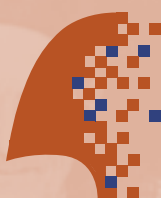
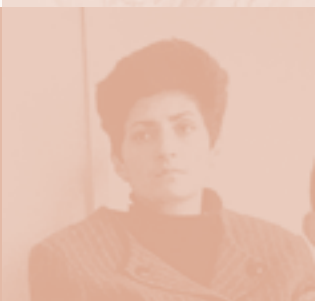
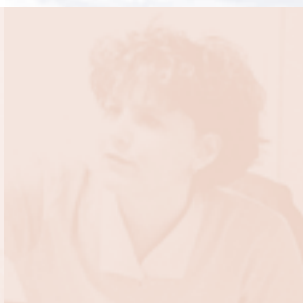
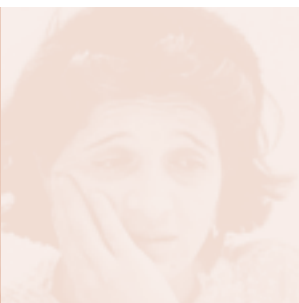




From Outline Policy Document to Civic Integration Act

LEGAL OPTIONS FOR A MORE COMPULSORY CIVIC
INTEGRATION SYSTEM

ADVISE



**Adviescommissie voor
Vreemdelingenzaken**

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INTEGRATION SYSTEM

THE HAGUE, NOVEMBER 2004

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CHAPTER I

Introduction

In her letter of 19 July 2004 (see Annexe 1), the Minister for Aliens Affairs and Integration asked the Advisory Committee on Aliens Affairs (ACVZ) to conduct a policy-oriented legal investigation in connection with the *Review of the Civic Integration System Outline Policy Document* (“the Outline Policy Document”) and on that basis to advise her whether the imposition of an obligation on certain categories of people to follow a civic integration programme subject to sanctions was legally possible.¹

These categories are:

- aliens or Dutch nationals born outside the territory of the EU/EEA (in Europe); and
- persons naturalised before 1 April 2003 (under the old Netherlands Nationality Act).

It should be noted at this point that in this report the ACVZ also offers an alternative legal construction, on account of the legal and other problems it has identified. In its view, this solution is capable of achieving the aims of the Outline Policy Document as best possible, while avoiding the problems discussed below and at the same time solving a number of other problematic issues (see Chapter 4).

In line with the request for advice from the Minister for Aliens Affairs and Integration, the ACVZ addressed the following four issues.

- 1a) Does the criterion proposed in the Outline Policy Document – ‘born outside the territory of the EU/EEA (in Europe)’ – constitute a prohibited (indirect) form of discrimination within the meaning of the Equal Treatment Act (AWGB)?
- 1b) Does the system proposed by the Outline Policy Document effectively disadvantage people born outside the territory of the EU/EEA (in Europe) in relation to persons born within the territory of the EU/EEA (in Europe)?
- 1c) If so, is there sufficient justification for this disadvantage in the sense that it serves a legitimate aim and the disadvantage is proportionate to this aim? In other words, does it form an appropriate, necessary and proportionate means of achieving this aim?
- 1d) Is the system proposed in the Outline Policy Document compatible with obligations under international law, such as those arising from the International Covenant on Civil and Political Rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms, and the European Convention on Nationality? Is it compatible with the Charter of the Kingdom, the Constitution, the Equal Treatment Act and any other Dutch statutory provision, as well as with general principles of good governance?
- 1e) Are naturalised Dutch citizens, Dutch nationals born in the Netherlands Antilles or Aruba and aliens who are not EU citizens disadvantaged in relation to Dutch nationals born in the Netherlands and EU citizens, who are not obliged to follow a civic integration programme although they are not always able to speak Dutch nor do they

¹ House of Representatives 2003-2004, 29543, no. 2.

have sufficient knowledge of Dutch society? If so, is this compatible with national and international law?

2a) Is the proposed obligation to follow a civic integration programme for persons who were naturalised under sections 7 and 8 of the old Netherlands Nationality Act and thereby complied with the statutory requirements in force at the time compatible with the principle of legal certainty?

2b) May the proposed obligation be imposed on Dutch nationals born outside the EU/EEA (in Europe) in view of the provisions of article 5 of the European Convention on Nationality, bearing in mind the legal status of persons who are naturalised Dutch citizens?

These questions are all answered in this report in the sense that the results of the legal analysis, as set out in chapter 3, provide direct or indirect answers to each of them. In view of the request for advice from the Minister for Aliens Affairs and Integration, and bearing in mind the broad context and the complex legal nature of the proposed new legislation on civic integration, the ACVZ was confronted with the need to consider the relevant aspects of national and international law in their relationship to one another. This includes relevant aspects of European law, since there are explicit dimensions under international and European law to – in particular – the criterion ‘Aliens or Dutch nationals born within or outside the territory of the EU/EEA (in Europe)’.

In order to compile this report, the ACVZ has itself studied the issues and in addition called upon external legal expertise. What is more, a number of prominent legal specialists sat on the subcommittee that prepared the report in the capacity of external experts. The academics thus consulted were: Professor E. A. Alkema (Leiden University), Dr J. Gerards (Leiden University), and Mr B.K. Olivier (Amsterdam University). The ACVZ is most grateful for the work they did in a very short period of time. That applies in particular to Dr L.F.M. Besselink (Utrecht University), who provided extremely useful research material for this report. All the external experts broadly supported the legal analysis, including the conclusions, which forms the basis for the ACVZ’s recommendations. Nevertheless, the ACVZ bears sole responsibility for the present report.

Structure of the report

The report is structured as follows. *Chapter 2* contains a general description of the aims and premises of the Outline Policy Document. The ACVZ then sets out its basic premises with regard to the civic integration programme and a number of conclusions regarding the aims. To support the legal analysis, it describes the legal system as outlined in the Outline Policy Document.

Chapter 3 examines the legal viability of the system proposed in the Outline Policy Document. A number of criteria used to this end are described and certain problematic issues analysed. This is followed by the conclusion reached by the legal analysis, which also identifies the sections of the target groups which would not be covered or would be difficult to cover through the proposed system. Because the legal system proposed in the Outline Policy Document can only be described as in part unviable and in part highly problematic, the ACVZ presents an alternative legal construction in *chapter 4*.

CHAPTER 2

Review of the civic integration system

This chapter outlines the aims and premises of the Outline Policy Document. Particular attention is paid to the target group and enforcement aspects of the proposed system. A number of basic premises with regard to civic integration formulated in a previous ACVZ report are set out. A brief consideration of some of the basic premises of the Outline Policy Document concludes this chapter.

2.1 Aims and premises of the Outline Policy Document

The Blok Committee and the Government response

The Temporary Committee on Integration Policy (known as the Blok Committee, after its chairman) expressed the view at the beginning of 2004 that the integration of many members of ethnic minorities had been a complete or partial success.² The Government endorsed this conclusion. However, the Government response to the report also concluded that this meant the integration of many other members of various ethnic minority groups had not been entirely successful, or had to date been a complete failure.³ On the basis of certain core data, the Government concluded that large groups of people with an ethnic minority background lag far behind the rest of the population in social, cultural and economic terms. In particular, their lack of a good command of Dutch, and the educational disadvantage, low employment rate and high proportion of benefit claimants, high crime rate and relatively unfavourable living conditions common to ethnic minorities were the cause of this difference. In its response the Government stated that it was necessary to ‘learn from what went wrong in the past and to formulate new principles for integration policy’.⁴ Currently, government policy focuses on ‘the things that are common to us all’. This is defined as ‘the Dutch language, the basic values that we share and the norms we consider that everyone should conform to’.⁵ The aim of the entire integration process is full membership of Dutch society. The Policy Document outlines a complete revision of the civic integration system in which the responsibility borne by newcomers and long-established immigrants themselves is the focal point.

Aims and premises of the Outline Policy Document

The aim of the Outline Policy Document is for every long-term resident of the Netherlands to have sufficient knowledge of the Dutch language and Dutch society to be able to participate in that society.⁶ The new system proposed in the Outline Policy

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- ² The Blok Committee (Temporary Committee on Integration Policy) was set up on 3 December 2002 to examine the integration policy of the Dutch Government over the past 30 years. On 19 January 2004 it published its final report entitled *Bruggen Bouwen (Building Bridges)* (House of Representatives 2003-2004, 28689, nos. 8-9).
 - ³ Government response to the final report *Bruggen Bouwen*, 24 May 2004, see § 2.2, p. 6 and 7 (House of Representatives 2003-2004, 28689, no. 170). See also *Jaarnota Integratiebeleid 2004* (2004 annual report on integration policy) (House of Representatives 2003-2004, 29837, nos.1-2), § 1.2.
 - ⁴ *Ibid.* see § 2.2, p. 7 (House of Representatives 2003-2004, 28689, no. 17).
 - ⁵ *Ibid.* see § 2.3, p. 7 (House of Representatives 2003-2004, 28689, no. 17).
 - ⁶ For full details of the plans for a new civic integration system please see the Review of the Civic Integration System Outline Policy Document and the letters concerning this issue of 24 June 2004 (House of Representatives 2003-2004, 27083 and 29543, no. 45) and 30 June 2004 (House of Representatives 2003-2004, 27083, no. 61) sent to Parliament by the Minister.

Document is based on the following premises:

- newcomers and long-established immigrants will be subject to a statutory obligation to follow a civic integration programme;
- the responsibility of the individual will be the central element in meeting this obligation;
- the obligation will only have been met once a civic integration examination has been passed;
- those subject to the obligation will be free to choose the way in which they prepare for the exam and with regard to the courses they choose to follow and pay for;
- local authorities will play a pivotal role, particularly with regard to certain special groups. This also applies to enforcement.⁷

The first three premises in particular mean that the new system would be of a *more compulsory nature*. It entails an obligation to achieve a result, not merely to make an effort. And the obligation will be enforced through the imposition of fines under administrative law in the event of non-compliance.

The target groups listed in the Outline Policy Document comprise:

Newcomers

- Aliens or Dutch nationals born outside the territory of the EU/EEA (in Europe)
- who were 16 (with the exception of persons still of compulsory school age) or older on their admission to the Netherlands
- and came to the Netherlands after the entry into force of the new legislation.

Established immigrants

- Aliens or Dutch nationals born outside the territory of the EU/EEA (in Europe)
- who were 16 (with the exception of persons still of compulsory school age) or older on their admission to the Netherlands
- and came to the Netherlands before the entry into force of the new legislation.

Exceptions:

- holders of certain qualifications;⁸
- people over the age of 65;⁹
- diplomats;
- third-country nationals who have obtained the EU status of long-term resident in another EU member state and who have had to comply with integration conditions in that state (EC Directive 2003/109/EC).

Enforcement system

There will be much greater emphasis on enforcement than in the old system. Measures to be adopted include steps to encourage participation, reimbursement of costs (subject

⁷ See Jaarnota Integratiebeleid 2004 (House of Representatives 2003-2004, 29837, nos.1-2, § 2.1, p. 11).

⁸ More specifically, persons in possession of certificates showing that they have knowledge and skills at the level of the civic integration exam. These would on the whole be certificates awarded in the Netherlands, the Netherlands Antilles or Aruba at the level of university education, higher professional education, senior secondary vocational education, certain forms of secondary education and the 'Staatsexamen NT2' (state examination in Dutch as a second language). See also the letter to Parliament (House of Representatives 2003-2004, 27083 and 29543, no. 45).

⁹ This is the age limit on the obligation to work that applies in social security legislation. The aim is to see whether, within the existing budgetary framework, there is scope for measures to improve the command of Dutch of people in this age group.

to an upper limit) for timely conclusion of the civic integration programme, and sanctions in the form of fines and refusal to grant a permanent residence permit.

Priority in terms of enforcement will be given to newcomers, to prevent the creation of new situations of disadvantage, and to two categories of established immigrants:

- those receiving benefit who must remain available to take up employment;
- those who are not receiving benefit and are not in paid employment (usually women in a disadvantaged situation).

The route to be taken by newcomers is as follows: the obligation to follow a civic integration programme arises as soon as residence rights (aliens) have been granted or after compulsory registration in the municipal personal records database or GBA (Dutch nationals). Six months after an intake interview, the first progress check takes place. There is a duty to report for this, on pain of a fine. A second check takes place at a time to be determined by the local authority within the first three years after the obligation arose. For this too there is a duty to report, once again on pain of a fine. If the civic integration examination has not been passed within three years, the entitlement to reimbursement of a part of the costs lapses. If the exam has not been passed within five years, another fine may be imposed. And finally, passing the exam is a precondition for the award of an independent or permanent residence permit.

Established immigrants who are receiving benefit follow more or less the same route. Enforcement begins with the immigrant being called up by the local authority for an intake interview. The civic integration programme may be linked to reintegration in the labour market. The local authority makes agreements with individuals who are not receiving benefit and are not in paid employment concerning the time schedule in which the examination must be passed, as well as their contribution to the costs and the repayment of part of the costs if they fail to meet the obligation. Failing to meet their obligation within five years may lead to a fine being imposed.

There are separate rules governing other established immigrants that grant a greater measure of freedom with regard to the period within which the exam must be passed in order to qualify for the maximum reimbursement. This changes if the local authority decides nevertheless to call the individual in question up. Enforcement then begins, following in most respects the regime that applies to newcomers: two progress checks with a duty to report and the possibility of a fine if they do not show up. Finally, they too are subject to a fine if the examination is not passed within five years.

In principle, established immigrants (like newcomers) are free to determine how they prepare themselves for the examination. If they wish to qualify for credit, or reimbursement of part of the costs, certain conditions apply. Local authorities play a pivotal role in the civic integration system proposed in the Outline Policy Document: they will be responsible for calling up immigrants, conducting intake interviews and progress checks, and imposing fines, where necessary.

2.2 Basic premises of the ACVZ with regard to the civic integration programme

The ACVZ has already expressed its views on civic integration in relation to admission to the Netherlands. In a report entitled *Civic integration requirements as a precondition for residence in the Netherlands* (February 2004), the ACVZ formulated a number of

basic premises in this respect. Taking into account what has been set out above, the ACVZ would now express those basic premises as follows.

- Every resident of this country, whether born here or not, needs certain skills and knowledge in order to be able to be a full member of Dutch society.
- Civic integration policy must be geared towards enabling people to function effectively in Dutch society.
- Civic integration requires a combination of cognitive skills (knowledge of the Dutch language¹⁰ and Dutch society) and practical skills in terms of functioning in society. We would recommend ‘learning by doing’ (dual system), as a form of civic integration through employment, but also through voluntary work, education and training.
- In the ACVZ’s view, civic integration should be the shared responsibility of the individual, government and society as a whole.
- The ACVZ sees civic integration as essential to the preservation of the Dutch economic and social order.
- In the view of the ACVZ, civic integration policy to date has been only a limited success.¹¹ This conclusion is based on the evaluation of the Newcomers Integration Act,¹² the evaluation of civic integration among established immigrants,¹³ the report on ethnic minority integration policy,¹⁴ the report published by the Blok Committee,¹⁵ the Government response to the Blok Committee report,¹⁶ the Review of the Civic Integration System Outline Policy Document,¹⁷ and the 2004 Annual Report on Integration Policy,¹⁸ all seen in relation to one another. The ACVZ is in principle in agreement with a civic integration system that puts the emphasis on personal responsibility and is of a more compulsory nature.
- The ACVZ notes that the aim of the Outline Policy Document, that everyone wishing to be a member of Dutch society on a long-term basis needs to have a knowledge of the Dutch language and Dutch society, is endorsed and has the support of a majority of the Dutch population and its representatives in Parliament. The aim therefore clearly has democratic legitimacy.
- Nevertheless, the ACVZ realises that the new civic integration system is no panacea for all the integration problems existing in the Netherlands. As the Outline Policy

¹⁰ The majority of newcomers acknowledge the importance of language for access to employment.

¹¹ ‘The civic integration system that has developed on the basis of the Newcomers Integration Act (WIN) has proved not to have achieved the desired results in all respects in recent years. The system is a complex one, and as a result lacks transparency. It also provides insufficient incentives to participants and implementers. It is relatively easy for newcomers to evade their obligations. It has emerged that only a limited number of newcomers reach the level deemed necessary for active participation in Dutch society. As regards implementation, supply is often not properly geared to demand. Coordination between the different agencies concerned with civic integration does not always run smoothly.’ See Rapportage Integratiebeleid Etnische Minderheden 2003 (2003 report on ethnic minority integration policy) (House of Representatives 2003-2004, 29203, no. 1, p. 15). See also the same report for 2002 (House of Representatives 2002-2003, 28612, no. 2).

¹² Evaluatie van de Wet Inburgering Nieuwkomers (House of Representatives 2002-2003, 28612, no. 2).

¹³ Inburgering (Civic Integration), progress report as part of the large-scale civic integration project for established immigrants (House of Representatives 2001-2002, 27083, no. 24). See also the CBS (Statistics Netherlands) report *Oudkomers en tweede generatie allochtonen in Nederland* (Established and second-generation immigrants to the Netherlands), 2003, and the SCP (Social and Cultural Planning Office) report *Oudkomers in beeld* (Established immigrants in view), 2001.

¹⁴ Rapportage Integratiebeleid Etnische Minderheden 2003, 16 September 2003 (House of Representatives 2003-2004, 29203, no. 1, p. 15).

¹⁵ *Bruggen Bouwen* (House of Representatives 2003-2004, 28689, nos. 8-9).

¹⁶ Government response to the final report *Bruggen Bouwen*, 24 May 2004 (House of Representatives 2003-2004, 28689, no. 17).

¹⁷ *Herziening van het Inburgeringsstelsel* (House of Representatives 2003-2004, 29543, no. 2).

¹⁸ *Jaarnota Integratiebeleid 2004* (House of Representatives 2003-2004, 29837, nos. 1-7).

Document states 'The road to full membership of Dutch society begins with civic integration. The latter is therefore not a synonym for integration, but constitutes the beginning of the entire integration process.' Civic integration falls under that part of the process called 'Necessary skills'. The other components are 'Reaching out' and 'Accessibility'.

The legal viability of the Outline Policy Document

This chapter focuses on the legal objections to the civic integration system proposed in the Outline Policy Document. The structure of the chapter is as follows. First, a number of general principles with regard to equal treatment are dealt with by way of introduction. The ACVZ then discusses three criteria that give rise to problems with regard to the proposed system. The chapter closes with a conclusion.

3.1 General principles

In assessing the legal viability of the system, our first concern was of course the question of whether provisions exist under national or international law that would form an obstacle to imposing an obligation to follow a civic integration programme. In the analysis below some of these explicit and implicit prohibitions are discussed.

Most of these provisions require further analysis, notably the prohibitions on discrimination and/or unequal treatment laid down in the Dutch Constitution and in a number of treaties.¹⁹ Further interpretation is also necessary in the case of provisions requiring a certain kind of treatment, such as most-favoured nation clauses in bilateral treaties (friendship, trade) or WTO trade agreements.

Relevant provisions under national and international law

In national law, the principle of equal treatment is enshrined in the article 1 of the Constitution. This requires that all persons in the Netherlands shall be treated equally. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever is prohibited.

The fundamental right laid down in article 1 of the Constitution is elaborated in other legislation including the Equal Treatment Act (AWGB). The AWGB gives an exhaustive list of the private-law relationships covered by the Act, namely in education, employment relationships and the provision of goods and services. But the Act only applies to these areas if the government is acting in them, with the proviso that when it comes to the provision of goods and services, the government must be acting as a private party. The measures proposed in the Outline Policy Document fall outside the scope of the AWGB because they are concerned with unilateral juristic acts under public law and other kinds of acts in the fulfilment of precisely the tasks that are the responsibility of government.

Furthermore, treaty provisions must be complied with in full. The main provisions in this context are:

¹⁹ The term 'treaty' is taken to mean an international agreement concluded between states and governed by international law. See the definition in article 2.1 of the Vienna Convention on the Law of Treaties, May 1969, Netherlands Treaty Series (Tractatenblad – Trb.) 1977, 169, revised version Trb. 1985, 79 (rectification Trb. 1996, 89).

- The International Covenant on Civil and Political Rights (ICCPR), articles 2, paragraph 1, and 26;²⁰
- The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), article 14 in conjunction with article 1 of Protocol 12 to the ECHR;²¹
- Article 5 of the European Convention on Nationality;
- Article 1 of the International Convention on the Elimination of all Forms of Racial Discrimination.²²

The general prohibitions on discrimination as formulated in article 26 ICCPR, article 14 ECHR, article 1, ECHR Protocol 12, and in the national constitutional traditions of the member states are part of the relevant system of fundamental rights protected by the European Court of Justice.²³

Direct and indirect discrimination

In the Dutch context a distinction is drawn between direct and indirect discrimination. The treaties listed above, which prohibit any form of unequal treatment and/or discrimination, do not make this distinction. Because the Netherlands is bound by these treaties, the distinction between the two forms plays no further role in this analysis. The difference can be illustrated by means of an example. A provision prohibiting caravan-dwellers from residing in a certain part of the Netherlands would constitute direct discrimination on grounds of race/origin. Indirect discrimination occurs where a measure or rule is formulated in neutral terms but in practice leads to unequal treatment. For example, if there was a provision stating that all residents of the Netherlands must live in homes that are not mobile. Such a provision as such applies to all Dutch residents, but would disadvantage caravan-dwellers in particular, and thus constitute indirect discrimination vis-à-vis this group.

Relevant discrimination grounds

To assess the legal viability of the system proposed in the Outline Policy Document, the question must be examined of whether it would give rise to discrimination on grounds of birth/origin. The aforementioned articles of the ICCPR and ECHR prohibit such discrimination. The Dutch Constitution does not refer to these grounds in so many words. They have to be inferred from the term race, given a broad interpretation, or under ‘on any other grounds whatsoever’.²⁴ The latter observation is of limited significance in view of the fact that the Netherlands is in any event obliged to comply with the treaties referred to above, in which discrimination on grounds of birth/origin is explicitly prohibited.

²⁰ Treaty of 19 December 1966, Trb. 1969, 99, revised version Trb. 1978, 177.

²¹ Treaty of 4 November 1950, Trb. 1951, 154 (Rectification Trb. 1961, 8 and 1979, 150), most recently amended 11 May 1994, Trb. 1994, 165. Protocol 12 to the ECHR will make it possible to submit an application to the Court over a broader range of equal treatment issues than is at present possible given the accessory nature of article 14. However it would be going beyond the remit of this report to discuss the relationship with article 14 ECHR. The Netherlands has ratified Protocol 12, but it has not yet entered into force as this requires another two ratifications. The ACVZ takes the view that it may enter into force within a relatively short period, which means that it will play a role with regard to the civic integration issue.

²² Treaty of 7 March 1966, Trb. 1967, 48.

²³ See article 6, paragraph 2 in conjunction with article 46, chapeau and (d), EU Treaty, ECJ C-368/95, 26 June 1997, Familiapress, consideration 24.

²⁴ The term ‘race’ must be broadly interpreted in accordance with the definition in the International Convention on the Elimination of all Forms of Racial Discrimination and in accordance with established case law of the Supreme Court (Hoge Raad – HR), and covers: skin colour, origin, and national or ethnic origin (House of Representatives 1990-1991, 22 014, no. 3, p. 13 and established Supreme Court case law since HR 15 June 1976, Nederlandse Jurisprudentie (NJ) 1976, 551, with notes by Van Veen).

Objective justification

As has been explained, a measure or rule leading to unequal treatment or discrimination is only permitted if there is an objective justification for it. Speaking very generally, for this to be the case, there must be a legitimate aim and a reasonable relationship between means and ends. In other words, if it has only been established that a particular distinction has a legitimate aim, this does not mean that it is permissible.

It emerges from established national and international case law that the general framework for deciding such questions involves answering the following questions:

- a. Does the measure serve a legitimate aim? That is to say, the aim must not be inherently discriminatory and must be sufficiently compelling.
- b. Is the measure appropriate (does it 'fit'): is it capable of achieving the aim? The nature of the distinction must be tailored to the aim envisaged.
- c. Does the measure meet the requirement of subsidiarity? Subsidiarity is not present if the aim can be achieved by using a less radical measure.
- d. Is the measure proportionate? What is at issue here is the balance between the aim sought and the damage to the interests of the individual.²⁵

These issues are assessed in their relationship to each other and are cumulative, that is to say, all of them have to be answered in the affirmative.²⁶ In the opinion of the ACVZ, the system proposed in the Outline Policy Document must be judged in terms of possible prohibited discriminatory effects using this yardstick. It goes without saying that this also applies to any alternative system.

a) The assessment of whether the aim is legitimate does not depend on the effect produced by the measure in specific cases: a general assessment can be made. First, the ACVZ supports the Government's view that '(...) the continuity of society is at stake if population groups stand opposed to one another, social organisations for ethnic groups are insufficiently effective and large sections of the population play no active role in society and the economy'.²⁷ In this light, the ACVZ takes the view that arguments can be found in the Building Bridges Report published by the Blok Committee, the Government response to it, and in the Outline Policy Document that point to a serious and urgent problem. On that basis, it can be argued that the aim of the Outline Policy Document – for every long-term resident of the Netherlands to have sufficient

²⁵ According to the Human Rights Committee (which monitors compliance with the ICCPR), no prohibited discrimination has taken place 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. General Comment on non-discrimination, GAOR/45, sup. 40, p.174, par.7. A similar limitation on the prohibition on discrimination can be found in article 14 ECHR. According to the ECtHR, '(...) the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised'. ECtHR 23 July 1968, Series A, vol. 6 (Belgian linguistic case). The circumstances do however have to be equal before any violation of article 14 can be established, ECtHR 13 June 1979, Series A, vol. 31 (Marckx). Gerards, J.H., *Rechterlijke toetsing aan het gelijkheidsbeginsel (Judicial review in the light of the principle of equal treatment)*, Kluwer Deventer 2002, p.121-122. The criteria applied by the Equal Treatment Commission (CGB), based on national and international legal norms relating to discrimination, consist in brief of a review of the aim (is the aim legitimate) and reasonableness of the relationship between this aim and the distinction made (the means chosen to achieve the aim must be appropriate and necessary). J.H. Gerards and A.W. Heringa, *Wetgeving gelijke behandeling (Equal treatment legislation)*, Kluwer, Deventer 2003, p. 142-145.

²⁶ ECtHR 23 October 1990, Series A, vol. 187 (Darby).

²⁷ 2003 report on ethnic minority integration policy, House of Representatives 2003-2004, 29203, no. 1, p. 8.

knowledge of the Dutch language and Dutch society to be able to participate in that society – is not inherently discriminatory (or at the very least, is not intended to be discriminatory) and is sufficiently compelling.

b) The second question is whether the means is appropriate to the aim, in other words, is the nature of the distinction tailored to the aim envisaged? Of crucial importance here, in the ACVZ's view, is whether a person who needs a civic integration programme is actually made subject to the obligation. The ACVZ considers the need to have been demonstrated if the person in question is likely to end up in a disadvantaged situation through the lack of the skills in question, or if he or she is already in such a situation, can escape from it by acquiring them. In the ACVZ's opinion, it is not acceptable for the distinction made to result in persons who do not require a civic integration programme being obliged to follow one, whereas those who do are not. If that is the case, the means is not only ill-fitted to the aim, but in its present form incapable of achieving the aim. It therefore misses the aim altogether. By obliging groups of people born outside the territory of the EU to follow a civic integration programme, while not imposing such an obligation on those born within the territory, the measure becomes both 'over-inclusive' and 'under-inclusive'. In terms of the aim, certain groups wrongly remain unaffected by the obligation while other groups are deemed to be subject to the obligation but objectively seen do not need such a programme. The means therefore is insufficiently suited to the aim. There are – certainly in view of the objective of the Outline Policy Document that every long-term resident of the Netherlands should have sufficient knowledge to be able to participate actively in Dutch society – no good reasons that might justify this lack of 'fit'.

c) The question of subsidiarity may be answered as follows: the set of measures taken thus far has had only limited success. That is partly due to the fact that the measures did not ensure either de jure or de facto that all concerned actually acquired the necessary knowledge. The measures proposed in the Outline Policy Document will improve the chances of success. To date, no less compulsory measures are known that would also achieve that aim. This consideration, in the view of the ACVZ, forms the argument on the basis of which it can in general terms be concluded that the subsidiarity requirement is fulfilled insofar as the degree of obligation is concerned. That is far from certain with regard to the distinction made in the Outline Policy Document. There is in fact a system available which would ensure that individuals who are not in need of a civic integration programme will not have the obligation to follow one imposed on them. That system is described below.

d) The fourth and last question is whether the measure is proportionate, or, in other words, whether the means is reasonable in terms of the aim. It must be noted that the civic integration obligation can entail considerable damage to interests. It entails study, costs of study, examination fees and only lapses once a result is achieved. Failure to meet the obligation can result in sanctions being imposed. A total of three fines may be imposed, a permanent residence permit may be withheld and the entitlement to reimbursement of costs (subject to an upper limit) may be withdrawn. In individual cases this may have drastic consequences. The question is, whether in the event of an accumulation of sanctions, the aim sought is still proportionate to the damage inflicted in specific cases. In situations in which not all the sanctions are imposed cumulatively, it can generally be stated that there is a proportionate relationship between the interest served by a more compulsory civic integration system and the damaged interests of the individual.

Treaty law

The ACVZ would point out that there are numerous treaties, both bilateral and multilateral, that may present an obstacle to the imposition of a civic integration obligation. It is necessary to ascertain, on a case-by-case basis, whether and to what extent the precise formulation of the treaty provisions stands in the way of imposing such an obligation (for example, in the context of freedom of establishment). In view of the limited time available, it proved impossible to make a thorough examination of all relevant treaty provisions. Many such treaties prescribe treatment that is equal to that given to a state's own citizens or that given to most-favoured non-citizens.

Furthermore, the majority of these treaties concern trade relations between the Netherlands and one or more countries. In relation to such treaties, the ACVZ notes that their provisions mostly do not in the formal legal sense present an obstacle to the imposition of a civic integration obligation, but that an obstacle may arise through the material effect of such an obligation. Under the Dutch-American Friendship Treaty, for example, US citizens are relatively free to settle in the Netherlands for business purposes. In formal legal terms, the terms of this Treaty would not be breached through the imposition of a civic integration obligation, since there would be no consequences with regard to residence rights. Residence would not be terminated as a result of failure to meet the obligation. In many cases, however, complying with the obligation would entail considerable effort, both in time and money, and there would be the possibility of incurring a fine. The set of requirements is so burdensome that it is possible to say that in material terms, it presents an extra obstacle to residence by an alien. An indication that, practically speaking, this is indeed the case can be found in the Blok Committee report and in the evaluation of civic integration for newcomers, from which it emerges that having a job is a significant reason for failing to complete the civic integration course. This leads to the conclusion that having to combine full-time employment and study may present an obstacle.

The ACVZ foresees problems in three main areas with regard to the legal viability of the system proposed in the Outline Policy Document:

1. In adopting the criterion of 'born within or outside the territory of the EU/EEA (in Europe)' (see section 3.2).
2. In adopting the criterion of 'naturalised before or after 1 April 2003' (see section 3.3).
3. In the system of sanctions chosen (see section 3.4).

3.2 'Born within or outside the territory of the EU/EEA (in Europe)'

The legal viability of this criterion is dependent on the category of persons to which it is applied. We look below at each category to see whether the criterion holds, taking into account peremptory provisions of national and international law including the prohibitions on discrimination. The following categories may be distinguished:

- A. EU citizens born within or outside the territory of the EU/EEA (in Europe);
- B. Nationals of a third country with which the EU or the Netherlands has concluded a bilateral or multilateral treaty (including the Association Agreement between the EEC Turkey), born within or outside the territory of the EU/EEA (in Europe);
- C. Dutch nationals born within or outside the territory of the EU/EEA (in Europe);

- D. Third-country nationals born within or outside the territory of the EU/EEA (in Europe);
- E. Family members of persons in the above categories.

A. EU citizens born within or outside the territory of the EU/EEA (in Europe)

The application of this criterion gives rise to three major problems with regard to EU citizens.

1) First, the proposal, as formulated in the Outline Policy Document, constitutes an infringement of article 17 of the EC Treaty, because the civic integration obligation is a unilateral national measure taken by the Netherlands that entails a restriction on or withdrawal of rights held by EU citizens under EC law. The infringement lies in the fact that the criterion adopted for the purposes of the civic integration obligation ('born within or outside the territory of the EU/EEA (in Europe)') constitutes an interference in the competences of member states as laid down in EC law. Under article 17 of the EC Treaty, member states have the exclusive right to determine which of their own nationals qualify for the rights associated with EU citizenship.²⁸

2) The rights and freedoms that EU citizens can claim on the basis of their EU citizenship are thus at stake, in particular, the right to move and reside freely within the territory of the member states, in accordance with article 18 of the EC Treaty, the free movement of persons pursuant to article 39 ff. of the EC Treaty, and the agreements – where relevant – pursuant to the totality of provisions implementing the EC Treaty. The proposed system of the Outline Policy Document would make it possible to impose a civic integration obligation on EU citizens born outside the territory of the EU/EEA who reside on a long-term basis in the Netherlands. It must be noted here too that the restriction on free movement does not result from a limit on the right to settle as such, but from the entire complex of effort and costs, including the possibility of fines in the event of failure to achieve the desired result, that arises from the obligation. In a material sense, that constitutes an obstacle to free movement. These supplementary (new) requirements attached to long-term residence are not regulated in secondary EU legislation containing comprehensive provisions concerning the settlement of EU citizens in member states other than their state of nationality. On the basis of the foregoing, it must be assumed that the civic integration obligation constitutes an infringement of the right to reside freely in the territory of the member states.

3) The criterion also would also lead to unequal treatment of EU citizens born outside the territory of the EU (for example, a Portuguese national born in Mozambique) compared to those born within the territory (a Portuguese national born in Portugal). The criterion thus leads to unequal treatment on grounds of birth/origin (see also the Introduction). It is doubtful whether this distinction can be objectively justified. No-one would claim that a Portuguese national born in Portugal is by definition in no need of a civic integration programme, while a Portuguese national born in Mozambique is. The nature of the distinction between the 'two sorts of Portuguese national' (i.e. born within or outside the EU) is not tailored to the aim sought (i.e. the acquisition of the necessary skills for integration by those who need it), and therefore would appear to be inappropriate. In addition, the damage done to interests (through the imposition of

²⁸ See ECJ case C-369/90, 7 July 1992, ECR I-4239, point 10 (Micheletti and others), ECJ case C-192/99, 20 February 2001 (Kaur) and ECJ case C-200/02, 19 October 2004 (Chen), as yet unpublished.

a substantial burden and the risk of a fine) is not in reasonable proportion to the aim. There is thus no balance precisely because it is an unjustifiable distinction. The Outline Policy Document puts forward no convincing arguments that would justify the lack of fit between the means and the aim.

B. Nationals of a third country with which the EU or the Netherlands has concluded a bilateral or multilateral treaty, born within or outside the territory of the EU/EEA (in Europe)

The Netherlands has concluded treaties with a large number of countries outside the EU/EEA on the treatment of each other's nationals. The criterion 'born within or outside the territory of the EU/EEA (in Europe)' may be incompatible with treaty obligations enshrined in the rules laid down in or in connection with Association Agreements or in bilateral or multilateral treaties, in particular in the context of friendship or trade. With regard to the rules laid down in or in connection with Association Agreements, the ACVZ has been unable to find any provisions that constitute a clear impediment to imposing a civic integration obligation. One exception is the Association Agreement between the EEC and Turkey.

B.1 Association Agreement between the EEC and Turkey²⁹

The criterion 'born within or outside the territory of the EU/EEA (in Europe)' in principle allows for the proposed civic integration obligation to be imposed on Turkish nationals. However, they are subject to the Association Agreement between the EEC and Turkey. Two provisions are relevant to the question of whether the Agreement constitutes an obstacle to the imposition of such an obligation. These are:

- article 41, paragraph 1 of the Additional Protocol to the Agreement which provides for freedom of establishment (self-employed persons) and the free provision of services (service providers) in the Netherlands, and
- article 13, Decision 1/180 of the Association Council which provides for free access to the job market for employees and their family members if they are legally resident in the Netherlands.

Both of these provisions are 'standstill clauses'. They differ in their scope and purport.

An obstacle is present if:

- the civic integration examination for self-employed persons and service providers stands in the way of freedom of establishment, and
- the civic integration examination for workers and their family members stands in the way of free access to the job market.

In the Abatay case, the European Court of Justice devoted detailed and thorough attention to the legal implications of both the standstill clauses.³⁰ The Court emphasised that the decisive factor is whether the new situation is less favourable for the person concerned than that which prevailed at the time when the standstill clause entered into force. It may be argued that the civic integration obligation creates a new and less

²⁹ Trb. 1964/217, p. 3687-3700.

³⁰ ECJ 21 October 2003, no. C-317/01 and C-369/01, Jurisprudentie Vreemdelingenrecht (JV) 2004/2, with notes by CAG (Abatay and others and Sahin v. Bundesanstalt für Arbeit).

favourable situation in that the person concerned has to comply with a requirement that did not apply at the time of the entry into force of article 41, paragraph 1 of the Additional Protocol (1 January 1973) or article 13 of Decision 1/80 (1 December 1980). Such a less favourable situation occurs when a Turkish national is engaged in work as an employee, service provider or self-employed person while at the same time being obliged to comply with civic integration requirements because, as stated earlier, the entire complex of efforts and requirements, including the possibility of fines in the event of failure to achieve the desired result, that arises from the obligation constitutes an obstacle to work.³¹ The fact that the aim of civic integration is to improve access to the labour market is not of decisive importance here. In the Savas judgment, the Court of Justice referred to a new measure that has an aim or consequence.³² It repeated this consideration in the Abatay judgment. According to the Court, therefore, it is not only the aim but also the practical consequences of a measure that are decisive.

In both judgments support can be found for the standpoint that *the standstill clauses probably constitute an obstacle to imposing a civic integration obligation on Turkish nationals to whom these clauses apply*. It is also important to remember that this exemption also applies to the family members of Turkish employees to whom article 13 of Decision 1/80 applies.

It should further be noted that article 41, paragraph 1 of the Additional Protocol and Decision 1/80 grant certain rights to individuals with Turkish nationality. The Association Agreement between the EEC and Turkey, the Additional Protocol and Decision 1/80 contain no provisions that would withhold these rights to Turkish nationals with refugee status. It may therefore be assumed that the exemption from the civic integration obligation discussed above must also apply to refugees with Turkish nationality.

Conclusion

In practice, this will probably mean that the obligation to follow a civic integration programme may not be imposed on *first-generation Turkish self-employed persons, service providers and employees, insofar as they are engaged in work, and persons belonging to their families*.³³ On the other hand, the proposed civic integration requirements may, under the system of the Outline Policy Document, be imposed on Turkish nationals to whom the standstill clauses do not apply, insofar as they are born outside the territory of the EU/EEA in Europe. This includes Turkish nationals who are no longer employees, service providers or self-employed persons within the meaning of the standstill clauses, which means that the obligation may be imposed on Turkish nationals who are retired, fully work-disabled or in receipt of full social assistance.

³¹ Work obligations proved to be one of the major reasons for failure to complete civic integration courses as provided for under the WIN. See the report entitled *Verscheidenheid in integratie, evaluatie van de effectiviteit van de WIN (Diversity in integration, an evaluation of the effectiveness of the WIN)*, Regioplan, March 2002, p. 85-90.

³² ECJ 11 May 2000, C-37/98, consideration 70, ECR 2000, p. I-02927 (Savas).

³³ In its report *Civic integration requirements as a precondition for residence in the Netherlands (February 2004)*, the ACVZ indicated that making the issue of a permanent residence permit subject to compliance with the civic integration obligation was incompatible with the standstill clauses, since it also led to a new, less favourable situation in that the withholding of a permanent residence permit – due to failure to meet civic integration requirements – means that the person concerned has only a provisional residence entitlement. This produces, de facto, a deterioration in that person's position, since it makes it more difficult for him/her to get a job. In addition, it will probably not be possible to impose civic integration requirements for the issue of an independent permit for further residence in cases where a right to further residence already arises from articles 6 and 7 of Decision 1/80.

It is furthermore relevant that Turkish nationals who came to the Netherlands for the purposes of *family reunification or formation* with second or third-generation immigrants do not, strictly speaking, fall under the rules laid down in or in connection with the Association Agreement and are therefore not exempt from the civic integration obligation. However, if these persons start work, whether as employee, service provider or self-employed person, the entire complex of applicable provisions could be interpreted in such a way that the obligation may not (as yet) be imposed on them. On the other hand, the rules laid down in or in connection with the Association Agreement focus on the gradual achievement of free movement. Turkish nationals who did not immigrate from Turkey, but were born in the Netherlands have not exercised the right of free movement. The provisions are not entirely clear. Since this question requires interpretation of rules laid down in or in connection with the Association Agreement with Turkey, the ACVZ considers it appropriate (in particular for diplomatic reasons) to submit the issue to the competent body, the Association Council. It is not inconceivable that in the light of Turkey's desire to join the EU it will agree to an interpretation which does not allow the latter categories to fall under the standstill clauses, all the more since after Turkey's accession all Turkish nationals born within the territory of the EU/EEA (to which Turkey belongs) will be exempt from civic integration requirements.

B.2 Other treaties

It should be noted with regard to treaties of trade or friendship that there are so many of these that in the time available it was impossible to ascertain whether and to what extent they present obstacles to imposing civic integration requirements.³⁴ To give some impression of the nature of the problem, three examples of such treaties are dealt with below.

Dutch-American Friendship Treaty

This treaty dates from 1956, and its aim is to promote trade between the parties.³⁵ It also establishes certain rights and privileges in the area of aliens law.

Under article II, citizens of both countries are entitled to admission and residence:

- a) for the purpose of carrying on trade between the two countries;
- b) for the purpose of developing an enterprise in which they have invested a substantial capital or of directing its operations (key personnel);
- c) for other purposes, subject to national laws governing the admission and residence of aliens.

The criterion 'born within or outside the territory of the EU/EEA (in Europe)' means that the proposed civic integration obligation can be imposed on US citizens. It must be assumed that it may in any event be imposed on Americans who fall into category c). The right of admission and residence under a) and b) is linked to the performance of specific activities. As soon as such performance ends, the right of residence attached to it lapses and those concerned then fall into category c). On this basis, it can be argued that the treaty only provides for a temporary residence entitlement. In that case, this means that the treaty stands in the way of civic integration requirements where admission is concerned, but not where permanent residence is concerned.

³⁴ See the article by S.H.J.M. Roelofs, *Een doos van Pandora voor de toelating van vreemdelingen? (A Pandora's Box where the admission of aliens is concerned?)*, *Migrantenrecht* 2004, 4, p.p. 147-156.

³⁵ Treaty for Friendship, Commerce and Navigation between the Netherlands and the United States, Trb. 1956, 40.

In connection with the sanction provisions, the following is possibly also of relevance with regard to the Dutch-American Friendship Treaty. Article VI of the Treaty, which is concerned with property, prohibits in paragraph 3 discriminatory measures which impair the property rights of either country's citizens. The question is whether an obligation to follow a civic integration programme on pain of a fine can be deemed to be such a measure, since US citizens have to comply with the obligation while Dutch nationals born in the Netherlands do not.

Netherlands-Japan Trade Treaty

Another example of a bilateral agreement is the Netherlands-Japan Trade Treaty.³⁶ Like many such agreements, the treaty contains most-favoured nation clauses. It has been argued that the consequence of such clauses should be that if a specific restriction is not imposed on citizens of any other country, they should not be imposed on nationals of the other party to the treaty.³⁷

Against this it may be argued that this is a trade policy agreement in the context of which it may not automatically be assumed that national aliens legislation does not apply. Nor does the abolition of visa requirements automatically imply this.

GATS

The most-favoured nation principle referred to in the previous section is also a feature of GATS.³⁸ A final judgment on these agreements requires a very detailed study. However, the ACVZ has not been able to conclude that a closer study of such agreements is highly likely to lead to the conclusion that the civic integration obligation cannot be imposed on a large number of third-country nationals. The ACVZ does recommend, however, that in preparing the new Civic Integration Act in particular, they be paid closer attention.

Attention should also be devoted to the 'national treatment' rule that frequently crops up in the GATS and in bilateral treaties. The question is whether the criterion 'born within or outside the territory of the EU/EEA (in Europe)' is incompatible with these treaties in that a consequence of applying the criterion is that citizens of the treaty partner who are born outside that territory will be subject to civic integration requirements.

Refugee Convention

Of a very different nature, but still relevant to the civic integration obligation, is the Convention relating to the Status of Refugees. A consequence of the criterion 'born within or outside the territory of the EU/EEA (in Europe)' is that the proposed civic integration obligation and its attendant costs may be imposed on refugees. In this context article 34 of the Refugee Convention is of relevance.³⁹ This article states that the Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. In addition, the article stipulates 'They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings'. The 1951 text speaks of naturalisation; it may be assumed that this term is also today of significance to civic integration.

³⁶ Bulletin of Acts and Decrees (Stb.) 1913/293 and Note of 29 May 1953, Trb. 1954/168.

³⁷ See the article by S.H.J.M. Roelofs, Een doos van Pandora voor de toelating van vreemdelingen? (A Pandora's Box where the admission of aliens is concerned?), *Migrantenrecht* 2004, 4, p. 149.

³⁸ General Agreement on Trades and Services, Trb. 1994, 235, p. 304 ff. and Trb. 1995, 130, p. 331 ff. The GATS is one of the multilateral trade agreements concluded under the auspices of the World Trade Organisation (WTO) and contains agreements and obligations with regard to the international trade in services.

³⁹ Trb. 1951, 131 and 1967, no. 76.

This gives rise to the question of the extent to which the Government's plans are in conflict with this provision. The text of article 34 suggests an obligation on the part of the receiving states to help refugees adapt to their new surroundings. Civic integration is the first step on the way to naturalisation. If this reasoning is followed (the one follows on from the other) then it can be argued that the costs of complying with the obligation should not be entirely borne by the refugee. The government is evidently obliged to assist refugees on the road to naturalisation and/or civic integration.⁴⁰

According to its letter of 24 June 2004 to the House of Representatives, the Government has provided for special treatment for refugees. Persons with refugee status who are at present residing in reception centres can receive assistance there and begin the civic integration programme free of charge. The Government further noted that refugees, who are newcomers, are entitled to social assistance. Newcomers claiming such benefit are a priority group within the civic integration programme. The Government aims in such cases to link civic integration with reintegration on the job market. And civic integration speeds up the naturalisation procedure, according to the Government.⁴¹

Despite what has been said above, it is not completely beyond doubt that the civic integration requirements comply with the provisions of article 34 of the Refugee Convention.

C. Dutch nationals born within or outside the territory of the EU/EEA (in Europe)

Adopting this criterion as proposed in the Outline Policy Document results in unequal treatment of Dutch nationals born outside the territory of the EU (for the record, mainly Arubans and Antilleans) in comparison to those born within the territory. EC law does not in principle prevent this distinction being drawn, except in the case of Dutch nationals who have exercised their right to free movement. The European Court of Justice has established that *Community law forms no obstacle to drawing a distinction between a state's own nationals*. The law that applies to a state's own nationals (who have not exercised their right to free movement) is deemed by the Court to be an internal affair that does not fall within the purview of EC law.⁴²

Nevertheless, applying the criterion can result in unequal treatment of one group of Dutch nationals. In that case, it leads to a distinction made on grounds of birth/origin. The unequal treatment lies in the fact that Dutch nationals born within the territory of the EU/EEA (in Europe) will not be subject to the civic integration obligation, while those born outside the territory will. Whether or not a particular Dutch national is obliged to follow a civic integration programme is then solely dependent on the place where he was born and not on whether he actually needs such a programme.

Here too, for the reasons outlined under A., it must be assumed that the distinguishing criterion (born within or outside the territory of the EU/EEA (in Europe)) is not tailored to the envisaged aim of the Outline Policy Document. The civic integration obligation for Arubans and Antilleans 'born outside the territory of the EU/EEA (in Europe)' proposed in the Outline Policy Document is also incompatible with article 26 of the

⁴⁰ With regard to the position of Turkish refugees, see the remarks made above on the Association Agreement between the EEC and Turkey.

⁴¹ Letter to Parliament, 24 June 2004 (House of Representatives 2003-2004, 27083 and 29543, no. 45, p.5).

⁴² ECJ 27 October, ECR 1982, p. 3723 (Jhanjan and Morson v. the Netherlands).

ICCPR, since it gives rise to discrimination on grounds of birth, national origin or other status. The discrimination lies in the unequal treatment they would receive compared to relevant, comparable groups. There is for example no justification to be found for exempting Antilleans or Arubans who were born in Europe but only resided for a short time in the Netherlands (the first year of their lives for instance) from civic integration requirements. Nor is there any justification for the inequality arising from the fact that other Dutch nationals and EU citizens who do not have the necessary knowledge and skills are not obliged to follow a civic integration programme while Arubans and Antilleans are. Here too, the damage done to interests (through the imposition of a substantial burden and the risk of a fine) is not in proportion to the aim. The Outline Policy Document presents no convincing arguments that would justify the lack of fit with the aim, nor has the ACVZ been able to find such arguments.

The Charter of the Kingdom of the Netherlands

In the light of the above, it is relevant that the Charter contains no specific provisions that would explicitly prevent the imposition of a civic integration obligation on Arubans and Antilleans. Article 43 of the Charter states that each of the countries, and therefore the Netherlands too, shall promote the realisation of fundamental human rights and freedoms.⁴³ These provisions introduce all relevant fundamental rights (article 26 ICCPR, Protocol 4 ECHR in conjunction with article 14 ECHR) into Kingdom relations (the Charter). Violating these fundamental rights would also constitute a violation of article 43 of the Charter, because the obligation for the Netherlands to comply with these instruments already arises from the act of signing the instruments themselves.

The ACVZ would remark in passing that whatever legal construction is eventually chosen, it is probably desirable to establish the civic integration rules in the form of a Kingdom Act. In view of the considerable impact the proposed obligation would have on the position of Arubans and Antilleans within the Kingdom, it might be expedient to guarantee the Netherlands Antilles and Aruba a degree of input and control. The Charter provides for Kingdom legislation that applies to only one of the countries, and does not stand in the way of regulating national affairs through a Kingdom Act (see article 38 of the Charter).

In this context it is worth noting that in its advisory opinion on the Newcomers Integration Bill, the Council of State took the view that the Explanatory Memorandum to the Bill was inadequate in merely stating that in the Government's opinion, the aim of the Act (*to promote social, educational and professional self-sufficiency for newcomers, who are at risk of finding themselves in a situation of disadvantage*) also applied to newcomers who are Dutch nationals (i.e. Arubans and Antilleans).⁴⁴

D. Third-country nationals born within or outside the territory of the EU/EEA (in Europe)

According to the Outline Policy Document, no civic integration obligation will be imposed on third-country nationals born within the territory of the EU/EEA (in Europe). It will be imposed on those born outside this territory. The following situations may arise. A Chinese national born in Germany will not be obliged to follow a civic

⁴³ Article 43:1. Each of the countries shall promote the realisation of fundamental human rights and freedoms, legal certainty and good governance. 2. Safeguarding these rights and freedoms, legal certainty and good governance shall be a Kingdom affair.

⁴⁴ See House of Representatives 1996-1997, 25114, no. A.

integration programme, whether or not he lived there for a short period or his entire life. A Chinese national born in China will be subject to the obligation. Just as in the situations described under A. and C., this constitutes a distinction according to birth/origin that cannot objectively be justified because the nature of the distinction is not tailored to the aim sought. In addition, the damage done to interests (through the imposition of a substantial burden and the risk of a fine) is not in proportion to the aim. The Outline Policy Document presents no convincing arguments that would justify the lack of balance between the means and the aim, nor have such arguments otherwise emerged.

E. Family members of persons in the above categories

Family members of migrants are usually granted residence rights derived from the entitlement of the migrant with whom they ‘comigrate’ (e.g. members of EU citizens’ families) or are allowed to reside in the Netherlands for the purposes of family reunification or formation. A distinction would be made between family members of persons in the above categories who were born within the territory of the EU/EEA (in Europe) and who do not possess the nationality of one of the member states, and those who were born outside that territory. In that case, a situation may arise in which a distinction is made on the grounds of a person’s place of birth. Just as under A., C. and D., and on the grounds outlined therein, this distinction cannot be justified because it is not, by its nature, tailored to the aim sought. By way of illustration, a Chinese woman born in China who has lived with her husband in Germany for some time and ‘comigrates’ with him to the Netherlands (because the husband has found work in this country) will be subject to civic integration requirements. Had she been born in Germany, while still possessing Chinese nationality, she would not. Furthermore, a difference in treatment of one spouse compared to the other may arise. For example, if the wife was born in Germany and has Chinese nationality, but her German husband was born in China, then he will be obliged to follow a civic integration programme and she will not. The distinction according to place of birth will also occur in cases of family reunification or formation.

3.3 ‘Naturalised before or after 1 April 2003’

According to the Outline Policy Document, the Government plans to apply the new civic integration requirements to persons naturalised before 1 April 2003 who were born outside the territory of the EU/EEA (in Europe), and who have not followed a civic integration programme or obtained qualifications demonstrating the necessary knowledge (with certain exceptions).

The ACVZ considers this element of the Outline Policy Document extremely problematic, legally speaking, for two reasons.

1) Incompatibility with the principle of legal certainty

The category of persons who were naturalised before 1 April 2003 certainly does not consist only of people with an inadequate knowledge of the Dutch language and Dutch society. Sections 7 and 8 of the old Netherlands Nationality Act, which was in force up to 31 March 2003, required applicants to possess that knowledge. What is more, it is clear that in many cases knowledge of Dutch and Dutch society was tested, albeit not through an examination. However, it is highly likely that in some of the naturalisations insufficient attention was paid to these requirements. Nevertheless, the integration obligation would be imposed on the group as a whole. Although the obligation has no

effect on the nationality of the persons concerned, it does affect their legal position. Dutch nationality law adopts the principle that nationality (citizenship) confers all the rights of citizenship on those who possess it. Actual ties to the Netherlands through lapse of time, kinship, residence or social links are the traditional grounds for acquiring citizenship. Dutch nationals who were naturalised before 1 April 2003 could therefore assume that their Dutch nationality and accompanying citizenship rights were granted because they were deemed to be sufficiently part of Dutch society.

Citizenship rights may also be affected negatively by legislation. There can be no justified expectation that this will never happen. But persons naturalised before 1 April 2003 could assume that they would not be treated differently with respect to civic integration requirements than other Dutch nationals. This justified expectation could partly be based on the provisions of section 7 and 8 of the Netherlands Nationality Act in force at the time. There is therefore serious doubt whether the obligation to follow a civic integration programme as proposed in the Outline Policy Document, partly in view of its burdensome nature, does not in fact conflict with the general principle of legal certainty.

2) *Distinction on grounds of origin*

The criterion 'naturalised after 1 April 2003' distinguishes between Dutch nationals on the basis of their origin. On the same grounds as set out under A., C., D. and E., the question must be put here of whether there is a sufficiently objective justification for this distinction. And on the same grounds it must here be answered in the negative.

3.4 Sanctions

Experience with the Newcomers Integration Act has shown that too few incentives have been built into the system and that enforcement has been insufficient. As a result of this and other factors, the system has proved insufficiently successful. The Outline Policy Document attempts to resolve this situation by introducing a system of positive and negative incentives that, to put it briefly, leads to an *obligation to achieve a result* as opposed to an *obligation to make an effort*. In addition, the Outline Policy Document dictates the moments at which the local authority has to proceed to active enforcement. Below, the ACVZ makes a number of legal points with regard to the proposed new system. However, in the ACVZ's view, these points do not lead to the conclusion that the present system under the WIN requires no amendment. Enforcement is the keystone of the civic integration system and the ACVZ endorses the need for it. For this reason the following chapter provides a possible solution for the problems outlined in this section.

The Bill containing the fourth tranche of the General Administrative Law Act is of direct significance to the introduction of the new system as proposed in the Outline Policy Document. The Bill aims to establish the administrative fine in a regulation under general administrative law.⁴⁵ The Bill deems this administrative fine to be a sanction of a *punitive* nature, consisting of an unconditional obligation to pay a sum of money imposed in order to punish the offender. The administrative fine proposed in the Outline Policy Document may also be deemed to be a punitive sanction, for it is indisputable that the aim of imposing this sanction is to punish the person concerned

⁴⁵ House of Representatives 2003-2004, 29 702, nos. 1-2.

for his/her failure to meet the mandatory civic integration requirements within the prescribed period. It is by the way not inconceivable that a refusal to reimburse costs incurred (up to a maximum) if the mandatory procedure has not been followed should also be deemed to be a punitive sanction, since its effect is to punish (and prevent).⁴⁶

The Bill containing the fourth tranche of the General Administrative Law Act also codifies a number of major legal principles arising from article 6 of the ECHR.⁴⁷ ‘No penalty without guilt’ is a general principle of both criminal and administrative law. Furthermore, the courts assess whether the amount of the fine is proportionate to the seriousness of the offence and the degree to which the person can be held responsible for the offence. In doing so, they may take account of the circumstances in which the offence was committed. Imposing a fine simply for failing to pass an examination is problematic since there must always be an element of guilt/culpability in the light of which the court makes its assessment.⁴⁸ Culpability can in fact only lie in failing to follow the instructions of the local authority in the preliminary stages, or in failing to turn up for the exam. Contrary to what is stated in the letter of 24 June 2004, the degree of culpability as a precondition for imposing a fine or in determining the amount of such a fine will play a decisive role in situations other than merely those involving medical problems. It will not always be easy – particularly in the case of long-established immigrants with few financial resources and little or no education – to demonstrate culpability or to make a sufficiently plausible case for it that the fine imposed is proportionate. It is to be expected that if the imposition of a fine is felt to be wrong or unlawful, an objection and application for review may be lodged. As emerged from the above, it must be feared that the chances of such an objection or application for review being successful are not inconsiderable. It seems obvious that local authorities will oppose the imposition of fines because the objection and review procedures to which this will give rise will overload their officials.

Finally, the ACVZ would observe that the point at which the civic integration obligation arises must be clearly established in the regulations. This point should correspond to the beginning of the enforcement process. At present this does not always appear to be the case. For example, the obligation for established immigrants arises on the date of entry into force of the Act, while *enforcement* begins when they are called up for an intake interview by the local authority. For newcomers, the civic integration obligation is not linked to the intake interview. This can lead to situations which in some cases cannot afterwards be held against the person concerned. It is also important for the intake interview to take place as soon as possible after the obligation has come into being, because here too considerable differences can be created with regard to duration, a possibility to which we must be alert.

⁴⁶ Administrative Jurisdiction Division (Council of State) 16 April 1999, AB 1999, 230, with note by BPV.

⁴⁷ House of Representatives 2003-2004, 29 702, no. 3, p. 122-123, 127-128.

⁴⁸ In fact, the Bill states that the administrative authority does not have to prove culpability, but may assume it if the fact that the person has committed the offence has been established. According to the Explanatory Memorandum, this is in line with article 6 ECHR because it is possible to invoke exculpatory grounds. This does not affect the fact that in these cases the principle of ‘no penalty without guilt’ applies. (HR 14 February 1916, NJ 1916, 681, Melk-en-water arrest) House of Representatives 2003-2004, 29 702, no. 3, p. 134 and pp. 140-141.

3.5 Conclusions

Below the conclusions arising from the legal analysis are set out, beginning with the conclusions relating to the three problems noted in section 3.1.

The general conclusion is that the proposed legal construction, based largely on two criteria – ‘born within/outside the territory of the EU/EEA (in Europe’ and ‘naturalised before or after 1 April 2003’ – is *in part unviable and in part highly problematic*. The reasons for this conclusion are as follows.

The criterion ‘born within/outside the territory of the EU/EEA (in Europe)’

Applying this criterion constitutes an infringement of articles 17 and 18 of the EC Treaty, which is not permissible. The Netherlands cannot decide that a person born outside the territory of the EU/EEA (in Europe) – for example, a Belgian born in the Belgian Congo – may not be deemed to be an EU citizen. Only the member states itself may determine this (in the example, Belgium). Another infringement of Community law arises in that the application of the criterion means that the person concerned effectively has fewer rights (free movement) than a person who was born within the territory. In the case of long-term residence (although the residence entitlement for EU citizens is declaratory), the civic integration obligation will also be imposed on EU citizens born outside the territory of the EU/EEA (in Europe). This new, additional requirement, which is not regulated in secondary EU legislation, is partly because of its burdensome nature an impediment to residence rights. Although there will be no residence consequences for EU citizens who fail the examination, they will be subject to a fine.

The distinction made on the grounds of whether a person was born within/outside the territory of the EU/EEA (in Europe) constitutes under international and national law a prohibited form of discrimination based on birth/origin/race and therefore must be objectively justified. As stated earlier, there are arguments supporting the view that the aim is legitimate (not inherently discriminatory and sufficiently compelling). This does not alter the fact that the distinction is too unrefined, and fails both the requirement that the means must be appropriate to achieving the aim, and that of proportionality. This applies to the distinction between EU citizens, between third-country nationals and between Dutch nationals. In all these categories, people who do not need a civic integration programme will be obliged to follow one and some who do will not. The means is therefore both over-inclusive and under-inclusive, and therefore unsuited to the aim of civic integration. Furthermore, the damage to interests that arises is not proportionate to the aim, also because the nature of the distinction is not tailored to the aim sought.

The Netherlands has concluded a series of treaties with other countries, both bilaterally and at EU level (for the purposes of recruitment, trade and friendship and also Association Agreements). It will be necessary to ascertain, on a case-by-case basis, whether they contain provisions that stand in the way of imposing a civic integration obligation. Particular attention needs to be paid to the rules laid down in or in connection with Association Agreements. The analysis showed that first-generation Turkish migrants, whether self-employed, employed or service providers, and their family members, probably do *not* have to comply with civic integration requirements. It probably will be possible to impose the obligation on other Turkish citizens. There may also be problems in connection with persons who come to the Netherlands for the purposes of family reunification or formation. On the other hand, it must be remembered that the Association Agreement confers rights to free movement and that the rights of a family member are in principle derived from those of the person in the

Netherlands whose family he or she belongs to. If that person in the Netherlands has not exercised his/her right to free movement there is possibly also no derived right. Another possible catch is the following. If such persons (family members) perform work in this country, either in paid employment or as service providers or self-employed, they will probably be protected in that capacity by Association Agreement rules. In that case, it may no longer be possible to impose a civic integration obligation on them.

The criterion 'naturalised before or after 1 April 2003'

This criterion is highly problematic. There is no statutory prohibition on amending the citizenship rights of Dutch nationals by law. There must however be well-founded and proportionate reasons, which are not arbitrary, for doing so. Nevertheless, it is seriously questionable whether the considerable financial and other obligations arising from the Outline Policy Document do not damage the legitimate expectation of naturalised Dutch citizens that they will not be treated differently from other Dutch nationals with regard to civic integration requirements. For this reason, there is a real danger of incompatibility with the principle of legal certainty.

Sanctions

Since the sanctions proposed are of a punitive nature, they may only be imposed if the person concerned can be found to have culpably failed to meet an obligation. In practice, this will not be easy to establish. In fact it may only be possible if a person fails to respond to the instructions of the local authority to report for an interview or fails to take the examination. The fine must also be proportionate to the offence. Objection and review procedures may be expected. Local authorities may be expected to be reluctant to impose fines because of the burden follow-up procedures will impose on municipal officials.

General

The risk that the courts will consider the civic integration requirements as proposed by the Outline Policy Document and as applied to certain groups unlawful may not be underestimated. If that is the case, a final judicial decision will only be reached some time after the requirements have been introduced. In the intervening period a substantial number of persons will have been obliged to make considerable efforts and incur considerable costs. If the Dutch state is then obliged to compensate them, the amount involved will be more than substantial. It should be noted here that several groups in the Netherlands have already announced that they are considering submitting the construction proposed in the Outline Policy Document to the highest (European) courts as being discriminatory.

The considerations set out above also answer questions 1a to 1e, and 2a and 2b in the Introduction.

Alternative proposals for a more compulsory civic integration system

4.1 General principles for reaching as many target groups as possible

The aim of the Outline Policy Document is for every long-term resident of the Netherlands to possess sufficient knowledge of the Dutch language and Dutch society to enable him/her to participate in that society. According to the Outline Policy Document, civic integration consists of acquiring that knowledge and experience. This aim has broad political support in the Netherlands. As stated earlier, the Netherlands is faced with a number of serious economic and social problems, as well as public-order issues, which give added urgency to the effort to achieve this aim as far as possible. The results of the civic integration process under the WIN are not insignificant, but far from sufficient, particularly where the civic integration of established immigrants is concerned. Perfecting the current legislation is without doubt a possibility, but it is highly doubtful that such improvements will lead to distinctly better results within a reasonable time.

Within the framework of current legislation, the ACVZ sees no other obvious method or new measures that would be highly likely to lead to much better results in the short term. The basic premise of the Outline Policy Document, that results can only be achieved with a more compulsory system than has been in force to date, at least in practice, is an obvious conclusion, particularly in the light of the foregoing. The problems to which the legal construction proposed in the Outline Policy Document will give rise have been described above.

The ACVZ's objective, on the basis of the aims and basic premises of the Outline Policy Document, was to ascertain whether a system can be developed which is legally viable and will apply to as many of the target groups listed in the Outline Policy Document as possible in a more compulsory way than the present legislation. Its general premises were as follows.

- The government is bound to comply, independently of any judicial opinion, with national and international obligations relating to discrimination. Furthermore, the Dutch state cannot afford, in view of the consequences of the civic integration obligation and possible claims for compensation arising from it, to adopt a system that runs a considerable risk of being condemned as unlawful by an international or Community court, possibly years after its introduction.
- In identifying or defining the target groups, the classification adopted may not result in unequal treatment that cannot be justified.
- First of all, it must be certain that civic integration requirements serve a legitimate aim which is not inherently discriminatory. The aim as formulated in the Outline Policy Document – that every long-term resident of the Netherlands possesses sufficient knowledge of the Dutch language and Dutch society to enable him/her to participate in that society – is not inherently discriminatory. The aim must also be sufficiently compelling. As stated above, the ACVZ considers the arguments supporting this view sufficiently forceful. The disadvantaged situation in which certain population groups

in the Netherlands find themselves, and above all their social implications, are so serious that it may be claimed that there is an urgent social need. The Government response to the report of the Blok Committee provides sound arguments in this respect. It refers to the public debate on integration and comments that many regard minorities policy as the social issue of the 21st century. The Government further states that after the attacks in the United States (11 September 2001) and Madrid (11 March 2004), many people fear that an ethnic underclass is being created which will lead to a permanent division of Dutch society into two camps. The stream of research data on the position of minorities since the nineties qualifies this picture to some extent, but does not deny the existence of 'great social disadvantage and social and cultural divisions'. The Government then sums up a series of facts that underscore this disadvantage and concludes 'that distance is [...] great, far too great'.

- Second, the means must be appropriate to (must 'fit') its aim. In other words, the distinction made must be tailored to the objective sought. This is the case if people who need a civic integration programme (for example, in order to avoid ending up in a disadvantaged position) are actually obliged to follow the programme.
- Third, the ACVZ considers it likely that there are no less burdensome solutions available (subsidiarity requirement).
- Fourth, care should be taken to ensure that any damage caused to interests is reasonably proportionate to the aim sought (proportionality requirement).

Finally, the set of positive and negative incentives should remain within the limits of what is acceptable in relation to preferential treatment for the target groups on the one hand, and what may be imposed as a punitive sanction on the other.

With regard to the system recommended by the ACVZ and set out below, it should be remembered that it is a system which compels only long-term residents within the territory of the Netherlands *who are in need of a civic integration programme* to comply with the requirements. The system would apply a distinguishing criterion which is acceptable because it conforms to the aims of civic integration, i.e. that people have an adequate command of the Dutch language and a knowledge of Dutch society.

4.2 Proposal for a legal system for deciding which persons should be subject to a civic integration obligation

1. The obligation to pass a civic integration examination will be imposed on all persons wishing and permitted to settle permanently in the Netherlands and all persons who are long-term residents at the time when the new Civic Integration Act comes into effect, who did not reside legally in the Netherlands for at least eight years in the Netherlands when of compulsory school age.
2. The following persons are exempt from the obligation to pass a civic integration examination:
 - a. Those who pursuant to obligations under international law may not be subjected to the obligation to pass a civic integration examination, in any event:
 - I. EU citizens and members of their families;
 - II. Turkish nationals covered by the Association Agreement between the EEC and Turkey, its Protocols and Decision no. 1/80 of the Association Council;

III. Third-country nationals to whom EC Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents applies and who have had to comply with integration conditions in order to acquire the status of long-term resident pursuant to article 5, paragraph 2 of the Directive;

IV. Persons who on the grounds of other international treaties (friendly relations, trade) cannot be subjected to the civic integration obligation.

- b. Persons in possession of a Dutch certificate of pre-vocational secondary education (VMBO), senior general secondary education (HAVO), pre-university education (VWO), vocational education (MBO), higher professional education (HBO) or university education and those possessing a similar certificate of education gained outside the Netherlands provided it states that the holder has a command of the Dutch language.
- c. Persons who, due to a medical condition or other reason for which they are not to blame and which can be objectively established, cannot be deemed to be capable of sitting the examination.
- d. Persons who have reached the age of 65.

This construction avoids the infringement of the EC Treaty that arises from the system proposed by the Outline Policy Document and does not lead to a form of discrimination that cannot be justified nor to unequal treatment.

The system proposed by the Outline Policy Document exempts all young people under the age of 16 from the obligation. The ACVZ system does not impose an age limit, but requires eight years' residence in the Netherlands while of compulsory school age. In this way a person who is not yet 16 cannot come to the Netherlands and not be subject to the requirements, which would not be beneficial to integration. In the past it was not unusual for young people to come to the Netherlands at a relatively advanced age for the purposes of family reunification. It is likely that these young people had greater problems with integration than children who came to this country while very young. Such 'late' migration without a civic integration obligation being imposed is possible under the system of the Outline Policy Document, but in that proposed by the ACVZ it is impossible. For the record, the ACVZ would point out that those persons who come to the Netherlands as children will only be subject to the obligation to pass the civic integration examination if at the end of the period in which they are of compulsory school age they:

- a. have not resided here for eight years while of compulsory school age;
- b. have no qualification that would grant them exemption; or
- c. are not studying (in day education) for such a qualification.

The system proposed by the ACVZ certainly does not lead to a situation in which all Dutch nationals would be subject to the civic integration obligation. It affects only those Dutch nationals who lack knowledge of the Dutch language and Dutch society. It applies in the same way to persons who were naturalised before 1 April 2003. It therefore does not conflict with the principle of legal certainty. Persons who were naturalised before 1 April 2003 are treated no differently under this system than those naturalised after that date, which is a reasonable expectation on their part. The question remains of whether the proposed system is feasible. It was not possible to carry out a feasibility test in the time available. However, the ACVZ can at present see no insuperable obstacles to implementation. The exemption of certain categories of persons will ensure that

the numbers having to take a civic integration exam will not be excessive. Indeed the ACVZ considers it not inconceivable that the total number of persons who under its system will be obliged to follow a civic integration programme may even be smaller than would result from application of the system proposed in the Outline Policy Document. However, it considers further investigation into expected numbers desirable. In any event, under both systems the possible numbers mean that measures to set priorities will be necessary. An obvious measure would be to focus in the first place on special groups, then on those who are unemployed but are obliged to accept work, and finally on the rest. At the same time, it is important to ensure that backlogs in dealing with civic integration programmes for newcomers do not arise.

Under both the Outline Policy Document and the ACVZ system it is not possible to select the precise target group in need of a civic integration programme simply through a search of the municipal personal records database (GBA). In both cases selection can be made in the GBA of persons who may possibly be subject to the requirements. The GBA contains personal particulars, addresses, dates of registration and removal, and details concerning nationality and naturalisation. The process of converting information on paper into a uniform digital municipal system began in October 1994. At the minimum, this included current information on all Dutch residents. It was not compulsory to include historical data. The selection of candidates for a civic integration programme under the system of the Outline Policy Document can be effected on the basis of criteria such as age, place of birth and, where relevant, date of naturalisation. Local authorities can search in the database to find the target group. An intake interview can then establish whether there are grounds for exemption, for example if the person concerned has an appropriate qualification.

Under the system proposed by the ACVZ, selection on the basis of the GBA is more time-consuming. This is because the important question is whether the person concerned lived for eight years in the Netherlands while of compulsory school age. Since historical data was not necessarily included in the conversion process, the GBA records the date on which every immigrant was registered in the system, but not in all cases does it show whether he or she then lived for an uninterrupted period in the Netherlands. This can be reconstructed from old personal index cards, which can take a great deal of time.

There is another possible problem in the case of persons born in the Netherlands, and immigrants who were registered for the first time in the GBA before 1994 and who at the time of registration were under the age of eight years. After all, those who were older on the date of immigration spent by definition less than eight years in this country while of compulsory school age, and are therefore obliged to follow a civic integration programme unless they fall into one of the categories of exceptions (for example because they have a Dutch certificate of secondary education).

Those persons born in the Netherlands and the group of people who were below the age of eight when they immigrated (and this took place before 1994) will not be subject to the civic integration obligation if they resided in the Netherlands for eight years while of compulsory school age. They are only so obliged if they interrupted their stay for a period of more than four years between the ages of four and seventeen. In that case, they do not meet the criterion of having spent at least eight years here while of compulsory school age. In some cases this can only be ascertained from personal index cards. One option may be to conduct such an investigation only if there are contra-indications. The group that because of more than four years spent abroad is subject to the civic integration obligation will probably not be large. What is more, part of this group will have a Dutch

secondary school certificate, which also exempts them from the requirements. A pre-selection system should be employed during implementation in order to restrict the group requiring manual checks as far as possible.

Recommendations on sanctions

It emerges from the above that sanctions in the form of fines are problematic. Further consideration of this issue is required. It may be possible, for instance, to hand out during the reporting procedure a list of requirements (possessing certain course or preparation materials, or being able to provide evidence of mentoring). Compliance with such requirements can be objectively established.

In addition, the ACVZ would recommend that the following be considered.

1. In cases where a person fails the examination after a number of attempts and there is no question of demonstrable non-compliance – and where therefore no fine can be imposed – and where failure is due to learning problems, provide for a compulsory additional intensive course. This should be laid down in the legislation.
2. Build extra positive incentives into the system alongside the punitive sanctions to supplement the reimbursement of costs. For example, certain rights could be attached to examination success, such as granting newcomers a permanent residence permit at an earlier stage, or admission to further study.

Rounding off the scheme

Other countries make use of an electronic admission system in connection with civic integration requirements. The ACVZ assumes that such a system can also be used to make a quick check. Although the system proposed by the ACVZ leads to a much more accurate identification of persons who lack sufficient knowledge of the Dutch language and Dutch society than that proposed in the Outline Policy Document, it is nevertheless possible in rare cases for people without qualifications to have the obligation imposed on them when it is clear that they meet all the requirements. It is therefore worth considering having such electronic monitoring available for those persons claiming to belong to this group to enable the local authority to establish directly on reporting whether the examination requirement is superfluous. Properly used, the check would save government some of the work involved in reporting and examining. It could be offered once on request and subject to the condition that the result would be accepted as binding. This would offer an absolute guarantee that the examination would not have to be taken if it was unnecessary.

ANNEXE I

The request for advice



Adviescommissie voor Vreemdelingenzaken

aan

De Minister voor Vreemdelingenzaken en Integratie
Mevrouw drs. M. C. F. Verdonk
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contactpersoon Dr. J.J. van Miert
doorkiesnummer 070 – 381 1410
datum 23 november 2004
ons kenmerk ACVZ/VZL/04/054
uw kenmerk 529 8524/04
bijlage(n) 1
onderwerp Aanbieding advies Contourennota inburgering

Zeer geachte mevrouw Verdonk,

Hierbij biedt de Adviescommissie voor Vreemdelingenzaken u aan het advies *'Van Contourennota naar inburgeringswet. Juridische mogelijkheden tot een meer verplichtend inburgeringsstelsel'*. De Adviescommissie voldoet hierbij aan uw adviesaanvraag van 19 juli 2004.

In dit advies wordt een analyse gemaakt van het in de Contourennota voorgestelde juridische systeem met betrekking tot de herziening van het inburgeringsstelsel. (Kamerstukken II 2003/04 29543, nr. 2). Hiertoe zijn de criteria t.b.v. het bepalen van de inburgeringsplicht alsmede enkele probleempunten nader onderzocht. Uitgangspunt is hierbij geweest om mogelijke spanningen van de Contourennota met juridische gegevens waaronder met name het gelijkheidsbeginsel te traceren en te identificeren. De ACVZ heeft het tevens tot haar taak gerekend om de noodzakelijk gebleken alternatieve oplossingen te formuleren.

Concreet is onderzocht of het juridisch mogelijk is bepaalde categorieën van personen, te weten - Nederlanders en vreemdelingen die geboren zijn buiten het grondgebied van de EU dan wel de EER; - en Nederlanders die zijn genaturaliseerd vóór 1 april 2003 (op basis van de oude Rijkswet op het Nederlanderschap), een te sanctioneren inburgeringsplicht op te leggen.

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Adviescommissie voor Vreemdelingenzaken

Gelet op de brede context en de complexe juridische verwevenheid van de voorgestelde nieuwe inburgeringswetgeving heeft de ACVZ gemeend bij haar analyse nationaalrechtelijke alsmede internationaalrechtelijke aspecten in beschouwing te moeten nemen.

De ACVZ heeft moeten concluderen dat om de in de Contourennota genoemde doelstelling 'wie in Nederland woont moet kennis hebben van de Nederlandse taal en de Nederlandse samenleving' te verwezenlijken, een aanpassing van het juridische systeem noodzakelijk is. Het door haar gepresenteerde alternatief acht zij juridisch houdbaar en effectief. Binnen het gegeven tijdsbestek was een uitvoeringstoets niet haalbaar. De ACVZ heeft bij eerste beschouwing echter geen onoverkomelijke problemen ten aanzien van de uitvoering ontwaart.

Het advies is op hoofdlijnen vastgesteld in de plenaire vergadering van de ACVZ van 1 november 2004. In verband met de tijdsdruk is begin november de toen beschikbare tekst ter hand gesteld aan de Projectorganisatie Modernisering Inburgering en de afdeling Wetgeving van uw Ministerie, teneinde betrokken te kunnen worden bij de voorbereiding van een nota/brief aan de Tweede Kamer.

Tot nadere toelichting is de ACVZ te allen tijde bereid.

De ACVZ zal het advies op 3 december openbaar maken.

Hoogachtend,

De Voorzitter

Mr. T.J.P. van Os van den Abeelen

De Secretaris

Dr. J.J. van Miert (Wvd)

ANNEXE 2

Composition of the ACVZ as of 1 November 2004

Chair

T.J.P. van Os van den Abeelen,
Coordinating vice-president of Amsterdam District Court

Deputy chair

J.J.T. Stoutjesdijk,
Former Chief Commissioner of Police

Members

H.J. Bakker,
General Secretary of the Council of Churches in the Netherlands

C. R. van Beuge,
Former ambassador and Director-General for European Cooperation, Ministry of Foreign Affairs

Professor G.B.M. Engbersen,
Professor of general sociology at the Erasmus University, Rotterdam

Dr B.M. Groen,
Former senior lecturer in Slavic studies and linguistics at Utrecht University and Leiden University

Professor G.J.H. van Hoof
Professor of international law and attorney-at-law

N. Jerkovic
National project manager, intercultural voluntary work

G.D.T. Keuning,
Major General (ret.), Royal Netherlands Army

P.A. Schaafsma,
Former CEO, Social Insurance Bank

Dr N. Tellegen,
Director, Wemos (organisation for international health issues)

Dr A.B. Terlouw,
Member of the Equal Treatment Commission

Professor B.P. Vermeulen,
Professor of constitutional and administrative law at Amsterdam Free University

Dr L.H.M. van Willigen,
Consultant, health care for refugees and human rights.

[vacancy]

Secretary

Dr J.J. van Miert (Acting)

Composition subcommittee

In order to prepare this report the ACVZ appointed a subcommittee supplemented with a number of external experts. The composition of this subcommittee was as follows:

Chair

T.J.P. van Os van den Abeelen

Members

J.J.T. Stoutjesdijk

C. R. van Beuge

Professor G.J.H. van Hoof

Professor B.P. Vermeulen

Dr A.B. Terlouw

External experts

Professor E.A. Alkema

Dr L.F.M. Besselink

Dr J. Gerards

B.K. Olivier

ANNEXE 3

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