The 'other' aim of the European Family Reunification Directive

Family reunification, third country nationals, fundamental rights and children

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Master's thesis

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Preface

This is not the first, nor will it be the last time that someone states in the preface of his thesis that it turned out to be more difficult than expected. Yet, I managed to deliver. I could not have done so without the help of a great many people.

First of all I would like to thank my first and second assessors, Marjolein van den Brink and Ton van den Brink (not related). Furthermore I would like to thank all the people from around Europe that answered my emails, many of whom have never met me in person. Most important in this regard were Dámaris Barajas and Inés Diez of RED Acoge, María José Aldanas and Carmen Perez Gonzalez, but also many thanks to – in a random order – Berta Muñoz, Ignacio Campoy, Margarita de la Rasilla, Maria Dalli, Gabriella Gallizia, Elisa Brey, the people from Defensor del Pueblo, Thomas Berthold, Ulrike Schwarz, Prof. Bernard Ryan, Dallal Stevens, Helen Johnson, Judith Dennis, my dear friend Betül Gülsen and anyone else that took some time to respond to my questions.

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Contents

Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
EC	European Commission
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
IDI	Immigration Directorate Instructions
OHCHR	Office of the High Commissioner for Human Rights
TCN(s)	Third country national(s)

Glossary

(Including the common names of laws in the native language)

Aliens Act	Vreemdelingenwet
Aliens Decree	Vreemdelingenbesluit
Aliens Circular	Vreemdelingencirculaire
Belgian Residence Act	Verblijfswet
Belgian Residence Decree	Verblijfsbesluit
Belgian Nationality Act	Wetboek van de Belgische nationaliteit
Dutch Citizenship Act	Rijkswet op het Nederlanderschap
German Residence Act	Aufenthaltsgesetz
General Regulations of the German Residence Act	Allgemeine Verwaltungsvorschrift
German Nationality Act	Staatsangehörigkeitsgesetz
Host country/state	The EU state where the sponsor lives
Indefinite leave to remain	British long-term residence permit for those legally resident in the UK
Indefinite leave to enter	British long-term residence permit for those resident outside in the UK
Limited leave to remain	British short-term residence permit for those legally resident in the UK
Limited leave to enter	British short-term residence permit for those resident outside in the UK
Machtiging tot voorlopig verblijf	Dutch visa for settlement in the Netherlands
National	(In the context of this thesis, also:) EU citizen living in the country of his nationality
Royal Decree 557/2011	Real Decreto 557/2011
Settled	A person who is settled in the UK has an indefinite leave to remain or enter
Spanish Immigration Act	Ley Orgánica 4/2000
Spanish Civil Code	Código Civil
Sponsor	The person in a family that legally resides in the EU and who will be joined by his family members

Part I

1.
Introduction

'Family' is considered to be the 'fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children', according to the Preamble of the UN Convention on the Rights of the Child 1989 (CRC). A similar text can be found in the International Covenant on Civil and Political Rights 1966,[1] the International Covenant of Economic, Social and Cultural Rights 1966[2] and the European Social Charter 1996 (ESC).[3] Family related rights are furthermore protected in for instance the European Convention on Human Rights 1950[4], the European Charter of Fundamental Rights 2000[5] and in several articles of Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW). The fact that family life is protected by many treaties that are ratified by many states,[6] shows that it is widely supported that everyone has a right to a family life. This means this right is also applicable to migrant workers and their families. Many immigration states - states where the number of immigrants is usually higher than that of emigrants - have imposed immigration restrictions to protect their security and economic needs.[7] These restrictions are often problematic because family members of migrant workers are usually not able to fulfil the same requirements for a residence permit as the workers themselves.
Immigration states therefore have to deal with two seemingly opposing interests: to restrict the number of immigrants and to live up to their (international) obligations towards immigrants and especially immigrant children. To cope with this contradiction, states introduced family reunification legislation that regulates which family members are allowed to join their family in the new host country[8] and under which conditions.[9]

Family reunification[10] makes up about 60 per cent of migration to Western Europe.[11] Due to the Schengen Agreement and the EU principle of the free movement of workers, many Western European states have abolished border checks with neighbouring states. This means anyone who can enter any one of these countries, can enter all of them. Therefore it is no surprise that the European Commission wanted to introduce EU-wide legislation on

[1] Art. 23(1).
[2] Art. 10(1).
[3] Recital 16.
[4] Art. 8.
[5] Arts 7, 9 and 33.
[6] The above-mentioned treaties together are ratified by all UN and therefore EU members. Especially the CRC is widely ratified: all members have done so except for the USA, South-Sudan and Somalia. See treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. Last check on 22 August 2014.
[7] OHCHR paper 2005, p. 17.
[8] In this thesis the words state and country are used interchangeably.
[9] See also Cholewinski 2002, p. 271.
[10] In this thesis the terms family reunification and family reunion will be used interchangeably.
[11] Currie, Veluti and Stalford 2013, p. 230.

immigration and more specifically, on family reunification. The seeds of this legislation were sown during a special meeting of the European Council in Tampere in 1999. During this meeting it was concluded that there should be a common EU asylum and migration policy and in this field there should be specific attention to the fair treatment of nationals of non-EU states, the so-called third country nationals (TCNs).[12] This fair treatment entails that '[t]he legal status of third country nationals should be approximated to that of Member States' nationals'.[13] It means that the principle of equality, a core principle of the EU, should as far as possible also be applied to TCNs.

One of the outcomes of the meeting in Tampere is the 2003 Family Reunification Directive of the European Commission,[14] which determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the EU Member States.[15] Based on the Tampere Presidency Conclusions, granting TCNs rights and obligations comparable to those of citizens of the European Union became an important aim of this Directive.[16]

Over the years, the European Commission has had researches[17] conducted on the implementation of the Directive that showed that many member states did in fact not correctly implement its provisions: the Directive's 'impact on harmonisation in the field of family reunification remained limited'.[18]
The objective of providing TCNs with rights and obligations comparable to those of citizens of the Union was reiterated in 2009 during the Stockholm meeting, a follow-up on 'Tampere'.[19] At the Stockholm meeting it was decided that an evaluation of the Directive was necessary, which led to a green paper[20] and the guidelines for application of the Directive which were released in April 2014.[21] However, both the green paper and the guidelines do not mention the fair treatment of TCNs. The approximation of the legal status of third country nationals to that of Member States' nationals is mentioned only indirectly, by stating that the promotion of family reunification of TCNs is an aim of the Directive.[22]

Does this lack of attention to the goals of the meetings at Tampere and Stockholm mean that the goal of providing TCNs with more equal rights is accomplished? Or does it mean that the promise made at those meetings is mere rhetoric?
To answer this question it needs to be assessed to what extent the national legislation of EU member states gives TCNs equal family reunification rights compared to EU nationals. And to make that assessment, it is necessary to decide what the term 'equal' means in this

[12] See the Presidency Conclusions of the meeting on www.europarl.europa.eu/summits/tam_en.htm. Last checked on 22 August 2014.
[13] See par. 21 of the Presidency Conclusions of the meeting on www.europarl.europa.eu/summits/tam_en.htm. Last checked on 22 August 2014.
[14] Directive 2003/86/EC on Family Reunification. Will hereinafter also be referred to as 'the Directive'.
[15] Art. 1 of Directive 2003/86/EC on Family Reunification.
[16] See recital 3 of the Preamble.
[17] See for instance COM(2008)610.
[18] See COM(2014)210, p. 1.
[19] 2010/C 115/01, par. 6.1.4.
[20] COM(2011)735.
[21] See COM(2014)210.
[22] See COM(2014)210, p. 3.

context. To avoid a philosophical discussion, fundamental rights will be used as an objective minimum standard. This means that if the family reunification possibilities of both TCNs and EU nationals are in line with relevant human rights principles they will be considered to be 'equal enough'.[23]
The choice for these minimum standards is inspired by the Directive which states that measures concerning family reunification should be adopted in conformity with the obligation to respect family life enshrined in instruments of international law.[24]

The question posed in the previous paragraph is an important starting point of this thesis, but it does not cover its exact aim. For this aim also has a basis in the rights of children. As stated in the CRC Preamble and mentioned above, family life is especially important for children. This is further stressed in 16(1) CRC which states that no child shall be subjected to arbitrary or unlawful interference with his or her[25] family. Art. 9(1) CRC adds that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when necessary for the best interests of the child.[26] The idea behind this focus on children is that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'.[27] In other words, proper family reunification possibilities are even more important to children than to others.
Furthermore, spouses and children are the largest group of migrants in most Western countries.[28]

The special position of children regarding the right to family life is acknowledged by art. 5(5) of the European Council Directive on the Right to Family Reunification, which stresses that the Member States shall have due regard to the best interests of minor children. According to a working document of the European Commission, '[t]his provision mirrors the obligation of the European Charter (Article 24 (2)) and in the UN Convention on the Rights of the Child (Article 3 (1)) that the child's best interest must be a primary consideration in all actions relating to children'.[29]

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[23] Of course if the possibilities for both are not in line with fundamental rights standards, one could draw the same conclusion, but then of course a second conclusion would be that the legislation should still be changed.
[24] Recital 2 of the Directive on Family Reunification. Also Wiesbrock sees fundamental rights as a basis for equality of TCNs and EU citizens: 'A first potential source of citizenship-related rights that TCNs resImmigration Directorate Instructionsng in the EU can rely upon is general principles of law and fundamental rights. The ability to fully rely on rights contained in the EU Charter of Fundamental Rights as well as the unrestricted application of general principles of law, such as the principle of proportionality, would approximate their rights in many areas to those of Union citizens.' Wiesbrock 2012, p. 73/74.
[25] Hereinafter 'his' will refer to both the male and female gender unless stated otherwise.
[26] See furthermore paragraph 3 of Article 24 of the EU Charter of Fundamental Rights:
'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'
And art. 10 CRC focuses specifically on family reunification:
'1. In accordance with the obligation of States Parties under article 9, paragraph 1, 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.'
[27] CRC Preamble.
[28] Thym 2013, p 728.
[29] SWD(2013) 172 , p. 12. Article 3(1) CRC, demands that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Article 24(2) of the EU Charter of Fundamental Rights: 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

Summarising the above: this thesis will to a certain extent reveal whether TCNs have equal family reunification rights in EU member states compared to EU nationals, as is one of the aims of the Tampere and Stockholm meetings. Fundamental rights will be used to assess the level of equality. Furthermore, there will be a specific focus on children, because the Directive and international law demand that their interests are a primary consideration in national family reunification legislation. This leads to the following main question:

To what extent are the family reunification possibilities of TCN family members of TCNs resident in EU member states equal to family reunification possibilities of TCN family members of Member States' nationals, from a children's rights perspective?

In turn this brings up these subquestions:

1. Which children's rights and other fundamental rights provisions are applicable to family reunification requirements in the EU?
2. Which standards do the applicable fundamental rights set for family reunification requirements?
3. What are the family reunification requirements for TCN family members of TCNs resident in the EU member states?
4. How do they differ from family reunification requirements for TCN family members of EU nationals living in their native country?
5. To what extent do the requirements for both families with TCN sponsors[30] and families with EU national sponsors comply with the standards set by the fundamental rights?

To answer these questions the requirements for family reunification of families with children in EU countries will be assessed on three levels. One level is a comparison between the requirements applicable to family members of TCN sponsors on the one hand and family members of national[31] sponsors on the other. Secondly, both sets of requirements will also be assessed on whether they are within the limits of the applicable fundamental rights. Thirdly, this will be done in several countries,[32] which gives the opportunity to discuss the differences between these countries.

In this thesis the comparisons on all three levels will be discussed in the context of the family reunification requirements, such as the income requirement or location of application for a residence permit. These requirements are discussed under two family reunification 'scenarios', which will be further discussed below. Simply put, one could describe them as 'a parent reunifies with his child' and 'a child reunifies with his parent'. The reason for this framework is that the applicability and content of the requirements depend on the scenario. In other words, a family reunification requirement cannot be discussed outside that context.

[30] The person in a family who legally resides in the EU and who will be joined by his family members.
[31] In this thesis the noun 'national' means 'an EU citizen living in the country of his nationality'. The adjective 'national' means 'the [noun] that is an EU citizen living in the country of his nationality'. For example: 'the national parent' means 'the parent who is an EU citizen living in the country of his nationality'. This is unless stated otherwise.
[32] Belgium, Germany, the Netherlands, Spain and the UK. The choice for these countries will be explained on page 15.

Per scenario every requirement is discussed in a different paragraph. Every paragraph contains a comparative overview of the relevant legislative provisions of all five countries studied, an assessment of these provisions with regard to the applicable fundamental rights provision(s) and as far as possible a comparison between the requirement for TCN sponsors and national sponsors. These requirements have to be discussed individually because different fundamental rights provisions are applicable to different requirements. This leads to the following set up of the thesis: the remainder of this introduction will discuss the limits of this thesis – what is taken into account and what is left out – and data collection. The third chapter gives a general explanation of the fundamental rights and shortly mentions how they relate to family reunification requirements. That roughly answers the first subquestion. The fourth chapter discusses some requirements that apply throughout the scenarios. The fifth and sixth chapter discuss the family reunification requirements in the context of the three scenarios. The seventh chapter discusses a uniquely British procedure. Those chapters roughly answer the last four subquestions. The eighth chapter is a conclusion of the entire thesis, which will be followed by a discussion.

Limits of the thesis

As mentioned above, the thesis consists of an assessment on three levels: between two groups of people, between different countries and there will be an assessment of national legislation in a context of international law. In the following it will be explained how this research is limited and why these limits are applied.

The scenarios
The most important limit is that of the scenarios that are the basis of this thesis. As explained above, the assessments will all be made in the context of the family reunification requirements, which are grouped under two family reunification scenarios. Because of the focus on children in this thesis, the scenarios regard children and their parents. Furthermore, spouses and children are the largest group of migrants in most Western countries.[33] This means that the conclusions from such scenarios are relevant for a high number of people.
The first scenario – in which a parent reunifies with his child – needs some introduction. Originally, scenario 1 would be a comparison between 'a minor TCN child living in an EU state with a regular residence permit wants a residence permit for his TCN parent' and 'a minor *national* child living in the EU wants a residence permit for his TCN parent'. Both scenarios can be split into two 'subscenarios', both with a different family situation of the child living in the EU. The parent could join
1. his TCN child without the other parent;
2. his national child without the other parent;
3. his TCN child and the TCN parent/partner;
4. his national child and the national parent/partner.

Of course the child and the parent/partner do not necessarily have to be both TCN or both British, a combination is possible as well, but that would not constitute a different scenario

[33] Thym 2013, p 728.

in legal terms because the applicable legislation would be the same as from one of the other scenarios.

This thesis discusses only the third subscenario in detail because there are practical problems regarding the other three. The main complication with the first subscenario is that in four of the five member states (the UK is the exception) it is impossible for a parent to base a family reunification application on the fact that his TCN child already has a residence permit. In other words, this scenario does not exist in legislation and can therefore not be discussed in this thesis.

For a TCN parent with a national child it is possible, within strict requirements, to reunite with that child in the EU based on that child's nationality (the second subscenario). This has been demanded by the ECtHR in the several cases, most importantly the *Zambrano* case.[34] In this case, the Colombian parents of Belgian children were refused a residence permit and about to be sent back to Colombia. This would force the children to join them, because they were dependent on their parents. This would practically deprive the children of the genuine enjoyment of an important right they have as EU citizens, which is the right to live in the EU. The Court found this to be unacceptable. Later cases have developed this principle and applied it to slightly different scenarios but the main issue has remained: TCN parents can apply for a residence permit based on the EU nationality of their child.
Therefore, when comparing these first two subscenarios the outcome is clear from the start regarding all countries except the UK: national children have better possibilities for family reunification with their TCN parents than TCN children and therefore both groups of children are not treated equally.
On top of that, in Germany and the Netherlands the rules regarding this subscenario can only be found in jurisprudence. Also the Belgian and Spanish legislation only cover this scenario very summarily, suggesting that much depends on the interpretation of judges. It would have been interesting to compare the different interpretations of the *Zambrano* cases in the five countries[35] discussed in this thesis, but unfortunately it proved impossible to provide a recent overview of the relevant jurisprudence in all five countries.[36]

This lack of information about the *Zambrano* case related jurisprudence also complicates the subscenario where the TCN parent joins both his child and his partner / the other parent who both have the nationality of their EU country of residence. In that scenario the parent might have to fulfil the same requirements as in the previous scenario, because he is

[34] CJEU 8 March 2011, C-34/09 (*Zambrano*). Hereinafter all cases related to Zambrano will together be referred to as 'Zambrano cases'.
[35] Hereinafter also referred to as 'the five countries'.
[36] The European Network on the Free Movement of Workers of the European Commission used write a report on the follow-up of case law of the CJEU in the field of migration, including cases such as Zambrano, but that working group has been discontinued recently. The EU websites are not very clear about this, but Paul Minderhout, the last project leader of the group, explained this on the phone. The latest report discussing the state of the jurisprudence in the Member States was published in 2012: EUROPEAN REPORT on the Free Movement of Workers in Europe in 2011-2012, FOLLOW-UP OF CASE LAW OF THE COURT OF JUSTICE, Rapporteur: Prof. Dr. Roel Fernhout. Available at ec.europa.eu/social/main.jsp?catId=475&langId=en. Last check on 22 August 2014.

joining his child. Whether that is true depends on the interpretation of the *Zambrano* case,[37] but without the appropriate jurisprudence it is impossible to know and therefore it is impossible to discuss this subscenario.

The *Zambrano* cases are not applicable to the subscenario in which the TCN parent joins his TCN child and his TCN partner, also parent of the child. Also, it is clear that the parent applying for the residence permit will have to apply as a partner, not as a parent. This follows from the explanation under the first subscenario above: a TCN parent cannot apply for family reunification based on the residence permit of his child, except in the UK. Therefore, the first scenario covered by this thesis is: a TCN parent reunites with his TCN child who lives with the other TCN parent in the EU with regular residence permits.

The second scenario, in which a TCN child joins his parent(s) in the EU, is less complicated. Two subscenarios are possible and both are covered in this thesis:
Scenario 2a. A minor TCN child wants a residence permit to reunite with his *parent(s) who has/have a regular residence permit* in an EU state.
Scenario 2b: A minor TCN child wants to reunite with his parent(s) who reside(s) in an EU country and who has/have the *nationality of that country*.
Note that either one or two parents could already be in the child's new host country and both situations will be discussed.

There are many alternatives possible, of which an important group consists of scenarios in which other family members than children and parents reunite. But as explained, these reunifications are less frequent than those of spouses and children. There are also scenarios possible in which the sponsor has the EU nationality of one country, but resides in another, and all kinds of combinations of the above.
This does not mean that the main question of this thesis cannot be answered. The scenarios covered by this thesis still give an insight in family reunification legislation of EU states, how it relates to fundamental rights standards and whether the rights of TCNs and nationals are the same.
Also, with these scenarios the discussion regarding the definition of 'family' can be avoided, which helps the clarity of this thesis. Whereas one might disagree about whether uncles, nephews or grandparents should be included in the family reunification legislation, there is little disagreement that children have a family life with parents. See for instance art. 4 of the Family Reunification Directive which leaves the Member States some discretion regarding which family members to admit, but not regarding children and parents. Also, the European Court of Human Rights assumes there is a family bond between a parent and his child (save in very exceptional circumstances).[38]
The meaning of the words 'children' and 'parents' should also be clarified. This thesis covers only biological children, because that covers the largest number of people without having to discuss specific rights or obligations regarding adopted and foster children.[39]

[37] For instance in the Netherlands a TCN parent can only rely on the 'Zambrano cases' when the other parent cannot care for the child in any way but this strict approach has been criticised by for example Weterings. See Weterings 2013, p. 404.
[38] Boeles et al. 2009, p. 146/7 referring to ECtHR 20 June 2002, 50963/99 (*Al-Nashif)*.
[39] Interesting in this context is for instance Bledsoe 2006, p. 8

EU citizens residing in a different member state than their own are not discussed for the same reasons that apply to other family member: that would make the comparison unnecessarily complicated and only a relatively small group of people would be included.[40] Also, the results of the comparison between TCNs and EU nationals resident in a different EU country would not in any way influence the results of the comparison that is made in this thesis.

More groups and issues are not specifically covered by this research. This does not mean that the legislative provisions discussed in this thesis never apply to them – that depends on the state – but they will not be discussed in detail. First of all, the people in the scenarios have or apply for a regular residence permit. That means that asylum seekers, refugees or people with a 'subsidiary status' are excluded. The reason for this is that they fall under a different set of rules in the Family Reunification Directive[41] and in international law in general.[42]
Furthermore, the legislation in some states contains exceptions to the general requirements for the following groups: people with dual (or more) nationalities, people with no nationality, TCN family members who already have a residence permit in another EU member state, unborn children, people with a handicap or chronic illness, convicts, people with limited residence permits for a specific purpose such as students, and other 'exceptional groups' such as 'highly qualified immigrants', victims of trafficking or people from designated states such as former colonies. These groups are also not included in this thesis for the same reason as the other exclusions: including them would have complicated this thesis without adding much to the overall comparison between the rights for TCNs and the rights for EU citizens.
Lastly, the issue of same-sex partnerships is not thoroughly discussed, but if a country's legislation makes special notice of such partnerships it will be noted where relevant.[43]

Legislation, jurisprudence and practice of immigration services
Another important limitation to the scope of this thesis is that it mainly covers the family reunification requirements from national legislation. This means that jurisprudence or practical policies of relevant authorities such as the immigration services are not included. This includes procedural requirements such as paperwork. After all, this is a research about the implementation of an EU Directive and when the European Commission creates a new Directive, it should be implemented in the legislation of the Member States; it is not a guideline for judges or practitioners on how to interpret the existing rules.
There is another, more practical, reason for the focus on legislation: it is impossible to give a guarantee that all and/or the latest jurisprudence and practice is included in this thesis. At least in the Netherlands, there are very frequently new immigration law cases and policy

[40] Of all immigrants in the EU, about two thirds are TCNs. See Eurostat paper on population and social conditions, p. 1.
[41] See chapter V of the Directive.
[42] See for instance the 1951 Convention relating to the Status of Refugees.
[43] Recital 5 of the Preamble of the Directive prohibits discrimination on the grounds of sexual orientation which according to Boeles et al. means that the rules for unmarried couples are applicable to same-sex couples in countries where such couples cannot marry. Countries in this thesis where same-sex couples cannot marry are Northern Ireland – the only part of the UK where it is not allowed – and Germany.

changes which means that only those who follow the weekly newsletters can be completely up to date.[44] To be up to date on jurisprudence in all five countries proved impossible.
On the other hand, if jurisprudence has a major impact on the interpretation of legislative provisions, it is worth mentioning both because it might change the application of a provision in practice and because it can be a forerunner of a change of legislation. To a lesser extent this is also true for practical policies. It should also be noted here that the UK is a common law state. That means that the decisions of the judiciary have an authority similar to legislation in civil law states.
To cope with difficulties of including jurisprudence and practice on the one hand and the need to keep this thesis close to 'reality' on the other hand, jurisprudence is discussed wherever relevant as far as possible. Practical policies are hardly taken into account. This is because jurisprudence is more intertwined with legislation and widely published than the practice of immigration policies.

The requirements for family reunification
The member states all have their own requirements for family reunification. This is especially true for families with a national sponsor, because the Family Reunification Directive does not cover their applications. To properly compare the situation of both types of families, all requirements allowed or obligated by the Directive for the first application for family reunification are taken into account. Those requirements regard the family situation, the age of the family members,[45] housing, income, health insurance, integration,[46] a waiting period for the sponsor[47] and the location of the application.[48]

There are two reasons for focusing on the requirements of the Directive. First, this will give a useful framework for comparison because most countries have had to implement this Directive. Secondly, because the requirements are different in various respects it is important to take all the applicable requirements into account for a useful comparison.

Requirements that fall outside the scope of the Directive will only be discussed if they have an impact on the application of families with children. For example in the Netherlands it is impossible to obtain a residence permit after residing in the country illegally. When this illegal residence took place while the foreigner was still a minor, the foreigner is exempted and can still receive a residence permit.[49]

The countries
In practice it was only possible to cover the relevant legislation of five member states. Within the practical limits, the best choice was the Netherlands, Germany, Belgium, Spain

[44] Rodrigues 2010, p. 5.
[45] See for both art. 4 of the Directive.
[46] See for these requirements art. 7 of the Directive.
[47] Art. 8 of the Directive.
[48] art. 5(3) of the Directive.
[49] Art. 3.77(9) Aliens Decree.

and the UK for several reasons. First of all, these are all immigration states, which means that the number of immigrants is usually higher than the number of emigrants.[50] Secondly because they have different characteristics: Belgium and the Netherlands are small states, Germany and the UK are two of the most populous and powerful EU states. Additionally, the UK is one of three states (with Denmark and Ireland) that is not bound by the Family Reunification Directive and it is also not a Schengen state. Spain's main relevant feature is that it is a country with a Schengen border shared with a non-European country. Because these countries are a 'cross-section' of Western EU member states, together they might give an idea about the situation in all of the Western EU states (roughly the old EU-15). Also, even if the requirements are different in other member states, it can still be possible to use the results of this research in other states, because many EU states might have a family reunification situation that is comparable to that in one of the five states discussed.
Lastly, because the UK is not bound by the Directive, involving UK legislation in this research will give an idea about the influence of the Directive on national legislation.

Data collection

The main source of information is the legislation in the five countries. This includes any type of law or regulation. Such legislation has been retrieved online, through the official government run websites.[51] Only the Spanish legislation was received mainly through an intermediary.[52]

For the Netherlands, Belgium and the UK the official text in respectively Dutch and English was used. For the German Residence Act an official English translation was needed. For lower legislation the German text had to be translated. Also all the Spanish legislation had to be translated.

The websites of the immigration services or NGOs were used for clarification or factual information. If that did not suffice, academics, people working at NGOs or immigration services were contacted. Especially regarding the Spanish legislation this was necessary because none of the relevant websites were in English.

The theoretical framework discussed above and in the next chapter is based on a literature study and international legislation and jurisprudence.

[50] It has to be noted from 2010 to 2012 more people emigrated from Spain than immigrated to Spain but in the eight years before then there was a migration surplus. Statistics about emigration and immigration of all EU states up until 2012 can be found here:
epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics#Main_tables. Last check on 22 August 2014.
[51] The Netherlands: wetten.overheid.nl; Belgium: www.ejustice.just.fgov.be; Germany: www.gesetze-im-internet.de; UK: www.gov.uk. Last check on 22 August 2014.
[52] Damaris Barajas, from RED Acoge, a refugee NGO. See www.redacoge.org. First she sent the provisions by email (on file with the author), later she also referred to this website: www.boe.es. Last check for both websites on 22 August 2014.

2.
Overview of the relevant fundamental rights conventions

This chapter contains an overview of the relevant fundamental rights conventions as far as they contain any provisions regarding family life or family reunification. Per convention there will be a description of the applicable provisions followed by an explanation of how these rules set a standard for family reunification requirements and which requirements could be affected by the provisions.
First the European Social Charter is considered because it contains the most specific standards for family reunification provisions, then the ECHR and the least specific is the CRC. At the end a few treaties are mentioned of which the applicable treaty bodies only touched upon the issue of family reunion[53] once or twice.
In chapters 3 and 4 the provisions discussed here will be applied on the family reunification requirements set by Belgium, Germany, the Netherlands, Spain and the UK.

The European Social Charter

The Family Reunification Directive states that it is without prejudice to more favorable provisions from other conventions and specifically mentions the European Social Charter ('ESC' or 'the Charter').[54]
This Charter is a human rights convention of the Council of Europe and was meant to be the social counterpart of the ECHR, discussed below. All member states of the Council can choose – within certain limits –which provisions they want to adhere to. The Charter has been revised in 1996. Both versions exist alongside each other but if a state ratified an article that can be found in both versions, the newest version of the article prevails.[55]
Art. 19(6) of the Charter that states that the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory. This article can be found in both the ESC from 1961 and the revised ESC. All five countries and many more EU Member States have ratified the article in either one of the Charters.[56]
Also the Appendices of both versions of the Charter contain an important provision regarding family reunification. They both explain that the term 'family of a foreign worker' entails at least his spouse[57] and dependent children. Both texts differ with regard to the maximum age of the children; this will be discussed further on in this chapter.

Although art. 19(6) ESC is limited to foreign workers, it is still a very useful paragraph for this thesis for two reasons. First, this thesis covers only migrants with a regular residence

[53] In this thesis the terms family reunification and family reunion will be used interchangeably.
[54] Article 3(4)(b).
[55] De Schutter 2012, p. 463-466.
[56] See the overview of ratifications on the ESC website: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013_en.pdf. Last check on 22 August 2014.
[57] In the 1961 Charter it only says 'wife' but the rules in all five countries are applicable to both husbands and wives, probably because discrimination based on gender has been prohibited.

permit and they are usually (family members of) migrant workers. Secondly, the standards set by the provision can be applied to foreigners in similar situations.
Furthermore, the ESC does not say anything about family members of nationals[58] but the standards from the Charter will be applied to them as well in this thesis. After all, there is no reason why national workers should be treated less than migrant workers.

The most important question to be answered now is: how should a state 'facilitate as far as possible the reunion of the family of a foreign worker', as art. 19(6) ESC demands? The answer can be found in the Conclusions of the European Committee of Social Rights (in this paragraph: 'the Committee' and in the remainder of this thesis: 'ESC Committee'). In these Conclusions the Committee gives a short overview of the relevant legislation and practice per ESC paragraph and explains what part of it is not in line with the ESC. These are very concrete comments that will be applied in detail in the following chapters; a short overview will be given here.

First it is important to note that art. 19(6) 'is but an aspect of the recognition in the Charter (Article 16)[59] of the obligation of states to ensure social, legal and economic protection of the family (...)'. This means that when applying any family reunification requirement the member states should do so with the aim to protect family life.[60] This basic principle seems to be in line with art. 8 ECHR, that allowed for family reunification requirements but only if they would not harm the principle of family life.

More specifically the Committee discussed the income, the housing, the language/integration, the waiting time and the age requirements. Regarding housing, it repeatedly stated that 'the requirement of having sufficient or suitable accommodation to house the family or certain family members should not be so restrictive as to prevent any family reunion'.[61]
In several Conclusions the Committee 'considers that the language knowledge requirement before the reunion is not in conformity with the 1961 Charter because it is likely to hinder family reunion rather than facilitate it'.[62]
When calculating the income of the sponsor, the Committee concluded that social welfare benefits should be included.[63] This has a serious influence on the effects of the income requirement, because it means that the fact that a sponsor is (partly) unemployed is not an obstacle for reunion.

[58] As explained in the introduction, in this thesis the noun 'national' means 'an EU citizen living in the country of his nationality', unless stated otherwise. The adjective 'national' means ' the [noun] that is an EU citizen living in the country of his nationality', unless stated otherwise. For example: 'the national parent' means 'the parent who is an EU citizen living in the country of his nationality'.
[59] The full text of art. 16 ESC: With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.
[60] Conclusions Belgium 2011, p. 23-24.
[61] For instance Conclusions Belgium 2011, p. 23-24 and Conclusions Germany 2011, p. 20-22 referring to Conclusions IV, Norway
[62] For instance Conclusions Germany 2011, p. 20-22.
[63] For instance Conclusions Germany 2011, p. 20-22.

The Committee further noted that the waiting period before a third country national sponsor can apply for family reunification should not be longer than one year,[64] where the Directive allows this to be two to three years.[65]

Contrary to the conclusions about the requirements above, there is a lack of clarity regarding the age requirement. The appendix of the 1961 Charter, applicable to Germany, Spain and the UK,[66] allows for the reunification of children *under the age of 21* years. The appendix of the revised 1996 Charter, applicable to Belgium and the Netherlands[67] mentions dependent unmarried children, as long as the latter are *considered to be minors by the receiving State*. This means that the age limit has become less strict in the new version of the Charter. In recent Conclusions the Committee warned several states that children up to the age of 21 should be allowed to reunite with their parents, [68] but it seems unlikely that it will continue to do so now that the revised Charter contains a different age limit.

Art. 19(6) of the ESC sets some clear standards for multiple family reunification requirements. Although other conventions are not as specific as the ESC, they also contain standards that should be taken into account.

European Convention of Human Rights

The second treaty that contains a provision that covers family reunification is the ECHR.[69] As mentioned above, this is also a convention of the Council of Europe. Two European Courts apply the provisions from this Convention: the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) and the case law of both will be discussed here.

The applicable provision of the ECHR is art. 8(1) that states that everyone has the right to respect for his family life. According to art. 8(2) exceptions to the first paragraph are possible if they are in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[64] Conclusions Germany 2011, p. 20-22 and Conclusions the Netherlands 2004, par. on art. 19(6).
[65] art. 8 of the Directive.
[66] See the overview of ratifications on the ESC website: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013_en.pdf. Last check on 22 August 2014.
[67] See the overview of ratifications on the ESC website: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013_en.pdf. Last check on 22 August 2014.
[68] See for instance Conclusions Belgium 2004, p. 22.
[69] Ratified by all EU Member States and open for ratification to the EU itself, see conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG. Last check on 22 August 2014.

The European Court of Human Rights

The ECtHR repeatedly stated that 'Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory'.[70] At the same time, the Court has accepted that under circumstances a family should be able to reunite. Therefore the following will explain how the Court decides when these circumstances have arisen.

As stated in for instance the case *Olgun v. The Netherlands*, 'the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities'.[71] Taking into account art. 8(2), this means that action against family life is only acceptable if it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society. The first of these criteria is not an issue in this thesis, because it discusses legislative reunification requirements. Art. 8(2) gives several options for the second criterion, a legitimate aim: family reunification can be refused in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Not only is the wording of these possible aims very wide, the Court also interprets them as such.[72] For instance, 'controlling immigration' has been accepted as a legitimate aim.[73]

That might be the reason that the parties usually do not discuss the legitimacy of the aim[74] but only argue about the necessity of the family reunification refusal. To determine whether a refusal is necessary, the legitimate aim pursued is weighed against the seriousness of the interference with the applicants' right to respect for their family life.[75] In other words: 'the State must strike a fair balance between the competing interests of the individual and of the community as a whole'.[76] Especially important is that the measure is proportionate. When the ECtHR is making this assessment, states are given a margin of appreciation.[77]

When the Court assesses if a state has properly balanced the interests of the community and the individual, it takes into account the following factors: 'the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion'.[78] In several cases, the best interest of a minor child has also been taken into account but not always as the paramount consideration.[79]

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[70] see for instance ECHR 8 April 2014, 47509/13 (J.M./Sweden), par. 36.

[71] ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*).

[72] Van Vaerenbergh 2013, p. 66.

[73] ECHR 20 October 2005, 8876/04 (*Haydarie v. The Netherlands*)

[74] See for instance ECHR 5 September 2000, 44328/98 (*Solomon v. the Netherlands*) or ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*)

[75] ECHR 21 June 1988, 10730/84 (*Berrehab*) par. 29 via Boeles and Bruins 2006, p. 5.

[76] ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*), par. 41.

[77] ECHR 19 February 1996, 23218/94 (*Gül v. Switzerland*), par. 38. See also Van Vaerenbergh 2013, p. 66.

[78] See for instance ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*), par. 43 or ECtHR 5 September 2000, 44328/98 (*Solomon v. the Netherlands*), par. 1.

[79] See for instance ECHR 31 January 2006, 50435/99 (*Rodrigues Da Silva and Hoogkamer v. The Netherlands*), par. 44 or ECHR 21 June 1988, 10730/84 (*Berrehab*), par. 29. On the other hand, see the case ECtHR 6 July 2010, 41615/07 (*Neulinger and Shuruk*),

Also, the level of integration of the sponsor might play a role: in some situations the Court considers it 'unreasonable to force the parent to choose between giving up the position which he or she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company'.[80]
Note that the Court makes a difference between cases of expulsion and cases of admission. The Court applies a stricter test for the Member States in the first type of cases. In situations of admission the Court has rarely decide art. 8 was violated,[81] but recently the Court has been stricter than before (more lenient from the perspective of third country nationals).[82]

Until 2005, the ECtHR never discussed the acceptability of requirements such as those from the Directive.[83] These requirements are a general way to balance the interests of TCNs and the EU states, but it seems that for the Court, the only thing that mattered were the individual circumstances of the case. This changed with the Haydarie case[84] in which the ECtHR had to decide whether or not the Dutch income requirement at the time was acceptable. This entailed an income as high as the benefits under the General Welfare Act, which did not seem unreasonable to the Court, especially because if the applicant could demonstrate to have made, during a period of three years, serious but unsuccessful efforts to find gainful employment, the income requirement would not have been maintained.
In Konstatinov[85] the Court also repeats that an income requirement in general is not unreasonable, but it does not really discuss whether the income requirement is acceptable in the case at hand. It only states 'that it has not been demonstrated that (...) Mr G. has in fact ever complied with the minimum income requirement or at least made any efforts to comply with this requirement'.[86]

From this it is hard to draw any clear conclusions about an income requirement or similar practicalities, but it seems clear that an exception should always be possible if any of the other factors – the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, etc. – requires it. The conclusions that can be drawn from the ECtHR case-law, as far as relevant for this thesis, is that family reunification should be possible if the circumstances require it and requirements should be proportionate taking into account a margin of appreciation for the Member States. Also, the interest of the child should be taken into account, but it does not necessarily have to prevail over any of the other factors.

The Court of Justice of the European Union
Similarly, but more specific, is the stance of the CJEU on the matter of family reunification. In the *Chakroun* case[87] the Court of Justice had to decide whether the Dutch income

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where the Court does take the child's interest as a paramount consideration. See par. 135 et seq. More cases can be found on this (incomplete) ECHR factsheet: www.echr.coe.int/Documents/FS_Childrens_ENG.pdf. Last check on 22 August 2014.
[80] ECHR 20 October 2005, 8876/04 (*Haydarie v. The Netherlands*).
[81] Boeles et al. 2009, p. 145.
[82] Boeles et al. 2009, p. 162, refers to ECtHR 21 December 2001, 31465/96 (*Sen*) and ECtHR 1 March 2006, 60665/00 (*Tuquabo-Tekle*)
[83] Boeles en Bruins, p. 41. For the requirements, see introduction.
[84] ECHR 20 October 2005, 8876/04 (*Haydarie v. The Netherlands*).
[85] ECHR 26 April 2007, 16351/03 (*Konstatinov v The Netherlands*).
[86] ECHR 26 April 2007, 16351/03 (*Konstatinov v The Netherlands*), par. 50.
[87] CJEU 4 March 2010, C-578/08 (*Chakroun*).

requirement was in line with the Family Reunification Directive. First the Court of Justice reiterated that according to Recital 2 of the Preamble the Directive should be interpreted in line with the ECHR, especially art. 8, and the European Charter of Fundamental Rights.[88] It should be noted that CJEU is not bound by the ECtHR's case law, but the CJEU uses it as 'inspiration'.[89]
The CJEU further stated that 'The margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof.'[90] This sentence became one of the foundations of the EC guidelines regarding the Directive.[91] It basically means that the Member States should use the possibility to implement requirements for family reunion for a relevant purpose, not just to reduce family reunification options in general.
Regarding the income requirement of the Directive[92] the Court of Justice stated that 'the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant. That interpretation is supported by Article 17 of the Directive, which requires individual examination of applications for family reunification.'[93] This means that an income requirement as such is acceptable, but that it depends on the individual situation of the applicant. The income requirement in the Netherlands at the time was 120% of the national minimum income. The CJEU only accepted this requirement insofar it was used as a guideline, not as a strict limit.[94] This is similar to the conclusion drawn above about the case law of the ECtHR.

Wiesbrock states that the decision of the *Chakroun* case can be applied as a general rule to family reunification requirements 'such as housing requirements, integration conditions, residence requirements. All of these will have to be strictly necessary and proportionate in light of the objective pursued and must be interpreted strictly'.[95]

Lastly it should be noted that the CJEU will soon decide on a case in which the pre-entry language test is challenged. In *Ayalti*[96] a German court asks the CJEU whether this test is in line with the Association Treaty between Turkey and the EU and if so, if the test is also in line with the Family Reunification Directive.[97] The first question is not relevant in this context if the CJEU would answer the second question it could shed more light on the compatibility of a pre-entry language test with fundamental rights. According to Thym,[98] the Court will apply art. 7 of the Charter of the Fundamental Rights of the European Union,

[88] CJEU 4 March 2010, C-578/08 (*Chakroun*), par. 44.
[89] Boeles et al. 2009, p. 185.
[90] CJEU 4 March 2010, C-578/08 (*Chakroun*), par. 43.
[91] COM(2014)210 .
[92] art. 7(1)(c).
[93] CJEU 4 March 2010, C-578/08 (*Chakroun*), par. 48.
[94] CJEU 4 March 2010, C-578/08 (*Chakroun*), par. 51.
[95] Wiesbrock 2010, p. 476.
[96] CJEU 15 March 2013, C-513/12 (*Ayalti*).
[97] Art. 7(2) of the Directive.
[98] Thym 2013, p. 729/730.

which is very similar to art. 8 ECHR: 'Everyone has the right to respect for his or her private and family life, native and communications.'
Thym believes that the CJEU will apply a proportionality test and decide that a pre-entry test is acceptable as long as there is a hardship clause for exceptional cases.[99]

Convention on the Rights of the Child

The CRC is a UN convention that – clearly – focuses on the rights of children. As explained in the introduction, it has been ratified by all EU member states. The CRC contains several articles that cover the issue of family life.[100] As mentioned before, art. 16 demands that no child shall be subjected to arbitrary or unlawful interference with his or her family. Also, art. 7 contains the right for children to know and be cared for by his or her parents. More specific is art. 9 CRC which demands that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when necessary for the best interests of the child. Article 10 demands that, in accordance with the obligation of States Parties under article 9, applications for family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.
It follows from the wording of these articles that especially arts 9 and 10 cover the issue of family reunification, whereas art. 16 protects family life in a more general sense[101] and art. 7 has been included in the CRC for situations of adoption and artificial fertilization. Therefore the following will discuss only the first two articles.

Arts 9 and 10 should be read and considered together. This follows from the wording of art. 10(1) and as all articles in the CRC, these two do not stand on their own.[102] In the past, some have interpreted art. 9 to apply only to domestic situations but that is not the general view at the moment.[103]

Although art. 9 demands that a child shall not be separated from his or her parents against their will, it is important to note that 'the right to family reunification is not expressly guaranteed'[104] by the CRC. Nonetheless, certain circumstances may create a situation in which prohibiting a person to reunite with his family is a breach of art. 9 and 'the cardinal principle of the CRC to act in the best interests of the child'.[105]

This still leaves open the question when refusing family reunification is against the CRC. As such, these articles cannot be applied to assess very concrete norms such as an income or housing requirement. The Committee on the Rights of the Child (hereinafter 'CRC Committee') has not published a general comment that gives any relevant clarification

[99] Thym 2013, p. 729/730.
[100] As explained in the introduction, the CRC is ratified by all EU member states.
[101] Hodgkin and Newell 2007, compare the chapters about arts 9 and 10 with the chapter about art. 16.
[102] See for instance Kenny 2011, p 191.
[103] Compare Detrick 1999, p.170 and Unicef Hodgkin and Newell 2007 p. 133.
[104] Hodgkin and Newell 2007, p. 135.
[105] Edwards 2005, p. 23. She only discusses refugee children, but the reasoning can be applied to all situations of family reunification. See also Kenny 2011, p 191 and 192.

regarding arts 9 and 10,[106] but it has made comments regarding these articles in its concluding observations. Based on these comments, Unicef[107] has published an implementation handbook gives guidance on the practical implementation of the CRC provisions.

Per CRC article the Handbook contains a checklist to assess whether a state's legislation fulfils the requirements of the applicable article. The checklist under art. 9 contains two important items in the context of family reunification.[108]
The first one demands that the laws and procedures governing the deporting of parents under immigration law pay regard to the child's right not to be separated from his or her parents unless necessary for his or her best interests. This is relevant for parents who apply in the host country for a residence permit.
The second item demands that *provisions* for the family reunification of immigrants and refugees pay regard to the child's rights not to be separated from parents unless necessary for his or her best interests.

Furthermore, although art. 10(1) might seem to only discuss the application of family reunification itself, the provision also limits substantive family reunification requirements. For instance, the Committee expressed its concern about the age limit at 15 years for children who apply for family reunification in Austria.[109]
Also, from the fact that the procedure should be dealt with in an expeditious manner one can distil the general rule that reunification requirements that prolong the time that children are apart from their parents should only be applied if absolutely necessary.[110] As the Implementation Handbook reads: 'Delay and uncertainty can be extremely prejudicial to children's healthy development. There is a sense in which any period of time is significantly 'longer' in the life of a child than in that of an adult.'[111] Common requirements that (can) have such a prolonging effect are integration requirements before application, a 'waiting period' for the sponsor and the demand that the family member should apply in his non-EU country of residence, even if this person is already in the host country.

So although the CRC does not contain very specific standards for family reunification requirements,[112] it does contain the clear basic principle that any delay should be avoided. According to Boeles, these articles might even mean that State Parties should facilitate family reunification as far as possible.[113]

[106] General Comment 6 discusses the articles but only in the context of separated children. They are not included in this thesis.
[107] United Nations Children's Fund.
[108] Hodgkin and Newell 2007 p. 133. See also pp. 125-126.
[109] Hodgkin and Newell 2007 refers to the Concluding Observations on Austria CRC/C/15/Add.251, para. 35.
[110] See also the recommendation of the CRC Committee to Finland in CRC/C/15/Add.132, p 7.
[111] Hodgkin and Newell 2007 p. 138.
[112] Boeles et al. also complain about this problem, see Boeles et al. 2009, p. 143.
[113] Boeles et al. 2009, p. 176.

Other fundamental rights bodies

Also the Committee on the Elimination of Discrimination against Women (hereinafter 'CEDAW Committee') made some remarks regarding family reunification requirements. In Concluding Observations on Denmark the committee stated its concern about the '"increase in the age limit for spousal reunification from 18 years to 24 years of age in order to combat forced marriage" and urged the State party "to consider revoking the increase in the age limit for family reunification with spouses, and to explore other ways of combating forced marriages"'.[114] This comment challenges the rationale of many states' rule about the age limit of reunifying partners. Such an age limit is detrimental to children's best interest if partners with a child have an age lower than the set limit.
Furthermore, the CEDAW Committee criticised the integration test and the income requirement in the Netherlands[115] and the language and integration test in France.[116] The Committee unfortunately did not clearly state whether these requirements were too strict and if so, how they should be changed.

In the 1996 Concluding Observations on Hong Kong the Committee on Economic, Social and Cultural Rights strongly urges the Hong Kong government to take every possible measure to develop a fair and open one-way permit approval mechanism in order to facilitate rapid family reunification.[117] Although 'rapid' is a fairly vague term, the intention of the Committee is clear and it seems that it roughly agrees with the CRC Committee.

The European Convention on the Legal Status of Migrant Workers also contains an article to protect family reunification,[118] but that treaty was not signed by the UK and many other European countries.[119] It was also not ratified by Belgium and Germany. Because several of the states discussed in this thesis and many other EU states do not have to adhere to this convention, it is not taken into account in this thesis.

In chapters 4 and 5, the fundamental rights standards discussed above will be applied to the family reunification requirements as far as they are specific enough. This means there will be a focus on the statements of the ESC Committee and the *Chakroun* case of the CJEU.
The next chapter covers the hardship clauses that apply to the requirements discussed in chapters 4 and 5.

[114] OHCHR Paper 2005, p8, referring to A/57/38 (part 2, paras. 311-355), § 345-346.
[115] CEDAW/C/NLD/CO/5, par. 42/43.
[116] CEDAW/C/FRA/CO/6, par. 22/23.
[117] Concluding Observations Hong Kong 1996, E/C.12/1/Add.10, par. 34.
[118] See art. 12.
[119] conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=093&CM=4&DF=&CL=ENG.

Part II

3.
Hardship clauses

The family reunification legislation of the UK, Germany and the Netherlands contains hardship clauses. These clauses entail alternative requirements that replace some of the 'regular' requirements discussed in the following chapters. The clauses are meant to prevent situations of particular hardship.
Explaining the clauses in every paragraph they apply to decreases the readability of this thesis. Therefore all clauses are explained here and when one of them applies to one of the requirements there will be only a reference to this chapter.

Parents who already legally reside in the UK and apply for leave to remain[120] can be exempted from several of the requirements discussed in the next chapters if they have a genuine and subsisting parental relationship with a child who

- Is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
- Is in the UK;
- Has lived in the UK continuously for at least the 7 years immediately preceding the date of application of the parent; and
- If it would not be reasonable to expect the child to leave the UK;

The same exceptions apply to the parent who has a genuine and subsisting relationship with a partner who is in the UK and is settled in the UK and if there are insurmountable obstacles to family life with that partner outside the UK.[121]

These criteria bring up the question when it is reasonable to expect a child that has lived in the UK for seven consecutive years to leave the UK. According to a guidance of the immigration services 'all of the points raised in the application, including any exceptional circumstances'[122] should be carefully assessed. The factors that should be taken into account fill six pages, but the most important factors are

- The child's health;
- Whether the parents would join the child;
- The extent of wider family ties in the UK;
- The (re)integration possibilities of the child in the new country;
- Country specific information.

That the facilities such as schooling are overall better in the UK than in the return country is usually not relevant.[123]

[120] A residence permit.
[121] Par the hardship clause Immigration Rules Appendix Family Members.
[122] Immigration rules annex: children's best interests in family and private life cases, par 5.
[123] Immigration Rules annex: children's best interests in family and private life cases, par 21 and 22. The criteria are based on section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, and case law. See Immigration rules annex: children's best interests in family and private life cases, par 6.

Another question is when there are insurmountable obstacles to family life with a partner outside the UK. The Immigration Directorate Instructions of the UK government explain that the sole fact that the couple and/or their child will face 'a degree of hardship' is not enough reason to provide the applicant with a residence permit. Furthermore, the following factors should be taken into account: the ability of the family to lawfully enter and stay in another country, cultural barriers and the impact of a mental or physical disability.[124]

In the Netherlands the Secretary of State can grant a residence permit when the applicant does not fulfil the mvv[125] criterion.[126] This is meant for situations where not granting the permit would lead to 'injustice of a paramount nature'.[127]
It is unclear what constitutes such an injustice, but it is clear that the hardship clause is only used in very extraordinary circumstances. The concerned Secretary of State (and before him, the concerned Minister) applied the clause five times between 2006 and 2011.[128]

In Germany there is a hardship clause for minors that are applying to stay with their TCN parent(s) in Germany (scenario 2). The law states that 'the child's well-being and the family situation are to be taken into consideration in this connection.'[129] Hardship only exists if the negative consequences for the child are very different from the consequences for other children that did not receive a residence permit for family reunification.[130] The decision should mostly be based on the individual circumstances of the case taking into account the best interest of the child and the life of the child in the native country, and several minor criteria.[131]

The following chapters will discuss the 'regular' requirements for the family reunification procedures.

[124] Immigration Directorate Instructions Section FM 1.0, par 3.2.7c. Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/292096/Overarch_Family_1__1_.pdf. Last check on 22 August 2014.
[125] Basically a long term visa.
[126] Article 3.71 (3) Aliens Decree, together with article B1/4.1 Aliens Circular.
[127] Translation from De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 29. See article B1/4.1 Aliens Circular for examples of situations in which the hardship clause will and will not be applied. None of them is specifically related to family reunification situations.
[128] De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 45
[129] Section 32(4) German Residence Act.
[130] Par 32.4.3.1 of the General Administrative Regulation on the German Residence Act
[131] Par 32.4.3.2 and 32.4.4 of the General Administrative Regulation on the German Residence Act

4.
Scenario 1: A parent reunites with his minor child who lives in the EU.

Introduction
This chapter discusses the scenario in which a minor TCN child with a regular residence permit in an EU state wants a residence permit for his TCN parent.

It should be noted that in the UK the rules for applications for entry clearance/leave to enter are covered by different provisions than the rules for an application for limited leave to remain[132] but the content of those provisions are often the same. Therefore, when discussing the British requirements, both situations are covered by the same text, unless specifically mentioned. The footnotes refer to two (sets of) provisions, one for applications for leave to enter and one for applications for leave to remain.
Furthermore, there has been a recent change in the legislation. The old provisions are still applicable to persons who have made an application before 9 July 2012 which was not decided as at 9 July 2012 and to applications made by persons in the UK who have been granted entry clearance or limited leave to enter or remain before 9 July 2012 and where this is a requirement, this leave to enter or limited leave to remain is extant.[133] These provisions are relevant for a decreasing number of people and they do not represent the current picture of UK family reunification legislation. Therefore the following covers only the new provisions.

Requirements on family life

The first issue under discussion is that of family life or the family situation. This paragraph discusses which the family members may join and what their bond should be with the sponsor.
The paragraph is split up in two subparagraphs each covering a different subtopic. First the requirements and possibilities of family reunification of non-married parents will be discussed. The Family Reunification Directive states that countries may allow for reunification of such people as long as the relationship is duly attested, stable and long.[134] The second subtopic is polygamy, because in several third countries polygamous families are legal, but they are not in Europe and the Directive demands that only one partner can join the sponsor.[135]

[132] The requirements for indefinite leave to remain are the same as for limited leave to remain with additional requirements about the length of residence in the UK. See RILRP.1.1.(d) and E-ILRP.1.1.
[133] Par. A280(c) Immigration Rules.
[134] Art. 4(3) Family Reunification Directive.
[135] Art. 4(4) Family Reunification Directive.

Parents who are not married

In all countries except for the UK[136] a parent who wants to reunite with his TCN child and the other parent needs to be the partner[137] of the other parent. This means that if the sponsor parent and the other parent are divorced, the other parent will often not be able to live in the same country as the child, which means that the child will hardly be able to spend time with the child.

The UK legislation allows under conditions for a divorced parent to apply for a residence permit to be able to live close to the child. An important condition is that the child is settled, which means he has an indefinite leave to enter/remain.[138] If the parent applies for leave to remain, he will also receive a permit if the hardship clause applies.[139] Furthermore, either the applying parent must have sole responsibility[140] for the child or the other parent must be settled.[141] Also, the parent applying for reunification must have access rights to the child and also be taking an active role in the child's upbringing. It is up to the parent to prove all the above.[142] Further requirements will be discussed below in the appropriate paragraphs.

As mentioned, in the other countries it is only possible for TCN spouses and other partners to reunite with their child in the EU. Also, in every country there are additional requirements for 'other partners' and in every country these requirements are different. Germany is the most restrictive in this sense. According to art. 27(2) Residence Act the rules for spouses[143] shall apply mutatis mutandis to enable the establishment and maintenance of a registered partnership in the federal territory. A partnership in the German Residence Act is basically the same-sex version of marriage.[144] This means that if the parents of a child have a different kind of partnership, the family will not be able to reunite.

In the other four countries, unmarried partners with a relationship other than marriage (or a same-sex equivalent) can reunite, but there are extra requirements regarding their relationship. The rules in Belgium and the Netherlands are similar. In Belgium, a child's parents can reunite if they have a registered partnership considered to be equal with marriage or if they are legally registered partners and fulfil the requirements.[145] In the Netherlands, there are possibilities for any couple that fulfils the additional requirements.[146]

Spouses that want to reunite in Belgium or the Netherlands will need to live together[147] and in Belgium the family members must also have an actual family life.[148]

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[136] When the parent applies for leave to enter: par. EC-PT.1.1. et seq. Immigration Rules Appendix FM. When the parent already has a different residence permit and applies for leave to remain: par. E-LTRPT.1.1. et seq. Immigration Rules Appendix FM

[137] For the purposes of this thesis the term partner covers all types of partners including spouses, unless stated otherwise.

[138] If the parent applies for leave to enter: par. E-ECPT.2.2 Immigration Rules Appendix FM. For leave to remain: E-LTRPT.2.2.

[139] E-LTRPT.2.2. See also chapter 3, p. 26.

[140] Similar to custody, a further explanation is given below.

[141] For leave to enter: E-ECPT.2.3. For leave to remain: E-LTRPT.2.3.

[142] For leave to enter: E-ECPT.2.4. For leave to remain: E-LTRPT.2.4. Immigration Rules Appendix FM

[143] To be precise: Sub-sections 1a and 3, Section 9 (3), Section 9c, sentence 2, Sections 28 to 31 and Section 51 (2) German Residence Act.

[144] Art. 27.2.1 of the General Regulations of the German Residence Act.

[145] Art. 10(1)(4) and 10bis(2) Belgian Residence Act.

[146] Art. 3.14 Aliens Decree.

[147] Arts 10 (1)(4) and 10(1)(5)(b) Belgian Residence Act or Art. 3.17 Aliens Decree.

Whether two unmarried people are partners in the context of Dutch family reunification legislation depends on whether their relationship is durable and exclusive, which means it should be very similar to a marriage.[149] There is a list of questions for both partners to make such a determination. A filled-in list and a 'relationship statement' should prove the relationship.[150] It is not made public what is on this list and what a relationship statement contains, but whether the partners have children together is not taken into account.[151]
In Belgium unmarried partners must show that they have an enduring and stable relationship. Having a child together will prove such a relationship.[152]

In Spain the unmarried partner can reunite if the relationship is registered and the registration is still valid.[153] If the partners are not married and their relationship is not registered either, the sponsor needs to show evidence that the relationship existed before establishing his residence in Spain.[154]

Apart from the situation explained above, parents can reunite in the UK if they are spouses or 'civil partners'[155], fiance(e)s or proposed civil partners or unmarried and same-sex partners.[156] The only relationship requirement is that the relationship between the applicant and their partner is genuine and subsisting.[157] There is no exception to that rule for partners who have children together, but as mentioned, if the partner does not fulfil these requirements he might apply as a non-partner parent.

The ESC demands in its appendix that at least the spouse of the sponsor should be able to reunite. The treaty text nor the ESC Committee's Conclusion say anything about other partners, let alone the parent of the sponsor's child that is not a partner in any way.

Also the CRC does not give very clear guidelines in this regard. As mentioned in the second chapter, art. 9 CRC demands that States Parties shall ensure that a child shall not be separated from his or her parents against their will unless it is in their best interest. But this does not entail a right to family reunification in the EU, unless reunification in the native country is impossible.

The ECtHR did not take any clear decisions about which family members should in general be allowed to reunite either, but it did state which family members can have 'family life' in the sense of article 8. Much depends on the circumstances, but non-married partners are definitely included. And when they have family life, family reunification might be the only way to keep it intact. Whether or not family life exists between such partners depends on

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[148] Art. 11(1)(2) Belgian Residence Act.
[149] Arts 3.14(a) or (b), 3.15(1) Aliens Decree and B7/3.1.1 Aliens Circular.
[150] Art. B7/5 Aliens Circular under the header 'Huwelijk en geregistreerd partnerschap' (marriage and registered partnership).
[151] This last statement was made by an employee of the Dutch immigration services when asked by phone.
[152] Art. 10(1)(5)(a) Belgian Residence Act
[153] Art. 53(b) Royal Decree 557/2011.
[154] Art. 53(b) Royal Decree 557/2011. See also Brey and Stanek 2013, p. 13.
[155] According to art. 1 of the Civil Partnership Act 2004, a civil partnership is a relationship between two people of the same sex which is formed when they register as civil partners of each other.
[156] GEN.1.2. together with E-ECP.1.1. or E-LTRP.1.1.
[157] For leave to enter: E-ECP.2.6. For leave to remain: E-LTRP.1.7.

factors such as the amount of time the partners live together and whether or not they have children.[158] As mentioned in the second chapter, whether or not a family should be allowed to reunite depends on the individual circumstances of the case. The ECtHR applies criteria such as the extent to which family life is effectively ruptured and the extent of the ties of the family members in the EU State. The Court also stated that 'relationships between adult relatives do not necessarily attract the protection of Article 8 without further elements of dependency involving more than the normal emotional ties'.[159] In other words, if there are no special circumstances, the Court will not demand that a Member State allows for reunification between two adults where it otherwise would not. At the same time, in the scenario at hand there are children involved. Then again, the states have a margin of appreciation.
The above shows that the ECtHR is not very clear on how strict the requirements for single parents can be. Yet it seems safe to conclude that the ECtHR would not accept a general exclusion of single parents without any possibilities for exceptions, especially when taking into account the Court's opinion that a break-up of the parents does not influence the right of the parents to be with the children.[160] Taking that as the minimum standard, the legislation in none of the countries except for the UK fulfils the fundamental rights standards.

Regarding the reunification of partners it is clear that the German legislation is the most problematic because non-married partners are also excluded without exceptions.
Regarding the reunion of partners it is also doubtful whether the Dutch legislation lives up to the fundamental rights standards. It will really depend on the list of questions and the practice of the immigration services. But the fact that it is not taken into account whether a couple has children together goes against the criteria of the ECtHR.
Also in Spain it is unclear if the provision regarding non-married partners is in line with the fundamental rights. It will depend on what is considered evidence that the relationship existed before the sponsor took residence in Spain.
Belgium is the only country in this research in which it is clearly stated in the law that having children gives non-married partners the right to reunite. This makes it clear that the family reunification provisions regarding partners 'pay regard to the child's rights not to be separated from parents', which means that, apart from the exclusion of unmarried parents, the legislation is in line with fundamental rights.
Note that these conclusions are not certain because they are based on the rather vague criteria outlined above.

Polygamous relationships
The second subtopic is polygamous relationships which, as mentioned above, are not allowed in the EU and are specifically excluded from family reunification by the Directive.[161] All countries have adhered to this exclusion. In Belgium,[162] the Netherlands,[163] Germany[164] and the UK[165] the 'first come first serve'-principle is applied: any partner can join, but after

[158] Boeles et al. 2009, p. 146/7 referring to ECtHR 20 June 2002, 50963/99 (*Al-Nashif)*.
[159] ECHR 26 April 2007, 16351/03 (*Konstatinov v The Netherlands*), par. 52.
[160] Detrick 1999, p. 173.
[161] Family Reunification Directive, art. 4(4).
[162] Art. 10(1), first sentence after subparagraph 7 and art. 10(1)(5)(d) Belgian Residence Act.

one partner has done so the others have lost that right. In Spain only the last person that became a partner of the sponsor is allowed to join the sponsor.[166] This last system is stricter than the others and can have a negative impact on children when the last partner does not have children with the sponsor and a different partner does.
Again the UK has the least restrictive legislation, because the partners of the sponsor who cannot not reunite as partners can apply as parents of their children. Applying the analysis from the previous subtopic on this one, the conclusion should therefore be that only the British legislation is in line with the ECHR because it is the only legislation that allows the other partners of the sponsor to reunite whereas the other countries forbid their reunification without any exceptions.

Age

The Family Reunification Directive allows member states to set a minimum age for the reunion of partners. This age limit should not be higher than 21 and is only allowed 'to ensure better integration and to prevent forced marriages'.[167] All researched countries make use of this possibility and have implemented a minimum age for partners who want to reunite.

In the Netherlands and Belgium both the partner and the sponsor have to be at least 21 years old.[168] There is an exception in both countries: the Dutch Aliens Circular states that for married couples or registered partners whose relationship existed before the sponsor had obtained legitimate residence in the Netherlands, a minimum age of 15 applies.[169] In Belgium the minimum age is lowered to 18 for partnerships or marriages that existed before arrival of the sponsor in Belgium.[170]

In Germany the limit is 18, but there is an exception for a situation of particular hardship.[171] To qualify for this exception, the situation of the spouse must be different from other spousal reunifications in such a way that sticking to the age restriction would be disproportionate. It should also be taken into account how much younger than 18 the partner(s) is/are.[172] It is unlikely that having a child together will be enough to fulfil these requirements, because the regulations do not mention that as a criterion. This suspicion is confirmed by the NGOs Verband binationaler Familien und Partnerschaften and Bundesfachverband Unbegleitete Minderjährige Flüchtlinge which state that it is very hard

[163] Art. 3.16 Aliens Decree.
[164] Section 30(4) German Residence Act.
[165] Par. 278, 279 and 280.
[166] Art. 17(1)(a) of the Spanish Immigration Act and Art. 53(a) Royal Decree 557/2011.
[167] Art. 4(5) Family Reunification Directive.
[168] Arts 3.14 and 3.15 Aliens Decree and art. 10(1)(4) Belgian Residence Act.
[169] Arti. B7/3.1.2 Aliens Circular. Might be changed to 18. A bill to change has passed the Second Chamber of parliament and is now being reviewed by the First Chamber. See (in Dutch): Kamerstukken I, vergaderjaar 2013-2014, 33488, A (Parliamentary Documents).
[170] Art. 10(1)(4) and 10(1)(5), last sentence Belgian Residence Act
[171] Section 30 (1)(1) and Section 30 (2) sentence 1 of the German Residence Act.
[172] Art. 30.2.1 General Regulations of the German Residence Act.

to fulfil the requirement of this exception[173] and that only very seldom marriages of minors are allowed, because of the fear of forced marriage.[174]

Also in the UK the reunification of partners is not possible if either the applicant or the sponsor is aged under 18 on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted. Also non-partner parents who apply to reunite with their child should be at least 18.[175]

Spain has the most liberal age requirement: Spanish law allows marriage between couples that are over 15, also for migrants.[176]

The minimum age requirement slows down the family reunification process for those who have not reached it yet. This means that children will have to be away from their parents for a longer time than necessary based on the other requirements. Such a delay 'can be extremely prejudicial to children's healthy development. There is a sense in which any period of time is significantly 'longer' in the life of a child than in that of an adult.'[177] Therefore art. 10 CRC states that the reunification procedure should be expeditious. This means that any rule that delays family reunification is likely to be against this article.

The idea behind the age limit is that it helps prevent forced marriages based on the idea that when children are older they are more likely to act independently of their parents. In both the Netherlands[178] and Germany[179] these assumptions have been refuted but the policies haven't changed. That and the fact that there is an exception for groups such as highly skilled workers[180] suggests that the age requirement is mainly there to discourage immigrants to come to Europe unless they are likely to benefit the European economy.

The CEDAW Committee also discussed the minimum age requirement in its Concluding Observations. It criticized Danish plans to raise the minimum age from 18 to 24. The Committee urged the state party 'to explore other ways of combating forced marriages'.[181] This means that also the CEDAW Committee challenges the rationale of many states' age requirement.

One of the main conclusions of the ECtHR case law regarding family reunification is that there should always be a possibility for a reunion if it is demanded by 'the extent to which

[173] Triebl and Klindworth 2012 (FRP Germany), p. 46 refers to Verband binationaler Familien und Partnerschaften (iaf) e.V. (2012), *Stellungnahme des Verbands bi- nationaler Familien und Partnerschafen , iaf e.V. zu: Grünbuch der Kommission zum Recht auf Famili- enzusammenführung von in der Europäischen Union lebenden Dritstaatsangehörigen (Richtlinie 2003/86/EG) KOM(2011) 735 endgültig,* p. 6.
[174] Email from Ulrike Schwarz, 3 June 2014, on file with the author.
[175] For leave to enter as a partner: par. 277, UK Immigration Rules and E-ECP.2.2. and E-ECP.2.3 Immigration Rules Appendix Family Members. For leave to remain as a partner: E-LTRP.1.3. and E-LTRP.1.4 Immigration Rules Appendix Family Members. For leave to enter as a parent: E-ECPT.2.1 Immigration Rules Appendix Family Members.
[176] Araujo 2010, p 28.
[177] Hodgkin and Newell 2007, p. 138.
[178] De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 30 refers to WODC 2008: 112, 136-137; Strik 2011: 194-195.
[179] Triebl and Klindworth 2012 (FRP Germany), p 55.
[180] Section 30 (1) sentence 2, no. 1 to 3 German Residence Act.
[181] OHCHR Paper 2005, p8, referring to A/57/38 (part 2, paras. 311-355), § 345-346.

family life is effectively ruptured, the extent of the ties in the [EU] State' or because 'there are insurmountable obstacles in the way of the family living in the country of origin'.[182] This means that there should be exceptions possible to the general rule. This is also the view of the European Commission, applying the CJEU's *Chakroun* case on the age requirement.[183] Based on this reasoning, none of the states lives up to the Court's standards. On the other hand, the ECtHR would probably only demand such an exception in extraordinary circumstances.[184]

Based on the above it is difficult to decide which minimum age would be in line with the fundamental rights standards – except for extraordinary circumstances. Following the CEDAW Committee's one could conclude that the age requirement for partners should not be higher than 18, which would mean that the rules in Germany, the UK and Spain are all acceptable.[185]

Income

This paragraph discusses the income requirement, which can be imposed on the sponsor by the Member States.[186] That the Directive states that countries 'may require' a certain level of income, it is not an obligation. Also, according to that article the purpose of this requirement is mainly to ensure that migrant families are no burden on the social assistance system. This did not prevent that some states demand a higher income than strictly necessary for that purpose. And the higher the income requirement, the harder it is for a foreigner to join his partner and child in the host state.

Because legislation constituting the definition of income can be very technical and different in every country the focus of this thesis is limited to three issues. One issue is the ratio between the income requirement and minimum wage (if existing), to give an idea on whether the income requirement is generally high compared to the income of nationals.[187] This is also an important criterion used by the CJEU in its *Chakroun* case, which will be discussed below.[188] Another issue that is taken into account is whether the size of the family makes a difference, because if having children increases the minimum amount, it is harder for families with children to live together. Also any specific exceptions for children are discussed.

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[182] See for instance ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*) par. 43 or ECHR 5 September 2000, 44328/98 (*Solomon v. the Netherlands*) par. 1.
[183] EC Guidelines, COM(2014)210, p. 7 and 8.
[184] Van Vaerenbergh 2013, p. 55.
[185] The CRC has the best interest of the child as one of its basic principles (See art. 3(1)) and also the Directive states that it should be taken into account when applying its provisions. Therefore one could argue that an exception to the minimum age requirement for couples with children is obligated but this has never specifically been stated by the CRC Committee.
[186] Article 7(1)(c) of the Directive.
[187] As explained in the introduction, in this thesis the noun 'national' means 'an EU citizen living in the country of his nationality', unless stated otherwise. The adjective 'national' means ' the [noun] that is an EU citizen living in the country of his nationality', unless stated otherwise. For example: 'the national parent' means 'the parent who is an EU citizen living in the country of his nationality'.
[188] CJEU 4 March 2010, C-578/08 (*Chakroun*).

In the following the requirements will be explained first and afterwards the fundamental rights assessment will be made. The countries have all very different requirements and are therefore discussed separately in the first part.

In the Netherlands an immigrant or the person he will be sharing a household with, should independently and durably provide for sufficient means of subsistence.[189] The minimum amount is 100% of the legal minimum wage for people older than 23, which is a little higher than for singles and single parents.[190] Whether or not a couple has children, let alone the number of children, does not have any influence on the necessary amount.[191]
If the income of the family is lower than the minimum wage but the net earnings are at a level that the family will not rely on social security, the income requirement is still met.[192]

In Germany the sponsor must be able to provide for his family and therefore a general precondition for the granting of a residence title is that 'the foreigner's subsistence is secure',[193] which means that he or she is able to earn a living without recourse to public funds. Any child-related benefits are not considered public funds.[194]
Although the law does not state any specifics on income, the federal authorities in Germany determined an exact minimum income for foreigners. The height of this income depends on the number of people in the family. Children are included in this number, but the minimum income does not rise as much for every child as it does for every adult.[195] This income standard cannot be compared to the minimum income because that does currently not exist in Germany. Negative economic developments, which can lead to an increase in unemployment, are not taken into account when someone's financial situation is assessed.[196]

Also in Belgium, all family members need to prove that the sponsor has a sufficient income. This income is 120% of the minimum wage for a family.[197] This amount is higher than that for couples without children but does not take into account the number of children.[198]
There is no exception for couples that have a child together. Child benefits are not even

[189] Art. 16(1)(c) Aliens Act.
[190] ind.nl/en/individuals/family/costs-income-requirements/Income-requirements en www.rijksoverheid.nl/nieuws/2013/11/07/minimumloon-per-1-januari-2014.html. Last check of both websites on 22 August 2014.
[191] ind.nl/en/individuals/family/costs-income-requirements/Income-requirements. Last check on 22 August 2014. See also Strik, de Hart and Nissen 2012 (FRP International), p 14.
[192] Kamerstukken II 2012/13, 32175, 49 (Letter of the Secretary of State to the Parliament), p. 1. Available at zoek.officielebekendmakingen.nl. Last check on 22 August 2014.
[193] Section 5(1) no. 1 German Residence Act.
[194] Section 2(3) German Residence Act.
[195] Triebl and Klindworth 2012 (FRP Germany), p 9 refers to Weber, ET SEQ. & Reimann, R. & Löfer, H. (2008), *Familienzusammenführung. Rechtsgrundlagen für die Einreise und den Aufenthalt in Deutschland,* Deutsches Rotes Kreuz e.V. (Hrsg.), 2. überarb. Auf., Berlin, p. 9 et seq.
[196] Triebl and Klindworth 2012 (FRP Germany), p 54. Triebl and Klindworth also found that the income requirement is a very great obstacle in reuniting a family and the most important reason for failure of reunification. (p. 54.)
[197] Art. 10(2), second sentence et seq. and art. 10(5) Belgian Residence Act. For sponsors with a temporary permit, see art. 10bis(2) Belgian Residence Act.
[198] art. 14(1)(3) of the 'Wet betreffende het recht op maatschappelijke integratie' and www.kruispuntmi.be/thema/je-bent-familielid-van-een-derdelander/de-derdelander-heeft-onbeperkt-verblijfsrecht-in-belgie/je-bent-echtgenoot-of-gelijkgesteld-partner-van-een-derdelander-met-onbeperkt-verblijfsrecht/wat#4. Last check on 22 August 2014.

taken into account when assessing the level of income of the parents.[199] On the other hand, according to NGO Kruispunt MI the immigration services cannot deny an application for family reunification immediately when the applicant has not proven to have enough means of subsistence. Every family or couple has the right to a 'needs assessment', which means that the immigration services have to assess if the family could live on the income that they are receiving, similar to the Dutch system.[200]

In Spain, the income requirement is 150% of IPREM - 'roughly the minimum wage'[201] - for two people.[202] The required income increases with every additional family member with another 50% of IPREM.[203] These requirements are fairly high, and there is another reason why the income requirement is difficult to meet. Araujo points out that the informal economy is relatively important in Spain, which means irregular contracts are quite common. This is problematic when applying for family reunification because the sponsor needs a regular contract to prove he fulfils the income requirement.[204]
In exceptional circumstances the level of the income requirement will be based on the situation of the minor; this follows from the best interest of the child principle embodied by the Organic Law 1 of 15 January 1996 about the judicial protection of the minor.[205]

For partners in the UK the income requirements are £18,600, an additional £3,800 for the first child and an additional £2,400 for each additional child.[206] This means that without any children, the income requirement is already 150% of the minimum wage of one person over 21 working full time. For those under 21 it is relatively more.[207] These amounts can be less if the sponsor has additional savings. Also, maternity allowance or bereavement benefits are considered income.[208] The only exception is that children who are settled in the UK, which means they have a long-term residence permit, are not taken into consideration when establishing the minimum income requirement.[209]
The single parent joining his TCN child must provide evidence that he will be able to adequately maintain and accommodate himself and any dependants in the UK without recourse to public funds, but there is no set minimum income.[210] There is no income requirement at all for a parent who applies for leave to remain and whose child or partner fulfils the requirements from the hardship clause as explained above.[211]

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[199] Art 10(5)(2) Belgian Residence Act.
[200] www.kruispuntmi.be/thema/je-bent-familielid-van-een-derdelander/de-derdelander-heeft-onbeperkt-verblijfsrecht-in-belgie/je-bent-echtgenoot-of-gelijkgesteld-partner-van-een-derdelander-met-onbeperkt-verblijfsrecht/wat#4. Last check on 22 August 2014.
[201] Brey and Stanek 2013, p. 9.
[202] Art. 18(2) Immigration Law and art 54(1) Royal Decree 557/2011.
[203] art 54(1) Royal Decree 557/2011.
[204] Araujo 2010, p. 32.
[205] Art. 54(3) Royal Decree 557/2011.
[206] For leave to enter: par. E-ECP.3.1. For limited leave to remain: E-LTRP.3.1 Immigration Rules Appendix FM
[207] According to this government calculator: www.gov.uk/am-i-getting-minimum-wage/y/current_payment/no/23/30/168/1550.0/0/no. Last check on 22 August 2014. See also: www.gov.uk/national-minimum-wage-rates. Last check on 22 August 2014.
[208] E-ECC.2.2.(d) Immigration Rules Appendix FM.
[209] For leave to enter: par. E-ECP.3.1 Immigration Rules Appendix FM. For leave to remain: E-LTRP.3.1.
[210] For leave to enter: par. E-ECPT.3.1 Immigration Rules Appendix FM. For leave to remain: E-LTRPT.4.1.
[211] See page 26.

As explained in the second chapter, the CJEU stated that art. 7(1)(c) of the Family Reunification Directive must 'be interpreted as meaning that the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant.'[212] Simply put: the income requirement cannot be a strict limit but should be applied as a guideline. Every family deserves an assessment of their needs.

Also the ESC Committee commented on the income requirement of several of the five countries. The major point of criticism was that social welfare benefits are not included when calculating the sponsor's income.
Both the *Chakroun* case and the ESC Committee's remarks will be taken into account when assessing the income requirements outline above.

The current income requirement in the Netherlands is in line with the *Chakroun* case, especially now that the Secretary of State has promised that the policy will be to make individual assessments.[213] Of course the way these assessments are executed could be against the CJEU's standards, but the legislation is in line with the standards. The ESC Committee is still critical: in its Conclusions regarding the Netherlands it noted that family members should not automatically be excluded from family reunification just because the sponsor's income is (partly) based on social security.[214] This suggests that the ESC Committee is of the opinion that the Dutch requirement is not in line with the ESC, but it did not literally say so. It stated that it needed more information on the application rejected because of the income requirement.
This means that tentatively it can be concluded that the Dutch rules comply with the fundamental rights standards applied here, but this might change with the next ESC Committee report.

Considering the above, the Belgian requirement for TCN parents with a temporary residence permit will be accepted by the CJEU, if the Belgian authorities give every family a chance to have their 'needs assessment' individually. Additionally, the ESC Committee did not criticize the Belgian income requirement and therefore it is safe to say that it is in line with the ESC as well.

Germany is the only country in which the interpretation of the CJEU can be found in the legislation itself, but in practice it seems to have strict requirements. Therefore one would be inclined to conclude that the German income requirements do not comply with the CJEU's standards. Also the ESC Committee stated that the German income requirement is too strict, mainly because social welfare is not included when calculating the sponsor's income. Note that this is a similar problem as in the Netherlands, but the Committee takes a

[212] CJEU 4 March 2010, C-578/08 (*Chakroun*), par. 43.
[213] Kamerstukken II 2012/13, 32175, 49 (Letter of the Secretary of State to the Parliament, 12 March 2013), p. 1 en *Aanhangsel handelingen II* 2013/14, 2054 (Parliamentary questions 23 May 2014), p. 3.
[214] Conclusions the Netherlands 2011, p. 24/25.

clear stand regarding the German rules. This gives more reason to believe that the Dutch income requirement might be within the limits set by the ESC. In conclusion: the German income requirement is not in line with the fundamental rights.

The Spanish income requirement is clearly against the Court's decision, unless the exception for minors will be applied in every case in which a family proves it can live on a lower income than demanded. The wording of the law suggests that that is not the case and according to an expert, there has never even been a successful claim on this exception.[215] Also the ESC Committee commented that social welfare benefits are not taken into account when making the income calculation of the sponsor and therefore concluded that the income requirement is not in line with the ESC.[216]

Based on the above, it will be clear that also the UK requirements do not comply with the CJEU's standards, especially when taking into account that 'decision-makers cannot exercise any discretion or flexibility with regard to the level of the financial requirement that must be met'.[217] This means that the amounts mentioned above are strict limits and no guidelines.
Also the ESC Committee is critical about the income requirement. The Committee noted that family members should not automatically be excluded from family reunification just because the sponsor's income is (partly) based on social security and it demanded more information about the issue, just as it did regarding the Dutch rules.[218]

Housing

In art. 7(1)(a) the Family Reunification Directive allows the Member States to require the sponsor to have accommodation 'regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned'. This means that the EU states can set rules regarding the housing of the sponsor but they cannot go beyond the housing requirements for national families. Except for the Netherlands[219] all countries have such housing requirements.
As with income, housing requirements can be very technical, so I will focus on two issues. The first one is whether the housing requirements are as strict as the requirements for nationals who do not apply for family reunification. The second is whether there are any exceptions for children. The latter issue because of this thesis' focus on children and the first one is based on the *Chakroun* case.
The *Chakroun* standards and the standards from the ESC and its Committee will be used to assess the housing requirement.

[215] María Jose Aldanas, email 27 May 2014. Email in file of author.
[216] Conclusions Spain 2011, p. 24-26.
[217] Immigration Directorate Instructions, Chapter 8, Annex FM 1.7 Financial Requirement, par. 3.2.1.
[218] Conclusions UK 2011, p. 24/25.
[219] But see De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p. 30 and 31. Also, that does not mean that Dutch parents of TCN children do not have to comply with the housing regulations that apply to all Dutch citizens.

In Germany Section 29 (1) no. 2 of the Residence Act demands that there is sufficient living space for all family members. The actual size that is considered sufficient is different depending on the 'Bundesland' (state) that the family lives in, but in general, living space which does not comply with the statutory provisions for Germans with regard to condition and occupancy shall not be adequate for foreigners.[220] Furthermore, children up to the age of two do not influence the minimum space necessary.[221]

Housing of TCN families in Belgium should fulfil the general requirements set for Belgians in article 2 of Book III, Title VIII, Chapter II, Part 2 of the civil code.[222] There are no exceptions for families with children.

Also in Spain there are housing requirements for the sponsor. Whether a house fulfils the standard is based on the type of contract of the house (own/rent), number or rooms, usage of each room, number of persons in the house.[223] It is unclear from the relevant legislation whether these requirements are different from the regulations for Spanish families. There are no exceptions for families with children.

In the UK there should be adequate accommodation for the sponsor and any dependants without recourse to public funds and the sponsor should own or occupy the residence exclusively. Accommodation will not be regarded as adequate if it is, or will be, overcrowded or if it contravenes public health regulations.[224] As in the other countries, there are no exceptions for spouses who have a child with the sponsor. These rules apply to both parents who join as a partner and single parents.
The housing requirement does not apply to a parent who applies for leave to remain and whose child or partner fulfils the requirements from the hardship clause as explained above.[225]

One could of course argue what size of a residence is minimally acceptable for any family, but it seems proportionate to demand from TCN families the same as for national citizens. And proportionality is one of the main principles used by the CJEU in the *Chakroun* case.[226] Therefore the legislation of Belgium, the Netherlands and the UK will probably pass the '*Chakroun* test'. For Germany it will depend on the differences between the *Länder*, because if a TCN family in one *Land* can properly live in a house of a certain size, it is unlikely that the CJEU will accept that a TCN family in a different *Land* with a house of the same size, is prohibited from reunification.

[220] Section 2 (4) sentence 2 of the German Residence Act.
[221] Section 2 (4) sentence 3 of the German Residence Act.
[222] Art. 10(2), second sentence et seq. or art. 10bis(2) Belgian Residence Act. See for the details on income and housing: www.kruispuntmi.be/thema/je-bent-familielid-van-een-derdelander/de-derdelander-heeft-onbeperkt-verblijfsrecht-in-belgie/je-bent-echtgenoot-of-gelijkgesteld-partner-van-een-derdelander-met-onbeperkt-verblijfsrecht/wat#4. Last check on 22 August 2014.
[223] Art. 18(2) Immigration Act and art 55 Royal Decree 557/2011.
[224] For leave to enter as a partner: par. E-ECP.3.4. For leave to remain as a partner: E-LTRP.3.4. For leave to enter as a parent: par. E-ECPT.3.2. For leave to remain as a parent: E-LTRPT.4.2.
[225] See page 26.
[226] Wiesbrock 2010, p. 476.

Although the regulations from these countries probably comply with the standards from the CJEU, the ESC Committee warned Belgium and Germany that the housing requirement 'should not be so restrictive as to prevent any family reunion'.[227] The UK did not receive any criticism from the Committee.

Unfortunately it was impossible to retrieve the proper housing regulations from Spain and therefore to assess them in the light of the *Chakroun* case but the ESC Committee did not condemn the Spanish housing requirements nor asked for more information in the last three reports, even though the issue came up in the last one.[228] Therefore it is tentatively concluded that the Spanish regulations are acceptable.

Health insurance

Art. 7(1)(b) of the Family Reunification Directive states that Member States may require that the sponsor has health insurance for himself and his family, covering all risks that nationals usually cover.

For a TCN who wants to join his family in the Netherlands, Spain or in the UK there is no health insurance requirement when applying for a residence permit.[229] In Germany, any immigrant should have adequate health insurance coverage[230] which means that he should at least be enrolled in a statutory health insurance fund.[231] In Belgium, TCN family members need to prove that the sponsor has a health insurance that covers the risks in Belgium for himself and the family members.[232]

When applying the *Chakroun* criteria again, it seems that the legislation in Belgium and Germany is in line with the ECHR, because in both countries it seems that the health insurance requirement is the same for TCNs as for German and Belgian nationals. Drawing a definite conclusion is impossible without further research on the insurance legislation in those countries.

Language/integration

In art. 7(2) the Family Reunification Directive allows member states to require that family members comply with integration measures before they reunite with their family. The Netherlands, Germany and the UK have implemented such measures; Belgium and Spain[233] do not have any requirements in this regard.

[227] Conclusions Belgium 2011, p. 23/24 and Conclusions Germany 2011, p. 20-22.
[228] Conclusions Spain 2011, p. 24-26.
[229] Although all residents of the Netherlands are obliged to have basic health insurance (art. 2(1) Zorgverzekeringswet in combination with art. 5(1)(a) AWBZ). The same could be true for the UK and Spain.
[230] Art. 2(3) German Residence Act.
[231] Art. 2(last paragraph) German Residence Act.
[232] Arts 10(2)(tweede zin), 10bis(2), 40ter(tweede zin) Belgian Residence Act.
[233] Brey and Stanek 2013, p. 8.

The parent who wants to reunite with his partner and/or child in the UK[234] or Germany[235] needs to prove that he can both speak and understand English respectively German on an A1 level of the Common European Framework of Reference. In the Netherlands all immigrants over 18 need to pass an integration test abroad, including a language test and questions about the Dutch society, before they can obtain a residence permit.[236]
There is an exception to the Dutch rule in case the Minister would decide that withholding an mvv because of the integration test requirement leads to a grave injustice.[237] This only applies in 'very special circumstances, such as medical emergencies, human trafficking, and domestic violence'.[238]
Similarly, in the UK an exception is possible if there are exceptional compassionate circumstances or if the applicant has a physical or mental condition that would prevent him from meeting the requirement.[239] For that exception the applicants must demonstrate that 'as a result of exceptional circumstances they are unable to learn English before coming to the UK'.[240]
This requirement does not apply to a parent who applies for leave to remain in the UK and whose child or partner fulfils the requirements from the hardship clause as explained above.[241]

As explained in the third chapter, the ESC Committee does not accept any language or integration conditions before the reunion. It literally stated that such requirements are 'not in conformity with the 1961 Charter because it is likely to hinder family reunion rather than facilitate it'.[242] The same was said with regard to the revised charter.[243] The Committee therefore concluded that in Germany, the Netherlands and the UK the legislation is not in line with the ESC.
Additionally, the CJEU stated in *Chakroun* that requirements like this should not compromise the aim of the Family Reunification Directive, which is to promote reunification,[244] and according to the European Commission the integration requirements should be applied with 'flexibility'.[245]

[234] For leave to enter as a partner: E-ECP.4.1. For leave to remain as a partner: E-LTRP.4.1. For leave to enter as a parent: Par. E-ECPT.4.1.(b) For leave to remain as a parent: E-LTRPT.5.1. Immigration Rules Appendix FM
[235] Section 30 (1) sentence 1 no. 2 and Section 2(9) of the German Residence Act, see also Triebl and Klindworth 2012 (FRP Germany), p 7
[236] Art. 3.71a Aliens Decree and art. B1/4.7 Aliens Circular.
[237] Art. 3.71a(2)(d) Aliens Decree.
[238] De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 29
[239] For leave to enter: par. E-ECP.4.2. For leave to remain: E-LTRP.4.2. For leave to enter as a parent:: Par. E-ECPT.4.2. For leave to remain as a parent: E-LTRPT.5.2. Immigration Rules Appendix FM.
[240] See Immigration Directorate Instructions, Chapter 8, Section 1.21, par. 7.1. Available on www.gov.uk/government/uploads/system/uploads/attachment_data/file/263206/english_lang.pdf. Last check on 22 August 2014.
[241] See page 26.
[242] Conclusion Germany 2011, p. 20-22. See also Conclusion UK 2011, p. 24/25.
[243] Conclusion the Netherlands 2011, p. 24/25.
[244] Family Reunification Directive par. 43.
[245] Guidelines COM(2014)210, p. 16.

There is good reason for the conclusions of the ESC Committee and the CJEU: according to experts and interviewed immigrated families in Germany, this language requirement, although it is the second lowest level, is still a major hurdle for spouses and not just for those with learning disabilities, illiterates or others who have arrears when it comes to learning a language. [246] In report discussing the Dutch integration measures it is also mentioned that, just like in Germany, 'the integration requirement led to postponement of family reunification because family members first had to prepare for the test and if they did not pass the examination, had to retake it.'[247] A major obstacle for family members is the necessity of personal appearance at the embassy for courses or for the test. It involves 'time and effort for the family members, for example due to long travelling times or organising the care of other family members (e.g. children) during their absence'. This is especially difficult in countries in turmoil, for example Egypt during the so-called Arab Spring.[248] This leads to a situation in which children are apart from one of their parents for a long time.[249]

Location of application

The Family Reunification Directive also discusses the country where the application for family reunification should take place. In art. 5(3) it is stated that this should be in a different country than where the sponsor is residing, unless the family member is already in that country and there are 'appropriate circumstances', whatever that means. In the latter case, the Member States *may* accept applications made in their own territory.

In all five countries the application procedures have the basic assumption that the family member applies at the embassy or consulate in his country of residence, or, as expressly stated in the Dutch legislation, in the nearest consulate or embassy.[250] There are exceptions to this basic assumption in all countries. In all countries except Spain it is possible to apply for a family reunification permit from within the applicable EU country if someone has a(n almost expired) residence permit for other reasons than family reunification.[251]

In Germany this rule is, at least in theory, the most wide: if a foreigner who is legally resident in the federal territory applies for a residence title, his or her residence shall be deemed to be permitted up to the time of the decision by the foreigners' authority, even if he does not possess a residence title.[252] The Aufenthaltsverordnung adds that a foreigner

[246] Triebl and Klindworth 2012 (FRP Germany), p 47.
[247] De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 74.
[248] Triebl and Klindworth 2012 (FRP Germany), p 48.
[249] Triebl and Klindworth 2012 (FRP Germany), p 47.
[250] NL: Art. 2s(1) Aliens Act. and B1/3.3.1 Aliens Circular; Belgium: art. 12bis(1) Belgian Residence Act; Germany: Aufenthaltsverordnung par. 39, based on Section 99(1)(2) German Residence Act; Spain: Art. 57 Royal Decree 557/2011;
[251] The Netherlands: B1/3.3.1 Aliens Circular. See also the website of the Immigration services: kdw.ind.nl/KnowledgeSessie.aspx?knowledge_id=MWOTEV_procedure; Belgium: Art. 26/2 Belgian Residence Decree; Germany: Section 81(3) German Residence Act; UK: For leave to remain as a partner: E-LTRP.2.1. For leave to remain as a parent: E-LTRPT.3.1.
[252] Section 81(3) German Residence Act. Even if the application is filed too late, deportation shall be deemed to be suspended from the time of application up to the time of the decision by the foreigners authority, unless an earlier and similar application was rejected. See art. 81.3.4 General Regulations of the German Residence Act Allgemeine Verwaltungsvorschrift.

can apply for a residence permit in Germany if he has a visa for Germany or a residence permit for another EU Member State.[253]

The rule in the Netherlands is that if someone does not need an mvv,[254] he can apply in the Netherlands.[255] This could be because he already has a(n almost expired) residence permit for other reasons than family reunification, as mentioned above, or because of an exceptional situation. Having a child in the Netherlands is not such a situation. Also, before someone is send to his native state, a test is conducted to assess whether this would constitute a violation of art. 8 ECHR.[256] As a last resort one could rely on the hardship clause.[257]
An interesting side-note is that in the Netherlands, instead of the family member, also the sponsor can apply and he can do so at an office of the immigration services in the Netherlands. This is especially advantageous for those family members who for instance reside in a country without a Dutch consulate or embassy.[258]

In the UK the same rule applies as in Germany but with a few exceptions that might in practice affect a lot of people: the family member cannot apply in the UK for leave to remain if he has permission to be in the UK as a visitor, has permission to stay for less than 6 months – unless he has visa to get married or become civil partners – or he has a visa to wait for the outcome of a family court or divorce. Also those with temporary admission or release, basically people who allegedly broke immigration rules, are in most cases exempted from applying for family reunification in the UK.[259]

In Belgium the rules are quite similar to the UK rule. If the family member has a permit for a period shorter than three months, he cannot apply in Belgium, unless the purpose of stay is marriage and the marriage takes place within those three months. Another exception applies if extraordinary circumstances prevent the family member from going to his place of residence abroad, but this is only for family members of sponsors with a long-term residence permit.[260]

The Spanish regulation is a little different from the others. Family members in the first degree, including partners, who are over 18 and whose permit is expired can apply for a new permit in Spain on the basis of 'exceptional circumstances' after 3 years of stay and if they give prove of a family relationship with a legal resident.[261] Furthermore, it is specifically stated in the law that the family member needs to prove that the sponsor provides him with sufficient means of subsistence.[262]

[253] Aufenthaltsverordnung par. 39, based on Section 99(1)(2) German Residence Act.
[254] Similar to a visa.
[255] Implicit in art. B1/3.3 Aliens Circular and B1/3.4.1.2 Aliens Circular.
[256] art. 3.71(2)(l) Aliens Decree jo. art. 17(1)(g) Aliens Act.
[257] Art. 3.71(3) Aliens Decree. See also above on p 26.
[258] art. B1/3.3.1 Aliens Circular.
[259] For leave to remain as a partner: E-LTRP.2.1. For leave to remain as a parent: E-LTRPT.3.1.
[260] art. 12bis(1) German Residence Act and Art. 26/2 Belgian Residence Decree.
[261] It is possible to submit a social integration report from local authorities instead of prove of the family relationship.
[262] Article 124(2) Royal Decree 557/2011.

Minors[263] who are applying for a Spanish residence permit to join their partner can do so in Spain if they have stayed in Spain for at least two years, even if that was an irregular stay. Children between 6 and 16 must have been going to school during those years.[264]

For family members who are still in their original country of residence and did not yet come to the host state, the obligation to apply for family reunification in their country of residence is relatively easy. But also for this group the personal appearance at a diplomatic representation can be problematic especially in countries in turmoil.[265]
Of course for those already in the respective host states the inconvenience is much bigger. In an extreme scenario, where there is no relevant diplomatic representation in the family member's country of residence, he would have to travel back to his country of residence, apply for a visa for a neighbouring country, travel to that country, apply for family reunification, travel back, await the decision in his country of residence and then travel back to the country where he was in the first place, now with the right permit.

According to art. 10 CRC the procedure should be dealt with in a positive, humane and expeditious manner.[266] Especially from the term 'expeditious' one can distil the general rule that reunification requirements that prolong the time that children are apart from their parents should only be applied if absolutely necessary.
Additionally, sending one member of a family back to his country of residence to apply for a visa or permit can be against art. 8 ECHR.[267]
The ESC Committee never discussed this issue in the last three reports about family reunification of any of the five countries.

The German legislation is in this regard the most likely to fulfil the criteria from art. 10 CRC and art. 8 ECHR. Whether the Dutch, Belgian and British legislation do so is questionable. The Dutch legislation fulfils at least the requirements of art. 8 ECHR because of the exceptions and the 'ECHR assessment'.[268] Also, the option that the sponsor can do the application instead of the family member could save the family a lot of time. This means that the legislation is in line with the applicable fundamental rights, but whether the procedure is lives up to those rights in practice depends on the way the 'ECHR assessment' is conducted. The fact that the hardship clause can be invoked here does not make the legislation more lenient because an application based that clause is accepted very rarely.[269]

The British and Belgian legislation is in some ways stricter than the Dutch and in some ways it is more lenient. Not having an 'EHCR assessment' makes it unlikely that it fulfils the criteria of the ECHR, especially when taking into account that the ECtHR stated that if the circumstances demand it, taking into account the relevant factors, family reunification

[263] As explained above under 'age', minor partners can also reunite in Spain.
[264] Art. 186(1) Royal Decree 557/2011.
[265] Triebl and Klindworth 2012 (FRP Germany) p. 48. See also par. on language/integration above.
[266] See also the recommendation of the CRC Committee to Finland in the Concluding Observations CRC/C/15/Add.132, p 7.
[267] Blaak, Bruning, Eijgenraam, Kaandorp & Meuwese 2012, p 750.
[268] Blaak, Bruning, Eijgenraam, Kaandorp & Meuwese 2012, p 750.
[269] See also above on p 26.

should always be possible.[270] On the other hand, in Belgium there is an exception for extraordinary circumstances but it does not apply to all family members.
Also, the fact that these two countries do not have any exceptions that can take into account the special situation of partners whose children are already in the respective host countries leads one to suspect that the best interest of the child were not taken into account which would constitute a violation of the CRC.[271] Although it is difficult to reach an unequivocal conclusion due to a lack of specific criteria from the ECtHR, the CJEU, the CRC Committee or the ESC Committee, it seems that the requirements in both the UK and Belgium do not comply with fundamental rights standards.

Spain's regulations are the strictest in this regard, because family members must have been in Spain for at least three years. This does not take into account any possible special circumstances regarding the family member. Furthermore, when a person applies for a permit on the basis of exceptional circumstances there might not be a guarantee that he will receive the permit.[272] Therefore the Spanish rules do not fulfil the requirements of the ECHR or the CRC.

Minimum length of stay of sponsor before application/waiting period

In several countries the sponsor needs to legally reside a certain period of time in the host country before family reunification is allowed. According to the Directive such a waiting period should be no more than two or three years, depending on the reception capacity. The rationale of such waiting periods should be 'to make sure that family reunification will take place in favourable conditions' so that 'the family members will settle down well and display a certain level of integration'.[273] This is supposedly more likely after the sponsor has been residing in the host State for a certain period.

The requirements are in all five countries quite similar, but the possible exceptions are very different. An exception is Belgium, where there is no waiting period for partners who have a child together.[274]

In the Netherlands there is a twelve-month waiting period for sponsors with a temporary residence permit.[275] Note that almost any TCN who applies for a regular residence permit will first receive such a temporary residence permit, which means that in practice all TCN sponsors will have to wait for a year before they can start the family reunification procedure. There is an exception for situations in which this waiting period harms the interest of minor children as protected by article 5(5) of the Family Reunification Directive.

[270] See for instance ECHR 10 May 2012, 1859/03 (*Olgun/The Netherlands*) par. 43 and see chapter 2.
[271] Art. 3(1) CRC.
[272] According to Dámaris Barajas of RED Acoge. Email of 21 August, on file with the author.
[273] CJEU 27 June 2006, C-540/03 (*Parliament v Council*).
[274] Art. 10(1)(4) and (5) Belgian Residence Act.
[275] Art. 3.15(3) Aliens Decree. There is an exception for those who have a residence permit for a specific temporary purpose, such as an exchange or seasonal work, see article 3.15(3)(a) Aliens Decree, but in most of those situations family reunification is not possible at all (art. 3.15(1)(b) Aliens Decree).

What that means in the concrete has not been made clear by the legislator who only refers to art. 17 of the Family Reunification Directive and states that interests of children and the nature and durability of the family bond are always taken into account.[276] There is no jurisprudence to clarify this provision either.

The Spanish legislation contains the same requirement as the Dutch – the sponsor can only apply for family reunification after he has been staying in Spain for at least a year – but without the exception.[277]

If the sponsor in Germany does not have a settlement permit[278] but a residence permit[279] he must wait for two years before family reunification is possible.[280] There is an exception if the marriage or partnership existed before the sponsor obtained his residence permit and the duration of the sponsor's stay in the federal territory is expected to exceed one year.[281] For couples with children it is very well possible that even these two requirements are cancelled for a sponsor with a residence permit because of a second exception.[282] Whether or not a couple qualifies for such an exception depends on the circumstances but one of the main criteria taken into account is whether the partners have a child together.[283]

In the UK there is not a specified minimum waiting time, but the sponsor must be settled or being admitted for settlement, which means he has an indefinite leave to enter or remain.[284] In practice this means that it can take several years before family reunification is possible, but this depends very much on the specific situation of the sponsor.
The same requirement applies to the child of a single parent when this parent applies for leave to enter.[285] If the parent applies for leave to remain, the requirement applies as well unless the parent can invoke the hardship clause.[286]

The CJEU decided that the waiting time requirement is not necessarily against the right to family life as protected by the ECHR.[287] At the same time, the CJEU does not accept a waiting time without taking into account all the relevant factors.[288] One of these factors is the best interest of the child.[289]

[276] Nota van Toelichting van Besluit van 27 maart 2012 tot wijziging van het Vreemdelingenbesluit 2000, het Besluit modern migratiebeleid en het Besluit inburgering (aanscherping eisen gezinsmigratie), Stb. 2012, 148. par. 3. See zoek.officielebekendmakingen.nl/stb-2012-148.html
[277] art. 56 Royal Decree 557/2011. de extranjería and art. 18(1). See also Brey and Stanek 2013, p. 9
[278] A permanent residence title, Section 9(1) German Residence Act
[279] A temporary title, Section 7(1) German Residence Act
[280] Section 30(1)(Sentence 1)(3)(d) German Residence Act
[281] Section 30(1)(Sentence 1)(3)(e) German Residence Act
[282] Section 30(2)(sentence 2) German Residence Act
[283] Art. 30.2.3.3 General Regulations of the German Residence Act. Also note that this exception is expressly not for cases of particular hardship according to Art. 30.2.2 General Regulations of the German Residence Act.
[284] For leave to enter as a partner: par. E-ECP.2.1(b). For leave to remain as a partner: E-LTRP.1.2.
[285] E-ECPT.2.2(c) Immigration Rules Appendix Family Members
[286] E-LTRPT.2.2. See also chapter 3 p. 26.
[287] CJEU 27 June 2006, C-540/03 (*Parliament v Council*), par. 98.
[288] CJEU 27 June 2006, C-540/03 (*Parliament v Council*), par. 99.
[289] CJEU 27 June 2006, C-540/03 (*Parliament v Council*), par. 101. See also Com(2014)210, p. 17.

As mentioned in the previous paragraph, reunification requirements that prolong the time that children are apart from their parents should only be applied if absolutely necessary, because such a separation can be harmful, especially for children. It is highly unlikely that this can be considered positive, humane or expeditious which means it goes directly against art. 10 CRC.

Yet the Netherlands, the UK and Spain have rules in place that prolong the procedure with at least a year, irrespective of whether a family fulfils all the family reunification requirements.
The Spanish legislation does not contain any possibilities for exceptions and are therefore not in line with art. 8 ECHR and art. 10 CRC. This is also true for the British legislation, except for single parents who fulfil the criteria of the hardship clause.

In the Dutch legislation there is an exception for situations that are harmful for children. Taking this exception literally would mean that in practice hardly any family with minor children should have to wait a year before family reunification is possible, because in most situations such a waiting time is harmful to minor children.[290] This does not seem to be the interpretation that is used in practice, because the website of the immigration services lists the waiting period as one of the standard requirements.[291] Whether the Dutch legislation is in line with the fundamental rights standards depends on the application of the exception for children.
The same conclusion can be drawn regarding the German legislation, although it seems quite likely that it will fulfil the standards because couples with children are explicitly mentioned.

Other requirements

In Germany, there is an additional requirement for TCN sponsors whose spouse is joining: the residence permit must contain the possibility of extension or the sponsor must have the possibility to obtain a settlement permit.[292] The same exceptions apply as for the waiting period[293] and therefore the same conclusion can be drawn: because of the exception for couples with children, the requirement is probably in line with the CJEU standards, but it depends on the practical application of the exception.

Conclusion

This conclusion should answer the main question with regard to parents that reunify with their children who are already in the EU. This chapter discussed the compliance of the applicable family reunification requirements with fundamental rights and the differences

[290] Hodgkin and Newell 2007, p. 138.
[291] ind.nl/particulier/familie-gezin. Last check on 22 August 2014.
[292] Section 30(1)(Sentence 1)(3)(d) German Residence Act.
[293] Section 30(1)(Sentence 1)(3)(e) and Section 30(2)(second sentence) German Residence Act and Art. 30.2.2 and Art. 30.2.3.3 General Regulations of the German Residence Act.

between the countries. Unlike the next chapter, this one could not compare the situation of TCN sponsors with national sponsors.

When looking at the first of these issues, the short conclusion is that overall the legislation is not in line with the fundamental rights. On average about half of the requirements is too strict. Notable is that there are very few differences in the requirements between couples with and couples without children. This would not have been a problem if both were always treated in line with the applicable fundamental rights, but that is clearly not the case. The rationale behind a requirement can disappear when a couple has a child. For instance, the rationale for the age requirement was that it prevents forced marriage because older children act more independently from their parents. When two people already have a child together, independence of the couple from their parents can become less relevant. At the same time the best interest of the (grand)child is to live with both his parents. In such a situation an exception for people with a child might be in order.

The second subject of comparison regards the differences between the countries. First it should be noted that is impossible to decide which country has the 'best' legislation, because for that one would need a way to value the requirements and the extent to which they are in line with fundamental rights. In other words: Germany has an income requirement that is too strict, but the German legislation on applying for family reunification is the most lenient. Does that make the legislation overall better than the Dutch legislation, which has a stricter requirement on the location for application, but is more lenient on the income? And is the legislation of a country that is not in line with fundamental rights standards regarding three requirements better than the legislation of a country that is not in line with fundamental rights standards regarding four or five requirements? Giving a well-founded answer to these questions would require a research on its own. That said, there are several general comments to make.

There is no country in this thesis in which all family reunification requirements for parents with children comply with fundamental rights standards. In Germany most requirements are not in line with fundamental rights, but as explained, this does not necessarily means Germany has the strictest legislation.[294]
Also notable is that except for possibly the housing requirements and the health insurance requirements none of the requirements is up to the fundamental rights standards in all five countries. This means there are quite some differences between the countries which confirms, as far as this scenario goes, the claim of the European Commission that the Directive did not really harmonise the legislation.[295]

[294] Still, the iaf concluded that the requirements in Germany are overall very high for parents who immigrate to their children's host country. They base this on the very low number of such parents receiving a residence permit: 306 in 2010, which is 0,6 % of the total number of temporary residence permits. Verband binationaler Familien und Partnerschaften (iaf) e.V. (2012), *Stellungnahme des Verbands bi- nationaler Familien und Partnerschafen , iaf e.V. zu: Grünbuch der Kommission zum Recht auf Famili- enzusammenführung von in der Europäischen Union lebenden Dritstaatsangehörigen (Richtlinie 2003/86/EG) KOM(2011) 735 endgültig*, p. 6, quoted in Triebl and Klindworth 2012 (FRP Germany), p 46
[295] Guidelines, COM(2014)210, p. 1.

The countries in this research were chosen to find out whether countries with different characteristics would have significant differences in the legislation based on these characteristics. Such differences are not very clear as far as this chapter goes. One would for instance expect the Netherlands, Belgium and to a lesser extent Germany to have similar legislation, but they are just as different from each other as they are from Spain or the UK. There is one exception: the exclusion of the single parents. They are prohibited from reuniting with their children in all countries except for the UK. This means that the legislation in the other countries does not take into account that even though the parents of some children are separated, they can still raise a child together and that it might be good for the child to see both parents on a regular basis.
Another advantage to allowing family reunion of parents that are not partners is that is provides a suitable compromise between the prohibition of polygamy in the EU and the right of children of polygamous partners to live with both their parents.
It should be noted that the Family Reunification Directive specifically prohibits the reunification of parents who are not partners. This means that if the Directive had any influence on the reunification legislation regarding parents in the Member States, it is that it prevented certain family members from reuniting. At the same time, the Directive does allow Member States to adopt or maintain more favourable provisions,[296] which means the Member States are responsible for the strict requirements themselves.

In any case, as far as the reunion of parents with children goes, it can be concluded that the Directive did not promote family reunification.

[296] Art. 3(5).

5.
Scenario 2: A minor child reunifies with his parent(s) who live(s) in the EU.

Introduction

This chapter contains a comparison between the following two scenarios that differ with regard to the nationality of the parent:
Scenario 2a. A minor TCN child wants a residence permit to reunite with his *parent(s) who has/have a regular residence permit* in an EU state.
Scenario 2b. A minor TCN child wants to reunite with his parent(s) who reside(s) in an EU country and who has/have the *nationality of that country*.

As in the previous chapter, the comparison will be done per family reunification requirement that can be found in the Family Reunification Directive. For every requirement the legislation of all 5 countries will be explained and then assessed using the fundamental rights standards from the second chapter. That will lead to a conclusion for that requirement. The chapter ends with an overall conclusion for this scenario. First some general comments are in order.

The scenarios discussed in this chapter cover both the situation that the child joins one or two parents. Therefore in the following the words parent and parents are used interchangeably, unless stated otherwise.

Note that it is unlikely that a TCN child joins two parents with the same EU nationality, because it means that the parents have a good opportunity to give their child that nationality as well, which would mean that the child will not have to fulfil any requirements for family reunification.

Especially lenient in this regard is the Spanish law. In Spain this scenario is not considered family reunification and therefore there is no family reunification legislation for this scenario. According to art. 17 of the Spanish Civil Code, those born of a Spanish father or mother are Spanish by birth.
Children who might have lost the Spanish nationality by living abroad[297] or whose parents were not Spanish when they were born, still fall in the category of persons who are or have been subject to the parental authority of a Spaniard. This means they are entitled to opt for the Spanish nationality.[298] These children only have to give up their old nationality and fulfil some procedural requirements.[299]

[297] Art. 24 Spanish Civil Code.
[298] Arts 20(1) of the Spanish Civil Code.
[299] Article 23 Spanish Civil Code. These are the requirements:
a) For the person older than fourteen and capable of issuing a statement by himself to swear or promise fidelity to the King and obedience to the Constitution and the law.
b) For the same person to declare that he renounces his prior nationality.

This means that in the following there is no need for a comparison between the two Spanish scenarios: it is clear that the children of a Spanish parent are better of in terms of family reunion. Therefore the focus regarding the Spanish legislation will be on the question whether the family reunification rights of the children of a TCN parent are in line with fundamental rights.

Similar is the German situation: if one of the child's parents is German when it is born – and if the German parent is the father, he acknowledges his child – the child will automatically receive the German nationality, even when the child is born abroad.[300] Therefore the requirements explained below for children of a German parent only apply if both parents were not Germans at the time of birth but one of them received German citizenship later on. The Dutch situation is practically the same as the German.[301] Therefore children of Dutch parents are usually no TCN, even when they are born abroad.[302]
A little stricter is the Belgian legislation where the children born from Belgian parents abroad are not automatically Belgian, but the requirements are easy to fulfil.[303]

The most strict are probably the British rules on nationality: children born abroad of British nationals might be British but in several cases might have to register for British citizenship. This is a procedure similar to naturalisation. It might be easier for some minors to fulfil the requirements for registration than for family reunification, but that will depend on their situation and the situation of their parents.[304]

Furthermore it is important to note that in the Netherlands, the family reunification regulations are exactly the same for TCN parents and Dutch parents, except for the requirement of a waiting period. Therefore when the Dutch regulations are discussed it will not specifically be mentioned which of the two types of parents fall under the relevant rule. It also means that the focus is on whether these regulations are in line with fundamental rights more than whether the two types of sponsors are treated the same.
Also in the UK most family reunification provisions for children cover both the situation where the parents have a British nationality as where they have a long-term residence permit, an indefinite leave to enter or remain. The rules for parents with a limited leave to enter or remain are covered by different provisions but the content of those provisions are often the same.[305] Therefore, when discussing the British requirements, all situations are

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c) For the acquisition to be registered with the Spanish Civil Registry.
If the minor is 14 or younger, the legal representative can apply on their behalf, those over 14 can do that themselves but should be assisted by a legal representative (Art 20(2) Civil Code).

[300] Section 4(1) German Nationality Act, official translation. Although there is an exception if the parent was born abroad as well and after 31 December 1999, Section 4(4) German Nationality Act.

[301] Art. 3 et seq. Rijkswet op het Nederlanderschap (Dutch Citizenship Act).

[302] But that it can happen and lead to immigration difficulties proves the case of Rachel Eind v The Netherlands, 11 December 2007, C-291/05. This case was about a Dutch father living in the UK who had a Surinam daughter. The fact that the father lived in the UK made the case fall outside the scope of this thesis because the focus here is only on EU citizens living in their own country.

[303] Art. 8(1) Wetboek van de Belgische nationaliteit (Belgian Nationality Act).

[304] See for more information the website of the UK government: www.gov.uk/register-british-citizen/children-born-outside-uk. Last check on 22 August 2014.

[305] They have been changed quite recently. Applications by children with a parent with limited leave to remain from before July 2012 are still covered by par. 301-303 of the Immigration Rules. See also Immigration Directorate Instructions Chapter 8, Section

covered by the same text, unless specifically mentioned. The footnotes therefore often refer to two (sets of) provisions, one for the situation where the parents have British nationality/indefinite leave to remain and one for the situation where the parents have a limited leave to remain.

Family life

The first requirement under discussion is that of family life or the family situation. This topic covers three subtopics. First the family situation of the child is discussed: the relation of the child with his parents and whether he has a family of his own. The second subtopic is polygamy, because in several countries children from polygamous families are restricted in their family reunification rights. Thirdly, custody will be discussed. This is only relevant if a child joins one parent in the EU and the other parent will not living with them.

Family situation of the child
Art. 4 of the Directive demands that minor children that want to reunite with their TCN parents must not be married. The five countries have all implemented this obligation in the national legislation in one way or another, except for Spain. The Spanish legislation does not say anything in this regard.

In the Netherlands a TCN child can only reunite with his sponsor parent if the minister decides that the child has been in effect a part of the family in the native country and still is part of the family.[306]
Children are assumed to be part of the family in line with the definition of family life from art. 8 ECHR. There will be no such assumption if the child lives independently and provides for himself or if the child has formed his own family.[307] In fact, according to the website of the immigration services this will make family reunification as a child impossible,[308] although according to art. B7/3.8.3 Aliens Circular the Immigration Services should always make an individual assessment.
Also in Belgium[309], Germany[310] and the UK[311] a TCN child cannot be married to be able to reunite with his TCN parent(s). In the UK it is added that even if the child gets a divorce, he does not fulfil the family requirement anymore.[312]

Regarding children of national parents, the countries have almost the same rules. As mentioned, the Dutch and British rules are almost always the same for both types of parents. Also a child who wants to join his German parent(s) in Germany cannot be married

FM 3.1 Children, par. 2.1. Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/263239/children.pdf. Last check on 22 August 2014.
[306] Article 3.14(c) Aliens Decree.
[307] art. B7/3.2.1 third paragraph and art. B7/3.8.1 Aliens Circular.
[308] ind.nl/particulier/familie-gezin. Last check on 22 August 2014.
[309] Art. 10(1)(4) and 10bis(2) Belgian Residence Act.
[310] Section 32(1) German Residence Act.
[311] Par. 297(iii) Immigration Rules or E-ECC.1.3-E-ECC.1.5 Immigration Rules Appendix FM.
[312] www.gov.uk/government/uploads/system/uploads/attachment_data/file/263240/child_gen.pdf. Last check on 22 August 2014.

either.[313] A child joining his Belgian parents is not expressly demanded to be single, he has to be living with his parents and at their expense.[314]

One could argue about the rationale for such a rule. Do minors who are married stop being minors? The CRC allows for a positive answer to that question: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'[315]
Also the ESC (both versions) only demands that *dependent* children are given the right to reunite with their families.[316] Children who started their own family do not fall within the meaning of that word.[317] This means that excluding married children and/or children who are not part of their parents' family anymore is not against fundamental rights standards. It also means that the legislation regarding the family situation of the child in most of the countries in this research for children of both TCN parents and national parents is in line with these standards.
Only the UK rule that excludes children who divorced their partner and became single again is probably not in line with the ESC. Such children might become dependent on their parents again, especially if their partner was the only breadwinner of the new family.

Polygamy
Polygamous relationships are legal in several third countries but not in any of the five countries. This means it is impossible to keep the family intact in a legal sense.[318] Such a restriction on family reunification can be strict or lenient. The Dutch and the UK legislation are both quite strict regarding the reunion of children from a polygamous marriage: if a parent-sponsor in the Netherlands or the UK is in a polygamous relationship, only children from the partner who joined the sponsor can receive a residence permit.[319] The Dutch rule goes on to state that even if none of the partners live in the Netherlands, only the children from one of them can join the sponsor.[320] This applies to both children of national British or Dutch parents as TCN parents.
In the UK children from other partners can reunite with the sponsor but only if their non-sponsor parent dies. If that is the case, the partner of the sponsor who is in the UK will, in the family reunification procedure, be considered to be the parent of these children. That means that the children have to fulfil the same requirements as children who reunite with both parents (see the next subtopic).[321]

The fundamental rights conventions used in this treaty do not state anything specific about this issue, but the CRC and the Family Reunification Directive state that the best interest of

[313] Section 28(1)(2) German Residence Act.
[314] Art. 40ter jo. 40bis(2)(3) Belgian Residence Act.
[315] Art. 1 CRC.
[316] Appendix ESC referring to art. 19(6).
[317] Conclusions Netherlands 2006, par. on art. 19(6).
[318] Of course if the family members all manage to receive a residence permit, they can continue their relationship in practice.
[319] Par. 296 Immigration Rules.
[320] Article 3.16 Aliens Decree and B7/3.2.6 Aliens Circular.
[321] UK Immigration Directorate Instructions Chapter 8 Section FM 3.2 children, par. 11.1 and 11.2. Even more difficult is the situation where the children are considered to be not legitimate, see paragraph 11.4.

the child should be taken into account.[322] Furthermore, art. 8 ECHR has been interpreted as a proportionality test in which the benefits for the state of a limit on family reunification must be balanced against the interests of the family involved.

In this situation the best interest of the child is to be able to live with a parent of choice if they cannot live together. The interest of the state is unclear, because the children would be allowed to live with their parent in the Netherlands and UK if their parents would divorce, taking into account custody rules (see next subtopic).
When balancing these two interests, taking into account that the interest of the child deserves special weight and that divorce of their parents is usually not for the best interest of the child, the conclusion is that the British/Dutch rules mentioned above is incompatible with fundamental rights.
Such rules cannot be found in the legislation of any of the other countries, which means that regarding polygamy the legislation is in line with fundamental rights.

Custody of the parent
The third subtopic is custody of the child. As stated earlier, this issue only comes up if the child joins a parent in the EU and the other parent will not be living with them. If this is the situation, legislation in all countries states that if the child joins a *TCN* parent in the EU, the latter must be the only one to have custody.[323] In the UK, it is enough to have 'sole responsibility' which entails custody but it is a wider concept.[324] If the TCN sponsor does not have sole custody, permission or a declaration of consent from whoever has custody as well, will be accepted instead in Belgium,[325] Germany[326] the UK[327] and the Netherlands, but not in Spain. In the Netherlands such consent is only needed when the legislation in the native country demands it. [328]
In many third countries it is possible that a competent authority gives consent instead of the other holder of custodial rights if for instance this person does not want to give consent, he cannot be found or if he is deceased. Such consent is accepted in Germany[329] and the Netherlands,[330] and depending on the circumstances, also the UK, but not in Belgium. This

[322] See for instance art. 3(1) CRC, art. 9 CRC, art. 5(5) Family Reunification Directive.
[323] In NL: Article 3.14(c); in Germany: Section 32(1); in Belgium Art. 10(1)(4); in Spain: art. 17(1)(b) Immigration Act, art. 53(c) and 53(d) Royal Decree 557/2011.
In Germany this requirement can be very strict, because the term 'sole custody' has been interpreted very strictly by the German Federal Administrative Court. A parent can only have sole custody over a child if the other parent does not have any remaining rights, even if it is impossible to lose such rights according to the laws of the native country. See, Triebl and C. Klindworth 2012 (FRP Germany), p. 38.
[324] Par. 297(i)(e) Immigration Rules or E-ECC.1.6(b) Immigration Rules Appendix FM. This means that the parent 'must satisfactorily demonstrate that he has, usually for a substantial period of time, been the chief person exercising parental responsibility. For such an assertion to be accepted, it must be shown that he has had, and still has, the ultimate responsibility for the major decisions relating to the child's upbringing, and provides the child with the majority of the financial and emotional support he requires. It must also be shown that he has had and continues to have care and control of the child.' Prove of custody is usually enough. See Immigration Directorate Instructions Chapter 8, Section FM 3.2 Children, part 4. Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/263240/child_gen.pdf. Last check on 22 August 2014.
[325] Belgium: Art. 10(1)(4) Belgian Residence Act.
[326] Germany: Section 32(3) German Residence Act.
[327] Immigration Directorate Instructions Chapter 8, Section FM 3.2 Children, par. 4.1.
[328] Art. B7/3.2.3 Aliens Circular, see also De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 10.
[329] Section 32(3) German Residence Act.
[330] Art. B7/3.2.3 Aliens Circular, see also De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 10.

means that if the child is alone in the native country but has a parent in Belgium, it will be impossible for him to join that parent if technically someone else also has custody.
In Germany children can furthermore rely on the general hardship clause if for some reason consent cannot be obtained from the parent nor from the competent authority.[331] In the UK there is a similar rule: if the parent does not fulfil the custody requirement the child can still come if there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.[332] This only applies if 'the child could not be adequately cared for by his parents or relatives in his own country' and the circumstances of that child are 'exceptional in relation to those of other children living in that country'.[333]
Additionally, the requirement of sole responsibility does not apply to the TCN sponsor whose TCN child was born in the UK and has not been away from the UK for more than two years.[334]

In the Netherlands, the UK and in Belgium, the same rules regarding custody apply to TCN and national parents.[335] In Germany the rules are different for national parents: both the German Residence Act and the General Administrative Regulation do not contain a rule about custody regarding the TCN child of a German parent. And as mentioned above, in Spain custody is not an issue for children of Spanish parents.

The next question is whether it is compatible to demand the abovementioned from the parent living in the EU. Before answering that it is important to note that the issue of consent will only be a problem when the parent in the third country is nowhere to be found or dead, or if the parents are not on good terms with each other or with a third person who also has custody. And in the latter case, it only becomes a children's rights issue if the parent in the child's state of residence cannot (properly) care for the child and/or if the child prefers to live with the parent in the EU. In all these situations, it is in the best interest of the child if the consent of the parent that is not in the EU can be circumvented. And as the Unicef Implementation Handbook for the CRC demands, provisions for the family reunification of immigrants should pay regard to the child's rights not to be separated from parents unless necessary for his or her best interests.

How consent of the parent in the third country should be circumvented and under what criteria is a question for educationalists, but the fact that this is not possible for children who want to join their parents in Belgium or their TCN parents in Spain makes it unlikely that the legislation in these countries fulfils international human rights obligations. This means that children of TCN parents living in Belgium and Belgian parents are not treated according to the CRC regarding custody. The same is true for children of TCN parents in Spain, which means that they are not treated equal to children of Spanish parents.

[331] Section 32 (4) of the German Residence Act. See chapter 3, p. 26.
[332] Par. 297(i)(f) Immigration Rules or E-ECC.1.6(c) Immigration Rules Appendix FM
[333] Immigration Directorate Instructions Chapter 8 Children Section FM, par 1.
[334] Par. 305(i) Immigration Rules.
[335] See for Belgium: art 40ter referring to art. 40bis(2)(3) Belgian Residence Act.

The Dutch, the British and German legislation do not suffer this deficiency and therefore the custody rules for children of TCN and national parents in the Netherlands or Germany are in line with the CRC.

Age

The Family Reunification Directive states that minor children 'must be below the age of majority set by the law of the Member State concerned'.[336] All five states followed this obligation, which means that in all states children cannot reunite with their parents when they are over 18.[337]
Also children of Dutch and German[338] parents can only join their parents when they are under 18, but TCN children of Belgians can join their parent(s) until the age of 20.[339]
For the children opting for the Spanish nationality, there is no age limit.[340]

As mentioned above, a maximum age limit of 18 for special rights for children is not at all against the CRC.[341] Interesting in this regard is the ESC's stand on the age requirement. As explained in the previous chapter, the 1961 Charter demands that children up until the age of 21 are allowed to join their parents, but that requirement changed in the revised charter. Germany, Spain and the UK still have to follow the latter rule, but the moment these states ratify the revised Charter, their legislation lives up to the Charter. This does not keep the ESC Committee from reprimanding these states that they should change their legislation and allow children up to the age of 21 to reunite with their parents.
This situation makes it impossible to reach a conclusion on whether legislation of the five countries fulfils the fundamental rights standards, except for the rules for children of Belgian and Spanish nationals, which are clearly compatible with those standards.

Income

This paragraph discusses the income requirement, which can be imposed on the sponsor by the Member States.[342] That the Directive states that countries 'may require' a certain level of income, it is not an obligation. Also, according to that article the purpose of this requirement is mainly to ensure that migrant families are no burden on the social assistance system. This did not prevent that some states demand more than strictly necessary for that purpose.

[336] Art. 4 Directive.
[337] The Netherlands: Article 3.14(c) Aliens Decree and De Hart, Strik & Pankratz 2012 (FRP the Netherlands), p 7/8. Germany: Section 32(1) German Residence Act. Spain: Art. 53(c) Royal Decree 557/2011. Belgium: art. 10(1)(4) and 10bis(2) Belgian Residence Act; UK: par. 297 (ii) Immigration Rules or E-ECC.1.2. Immigration Rules Appendix FM.
[338] Section 28(1)(2) German Residence Act.
[339] art 40ter referring to art. 40bis(2)(3) Belgian Residence Act.
[340] Art. 20 Spanish Civil Code.
[341] Art. 1 CRC.
[342] Article 7(1)(c) of the Directive.

As under the first scenario, there is a focus on three issues when discussing the income requirement in the five countries. One issue is the ratio between the income requirement and minimum wage (if existing), to give an idea on whether the income requirement is generally high compared to the income of nationals. This is also an important criterion used by the CJEU in its *Chakroun* judgment, which will be discussed below.[343] Another issue that is taken into account is whether the size of the family makes a difference, because if having children increases the minimum amount, it is harder for families with children to live together. Also any specific exceptions for children are discussed.
In the following the requirements will be explained first and afterwards the fundamental rights assessment will be made. The countries have all very different requirements and are therefore discussed separately in the first part.

As mentioned above under the first scenario[344] the income requirement in the Netherlands for *couples* does not depend on the number of children in the family. That means that if the child will join both parents, the income requirement stays the same (100% of the minimum wage). But there is a difference between the income requirement of singles and single parents – the limit is resp. 70% and 90% of the minimum wage – so if the child joins only one parent, this will severely influence this parent's income requirement.[345] Note that these percentages are guidelines rather than strict limits. Therefore, if the income of the family is lower than these limits but the net earnings are at a level that the family will not rely on social security, the income requirement is considered to be met.[346]
As usual, the rules are the same for Dutch and TCN parents.

In Germany, for the reunification of a child and his TCN parent, the same rules apply as for the reunification of a partner as described under the first scenarios. In short: although the law does not state any specifics on income, the federal authorities in Germany determined an exact minimum income for foreigners. The height of this income depends on the number of people in the family. Children are included in this number, but the minimum income does not rise as much for every child as it does for every adult.[347] It should also be noted that any child-related benefits are not considered public funds.[348]
For German sponsors there is no income requirement when their children join them.[349]

In Belgium, children of a TCN sponsor with a permanent residence permit do not need to prove that the sponsor has sufficient, stable and regular means of subsistence.[350] This exception is not made for children of a sponsor with a temporary residence permit. For those sponsors the same income requirements as in the first scenario apply. In short: this

[343] Decision of 4 March 2010, Case C-578/08.
[344] See page 28.
[345] ind.nl/en/individuals/family/costs-income-requirements/Income-requirements. See also Strik, de Hart and Nissen 2012 p 14.
[346] Kamerstukken II 2012/13, 32175, 49 (Letter of the Secretary of State to the Parliament), p. 1.
[347] Triebl and Klindworth 2012 (FRP Germany), p 9, refers to Weber, ET SEQ. & Reimann, R. & Löfer, H. (2008), *Familienzusammenführung. Rechtsgrundlagen für die Einreise und den Aufenthalt in Deutschland,* Deutsches Rotes Kreuz e.V. (Hrsg.), 2. überarb. Auf., Berlin, p. 9 et seq.
[348] Section 2(3) German Residence Act.
[349] Section 28(1) German Residence Act.
[350] Art. 10(2) Belgian Residence Act.

income is 120% of the minimum wage for a family.[351] According to NGO Kruispunt MI the immigration services cannot deny the application immediately when the applicant has not proven enough means of subsistence. First a 'needs assessment' has to be conducted which means that the immigration services have to assess if the family could live on the income that they are receiving, similar to the Dutch system.[352]
According to the Residence Act, the Belgian parent of a TCN child also needs to prove that he has sufficient means of subsistence,[353] but this condition has been ruled unconstitutional by the Constitutional Court. The law has not been amended yet, but the Court demanded that the relevant authorities should apply the condition of means of subsistence as they do for those with a permanent residence permit, which in practice means that this condition has been annulled and that there is no income requirement for Belgian parents.[354]

In the UK, both the TCN and British parents should maintain their family without recourse to public funds.[355] But for parents with an indefinite leave to remain or enter or the British nationality, there is no specified minimum income. This is very different for parents with a definite leave to enter or to remain: they have to earn £18,600 plus £3,800 for the first child and another £2,400 for each additional child. Without any children, the income requirement is already 150% of the minimum wage of one person over 21 working full time. For those under 21 it is relatively even more.[356] These amounts can be less if the sponsor has additional savings. Also, maternity allowance or bereavement benefits are considered income.[357] Furthermore, children who are British citizens or settled in the UK are not taken into consideration when establishing the minimum income requirement.[358]
There is no income requirement for the TCN sponsor whose TCN child was born in the UK and has not been away from the UK for more than two years.[359]

Also in Spain income requirement is the same as in the first scenario and similar to the UK requirement: 150% of IPREM[360] for the TCN sponsor and one family member plus another 50% for every additional family member. It could be less when children are involved because in exceptional circumstances the level of the income requirement will be based on the situation of the minor; this follows from the best interest of the child principle embodied by the Organic Law 1 of 15 January 1996 about the judicial protection of the minor.[361]

[351] Art. 10(2), second sentence et seq. and art. 10(5) Belgian Residence Act.
[352] www.kruispuntmi.be/thema/je-bent-familielid-van-een-derdelander/de-derdelander-heeft-onbeperkt-verblijfsrecht-in-belgie/je-bent-echtgenoot-of-gelijkgesteld-partner-van-een-derdelander-met-onbeperkt-verblijfsrecht/wat#4
[353] Art. 40ter Belgian Residence Act.
[354] Case 121/2013, par B.64.4 and B.64.5, Belgisch Staatsblad, p 86854, found on www.ejustice.just.fgov.be/wet/wet.htm. See also www.ejustice.just.fgov.be/cgi/article_body.pl?language=nl&caller=summary&pub_date=2013-12-20&numac=2013000828 under I.2.1. Last check for both websites on 22 August 2014.
[355] Par. 297(v) Immigration Rules or E-ECC.2.3.(b) Immigration Rules Appendix FM.
[356] According to this government calculator: www.gov.uk/am-i-getting-minimum-wage/y/current_payment/no/23/30/168/1550.0/0/no. See also: www.gov.uk/national-minimum-wage-rates. Last check on 22 August 2014.
[357] E-ECC.2.2.(d) Immigration Rules Appendix FM.
[358] Par. E-ECC.2.1 Immigration Rules Appendix FM.
[359] Par. 305(i) Immigration Rules.
[360] Similar to the minimum wage. See Brey and Stanek 2013, p. 9.
[361] Art. 54(3) Reglamento de Extranjeria.

As with the previous requirements, the income requirements in all five countries will be assessed in the context of fundamental rights provisions. Just like in the previous chapter, this will be done in the context of the *Chakroun* case. In this case the CJEU decided, simply put, that every family deserves an individual income assessment based on the needs of that specific family. Also the ESC and the reports of the ESC Committee will be taken into account.

The current income requirement in the Netherlands seems to comply with the CJEU's decision, but it will depend on the way every individual case is assessed. The ESC Committee noted in its Conclusions regarding the Netherlands that family members should not automatically be excluded from family reunification just because the sponsor's income is (partly) based on social security.[362] This suggests that the ESC Committee is of the opinion that the Dutch requirement is not in line with the ESC, but it did not literally say so. It stated that it needed more information on the application rejected because of the income requirement.
This means that tentatively it can be concluded that the Dutch rules comply with the fundamental rights standards applied here, but this might change with the next ESC Committee report. Either way, children of Dutch parents and of TCN parents living in the Netherlands are treated equally.

Also the Belgian requirement for TCN parents with a temporary residence permit will be accepted by the CJEU if the Belgian authorities give every family a chance to have their 'needs assessment' individually. The ESC Committee did not criticize the Belgian income requirement and therefore it is safe to say that that requirement is in line with the ESC. This means that children of TCN parents are treated equal to TCN children of Belgian parents.

As mentioned in the previous chapter, the German income requirement is very strict in practice and there seems to be no room for individual assessments. Therefore one would be inclined to conclude that the German income requirements do not comply with the CJEU's standards. Also the ESC Committee stated that the German income requirement is too strict, mainly because social welfare is not included when calculating the sponsor's income. Note that this is a similar problem as in the Netherlands, but the Committee takes a clear stand regarding the German rules. This gives more reason to believe that the Dutch income requirement is just within the limits set by the ESC. This means that TCN children of TCN parents are not treated equally with TCN children of German parents.

The UK requirement deserves a similar 'verdict', especially for the strict rule for sponsors with a limited leave to remain or enter. The general requirement for the other sponsors to maintain their family without recourse to public funds is in line with the '*Chakroun* standards' of the CJEU – although the application in practice could change that judgement – and could be in line with the ESC. The latter depends on whether applications are 'systematically refused on the ground that such reunion could entail an increase on social

[362] Conclusions Netherlands 2011, p. 24/25.

benefits financed from public funds'; similar criticism as towards the German and Dutch rules.
The rules for parents with a limited leave to remain are clearly not in line with the *Chakroun* standards, especially when taking into account that 'decision-makers cannot exercise any discretion or flexibility with regard to the level of the financial requirement that must be met'.[363] This means that the amounts mentioned above are strict limits and no guidelines. In conclusion: part of the UK income requirement is probably in line with the applicable fundamental rights, but an important part is clearly not compatible with these rights.[364] This means that TCN children whose parents have limited leave to remain are not treated equally to TCN children of British parents.

Also Spanish requirement is against the Court's decision for the same reasons the British and German requirements are, and as mentioned in the previous chapter the exception for minors is not used to repair this deficiency. Also the ESC Committee commented that social welfare benefits are not taken into account when making the income calculation of the sponsor.[365]
This means that the Spanish income requirement does not comply with the fundamental rights standards, which in turn means that TCN children of TCN parents are not treated equally with TCN children of Spanish parents.

Housing

In art. 7(1)(a) the Family Reunification Directive allows the Member States to require the sponsor to have accommodation 'regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned'.
Except for the Netherlands[366] all countries have such housing requirements. As in the first chapter, the *Chakroun* standards and the standards from the ESC and its Committee will be used to assess the housing requirement.

In Belgium both the TCN and the Belgian sponsor should live in 'suitable' housing.[367] Just as under the first scenarios, such housing should fulfil the general requirements as set out for all people in Belgium in article 2 of Book III, Title VIII, Chapter II, Part 2 of the civil code.

[363] UK Immigration Directorate Instructions Chapter 8 Annex FM 1.7 Financial Requirement, par. 3.2.1.
[364] Striking in this regard is the case of MM and others v Secretary of State of the Native Department at the Court of Appeal. This overturned the High Court's decision that the income requirement is disproportionate. An appeal to the Supreme Court might follow.
At this moment about 4000 people await a decision on an application for limited leave to remain as a family member and the income requirement is their only hurdle. See the website of the parliament www.parliament.uk/briefing-papers/SN06724/the-financial-minimum-income-requirement-for-partner-visas and the Native Office: www.gov.uk/government/news/native-office-wins-judgment-on-minimum-income-threshold. The full case can be found at www.bailii.org/ew/cases/EWCA/Civ/2014/985.html. Last check for all websites on 22 August 2014.
[365] Conclusions Spain 2011, p. 24-26.
[366] But see De Hart, Strik & Pankratz 2012 (FRP the Netherlands) p. 30 and 31. Also, that does not mean that Dutch parents of TCN children do not have to comply with the housing regulations that apply to all Dutch citizens.

The German housing requirements for the reunification of children of TCN parents are the same as for partners as explained under scenario 1a. This means that there should be sufficient living space for all family members.[368] The actual size that is considered sufficient is different depending on the *Bundesland* (state) that the family lives in, but in general, living space which does not comply with the statutory provisions for Germans with regard to condition and occupancy shall not be adequate for foreigners.[369] Furthermore, children up to the age of two do not influence the minimum space necessary (Section 2 (4) sentence 3 of the Residence Act).
For German parents that are to be reunited with their child, there are no housing requirements when applying for reunification,[370] but that does not mean that they do not have to comply with general housing regulations applicable to all German citizens.

Also in the UK the sponsor parent should provide proper accommodation which he owns or occupies exclusively. Accommodation will not be regarded as adequate if it is, or will be, overcrowded or if it contravenes public health regulations.[371]
The housing requirement does not apply to the TCN sponsor whose TCN child was born in the UK and has not been away from the UK for more than two years.[372]

The Spanish housing regulations for TCN families are the same as in the first scenario: whether a house fulfils the standard is based on type of contract of the house (own/rent), number or rooms, usage of each room, number of persons in the house. It is unclear whether this is different from the regulations for autochthonous families. There is no exception for children.[373]

The requirements above are roughly the same as in the first chapter. This means that the assessment will have almost the same conclusions.
The Belgian legislation will probably pass the '*Chakroun* test' for both children of TCN parents and Belgian parents, but the ESC Committee warned Belgium that the housing requirement 'should not be so restrictive as to prevent any family reunion'. This does not mean that the Committee does not approve of the Belgian requirement; it asked for more information on the matter which means that they are not sure about their verdict.[374] The conclusion of this thesis is therefore that the Belgian legislation is in line with the applicable fundamental rights, but it remains to be seen whether the same conclusion can be drawn regarding the Belgian practice. Either way, children of Belgian parents and TCN parents are treated the same.

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[367] Art. 10(2), second sentence et seq and Art. 40ter, second sentence. See for the details on income and housing: www.kruispuntmi.be/thema/je-bent-familielid-van-een-derdelander/de-derdelander-heeft-onbeperkt-verblijfsrecht-in-belgie/je-bent-echtgenoot-of-gelijkgesteld-partner-van-een-derdelander-met-onbeperkt-verblijfsrecht/wat#4.
[368] Section 29 (1) no. 2 of the German Residence Act.
[369] Section 2 (4) sentence 2 of the German Residence Act.
[370] Compare Section 28 with Section 29 of the German Residence Act.
[371] Par. 297(iv) Immigration Rules or E-EEC.2.4. Immigration Rules Appendix FM.
[372] Par. 305(i) Immigration Rules.
[373] Art. 18(2) Immigration Act and art. 55 Royal Decree 557/2011.
[374] Conclusions Belgium 2011, p. 23/24.

For the German housing rules regarding children of TCN it will depend on the differences between the *Länder* whether the standards from the *Chakroun* case are fulfilled. Also the ESC Committee was critical: just as in Belgium it asked for more information on rejections based on the housing requirement. Therefore the conclusion will be that the legislation might be acceptable, but, as in Belgium, practice might not be.[375] This means that it is not possible to decide clearly whether children of TCN parents are treated equally with children of German parents.

Whether the requirement for children of TCN parents in Spain lives up to the CJEU's standard remains unclear. The ESC Committee did not condemn the Spanish housing requirements nor asked for more information in the last three reports, even though the issue came up in the last one.[376] Therefore it is tentatively concluded that the Spanish regulations are acceptable.

As mentioned with regard to the first scenario, the housing requirements in the UK pass the *Chakroun* test and the ESC did not criticize this issue in any of the last three reports on the UK.[377] And because the rules are the same for children of TCN parents and British parents, both groups are treated equally.

Health insurance

The same requirements apply as in the previous chapter, which means there is no health insurance requirement in the Netherlands, Spain or in the UK and the requirement in Belgium and Germany is the same as for Belgians resp. Germans.

Language/integration

In art. 7(2) the Family Reunification Directive allows member states to require that family members comply with integration measures before they reunite with their family.
As mentioned under the first scenario, both Belgium and Spain[378] do not have any requirements in this regard. Minor children (below 18) in the Netherlands[379] and the UK do not need to do an integration test either before obtaining their first permit.

In Germany there is no integration requirement for children of German parents and children of TCN parents until the age of 15. This is different for children of TCN parents between the ages of 16 and 18 who want to join their parent in Germany and who do not relocate the central focus of their lives to Germany *together* with their parents. This means that a minor joins his parent later shall only receive a residence permit if he speaks German and appears, on the basis of his or her education and way of life to date, that he or she will

[375] Conclusions Germany 2011, p. 20-22.
[376] Conclusions Spain 2011, p. 24-26.
[377] Conclusions UK 2004, 2006, 2011.
[378] For Spain see Brey and Stanek 2013, p. 8.
[379] Implicitly in Art. 3.71a Aliens Decree and art. B1/4.7 Aliens Circular.

be able to integrate in Germany.[380] 'For example, this can be assumed in the case of children, who were raised in a Member State of the European Union or the Agreement on the European Economic Area'.[381] Also, the immigration services take into account that integration will be easier for younger children.[382]
All those who do not appear to easily integrate in Germany have to have German language skills on the highest level (C1) of the Common European Framework of Reference for Languages.[383] This is unobtainable for many children.[384] In exceptional situations children can rely on the hardship clause to be exempted from this requirement.[385]

This rule clearly does not pay regard to the child's rights not to be separated from parents. Even if an integration and language test before arrival is necessary for children to integrate in Germany, which is not a given, the standards used are unnecessarily high. The standards for adults are much lower which means that if a child turns 18 and would marry a TCN with a residence permit, he would only be required to know German on an A1 level instead of C1. Obtaining such a high level of knowledge of a language requires a lot of time. The CRC Committee condemned this integration requirement by stating that it does not take into account the best interest of the child. The Committee demanded that all children have the same requirements.[386]
The lack of proportionality also makes that the rule is not in line with the *Chakroun* case. Furthermore, the ESC Committee generally does not accept integration conditions before the reunion. It repeated that once more in the 2011 German report.[387] The hardship clause does not change this verdict, because it can only be invoked by children in exceptional circumstances.

Apart from the German rule explained above, the regulations are obviously the same in every country for both children with TCN parents as children whose parents have any of the applicable EU nationalities.

Location of application

As mentioned in the previous scenario, the Family Reunification Directive states that the application for family reunification should take place in a different country than where the sponsor is residing, unless the family member is already in that country and there are 'appropriate circumstances'.[388]

[380] Section 32(2) German Residence Act.
[381] Triebl and Klindworth 2012 (FRP Germany) p. 11/12, footnote 18, referring to no. 32.2.4 of the General Administrative Regulation on the German Residence Act.
[382] No. 32.2.6 of the General Administrative Regulation on the German Residence Act.
[383] Strik, de Hart and Nissen 2012 (FRP International), p. 16 and www.coe.int/t/dg4/linguistic/cadre1_en.asp. Last check on 22 August 2014.
[384] Triebl and Klindworth 2012 (FRP Germany), p. 46.
[385] See chapter 3, p. 26.
[386] CRC Report Germany 2014, par. 44/45.
[387] Conclusions Germany 2011, p. 20-22.
[388] Art. 5(3) Family Reunification Directive

As explained in the previous scenario, the general rule in all countries except Spain is that if someone has a(n almost expired) residence permit for other reasons than family reunification, this person can apply for a family reunification permit from within the applicable EU country.[389]

The requirements for TCN children joining a family member in Germany and the UK are the same as for spouses as explained in the previous chapter. This means that children applying for a German permit can always do so in Germany if they are legally resident in that country, whether the parent in Germany is a TCN or a German.
In the UK this means that the child cannot apply in the UK for leave to remain if he has permission to be in the UK as a visitor or if he has permission to stay for less than 6 months. Also those with temporary admission or release, basically people who allegedly broke immigration rules, are in most cases exempted from applying for family reunification in the UK.[390]

In Belgium the rules for minors are more lenient than those for partners. As in Germany, TCN minors who are legally in Belgium can apply for family reunification, whether they have TCN or Belgian parents.[391]

In the Netherlands the legislation for the application of minors is also almost the same as for spouses: the rule is that the application should be in the third country of residence unless in exceptional situations or a breach of art. 8 ECHR. Also the hardship clause is applicable.[392] For minor children there is an additional exception: if they are school-going and have legally resided in the Netherlands for three consecutive years they can apply in the Netherlands.[393] Also, the sponsor can apply for family reunification instead of the family member, which is advantageous for those family members who for instance reside in a country without a Dutch consulate or embassy.[394]

Minor children who are applying for a Spanish residence permit to join their TCN parent can do so in Spain, if they have stayed in Spain for at least two years, even if that was an irregular stay. Children between 6 and 16 must have been going to school during those years.[395]

The fundamental rights standards regarding this requirement are the same as in the previous chapter. This means that there should be possibilities for children to apply in the relevant EU country if they already reside there. This follows from art. 10 CRC which

[389] The Netherlands: B1/3.3.1 Aliens Circular. See also the website of the Immigration services: kdw.ind.nl/KnowledgeSessie.aspx?knowledge_id=MWOTEV_procedure; Belgium: Art. 26/2 Belgian Residence Decree (Verblijfsbesluit); Germany: Section 81(3) German Residence Act; UK: see the website of the Immigration services: www.gov.uk/remain-in-uk-family/eligibility. Last check of all websites on 22 August 2014.
[390] www.gov.uk/remain-in-uk-family/eligibility. Last check on 22 August 2014.
[391] Art. 12bis(1). The first, second and fourth reasons also apply to TCN sponsors with a temporary residence permit, see Art. 26/2 Residence Decree.
[392] See Chapter 3.
[393] Art. 3.71(2)(k) Aliens Decree jo. art. 17(1)(g) Aliens Act.
[394] art. B1/3.3.1 Aliens Circular.
[395] Art. 186(1) Royal Decree 557/2011.

demands that the procedure should be dealt with in a positive, humane and expeditious manner[396] and art. 8 ECHR, which can also forbid to send one member of a family back to his country of residence to apply for a visa or permit.[397] The ESC Committee never discussed the issue in any of its reports.

The German and Belgian legislation fulfil the criteria from art. 10 CRC and art. 8 ECHR. This means that in both countries TCNs and national citizens are treated equally regarding the location of applying for family reunification.
Also the Spanish regulations are in line with the applicable fundamental rights, especially because even children who have stayed irregularly in Spain can receive a permit. The schooling requirement is easy to fulfil because in Spain undocumented children can go to public school. This means there is to a certain extent equal treatment of children of TCNs and children of Spanish citizens regarding this requirement.

As mentioned in the previous chapter, the Dutch legislation is probably in line with art. 8 ECHR but it will depend on the way the 'ECHR assessment' is conducted in practice. Either way, TCNs and national citizens are treated equally because the rules are the same for both.

Regarding the UK the same conclusion can be drawn as with regard to the first scenarios. The fact that this country does not have any exceptions that can take into account the special situation minor children leads one to suspect that the best interest of the child were not taken into account and therefore the requirement does not comply with the fundamental rights standards.

Minimum length of stay of sponsor before application/waiting period

The requirement discussed in this paragraph is the period that the TCN sponsor should wait after obtaining a residence permit before he and his family members can start the family reunification procedure. This waiting period can be found in art. 8 of the Family Reunification Directive and should according to the Directive be no more than two or three years, depending on the reception capacity. As mentioned before, the rationale of such waiting periods is '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'.[398] Therefore it is not a requirement for sponsors with the nationality of the five EU states.

In both Germany and the UK there are no waiting periods before a parent sponsor can be joined by his child.
As in the first scenario, in the Netherlands only the TCN sponsor with a temporary residence permit needs to legally reside there for at least a year before he can apply for

[396] See also the recommendation of the CRC Committee to Finland in the Concluding Observations CRC/C/15/Add.132, p 7.
[397] Blaak, Bruning, Eijgenraam, Kaandorp & Meuwese 2012, p 750.
[398] CJEU 27 June 2006, C-540/03 (*Parliament v Council*).

family reunification.[399] The same exception applies: for situations in which this waiting period harms the interest of minor children as protected by article 5(5) of the Family Reunification Directive. This is the only requirement that is asked of TCN sponsors in the Netherlands and not of Dutch sponsors.
Also in Belgium there is a 12-month term. But unlike the Dutch rule, it does not apply if the child's TCN parent-sponsor has a temporary - not a long-term - residence permit[400] or if the parent-sponsor and the other parent of the child are partners.[401] In the latter case, it does not matter whether the child joins both parents or that one parent stays behind in the native country.[402] If the child's parents are not partners and if the sponsor parent has a long-term residence permit, the 12-month term will be upheld.
Just like in scenario 1b, Spain has the strictest regulation in this regard for TCN parents: there is a twelve-month term and there are no exceptions.[403]

As mentioned before, the CJEU decided that this article is not necessarily against the right to family life as protected by the ECHR.[404] At the same time, the CJEU does not accept a waiting time 'without taking into account, in specific cases, all the relevant factors.'[405] And the Court states that the best interests of the child are a factor that should be taken into account.[406]
The ESC Committee has accepted a waiting period of one year, not longer, but does not require any exceptions.[407]
Additionally, it has been mentioned that reunification requirements that prolong the time that children are apart from their parents should only be applied if necessary. Also, provisions for the family reunification of immigrants should pay regard to the child's rights not to be separated from parents.[408] It is therefore highly unlikely that such a waiting time can be considered positive, humane or expeditious if there is no exception for children.

The German and British rules are clearly in line with the CRC and the ECHR and treat TCN children and national children equally.
Whether the Dutch legislation is in line with the relevant fundamental rights depends on the interpretation and the implementation in practice of the exception for situations that harm the interest of minor children. Based on the website of the immigration services one could conclude that the waiting period is usually applied.[409]
This also means that it depends on the interpretation and the implementation in practice of the Dutch legislation whether or not TCN children and national children are treated equally.
The Belgian legislation makes an exception for children whose TCN parents are partners. Regarding children in this situation there is clearly no problem with the CRC or the ECHR.

[399] Art. 3.15(3) Aliens Decree. There is an exception for those who have a residence permit for a specific temporary purpose, such as an exchange or seasonal work, see article 3.15(3)(a) Aliens Decree, but in most of those situations family reunification is not possible at all (art. 3.15(1)(b) Aliens Decree).
[400] Art. 10bis(2).
[401] Art. 10(1)(4 and 5).
[402] This is not very clear from the legislation, but an employee of the immigration service explained this.
[403] Art. 56 Royal Decree 557/2011 and art. 18(1) Immigration Act. See also Brey and Stanek 2013, p. 9.
[404] CJEU 27 June 2006, C-540/03 (*Parliament v Council*) par. 98.
[405] CJEU 27 June 2006, C-540/03 (*Parliament v Council*) par. 99.
[406] CJEU 27 June 2006, C-540/03 (*Parliament v Council*) par. 101. See also Commission Guidelines COM(2014)210, p. 17.
[407] See for instance Conclusions Germany 2011, p. 20-22.
[408] Hodgkin and Newell 2007, p. 133.
[409] ind.nl/EN/individuals/family. Last check on 22 August 2014.

But such an exception does not take into account the best interests of children whose parents are not partners. This is arbitrary in two ways. First because children have no influence on whether or not their parents are in an official partnership. Secondly, whether or not the parents are married has no direct influence on whether the child will settle down well and display a certain level of integration – which is the rationale of the waiting period – especially because the waiting period is also cancelled if one partner stays behind in the native country.[410] Therefore, as far as TCN children of single parents are concerned, the Belgian legislation does not fulfil the requirement of art. 10 CRC. And because there is no possibility for exceptions as demanded by the CJEU, the legislation is also not in line with art. 8 ECHR. This means that those children are not treated equally with children of Belgian parents.

The Spanish legislation does not contain any possibilities for exceptions and is therefore not in line with art. 8 ECHR and art. 10 CRC. This also means that children of TCN parents are not treated equally to children from Spanish parents.

Other

A foreigner who has resided in the Netherlands illegally has lost the opportunity to obtain an mvv.[411] An exception will be made when the illegal residence has taken place while the foreigner was still a minor, which means this exception is applicable to all those who apply for family reunification as a minor.[412] Such exceptions for children take into account the best interest of the child.

Conclusion

This chapter discussed both the family reunification requirements for TCN children of TCN parents and of national parents and the following will give an answer to the main question regarding these scenarios. But first off it should be noted that most children of national parents in most countries will (almost) automatically receive the nationality of their parents, even if they are born in a third country. This is of course a much better situation for most children than to have to go through a family reunification procedure.

In this chapter family reunification legislation is compared on three levels: first, the requirements are assessed using fundamental rights. Secondly, there is a comparison between children of TCN parents and children of national parents. Thirdly, the differences between the five countries are discussed.
Regarding the first issue, this chapter made clear that when it comes to the reunion of minor children with their parents, most requirements in most countries comply with the fundamental rights standards set in this thesis. This means that overall there are fewer

[410] This is not very clear from the legislation, but an employee of the immigration service explained this.
[411] Art. 16(j) Aliens Act.
[412] Art. 3.77(9) Aliens Decree.

requirements for minors and some of the requirements are less strict compared to the situation for parents discussed in the first chapter.

When looking at the second element of comparison, it should be noted that national parents and their children have to fulfil fewer requirements than TCN parents and their children. But because the requirements for children of TCN parents are mostly within the limits set by the fundamental rights, these differences do not necessarily render the requirements unequal. A good example is the Belgian legislation on income. There is only an income requirement for TCN parents, but it is within the limits of the applicable standards.

As explained above, the countries in this research were chosen to find out whether countries with different characteristics would have significant differences in the legislation based on these characteristics. Just as in the first chapter, such differences are not very clear, if they exist at all.
Spain's legislation stands out because it seems to be the strictest: in that country more requirements for children of TCN parents are not in line with fundamental rights than in any other country. This strictness is mainly due to a lack of exceptions for minors. The other countries have very similar requirements, but usually also a clause that takes into account the interests of children. This strictness might have to do with the fact that Spain shares a 'Schengen border' with a third country (Morocco).
Regarding the UK there are no differences in the requirements that stand out in any way.

6.
The British private life procedure

Besides the 'regular' procedure discussed above, there is an additional procedure in the UK called 'private life' procedure.[413] This procedure is only available for those who have been living in the UK and apply for a leave to remain.[414] It is not specifically a family reunification procedure but because any immigrant can directly apply for this procedure if he is living in the UK,[415] family members of people living in the UK can use this procedure to remain with their family. Those who fulfil the criteria of this procedure do not have to deal with any of the requirements discussed above.

The criteria to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.[416]

As is clear from the above, those who have lived in the UK for more than 20 years or more than half their lives for those between 18 and 25, do not have to fulfil any further requirements. A fundamental rights assessment is not necessary here.
Those under 18 should not reasonably be expected to leave the UK. The factors that should be taken into account are the same as with regard to the hardship clause from the third chapter:

- The child's health;
- Whether the parents would join the child;
- The extent of wider family ties in the UK;
- The (re)integration possibilities of the child in the new country;
- Country specific information.[417]

[413] Before July 2012 there was a different procedure for this scenario if the parent abroad could prove he had access rights to the child. These rights are now only applicable for those who applied before that time and therefore they will not be discussed here any further. See par. A246 et seq. Immigration Rules.
[414] Leave to remain is a residence permit for those who are already legally resident in the UK.
[415] See the Long residence and private life guidance, p52. Due to an error this guidance was unavailable at 22 August 2014 at the government website, but it used to be available at www.gov.uk/long-residence/overview.
[416] 276ADE Immigration Rules.
[417] Immigration Rules annex: children's best interests in family and private life cases, par 21 and 22. The criteria are based on section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the

Whether this complies with the fundamental rights will fully depend on the practical application but it should be noted that these factors are similar to the ones applied by the ECtHR. [418]

A person who has lived in the UK for less than 20 years can receive a leave to remain if there are 'very significant obstacles' to his stay in the third country he would have to go to. In considering whether there are such obstacles the relevant factors are:

- The length of time the person has spent in the UK;
- The length of time the person has spent in the country to which they would have to go if required to leave the UK;
- The exposure the person has had to the cultural norms of that country;
- Whether the person speaks the language of that country;
- The extent of the family and friends the person has in that country, and
- The quality of the relationships the person has with those family members and friends.[419]

When applying fundamental rights to these criteria, the same conclusion can be drawn as regarding minors: whether the criteria are acceptable will depend on their application in practice, but in theory they are in line with the standards of the ECtHR.

welfare of children who are in the UK, and case law. See Immigration rules annex: children's best interests in family and private life cases, par 6.

[418] For instance Olgun v. the Netherlands par. 43 or Solomon v The Netherlands par. 1. See also chapter 3, page 26.

[419] See the Long residence and private life guidance, p58. Due to an error this guidance was unavailable at 22 August 2014 at the government website, but it used to be available at www.gov.uk/long-residence/overview.

Part III

7.
Final conclusion

This thesis aims to answer the following question:
To what extent are the family reunification possibilities of TCN family members of TCNs resident in EU member states equal to family reunification possibilities of TCN family members of Member States' nationals, from a children's rights perspective?

To answer this question the previous chapters assess family reunification requirements on three 'levels'. The first level is a fundamental rights assessment of family reunification requirements. Secondly, there is a comparison between families with a TCN sponsor and families with a national sponsor.[420] Thirdly, the differences between Belgium, Germany, the Netherlands, Spain and the UK are discussed.

The fundamental rights assessment showed that different conventions and bodies have different demands. The ESC and the ESC Committee have very specific standards that exclude any requirement that is more likely to hinder than to facilitate family reunification. These specific criteria make it easy to assess family reunification requirements. It should be noted that some EU Member States are not bound by the family reunification provisions of the ESC and therefore the conclusions drawn in this thesis are not applicable to those countries.
The ECtHR leaves the states some room for manoeuvre but demands that within the right circumstances, family reunification should be possible regardless of the requirements discussed in this thesis. The CJEU has an approach that is somewhere between the approach of the ECtHR and the ESC Committee: it accepts most requirements, but only as guidelines that aim to facilitate family reunification.
The CRC and the CRC Committee are not very specific on the requirements that most states uphold, but they make clear that the procedure should take into account the best interest of the child and that it should be expeditious.
When applying these standards on the requirements of the five countries, it becomes clear that the fundamental rights provisions are not always specific enough. Therefore it is impossible to make a fundamental rights assessment with regard to some of the requirements. Especially with regard to the provisions in the CRC there are no clear standards that can be applied to the requirements of many EU countries. To improve the applicability of the CRC to family reunification legislation, a future General Comment should clarify arts. 9 and 10 or the Committee on the Rights of the Child should be more specific in its Concluding Observations.

[420] As explained in the introduction, in this thesis the noun 'national' means 'an EU citizen living in the country of his nationality', unless stated otherwise. The adjective 'national' means ' the [noun] that is an EU citizen living in the country of his nationality', unless stated otherwise. For example: 'the national parent' means 'the parent who is an EU citizen living in the country of his nationality'.

In this regard, special attention should also be had to the age requirement. The revised ESC has a lower standard than the minimum of 21 from the 1961 ESC. This is in line with other fundamental rights conventions such as the CRC, yet the ESC Committee recently criticised states that have not yet ratified the revised ESC that the age requirement is not set at 21.

Sometimes the fundamental rights assessment of a requirement is impossible because the requirement itself is not specific enough, such as the housing requirement in Germany. If legislation is too vague, compliance with fundamental rights depends on the application in practice which means that it is impossible to decide on that issue within the confines of this thesis.
Despite these difficulties, it has been possible to make a fundamental rights assessment with regard to most requirements in most countries. This assessment shows that there are significant differences between the two scenarios. For children, also TCN children, it is relatively easy to join their parent(s): most of the requirements for such a scenario are in line with the fundamental rights. For parents it is too difficult to join their children or partners, at least when they are TCNs, because the requirements for them are often stricter than acceptable from a human rights perspective. Therefore it seems that the researched countries have quite a limited view on the right of children to be with their parents. It gives reason to believe that they do not necessarily want to hinder children from residence in their countries, but at the same time find that if the child stays with only one of its parents, the child's rights are adhered to. That is an interpretation of the child's best interests that is too narrow because it is not in line with arts. 9 and 10 of the CRC, where clearly the plural form 'parents' is used.

The second assessment level of this thesis, a comparison between families with a TCN sponsor and families with a national sponsor, was based on one of the goals of the EU meetings at Tampere and Stockholm: giving TCNs rights that are equal or at least similar to those of EU nationals. It is very clear from this thesis that TCNs do not have rights that are the same as EU nationals, but regarding the rights of TCN children to join their parents, it can be concluded that in most countries the children of TCN parents have similar rights compared to the children of national parents. This is because almost all requirements of TCN children to join their TCN parents adhere to fundamental rights, except in Spain.
The conclusion for parents joining their child (the first scenario) is different. Although this thesis does not contain a thorough comparison between TCN parents of TCN children and TCN parents of national children it can be concluded that the latter group is usually better off. As explained in the introduction, this is because in certain scenarios the parents of TCN children cannot join their child in the EU at all where parents of national children can. Additionally, the requirements for TCN parents joining a TCN child and partner are often too strict by fundamental rights standards. This also suggests that this group is worse off than TCN parents joining a national child and partner.
The Tampere goal of giving TCNs and national similar rights has clearly not been reached. Although this thesis only covers partners and children, this conclusion can probably also be drawn with regard to other TCN family members. They are further away from the core family, which means it is unlikely that their family reunification requirements are less strict. A possible reason for the fact that the Tampere goal has not been reached is that the Member States never wanted to use it as a basis of the Directive. Strik quotes a German

delegate who stated that the Tampere goal regarding TCNs were rejected by 'everyone' at the start of the negotiations for the Directive because they did not know what that goal would entail. This confirms the suspicion stated in the introduction that the Tampere goals were mere rhetoric as far as the Member States go.[421]

The third level of comparison is the comparison between the countries. Although this thesis cannot answer which country has the best legislation, there are some differences that should be noted here. As explained in the introduction, the selected countries all have certain characteristics that are different from most other countries. Spain for instance is an example of the southern European border states. It seems to be the strictest country, especially regarding children joining their TCN parents (scenario 2). Spain is also quite strict regarding the rules for parents reuniting with their children and partners (scenario 1), but so are the other countries, which makes that Spain does not stand out regarding that scenario.
The legislation of the UK, which is the only country that is not bound by the Family Reunification Directive, contains two important exceptions. The first exception is that in the UK single parents are allowed to reunite. This is not possible in any of the other countries. The second exception is the additional private life procedure for those who live in the UK for a long time or have significant obstacles for return. This procedure opens up family reunification possibilities for some people who might not fulfil the 'regular' requirements. The two ways in which the British legislation stands out widen the possibilities to reunite. The only effect that the Directive seems to have had on the other states' legislation is therefore a restrictive one.
Lastly, the legislation of the two most populous states, Germany and the UK, did not stand out, nor did the legislation of the least populous states, Belgium and the Netherlands. This means that the number of citizens of a country does not seem to have any influence on the strictness of the family reunification requirements.
Because the differences between the different countries are limited, the general conclusions drawn here probably also apply to other (western) EU countries.

So far the Directive has not brought the family reunification requirements fully in line with fundamental rights and it did not create equal rights for TCNs. Whether it will do so in the future is hard to predict, as migration law changes fast and can be influenced by events such as the attacks of September 11.[422] At the same time the EC released its guidelines[423] last April which have much regard for the *Chakroun* case of the CJEU. Although those guidelines are not specifically aimed at equalising the rights of TCNs and nationals, if the states decide to follow them a first step has been taken to achieve the Tampere aims. If the member states would also act on the criticism from the ESC Committee, the conclusion of a future research on family reunification requirements will have am much more positive outcome.

[421] See Strik 2011, p. 119/120. Strik thinks that the reference to Tampere in the preamble of the Directive means that the delegates of the Member States did not think that the Court would attach any weight to such a recital.
[422] See Strik 2011, p. 118.
[423] COM(2014)210.

8.
Discussion

The following is an analysis of the difficulties that arose in the process of writing this thesis, the resulting limitations and what that means for the conclusions drawn above.

One of these difficulties is that immigration law often changes. As mentioned in the introduction, immigration lawyers in the Netherlands need weekly updates.[424] Writing this thesis took about six months and during that time the Belgian Residence Act was amended and a new Immigration Act was introduced in the UK. Also, one of the Immigration Directorate Instructions used to interpret UK law was published in July 2014. Not all of these changes were relevant for this thesis, but it gives an idea of how often they take place. This means that the details of this thesis might be outdated soon. At the same time, the more general conclusions will probably retain much of their relevance for a while.
In this regard it should also be noted that most of the research for this thesis was done before July 2014, with an exception for the British legislation, which has been updated until mid-August. Any changes after those dates have not been taken into account.

Furthermore, this thesis does not go into the purpose of the provisions that are discussed. Therefore it was sometimes difficult to determine whether a provision was necessary or proportionate, which is important in the context of art. 8 ECHR. A related limitation is that national jurisprudence and practical application are not fully discussed. This means that sometimes only general conclusions could be drawn about a provision where including these issues might have given a more nuanced image. Hopefully a different research can cover this. Such a research would be especially relevant if it could cover the effects of the family reunification measures compared to their purpose such as the Family Reunification Project's research regarding integration.[425]

As explained in the introduction, lack of knowledge of relevant languages was a major hurdle. Many countries could not be included in the thesis because of it. Also, when questions arose regarding the countries that were included, it was more difficult to find an answer. Often, advice from others was necessary. Fortunately, many times someone was found to help, but it means that the present author had to base his conclusions on the input of others. This is not necessarily a problem, but it is impossible to guarantee that this input does not contain any factual inaccuracies especially because fact checking was not always possible. The information about Spain is completely based on translations and information from intermediaries.
And although almost all the statements above regarding German and British law was based directly on the applicable source, it was translated by the author who is not a native in neither one of those languages. It should furthermore be noted that an official English translation of the German Residence Act was used.

[424] Rodrigues 2010, p. 5.
[425] Strik, de Hart and Nissen 2012 (FRP International)

Despite these difficulties and limitations, the overall conclusions achieve the objective of this thesis: to answer the questions raised in the introduction of this thesis and give an overview of the family reunification legislation in the EU in a fundamental rights context.

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Annex

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

Official Journal L 251 , 03/10/2003 P. 0012 - 0018

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(a) thereof,
Having regard to the proposal from the Commission(1),
Having regard to the opinion of the European Parliament(2),
Having regard to the opinion of the European Economic and Social Committee(3),
Having regard to the opinion of the Committee of the Regions(4),
Whereas:
(1) With a view to the progressive establishment of an area of freedom, security and justice, the Treaty establishing the European Community provides both for the adoption of measures aimed at ensuring the free movement of persons, in conjunction with flanking measures relating to external border controls, asylum and immigration, and for the adoption of measures relating to asylum, immigration and safeguarding the rights of third country nationals.
(2) Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.
(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need for harmonisation of national legislation on the conditions for admission and residence of third country nationals. In this context, it has in particular stated that the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union. The European Council accordingly asked the Council rapidly to adopt the legal instruments on the basis of Commission proposals. The need for achieving the objectives defined at Tampere have been reaffirmed by the Laeken European Council on 14 and 15 December 2001.
(4) Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.
(5) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.
(6) To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.
(7) Member States should be able to apply this Directive also when the family enters together.
(8) Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.
(9) Family reunification should apply in any case to members of the nuclear family, that is to say the spouse and the minor children.
(10) It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family reunification of these persons, this is without prejudice of the possibility, for Member States which do not recognise the existence of family ties in the cases covered by this provision, of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation.

(11) The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households.
(12) The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.
(13) A set of rules governing the procedure for examination of applications for family reunification and for entry and residence of family members should be laid down. Those procedures should be effective and manageable, taking account of the normal workload of the Member States' administrations, as well as transparent and fair, in order to offer appropriate legal certainty to those concerned.
(14) Family reunification may be refused on duly justified grounds. In particular, the person who wishes to be granted family reunification should not constitute a threat to public policy or public security. The notion of public policy may cover a conviction for committing a serious crime. In this context it has to be noted that the notion of public policy and public security covers also cases in which a third country national belongs to an association which supports terrorism, supports such an association or has extremist aspirations.
(15) The integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions.
(16) Since the objectives of the proposed action, namely the establishment of a right to family reunification for third country nationals to be exercised in accordance with common rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved by the Community, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
(17) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol these Member States are not participating in the adoption of this Directive and are not bound by or subject to its application.
(18) In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I General provisions

Article 1
The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

Article 2
For the purposes of this Directive:
(a) "third country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;
(b) "refugee" means any third country national or stateless person enjoying refugee status within the meaning of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the Protocol signed in New York on 31 January 1967;
(c) "sponsor" means a 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;
(d) "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;

(e) "residence permit" means any authorisation issued by the authorities of a Member State allowing a third country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals(5);
(f) "unaccompanied minor" means third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States.

Article 3
1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.
2. This Directive shall not apply where the sponsor is:
(a) applying for recognition of refugee status whose application has not yet given rise to a final decision;
(b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;
(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.
3. This Directive shall not apply to members of the family of a Union citizen.
4. This Directive is without prejudice to more favourable provisions of:
(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;
(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.
5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions.

CHAPTER II Family members

Article 4
1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:
(a) the sponsor's spouse;
(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;
(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;
(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.
The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married.
By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.
2. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.
3. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons.
Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.
4. In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.
By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.
5. In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.
6. By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.

CHAPTER III Submission and examination of the application

Article 5
1. Member States shall determine whether, in order to exercise the right to family reunification, an application for entry and residence shall be submitted to the competent authorities of the Member State concerned either by the sponsor or by the family member or members.
2. The application shall be accompanied by documentary evidence of the family relationship and of compliance with the conditions laid down in Articles 4 and 6 and, where applicable, Articles 7 and 8, as well as certified copies of family member(s)' travel documents.
If appropriate, in order to obtain evidence that a family relationship exists, Member States may carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary.
When examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof.
3. The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.
By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.
4. The competent authorities of the Member State shall give the person, who has submitted the application, written notification of the decision as soon as possible and in any event no later than nine months from the date on which the application was lodged.
In exceptional circumstances linked to the complexity of the examination of the application, the time limit referred to in the first subparagraph may be extended.
Reasons shall be given for the decision rejecting the application. Any consequences of no decision being taken by the end of the period provided for in the first subparagraph shall be determined by the national legislation of the relevant Member State.
5. When examining an application, the Member States shall have due regard to the best interests of minor children.

CHAPTER IV Requirements for the exercise of the right to family reunification

Article 6
1. The Member States may reject an application for entry and residence of family members on grounds of public policy, public security or public health.
2. Member States may withdraw or refuse to renew a family member's residence permit on grounds of public policy or public security or public health.
When taking the relevant decision, the Member State shall consider, besides Article 17, the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such person.
3. Renewal of the residence permit may not be withheld and removal from the territory may not be ordered by the competent authority of the Member State concerned on the sole ground of illness or disability suffered after the issue of the residence permit.

Article 7
1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:
(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;
(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;
(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.
2. Member States may require third country nationals to comply with integration measures, in accordance with national law.
With regard to the refugees and/or family members of refugees referred to in Article 12 the integration measures referred to in the first subparagraph may only be applied once the persons concerned have been granted family reunification.

Article 8
Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.
By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.

CHAPTER V Family reunification of refugees

Article 9
1. This Chapter shall apply to family reunification of refugees recognised by the Member States.
2. Member States may confine the application of this Chapter to refugees whose family relationships predate their entry.
3. This Chapter is without prejudice to any rules granting refugee status to family members.

Article 10
1. Article 4 shall apply to the definition of family members except that the third subparagraph of paragraph 1 thereof shall not apply to the children of refugees.
2. The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.
3. If the refugee is an unaccompanied minor, the Member States:

(a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);
(b) may authorise the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

Article 11
1. Article 5 shall apply to the submission and examination of the application, subject to paragraph 2 of this Article.
2. Where a refugee cannot provide official documentary evidence of the family relationship, the Member States shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship. A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking.

Article 12
1. By way of derogation from Article 7, the Member States shall not require the refugee and/or family member(s) to provide, in respect of applications concerning those family members referred to in Article 4(1), the evidence that the refugee fulfils the requirements set out in Article 7.
Without prejudice to international obligations, where family reunification is possible in a third country with which the sponsor and/or family member has special links, Member States may require provision of the evidence referred to in the first subparagraph.
Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within a period of three months after the granting of the refugee status.
2. By way of derogation from Article 8, the Member States shall not require the refugee to have resided in their territory for a certain period of time, before having his/her family members join him/her.

CHAPTER VI Entry and residence of family members

Article 13
1. As soon as the application for family reunification has been accepted, the Member State concerned shall authorise the entry of the family member or members. In that regard, the Member State concerned shall grant such persons every facility for obtaining the requisite visas.
2. The Member State concerned shall grant the family members a first residence permit of at least one year's duration. This residence permit shall be renewable.
3. The duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor.

Article 14
1. The sponsor's family members shall be entitled, in the same way as the sponsor, to:
(a) access to education;
(b) access to employment and self-employed activity;
(c) access to vocational guidance, initial and further training and retraining.
2. Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity.
3. Member States may restrict access to employment or self-employed activity by first-degree relatives in the direct ascending line or adult unmarried children to whom Article 4(2) applies.

Article 15
1. Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.

Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship.
2. The Member States may issue an autonomous residence permit to adult children and to relatives in the direct ascending line to whom Article 4(2) applies.
3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.
4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.

CHAPTER VII Penalties and redress

Article 16
1. Member States may reject an application for entry and residence for the purpose of family reunification, or, if appropriate, withdraw or refuse to renew a family member's residence permit, in the following circumstances:
(a) where the conditions laid down by this Directive are not or are no longer satisfied.
When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income;
(b) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship;
(c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.
2. Member States may also reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew the family member's residence permits, where it is shown that:
(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used;
(b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.
When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his/her residence permit.
3. The Member States may withdraw or refuse to renew the residence permit of a family member where the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence under Article 15.
4. Member States may conduct specific checks and inspections where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience as defined by paragraph 2. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permit.

Article 17
Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.

Article 18
The Member States shall ensure that the sponsor and/or the members of his/her family have the right to mount a legal challenge where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered.
The procedure and the competence according to which the right referred to in the first subparagraph is exercised shall be established by the Member States concerned.

CHAPTER VIII Final provisions

Article 19
Periodically, and for the first time not later than 3 October 2007, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose such amendments as may appear necessary. These proposals for amendments shall be made by way of priority in relation to Articles 3, 4, 7, 8 and 13.

Article 20
Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by not later than 3 October 2005. They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 21
This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 22
This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.
Done at Brussels, 22 September 2003.
For the Council
The President
F. Frattini
(1) OJ C 116 E, 26.4.2000, p. 66, and OJ C 62 E, 27.2.2001, p. 99.
(2) OJ C 135, 7.5.2001, p. 174.
(3) OJ C 204, 18.7.2000, p. 40.
(4) OJ C 73, 26.3.2003, p. 16.
(5) OJ L 157, 15.6.2002, p. 1.