2025, were already temporarily or permanently residing in Europe as family members, residents or citizens (Open Society Institute, 2010, p. 22). As a working hypothesis, I seek to explain how a defined proportion of family members are admitted and how the conditions for family reunification vary restrictively not only between the different states but also are increasingly stratified (Block, 2015, p. 1437; Scheweizer, 2015, pp. 2130-2135). These complex rules of belonging reflect the dominant and liberal conceptions of membership and produce logics of hierarchies creating “stronger” and “weaker” members with accordingly more or less rights and more or less possibilities of integration.

#### BACKGROUND TO EUROPEAN FAMILY REUNIFICATION RULES

Since 2003, common European immigration rules have been put in place to regulate the conditions to exercise the right to family reunification of third-country nationals on an EU level. The Amsterdam Treaty took effect on 1 May 1999, adding a new section IV, ‘Visa, asylum, immigration and other policies related to free movement of persons’, to the EC Treaty. Article 63(3)(a) of the EC Treaty states that the Council, acting unanimously by proposal of the Commission or on the initiative of a Member State and after consulting the European Parliament, within a period of five years from the entry into force of the Treaty of Amsterdam, shall adopt measures regarding the conditions for entry, residence and standard procedures for the issue by Member States of long-

term visas and residence permits, including those for the purpose of family reunification. Despite this Europeanization, family reunification has been a complex issue and there are three main categories of family in a European context according to the status of the sponsor.

The first category concerns family reunification of nationals from an EU Member State with third country nationals (i.e. nationals of countries that are not members of the EU). The rules applicable in this situation fall within the remit of Member States or some agreements between the European Economic Community and third countries, as concluded under Article 310 ETC, i.e. association Agreement between Turkey and the European Community that protects Turkish citizens against restrictive migration policies. The second category concerns family reunification of citizens of an EU Member State who have exercised their right to freedom of movement within the EU. This situation falls within the scope of Directive 2004/38/EC to provide a better definition of the status of family members. The Free Movements of Union Citizens Directive allows spouses, registered partners, couples who can attest to their durable relationship and children up to the age of 21 to join a Union citizen who has exercised his or her mobility rights. On the one hand, the application of a favourable regime requires a relationship with an EU citizen, including both blended families and those entirely composed of EU citizens. On the other hand, if EU citizens are moved or installed in another Member State, their wives/husbands and children under 21 years can live together in the territory of the second Member State. Likewise, the family members of the worker are also guaranteed access to employment and education in the host country on an equal rights basis. Consequently, Directive 2004/38/EC has simplified and strengthened the right to free movement and residence for Union citizens and their family members (European Commission, 2009) and has also included third country nationals as family members of EU citizens both due to successive legal changes and also to the broad interpretation by the European Court of Justice (Baheten Blaise Metock and others v. Minister for Justice, 2008; Gerardo Ruiz Zambrano against the Office national de l'emploi (ONEm), 2011; De Somer & Vink, 2015).

However, the third category concerns family reunification of third country nationals who are residing in a Member State that want their families, of third-country nationality, to join them. This general situation is covered by Directive 2003/86/EC on the conditions for exercising the right to family reunification of third-country nationals – as well as rights deriving from this status, and which has been embedded in EU rules

and has an impact on national rules and practices. Since the mid-2000s, European Member States have been obliged to transpose the Directive into their national legal systems. This means that they must, when required, adapt their rules to the requirements set out in the Directive, which has obliged some states to adopt new rules in the field of family reunification. Ultimately, the obligation to transpose Directive 2003/86/EC into law has served as a very strong lever to modify national rules, and to a certain extent, national policies in this regard (European Commission, 2012a; Groenendijk, 2011, pp. 5-15).

I focus on in the implementation of this latter Directive and the Green Paper on the Right to Family Reunification for TCNs residing legally in a Member State<sup>3</sup> (European Commission, 2011; European Commission, 2012b; EMN, 2016, p. 6). This Directive identifies particularly restrictive conditions for being eligible as a sponsor for family reunification; a valid residence permit of at least one year and reasonable prospects of obtaining the right of permanent residence (Article 3 (1)). Moreover, as regards the eligibility of family members, Article 4 (1) of the Directive requires Member States to authorize the entry and residence of the “nuclear” or “core” family, i.e. the sponsor’s spouse and any minor children belonging to the sponsor or spouse. Because Member States are free to decide whether to include other family members in their national legislation (Article 4 (3)). Although this is only a “may” clause, more than half of the Member States have chosen to include parents of the sponsor and/or his/her spouse. Moreover, the Directive 2003/86/EC establishes a set of material conditions that Member States may ask family reunification applicants to fulfil. For the purposes of this study, the main conditions in Articles 4, 7 and 8 have been targeted in particular: appropriate accommodation, medical insurance, stable and regular resources, and complies with integration measures. This last one was the most controversial and debated requirements because the Directive itself does not give any precise indication about what these integration measures should entail or how should they be applied, and

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<sup>3</sup>This paper does not cover conditions for the family reunification of refugees which is subject to specific, more favourable rules in Directive 2003/86/EC (Council of Europe Commissioner of Human Rights, 2017). Beneficiaries of subsidiary protection are not within the scope of application of the Directive, thereby falling under national law to extend to this group the favourable family reunification conditions they provide for refugees (Sales, 2016). Finally, Family members of highly skilled workers (holding an EU Blue Card), researchers and intra-corporate transferees enjoy more favourable conditions for family reunification laid down in other directives (in the Member States bounded by them).

they are only used by some Member States (Naime Dogan v. Bundesrepublik Deutschland, 2014, par. 37-38; Minister van Buitenlandse Zaken v. K and A, 2015).

## THE MAIN LEGAL CONSTRAINTS REQUIRED UNDER EUROPEAN REUNIFICATION RULES

According to Directive 2003/86/EC, the development of a family migration policy and legal procedures has become ever more restrictive through the tightening of the definitions of family, limiting those who can be joined by family members, and through measures ostensibly designed to prevent false and forced marriages (Spencer, 2011). Non-EU family reunion is relatively rare in the EU.<sup>4</sup> With very few exceptions, non-EU families have been more likely to reunite in countries with inclusive family reunion policies, such as the Nordic, Benelux and Southern European countries. Non-EU family reunion is very rare in countries with restrictive policies, such as Cyprus, Estonia, Ireland, Malta and, to some extent, Austria, Denmark, Greece and Latvia.

In this context, the family has been constructed by law in terms opposed to social structures (to which the family is thought to belong). From a migration control perspective, family related migration appears to be a form of unsolicited and by implication unwanted migration. Reflecting such tensions and selectivity, Member states have a variety of options to indirectly control and restrict family related migration because many questions depend mainly on European family migration rules and national practices, such as what counts as a family model, who can sponsor family members and what guides immigration officers in their considerations of what constitute good and genuine family relationships. All these questions have long been contested because the regulations governing this concept of family have become increasingly restrictive and variable in European member States. For example, non-EU family reunion has become less common following reforms in Belgium and United Kingdom and more common in Sweden or Denmark due to the large influx of asylum migrants. Restrictive policies are slightly more likely to be selective based on immigrants' backgrounds, with only certain nationalities able to reunite (e.g. Denmark, Ireland).

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<sup>4</sup> According to Huddleston, Bilgili, Joki & Vankova (2015) out of every 100 non-EU residents in the average EU country, only 2.2 are newly arrived non-EU family members. Since 2008, rates have slightly risen in Denmark, Lithuania, Luxembourg, Netherland, Slovaia and dropped in Belgium, Bulgaria, United Kingdom and Southern Europe.

Matters of family reunification generally revolve around the nuclear family, which is preliminarily conceived to be a good family members and as a “gender neutral” policy area (Morris, 2015). In fact, according to McGlynn (2005, p. 121), the implementation of these migration policies requires a significant degree of state intrusion into family and personal life (Sen v. The Netherlands, 2001; Tuquabo-Tekle and others v. The Netherlands 2005; Rodrigues da Silva and Hoogkamer v. The Netherlands 2006; Biao v. Denmark, 2016, par. 76–102) and falls short in crafting gender sensitive policies that would benefit migrant women treatment. However there is no uniform policy to explain who exactly forms part of the nuclear family and not all families or immigrant subjects are equal or homogenous in their trajectories or mobility. Race, class, religion, country of origin, spatial location, socio-economic status, material preconditions and mode of emigration (e.g. students versus illegal immigrants, labourers and precarious workers versus trained professionals) all converge to determine the possibility and impossibility of family reunification (Lo, 2015, p. 14; Mazzucato, 2015). Much of these differences are not considered in the EU Member States that reduces this heterogeneity regarding internal conditions as to who is admitted as a family member and regarding external conditions as to who can act as a sponsor as well as conditions set by Member States with respect to financial means, accommodation, health insurance, integration and access to labour market. For instance, laws that constrain a migrant’s ability to live their family life according to their own wishes; increasing suspicion of migrants and another abusive law that obliges families to prove that their motives are genuine and the bypassing of bureaucratic obstacles that make family reunification difficult for many people (Kraler, 2010, p. 71).

*Table 1. Internal and external conditions for family reunification in EU*

<b>INTERNAL CONDITIONS</b>	
<b>Minimum age for spouses</b>	≤ 18 years in AT, BE, CY, GE, FR, GR, LU, MA, NT, SL, SW
<b>Prohibition of polygamy</b>	All 27 and family reunification of a spouse shall not be authorised if the sponsor already has a spouse living with him/her in the (Member) State (AT, BE, DE, EE, ES, FI, FR, HR, HU, IE, LU, LV, NL, PL).



<b>Same-sex partners</b>	Most (Member) States' laws allow same-sex partners (either married or registered) to apply for family reunification (AT, BE, CY, CZ, DE, ES, FI, FR, HU, IE, LU, NL, NO, SE, SI, UK). A smaller number of (Member) States does not permit this (EE, LT, LV, MT, PL, SK). Same-sex couples have an equal right to family reunification as spouses from opposite sexes in AT, BE, CY, CZ, FI, IE, LU, NE, NO, ES, SW and the UK.
<b>Dependents outside nuclear family</b>	Full entitlements for parents or grandparents in 10 and for adult children in 6 (full for both in CZ, PT, SI, SE, recent restrictions in UK)
<b>Non-married partners</b>	Not included in(AT, BG, CZ, DE, EE, HU, IT, LV, PL, SE). In other (Member) States they are included (IE, NL, SI, UK). In certain (Member) States non-married partners fall under the scope of the Family Reunification Directive, provided that the couple has a registered partnership equivalent to a marriage (BE, ES, IT, LT, LU) or the partners have been living together in a marriage-like relationship for at least two years (FI, IE, NO) and three years or shorter if a child was born into such union (HR).
<b>EXTERNAL CONDITIONS</b>	
<b>Minimal period of lawful residence</b>	Temporary permits of $\leq 1$ year: Most types of temporary residents (27 countries) can sponsor their family, either immediately (14) or after 1 year (10)
<b>Integration criteria</b>	Most (Member) States do not require TCNs to fulfil any specific integration measures in order to reunite with family (BG, CY, CZ, EL, ES, FI, HR, HU, IE, LT, LU, NO, PL, SI, SK, UK), <b>basic language proficiency</b> , corresponding to A1 level (AT, DE, NL), or take a civic integration exam (NL); <b>civic integration exam after admission</b> (NL, UK) – as part of their general integration programme (AT, DE, LV, NL, UK). Free-of-charge language training may be provided in some instances (EE, LV and NO).
<b>Autonomy of the residence permit</b>	<b>5 years:</b> AT, BE; CY; CZ; FR, GE, GR, HU, IT, LV, LT, MA, LU, NET, PL, PT, RO, SL, SP, UK <b>3 years:</b> CZ; NE, FR (facilitated in only 11 countries: AU, BE, IT, NO, PT, SI, ES, SE)
<b>Income conditions and accomodation requirements</b>	22 countries can use any legal source to prove a 'stable and sufficient' income, though the level is often vague and higher FR, BE, GE, NE, PL, PT, SL, SP, SW, IT. (16 countries) than what national families need to live on social assistance (6). Accomodation requirements (AT, BE, BG, CY, CZ, DE, EE, EL, ES, FR, HU, IT, LT, LU, LV, PL, SE, SK, UK) but not prevision in (HR, IE (except for elderly parents), NL, SI) or for specific family members and/ or sponsors (NO, UK).

<p><b>Access to employment                  For family members</b></p>	<p>Immediate equal right to work for families and <b>unrestricted access to the labour market</b> based on their residence permit following family reunification (CZ, DE, EL, EE, ES, FI, FR, IT, LT, PL, SE, SI), but in others they need <b>work permit</b> (BE, IE) or pass a <b>labour market test</b> a year after admission for family reunification (CY, HU, LU, SI).</p>
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Source: (Huddleston, et al., 2015 and EMN, 2016).

*The internal conditions and its implementation*

First, the spouse is, along with minor children, the person to whom family reunification is most obviously granted although the Directive does not define the meaning of spouse in Article 4. According to national legislation, the question of what constitutes a migrant family member is unclear because it is not the same for EU citizens and national families. Migration law requires a sponsor’s spouse to have reached a minimum age before he or she can join him or her (Table 1), and requires non-marital separation in legal terms to support their family reunification.

Another requirement related to the family reunification of spouses is the duration of the relationship, e.g. Cyprus requires a couple to have married at least one year before submission of the application. Moreover, a formal marriage does not mean that couples have formed a genuine relationship. A legal marriage contract is a symbol and not the substance of the relationship, and some marriages might be shams (Wray y Hutton, 2014, p. 209). Family migration must be based on a genuine and continuing marriage or partnership. Legal rigour is employed with respect to marriage dissolution in the case of second or subsequent marriages, which sets the economic rights to maintain the spouse, dependent relatives and common children in good faith. This obligation requires the observation of a carefully safeguarded system that prohibits polygamous marriages, governs forced marriage in compliance with a minimum age and controls for repudiation effects. In general, European states have adopted a prohibitive approach that seeks to impose limits on two separate levels: civil and criminal (Shah, Foblets & Rohe, 2014, p. 143; Buchler, 2011). For instance, on the criminal level, polygamy and forced marriage are targeted through legislation that makes multiple marriage an offence bearing the potential to trigger penal sanctions. This approach is taken, but a brief glance at the evolution of domestic law and jurisprudence in Europe reveals differences and a lack of legal security in each case. For

instance, as demonstrated in France in 1992, for example, the Cour d'Appel de Versailles refused social security benefits to the second wife of a Muslim husband and in 1988 the Cour d'Appel d'Aix-en-Provence similarly denied a Muslim woman her alimony on the ground that she was the second co-wife and that polygamy was considered contrary to “ordre public” (Shah *et al.*, 2014, p. 32). Unless an Islamic ceremony was conducted in the spouses’ country of citizenship, the marriage is considered to have some legal validity under French law as long as it does not violate “ordre public” (Fournier, 2004, pp. 15-26).

Similar to France, under German law the recognition of polygamous marriages means in practice that Muslim women can obtain social security benefits, such as inheritance, custody rights and child support payments (Shah, 2003, p. 382). Spain’s approach to polygamy in its immigration context has not been altogether different from German’s recent position and partial recognition is either granted in the context of claims for matrimonial relief or pension schemes in order to protect the interest of the widows. It has helped that in Spanish law each surviving divorced spouse is entitled to the deceased's pension in proportion to the respective periods of their marriage with the deceased. However, in 2003 the Supreme Court of Justice of Catalonia has held that only the first spouse should be assigned the claimed pension. In the United Kingdom, the traditionally liberal approach to the immigration of the wives of polygamists was considerably restricted by the introduction of the *Immigration Act, 1988* (Shah, 2003, p. 383). This legislation imposed an effective ban on the admission of a wife when another wife or widow of the same man had already been admitted to the country (Shah, 2003, p. 391). Similar challenges have been brought against polygamy restrictions in immigration policies in the Netherlands, where a female resident in the country who acquired Dutch nationality and then married a man in Morocco who already had a wife was refused a divorce because her marriage was considered to be so connected to the Netherlands that it breached Dutch public policy and therefore could not be recognised (Campbell, Bala, Duvall-Antonacopoulos, Macrae, Paetsch, Bailey, Baines, Amani & Kaufman, 2005).

There is a similar approach to the recognition of divorces pronounced in other jurisdictions, provided that there are no objections to this on “ordre public” grounds. However, multicultural controversies arise when a number of legal systems in the Islamic world permit a husband to divorce his wife by simply pronouncing the word *talaq* three times. Courts in some European countries take into account the

circumstances surrounding the repudiation and whether the divorce resulting from it is in fact unacceptable to the values of the country in question, while other jurisdictions simply note, irrespective of the circumstances of the individual case, that the institution of divorce by repudiation contravenes the principle of equality between the sexes or procedural principles (Kruninger, 2015). For instance, the French attitude implies denial of recognition of any repudiation-based divorce, whether or not it was established after legal proceedings in the case of sufficient proximity of the spouses involved with the French legal order. In the Netherlands, a prominent argument in the discussion is the principle of *favor divortii* and the interests of the wife in recognition of the repudiation, in order to prevent atypical legal relationships, which is the rationale behind the Dutch attitude towards repudiation-based divorces (Kruining, 2015, p. 217). The revision to Belgian Law in 2005 provides against the recognition of Muslim *talaq* except in cases where there is no proximity to Belgium and the same law states that an act abroad recognizing the decision of the husband to dissolve the marriage may not be recognised in Belgium, unless the women benefits from the same right, effectively recognising *talaq*. Despite the ambivalence about the effects of *talaq* pronounced in non-European countries, Spanish and German courts now tend to recognize effects in a somewhat analogous manner through a kind of legal transfer to assimilate Islamic repudiation into divorce, but only if there is the possibility of divorce for women (Quiñones, 2013).

Unmarried and same-sex partners are grouped together in immigration rules and separated from married partners when the marital relationship is not simply a formal legal status. For instance, with respect to same-sex partners, different European Member States (e.g. Austria, Belgium, Denmark, Finland, Ireland, the Netherlands, Spain, Sweden and the UK) have decided to extend the right to family reunification to both registered and unmarried same-sex-partners, while three of them restrict the possibility to registered partnerships only, thus excluding unmarried partners in *de facto* cohabitation (e.g. Czech Republic, Germany, Luxembourg). Undoubtedly, the possible inclusion of this type of non-marital relationship is has been fixed but there are potential problems for the determination of common elements regarding the legal framework of *de-facto* union registration. Consequently unmarried partners (i.e. registered, non-registered or cohabiting partners, depending on the country) are considered family members. However, there are some countries that impose additional conditions with respect to the characteristics of a relationship (Table 1). In addition, European family reunification rules assume that it is not discriminatory to grant family reunification

rights to the spouse of the sponsor without extending the same rights to the unmarried partner of the sponsor, even when the country of origin of the individuals concerned does not allow for two people of the same sex to marry.

Second, under the exclusion criteria for nuclear family configuration there is false scope regarding the status of children. Family admission seeks to assimilate an applicant's dependents, including those born outside of marriage or a registered domestic union. Of course, this only refers to minors and they must be unmarried in order to be eligible for family reunification. Therefore, family reunification rules exclude older sons or daughters, regardless of whether they are dependent or not. There are no provisions to raise the age to 21 –as has been explicitly explained only in the case of the children of European nationals– but there are further restrictions as regards the maximum age of children and some countries establish different levels for minors: under 16 years; up to 18 years and older than 18 years in cases of extraordinary hardship. However, a more controversial question is the requirement to show evidence of family relationship and age, even implicitly through DNA testing (European Commission, 2008; European Migration Network, 2018; La Spina, 2012, p. 65; McIntosh, 1988, p. 113). Indeed, as stipulated by the European Court of Human Rights, and as one may often recall, biological paternity does not in itself imply *ipso iure* the existence of a family relationship between parent and child, and instead is linked to other types of indications of family life. In short, since the Court of Strasbourg opted for the presumption of family life if there are legal or blood ties between parents and children, grandparents and grandchildren and sometimes between siblings, it seems clear that the family is not a purely biological construction if, moreover, there is no universal definition of family to which one can appeal (McIntosh, 1988, p. 104).

Nowadays, it is not enough for a child to be single and of the appropriate age in order to determine whether they can be a beneficiary of family reunification. The family relationship must be proved and, for instance, in order to renew a residence permit in Portugal, the sponsor must justify the need for the family reunification of adult children, and must certify compulsory schooling during the stay in the host society. Together with age, disability also allows children to apply for family reunification when they are objectively unable to attend to their own needs due to their condition. However, this legal requirement is more concerned with the idea of care, given the particular situation of dependence derived from the delicate condition of the child, and less with the actual family relationship. This is possible when they are not the applicant's children, but the

applicant is their legal guardian and holds representative powers that do not oppose the principles of law. In fact, there are basic problems with different legal and cultural adoptions, e.g. *kafala*, an institution in Islamic law that allows the legal adoption of a child by a person other than their biological parents. Many member States, such as Spain, do not consider *kafala* to be a real relationship or adoption in accordance with domestic rules (Pascouau, 2011, p. 168; Böcker & Strik, 2011). However, if biological and adopted children are to be treated in the same way, it is reasonable to believe that this demand is a disproportionate form of discrimination in relation to the object of these different conditions for family reunification. Article 10.1 of the Convention on the Rights of the Child, referring to the obligations stipulated in Article 9.1 points out that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States’ Parties in a positive, humane and expeditious manner”.

A third example of singularity and exclusion is the family reunification of ascendants. Because of the boundaries of the nuclear family, this kind of reunification is governed by a matter of dependence and kinship that creates a legal minefield in terms of migrant grandmothers/mothers. In fact, the legitimate discretion of the Member States following the guidelines of Directive 2003/86/EC enforces several strict limitations on age and degree of relationship, but in terms of the latter, the determinations generally coincide. In European immigration law, this condition explicitly operates in relation to the first-degree relatives of the applicant and their spouse, and is similar to the provisions for children of any domestic partners of the sponsor. An element of dependency is required and the immigration laws of destination countries set a minimum age for parents of 65 years (e.g. Czech Republic or Netherlands) or pensionable age, and alone or single (e.g. Netherlands, Estonia, Czech Republic and Italy). Meanwhile, families are dependent when they prove to have transferred funds or incurred the family’s welfare costs. In this case, this age requirement is a maximum age, in addition to the need for reasons for this family to enter. Thus, it is indirectly presumed that the family life of ascendants with their adult children is not common, so this type of extended family should be justified for humanitarian reasons, such as illness or disability, but immigration authorities could accept these reasons or not under terms of exceptional dependency. The possibility of sharing family life with ascendants of over sixty-five years is only allowed as a rare exception for economic reasons whereby the sponsor must prove sufficient financial

income, as is the case in Spain and Italy, for instance (Bonizzoni, 2009, p. 93). Rarely, additional persons are admitted by a family reunification scheme, such as the sponsor's siblings (Hungary) or a person who the sponsor has parental custody or care over (e.g. Hungary, Czech Republic, Portugal, Estonia, Finland).

These limitations greatly oppose the principle of non-discrimination because despite section 4.2 a) of Directive 2003/86/EC, Member States have the option of not authorizing the entry and residence of an applicant's ascendant or spouse. The limitation on the exercise of family reunification for ascendants and additional relatives negatively affects the protection of family rights under Article 8 ECHR (Cholewinski, 2002), the Directive and, above all, the direct and indirect configuration of the model and the development of a family dynamic.

#### *The external conditions and its implementation*

Directive 2003/86/EC establishes a set of external conditions that Member States may require of applicants for family reunification, but with room for discretion. For instance, Article 7 of Directive allows Member States to require a sponsor to prove that he/she has appropriate accommodation; medical insurance; stable and regular resources; and complies with integration measures. Moreover, another sensitive question related to "dependent conception" is the access to employment for family members. The Article 14.2 of the directive leaves important margins of discretion to Member States in order to decide according to national law the conditions under which family members shall exercise an employed or self-employed activity.

First, the EU Directive requires the mandatory condition of a residence period, in general two years before the application. A non-lawfully residing third-country national being a sponsor for family reunification purposes often depends on their immigration status in the Member State. Austria, Denmark, Estonia, Germany and Latvia require a permanent residence permit in order to be eligible for family reunification. In most EU countries, however, it is enough for the potential sponsor to hold a temporary residence permit. Cyprus and France also require a temporary permit that is valid for at least one year. Other EU Member States grant different reunification rights according to the type of residence permit. For instance, reunification with parents or grandparents is not possible for persons that have no temporary residence permit and consequently only holders of a permanent residence permit are entitled to bring in family members in a broader sense. In general, holders of temporary residence permits

can bring in members of their nuclear family. In addition to the legal status of the sponsor, Article 8 of Directive 2003/86/EU entitles Member States to establish a period of legal residence before the sponsor is entitled to be joined by his/her family. The term of legal residence required varies between Member States from 12 months (Ireland, Luxembourg, Slovenia and Netherland) or more but may not exceed two years (Cyprus, Hungary, Letona, Latvia, Malta, Poland) or three years in Austria (EMN, 2016, p. 27). In addition to the provision of adequate housing and stable resources or sufficient health insurance, quality housing is required, which is not generalized to all families in the host society and social welfare network.

In any case, legislators require financial inputs in the year following the date of the application. The sponsor has to declare possible changes in resources over the previous months. And they also require the family reunification applicant not to obtain this income from the healthcare or welfare system, although the income of other household members can be taken into account. The amount of resources defined by law or regulation is only a reference and therefore the immediate consequence of not meeting the income condition may not mean automatic rejection of the application. Moreover, “needs” can vary greatly depending on individuals, as in the Chakroun case, whereby a 60 year-old couple does not have the same needs as a 30 year-old couple (European Parliament v. Council of the European Union, 2006; Rhimou Chakroun, 2010). The Court has framed the margins of manoeuvre of member states. For instance, a yearly schooling allowance granted to the sponsor due to their level of resources may not lead to rejection. However, given the difficulty to achieve sufficient income under economic crisis, Portugal has adapted rules on family reunification when an applicant involuntary ends up unemployed and their level of resources is diminished. Finally, accommodation is a pre-condition for family reunification. This requirement can either be formulated very broadly as adequate accommodation, i.e. for the family or precisely expressed by the number of square metres required per family member or what is considered normal for a comparable family in the same region in order to meet general health and safety standards (Minister van Buitenlandse Zaken c. K and A, 2015).

Second, although integration and fraud control seem to suggest very different problems, they are often interrelated and target the same immigrant groups. Both arguments lead to extended scrutiny of all migrant families, opening up questions as to how suited migrant family lives are to the dominant family norms (Mullaly, 2011). Suspicion of widespread fraud or false declarations of parenthood are often based on



gender and ethnicity-based stereotypes, and on a lack of understanding of different family forms or even the outcomes of discrimination, which are simply used as arguments regarding the integration issue. For instance, Article 4, paragraph 5 of Directive 2003/86/EC states that “in order to better ensure integration and to prevent forced marriages, Member States may require the sponsor and his/her spouse to be of a minimum age, which is at least 21 years old, before the spouse is able to join him/her”. Accurate information must be obtained on the scale of fraud or forced marriages before introducing restrictive policy measures to combat these phenomena (La Spina, 2012, p. 39). In fact, a number of Member States are developing policies or amending legislation in order to better tackle the misuse of the right to family reunification, although an EMN study (2012) provides evidence that marriages of convenience do occur but it is not yet possible to fully quantify this across all Member States.

Third, on an EU level, the European Pact on Immigration and Asylum in 2008 and the Stockholm Programme accomplished the widespread transfer of nationalistic integration schemes into common EU immigration policy in what concerns, most crucially, the rule of law and non-discrimination (DOUE 2010/C 115/01). Since 2003, Northern and Central Member States have heavily encouraged a shift to civic integrationism or illiberal social policy in legal and political terms due to failed multiculturalism. Four member states (Austria in 2011, Germany and France in 2007 and the Netherlands in 2006) use these measures as a condition for admission into their territory, requiring family members to pass language tests, tests on the knowledge of the host society or to sign a contract obliging them to take civic and, if needed, language courses before entry in the territory of the member state.

In France, the integration process is pursued upon arrival. The content of integration measures may differ between these countries but their effects are similar in the sense that they play on the legal status of family members i.e. on his/her entry in the territory and/or his/her capacity to remain in the territory and the access to the labour market for reunited families during a year at most. For instance, a majority of Member States prefer submitting the members of the family to the requirement of a work permit: e.g. Austria, Belgium, Czech Republic, Estonia, France, Hungary, Ireland, Latvia, Poland, Romania, Spain, Sweden are in that case, this latter, Member State applies legislation prohibiting any kind of discrimination on the labour market. Hence, most Member States choose to limit or set more (Austria, Greece and Slovakia) or less strict conditions to the access to labour (Finland, Estonia, Lithuania), the flexibility of the

directive frame letting them a great margin of action for that purpose.

However, other Member States require family members to undertake certain formal obligations only upon entry, such as taking integration (mainly language) courses (Böcker and Strik, 2011; Strik, de Hart y Nissen, 2013), although this new civic integration paradigm presents inherent contradictions with regard to equal treatment, non-discrimination, effectiveness, proportionality and social inclusion in each regional and local area of Europe (III/IV Annual Immigration and Asylum Report COM (2012) 250 final; COM (2013) 422 final, COM (2014) 288 final). In the coming decade, the European Union will be increasingly influenced by the huge impact of the economic crisis, and mandatory integration programs to ensure selective immigration, restrictive control and access to state welfare arrangements will be implemented. However, in Southern European countries, these integration conditions/measures could become an unlimited “national” tool to control the non-national “inside” the nation-state and even abroad<sup>8</sup>. In this regard, Koopmans argues that Sweden, Belgium and the Netherlands, which have combined multicultural policies with a strong welfare state, have had relatively poor integration outcomes. And many countries that have either more restrictive or assimilationist integration policies (Germany, Austria, Switzerland, France) or a relatively austere welfare state (the United Kingdom) have achieved better integration results regarding employment, spatial segregation and incarceration (Koopmans, 2010, pp. 20-25). Whereas in Belgium, the requirement is only applicable after arrival in the country and due to constitutional constraints, integration measures are only applicable in the Flemish region of the country.

No comparable tests have been conducted in Spain, Italy or Sweden. For example, in Sweden, there has been little civic conditioning in family migration policy, though this situation may currently be changing due to the large influx of asylum migrants (Bech *et al.*, 2017, p. 3) or in Spain does not formally employ integration measures. After all, rules adopted in 2011 may pave the way to an increased role of integration issues in Spanish migration law. Hence, in order to renew a residence permit, and when other requirements are not fulfilled, the foreigner’s efforts to integrate may be evaluated (Pascouau, 2011; EMN, 2016; EMN, 2018).

#### FINAL REMARKS

Accounting for approximately 30% of all permanent flows towards the EU, family reunification constitutes an integral part of the Union's policy on migration.

Consequently, the EU legislator has to strike a balance between protecting external borders and safeguarding human rights, i.e. right to family life, as mandated in articles 2, 3, 6, 21 Treaty of Europe, and 67 Treaty on functioning of European Union. By unmasking the impact of European family reunification rules, I show how these rules paradoxically contain many provisions that initiate, propitiate, and sustain family separations. The presumption that family reunification promotes the integration of immigrants is also paradoxically, because there are different stipulations preventing families from reuniting and privileging some family members over others hinder immigrant integration.

European Immigration law and national policies are based on pre-exclusion and discrimination against certain family systems, whereby in order to be admitted families are forced to assume different structures to the existing reality. In this regard, immigration controls give legal significance to certain characteristics such as age, marital status, citizenship, earnings and education but often depend on putative reasons for legal entry, not on guarantees of the right to family life. Dependency is probably one of the key concepts in state constructions of family relationships for different reasons: it is constructed by defining the rights and obligations of a family member in relation to the sponsor; family members do not have an independent right of residence or employment and many acquire an independent right only over time and are financially dependent on certain secondary migrants, and not directly on members of the nuclear family.

On a national level, a review of family reunification rules makes it clear who is considered a “good” family member and also who is not quite “good enough” but the key point is why integration policies do not promote social inclusion and equal access to rights in the receiving society at the same time (Zontini, 2010, p. 230). Behind the preservation of the community of values lies the perverse logic of tolerance, but not the recognition of family unit as family rights. In fact, the new integration requirements imply that immigrants have to “earn” their right to permanent residence and family life (and the social rights attached to it) by demonstrating their willingness and ability to integrate into these communities of value: they must be self-responsible individuals that are able to support themselves without recourse to public funds, have a clean criminal record and show willingness to engage with the host society (Kraler, 2010; Böcker and Strik, 2011, p. 158). In fact, family members will be considered wanted, but not welcome, so if they are different, they can only be tolerated. However, such fragility of

the tolerated family or the families accepted on condition generates a great risk of exclusion, legal uncertainty and an increase in discrimination or failure in multicultural societies. Therefore, those who are not firmly established in the community of value must endlessly prove themselves. The borders are marked, and they are discredited and criticised unless they prove that they have the right values (i.e. binding integration; correct degree of relationship; DNA test). Immigration law contributes to a strong tendency to naturalize migrants as dependent and criminal, but does not help to make migrants subjects with rights or even facilitate equal access to social rights.

Therefore, different family realities that feature cultural or emotional breakdown undergo constant redefinition and reorganization, which is particularly the case for male-female, mother-father and parent-child relationships or the effects of separation. Plural families are exposed to legal interference that is highly insensitive, and some households have more opportunities for reunification, while others that do not conform to the nuclear family pattern are required to reconstitute the family with the only family members they can get. For instance, an applicant whose status is married or in a domestic partnership can reunite not only with the respective spouse or partners, but also, where they have them, with his/her children depending on their age, as well as with some of his/her ascendants and dependents. But if the applicant's marital status is single, he/she can only reunite with his/her children, but in an unfair manner, he/she would not be able to do so with possible brothers, nephews or uncles, even if these are the only members of their family. And there is even less possibility of this in such cases as polygamy or repudiation. Muslims are required to reconstitute with the only family members they can get or to choose according to the European “ordre public”.

The maintenance of criminal sanctions for polygamy, forced marriage and the inconsistencies and contradictions of this limited extension of recognition of repudiation-based divorce in European law and jurisprudence should be seriously reconsidered. On the one hand, there is a need to change the current preferred approach that has reinforced a strong tendency to naturalize Muslim women as criminals or victims of oppression, which does not help to make them subjects with equal access to social rights, protection and free personal autonomy. And on the other hand, there is a need to find new solutions to accommodate the interests of plural societies and respect for women's rights, the needs for protection and to safeguard the most vulnerable individuals in a manner that is consistent with current social norms.

Non doubt, the eligible criteria for family reunification require further

discussion, which should especially take into account how European societies tend to understand the contrasting concepts of family in a broader and more stringent sense. But this is not only a quantitative question, family reunification schemes pursue a qualitative goal, the integration process will be easier if certain atypical families are excluded. Thus, in my opinion, the creation of other European family reunification rules means, in any case, “to be or not to be” a host society as a community of rights, and not just a community of “ideal” values based on exclusion and discrimination. Basically, because bringing immigration law more in line with family law, the critical needs and social aspirations of individuals and changing transnational reality, in the field of “famigration” (Hong, 2014, pp. 76-77) provides more security and justice and less traditional discrimination.

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