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## **CARIM INDIA – DEVELOPING A KNOWLEDGE BASE FOR POLICYMAKING ON INDIA-EU MIGRATION**

Co-financed by the European Union

### ***The EU as a Family- Friendly Destination? – Family Reunification Rights for Indian Nationals in the EU and Access of Family Members to the Labour Market***

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**Carla Heimann**

CARIM-India Research Report 2013/11



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**CARIM-India**  
**Developing a knowledge base for policymaking on India-EU migration**

**Thematic Report**  
**CARIM-India RR2013/11**

**The EU as a Family-Friendly Destination?**  
**Family Reunification Rights for Indian Nationals in the EU**  
**and Access of Family Members to the Labour Market**

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If cited or quoted, reference should be made as follows:

Katharina Eisele, Carla Heimann, The EU as a Family-Friendly Destination? – Family Reunification Rights for Indian Nationals in the EU and Access of Family Members to the Labour Market, CARIM-India RR 2013/11, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, 2013.

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## **CARIM-India – Developing a knowledge base for policymaking on India-EU migration**

This project is co-financed by the European Union and carried out by the EUI in partnership with the Indian Council of Overseas Employment, (ICOE), the Indian Institute of Management Bangalore Association, (IIMB), and Maastricht University (Faculty of Law).

The proposed action is aimed at consolidating a constructive dialogue between the EU and India on migration covering all migration-related aspects. The objectives of the proposed action are aimed at:

- Assembling high-level Indian-EU expertise in major disciplines that deal with migration (demography, economics, law, sociology and politics) with a view to building up migration studies in India. This is an inherently international exercise in which experts will use standardised concepts and instruments that allow for aggregation and comparison. These experts will belong to all major disciplines that deal with migration, ranging from demography to law and from economics to sociology and political science.
- Providing the Government of India as well as the European Union, its Member States, the academia and civil society, with:
  1. Reliable, updated and comparative information on migration
  2. In-depth analyses on India-EU highly-skilled and circular migration, but also on low-skilled and irregular migration.
- Making research serve action by connecting experts with both policy-makers and the wider public through respectively policy-oriented research, training courses, and outreach programmes.

These three objectives will be pursued with a view to developing a knowledge base addressed to policy-makers and migration stakeholders in both the EU and India.

Results of the above activities are made available for public consultation through the website of the project: <http://www.india-eu-migration.eu/>

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## **Abstract**

This article analyses and evaluates the family reunification schemes for Indian nationals in the EU with a focus on the three EU Member States the Netherlands, Germany and Denmark from a comparative legal perspective. First, the EU legislation governing the reunification of families is examined that is applicable to third-country nationals regardless of nationality. Second, this article investigates how the national laws of the selected three Member States are designed, in which respect they are favourable or not, and whether the legal frameworks allow family members to become part of the labour force in the host Member State. These analyses allow to draw a number of conclusions as to how “family-friendly” the EU and some of its Member States present themselves, and whether the legal schemes under review promote the objective of making the EU more attractive as destination for third-country workers, including Indian nationals.

## 1. Introduction

Since the economic crisis that India struck hard in 1991, the country has been growing rapidly as an economic actor turning into a global player.<sup>1</sup> While the 2008 financial and economic crisis has affected today's interconnected world economy, including India, in an unprecedented way, forecasts indicate that the Indian Republic may recover slowly by 2013.<sup>2</sup> These variations, however, have not had a noticeable impact on the EU's interest to enhance its cooperation with Asia's third largest economy. The EU has been keen to promote and deepen its foreign relations with India continuously, most visible in economic terms building on the 1974 commercial cooperation agreement between the European Economic Community and India, replaced in 1994 by a cooperation and partnership agreement.<sup>3</sup> Immigrants of Indian origin are well represented in the EU: in 2010, Indian nationals were the second largest group provided with residence permits in the EU-27 (200 000) for various purposes including remunerated activities, family reunion and study.<sup>4</sup>

In recent times the promotion of labour mobility between India and the EU has been high on the agenda of national and European policy makers alike: the attraction of human capital has been identified as fundamental for economic growth. It has been pointed out that "many industrialised countries are changing their policies in order to become more 'attractive' for highly-skilled migrants", while simultaneously "migrants have become increasingly mobile and are 'shopping around', looking for the best country to work and live in. This has led economists to speak of an 'immigration market', where states seeking to attract migrants constitute the demand side, whereas potential migrants are on the supply side."<sup>5</sup> The question arises which working and living conditions make a country particularly attractive for migrants. Next to advantageous rights concerning entry, labour market access, as well as rights ensuring a more secure legal status in the host state (for example equal treatment in respect to working conditions or social security) favourable rules regulating family reunification may constitute a decisive factor when selecting the country of destination. As important as rules facilitating family unity are provisions promoting the access of family members of workers to the labour market in the host country which facilitates their integration in the host society.

This article analyses and assesses the family reunification schemes for Indian nationals in the EU with a focus on the three EU Member States the Netherlands, Germany and Denmark from a comparative legal perspective. In a first step the EU legislation governing the reunification of families is examined that is applicable to third-country nationals regardless of nationality. In a second step this article investigates how the national laws of the selected three countries are designed, in which regards they are favourable or not, and whether the legal frameworks allow family members to become part of the labour force in the host Member State. These analyses allow to draw a number of conclusions as to how "family-friendly" the EU and some of its Member States present themselves, and whether the legal prerequisites promote thus the objective of attracting highly-qualified third-country migrants, such as Indian nationals, to the EU.

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<sup>1</sup> K. Basu, *India's Emerging Economy: Performance and Prospects in the 1990s and Beyond* (Massachusetts Institute of Technology Press 2004).

<sup>2</sup> See Reuters, "Worst may be over for Indian economy, but growth rate at decade-low: poll", 11 October 2012, available at: <http://profit.ndtv.com/news/economy/article-worst-may-be-over-for-indian-economy-but-growth-rate-at-decade-low-poll-311941>.

<sup>3</sup> Commercial Cooperation Agreement between the European Economic Community and the Republic of India, OJ L 82, 27.3.1974, p. 2; Cooperation Agreement between the European Community and the Republic of India on partnership and development, OJ L 223, 27.8.1994, p. 24.

<sup>4</sup> European Commission, 3<sup>rd</sup> Annual Report on Immigration and Asylum (2011), COM(2012) 250, 30.5.2012, p. 3.

<sup>5</sup> A .Wiesbrock and M. Hercog, "Making Europe more attractive to Indian Highly Skilled Migrants?: The Blue Card Directive and National Law in Germany and the Netherlands", *Research Report Thematic Paper CARIM-India*

## 2. Family Reunification under EU Law

With the insertion of Title IV into the Treaty of Amsterdam (today: Title V of the Treaty of Lisbon) in 1999 the EU was equipped for the first time with legislative powers in the field of immigration and asylum on the basis of which it has passed rules in form of directives and regulations applicable to third-country nationals.<sup>6</sup> It must be borne in mind, however, that Title IV of the Treaty of Amsterdam has been subject to a particular legal regime because the Member States considered migration issues as a highly sensitive policy area touching the core of national sovereignty: not only did the law-making procedures set out derogations but the jurisdiction of the Court of Justice of the European Union was severely restricted under this Title.<sup>7</sup> Importantly, the geographical coverage of Title IV EC was curtailed from the outset because Denmark, Ireland and the UK negotiated special rules on their position in separate Protocols. While Denmark completely opted-out of Title IV EC, Ireland and the UK decided on a rule which allowed them “to opt-in” on each measure if they communicated their interest of participation to the Council.<sup>8</sup> One of the legal instruments adopted under Title VI EC is Council Directive 2003/86/EC, which has created a system for family reunification for third-country nationals lawfully residing in the territory of a Member State.<sup>9</sup>

### 2.1. Council Directive 2003/86/EC on the Right to Family Reunification

Council Directive 2003/86/EC has first introduced an (almost) EU-wide legally enforceable right to family reunification for third-country nationals with legal residence, which applies in all EU Member States to the exclusion of Denmark, Ireland and the UK.<sup>10</sup> Council Directive 2003/86/EC is applicable in cases where the sponsor (the third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her) has a residence permit issued by a Member State valid for one year or more who has reasonable prospects of obtaining the right of permanent residence.<sup>11</sup> This last aspect of the requirements is left vague and remains thus open for the Member States’ interpretation enabling them to implement their own standards. The European Commission criticised this “margin of interpretation” in the Green Paper, which it published in 2011 on Council Directive 2003/86/EC as being able to “lead to legal insecurity and to the exclusion of almost any third-country national from the scope of the Directive.”<sup>12</sup> The question arises which family members are entitled to join the sponsor under the family reunification scheme of Council Directive 2003/86/EC. The Directive has a rather narrow conception of what a family includes covering the nuclear family only. Article 4 (1) defines family members as the sponsor’s spouse and the minor children of the sponsor and of his/her spouse including adopted children; both definitions are further narrowed down:

- **the sponsor’s spouse:** the married partner of the sponsor can request residency. In a polygamous marriage only one of the spouses is allowed residency under Article 4 (4) of

(Contd.) \_\_\_\_\_

RR2012/09 (2012), p. 1, referring to G.J. Borjas, “The Economic Benefits from Immigration”, 9 *Journal of Economic Perspectives* (1995), p. 17.

<sup>6</sup> On the communitarisation of migration policies, see G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff Publishers, Leiden 2006), Chapter 2.

<sup>7</sup> See former Article 68 (1) EC, which stipulated that national courts could only refer questions for preliminary rulings to the Court of Justice if there were no national legal remedies available.

<sup>8</sup> See Protocols 4 and 5 to the TEU on the position of the UK and Ireland, and Denmark, respectively.

<sup>9</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>10</sup> See Recitals 17 and 18 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; the Court of Justice explicitly acknowledged the right to family reunification in Case C-540/03 *European Parliament v. Council* [2006] ECR I-05769, para. 60.

<sup>11</sup> Article 3 (1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>12</sup> European Commission, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735, 15.11.2011, p. 2.

Council Directive 2003/86/EC. The Member States may ask for a minimum age of the spouse, which can be up to 21 years of age, even if this age does not correspond to the age of majority in the given Member State.<sup>13</sup> The reason for the age requirement is, according to the Directive, to ensure better integration and prevent forced marriages.<sup>14</sup> However, as the Commission acknowledged in the Green Paper, “it is difficult to estimate if this [abuse of the rules on family reunification for forced marriages] is a real problem and how big it is.”<sup>15</sup> Unmarried partners of the sponsor are usually not granted residency not even with proof of a long and stable relationship or even a registered partnership.<sup>16</sup> Only seven Member States so far allow non-married couples to be reunited on their territories. Same-sex partnerships suffer most under this law seeing that they are only accepted in few Member States.<sup>17</sup> The last two categories of family members are dealt with under the optional clause addressing ‘other family members’.<sup>18</sup> Recital 5 of the Directive states that there shall be no discrimination based on any issue, including gender. This means for same-sex marriages and registered partnerships that if the registered partnership or the marriage between nationals of the own country is allowed so ‘may’ it be for those of non-nationals.<sup>19</sup>

- **the children:** this includes the minor, unmarried children of the sponsor and of his/her spouse, including adopted children. It also covers the minor, unmarried children, including adopted children of either the sponsor or of his/her spouse where one of the persons has custody and the children are dependent on him or her. In cases of shared custody the minor is allowed to reside within the EU with the custodian provided that the other custodian agrees.<sup>20</sup> What constitutes a minor is left to the national law of the Member States, in the EU a minor is normally a person up to 18 years of age.<sup>21</sup> The Directive sets forth two further restrictions if they were already part of national law on the date of implementation: firstly, children over 12 years arriving independently of the rest of their families may have to prove they meet integration conditions required under national legislation.<sup>22</sup> The Court of Justice ruled in Case C-540/03 that despite this provision Member States must still respect the best interests of the child.<sup>23</sup> Only two Member States apply this derogation (Germany and the Czech Republic). Secondly, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15.<sup>24</sup> No Member State has implemented this restriction.<sup>25</sup>

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<sup>13</sup> Ibid., p. 3.

<sup>14</sup> See Article 4 (5) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>15</sup> European Commission, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735, 15.11.2011, p. 3.

<sup>16</sup> D. Chalmers, G. Davies and G. Monti, *European Union Law: Texts and Materials*, 2nd ed. (Cambridge University Press 2010), p. 517.

<sup>17</sup> Ibid.

<sup>18</sup> See Article 4 (3) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>19</sup> European Commission, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735, 15.11.2011, p. 4.

<sup>20</sup> Article 4 (1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>21</sup> D. Chalmers, G. Davies and G. Monti, *European Union Law: Texts and Materials*, 2nd ed. (Cambridge University Press 2010), p. 516.

<sup>22</sup> See Article 4 (1) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>23</sup> Case C-540/03 *European Parliament v. Council* [2006] ECR I-05769, para. 73.

<sup>24</sup> Article 4 (6) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>25</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, p. 5.

- **other family members:** the Directive gives Member States the opportunity to allow other family members to join the sponsor – half of the Member States authorise family reunification for the parents of the sponsor and/or his/her spouse.<sup>26</sup>

In accordance with Article 13 (1) of Council Directive 2003/86/EC the Member State concerned shall authorise the entry of the family member or members as soon as the application for family reunification has been accepted. Importantly, the Member State concerned shall in this regard grant such persons every facility for obtaining the requisite visas.

Articles 6 to 8 of Council Directive 2003/86/EC specify the requirements for the exercise of the right to family reunification. Member States may require the sponsor to provide adequate accommodation for his/her family; sickness insurance for himself/herself and his/her family members; as well as stable, regular and sufficient resources without recourse to the social assistance system of the Member State concerned.<sup>27</sup> In the case of *Chakroun* the Court of Justice clarified that the term “recourse to the social assistance system of the Member State” must be interpreted as precluding a Member State refusing family reunification to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income.<sup>28</sup> In this judgment the Court moreover decided that Member States may not draw a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State. In addition, a Member State can impose integration measures relating to language, culture, politics and history of the host state in form of tests in order to assess the “integration ability”.<sup>29</sup> These tests can be applied to all residency seekers, including minors from the age of 12 who arrive independently of the rest of his/her family in Germany (the Czech Republic adopted national provisions introducing such integration conditions only after the Directive’s implementation deadline, and, arguably, these conditions are therefore not legally valid).<sup>30</sup> Importantly, the aim of such measures is *to facilitate the integration of family members*. The Commission pointed out that the admissibility of integration measures under the Directive is contingent on whether they serve the purpose of integration and whether they observe the principle of proportionality, and specified that “their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.), whether such measures or their impact serve purposes other than integration (e.g. high fees excluding low-income families).”<sup>31</sup> A few Member States have introduced such integration measures, in particular the Dutch language test abroad has been criticised.<sup>32</sup>

By virtue of Article 8 of Council Directive 2003/86/EC Member States can require the sponsor to have legal residence in their territory for a period not exceeding two years, before having his/her family members join him/her. Furthermore, Article 8 (2) of Council Directive 2003/86/EC authorises

<sup>26</sup> Articles 4 (2) and 4 (3) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification; see D. Chalmers, G. Davies and G. Monti, *European Union Law: Texts and Materials*, 2nd ed. (Cambridge University Press 2010), p. 517.

<sup>27</sup> Article 7 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>28</sup> Case C-578/08 *Chakroun* [2010] ECR I-01839.

<sup>29</sup> Article 7(2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>30</sup> See Article 4(1) Directive 2003/86/EC and European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, p. 5.

<sup>31</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, pp. 7-8.

<sup>32</sup> K. Groenendijk, “Family Reunification as a Right under Community Law”, *European Journal of Migration and Law* 8 (2006), 215-230, pp. 223-225.

Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members. The European Parliament challenged these derogatory rules taking the view that they violated Article 8 of the European Convention of Human Rights (ECHR) guaranteeing the right to respect for family life. In its decision the Court of Justice rejected this challenge stating that “that provision [Article 8 of Council Directive 2003/86/EC] does not therefore have the effect of precluding any family reunification, but preserves a limited margin of appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration.”<sup>33</sup> Yet, duration of residence in the Member State and a Member State’s reception capacity are only two of the factors which must be taken into account by the Member State when considering an application. All the factors, as prescribed in Article 17 of the Directive, must be considered and analysed, including the best interests of minor children.<sup>34</sup> One may wonder, however, if integration and settling in the host Member State would not happen sooner if the family is present. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family members and shall grant them a first residence permit of at least a year.<sup>35</sup> Lastly, any application for residency under Council Directive 2003/86/EC may be denied on grounds of public policy, public health or public security.<sup>36</sup>

When speaking of highly-qualified migrants it is crucial to indicate that Council Directive 2009/50/EC setting out entry and residence conditions for highly-skilled third-country migrants (the so-called EU Blue Card) provides for derogations as regards the application of Council Directive 2003/86/EC on the right to family reunification.<sup>37</sup> This implies among other things that the integration conditions and measures referred to in Council Directive 2003/86/EC may only be applied *after the persons concerned have been granted family reunification*. Moreover, residence permits for family members of EU Blue Card holders shall be granted, where the conditions for family reunification are fulfilled, at the latest within six months from the date on which the application was lodged.<sup>38</sup>

In a 2008 report on the application of the Directive 2003/86/EC the Commission considered that the Directive has in general been transposed satisfactorily in most of the Member States.<sup>39</sup>

The Commission emphasised some points of incorrect transposition or misapplication of the Directive. These included deficiencies concerning the visa facilitation or the grant of residence permits for those family members whose application are already accepted, the careful consideration of the best interest of the child or the more favourable provisions for the family reunification of refugees. Moreover, the Commission criticised that the main application problem constitute some “may” provisions of the Directive that allow Member States to introduce or maintain requirements for the exercise of the right to family reunification, such as fees, possible waiting period, stable and regular resources as an economic condition and possible integration measures. Such “may” provisions are applied in an excessive manner according to the Commission, which has resulted in restricting the

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<sup>33</sup> Case C-540/03 *European Parliament v. Council* [2006] ECR I-05769, para. 98.

<sup>34</sup> *Ibid.*, 99-101.

<sup>35</sup> Article 13 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>36</sup> Article 6 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>37</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>38</sup> See Article 15 of Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>39</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008.

right to family reunification to an extent which runs counter to the objective of Council Directive 2003/86/EC. In 2011, the Commission published a Green Paper in which it called upon the Member States to specify and quantify problems of abuse of the right to family reunification with a view to address them at EU level in a more targeted and coherent way.<sup>40</sup>

## 2.2. The Right to Respect for Family Life under the EU Charter and the ECHR

Two legal documents are equally important for the protection of the family under EU law: the EU Charter of Fundamental Rights (EU Charter) and the ECHR. The EU Charter, inspired by the ECHR, has become legally binding with the entry into force of the Treaty of Lisbon: Article 6 (1) TEU specifies that the Charter has “the same legal value as the Treaties.”<sup>41</sup> In comparison, the ECHR is a European human rights treaty that entered into force in 1953 and needs to be ratified by states which wish to become a state party of the Council of Europe.<sup>42</sup> Concerning the interpretation of the EU Charter, it is stipulated that in so far as the EU Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Union law may provide for more extensive protection.<sup>43</sup>

Article 7 EU Charter lays down that everyone has the right to respect for his or her private and family life, home and correspondence.<sup>44</sup> The personal scope of Article 7 EU Charter is inclusive referring to *everyone* covering EU citizens and third-country nationals, and the provision could arguably qualify for direct effect. The wording of this provision is almost the same as in Article 8 (1) ECHR – the EU is bound to guarantee the fundamental rights that the ECHR stipulates. The ECHR applies to *all persons within the jurisdiction* of the contracting parties and covers therefore citizens and non-citizens alike.<sup>45</sup> However, a closer look reveals that only a limited set of basic rights is indeed guaranteed to *everyone* under the Convention. Within the scope of the EU Charter the family in addition enjoys legal, economic and social protection as specified in Article 33 (1).

The Court of Justice has closely followed the case law handed down by the Strasbourg court concerning the interpretation of Article 8 ECHR. The Court of Justice explicitly referred to the right to respect for family life in the ECHR and the respective case law in the cases of *Carpenter* and *Baumbast*. In *Carpenter* the Court of Justice ruled that the Philippine wife of a British service provider who stayed without legal authorisation in the UK could claim a right of residence on the basis of Article 49 EC (now Article 45 TFEU). This article, read in the light of the fundamental right to respect for family life, had to be interpreted as precluding a refusal, by the Member State of origin of a service provider established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.<sup>46</sup> In *Baumbast* the Court of Justice confirmed that Regulation (EU) No 492/2011 on the

<sup>40</sup> European Commission, Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC), COM(2011) 735, 15.11.2011.

<sup>41</sup> Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010, p. 389.

<sup>42</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 5; all 27 EU Member States are parties to the ECHR, the negotiations on the EU's accession to the ECHR are ongoing as of 10 December 2012.

<sup>43</sup> See Article 52 (3) EU Charter.

<sup>44</sup> Article 51 of the EU Charter enshrines that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

<sup>45</sup> See Article 1 ECHR; on the notion of “jurisdiction” under Article 1 ECHR, see M. Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review* (2005), 3.

<sup>46</sup> Case C-60/00 *Carpenter* [2002] ECR I-6279, paras. 41-46.

freedom of movement of workers had to be interpreted in the light of the requirement of respect for family life in Article 8 ECHR because this requirement is one of the fundamental rights which, according to settled case law, are recognised by Community law.<sup>47</sup>

The Court of Justice acknowledged that Article 7 EU Charter contained rights corresponding to those guaranteed by Article 8 (1) of the ECHR, and that therefore Article 7 of the Charter had to be given the same meaning and the same scope as Article 8 (1) ECHR, as interpreted by the case law of the European Court of Human Rights.<sup>48</sup> In *Dereci and Others* the Court of Justice dealt with the question as to whether the third-country family members of Union citizens could invoke EU law for a right of residence in Austria.<sup>49</sup> The Court highlighted that – based on Article 51 EU Charter – it had to construe, in the light of the Charter, the law of the EU within the limits of the powers conferred on it. The Court of Justice decided that it was up to the referring national court to take a decision in that specific dispute but provided guidance in ruling that “if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8 (1) of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.”<sup>50</sup>

### 3. Family Reunification for Indian Nationals under National Law

#### 3.1. The Netherlands

Prior to the implementation of Council Directive 2003/86/EC the Netherlands required the spouse to be of the minimum age of 18 years, an integration test was (and is still) required and the income had to be at least 120% of that of the minimum wage.<sup>51</sup> The transposition of the Directive was carried out by adapting the existing legislation applicable to foreigners; these amendments entered into force in November 2004.<sup>52</sup> The Directive is, however, in parts not fully implemented yet. Requiring a wage which amounts to 120% of the minimum wage, was ruled as inconsistent with the Directive.<sup>53</sup>

To qualify as a sponsor, Article 7 (1) (c) of Council Directive 2003/86/EC allows Member States to ask for stable and regular resources. The Netherlands require an approximate monthly income of 1 441 Euro, which the state considers to be as stable.<sup>54</sup> The Netherlands asked for the highest monthly income: the respective provision has in this context been criticised as amounting to a discrimination on grounds of age. For family formation, 120% of the legal minimum wage was required from every

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<sup>47</sup> Case C-413/99 *Baumbast* [2002] ECR I-07091, para. 72.

<sup>48</sup> Case C-400/10 *PPU McB* [2010] ECR I-08965, para. 53; the Court refers to Case C-450/06 *Varec* [2008] ECR I-581, para. 48.

<sup>49</sup> See also Case C-34/09 *Zambrano* [2010] Judgment of 8 March 2011, not yet reported, in which the European citizenship of a child entailed a right of residence for the third-country national father, although the child had never left its Member State of birth; the Court held that Article 20 TFEU precluded national measures which had the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.

<sup>50</sup> Case C-265/11 *Dereci and Others* [2011] Judgment of 15 November 2011, not yet reported, paras. 72-73.

<sup>51</sup> Centre for Migration Law, Questionnaire on Family Reunification Directive 2003/86/EC to the Netherlands, Radboud University Nijmegen, available at: <http://cmr.jur.ru.nl/cmr/qs/family/Netherlands/>.

<sup>52</sup> European Migration Network, Synthesis Report on Family Reunification (2008), p. 15, available at: [ec.europa.eu/home-affairs/doc\\_centre/immigration/docs/studies/emn\\_family\\_reunification\\_synthesis\\_report\\_jan08.pdf](http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/emn_family_reunification_synthesis_report_jan08.pdf).

<sup>53</sup> Case C-578/08 *Chakroun* [2010] ECR I-01839.

<sup>54</sup> *Ibid.*, para. 21.

sponsor irrespective of age.<sup>55</sup> Discrimination on any grounds is prohibited under Recital 5 of the Directive including age. Moreover, an employment contract of at least one year or an employment record of three years is also required from the sponsor. These conditions are very difficult to fulfil for workers in their early twenties who are likewise entitled to family reunification.<sup>56</sup>

The 120%-income requirement was challenged in the case of *Chakroun*.<sup>57</sup> The Court of Justice made clear that the extent of needs to sustain oneself depends on the individual. While Member States may indicate a certain sum as a reference amount – according to the Court – they may not impose “a minimum income level below which all family reunifications will be refused”, irrespective of an actual examination of the situation of each applicant. Such an interpretation would be contrary to the requirement that every case must be judged individually as provided for in Article 17 of the Directive.<sup>58</sup> The Court decided that if the sponsor has stable and regular resources to maintain himself and his family members no higher wage requirements may be required.<sup>59</sup>

Concerning the entrance exam and integration requirements, the so-called *Integration Abroad Act* requires all immigrants to pass exams on the Dutch language and the Dutch society, in the country where they are staying prior to entry.<sup>60</sup> This is applicable for all third-country nationals between 16 and 65; in addition, the *Integration Act* provides for further integration conditions after entry into the Netherlands.<sup>61</sup> Next, the Netherlands have created a specific exception concerning the children of polygamous marriages. Only the Netherlands have restricted the entry of children of a second or further spouse to the Dutch territory as provided for under Article 4 (4) of Council Directive 2003/86/EC.<sup>62</sup>

### 3.2. Germany

The changes made to adapt the German immigration laws to the rules under Council Directive 2003/86/EC were not major. Spouses are admitted at the minimum age of 18 and dependent children up to the age of 18 with exceptions.<sup>63</sup> Other dependents may be granted a residence permit if necessary to avoid particular hardship.<sup>64</sup> Most of the development in the area of family reunification were made to adjust the Residence Permit Act (*Aufenthaltsgesetz*) to Council Directive 2003/86/EC.

The contentious issue prior to the amendments of the national law in 2005 and prior to the adoption of the Directive Implementation Act of 6 July 2007 was whether a German language test should be imposed on all immigrants, including those who applied for family reunification. Currently, a foreigner who is granted a residence permit for the purpose of family reunification and who intends to reside in Germany on a permanent basis is entitled to attend an integration course (which includes a

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<sup>55</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, p. 7.

<sup>56</sup> Ibid, p. 7.

<sup>57</sup> Case C- 578/08 *Chakroun* [2010] ECR I-01839.

<sup>58</sup> Ibid., para. 48.

<sup>59</sup> Ibid., paras. 46-52.

<sup>60</sup> European Migration Network, Synthesis Report on Family Reunification (2008), p. 24.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid., p. 18.

<sup>63</sup> See German Residence Permit Act, Sections 30 and 32, as well as A. Kreienbrink and S. Rühl, German Federal Office for Migration and Refugees, Working Paper 10 on family reunification in Germany, p. 15; see also European Migration Network, Synthesis Report on Family Reunification (2008), p. 22.

<sup>64</sup> German Residence Permit Act, Section 36.

language course).<sup>65</sup> The entitlement entitled to attend an integration course becomes an obligation if the foreigner is unable to communicate verbally in the German language at a basic level.<sup>66</sup> This is intended to prevent forced marriages and to promote integration into the German society. The residence permit will only be granted if the spouse can verbally communicate on a basic level in the German language – which translates into approximately 200-300 words.<sup>67</sup> Both the minimum age requirement for the sponsor and the spouse, and the basic knowledge test are not applicable if: the marriage existed prior to the sponsor obtaining the residence permit and if the spouse is either a highly-qualified person, a researcher or a self-employed third-country national, pursuant to Section 30 (1) of the Germany Residence Permit Act (or if he is an asylum seeker and the marriage existed prior to the application under the same Section of the Residence Permit Act).

Germany has made some specific rules concerning the duration of the residence of the sponsor: if the sponsor has been resident for less than two years, then the German authorities require that the marriage has existed at the time of granting the sponsor's residence permit and that the remaining duration of the sponsor's stay must be expected to be at least one year. If these requirements are not fulfilled, the spouse can still be granted admission under discretionary rules.<sup>68</sup> Another condition for being eligible as a sponsor in accordance with Article 7 (1) (b) of Directive 2003/86/EC concern sickness insurance coverage for the sponsor and all the family members intending to join.<sup>69</sup> Next, under Article 7 (2) (c) of Directive 2003/86/EC stable and regular resources are required.<sup>70</sup>

### 3.3. Denmark

Denmark does not take part in the adoption of Council Directive 2003/86/EC, and is thus not bound by the latter legal instrument.<sup>71</sup> The Directive was not adopted due to the reservations of Denmark to Title V TFEU. The laws for family reunification are therefore dealt with under Danish national law specified in the Danish Aliens Acts.<sup>72</sup> In order to qualify as a non-EU national sponsor under Section 9 (1) (i) of the Aliens Act of Denmark, family members must either be from one of the Nordic countries (Norway, Sweden and Finland), holding a residency permit for asylum, or having a permanent residence permit for more than the last three years.<sup>73</sup> The sponsor must also be able to support himself so that the family members joining the sponsor do not have to receive social support from the Danish government.<sup>74</sup> Nor can the sponsor be at the time of application be receiving social assistance, as stipulated in Section 9 (5) of the Aliens Act. Another condition, found in Section 9 (4) of the Aliens Act, is that a collateral of 100 000 DKK (approximately 13 400 Euro) needs to be presented in form of a bank guarantee. In view of accommodation, an adequate size for the amount of family members joining the spouse is required according to Danish standards.<sup>75</sup> Section 9 (2) (ii) of the Danish Aliens Act stipulates that the sponsor

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<sup>65</sup> German Residence Permit Act, Section 44 (1) (1b); see also A. Kreienbrink and S. Rühl, German Federal Office for Migration and Refugees, Working Paper 10 on family reunification in Germany, p. 22.

<sup>66</sup> German Residence Permit Act, Section 44a (1)(1).

<sup>67</sup> European Migration Network, Synthesis Report on Family Reunification (2008), p. 22.

<sup>68</sup> *Ibid.*, p. 17.

<sup>69</sup> German Residence Permit Act, Section 2 (3); see also A. Kreienbrink and S. Rühl, German Federal Office for Migration and Refugees, Working Paper 10 on family reunification in Germany, p. 21.

<sup>70</sup> See German Residence Permit Act, Section 5 (1) (1).

<sup>71</sup> See Recital 18 of Council Directive 2003/86/EC.

<sup>72</sup> See in this context: Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, pp. 1-2.

<sup>73</sup> *Ibid.*, p. 2.

<sup>74</sup> *Ibid.*, p. 9.

<sup>75</sup> Danish Aliens Act, Section 9 (6).

may also qualify for family reunification with a minor child when holding a permanent residence permit in Denmark, or a temporary residence permit, which can be made permanent.<sup>76</sup>

To qualify as a spouse under Danish law a minimum age of 24 years is foreseen – this age requirement was introduced prior to the enactment of the Directive in 2002.<sup>77</sup> The spousal reunification is regulated by a point system; points are given for language skills, work experience and level of education.<sup>78</sup> A certain amount of points awarded to the applicant may compensate the fact that one of the spouses is under 24 years of age.<sup>79</sup> 60 points are required to qualify for family reunification, 120 points are needed if one of the spouses is not 24 years yet.<sup>80</sup> Under Section 9 (7) of the Danish Aliens Act the spouse has to establish that he or she has greater ties with Denmark than with the place of origin or current residence. In order to prevent forced marriages the Danish authorities have the discretion to prohibit reunification if the latter find the marriage doubtful.<sup>81</sup> For granting spousal reunification the authorities will consider the length of the union, the age of the spouses, the spouses' financial situation and their educational background. The Danish government contends that the 24 year of age-requirement has shown that it prevents the occurrence of forced marriages and marriages of convenience.<sup>82</sup>

The maximum age to qualify as a sponsor's child is 15 years, only in special cases will the limit be increased to 18 years of age.<sup>83</sup> The 15-year age limit was stipulated with the objective to ensure the children's integration into the Danish society.<sup>84</sup> For a child whose other parent is still living in the child's country of origin – or another country where the child is residing – and where the child's application for a residence permit is submitted more than two years after the parent in Denmark meets the requirements for family reunification with the child, a special "attachment requirement" applies: a residence permit will only be granted if the child has the opportunity to create ties with Denmark, which are sufficient to constitute a basis for successful integration into the Danish society.<sup>85</sup> For evaluating whether this requirement is met, the length and the nature of the child's stay in the country of origin is taken into account, as well as the ties with the parent living in Denmark and the duration of that parent's stay on the Danish territory.<sup>86</sup>

An immigration test is required for the spouse joining the sponsor, which consists first of an oral language test to evaluate the level of the Danish language skills. The second part tests the level of the applicant's knowledge of the Danish society.<sup>87</sup> Both spouses need to sign a declaration of active participation, which aims to ensure that the accompanying family members learn the Danish language and integrate into the Danish society.<sup>88</sup> Other family members also have the opportunity to be reunited with their family in Denmark: for example cases of adoptions and cases of parents whose adult

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<sup>76</sup> See also Centre for Migration Law, Questionnaire on Family Reunification Directive 2003/86/EC to Denmark, Radbound University Nijmegen, available at: <http://cmr.jur.ru.nl/cmr/qs/family/Denmark/>.

<sup>77</sup> Danish Aliens Act, Section 9 (1) (i).

<sup>78</sup> See Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, p. 2.

<sup>79</sup> Ibid.

<sup>80</sup> Danish Aliens Act, Section 9 (15).

<sup>81</sup> Danish Aliens Act, Section 9 (8).

<sup>82</sup> Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, p. 4.

<sup>83</sup> Danish Aliens Act, Section 9 (1) (ii); see also Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, p. 6.

<sup>84</sup> Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, p. 6.

<sup>85</sup> Section 9 (17) of the Danish Aliens Act.

<sup>86</sup> Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, pp. 6-7.

<sup>87</sup> Danish Aliens Act, Section 9 (2).

<sup>88</sup> Ibid.

children live in Denmark is dealt with under Section 9 (1) (iii) of the Aliens Act. Under Section 9 (c) (1) of the Aliens Act family reunification will, however, only be granted for special reasons.

The conditions are generally considered as less favourable as those put forward by Council Directive 2003/86/EC. For example, there are no time limits on the duration of the administrative procedures for assessing an application.<sup>89</sup> In addition to this, the average waiting period for a family reunion under national laws may take up to a maximum of ten years.<sup>90</sup> Though, a more favourable rule under Danish law allows unmarried partners to be reunited under Article 9 (1) (i) of the Aliens Act, as long as they have been in a regular cohabitation of a long-term period of one to two years. If the couple can show good reasons as to why they have not been residing together longer than the period indicated, the time requirement can be lessened.<sup>91</sup> Furthermore, under Danish law same-sex registered partnerships are treated as married spouses, and they are under the Aliens Act also considered as such – this also includes cohabiting partners.<sup>92</sup>

Generally speaking, however, E. Ersboll, a Senior Research Fellow at the Danish Institute for Human Rights, highlighted the increasing number of policy restrictions on family reunification and pointed out that the adopted rules in fact restrict family reunion and do not improve the immigrants' integration into Denmark and its society.<sup>93</sup>

## 4. Access of Family Members to the Labour Market

### 4.1. Rules under Council Directive 2003/86/EC

Once the family reunification application has been accepted by one of the Member States the family member is entitled to certain privileges. Under Article 14 (1) (b) of Council Directive 2003/86/EC family members are entitled to become employed or self-employed, in the same way as the sponsor. In line with Article 14 (2) of Council Directive 2003/86/EC Member States may decide according to the national law the conditions under which family members shall exercise an employed or self-employed activity. The Member States must guarantee that these conditions have a time limit which shall in no case exceed 12 months, during which the national authorities may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity.

In so far three different situations have arisen on how the family members' access to the labour market has been dealt with by the Member States: either no access at all is granted, or only with a work permit (with or without a labour market test), or free access to the labour market.<sup>94</sup> It is, however, unclear whether such a labour market test needs to be carried out for each individual applicant, or whether an annual test suffices – or whether a test should include the area of work or the region where the

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<sup>89</sup> Centre for Migration Law, Questionnaire on Family Reunification Directive 2003/86/EC to Denmark, Radboud University Nijmegen.

<sup>90</sup> Ibid.

<sup>91</sup> Danish Ministry of Justice, Response to the European Commission Green Paper on family reunification, 14.3.2012, pp. 1-2.

<sup>92</sup> Ibid.

<sup>93</sup> E. Ersboll, EUDO Citizenship Observatory, *Country Report: Denmark*, 2010, European University Institute, Robert Schuman Centre for Advanced Studies.

<sup>94</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, p. 13.

applicant intends to live.<sup>95</sup> Considering the time limit, from 19 December 2011 onwards no more time limits shall be imposed by the Member States as regards access to labour market for family members.<sup>96</sup>

A pending case before the Court of Justice may provide some guidance in this respect: the case concerns the question whether national law that systematically denies third-country students access to the labour market, in that they are issued a work permit for a vacant position only if a check has been previously carried out as to whether the position cannot be filled by a person registered as unemployed, is compatible with EU law.<sup>97</sup>

The lack or undetermined access to labour markets is particularly discriminatory for women, as they are the main category of family reunification applicants.<sup>98</sup> On the other hand, it can be considered as progressive that family members may enter the labour market in the respective Member State.<sup>99</sup> It must be borne in mind that the equal treatment to be provided for family members is relative in nature: if the sponsor does not have access to employment nor, under the Directive, does the family member. An issue has risen in cases where the sponsor himself did not need a work permit to take up work, while family member were required to be in possession of a work permit.<sup>100</sup>

#### 4.2. Rules in the Netherlands

The Netherlands permit employment in any form for family members, whether employed or self-employed, and the Member State did not make use of the exception to equal treatment allowed under Article 14 (2) of the Directive. In response to the CMR questionnaire the Dutch authorities stated that the access to employment corresponds with the right to work of the sponsor; it can include “free access to the labour market; access if the employer has granted a working permit; only specific work permitted if the employer has granted a working permit; no access.”<sup>101</sup>

#### 4.3. Rules in Germany

Germany requires a labour market test to be applied before any application for labour market access is granted to a family member. In Germany this measure exceeds what the directive permits as German law allows the complete exclusion from employment for entire categories of family members during the first year after admission, whilst the Directive allows exclusion only on the basis of a labour market test.<sup>102</sup>

According to Section 39 of the German Residence Permit Act the Federal Employment Agency needs to approve any application for work permits before any family member may take up employment or self-employment. Section 39, however, applies only to the non-nuclear family, the

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<sup>95</sup> S. Morano-Foadi and M. Malena, *Integration for Third-Country Nationals in the European Union: The Equality Challenge* (Edward Elgar Publishing 2012), p. 263.

<sup>96</sup> *Ibid.*, p. 88.

<sup>97</sup> Case C-568/10 *Commission v. Austria* (2011/C 55/33), action brought on 6 December 2012; the case deals with the access to the labour market under Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

<sup>98</sup> K. Kraal, J. Roosbald and J. Vrench, *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Policies of Diversity* (Amsterdam University Press 2010), p. 63.

<sup>99</sup> *Ibid.*

<sup>100</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, p. 13.

<sup>101</sup> Centre for Migration Law, Questionnaire on Family Reunification Directive 2003/86/EC to the Netherlands, Radbound University Nijmegen.

<sup>102</sup> European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification, COM(2008) 610, 8.10.2008, pp. 13-14.

nuclear family is dealt with under Section 29 of the German Residence Act. Section 29 (5) of this Act specifies that the family member is entitled to take up employment if the sponsor is entitled to do so, or if the sponsor holds a residence title in accordance with Sections 19 (a) or 20 of the Act, or where the marital cohabitation has existed lawfully in Germany for a minimum of two years. The Federal Employment Agency has the authority to restrict work permits as allowed under Article 14 (2) of the Council Directive 2003/86/EC, if the stay is of a temporary nature only. The term ‘temporary’ is not further defined and is open to interpretation on a case-by-case basis.<sup>103</sup>

#### 4.3. Rules in Denmark

According to the Migrant Integration Policy Index the Danish rules are one of the least encouraging and favourable for family reunification.<sup>104</sup> However, the provisions on the access to the Danish labour market for family members reuniting in Denmark, are rather welcoming. As soon as family members hold a residence permit they do no longer need to apply for a work permit. They are immediately allowed to work in Denmark.<sup>105</sup>

### 5. Conclusion

For almost thirty years now the EU holds close contractual relations with India that govern the partners’ economic interests with one another. The EU has made great efforts to present itself as an advanced knowledge economy with the aim to attract highly-skilled immigrants from outside the Union – India has become one of the ‘target countries’ in this context. The degree as to how ‘attractive’ a certain Member State in fact for a third-country national (including Indian nationals) is depends on a number of criteria, including favourable family reunification rights. Such rights allow third-country workers residing in the EU to be reunited with his/her family in the host Member State. This article has provided an overview and an evaluation of how “family-friendly” the EU represents itself on the basis of its family reunification system. In addition, the national laws providing for family reunion of three EU Member States have been subject to analysis.

The right to family reunification is guaranteed under various sources of law in the EU and its Member States. With the adoption of Council Directive 2003/86/EC on the right to family reunification European legislation entered into force that sets forth the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of a Member State. Council Directive 2003/86/EC aims to facilitate family reunification and permits family members to join the work force in the respective Member State. Yet, Council Directive 2003/86/EC has strictly defined the kind of family members who are allowed to be reunited with the sponsor – a small circle of family members which generally consists of the children and the spouse. The Directive does, however, provide for the possibility for the Member States to allow more than just the nuclear circle to be admitted to the EU for family reunification purposes. Importantly, the right to respect for family life is also guaranteed under Article 8 ECHR, which binds the EU and all of its Member States, as well as Article 7 EU Charter, which has become legally binding with the entry into force of the Treaty of Lisbon.

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<sup>103</sup> Centre for Migration Law, Questionnaire on Family Reunification Directive 2003/86/EC to Germany, Radboud University Nijmegen, available at: <http://cmr.jur.ru.nl/cmr/qs/family/Germany/>.

<sup>104</sup> Migrant Integration Policy Index, Country: Denmark, available at [www.mipex.eu/denmark](http://www.mipex.eu/denmark); the only country considered worse in terms of family reunification laws is Ireland.

<sup>105</sup> Danish Aliens Act, Section 14 (1) (iv) and (vii).

Considering that EU directives provide for minimum harmonisation only, the respective national laws on family reunification may still differ. Moreover, Council Directive 2003/86/EC is not applicable in all EU Member States – Denmark, Ireland and the UK are not bound by the latter legal instrument adopted under Titel V TFEU. Against this background it comes as no surprise that the national laws of the investigated Member States display distinctions as regards the family reunion rules. **The Netherlands** have to be assessed as restrictive country when taking into account the scope of family members allowed to join the sponsor on the Dutch territory. Some of the disputable issues of Dutch legislation, which were ruled as contrary to Council Directive 2003/86/EC, have been amended. For example, the minimum income requirement was quashed by Court of Justice. The Netherlands have introduced integration abroad tests that require some immigrants to pass exams on the Dutch language and the Dutch society, in the country where they are staying prior to entry.<sup>106</sup>

In **Germany** Council Directive 2003/86/EC has not changed a lot of the existing German immigration law. The German state allows family reunification with other dependents if necessary to avoid particular hardship. One controversial subject relates to the language test, which was heavily disputed in Germany. The Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) decided a case on this issue on 30 March 2010. Despite the fact that the case concerned the interpretation of EU law, the Federal Administrative Court did not ask the Court of Justice for a preliminary ruling.<sup>107</sup> The case dealt with the issue as to whether the issuance of visas for the purpose of family reunification could be refused by the German authorities because the applicant Turkish spouse did not prove to possess basic knowledge of German. According to the Federal Administrative Court this language requirement did neither violate norms stipulated in the German constitution, such as the protection of family life and the principle of equal treatment, nor was it incompatible with the ECHR or EU law, including Council Directive 2003/86/EC.<sup>108</sup> The fact that some third-country nationals did not have to prove such language skills at all (or alternatively, at a later point in time after entry) as they were exempted from visa requirements was in the view of the German court justified because Germany enjoyed a wide discretion in maintaining foreign relations with third countries; this included according third-country nationals privileges as regards entry and residence.<sup>109</sup> The decision of the Federal Administrative Court has been criticised because most of the reasons indicated justified the differential treatment concerning the right to entry and residence between EU citizens and third-country nationals, while the main issue at stake was whether differences *among* third-country nationals could be justified because persons of certain non-EU nationalities were exempted from passing the language test.<sup>110</sup> It is unfortunate that the Federal Administrative Court did not refer the case to the Court of Justice for clarification and guidance.

**Denmark** adopted its own set of rules as the Danish state is not bound by Council Directive 2003/86/EC. Still, the Danish legislation does, through recent changes, regulate family reunification in a similar manner as the Council Directive suggests. A third-country national sponsor must hold a permanent residence permit for more than the last three years – this minimum residence period is longer than the one, which the Council Directive prescribes. In addition, Danish law provides for a point system, on the basis of which the authorities check whether an applicant is suitable for family reunification or not. This point system is stricter than Council Directive 2003/86/EC and more rigorous than the immigration tests of Germany and the Netherlands. The point system requires the

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<sup>106</sup> European Migration Network, Synthesis Report on Family Reunification (2008), p. 24.

<sup>107</sup> Urteil des Bundesverwaltungsgerichts of 30 March 2010, BVerwG 1 C 8.09 (VG 35 V 47.08); see R. Marx, 'Sprachnachweis und Ehegattennachzug', *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2011), 15.

<sup>108</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>109</sup> Urteil des Bundesverwaltungsgerichts of 30 March 2010, BVerwG 1 C 8.09, paras. 59-60.

<sup>110</sup> K. Groenendijk, 'Are Third-Country Nationals Protected by the Union Law Prohibition of Discrimination on Grounds of Nationality?', in: K. Barwig and R. Döbelstein (eds.), *Den Fremden akzeptieren - Festschrift für Gisbert Brinkmann* (Nomos, Baden-Baden 2012), 131, pp. 136-137.

minimum age of the spouses of 24 years, which is higher than the Council Directive permits. Other rules on family reunification follow the Council Directive, for example, the sponsor must be able to sustain his family with his income and provide adequate housing suitable for his family members. In Denmark the sponsor may not receive social assistance at the time of application; since the Court of Justice held in *Chakroun* that – given the level of resources – special assistance to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies must be interpreted as not falling under the phrase ‘recourse to the social assistance system’ in Article 7 (1) (c) of Council Directive 2003/86/EC, the aforementioned Danish rule would be contrary to the Council Directive.

In an attempt to assess and compare the family reunification systems of the three Member States, it appears that Germany displays the most ‘lenient’ rules for family reunion, while the laws of the Netherlands and Denmark seem equally restrictive. Upon closer inspection the Danish provisions are partially more restrictive than the Dutch rules. An exception relates to the very progressive Danish rule which treats same-sex registered partnerships as married spouses under the Danish family reunification scheme. It is clear that all Member States, with their respective rules, aim to avoid and reduce possible marriages of convenience or forced marriages and the recourse to their respective social assistance systems. EU law guarantees, however, that also other factors, such as the right to respect for family life and the best interests of the child, must be duly taken into consideration. Regarding access of family members to the labour market, the rules in Germany and the Netherlands generally corresponds to the sponsor’s right to work. Once a family member has been granted a residence permit in Denmark he or she is also entitled to work. A problem may arise in cases where sponsors are not required to hold work permits, while family member applicants are under the obligations to have the latter permits. In this context Germany is the most restrictive country as the German provisions allow for restrictions for family members to join the German work force. By contrast, the Netherlands and Denmark provide family members with the possibility to access their respective labour markets.

Each Member State has its specific family reunification scheme with particular assets and drawbacks. Undoubtedly, Council Directive 2003/86/EC has improved the reunification rules in those Member States where it applies as it has set minimum standards, which must be observed – national courts may now ask the Court of Justice for advice as regards interpretation in cases of doubt. This safeguard is absent in the legal systems of Denmark, Ireland and the UK.