

# Summary

## Introduction

These recommendations concern European and national public order policy. Such policy is based on the principle that rights of residence may be restricted in the case of migrants that pose a threat to public order. This principle is consistently applied in the Aliens Act 2000. As a member of the European Union, the Netherlands is bound by migration law standards established in the Treaty on the Functioning of the European Union, regulations, guidelines and the Charter of fundamental rights of the European Union. The Advisory Committee on Migration Affairs (ACVZ) was recently prompted to reassess public order policy by three developments in the area of national and European public order policy:

1. In the Netherlands, the criteria for termination of residence due to criminal offences have been radically tightened a total of three times since 2005;
2. The Court of Justice of the European Union (the Court) has issued key rulings on the application of the European public order benchmark for citizens from non-EU countries.
3. According to a recent decision by the Administrative Jurisdiction Division of the Council of State (the Division), Court rulings dictate that any termination of residence cases in the Netherlands in areas governed by European law are subject to the Court's interpretation of the concept of public order.

These recommendations concern the following central research question:

*'How can Dutch public order policy within the framework of European Union law be structured in a balanced manner that both protects public order and safeguards the legal rights of migrants?'*

In making these recommendations to the Minister for Migration and the Dutch Parliament, the ACVZ has mainly focused on the refusal and revocation of regular residence permits. However, the recommendations are also relevant to asylum law. European asylum law contains specific standards that establish stronger safeguards against deportation. The recommendations concern the endangerment of public order as a result of criminal offences. Although this distinction is somewhat difficult to make, their scope does not extend to threats to public or national security.

## The personal conduct and present threat benchmark as defined in European Union law

The Court defines the concept of a 'risk to public policy' as follows: "the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." This approach under EU law is referred to as the 'personal conduct and present threat benchmark', a concept recorded in Article 27 of the Citizenship Directive.

The Court has ruled that this personal conduct and present threat benchmark also applies to the rights, by virtue of the EC-Turkey Association Agreement, of Turkish citizens living in Europe. The Court recently issued judgements on the application of the personal conduct and present threat benchmark to the revocation of asylum status, the departure deadline for third-country nationals and the legality of immigration detention on the basis of the Return Directive. The Court deemed the personal conduct and present threat benchmark to be applicable in all these cases.

According to a 4 July 2017 Division judgement, previous Court rulings establish that – at least with regard to terminations of residence and the issue of entry bans – the definition of public order will consistently apply in cases where a guideline offers room to weigh the relevant migrant’s potential danger to public order when applying the relevant authorities.

The ACVZ feels it would be appropriate to apply an integrated public order policy based on broad application of the personal conduct and present threat benchmark. This position is supported by the fact that over 90% of all residence applications are currently already subject to EU law.

### **The balancing of interests**

In addition to the personal conduct and present threat benchmark, EU law also includes an obligation to balance the various relevant interests. Amongst other aspects, this concerns the protection of relevant fundamental rights, the right to an effective procedure and the right to proper administration. These fundamental rights, as recorded in the principles of European Union law and the Charter of fundamental rights, are partly rooted in the rights guaranteed in the European Convention on Human Rights (ECHR). Any effort to balance the various interests should take account of EC Citizenship Directive guidelines and the guiding principles established through previous rulings by the European Court of Human Rights on Article 8 of the ECHR.

### **Asylum standards under EU law**

As regards public order, asylum cases must be benchmarked against various criteria within both EU and national law. EU criteria on admission, extension and termination of residence have been recorded in the Qualification Directive. This Directive is applied as a benchmark in determining the seriousness of criminal offences. In accordance with the Division’s interpretation of previous Court rulings, terminations of residence must – at minimum – be benchmarked against the personal conduct and present threat criterion established in the Citizenship Directive. According to national law, the sliding scale also applies to asylum cases.

### **The sliding scale**

Under the Dutch legal system, threats to public order are elaborated in detail in subordinate legislation. As regards termination of residence, the concrete significance of public order threats has been recorded in a sliding scale in Article 3.86 of the Aliens Decree. This scale takes the form of a table, and is used to determine whether a migrant’s residence can be terminated on the basis of conviction for a criminal offence. The table is based on the principle that migrants should enjoy greater protection against deportation after a longer period of legal residence, and must thus have committed a more serious public order infraction to justify termination of their legal residence. This system offers both migrants and policy makers a greater degree of legal certainty, while limiting the risk of arbitrary decisions.

On the other hand, the sliding scale does not offer room to factor changes in behaviour since the crime – and thus present urgency of the public order threat – into the assessment. Furthermore, application of the sliding scale exclusively factors in the duration of legal residence immediately prior to the moment upon which the crime was committed or commenced. Any interruptions of the legal residence period will render previous periods of legal residence irrelevant during application of the sliding scale. As of 1 July 2012, migrants are no longer automatically protected after a legal residence of twenty years. The duration of legal residence does not affect the period over which imposed punishments and measures are totalled.

### **Proportionality and effectiveness**

The measure's impact on the individual must be proportionate to its legitimate purpose. The ACVZ takes the position that current public order policy conflicts with the principle of proportionality in four areas:

1. migrants that enjoyed security of residence in the Netherlands over dozens of years may still be held accountable for their criminal past over this entire period;
2. migrants residing in the Netherlands for less than three years can be deported after having been convicted for a single criminal offence;
3. in accordance with the habitual offenders guideline, the total duration of punishments imposed upon migrants to have committed more than three criminal offences – regardless of their severity – on the basis of the sliding scale may be considerably shorter than the punishments imposed upon those found guilty of a single serious criminal offence.
4. the practice of retroactively revoking residence permits from the day upon which the crime was committed (or commenced) is problematic: a long period of time can pass between the actual offence and the decision (or intention) to revoke the migrant's legal residence.

The ACVZ has its doubts as to the effectiveness of current public order policies. A projection by the Research and Documentation Centre (WODC) predicted that successive efforts to tighten public order policy over the course of 2010 would result in more terminations of residence. Based on figures over the 2013 through 2016 period, this projected increase in terminations of rights of residence did not take place.

### **The sliding scale and EU law**

The current sliding scale system is vulnerable to criticism in light of the principles of proportionality and effectiveness. Some of these objections could be addressed by applying the personal conduct and present threat criterion established under EU law to all immigration law in accordance with previous rulings by the Division.

The sliding scale system must be aligned with the personal conduct and present threat benchmark and safeguards protecting migrants' fundamental rights. In legal terms, this would involve integrating both the personal conduct and present threat benchmark and the broad balancing of interests as a part of the fundamental rights benchmarking process into Article 3.86 of the Aliens Decree, rather than including them as a mere supplement or exception. In its current form, Article 3.86 of the Aliens Decree incorporates fundamental rights as a supplement to or exception from the first eleven paragraphs, which contain the actual sliding scale. The advisory committee feels this does insufficient justice to the need to safeguard the fundamental rights of third-country nationals in public order policy.

## Conclusions and recommendations

The ACVZ has reached the following conclusions:

### Conclusion 1

Clear data and figures on the application of public order policy and the desirability or consequences of proposed changes are insufficiently available.

### Conclusion 2

Protection under EU law extends beyond the sliding scale applied in national public order policy.

EU law applies the ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ criterion.

### Conclusion 3

The sliding scale system must be aligned with the personal conduct and present threat benchmark and safeguards protecting migrants’ fundamental rights by integrating both the personal conduct and present threat benchmark and the broad balancing of interests as a part of the fundamental rights benchmarking process into Article 3.86 of the Aliens Decree.

The ACVZ recommends the following legislative amendments:

### Recommendation 1

Provide a legal basis for ex nunc present threat assessments by adjusting the sixth paragraph of Article 3.86 of the Aliens Decree.

### Recommendation 2

Apply the EU personal conduct and present threat criterion across the full spectrum of immigration law. This will serve to assuage criticism on the perceived proportionality and effectiveness of the sliding scale.

Include a legal provision establishing that migrants will be deemed a threat to public order when posing a present threat to one of the fundamental interests of society.

### Recommendation 3

Include a legal provision specifying that any application of the personal conduct and present threat benchmark or effort to balance individual interests should take account of the EC Citizenship Directive guidelines and guiding principles of the European Court of Human Rights (ECHR) as well as the sliding scale. Elaborate these provisions into a public work instruction in support of executive staff.

### Recommendation 4

Review the current practice of revoking the right of residence with retroactive effect. In the case of an approach based on EU law, the Division must remain prepared for new developments that could positively or negatively impact the existence of a personal conduct and present threat all the way through the appeals phase.

**Recommendation 5**

Do not apply more than one sliding scale. The simultaneous use of three, poorly aligned sliding scales will negatively impact the effectiveness and efficiency of policies.

**Recommendation 6**

Improve the effectiveness of public order policy by clearly registering any decisions made on the basis of this policy as such, and applying this registration data for policy monitoring purposes. Use the outcomes to substantiate desirable policy changes.