Summary

1. Integration according to the Contourennota

The integration policy envisaged by the Balkenende II government, is outlined in the *Contourennota herziening van het inburgeringsstelsel* (further*: the Contourennota)*.[1] The envisaged integration measures differ, on a number of point, from today's policy. Thus according tp the *Contourennota newly* arriving immigrants (the so-called *nieuwkomers*) will be compelled to sit a rudimentary examination in the country of origin, the so-called '*basisexamen buitenland'*. Further, newly arriving immigrants will be obliged to pass a second integration examination within five years of their arrival in the Netherlands (the so-called *inburgeringsverplichting*). The latter obligation will also be imposed on immigrants who are already resided in the Netherlands (the so-called: *oudkomers*), albeit within a period to be decided on by the local officials.

Those compelled to pass the rudimentary examination will have to sit an examination in their country of origin where they will also have to prepare themselves for the exam. The rudimentary examination will test whether the person concerned has sufficient knowledge of the Dutch language and society. Until the rudimentary examination has been passed, no long-term visa (*machtiging tot voorlopig verblijf*) will be issued. As a rule, long-term residence in the Netherlands is not granted to a person who has not applied for a *machtiging tot voorlopig verblijf*, therefore long-term residence will not be possible until the rudimentary examination has been passed. The obligation to sit the rudimentary examination will therefore only apply to newly arriving immigrants who need a long-term visa to enter the Netherlands.[2]

Within five years of their arrival in the Netherlands an immigrant will have to provide proof that he/she has sufficient knowledge of the Dutch language (both oral and written) and the Dutch society by passing an integration examination.[3] The responsibility to pass the integration examination within five years is put in the hands of the person obliged to integrate, *inter alia* by requiring the immigrant to finance his/her integration his/herself.[4] If the integration test is passed within three years, the immigrant is eligible to a grant paid by the government.[5] The government will, however, ensure that there are sufficient places in the courses, which will initially be offered by the Regional Education Centers [*Regionale*

[1] TK II 2003-2004, 29 543, Nos. 1-2.
[2] *Contourennota*, p. 5.
[3] *Contourennota*, pp. 4 and 18. The level to be acquired will be determined after the Tijdelijke Adviescommissie Normering Inburgeringseisen [Temporary Advisory Commission on the Standard of Integration Obligations] has published its second report (*Contourennota* pp. 5-6).
[4] Those who cannot afford the course themselves will be granted a loan, *Contourennota*, p. 22..
[5] *Contourennota*, annex 4, p. 28.

Opleidingscentra]. In the long run, other certified institutions can enter the market for immigration courses.[6] People who do not require a financial loan, which can be obtained from the government, are free enrol with an institution that has not be certified.[7] Enforcement of the integration obligation will be effected by means of an administrative penalty after five years, on the one hand, and by linking the issuing of an independent or permanent residence permit to the successful completion of the integration examination, on the other hand. A refusal to issue an independent or permanent residence permit will only be possible if the immigrant has not yet be issued either of these residence permits. The possibility to impose an administrative penalty[8] will also be used to force those compelled to integrate to turn up for the intake and progress talk.[9]

2. *Research questions and –method*

The extension of the obligation to integrate to a larger group of people and the move to an obligation to integrate as opposed to an effort to master the Dutch language and knowledge of the Dutch society, brings to the for the question as to the limits of Member State competence under European Community Law. The compatibility of the plans, as envisaged by the Dutch government, with European Law is all the more urgent in the light of the complex nature of European Community law and the recent developments in European Migration Law (e.g. the adoption of the Family reunification Directive,[10] the Long-term Residence Directive[11] which both apply to third country nationals and the Residence Directive for nationals of the Member States and their family members[12]). The main question that needs to be answered in the light of these developments, is the following:

> *Does European law restrict the powers of a Member State to impose an integration obligation on (certain groups of) people, and if so, which?*

The questions that follow from the main question and therefore require in depth consideration are:

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[6] Where no credit facilities are required, an immigrant may choose freely where he/she buys his/her integration course, *Contourennota*, pp. 11-13.
[7] *Contourennota*, pp. 12-13.
[8] The *Contourennota* does not state the sum of the fine.
[9] *Contourennota*, pp. 7-8.
[10] Council Directive 2003/86/EC of September 22, 2003, on the Right to Family Reunification, *OJ EC* 2003, L 251/12.
[11] Council Directive 2003/109/EC of November 25, 2003 concerning the Status of Third-country Nationals who are Long-term Residents, *OJ EC* 2004, L 16/44.
[12] Directive 2004/86/EC of the European Parliament and the Council of April 29, 2004, on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, *OJ EC* 2004, L 16/44.

Summary

1. Does European Community Law, including the Association Agreement EC-Turkey, allow the Netherlands to impose on newly arriving immigrants the obligation to sit a rudimentary examination abroad?
2. Does European Community Law, including the Association Agreement EEC-Turkey, allow the Netherlands to impose an obligation to integrate on newly arriving immigrants and/or immigrants already resident in the Netherlands and penalise a failure to pass the integration examination with penalties related to the issuing of a residence permit and/or a fine?

The above listed questions concern both newly arriving immigrants (questions 1 and 2) and immigrants already resident in the Netherlands (question 2). The following groups of people will be distinguished:

1. Citizens of the Union (born within or outside the territory of the European Union or EEA);[13]
2. Nationals of the Member State (born within or outside the territory of the European Union or EEA);
3. Family members of citizens of the Union and EEA-citizens, who are third country nationals who have/have not been granted permission to reside in the territory of the European Union or EEA;[14]
4. Third country nationals (born within or outside the territory of the European Union or EEA) who have been granted the status of long-term resident third-country national and who have passed an integration test in the first Member State;
5. Family members of third country nationals who enjoy a right of residence under the Family Reunification Directive;[15]
6. Turkish nationals (born within or outside the territory of the European Union or EEA) who fall within the personal scope of the Association Agreement EEC-Turkey;[16]

[13] Throughout the text I will use the terminology: European Union, nationals of the Member States and citizens of the Union. For convenience sake, where these concepts are used they also include EEA, nationals of EEA States and citizens of EEA-States.
[14] The relevant case law of the European Court of Justice (ECJ) is: ECJ cases C-459/99, *BRAX*, [2002] ECR I-6591 and C-109/01, *Akrich*, September 23, 2003, n.y.r..
[15] Council Directive 2003/86/EC of September 22, 2003, on the Right to Family Reunification, *OJ EC* 2003, L 251/12.
[16] In addition the Europe Agreements concluded with Romania (Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and Romania, of the other part, *OJ EC* 1994, L 357/2) and Bulgaria (Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, *OJ EC* 1994, L 358/3) could limit the powers of a Member State to impose integration conditions on nationals from these countries. These agreements, however, will not be considered in this research.

7. Family members of Turkish nationals (born within or outside the territory of the European Union or EEA) who fall within the personal scope of the Association Agreement EEC-Turkey.

In order to answer the two aforementioned questions it is necessary to establish for each group of people how much room European Community Law leaves a Member State to adopt an integration policy that will require it to employ admission and residence requirements other than those found in European law. A similar analysis will have to be made re the powers of a Member State to refuse an application for an independent or permanent residence permit until the Dutch integration obligation has been satisfied. Further, it is necessary to establish whether European Community Law allows a Member State to impose a financial penalty for not satisfying the integration obligation. Therefore, the following issues have to be considered for each one of the seven groups of people on the basis of an analysis of European Community Law concerning entry and residence requirements:

A. Does European law, including the Association Agreement EEC-Turkey, allow the Netherlands to impose an obligation on newly arriving immigrants to pass a rudimentary integration examination abroad?
B. Does European law, including the Association Agreement EEC-Turkey, allow the Netherlands to impose an obligation to integrate on newly arriving immigrants?
C. Does European law, including the Association Agreement EEC-Turkey, allow the Netherlands to impose an obligation to integrate on immigrants already legally resident in the Netherlands?
D. Does European law, including the Association Agreement EEC-Turkey, allow the Netherlands to refuse to issue an independent or permanent residence permit until the integration obligation has been satisfied?
E. Does European law, including the Association Agreement EEC-Turkey, allow the Netherlands to impose a financial sanction on a failure to pass the integration examination?

One final point. This report addresses the question of restrictions imposed by European law on the development of a national integration policy. Thus, where Community law does not oppose the plans envisaged by the Dutch government, restrictions might follow from other legal obligations, for instance the International Covenant on Civil and Political Rights, the Refugee Convention or national law. Further, it must not be forgotten that under the terms of Article 6 EU the European Convention for the Protection of Human Rights and Fundamental Freedoms is part and parcel of the general principles of Community law that have to be

respected. We can already find Article 8 ECHR, for instance, in the Court of Justice's case law on the right to reside in a Member State as a family member of a citizen of the Union.[17]

3. Entry and Residence according to European Community Law

The answer to the question whether Europe has its own integration policy is negative. Therefore, the legal limitations to the powers of a Member State to adopt its own integration policy under European law are implicit. The restrictions to national competence re integration conditions are therefore the conditions for admission and residence found in Community Law. Because European (Migration) Law has established different regimes for different groups of people, based on, on the one hand nationality, and, on the other hand, the nature of the residence right, it is important to establish which conditions for admission and residence apply under Community law to a particular group of people. Prior to this analysis, I will first consider briefly to what extent a Member State may impose sanctions for breaches of Community law.

Where harmonization of sanctions for a breach of Community law is missing, the Court's case law reveals that the principle of equivalence of Community law stands in the way of applying different standards (both substantive and procedural) to breaches of Community law as compared to comparable infringements of national law.[18] Besides the principle of equivalence a penalty for an infringement of an obligation that is imposed by virtue of Community law has to be proportional to the nature of the offence committed, effective and may not result in an obstacle to the exercise of a right of Community law, amongst which the fundamental right to free movement of persons.[19] Examples from the Court's case law of disproportionate penalties are: imprisonment, because this will stand in the way of the right to free movement of persons, and expulsion.[20]

3.1 Citizens of the Union

According to Article 17 EC a citizen of the Union is a national of a Member State irrespective of the place of birth, the moment the nationality of a Member State was acquired or the fact that they are nationals of more than one State, including a third State.[21] Citizens of the Union, according to Article 18(1) EC, enjoy the right to move and reside freely on the territory

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[17] ECJ cases C-60/00, *Carpenter*, [2002] ECR I-6279 and C-109/01, *Akrich*, September 23, 2003, n.y.r..
[18] *E.g*. conclusion A.-G. Léger in case C-230/97, *Awoyemi*, July 16, 1998, [1999] ECR I-6781, para. 32.
[19] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487.
[20] ECJ cases 18/75, *Watson &* Belmann [1976] ECR 1185157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487
[21] ECJ case C-369/90 *Micheletti* [1992] ECR I-4239.

of the Member States subject to the limitations and conditions laid down in the EC-Treaty[22] and secondary Community law.[23] An important concept in the right to free movement of persons is the prohibition of discrimination based on nationality. The Court of Justice has ruled that national legislation that distinctly[24] or indistinctly[25] differentiates between nationals of the Member States as well as national legislation that in its effect is an obstacle to the exercise of the right to free movement of persons, violates Community law, unless there is an objective ground that justifies differential treatment and the national rule satisfies the proportionality test.

Admission to the territory of a Member State has to be granted to those who are in the possession of a valid identity card or a valid passport.[26] Citizens of the Union are never required to have a visa to enter the territory of another Member State.[27] The right of residence is subdivided into a right of residence for up to three months (Article 6 Directive 2004/38/EC), a right of residence longer than three months but shorter than five years (Article 7 Directive 2004/38/EC) and a right of permanent residence (Articles 16, 17 and 19 Directive 2004/38/EC). Amongst the conditions for residence, which, on the one hand, concern the establishment of the nationality of the persons concerned and, on the other hand, should reassure a Member State that the person seeking admission will not burden the public funds,[28] we do not find the possibility to impose an obligation to integrate into the host-society, a long the lines envisaged by the Balkenende II government. The right of residence in another Member State is still linked to the obligation to be in the possession of a residence permit; an obligation that will no longer exist once the implementation period of Directive 2004/38/EC has expired.[29] The right permanent right of residence in Directive 2004/38/EC is also no longer linked to the possession of a residence permit.[30]

EC law, therefore, unilaterally establishes the conditions for entry and residence of nationals of the Member States seeking access to another Member State under the terms set out in Community law. As there is no duty to apply for a visa, nationals of the Member

[22] Articles 39 (workers), 43 (self-employed people) and 49 (service providers and recipients of services) EC.
[23] The relevant acts of secondary Community law are: Regulations (EEC) No. 1612/68, and 1251/71 and Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The majority of these acts will be replaced by Directive 2004/38/EC by April 30, 2006 at the latest. For convenience sake, I will take as standing law Directive 2004/38/EEC as it envisages to both codify and simplify the existing legal acts.
[24] An example of a distinctly discriminatory national rule is that everybody who is not a Dutch citizen is obliged to pass an integration test.
[25] An example of an indistinctly discriminatory national rule is that everybody born outside the Dutch territory has to pass an integration test.
[26] Article 5(1) Directive 2004/38/EC
[27] Article 5(1) last paragraph, Directive 2004/38/EC.
[28] See however: ECJ case C-138/02, *Collins,* March 23, 2004, n.y.r.
[29] This follows from Article 8 Directive 2004/38/EC.
[30] Article 19 Directive 2004/38/EC.

States cannot be forced to sit the rudimentary examination in their country of origin.[31] An obligation to integrate that is linked to the issuing of a permanent or independent residence permit will be ineffective as from April 30, 2006 nationals of a Member State will not need to apply for a residence permit in order to reside in another Member State.[32] As an integration obligation is contrary to EC-law, it is not possible to impose penalties.

3.2 Nationals of the Member State

Dutch nationals are nationals of a Member State and therefore qualify as citizens of the Union irrespective of their place of birth or the moment when they acquired Dutch nationality. As citizens of the Union they are beneficiaries of the right to free movement of persons under the terms of Community law. However, they can only rely on Community law in the Netherlands if there is a sufficient link between the individual and Community law, *inter alia* after the national has exercised his/her right to free movement of persons. Therefore it is only after a national of a Member State has resided in another Member State under the terms of Community law and then returns to his/her Member State of nationality that Community law applies within the Member State of nationality.[33] The Court of Justice has justified this reading of the right to free movement of persons by arguing that an individual should not be put in a less advantageous position in his/her Member State of nationality merely because he/she has exercised the right to free movement of persons. Until a national has taken advantage of the possibilities offered to him/her by Community law, national law applies. This is referred to as reversed discrimination.[34]

The Court's decision in the *Kaur* case, however, does offer the Dutch government the possibility to exclude certain Dutch nationals, for instance those nationals born outside the territory of the EU or EEA, from the personal scope of the right to free movement of persons. According to European law, this is a purely internal matter that has to be respected by the other Member States. If, however, a Member State does opt for a distinction between nationals a long the lines of the *Kaur* judgment it will have to communicate its decision to the other Member States so that the latter can act along these lines when applying the rules on free movement of persons.[35] The judicial bench of the Dutch Council of State [*Afdeling*

[31] ACV, *Inburgeringseisen als voorwaarde voor verblijf in Nederland* (Den Haag, 2004) p. 29.
[32] ACV, *Inburgeringseisen als voorwaarde voor verblijf in Nederland* (Den Haag, 2004) p. 37.
[33] ECJ joined cases 35/82 & 36/82, *Morson and Jhanjan* [1982] ECR 3723 and ECJ case C-224/98, *D'Hoop* [2002] ECR I-6191.
[34] When a national returns to his/her own Member State with a family member, due consideration has to be given to the Court's ruling in *Akrich* (ECJ case C-109/01, September 23, 2003, n.y.r.) where it appears to have made a distinction between legal resident family members and illegally resident family members in that country prior to exercising the right to free movement of persons.
[35] G.-R. de Groot, Visumplicht Antillianen/Arubanen en het Europees burgerschap, in: *Migrantenrecht* (2000 – 2) p. 51, *idem*. The Relationship between the Nationality Legislation of the Member States of the European

Bestuursrechtspraak van de Raad van State] has requested the Court of Justice for a preliminary ruling on the rights of persons who fall within the scope of Part Four of the EC Treaty entitled *Association of the Overseas Countries and Territories*.[36] The Court's answer in the preliminary ruling should shed clarity on the question to what extend nationals of a Member State born in one of the 'overseas countries and territories' within the meaning of Part Four of the EC-Treaty can invoke the provisions on the right to free movement of persons found in Title II of Part Three of the EC-Treaty.[37]

In principal the Member States have retained their powers *vis-à-vis* their own nationals. This situation only changes if there is a link between the individual and Community law. If this is the case a national falls within the scope of Community law and the powers of the Member State are restricted accordingly. The own national has then to be treated as set out under sub-section 1 of this paragraph. For nationals who cannot invoke Community law the answers to the five questions set out above are as follows. Nationals can be compelled to sit the *basisexamen buitenland* as well as the integration examination, as long as they do not fall within the personal scope of Community law. However, linking the integration obligation to a refusal of an application for a long-term visa or a permanent or independent residence permit is not be effective as long as nationals can enter and reside in the Netherlands without these documents. An administrative penalty for not passing the rudimentary examination within five years of arrival, however, is possible.

3.3 Family Members of EU Citizens and EEA Nationals

Who qualifies as a family member of a citizen of the Union is determined by secondary EC law. Unlike the present *acquis*,[38] Directive 2004/38/EC does not distinguish between the capacity in which the citizen of the Union resides in a Member State.[39] The only exception to this rule, as we will see presently, concerns students.[40] In article 2 Directive 2004/38/EC we find the following enunciation of family members who may accompany a migrating citizen of the Union to the host Member State:

Union and European Citizenship, in: M. LA Torre (eds.) *European Citizenship: An Institutional Challenge* (Kluwer Law International, The Hague, 1998) pp. 115*ff* and F.J.A. van der Velden, *Unieburgers en staatsbugers; De invloed van het Europese gemeenschapsrecht op het nationaliteitsrecht van de lidstaten, Preadvies voor de NVIR*, Mededeling van de NVIR 129 (T.M.C. Asser Press, The Hague, 2004) pp. 18-19.

[36] *Afdeling Bestuursrechtspraak Raad van State*, case Nos. 200404446/1 and 200404450/1, July 13, 2004.

[37] The *Afdeling Bestuursrechtspraak* refers to Article 186 that runs: 'Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States'.

[38] See Article 10 Reg. (EEC) No. 1612/68 and Article 1 Directives 90/364/EEC, 90/365/EEC and 93/96/EEC.

[39] This Directive does not apply to Dutch citizens who have not exercised their right to free movement of persons (Article 2 and Article 3(3) Directive 2003/38/EC).

[40] Article 7(1) Directive 2004/38/EC.

a) the spouse;

b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b); and

d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Article 7(1) of the Residence Directive restricts the right of residence accorded to a student's family members to the categories a-c. Family members who are not mentioned in Article 2(2) of the Residence Directive will have to qualify for family reunion under the national legislation regarding entry and residence in the envisaged host Member State. Member States are obliged to facilitate entry and residence of family members who, in the country of origin, were dependants or members of the household as well as partners with whom the Union citizen has a durable relationship, duly attested.[41] Member States are compelled to examine the personal situation meticulously and state the reasons for turning down an application for entry or residence.[42]

The starting point for Community law as far as family members are concerned is therefore the relationship with a migrating citizen of the Union and not the nationality of the family member who wants to accompany the citizen of the Union. Nevertheless, family members who are not a national of a Member State themselves slightly different formalities apply for entry and residence. A family member who is a national of a Member State him/herself enjoys a right of entry if he or she can show a valid identity card or passport.[43] A family member who is not a national of a Member State will have to be in the possession of a valid passport and, if applicable, also a visa.[44] Following the *MRAX* ruling[45] of the European Court of Justice, a family member who presents him/herself at the border without a long-term visa but who can provide proof of his/her identity and the relationship with the national of a Member State whom he/she wishes to accompany in the host-Member State cannot, as such, be refused the right of entry to the territory of that Member State. A further

[41] Article 3(2) Directive 2004/38/EC. In the case of a student, Members States also find themselves obliged to facilitate entry and residence of dependent direct relatives in the ascending line (Article 7(4) Directive 2004/38/EC.
[42] Article 3(2) last paragraph, Directive 2004/38/EC.
[43] Article 5(1) Directive 2004/38/EC.
[44] Article 5(2) Directive 2004/38/EC.
[45] ECJ case C-459/99, [2002] ECR I-6591.

differentiation in the Court's case law is found in the *Akrich* decision.[46] In this decision the Court of Justice qualified residence by a family member in another Member State for the sole purpose of circumventing national immigration law of the Member State of nationality as abuse. As a consequence (re)admission of a family member to the Member State of which the citizen of the Union is a national may be determined in accordance with national law. An exception is the so-called 'authentic marriage' that has to be considered in the light of the case law concerning Article 8 ECHR handed down by the European Court for Human Rights in Strasbourg.

The administrative formalities for a right if residence exceeding three months for family members who themselves are a national of a Member State are found in Article 8(5) of the Residence Directive. Besides the formalities which apply to the migrating national of a Member State, family members who themselves are a national of a Member State will have to be able to provide proof of their relationship with the person they are accompanying and, where appropriate, that the national of a Member State whom they are accompanying has a registration certificate. For family members who are not a national of a Member State themselves the formalities for residence exceeding a period of three months are found in Article 9 of the Residence Directive. They are the only ones who have to apply for a residence permit, which has to be issued by the host-Member State within six months after a valid passport, a document providing proof of the relationship with a national of a Member State and, where appropriate the registration certificate of the Union citizen have been submitted.[47] The residence permit is, as a rule, valid for five years.[48]

After five years of legal residence, family members of a citizen of the Union also enjoy a permanent right of residence.[49] The same conditions apply to the family members of a migrating national of a Member State as apply to the migrating Member State national for the determination of their permanent residence right.[50] The qualifying conditions for a permanent right of residence for family members who are not them selves a national of a Member State are found in Article 20 of the Residence Directive. They are the only family members who have to be issued a residence permit. An application for a permanent residence card has to be made prior to the expiration of the initial residence permit. The Member State is obliged to issue a permanent residence permit within in the period of six

[46] ECJ case C-109/01, September 23, 2003, n.y.r.
[47] Additional requirements are found in section D-F.
[48] Article 11 Directive 2004/38/EC. Temporary absences not exceeding six months a year, absences of a longer duration for compulsory military service and one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country will not affect the right of residence.
[49] Article 16(1) and (2) Directive 2004/38/EC.
[50] Article 19 Directive 2004/38/EC.

months following the application. The permanent residence card has to be renewed every ten years and remains valid despite an interruption of the residence as long as the interruption does not amount to more than two consecutive years.

The aforementioned entails the following answers to the five questions listed in the first paragraph.

A. The obligation to pass the *basisexamen buitenland* can only be imposed on those who are under the obligation to possess a long-term visa to enter the territory of a Member State. This is only the case for family member who are not nationals of a Member State themselves.[51] According to *MRAX* a family member who presents him/herself at the border without a long term visa, but who can provide proof of his/her identity as well as the relationship he/she has with the national of a Member State he/she wishes to accompany in the host-Member State, cannot, without further reasons, be refused entry to the territory of the Member State. In addition account has to be taken of the sub-division the Court appears to have made in the *Akrich* case between legally residing family members and illegally residing family members when access is sought to the territory of the Member State of nationality of the migrating citizen of the Union if the family member resided in that country without permission prior to the exercising of the right to free movement of persons.

B. A requirement to satisfy national integration conditions for newly arriving migrants within five years after entering a Member State is contrary to Community law as far as family members of Union citizens are concerned, because it is Community law itself that determines the conditions for entry and residence in a Member State. Amongst these conditions we do not find listed an obligation to satisfy national integration requirements. Moreover, it is not unlikely that an integration obligation will be classed as an obstacle to the right to free movement of persons in the case of family members who themselves are nationals of a Member State. As far as family members who are not them selves nationals of a Member State are concerned, an integration obligation might be considered an obstacle to the right of free movement of persons that the family member they are accompanying enjoys under Community law. Obstacles to free movement violate Community law, unless they can be justified by objective considerations and they satisfy the proportionality test.

C. See under B.

D. Upon expiry of the period for implementation of Directive 2004/38/EC failure to comply with integration measures within five years after entry to the territory – if such

[51] See Articles: 3(1) Directives 68/360/EEC and 73/148/EEC and Article 5(1), second paragraph of Directive 2004/38/EC.

conditions can be imposed at all - in the form of a refusal of an application for an independent or permanent residence permit will only be possible in the case of family members who are not themselves nationals of a Member State, as family members who are nationals of a Member State will no longer be required to apply for a residence permit as proof of their right of residence under Community law.[52] According to current Community law a residence permit has declaratory effect only. This means that the right of residence is not dependent on the possession of a residence permit. Moreover, a Member State has to issue a residence permit, if the conditions for residence are satisfied. It is more than likely that the European Court of Justice will attach the same status to the residence permit issued under the terms set out in directive 2004/38/EC to third country national family members.

E. Where an individual can be subjected to an integration obligation, a Member State will have the possibility to impose an administrative financial sanction under the conditions set out in the case law of the European Court of Justice regarding penalisation of infringements of Community law by national authorities. These conditions are: the principles of equivalence and proportionality.[53]

3.4 Third Country Nationals with the Status of Long Term Resident

The status of long-term resident can be granted by a Member State to third country nationals 'who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application'.[54] Prior to according this status a Member State may require the applicant to provide proof that he/she has, for himself/herself and accompanying family members:

- 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 and
- a sickness insurance in respect of all risks normally covered for the own nationals in the Member State concerned.[55]

[52] See Articles 8, 9, 19 and 20 of Directive 2004/38/EC for the residence permit obligation.
[53] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487. See also the Conclusions of Advocate-General Léger in case C-230/97, *Awoyemi*, July 16, 1998 [1999] ECR I-6781.
[54] Article 4(1) Directive 2003/109/EC.
[55] Article 5(1) Directive 2003/109/EC. According to Article 7(1) second paragraph of the Long-term Resident Directive a Member State can require proof of appropriate accommodation. This enables a Member State to impose conditions as to the nature of the accommodation available to the long-term resident third country national.

In addition a Member State can require that a third country national complies with integration conditions set out in national law.[56] Even if these requirements have been satisfied, the status of long-term resident may be refused for reasons relating to public policy and public security. The status 'long-term resident' has a permanent nature and follows from the Long-term resident's EC residence permit that is to be issued by a Member State.[57]

One of the rights[58] connected to the status of long-term resident is the right to reside in another Member State for a period exceeding three months with a view to take up paid employment as a worker or self-employed person,[59] pursue a study or vocational training,[60] or another purpose.[61] An application for a residence permit has to be filed with the competent authorities of the second Member State within three months of entry in that Member State. The application can also be lodged whilst resident in the first Member State.[62] The second Member State can require evidence of stable and regular resources and that a sickness insurance covering all risks which are normally covered for its own nationals has been taken out.[63] Besides the documents that provide proof of the aforementioned requirements, the residence permit for long-term residents issued by the first Member State has to be handed over as well as valid travel document or a certified copy of that document.[64] A Member State may also require evidence of appropriate accommodation.[65] As far as compliance with integration conditions in accordance with national law are concerned, the second Member State has to take into consideration whether such an obligation has been imposed on the long-term resident by the first Member State. If this is the case, the second Member State can only require the long-term resident third country national to attend language courses.[66] The second Member State can refuse applications for residence from long-term residents where the person concerned constitutes a threat to public policy or public security.[67]

The permanent nature of the status of long-term resident does not imply that the status can never be revoked or lost. The grounds for revoking or loss of the status of long-

[56] Article 5(2) Directive 2003/109/EC.
[57] Article 8(1) and (2) Directive 2003/109/EC.
[58] A right to equal treatment is enjoyed by a long-term resident third country national under the terms of Article 11 Directive 2003/109/EC.
[59] Section 4 (a) of Article 15 Directive 2003/109/EC establishes which documents 'in particular' may be required for admission for work purposes be it as a worker or a self-employed person.
[60] Article 15(4)(b) Directive 2003/109/EC allows a Member state to require evidence of enrolment in an accredited establishment for studies or vocational training.
[61] Article 14(1) Directive 2003/109/EC.
[62] Article 15(1) Directive 2003/109/EC.
[63] Article 15(2) Directive 2003/109/EC.
[64] Article 15(4) Directive 2003/109/EC.
[65] Article 15(4) second paragraph of Directive 2003/109/EC.
[66] Article 15(3) Directive 2003/109/EC.
[67] Article 17(1) Directive 2003/109/EC.

term resident that apply to third country nationals who have not exercised their right to free movement can be found in Article 9 Directive 2003/109/EC. In the case of long-term residents who have migrated to another Member State, the grounds for revoking the residence permit and an obligation for the first Member State to readmit the long-term resident are found in Article 22 Directive 2003/109/EC.

As the Directive has only recently entered into force and there is no case law of the European Court of Justice that, for instance, defines what is meant by 'integration conditions' it is not possible to pinpoint the exact scope of the powers of a Member State to adopt integration conditions. For the time being the following can be said in relation to the integration obligations proposed by the Balkenende II government:

A. An obligation to satisfy a rudimentary examination abroad can only be imposed where a long-term resident third-country national needs a long-term visa to enter the country. This will never be the case in the first Member State, as a period of five years legal residence is required prior to the acquisition of the status of long-term resident'. As far as the second Member State is concerned, such an obligation may be imposed where a long-term visa is required. In this respect it is important how the European Court of Justice will interpret Article 15(1) Directive 2003/109/EC.

B. If integration conditions have been satisfied in the first Member State prior to obtaining the status of long-term resident third country national, the second Member State can only impose an obligation to follow a language course on the long-term resident third country national.

C. See under B.

D. It appears possible to refuse an application for a permanent or independent residence permit where integration measures have not been satisfied, as the Long-term Residence Directive explicitly empowers the Member States to include integration measures in their national legislation. This holds true both for the first and second Member State.

E. A Member State will be able to impose an administrative financial sanction if the integration requirements are not satisfied within five years after arrival in the Member State as long as the conditions set out in the case law of the European Court of Justice regarding penalisation of infringements of Community law by national authorities are met. These conditions are: the principles of equivalence and proportionality.[68]

[68] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487. See also the Conclusions of Advocate-General Léger in case C-230/97, *Awoyemi*, July 16, 1998 [1999] ECR I-6781.

3.5 Family Members of Third Country Nationals who derive their Right of Residence from the Family Reunification Directive

It was only recently that the European Community adopted legislation regarding family members of third country nationals. In general the Family Reunification Directive has to be applied with due respect to international obligations, in particular the right to family and private life in Article 8 of the European Convention on Human Rights.[69] The distinction made in the Netherlands between family reunification where all the family members enter the country at the same time as the sponsor and situations in which the family members enter the country at a later point in time, as well as the distinction between family reunification of first and second generation foreigners is not found in the Directive on Family Reunification.

The conditions for admission in Directive 2003/86/EC apply to applications for family reunification made by a third country national.[70] Which family members qualify for family reunification is laid down in Article 4 Directive 2003/86/EC. The first family member who qualifies for family reunification is the spouse of the sponsor. Besides the spouse of the sponsor, minor, unmarried children of both the applicant and the spouse or who are adopted derive a right to family reunification under the Directive. In addition the minor unmarried dependent children of both spouses enjoy a right to family reunification if one of the spouses has custody over the children. A Member State may, by law or regulation, authorise the entry and residence of the unmarried partner with whom the sponsor is in a duly attested stable long-term relationship, or with whom the sponsor is bound by a registered partnership and the unmarried minor children including adopted children.[71]

Whilst an application for family reunification is being processed, the family members are to remain outside the territory of the Member State.[72] The application for family reunification has to be accompanied by certified copies of the family member(s) travel document(s) and documentary evidence of the family relationship. In addition proof may be required of

- accommodation that is regarded as normal for a comparable family in the same region;
- a sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for the applicant and the members of the family; and

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[69] Preamble to Directive 2003/86/EC, second consideration.
[70] This follows from the definition of family reunion in Article 2(a) Directive 2003/86/EC and the explicit exclusion from the personal scope of the Family Reunion Directive of Citizens of the Union in Article 3(3) Directive 2003/86/EC. The Directive also does not apply to applications made by a person seeking protection as a refugee where no final decision has been adopted regarding the application, to an application made by a person authorised to reside on a temporary basis or applying for authorisation to reside on that basis and a person authorised to reside on the basis of a subsidiary form of protection or is awaiting such authorisation.
[71] Article 4(3) Directive 2003/86/EC.
[72] Article 5(3) Directive 2003/86/EC.

- stable and regular resources which are sufficient to maintain the family without recourse to the social assistance system of the Member State concerned.[73]

A Member State is at liberty to adopt integration measures in its national law.[74] As far as refugees and family members of refugees are concerned, integration members may only be applied once the persons concerned have been granted a right of family reunification.[75] An application for family reunification can be rejected for reasons related to public policy, public security or public health.[76]

As the Family Reunification Directive entered into force only recently and, therefore, has not generated any case law from the European Court of Justice, it is not possible to pronounce on the exact scope of the competence of a Member State to adopt integration measures. Nevertheless the following can be said with regard to the integration measures proposed by the Balkenende II government:

A. The obligation to pass the rudimentary examination abroad can only be imposed on those who are under the obligation to possess a long-term visa to enter the territory of a Member State.

B. It is possible to impose integration measures on newly arriving migrants, if these measures satisfy international standards, such as Article 8 ECHR. As far as refugees and their family members are concerned, there is the limitation that they first have to be granted family reunification before they can be subjected to integration measures.

C. See under B.

D. A link between integration measures and the issuing of an independent or permanent residence permit is possible, because the Family Reunification Directive explicitly provides for a competence to impose integration measures on family members.

E. A Member State will be able to impose an administrative financial sanction if the integration requirements are not satisfied within five years after arrival in the Member State as long as the conditions set out in the case law of the European Court of Justice regarding penalisation of infringements of Community law by national authorities are met. These conditions are: the principles of equivalence and proportionality.[77]

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[73] Article 7(1) Directive 2003/86/EC.
[74] Article 7(2) first paragraph Directive 2003/86/EC.
[75] Article 7(2) second paragraph Directive 2003/86/EC.
[76] Article 6(1) Directive 2003/86/EC.
[77] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487. See also the Conclusions of Advocate-General Léger in case C-230/97, *Awoyemi*, July 16, 1998 [1999] ECR I-6781.

3.6 Turkish Nationals

Turkish nationals may derive rights, which set aside national immigration law, from the 1963 Association Agreement EEC-Turkey,[78] read in combination with the Additional Protocol[79] and Decision No. 1/80 of the Association Council EEC-Turkey.[80] Association law is applicable to the following three groups of people. The first group is composed of workers who derive rights from Article 6 Decision No. 1/80. Self-employed persons and service providers are the second group that must be distinguished. They enjoy protection against application of more stringent national rules establishing entry conditions by virtue of the standstill clause in Article 41 of the Additional Protocol read in conjunction with respectively Article 13 and 14 of the Association Agreement. Besides these two groups a third group consisting of family members of Turkish workers can be distinguished. The latter can rely on Association law if they fall within the personal scope of Article 7 Decision No. 1/80. As nothing has been provided for in the Association Agreement and subsequent legislation for family members of self-employed persons and service providers, Member States have retained their powers to establish conditions for entry and residence as far as this group is concerned. The Netherlands may therefore impose an obligation to pass a *basisexamen in het buitenland* on these family members if they require a long-term visa to enter the county. In addition it may impose the obligation to pass an integration examination within five years after first entry. Sanctions affecting the issuing of residence permits as well as financial sanctions are within bounds. Here I will discuss the position of Turkish workers, Turkish self-employed persons and service providers as well as family members of Turkish workers successively.

Turkish Workers

With regard to Turkish workers Member States have retained exclusive competence to decide on their first admission to their territory as well as their first admission to the national labour market of that Member State under the terms set out in national law.[81] This also the case when a Turkish worker moves from one Member State, for instance Germany where he enjoyed protection under Association law, to another Member State, for instance the Netherlands. His/her first application for admission lodged with the Dutch authorities will have to be considered under the terms set out in Dutch immigration legislation. The same holds true for the first admission to the Dutch labour market. The European Court of Justice

[78] *Agreement establishing an Association between the European Community and Turkey*, signed at Ankara, September 12, 1963, *OJ EC* 1973, C 113/2.
[79] *Additional Protocol to the Association between the European Community and Turkey*, signed at Brussels, November 23, 1970, *OJ EC* 1970, C 113/18.
[80] Decision No. 1/80 of the Association Council of September 19, 1980, on *The Development of the Association*, not published in the *Official Journal.*
[81] See, for example, ECJ case C-340/97, *Nazli* [2000] ECR I-957.

has, however, restricted the exclusive powers of a Member State concerning the right to enter their territory and to take up first employment. According to the Court a Member State may not 'modify unilaterally the scope of the system of gradually integrating Turkish workers into the host State's labour force'.[82] This finding implies, according to the Court, that a 'State no longer has the power to adopt measures regarding residence which are such as to impede the exercise of the rights expressly granted by Decision No. 1/80 to someone who fulfils its conditions and, by the same token, is already duly integrated in the host Member State'.[83] For this reason it is not only important to establish who qualifies as Turkish worker within the meaning of Article 6 Decision No. 1/80, but also which rights a Turkish worker enjoys by virtue of this provision.

The European Court of Justice has outlined the personal scope of Article 6 Decision No. 1/80 in a number of decisions.[84] The two important concepts are: 'legal employment' and 'belonging to the labour force'. Legal employment is assumed when the position on the labour market is 'sable and secure and not of a temporary nature'.[85] One can determine whether somebody belongs to the labour force by establishing whether there is a sufficiently close connection with the territory of the Member State where residence is envisaged, on the one hand,[86] and by looking at the work relationship, on the other hand.[87] Member States are not permitted to exclude certain professions from the scope of application of Article 6 Decision No. 1/80 in their national legislation.[88] The test that has to be passed according the Court's case law establishing who qualifies as a Turkish worker is the following:

1. Is there an employment relationship in which a Turkish worker performs an economic activity for and under the direction of another person?
2. Is the work to be classed as genuine and effective, not merely marginal and ancillary?
3. Does the employment relationship have sufficient connection with the territory of the Member State where residence is envisaged?
4. Is the position of the Turkish worker stable and not merely of a temporary nature?

[82] ECJ case C-340/97, *Nazli*, [2000] ECR I-957.
[83] ECJ case C-340/97, *Nazli*, [2000] ECR I-957.
[84] ECJ cases C-434/93, *Bozkurt* [1995] ECJ I-1475, C-98/96, *Ertanir* [1997] ECR I-5179 and C-36/96, *Günüydin* [1997] ECR I-5143.
[85] ECJ case C-192/89, *Sevince* [1989] ECR I-5133.
[86] ECJ case C-434/93, *Bozkurt* [1995] ECR I-1475.
[87] Legal employment within the meaning of Article 6 Decision No. 1/80 can only be assumed if the worker 'is bound by an employment relationship covering a genuine and effective economic activity pursued for the benefit and under the direction of another person for remuneration' (see Cases C-98/96, *Ertanir* [1997] ECR 5179, C-36/96, *Günüydin* [1997] ECR I-5143 and C-1/97, *Birden* [1998) ECR I-7747.
[88] Case C-98/96, *Ertanir* [1997] ECR 5179.

If these conditions are satisfied, then a Turkish worker belongs to the employment market of the host-State. As a consequence he/she can invoke Article 6 Decision No. 1/80 after one year of legal employment performed for the same employer in the host-State. Although the wording van the first paragraph of Article 6 Decision No. 1/80 sees to admission to the labour market, a Turkish worker who falls within the personal scope of this provision is entitled to have a residence permit issued to him/her as well as a renewal of the residence permit upon its expiry. The Court justifies the linking of the right to access to the labour market to the issuing of a residence permit by arguing that any other reading would deprive the right granted to a Turkish worker of any effect.[89] Further the Court's case law reveals that the right of residence follows from Article 6 Decision No. 1/80 itself. With this reading the residence permit issued by a Member State merely has declaratory effect; it just serves as proof of an already existing right.

After one year of legal employment with one and the same employer, a Turkish worker falls within the personal scope of Decision No. 1/80 enjoys a right of access to the labour market under the conditions set out in Article 6 of that Decision. In its *Sevince* ruling[90] the Court linked a right of residence to safeguard the effect of the rights found in Article 6 Decision No. 1/80. The protection accorded to Turkish workers, we know from the *Bozkurt* judgment,[91] is lost when a Turkish worker has definitely ceased to belong to the labour force of the Member State, for instance because he has become totally and permanently incapacitated for work or has reached retirement age. A temporary absence from the labour market, for instance due to (involuntary) unemployment, is not a reason to assume that the protection enjoyed by virtue of Article 6 decision No. 1/80 has expired. This is only the case after a reasonable period of time has lapsed and if the person concerned does not satisfied the formalities that may be required by a Member State from work seekers under national law.[92]

In conclusion, Article 13 Decision No. 1/80, as interpreted by the European Court of Justice in the *Abatay* case, has to be read as a restriction for Member States to tighten up the conditions for first admission to the employment market which applied s from September 1980 when Decision No. 1/80 entered into force.[93] It is, however, not clear whether

[89] ECJ case C-192/89, *Sevince* [1990] ECR I-3461.
[90] Relevant factor are: the place where the worker is hired, the territory on which paid employment is based and the applicable national legislation in the field of employment and social security law (ECJ cases C-434/93, *Bozkurt* [1995] ECJ I-1475, C-98/96, *Ertanir* [1997] ECR I-5179 and C-36/96, *Günüydin* [1997] ECR I-5143).
[91] ECJ case C-434/93 *Bozkurt* [1995] ECR I-1475.
[92] ECJ case C-171/95, *Tetik* [1997] ECR I-329.
[93] It is also possible, as Groenendijk argued in his annotation on the *Sevince* case, that instead of 1980 it is 1976 when the powers of the Member States where put at a standstill as Decision No. 1/80 is the follow-up.

integration measures abroad or after arrival in the host-State actually amount to a tightening up of the conditions *for admission to the territory*, which are still part of the exclusive powers of the Member States. They might have to be classed as conditions *concerning the admission to the labour market,* which are no longer the exclusive competence (*i.a*, after one year of legal employment, Article 6 Decision No. 1/80 starts to work) of a Member State. This distinction is in particular important to determine whether integration measures upon arrival do not violate obligations under Association law.[94] It can also not go without mentioning that it is not (yet) clear if and to what extend the powers accorded to the Member States to regulate first admission to their territory and labour market also include the period in which a Turkish worker derives rights from Article 6 Decision No. 1/80. The integration obligation proposed by the Dutch government will actually apply during the first five years or until the integration conditions have been satisfied, whereas Article 6 Decision No. 1/80 provides a Turkish worker with a right of residence after one year legal employment. The rights of a Turkish worker become stronger on the completion of three respectively four years of legal employment. A restriction of a Member State's powers could flow from the fact that the Court is of the opinion that a Member State is not competent to alter, on its own accord, the system of Article 6(1) Decision No. 1/80 that envisages gradual integration of Turkish workers in the national labour market. It is this system of gradual integration that is used by the Court in *Nazli* to restrict the powers of a Member State to adopt measures that will form an obstacle to the exercise of the rights already accorded to an individual.

It is very important to fall within the personal scope of Article 6(1) Decision No. 1/80. Until one satisfies the conditions set out in Article 6(1) Decision No. 1/80 Member States are competent to rule, under the terms set out in its national legislation, on the granting of permission to enter their territory, as well as access to the labour market of that Member State. A restriction to the exclusive powers of a Member States is found in the standstill clause of Article 13 Decision No. 1/80.[95] As far as the integration measures envisaged by the Balkenende II government are concerned, the following holds true:

A. The obligation to pass the rudimentary examination abroad might be imposed on workers as a condition for a long-term visa, thus required, if it is classed as a condition concerning the admission of the worker. The rudimentary examination abroad, on the other hand, may just as easily be classed as a restraint to enter the labour market. If this is the case, then the standstill clause in Article 13 Decision No.

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of Decision No. 2/76 that was adopted in 1976 where we find a standstill provision in Article 7 (RV 1990/91, with annotation C.A. Groenendijk).

[94] The rudimentary examination abroad appears to remain clear of Community law interference, but there is no absolute certainty.

[95] See, for instance: ECJ case C-340/97, *Nazli* [2000] ECR I-957.

1/80, as interpreted by the European Court of Justice in *Abatay*, applies. The legal status of workers is then to be determined in accordance with the rules that were in force in 1980 or even 1976. If there was no (equivalent) obligation to the rudimentary examination abroad in 1980, then such an obligation cannot be imposed on Turkish workers as from 2004. Ultimately it will be up to the Court to cut the knot.

B. An integration examination imposed on Turkish workers might violate Association law, as the Court of Justice has ruled that although Decision No. 1/80 does not affect a Member State's competence to regulate first entry to the territory and labour market of a Member State, this provision *'cannot be construed as permitting the Member State to modify unilaterally the scope of the system of gradual integration of Turkish workers in the host State's labour force, by denying a worker who has been permitted to enter its territory an who has lawfully pursued a genuine and effective economic activity for a continuous period of more than one year with the same employer the rights which the three indents of that provision confer on him progressively according to the duration of his employment'*.[96] Considering the law as it now stands it is not possible to answer the question whether the integration measures unilaterally modify the scope of Article 6 decision No. 1/80.

C. Turkish workers already resident in the Netherlands enjoy protection by Association law if and as long they belong to the legal employment market.[97] As far as this group is concerned the same can be said with regard to the integration examination as has been said in respect of the newly arriving Turkish nationals. A pensioned or fully and permanently incapacitated Turkish worker cannot rely on Association law to safeguard his/her right of residence in a Member State. They can be treated as third country nationals.

D. Penalisation of non-compliance with the integration examination by withholding an independent or permanent residence permit is only possible if a Member State can impose such an obligation on a Turkish worker. As far as Turkish workers are concerned it is not entirely clear whether they can be subjected to integration measures. If an integration measure can be imposed on a Turkish worker, the residence permit that is issued in accordance with the EEC-Turkey Agreement merely has declaratory effect. In other words, the right of residence is derived directly from the Association Agreement and, therefore, the residence permit serves as proof of an existing right.

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[96] ECJ case C-1/97, *Birden* [1998] ECR I-7747, cons. 37. Confirmed in ECJ case C-340/97, *Nazli* [2000] ECR I-957, cons 30. See also: ACVZ, *Inburgeringseis en de voorwaarde voor toelating in Nderland* (The Hage, 2004) p. 38.

[97] ECJ cases C-434/93 *Bozkurt* [1995] ECR I-1475 and C-340/97, *Nazli* [2000] ECR I-957.

E. Member State will be able to impose an administrative financial sanction if the integration requirements are not satisfied within five years after arrival in the Member State as long as the conditions set out in the case law of the European Court of Justice regarding penalisation of infringements of Community law by national authorities are met. These conditions are: the principles of equivalence and proportionality.[98]

Turkish self-employed persons and service providers

Article 13 and 14 of the Association Agreement read in combination with Article 41(1) of the Additional Protocol are important provisions for Turkish self-employed persons and service providers because of the standstill clause in Article 41(1) of the Additional Protocol.

According to Article 13 of the Association Agreement restrictions on the freedom of establishment between the European Union and Turkey have to be lifted. In doing so the Contracting Parties have agreed 'to be guided by' the relevant provisions in the EC-Treaty. The same applies to the free movement of services, according to Article 14 of the Association Agreement. Although no implementing measures have been adopted, the Court found in *Savas*[99] (self-employed persons) and in *Abatay*[100] (service providers) that these provisions read in combination with Article 41(1) Additional Protocol entail a prohibition to introduce new restrictions on free movement of establishment and services. As a consequence Member States cannot adopt national legislation that will restrict the exercise of these rights. A restriction is assumed when the situation of the individual deteriorates in comparison to the situation when the Additional Protocol entered into force. For the Netherlands this was January 1, 1973.[101] An attempt to reconstruct the conditions for admission in the Netherlands in 1973 by Groenendijk reveals the following. He finds that in the 1973 case law not being in the possession of a long-term visa did not constitute a sufficient ground to refuse a residence permit to an immigrant seeking access to the Dutch territory as a self-employed person.[102] His conclusion is that the long-term visa requirement cannot be imposed on Turkish self-employed persons in 2004. The same can be said as far as Turkish self-employed persons and service providers are concerned regarding the obligation to pass an integration examination after arrival in the Netherlands.[103] Penalisation of non-compliance with

[98] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487. See also the Conclusions of Advocate-General Léger in case C-230/97, *Awoyemi*, July 16, 1998 [1999] ECR I-6781.
[99] ECJ case C-37/98 [2000] ECR I-2927.
[100] ECJ joined cases C-371/01 and C-369/01, October 21, 2003, n.y.r..
[101] ECJ joined cases C-371/01 and C-369/01, October 21, 2003, n.y.r..
[102] C.A. Groenendijk, Annotation on case C-37/98, *RV* 2000/91, p. 354, point 2.
[103] The ACVZ does not address this question (ACVZ, *Inburgeringseisen als voorwaarde voor toelating in Nederland* (The Hague, 2004) p. 38).

integration measures by withholding a permanent or independent residence permit is only an option if such measures can actually be imposed, which is not the case for Turkish self-employed persons and/or service providers. The same holds true for a administrative fine.

3.7 Family Members of Turkish Nationals

As has been stated, only the family members of Turkish workers fall within the personal scope of Association law, because the Association Council has only adopted legislation with respect to this group of people. Article 7 Decision No. 1/80 is of utmost importance for them, as they derive an independent right of residence that is linked to their right to enter the labour market from this provision on completion of three or five years of residence in the host-State. As for children who have completed their vocational training in the host country, the second paragraph of Article 7 Decision No. 1/80 provides them with a right to respond to any offer of employment if one of their parents has been legally employed for a period of at least three years in the host-State at any moment in the past. Like under Article 6 Decision No. 1/80 the right of residence accorded to family members of Turkish workers is directly linked to the employment relationship.[104] The Court has also ruled that a residence permit issued to a Turkish worker's family members merely has declaratory effect.

The decision in *Ayaz* justifies the conclusion that the family members who may join a Turkish worker are the same as the family members who can accompany a national of a Member State.[105] In any case this covers the spouse and children under the age of 21 years old of both spouses. Whether the Court will be willing to allow a Turkish worker to be joined by a partner, a long the line of *Reed*,[106] is a question that at this moment cannot be answered with a hundred per. cent certainty. Likewise, nothing much can be said on the position of parents of Turkish workers, as the Court of Justice has not yet pronounced it self on this issue. From *Cetinkaya* it follows that a child that was born on the territory of a Member State falls within the personal scope of Article 7 Decision No. 1/80 even if it has reached the age of majority.[107]

Article 7 Decision No. 1/80 sets out rights for family members of Turkish workers. As for the Member States, they are still entitled to determine unilaterally the conditions for family reunification. As a consequence they can also require that the family unity is ensured during the period prior to the completion of the conditions set out in Article 7 Decision No. 1/80. Thus it may require that family members live together unless there are objective conditions

[104] ECJ cases C-355/93, *Eroglu* [1994] CCR I-5113, C-351/95, *Kadiman* [1997] ECR I-2133 and C-210/97, *Akman* [1998] ECR I-7519.
[105] ECJ case C-27/02, *Ayaz,* September 30, 2004, n.y.r.
[106] ECJ case 59/85 [1986] ECR 1283.
[107] ECJ case C-467/02 *Cetinkaya,* November 11, 2004, n.y.r.

that require otherwise. The examples found in the Court's case law are: the distance between the family home and the place where a family member works or the place where the institution for education is located.[108] The family members of Turkish worker, like the Turkish worker him/her self, enjoys a restricted right to enter the employment market after thee years and, when they exercise this right, their own right of residence in the host-State.

In conclusion the same holds true for the application of Article 7 Decision No. 1/80 regarding the standstill clause in Article 13 decision No. 1/80 as has been said in respect of Turkish workers. The reader is referred to that section for further details.

This brings us to the following answers to the question on the compatibility of the integration measures proposed by the Balkenende II government with Association law:

A. The obligation to sit a rudimentary examination abroad that is linked to the issuing of a long-term visa can be imposed on family members of Turkish workers if it is classed as a condition for access to the territory. Like with Turkish workers, Article 13 Decision No. 1/80 could possibly alter the situation if this integration measure is classed as affecting the access to the labour market. A small problem might be caused by the objective of Article 7 Decision No. 1/80, namely facilitation of the integration of the Turkish worker into the host-State. This objective might just be found infringed if family members are confronted with an integration measure that bars them from entering the Netherlands or, in any case, delays their arrival in the country.[109] European law as it stands does not provide an adequate answer to this issue.

B. Newly arriving family members of Turkish workers, fall within Member State competence as far as admission conditions are concerned. If an integration examination is part and parcel of the admission conditions a family member is obliged to satisfy this condition. If, however, Article 13 Decision No. 1/80 also limits Member State competence to unilaterally modify the conditions for access to the labour market to the disadvantage of a Turkish family member, then, in line with the *Birden* and *Nazli* decisions, there will be a restriction as to the powers of a Member State to impose integration measures on family members of Turkish workers.

C. Family members of Turkish workers already resident in the Netherlands were admitted to the territory in accordance to national law. If their labour participation brings them within the scope of Article 7 Decision No. 1/80 then an obligation to

[108] ECJ cases C-355/93, *Eroglu* [1994] ECR I-5113, C-351/95, *Kadiman* [1997] eCR I-2133 and C-210/97, *Akman* [1998] ECR I-7519.
[109] Article 8 ECHR might also be at stake here.

satisfy integration measures is possibly incompatible with Association law.[110] Besides the restriction that might follow from Article 13 Decision No. 1/80, Member State powers may also be restricted due to the fact that amongst the family members of Turkish workers there will be a number of people who enjoy an independent right of residence by virtue of Article 7 Decision No. 1/80.

D. Penalisation of an integration obligation by refusing an independent or permanent residence permit is only possible if such an obligation can actually be imposed. Article 13 Decision No. 1/80 might stand in the way of imposing such an obligation on family members in the same way as it does for Turkish workers themselves. If there is room to impose an integration obligation, then, under the terms of the EEC-Turkey Agreement, a residence permit merely has declaratory effect. In other words the right of residence follows directly from Association law it self and, therefore, the residence permit that is issued serves as proof of an existing right. The residence permit issued to those satisfying the conditions of Article 7 Decision No. 1/80 is an independent residence card that allows its bearer to work under the terms set out in that provision. Whether Association law obliges a Member State to issue a permanent residence permit is not yet been decided.

E. Member State will be able to impose an administrative financial sanction where integration measures can be imposed as long as the conditions set out in the case law of the European Court of Justice regarding penalisation of infringements of Community law by national authorities are satisfied.[111]

4. In Conclusion

In this report I have considered the limitations flowing from European Community law with which a Member State wishing to adopt integration measures will be confronted. A number of the integration measures proposed by the Dutch government in March 2004 are in breach of European law. Yet other points are hard to test against European law as, considering the status quo in 2004 it is far from clear what the exact limitations are under European law. A further, complicating factor concerns the fact that European Community law is still under construction, as is shown by the proposals for legislation that can be found on the European negotiation table and the constant stream of case law from Luxembourg. These

[110] A family member may, for instance, qualify under Article 6 Decision No. 1/80, for instance if he/she participates in the labour market of the host-State before expiry of the three year period found in Article 7 Decision No. 1/80.

[111] ECJ cases 157/79, *Pieck* [1980] ECR 2171, C-265/88, *Messner* [1989] ECR 4209 and C-329/97, *Ergat* [1999] ECR I-1487. See also the Conclusions of Advocate-General Léger in case C-230/97, *Awoyemi*, July 16, 1998 [1999] ECR I-6781.

developments will also put their mark on the powers left to Member States to design their own integration policy.

For those points which cannot be addressed satisfactorily, it appears appropriate to ask the European Commission for advice, in particular as the Dutch proposal on integration measures will certainly not be without implications for the application of European law and the relations between the Netherlands and the other Member States. It seems sensible to consult the European Commission in respect of the condition 'born outside the EU/EER' to find out whether it complies with the ideas of the European Commission if and when it finds the time ripe to adopt European legislation on integration. Other questions which can be put before the European Commission concern the relationship between the Association Agreement EEC-Turkey and the only recently adopted Directives on family reunion and long-term resident third country nationals that both allow Member States to adopt integration measures in their national legislation.

Besides the 'political road', it can also be considered whether it is appropriate to ask the European Court of Justice for an interpretation on unclear concepts and/or the relationship between the different legal acts. One option would be to take several pending, representative national cases and refer preliminary questions to the European Court of Justice under Article 234 EC.[112] This provision also provides for an accelerated procedure. In addition Article 68(3) EC enables a Member State to request the European Court of Justice to hand down a ruling on the interpretation of Title IV EC or an act of the institutions of the Community based on this Title. It is not required that a case is pending before a national court to use this provision. A decision handed down by the European Court of Justice under this provision does not apply to judgments of courts or tribunals of the Member States which have become *res judicata*. This procedure could be used for questions relating to the Family Reunification Directive or the Long-term Resident Third-country National Directive.

It is finally up to the Dutch government to ensure that it takes great care in ensuring that national policy on integration complies with legislation adopted by the European legislator when it implements the European Directives on Family Reunification and Long-Term Resident Third-country Nationals into its national law and simultaneously adopts other national laws and develops national policies.

[112] As far as the new Directives which have been adopted within the framework of Title IV EC the same tactic can be followed in the future by using the preliminary reference procedure in Article 68(2) EC.