VU VRIJE UNIVERSITEIT AMSTERDAM Faculty of Law

Compatibility of the 'obligation to successfully pass integration exams' with Article 34 of EU Qualification Directive

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1. Introduction

Refugees are protected against *refoulement* and enjoy access to certain rights in the host country.[1] These rights are included in the Refugee Convention and the EU Qualification Directive (QD).[2] One of the purposes of this Directive is to lay down standards for the content of the granted protection through ensuring that a minimum level of rights is available for refugees in all Member States.[3] One of these rights concerns '*access to integration facilities*' as meant in Article 34 of the QD.

The Administrative Jurisdiction Division of the Dutch Council of State[4] requested the Court of Justice of the European Union (CJEU) to clarify whether Article 34 of the QD precludes a Dutch law implementing '*the obligation to pass the integration exam successfully within a period of three years, under pain of a fine*'. [5] The present expert opinion demonstrates that this question needs to be answered in the positive.

We first show that the Netherlands is an outlier within the EU in that it is the only Member State requiring such an obligation to pass the integration exam, under pain of a fine (Chapter 2). As the Qualification Directive must be interpreted in conformity with the Refugee Convention,[6] we secondly examine whether that Convention permits such an obligation (Chapter 3). Third, we closely look at the text and history of Article 34 of the QD and demonstrate that although Member States retain a certain margin of discretion when implementing Article 34 QD, the scope of this margin is narrow (Chapter 4).

Subsequently, we outline (chapter 5) how the CJEU approached obligations to pass integration exams in the context of other EU Directives, specifically the Long-Term Residents Directive (LTRD)[7] and the Family Reunification Directive (FRD)[8]. These two Directives provide that Member States 'may require' third-country nationals to 'comply' with integration

[1] In this expert opinion, we use the term 'refugees' to refer to 'beneficiaries of international protection', i.e. refugees and persons eligible for subsidiary protection.
[2] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9 (hereinafter the Qualification Directive).
[3] Article 1 and Considerans 12 of the QD.
[4] Council of State, 25 Marsh 2023, ECLI:NL:RVS:2023:975.
[5] Article 7 b of the Dutch Integration Act 2013. See also Article 3, 6 and 7. Regarding the 2021 Integration Act replacing the 2013 Act, see Articles 3, 6 and 11, https://wetten.overheid.nl/BWBR0044770/2023-01-01#Hoofdstuk2.
[6] Considerance 4 and Article 20 (1) of the QD.
[7] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, OJ 16/44, 23.01.2004.
[8] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

measures, as being one of the conditions for acquiring 'long-term resident status', 'admission', or for an autonomous or permanent residence permit. [9] Although these two Directives differ in scope and objective from the QD, the CJEU's approach is relevant in terms of comparison.

In the light of the previous chapters, we conclude (chapter 6) by arguing that 'the obligation to pass the integration exam within a period of three years, under pain of a fine' falls outside the narrow margin of discretion Member States have under Article 34 of the QD.

2. Integration in EU Member States

Several EU Member States have introduced integration requirements and integration courses for refugees. The Netherlands is no exception to this. Nevertheless, in comparison to other Member States, the Netherlands is an outlier as regards the nature of integration obligations that it requires from refugees and the instruments offered to meet such obligations.

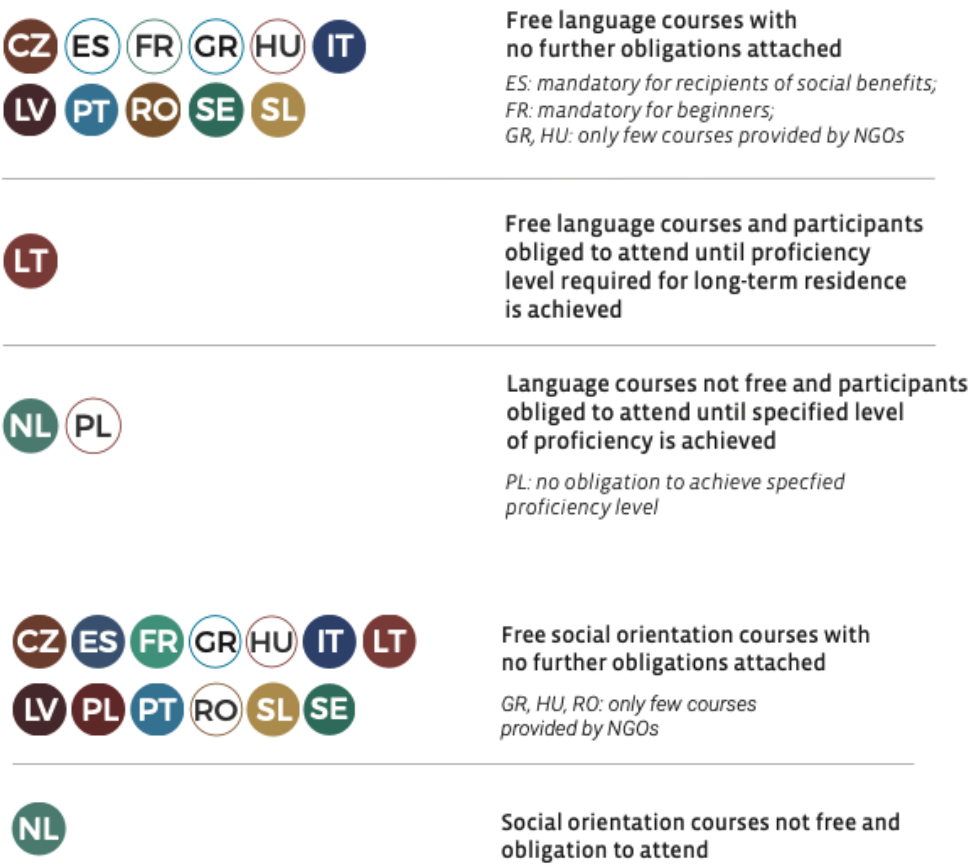
2.1. Access to integration courses

A 2019 comparative study[10] of the national refugee integration evaluation mechanism focusing on 14 Member States[11] reveals that while 12 countries offer free language courses, only the Netherlands and Poland do not. In addition, while most countries do not attach any obligation to those courses, the Netherlands, Poland and Lithuania require that refugees attend until achieving the required proficiency level. Furthermore, while 13 Member States offer free social orientation courses with no related obligation, such courses are not free in the Netherlands and refugees are obliged to attend. The following table illustrates these divergences in national practices:

[9] See the following provisions: Article 5(2) of the Long-Term Residents Directive; Article 7(2) and 15 of the Family Reunification Directive.

[10] See: A Wolffhardt, C Conte, and T Huddleston, The European Benchmark for Refugee Integration: A Comparative Analysis of the National Integration Evaluation Mechanism in 14 EU Countries: Baseline Report [Report]. (Migration Policy Group and Institute of Public Affairs, 2019), www.migpolgroup.com/wp-content/uploads/2019/06/The-European-benchmark-for-refugee-integration.pdf, accessed 29 March 2023.

[11] The 14 countries in the study are: Czechia, France, Greece, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden.



Source: Wolffhardt, A., Conte, C., and Huddleston, T. (2019).[12]

That being said, since the entry into force of the 2021 Dutch Integration Act[13], language and social orientation courses for refugees are free as Dutch municipalities are now responsible for ensuring the availability of courses and for supervising refugees during the integration process.[14]

2.2 The obligation to successfully pass the exam

The Netherlands is the only Member State which introduced an *obligation for refugees to successfully pass the integration exam*, as a 2019 study by the European Migration

[12] A Wolffhardt, C Conte, and T Huddleston, The European Benchmark for Refugee Integration: A Comparative Analysis of the National Integration Evaluation Mechanism in 14 EU Countries: Baseline Report [Report]. (Migration Policy Group and Institute of Public Affairs, 2019), p.151 www.migpolgroup.com/wp-content/uploads/2019/06/The-European-benchmark-for-refugee-integration.pdf, accessed 29 March 2023.
[13] Dutch Integration Act 2021, https://wetten.overheid.nl/BWBR0044770/2023-01-01#Hoofdstuk2 , replacing the 2013 Act.
[14] *Kamerstukken II* 2019/20, 35483, nr. 3, p. 7-8, https://zoek.officielebekendmakingen.nl/kst-35483-3.pdf ; Dutch Integration Act 2021, https://wetten.overheid.nl/BWBR0044770/2023-01-01#Hoofdstuk2

Network[15] of 25 Member States[16] revealed. Instead, six Member States[17] implemented the obligation to *participate in the integration courses* while failing to participate in those programmes is generally sanctioned in other ways than fines.[18] In the majority of Member States offering integration programmes, there is no legal obligation to participate in the programmes.[19] The sanctions that Dutch authorities may impose are also stricter than in other Member States. Four Member States[20] impose sanctions on refugees if they fail to comply with the obligation to participate. This includes a fine (Belgium) or reduction of social assistance (Austria and Norway). In Germany, authorities providing social benefits can also impose sanctions, and the duration of the residence permit can be limited. However, while these Member States impose such sanctions if refugees do not participate in the offered courses, the Netherlands is the only Member States that imposes sanctions for failing to successfully pass the integration exam.

Another outstanding element of the Dutch version of integration obligations is that refugees have to successfully pass the exam *within a period of 3 years*. The aim of this instrument is to 'accelerate' participation of refugees in the society, similar to the aim of the connected fines in case of failure to pass the exam.[21] Finally, it is also worth mentioning that the same obligation applies to other migrants in the Netherlands both under the 2013 Integration Act and the current 2021 Act.[22]

2.3 In sum

This country comparison shows that most Member States emphasize facilitation of integration of refugees through offering integration programmes involving an obligation to participate rather than imposing an obligation to successfully pass the examination, under pain of a fine. Therefore, there is consensus among Member States that the obligation to successfully pass the exam, under pain of a fine, is not an appropriate measure to facilitate

[15] European Migration Network, Civic integration policy in relation to refugees, Open Summary of EMN Ad-Hoc Query No. 2018.1341, 26 February 2019, https://www.emnnetherlands.nl/sites/default/files/2019-04/Open%20Summary%20Civic%20Integration%20Policy%20in%20relation%20to%20recognised%20refugees_0.pdf.

[16] Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, United Kingdom and Norway.

[17] Austria, Belgium, Germany, Estonia, Netherlands and Norway.

[18] EMN 2019, p. 2-4.

[19] Belgium, Czech Republic, Estonia, Finland, France, Italy, Lithuania, Luxembourg, Latvia, Malta, Slovak Republic and the United Kingdom.

[20] Belgium, Germany, the Netherlands, Norway and Austria.

[21] Tweede Kamer, vergaderjaar 2019–2020, 35 483, nr. 3, p. 8.

[22] Article 7 b of the Dutch Integration Act 2013. See also Article 3, 6 and 7. Regarding the 2021 Integration Act, see Articles 3, 6 and 11.

integration. The Netherlands is once again an outlier in the nature of integration obligations that it requires from refugees and the instruments it uses to facilitate integration.[23]

3. Integration in the Refugee Convention

In this chapter, we closely look at the text and history of Article 34 the Refugee Convention providing that the Contracting States 'shall as far as possible facilitate the assimilation and naturalization of refugees'. [24]

3.1. Text and history of Article 34 Refuge Convention

At the outset, the wording of this provision (*shall*) implies a positive obligation for States to 'facilitate assimilation'. Indeed, according to the *travaux préparatoires* of the Refugee Convention, Article 34 contains

> 'the obligation to facilitate the assimilation and naturalization of refugees as far as possible and to make, in particular, every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.' [25]

However, Contracting States retain a certain margin of discretion (reflected in the wording of Article 34: '*as far as possible'*) regarding the measures to be taken to achieve that aim. The next question is whether the obligation to successfully pass the integration exam falls within this margin.

In the *travaux préparatoires* of the Convention, the term 'assimilation' was viewed as bearing an 'unpleasant connotation vaguely related to the notion of force'.[26] Because of

[23] The Dutch Integration Act is the only integration act that has been addressed by the CJEU. See C. A. Groenendijk, 'Nederlands Inburgeringsbeleid En Het Unierecht 2009-2019. Nederlandse Strengheid En Wetgevend Perfectionisme Werken Contraproductief', *Asiel en Migrantenrecht*, Vol. 6/7, (2019), pp. 282.

[24] Article 34 of the Refugee Convention (emphasis added): 'The Contracting States **shall as far as possible facilitate** the **assimilation** and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

[25] UNHCR, The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, (1990), pp. 251 and 252.

[26] See for example the statement of Israel: " (…) The Israeli representative wondered whether there was a legal definition of the word 'assimilation'. (…) The word 'assimilation', well-known in sociology, bore a rather unpleasant connotation vaguely related to the notion of force. If it was merely intended to mean the making accessible of facilities for learning the language of the country, there could be no objection to it. If, however, assimilation were voluntary, there would be no need for any mention of it, and if it were not voluntary, it would be an attack on the spiritual independence of the refugees (…)'. *Travaux preparatoires*, p. 249.

this, the UNHCR makes use of the term 'integration' rather than 'assimilation'.[27] In fact, the notion of assimilation was viewed by Contracting States as having a negative relation to the use of force and forced assimilation is considered to be undesired as well as harmful. In this light, the UNHCR favours the term 'integration' rather than 'assimilation'.[28] In its commentary on the *travaux preparatoires*, the UNHCR states as follows:

> "The Ad Hoc Committee discussed at some length what was meant by facilitation of assimilation. It was agreed that attempts at forced assimilation of refugees were undesired, and in fact harmful: "an attack upon the spiritual independence of the refugee". What is meant in Article 34 is in fact the laying of foundations, or stepping stones, so that the refugee may familiarize himself with the language, customs and way of life of the nation among whom he lives, so that he - without any feeling of coercion - may be more readily integrated in the economic, social and cultural life of his country of refuge. Language courses, vocational adaptation courses, lectures on national institutions and social pattern, and above all stimulation of social contacts between refugees and the indigenous population, are but some of the means which may be employed for the purpose. By facilitating "assimilation" the Contracting State is to a certain extent also facilitating the naturalization of refugees: In the sense the word is used in Article 34, "assimilation" is "an apt description of a certain stage in the development of the life of the refugee and of the general refugee problem"; indeed it "clearly corresponded to the conditions the refugee should fulfil in order to qualify for naturalization".[29]

Thus, the Contracting States agreed that 'forced integration', for example integration through a programme obliging refugees to pass the exam under pain of a fine, is not a suitable tool to facilitate integration. In this vein, the UNHCR states in one of its Discussion Papers that

> 'the application of sanctions for non-fulfilment of integration obligations (…) should not be applied to refugees, as they have the effect of eroding the minimum set of rights which States must accord to them based on international and/or regional refugee and human rights norms.'[30]

[27] UNHCR, A New Beginning: Refugee Integration in Europe, (2013) www.unhcr.org/media/new-beginning-refugee-integration-europe, p. 11.
[28] A. Fielden, 'Local integration:an under-reported solution to protracted refugee situations' (Research Paper N. 158, UNHCR, 2008) p. 2.
[29] UN High Commissioner for Refugees (UNHCR), Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37), October 1997, available at: http://www.refworld.org/docid/4785ee9d2.html; Written by Professor Atle GrahlMadsen in 1963; re-published by the Department of International Protection in October 1997, p.146-147.
[30] UNHCR, Note on the Integration of Refugees in the European Union, (2007), pp 7.

By this understanding, the facilitation requirement should be an avenue for the gradual enjoyment of a set of diverse rights by the refugee.[31] Correspondingly, in their assessment of refugee integration in Europe, UNHCR has also noted that:

> 'Refugees [...] however have specific needs due to, among other factors, their loss of the protection of their country; their experiences of persecution or armed conflict; their particular difficulties obtaining documentation; and the separation and loss of family which often follows as a consequence of flight. Measuring the impact of integration policies on refugees without an understanding of their particular needs may lead to misguided policy development and to lack of crucial support needed to avoid long-term dependency, marginalisation and isolation of refugees.'[32]

Therefore, in the light of the Refugee Convention, integration must be defined to be a 'dynamic and multifaceted two-way process' that requires all parties involved to make an effort and be involved in this process.[33] Shifting the responsibility of integration from the State to the refugee, by imposing the obligation to pass the exam, increases the vulnerability of refugees and complicates the full enjoyment of other substantive rights.[34]

3.2 In sum

Article 34 of the Refugee Convention implies that Contracting States have the *positive obligation* and *responsibility to facilitate* integration, while coercion and sanctions are viewed as inappropriate to comply with that obligation. This shows that the Contracting States and the UNHCR consider the obligation to successfully pass the integration exam under pain of a fine as falling outside the margin of discretion States have under Article 34 of the Convention.

4. Integration in the Qualification Directive

Article 34 of the QD titled as "access to integration facilities" provides that

> 'In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they

[31] UNHCR Nicosia, The Integration of Refugees: A Discussion Paper (2014), p. 1.
[32] UNHCR, A New Beginning: Refugee Integration in Europe, (2013), pp. 11.
[33] UNHCR Nicosia, The Integration of Refugees: A Discussion Paper (2014), p. 1.
[34] A. Xanthaki, 'Against Integration, for Human Rights' (The International Journal of Human Rights (815), 20:6, 2016), p. 823-825.

consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.'

While this provision comprises a *positive obligation* for Member States, they retain a *margin of discretion* in how to facilitate integration. However, this margin is narrow for the reasons discussed below.

4.1. The positive obligation to facilitate integration

To begin with, the title of Article 34 reflects that this provision is primarily concerned with facilitating and promoting integration rather than compulsory integration 'tests' or exams. In addition, the text of this provision shows that its main objective is to 'facilitate' integration of refugees. Member States have a positive obligation to 'ensure access to integration programmes' in order to achieve that objective while taking the specific needs of refugees into account.[35] However, Member States retain a certain margin of discretion when deciding on the appropriateness of integration facilities to be offered.[36]

4.2 Narrow margin of discretion

The scope of the margin of discretion States have under Article 34 QD is, nevertheless, narrow for two reasons. [37] The first reasons is related to the specific needs of refugees, while the second reason concerns the consensus among Member States regarding the inappropriateness of the *obligation to successfully pass the exam* when facilitating integration.

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[35] CJEU C-163/17 *Jawo v. Bundesrepublik Deutschland* [2019] para. 46; Opinion of Advocate General Wathelet, Case C-163/17, Jawo v Bundesrepublik Deutschland, paras. 140-141.

[36] This discretion suggests that Article 34 is not clear and unconditional so that it would not have direct effect. However, this provision contains a clear positive obligation to ensure access to integration programmes in order to facilitate integration. Moreover, even if Member States retain a margin, national courts should examine whether the national measure in question still falls within the limits of that margin. See by analogy, Case C-72/95 *Kraaijeveld and Others*, para. 56; Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging*, para. 66; and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others*, paragraphs 100 to 103.

[37] See also the CJEU's judgment *H.T.* (C-373/13) in which the CJEU says that 'Member State has no discretion as to whether to continue to grant or to refuse' to refugees the substantive benefits comprised in the QD, such as access to integration programmes (para. 95) and that those rights 'may be limited only in accordance with the conditions set by Chapter VII of that directive, since Member States are not entitled to add restrictions not already listed there' (para. 97).

4.2.1 Specific needs of refugees

Article 34 of the QD provides that the integration measures should 'take into account the specific needs' of refugees. This wording was meant to increase the level of protection of refugees as reflected in the Commission Proposal for the Recast Qualification Directive[38] recognising the need for 'further EU action to attain *higher* and more harmonised standards of protection'.[39] Recognising the significance of the specific needs of refugees in the context of integration is key to understanding the historical emphasis on imposing a strong obligation on Member States to facilitate integration. In particular, the Commission Proposal acknowledges that in order to 'ensure the effective exercise of the rights formally granted to beneficiaries of protection, it is necessary to address the specific integration challenges they face'.[40] This entails empowering refugees with a minimum basic level of local knowledge necessary to effectively assert their fundamental rights in their new country of residence. Attributing such a purpose to integration necessitates its understanding as a basic protection for all refugees, which forms the foundation for the effective assertion of other fundamental rights. In turn, this supports the argument that Member States have, at a minimum, a positive obligation to ensure access to tailored integration programmes. This is consistent with the provision of the freedom to create for refugees more favourable standards as stated in the QD.[41]

In the same line of reasoning, the Commission Proposal highlighted that the general force of the legislative intent was to 'increase access to social protection, to the labour market and overall integration, to the extent that it raises the level of rights' of refugees and their family members.[42] Furthermore, the Proposal introduced other amendments to Article 34 that reflected the legislative intent of increasing standards of protection in the context of integration. First, the Commission suggested that under the novel provision, Member States shall 'ensure access to', as opposed to merely 'mak[ing] provision for'[43] integration programmes. This implies a stronger obligation for facilitating integration in the sense of not just making programmes available, but also accessible as meant in Article 34. Second, the Commission recommended that integration programmes could include introduction and language training programmes tailored to the needs of refugees in Article 34(2).[44] While the latter was omitted from the adopted text of Article 34, its essence was retained in Recital 47 of the QD. This calls for the specific needs and particularities of the situation of refugees to

[38] Commission, 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' COM (2009) 551, p. 10. See also Recital 10 of the Qualification Directive which carries forward this intention into the adopted text.
[39] Commission Proposal for the Recast Qualification Directive p. 10.
[40] Commission Proposal for Recast Qualification Directive p. 9. See also Recital 41 of the Qualification Directive.
[41] Article 3 of the Qualification Directive.
[42] Commission Proposal for the Recast Qualification Directive p. 11. Note, particularly, in this respect that the Commission frames the content of international protection in the language of rights.
[43] Commission Proposal for the Recast Qualification Directive p. 41.
[44] Commission Proposal for Recast Qualification Directive p. 42.

be taken into account in integration programmes, including through language training and the provision of information concerning their rights and obligations.[45]

4.2.2 Consensus among Member States

We have seen (chapter 1) that there is a consensus among Member States that the obligation to *successfully pass the exam under pain of a fine* is not an appropriate measure to facilitate integration. In fact, the Netherlands is an outlier within the EU in that it is the only Member State requiring such an obligation. Instead, many Member States implemented the obligation to *participate in the integration courses* accompanied with other forms of sanctioning non-attendance instead of fines. In the same vein, Article 38 (*access to integration measures*) of the Proposal for Qualification Regulation allows Member States to require participation in integration courses: 'Member States may make participation in integration measures compulsory'. [46] This wording does not contain any obligation to successfully pass the exam.

4.3 In sum

The main objective of Article 34 QD is to 'facilitate' integration of refugees. Based on its text as well as history, this provision comprises a *positive obligation* for Member States to 'ensure access to integration programmes'. Although States have a certain margin of discretion, its scope is narrow. That being said, the remaining question is whether 'the obligation to pass the integration exam successfully within a period of three years, under pain of a fine' falls within or rather outside that narrow margin of discretion. This question is addressed in the concluding chapter after having taken a close look (chapter 5) at how the CJEU approached integration obligations in the context of other EU Directives, in particular the Long-Term Residents Directive (LTRD) and the Family Reunification Directive (FRD).

[45] E.B Van Harten, 'Refugee Integration in European Human Rights Law and EU Law: A Right to be Integrated?' in: P. Czech, L. Heschl, K. Lukas, M. Nowak, & G. Oberleitner (Eds.) (European Yearbook on Human Rights/2022), p. 54.

[46] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final - 2016/0223 (COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0466

5. Integration in other EU Directives

This chapter outline how the CJEU approached obligations to pass integration exams in the context of other Directives, specifically the Long-Term Residents Directive (LTRD)[47] and the Family Reunification Directive (FRD)[48]. Although these two Directives differ in scope and objective from the QD, the CJEU's approach is relevant in terms of comparison.

5.1. Integration in the Long-Term Residents Directive and the Family Reunification Directive

As to the Long-Term Residents Directive, Article 4(1) provides that Member States 'shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.' This Directive allows Member States to implement integration requirements for obtaining long-term resident status. So, Article 5 (2) provides that they 'may require third-country nationals to comply with integration conditions, in accordance with national law'.[49]

In *P and S*, the CJEU held that the main objective of the Directive is the facilitation of integration of third-country nationals who are settled on a long-term basis in the Member States.[50] The Court notes that the acquisition of knowledge of the language and society contributes to this objective. In its view, the obligation to pass a civic integration examination does in principle not jeopardize the achievement of the objective of the directive.[51] However, the Court held that the means of implementing the civic integration obligation may be liable to jeopardise those objectives, taking into account for instance, the level of knowledge required to pass the exam, the accessibility of courses and materials for preparation, the amount of fees applicable and specific individual circumstances such as age, illiteracy or level of education.[52] Similarly, the Court also held that the system of fines, of itself, may not be liable to jeopardise the objectives of the Long-Term Residents Directive,[53] however, may do so in view of the 'relatively high'[54] maximum amount (€1000)

[47] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents, OJ 16/44, 23.01.2004.
[48] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.
[49] The Netherlands implemented both provisions under Article 45b (1) and 45b(2) under a, b and g of the Aliens Act.
[50] CJEU Case C-579/13 P and S v Commissie Sociale Zekerheid Breda [2015] para. 46. See also Considerans 4, 6 en 12 of the Directive.
[51] *P and S*, para. 48.
[52] *P and S*, para. 49.
[53] *P and S*, para. 50.
[54] *P and S*, para. 51.

at issue, and the fact that it was borne in addition to the high costs of taking part in the examinations.[55]

With regard the Family Reunification Directive, Member States are permitted to use integration condition when dependent family members seek first admission as well as when they apply for the autonomous residence permit after certain years of dependent residence in the host state.

As to pre-admission conditions, Article 7 (2) of the Family Reunification Directive provides that Member States 'may require third country nationals to comply with integration measures, in accordance with national law' as a condition for admission.

In *K and A*[56], the CJEU held that Article 7(2) did not preclude Member States from conditioning the authorisation of entry into the territory for the sponsor's family members to the observance by those family members of certain integration measures prior to entry.[57] However, the Court clarified that Member States must not use the margin of discretion under Article 7(2) as a mode of jeopardising the primary objective of the Directive, which is to promote family reunification.[58] Accordingly, the Court assessed whether the transposition of Article 7(2) in Dutch Law jeopardised its objectives, or otherwise went beyond what was necessary to attain them, in contravention of the principle of proportionality.[59] Although Article 7(2) does not contain any reference to the facilitation of integration, the Court highlighted that the integration measures imposed could be 'considered legitimate only if they are capable of facilitating the integration of the sponsor's family members'.[60] This statement can be seen as based on considerans 15 stipulating that the integration of family members 'should be promoted'. While, of itself, the obligation to pass civic integration examinations at a basic level was found to facilitate integration, the Court acknowledged that the conditions of application of such requirements may go beyond what is necessary to achieve such aims.[61] In this regard, the Court held that this could be the case where the obligation to pass the integration examination served to systematically prevent family reunification despite the individual having demonstrated their willingness to pass the examination and put in every effort to achieve this objective.[62] Moreover, in relation to the issue of costs, the Court held that while Member States have the discretion to require third-country nationals to pay various fees in relation to integration measures adopted under Article 7(2), such fees should not make family reunification 'excessively difficult or impossible'.[63] In this context, excessive difficulty or impossibility was defined in

[55] *P and S*, para. 53.
[56] CJEU Case C-153/14, *K and A v. Minister van Buitenlandse Zaken* [2015].
[57] *K and A,* para. 49.
[58] *K and A,* para. 50.
[59] *K and A,* para. 51.
[60] *K and A,* para. 52.
[61] *K and A,* para. 56.
[62] *K and A,* para. 56.
[63] *K and A,* para. 64.

the sense of having a 'significant financial impact'[64] such that the primary objective of the Directive is jeopardised.

Furthermore, it is important to note that the obligation to pass the integration test before admission does not apply for family members of refugees.[65]

With respect to autonomous residence, Article 15(1) of the FRD states that 'not later than after five years of residence' the dependent family member 'shall be entitled' upon application to an autonomous residence permit'. Member States have a margin of discretion when implementing this provision.[66] The Netherlands opted for the maximum period of 5 years and requires that dependent family members pass successfully the integration exam in order to be granted an autonomous residence permit.[67] This integration measure was addressed by the CJEU in *C & A*[68] and *K*[69] in which the Court confirms its approach in *P en S* and *K en A*.

The Court first notes that after 5 years of residence the third country national 'should have been able to acquire some knowledge of the language and society' as would enable him/her, in principle, to pass an examination on those subjects'.[70] In the Court's view, imposing such an obligation 'cannot therefore be considered, in principle, to be liable to undermine the effectiveness of Article 15(1) of the directive'. [71] The Court, then, refers to the principle of proportionality and states that 'the detailed rules for such a requirement must be suitable for achieving the objectives of the national legislation and must not go beyond what is necessary to attain them'.[72] Importantly, the Court stresses that such a requirement 'cannot legitimately go beyond what is necessary to attain the objective of facilitating the integration of those third country nationals'.[73] In addition, the Court refers to various elements which need to be taken into account, in particular 'demonstrated willingness to pass the exam' and other personal circumstances such as age and health conditions'.[74]

5.2. In sum

The CJEU does not reject the obligation to successfully pass integration exams. It, nevertheless, clearly states that such an obligation is 'legitimate' only if it indeed facilitates

[64] *K and A,* para. 65.
[65] Article 12 (1) FRD.
[66] Article 15 (4) FRD provides that the conditions relating to the granting of the autonomous residence permit are 'established by national law.'
[67] Article 3.51 and 3.80a of the Decree on Foreign Nationals.
[68] CJEU 7 November 2018, C-257/17, (*C. en A.)*
[69] CJEU 7 November 2018, C-484/17 (*K*), paras. 21-24.
[70] *C & A*, para. 59.
[71] *C & A*, para. 59.
[72] *C & A*, para. 60.
[73] *C & A*, para. 62.
[74] *C & A,* para. 63-64.

integration. In addition, the principle of proportionality and effectiveness should be taken into account when implementing such requirements.

6. Conclusion

Based on the preceding chapters, we argue that the question whether Article 34 of the QD precludes a Dutch law implementing 'the obligation to pass the integration exam successfully within a period of three years, under pain of a fine' needs to be answered in the positive.

At the outset, Article 34 of the QD contains a strict positive obligation and an unconditional right to access integration facilities. The responsibility lies on the State which should take effective and legitimate measures to facilitate integration of refugees. While Member Sates enjoy a margin of discretion when complying with that obligation, that margin is narrow particularly because most Member States did not implement such an obligation but only an *obligation to participate* in the integration courses, a practice which is in line with the Proposal for the Qualification Regulation aiming to further harmonise national integration practices.

Crucially, the obligation under study falls outside the scope of the narrow margin of discretion Member States have.

Firstly, the title of Article 34 QD (access to integration facilities) reflects that this provision is primarily concerned with facilitating and promoting integration rather than compulsory integration exams. In addition, as reflected in the *travaux preparatoires* of Article 34 of the Refugee Convention and UNHCR documents, such an obligation is not a suitable tool to facilitate integration. Hence, it is not a 'legitimate' measure as it contravenes the *effet utile* of Article 34 QD. Moreover, the fact that the QD does not explicitly grant Member States the choice to require compliance with integration requirements leads to the conclusion that the obligation to successfully pass the exam falls outside the scope of that Directive.

This conclusion is supported by the fact that the EU legislator explicitly included such an option in the Long-Term Residents Directive and the Family Reunification Directive. Instead of granting Member States that option, Article 34 of the QD and Article 38 of the Qualification Regulation contain an unconditional right to access integration measures connected to the positive obligation of Member States to facilitate integration through ensuring access to integration programmes. In the LTRD and the FRD, we do not find such an unconditional right, but rather a possibility to impose an obligation to successfully pass the integration exam. Significantly, these two Directives differ from the Qualification Directive in a fundamental respect: The Qualification Directive explicitly refers to the Refugee Convention, while those two Directives do not. It is, therefore, doubtful whether the

approach taken by the two Directives and the related CJEU's acceptance of the obligation to pass the exam is permissible in the case of refugees.

Additionally, the time frame of three years, within which refugees should succeed the integration exam, moves the Dutch obligation away from the narrow margin of discretion that States have, as that period fails to take the specific needs of refugees into account. First, it is inconsistent with the fact that refugees in the Netherlands would have to submit evidence of having passed the integration exam after a period of 5 years when they apply for stronger residence rights. A logical approach would be to grant them a period of 5 years to integrate, and if they fail, a suitable 'sanction' would be refusal of stronger residence rights rather than fines. Moreover, since the period of 3 years is also applicable to other migrants, this similar treatment demonstrates that the specific needs of refugees are not sufficiently taken into account. Furthermore, this 'equal' treatment between refugees and other migrants contradicts one of the aims of the Qualification Directive, namely: *increasing* the level of protection of refugees as well as the more favourable conditions in the case of refugees in EU law more generally.[75]

Furthermore, since the Netherlands opted for the period of 3 years to 'accelerate' integration, the aim of the period of 3 years is primarily 'acceleration' and not 'facilitation' of integration as meant in Article 34 QD. While accelerating the process bears the potential of facilitating integration, it also inhabits the risk of rendering it ineffective when the acceleration instrument is not suitable to facilitate integration. This is precisely the case as force and coercion were rejected by the Contracting States during the *travaux préparatoires* of the Refugee Convention. Crucially, there are suitable alternatives to accelerate refugee integration such as offering basic integration courses shortly after the submission of an asylum application combined with the acceleration of access to labour market for asylum seekers.[76]

In closing, it is important to mention that the Dutch Administrative Jurisdiction Division of the Council of State requested the CJEU referred three other related questions to the CJEU, besides the question regarding the obligation to successfully pass the exam under pain of a fine. These questions read as follows:

- Question 2: does Article 34 preclude national legislation which takes as a starting point that refugees should take on the full costs of integration programmes?
- Question 3: for answering question 2, is it relevant that the national legislation allows the possibility to obtain a loan and debt cancelation when the refugee has passed the exam on time?[77]

[75] See for example Chapter v of the FRD.
[76] For a discussion of access to labour market for asylum seekers in the Netherlands, see: Yasemin Savci (2023). 'Arbeid door vreemdelingen teveel beperkt door 24-weken-eis', *Verblijfblog*, https://verblijfblog.nl/arbeid-door-vreemdelingen-teveel-beperkt-door-24-weken-eis/;
[77] The possibility to obtain a loan is not applicable under the current 2021 Integration Act.

- Question 4: if question 1 (regarding the obligation to pass the exam) and 2 are answered in the affirmative, does the amount of the fine in combination with loan repayment jeopardise the achievement of the objectives pursued by the QD and the realisation of the aim and useful effect of Article 34 QD?

Since Article 34 QD precludes a Dutch law implementing 'the obligation to pass the integration exam successfully within a period of three years, under pain of a fine', as demonstrated in this expert opinion, the other three prejudicial questions do no longer need to be answered.