Bijlage 133040.5

*Franco Frattini*
*Vice-President of the European Commission*

14.06.[illegible] - 385

*Brussels,*

Aan minister Mevr Rita

*I very much appreciate that you have consulted the Commission in order to have a first assessment of the proposal for the new Dutch integration legislation, notably with regard to existing Community rules in this field. I consider this exercise very useful as it provides the opportunity for an open dialogue which helps to reinforce mutual trust between the Commission and Member States.*

*First of all, I would like to say that I fully acknowledge the efforts made by the Dutch Government to address the challenges represented by the integration of third country nationals into our societies. In this respect, I do not have objections to the draft legislation as I consider that it is certainly possible for Member States to foresee national integration measures for third country nationals.*

*More precisely, as far as the compatibility of the draft legislation with Directive 2003/86/EC on the right to family reunification and Directive 2003/109/EC concerning the status of third country nationals who are long-term residents is concerned, I agree with you that the provisions of*

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*Article 7(2) of Directive 2003/86 and of Articles 5(2), 15(3) and 23 of Directive 2003/109 allow Member States to impose integration measures/conditions in accordance with national law. These national integration measures/conditions must, however, be proportionate and respectful of the fundamental rights recognised by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, in particular Article 8 thereof.*

*However, I consider that the application of the measures envisaged in the draft legislation to third country nationals who are family members of EU citizens poses certain legal problems. Furthermore, there is a risk that some of the provisions envisaged in your legislation may be incompatible with the standstill provisions of the Association Agreements.*

*Given the complexity of this matter, a more detailed explanation on these points and on the issues addressed in your letter is set out in an annex prepared by my Directorate General. I would like to stress that this reply can only give some preliminary indications, as the Court of Justice remains the only institution that can provide an authentic interpretation of Community law provisions and rule on the compatibility of the Dutch legislation with Community legislation.*

Yours sincerely,

## *Annex*

### *1. Preliminary integration abroad of EU citizens and their family members*

*It is understood from your letter that the prerequisite for preliminary integration will not be required from EU citizens, EEA or Swiss nationals, or from EU citizens' family members who are non-EU nationals, as long as they are already residing in the territory of another Member State. This would be in conformity with EC legislation and case law on the right to free movement of EU citizens, and you should therefore clarify this issue by explicitly excluding these persons from the scope of the new legislation.*

*On the other hand, you intend to apply the requirement for preliminary integration to non-EU family members who are not yet residing in the territory of the EU. In doing so you consider that Community legislation provisions on the free movement of EU citizens do not apply to family members who are third country nationals and who do not yet reside in the territory of the Union. You consider this to be the interpretation to be given to the judgment of the Court of Justice in the Akrich case.*

*In this respect the following observations are made.*

*First of all, it should be reminded that the freedom of movement of EU citizens and their family members is a fundamental right enshrined in the Treaty and in the Charter of Fundamental Rights. All derogations aimed at limiting its exercise have to be interpreted restrictively.*

*What the Court seems to conclude in the Akrich judgment is that immigration rules can in any event be seen as an obstacle to the full and effective exercise of the right of free movement enjoyed by Union citizens and must therefore be subject to proportionality and fundamental rights scrutiny.*

*However, in its ruling it does not seem that the Court wanted to exclude completely the situation of Mr. Akrich from the scope of Community law. If that had been its intention it would not have made reference, as it does, to the application of the right to family life as guaranteed by the European Convention on Human Rights. As you are well aware, the Community does not have general competence as regards fundamental rights under the terms of the Treaties on the European Union and establishing the European Community, and may only intervene in the event of fundamental rights violations in the field of the application of Community legislation.*

*Furthermore, the Akrich ruling referred to a particular situation of a family member who resided unlawfully on the territory of a Member State, so its conclusions should not be extended to other cases which may differ even partially from it.*

*The Akrich ruling has also to be read in combination with other recent judgments of the Court of Justice on the rights of non-EU family members. Particular reference is made to the MRAX ruling (Case C-459/99), in which the Court ruled that Member States cannot deny entry to the third country national spouse of an EU citizen on the sole grounds that the claimant has not obtained the required visa, and cannot refuse a residence permit or issue an expulsion order on the sole grounds that they entered the Member State concerned unlawfully.*

*In another recent ruling of the Court, Carpenter (Case C-60/00), the status of Mrs. Carpenter, who also resided illegally in the United Kingdom, was considered to be irrelevant for the application of Community law provisions. Rather the Court ruled that the deportation of Mrs. Carpenter would affect the conditions under which Mr. Carpenter provided intra-Community services, and therefore could represent a barrier to the freedom to provide services enshrined in the Treaty.*

*In addition, although the ruling in Akrich referred solely to the spouse, the Dutch legislation applies to all family members including children who are not legally resident in the territory of the Union.*

*Reading Akrich to exclude from the scope of Community law the spouse and other family members who have not yet entered the territory of a Member State would create two categories of EU citizens benefiting from Community law: a first category whose family members are already residing within the territory of the Union and who would benefit from free movement rules; and a second category whose family members do not yet reside in a Member State or who want to get married to a third country national who is not already resident in a Member State and whose family member would be subject to national immigration rules. This would constitute discrimination between different categories of EU nationals which would seem difficult to justify.*

*It could therefore be concluded that even if it were admitted that the ruling in Akrich had partially overruled previous case law, and had effectively excluded family members who are unlawfully present in the Union from the scope of Community law, it might not be interpreted in the sense of excluding from its scope family members who have not yet entered the Union.*

*Such an exclusion would be inconsistent with the purposeful and generous interpretation which characterises the jurisprudence of the Court in the field of individual rights, and contrary to the very wording of applicable Community law and in particular of Regulation 1612/68 which does not make a spouse's right to enter and reside conditional upon them being already present in the territory of the Union.*

*With reference to the provisions of Directive 2004/38 on the right of Union citizens and their family members to move and reside freely within the territory of Member States, which codifies existing community legislation on free movement, although the deadline for transposing the provisions of the Directive into national legislation is April 2006, any legislation adopted which is contrary to its provisions would represent an incorrect transposition both of this Directive and of currently applicable Community law.*

*Article 3 of the Directive states that it shall apply to all Union citizens who move and reside in a Member State other than that of which they are a national and their family members, regardless of their nationality, who accompany or join them.*

*As it is already the case under currently applicable Community instruments, it is not specified in the Article, or in any other Article of the Directive, that the provisions would only apply to family members who are already residing in the territory of another Member State.*

*Article 5 of the same Directive states that Member States shall grant leave to enter their territory to family members who are not nationals of a Member State, but who have a valid passport. This is a general rule that does not make a distinction on whether the person in question is entering from another Member State or from outside the territory of the Union.*

*The same article also says that family members who are not nationals of a Member State shall only be required to have an entry visa, and that Member States shall grant such persons all facilities to obtain such visas on the basis of an accelerated procedure.*

*The legislator has also taken on board the MRAX ruling by stating that where a family member who is not a national of a Member State does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall give such a person every reasonable opportunity to obtain the necessary documents or prove by other means that they are covered by the right of free movement and residence.*

*It is therefore clear from these provisions that the lack of a required visa and/or travel documents cannot constitute a reason to refuse entry to a non-*

*EU family member who can prove to be a beneficiary of Community law, i.e. who can prove their family link to an EU citizen and who does not constitute a threat to the public order or public security of the Member State concerned.*

*In this respect it should also be reminded that the Commission initiated an infringement procedure against the Kingdom of Spain (case C-157/03) concerning the requirement imposed upon family members who are third country nationals to obtain a residence visa (a national long-term visa) before entering their territory. The conclusions of the Advocate General in this case expressly state that the obligation to obtain a residence visa before entering the territory is contrary to Community legislation provisions on the right of free movement.*

*On the basis of the above mentioned considerations, it appears that the requirement imposed by the draft legislation on family members who are not nationals of a Member State to obtain a residence visa is contrary to Community legislation regulating the right of entry of an EU citizen's family members. Furthermore, the obligation for such family members to pass a test of language and integration in order to enter Dutch territory constitutes an additional condition to their right to free movement which is contrary to Community provisions on free movement.*

## *2. Integration measures for EU citizens' family members on Dutch territory*

*On the basis of the envisaged legislation, after having entered Dutch territory non-EU family members with no previous residence in another Member State would be subject to the obligation to attend language classes. The non-attendance of such classes or the failure of exams would result in financial fines and the refusal of a permanent residence permit.*

*In this respect, it should be noted that Community law instruments on free movement, as well as Directive 2004/38, clearly provide that the only condition to the right of residence of family members of EU nationals is the family link and the absence of a threat to public order or public security. In line with this, the above mentioned instruments exhaustively enumerate the documents that should be provided by a non-EU family member in order to obtain a residence card, and these are a passport and proof of family relationship. No distinction is made according to the previous country of residence of the persons concerned.*

*Furthermore, Directive 2004/38 provides that family members who are not nationals of a Member State and have legally resided with the Union citizen*

*in the host Member State for a continuous period of 5 years shall acquire an unconditional right of permanent residence there. This is an important innovation with regard to existing legislation. The only requirement for them to acquire permanent residence is therefore a continuous legal residence on the territory of the host Member State.*

*The condition of attending and passing language tests would be therefore contrary to both currently applicable Community law instruments and to Directive 2004/38, as it stems from the constant jurisprudence of the Court of Justice (e.g. C-48/75 Royer), that Member States cannot impose on Union citizens and their family members the respect of conditions which are not expressly foreseen in the legislation.*

## 3. *Compatibility of the proposed legislation with the Association Agreements*

*On the issue of compatibility of draft legislation with the Association Agreements concluded by the European Community with several third countries, notably Turkey, firstly it is assumed, on the basis of the information in your letter, that by virtue of the draft laws all third country nationals who migrate as employees, self-employed workers or service providers (or family members of those categories) are not required to pass either the integration test abroad or the compulsory integration programme after arrival in the Netherlands. Secondly it is assumed that the above groups of migrants are not entitled to receive a permanent or long-term residence permit but would have to renew their permit at least every five years, and thirdly that religious ministers are required to follow compulsory integration even if they fall within the above categories.*

*If the first assumption is correct then this should be made clear in the legislation.*

*As to the second point, it is settled case law that the residence cards of migrant workers and their family members from Turkey, or self-employed workers and service providers and their family members from Turkey and other associated countries (Bulgaria, Romania, Croatia) are declaratory and not constitutive in nature because the right of residence directly flows from the relevant provisions in the Association Agreements. The card only serves as evidence of an already existing right. Any additional burden, such as fees for issuing or extending such residence cards, which are not charged for example to Community citizens residing in the Netherlands, could be interpreted as a new obstacle to exercising rights under the Agreements that did not exist at the time of entry into force of the instruments and, as such, are contrary to the relevant standstill provisions.*

*Thirdly, the envisaged treatment of religious ministers raises some legal problems insofar as it will have an impact on the system of gradual integration of Turkish workers in Member States under the EC/Turkey Association Agreement. Under Article 6 of Decision 1/80, a Turkish worker benefits after the first year from gradual strengthening of his integration into the employment market of their host country and is entitled to residence.*

*Therefore, it could be that there is no legal provision which would justify the special treatment of Turkish religious ministers who enjoy rights under Article 6. In particular, Article 12 (disturbances on employment markets jeopardizing standards of living in a particular region) and Article 14 (limitations justified on grounds of public policy, public security or public health) of Decision 1/80 do not provide sufficient legal justification for such a blanket measure by the Dutch Government.*