FIDE report – Dutch Contribution Topic III

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Question 1

Respect for equal treatment

The Dutch judiciary has accepted the principles of direct effect and supremacy of Union law in direct reference to the CJEU.[1] EU rights and concepts are respected by authorities and enforced by Courts. It is illustrated by a recent district court ruling[2] that a Dutch transport company could not rely on pay arrangements applicable only to foreign employees against a Hungarian worker claiming higher salary. The discriminatory arrangements were null and void under Regulation 492/2011.[3] The court further set aside Dutch time limits for retrospective payment claims under reference to *Emmott*,[4] and referred to *King*[5] to rule on the obligations for the employer. The Hungarian worker in the Dutch case accidentally learned he had right to a higher salary upon consulting legal aid.

Recent research revealed that especially low skilled EU workers lack information about their equal treatment rights, regardless of the type of employment contract they have. Direct employment contracts are often in English or Dutch. [6] EU workers staying longer than four months in the Netherlands are supposed to register in the Personal Records Database (PRD) of the municipality of residence. Many EU workers do not register or register in the database for non-residents, rendering it difficult for municipalities to inform them on housing, health care and municipal welfare provisions. Non-registration may result in denial of social benefits because proof of residence periods is lacking. The COVID-pandemic exposed the vulnerability of low skilled EU workers. Improvement of the registration system and a duty of employers to incite people to register were suggested as major instruments to end vulnerability of EU workers. The registration system is currently adjusted to include contact details (email and phone number) of those who register as non-resident persons.[7]

Different treatment of economically inactive citizens

Difference in treatment concerns access to social assistance and maintenance aid for studies, in line with Article 24(2) of Directive 2004/38/EC.

Access to social assistance Foreign nationals residing lawfully under the Aliens Act (AA) are equated to Dutch citizens in access to social assistance. Union citizens reside lawfully when residence is compliant with an arrangement under the TFEU or the EEA Treaty.[8] In line with Article 24(2) of Directive 2004/38/EC social assistance can be refused to economically inactive citizens residing shorter than three months, or not able to prove residence longer than three months, or residing longer than three months as jobseeker while having a genuine chance to be engaged.[9] Union citizens who work at least 40% of the regular working time and earn at least 50% of the minimum income threshold are presumed to be a worker under EU law, and have access to (complementary) social assistance. Below these thresholds, individual circumstances should be taken into consideration for a decision on their EU worker status.[10]

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[1] ECLI:NL:HR:2004:AR1797, para. 3.6; ECLI:NL:RVS:1995:AN5284.
[2] ECLI:NL:RBOVE:2022:767.
[3] Article 7(4) Regulation 492/2011.
[4] CJEU C-208/90 (*Emmott*).
[5] CJEU C-214/16 (*King*), para. 61.
[6] L. Berntsen a.o., *Working in times of corona in distribution or meat processing. Survey among Polish and Romanian workers in the Netherlands* (Working paper De Burcht) 2022, p. 11-13.
[7] Amendment to Article 269 §1 of the PRD Act, 14 July 2021, *Stb.* 2121, 396. These provisions will enter into force once the ICT system is adjusted.
[8] Article 8(e) AA.
[9] Participation Act, Section 11(2); ECLI:NL:CRVB:2016:4132; ECLI:NL:CRVB:2016:4139; ECLI:NL:RBZWB:2020:4650.
[10] Vreemdelingencirculaire B.10/2.2 & 2.3.

Dutch municipalities implement and administer social assistance. They enjoy a margin of discretion, but are required to cooperate with the Immigration Services (IND).[11] Municipalities presume lawful residence when citizens reside between three months and five years. They will notify their social assistance to the IND. Social assistance stops the moment the IND terminates the residence. Jobseekers who claim residence under Article 14(4) Directive 2004/38 are also notified to the IND.[12] The IND uses a sliding scale to determine (un)lawful residence.[13] There is little case law on denial of social assistance for economically inactive EU citizens.[14]

Access to student support: EU students with a worker status or who have acquired the right of permanent residence based on Article 16 of Directive 2004/38 are entitled to loans and grants, including costs for study material and public transport cards,[15] in contrast to economically inactive students. Students have a worker status if they work more than 56 hours per month on average.[16] Below 56 hours individual circumstances are taken into consideration.[17] Media coverage in May 2022 that the 'individual circumstances' rule was not properly communicated, led to adjustment of the information on the website of the relevant Agency (DUO). Provisory student finance is granted for the duration of the submitted employment contract, with retrospective verification and possible recovery per month.[18] Months with zero hours of work cannot be compensated with more hours of work in other months.[19]

Question 2

Equal treatment in the domain of social security benefits

A. In the Dutch public and political discourse, poor EU citizens, criminal EU citizens or EU citizens claiming benefits sometimes are labelled as 'unwanted', even when they legally enjoy a fundamental right to EU mobility and the protection of EU law. In recent years however, there is little discussion on the subject of access to social assistance of non-active EU citizens. There is little Dutch case law on the subject (including expulsion) as well. After the *Dano* judgment, there were some developments of a restrictive nature though. In an unpublished court case, the IND used the *Dano* reasoning regarding an inactive EU citizen who had asked for social assistance benefit but had never searched for work.[20] According to the IND, it was current policy to immediately consider such an EU citizen as an unreasonable burden on Dutch public funds. Another case in which the *Dano* reasoning was used is a judgment by the district court The Hague.[21] In this case, the Court followed the IND and ruled that the Bulgarian applicant never had a right of residence due to being unemployable and not speaking Dutch.
An important change occurred in 2018. In two judgments the Council of State noted that Article 14(3) Directive 2004/38 stating that 'an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State' is implemented in Dutch law with a different wording.[22] Article 8.16(1) of the Dutch Aliens Decree uses the words 'termination of the right of residence' instead of the words 'an expulsion measure'. The Council of State has explicitly emphasized this distinction, marking a radical change in the assessment of this right. Now a balancing of interests and an individual assessment is needed in all cases wherein the immigration authorities decide that the right of residence of an inactive EU citizen

[11] ECLI:NL:CRVB:2013:BZ3855; ECLI:NL:CRVB:2013:BZ3857; ECLI:NL:CRVB:2015:57.
[12] The IND decides on continued residence rights for jobseekers; ECLI:NL:CRVB:2018:1704.
[13] Dutch Aliens Act Implementation Guidelines; D. Kramer, *Earning Social Citizenship. Free Movement, National Welfare and the European Court of Justice* (PhD Thesis VU Amsterdam), 2020.
[14] Mantu, Minderhoud and Grütters suggest several explanations: either there are not many applications, or residence rights are not often withdrawn, or citizens do not appeal withdrawal decisions, in 'Legal Approaches to 'Unwanted' EU Citizens in the Netherlands', *CEEMR* 2021, vol. 10(1), p. 40.
[15] Article 2.2.(1) under b Study Finance Act (WSF) 2000; Study Finance Decision (bsf) Article 3a; ECLI:EU:C:2019:3700, point 4.6.
[16] The 56 hours is in line with the implementation guidelines for access to social benefits, see fn. 15.
[17] Beleidsregel controlebeleid migrerend werknemerschap van 13 december 2012.
[18] ECLI:NL:CRVB:2017:2973.
[19] ECLI:NL:RBAMS:2021:6295.
[20] *Rechtbank* Den Haag 1 September 2015, case number AWB 15/4877.
[21] ECLI:NL:RBDHA:2016:3075.
[22] ECLI:NL:RVS:2018:3584 and 3585.

has been terminated or had never existed. Questions can still be raised about how this will work in practice.

In academic literature there are some publications critically discussing the CJEU case law in *Brey, Alimanovic, Dano* and *Garcia-Nieto*[23] and some publications which more or less support this line of case law.[24]

B. Since 2012, the Netherlands has had an indexation system for the export of a number of benefits[25] to non-EU countries with which the Netherlands has signed a social security treaty. The amount of the benefit is linked to the level of the standard of living in the country concerned. As of 2015, child benefits are no longer exported at all to most non-EU countries.

In May 2017, the Minister of Social Affairs indicated that at that time there was insufficient support for the possibility of introducing such an indexation principle within the EU.[26] Indexation within the EU would in fact be contrary to EU law, in particular to Article 67 of the Social Security Coordination Regulation.[27] Starting a discussion within the EU to apply an indexation system would be unwise and could directly worsen the negotiating position of the Netherlands, according to the Minister.

The proposal would also be highly symbolic in nature. The estimated saving for the Netherlands at that time would not exceed € 8 million.

Question 3

Actual situation regarding workers' mobility

a. Since the EU enlargements of 2004 and 2007, in addition to an increase of 'settlement migration', many other flows of temporary (e.g. posting), frontier and circular labour mobility have emerged within the EU. According to the available data, around 7% (630.000 people) of the total Dutch working-age population (approx. 9 million) does have the nationality from another EU/EEA country than the Netherlands. Around 4% (360.000) has an Eastern-European nationality (more than one-third is of Polish nationality). However, temporary flows of intra-EU labour mobility do not occur fully in the statistics. According to Strockmeijer, around half of the workers from Eastern European countries do not register in the population register, even not when staying in the Netherlands for more than 4 months. Therefore, the actual influx of workers from these Member States is much larger.[28] Moreover, the Netherlands is one of the main 'receiving' Member States of posted workers within the EU. It is estimated that there were between 132.000 and 404.000 incoming posted workers between 2018 and 2020.[29] Eight out of ten notified posted workers are employed in international road freight transport, for whom specific posting rules apply.[30] In general, migrant and posted EU-workers work in larger numbers

[23] A.o.: P.E. Minderhoud and S.A. Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive', in: D. Thym (Ed.), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*, Oxford: Hart Publishing 2017, p. 191-207; D. Kramer, op.cit. fn 19, 2020.
[24] A.o. D. Carter and M. Jesse, *The "Dano Evolution": Assessing Legal Integration and Access to Social Benefits for EU Citizens* (European Papers 3(3)) 2018, p. 1179-1208.
[25] Child benefits AKW, survivor benefits ANW and complementary disability benefit WGA.
[26] *Parliamentary Papers II*, 2016/2017, Appendix 1832.
[27] Regulation 883/2004.
[28] Netherlands statistics (2022); A.W. Strockmeijer, P. de Beer, J. Davegos (2020), 'Explaining differences in unemployment benefit takeup between labour migrants and Dutch native workers', *International Social Security Revie*w, Vol. 73, 2/2020).
[29] Based on examining A-1 certificates, more than one third are third-country nationals employed by companies based in the EU. This concerns mainly Ukrainians and Belarusians posted from Poland or Lithuania.
[30] Arjan Heyma, Henri Bussink, Tobias Vervliet, (2022), *Posted workers to the Netherlands – Facts and figures*, SEO for POSTING.STAT

via temporary work agencies and other intermediaries[31] in industry,[32] agriculture,[33] transportation and warehousing (distribution), construction, wholesale and retail trade. The industries suffering most from labour shortages are construction, healthcare, childcare, military, education, ict, leisure and hospitality.

b. In the Netherlands there is nowadays a broad support for a level playing field (fair intra-EU labour mobility) instead of a free playing field. For instance, when it held presidency of the Council of the EU in the first half of 2016, the Netherlands has strongly pushed for a revision of the posting of workers directive according to the principle of 'equal pay for equal work in the same place'.

c. The mobility of "essential workers in critical occupations" is an important issue in relation to personnel shortage, especially during and in the aftermath of the pandemic. However, this is not (often) linked to a rethinking of the EU freedom of movement of workers.

Question 4

In the Netherlands, *brain drain* is not considered an issue as there is no significant outflow of workers to other Member States.

Question 5

National (case)law on posting of workers

a.

The Directive 2018/957 (as well as the other Posting of Workers Directives 96/71 and 2014/67) are transposed into Dutch law in the Terms of Employment Posted Workers in the European Union Act (hereinafter: "*WagwEU*"), effective since 30 July 2020.[34] The purpose of the *WagwEU* is – in short – to avoid social dumping and to deal with sham employment and to implement the Posting of Workers Directives. Concerning the 'hard core' of Dutch labour standards, the *WagwEU* makes a couple of provisions in Book 7 (on employment contracts) of the Civil Code (*BW*) applicable[35] to posted workers in the Netherlands, together with 'public labour law', such as the Minimum Wages Act (*WML*).[36] Next to that, in sectors[37] where a universally binding collective labour agreement (CLA) is applicable, posted workers are also entitled to provisions from such extended CLA's, as far as these are related to the hard core.[38] Regarding the principle of equal pay for equal work as manifested in the revised Article 3 of the Directive, it is codified in the law that the concept of 'remuneration' includes at least the following components:

-the applicable periodic wage for the scale

-the applicable reduction in working hours per week/month/year/period

-bonuses for overtime, shifted and irregular working hours, including public holiday bonus and shift work bonus

-interim wage increases

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[31] Bianca Szytniewskia and Marleen van der Haar, 'Mobility power in the migration industry: Polish workers' trajectories in the Netherlands', (2022): Mobility power in the migration industry: Polish workers' trajectories in the Netherlands', *Journal of Ethnic and Migration Studies*.

[32] Including the food processing industry, such as meat-packing.

[33] Much unskilled work in fields, greenhouses, such as collecting strawberries, vegetables, fruits or packing flowers.

[34] Government Gazette 2020, 250.

[35] If more favourable for the posted worker concerned (in comparison to his contractual terms and conditions of employment).

[36] The *WML* stipulates a flat minimum wage rate. Lower rates of minimum wage are applicable for young workers (aged 15 to 20 years).

[37] Apart from the merchant shipping sector.

[38] Or the 'extended' hard core, for workers posted longer than 12 or (upon notification) 18 months.

-reimbursement of expenses: allowances for, or reimbursement of costs, necessary for carrying out the job, including travel, meal and accommodation costs for workers who for the purpose of work are away from home and not at their usual place of work in the Netherlands

-increments

-end-of-year bonuses

-additional allowances related to holidays.

Not included in the concept of remuneration are: contributions to supplementary occupational pension schemes, occupational social security benefits, and allowances paid out as reimbursement of costs actually incurred in relation to the posting, such as travel, meal and accommodation costs.

Notably, the (extended) hard core of Dutch CLA provisions does not have to be applied if the period of extension is expired until a renewal of the CLA. In practice, such periods without extension occur regularly. After the renewal of an expired CLA it might take some time before the provisions of the new CLA are extended.

Since the beginning of this century, the increasing presence of Eastern European workers on the Dutch labour market, most notably through reliance on temporary employment agencies and employer-arranged schemes such as posting, led to an increase of exploitative or abusive employment relationships. As numerous research studies have confirmed,[39] this is most problematic in sectors such as road transport, the construction industry, agriculture, horticulture, fish and meat processing industries, hospitality business and the temporary employment agencies sector, due to a high demand for cheap labour. Next to that, unsafe and illegal housing situations, widely exposed in the press, became a growing problem for municipalities with a lot of (posted or migrant) temp agency workers.

b.

Since the first case in 2012 was brought before the court in Groningen against a Polish subcontractor in the building sector, there have been a modest but increasing number of court cases concerning workers posted in the Netherlands.[40] Many cases concerned the road transport sector, including two cases that eventually made it to the CJEU.[41] Some Dutch court cases concern (alleged) posting by temporary employment agencies, such as the high profile case regarding the notorious Atlanco Rimec Group. In this case, Dutch courts ruled that the workers were not genuinely posted, as under their contracts, their habitual country of work was the Netherlands. Consequently, all Dutch law was deemed applicable pursuant to Art. 8(2) Rome I.[42]

Question 6
Freedom of establishment, the right to conduct a business (Art. 16 CFR) and the right to strike

A. The right to conduct a business has been invoked to challenge different kinds of national measures, from an obligation to publish the annual accounts in a penal law procedure to a ban to use fireworks during new years' eve in a summary procedure.[43] In the area of labour law the freedom of establishment and the right to conduct a business have been used by the low cost airline Ryanair to (collectively) dismiss pilots after its decision to close the base in Eindhoven.

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[39] See e.g. K. McGauran e.a. (June 2016), *Profiting from dependency. Working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies*, commissioned by SOMO/Fair work.

[40] See for an overview: Z. Even (2020), 'Posting of workers before Dutch courts' , in: Magdalena Bernaciak, Zane Rasnača, *Posting of workers before national courts*, Brussels: Etui 2020, p. 163-179.

[41] CJEU, 1 December 2020, Case C-815/18 (FNV v VanDenBosch); CJEU 16 July 2020, C-610/18 (AFMB and Others v SVB).

[42] ECLI:NL:RBMNE:2015:5393 and ECLI:NL:GHARL:2018:1942.

[43] ECLI:NL:GHARL:2017:11487; ECLI:NL:RBROT:2020:10079.

Ryanair requested the district court in Oost-Brabant to annul the decision of the *UWV*, the competent administrative agency that provides employee insurance schemes.[44] The court left more freedom to the company than the *UWV* to decide to close the base. It refused to ask preliminary questions to the CJEU, demanded by Ryanair, because the court deems the Dutch dismissals rules in the *Ontslagregeling* sufficiently clear and specific to not be against the freedom to conduct a business and the freedom of establishment.

B. The protection of the right to strike has been guaranteed by the Dutch Supreme Court in 1986 on the basis of Article 6(4) of the European Social Charter (ESC). Recently case law of the Dutch Supreme Court, has strengthened the right to strike. It is not EU law, but the views of the European Committee of Social Rights (ECSR) that have been influential in a recent change of jurisprudence. The ECSR considered the Dutch law concerning the right to strike to be not in conformity with Article 6(4) ESC. The Supreme Court in the cases of *Amsta* and *Enerco* changed its jurisprudence accordingly.[45] There is since this new case law no room anymore for the so-called *ultimum remedium* test in deciding whether a strike is legal or not. The ECSR argued that it should not be up to a judge to decide whether a strike is premature or not.[46] This would affect the very substance of the right to strike. The Dutch Supreme Court treated the views of the ECSR as very authoritative. A strike that is within the scope of Article 6(4) ESC is now presumed to be legal. Limitations to this right will have to be dealt with under Article G ESC.

Question 7

Implementation of the social acquis

A *Anti-discrimination law*

In general, the EU acquis in the domain of anti-discrimination law, is implemented correctly in Dutch law, including the notion of reasonable accommodation. Since people with a disability often have difficulty finding a job, the Participation and Quota Act of 2015 encourages employers to hire people with disabilities with subsidies and other support options. According to the quota agreement, employers in the market sector must supply 100,000 jobs for work-disabled people by 2026.[47]

Dutch practice is in conformity with recent EU case-law regarding religious discrimination. The Minister of Justice referred to said case-law in a draft lifestyle-neutrality-code for public servants with special investigation tasks (*buitengewoon opsporingsambtenaren; boa's*) when in contact with the public.[48] A similar guideline for the police was updated in 2021, after the Netherlands Institute for Human Rights (*CRM*) ruled that the National Police cannot simply prohibit employees from wearing a headscarf in combination with their uniform when their official duties require only limited interaction with the public.[49]

Despite the persistent nature of the gender pay gap in the Netherlands, the *CRM* receives relatively few complaints regarding alleged wage discrimination. The Institute has expressed its concerns about failing enforcement of equal pay legislation in practice.[50] Currently, a Bill is pending in Parliament which would make it mandatory for enterprises with 250 or more employees to acquire a certificate of conformity with equal pay for equal work. The Bill is rather similar to the proposal for an EU Directive on pay transparency.[51]

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[44] ECLI:NL:RBOBR:2019:5646.
[45] ECLI:NL:HR:2014:3077 (*Enerco*); ECLI:NL:HR:2015:1687 (*Amsta*).
[46] Annual Conclusions ECSR 2014.
[47] https://business.gov.nl/regulation/participation-act/
[48] *Parliamentary Papers II*, 2021/22, 29628, nr. 1099
[49] https://oordelen.mensenrechten.nl/oordeel/2017-135
[50] The Netherlands is also in breach with Articles 4§3 and 20.c of the ESC. See ECSR, 6 December 2019, UWE v. the Netherlands, Complaint No. 134/2016. (http://hudoc.esc.coe.int/eng?i=cc-134-2016-dmerits-en).
[51] COM/2021/93.

Working Time Directive

B. The Working Time Directive has been implemented in the Dutch Working Time Act (*Arbeidstijdenwet;Artw*). The *Artw* regulates (maximum) working hours and (minimum) rest periods. The right to paid annual leave is laid down in the Civil Code (*BW*). The *Artw* covers employees and civil servants (Article 2), but not the self-employed. The *Artw* can therefore only apply to platform workers, if they are deemed employees.

In general, the Directive has been correctly implemented into Dutch legislation. A problem might be the enforcement of these rules, partly due to limited capacity of the Netherlands Labour Authority (NLA). Moreover, the right to paid leave is not a matter for the NLA, so individual employees or trade unions must enforce this. Also, the obligation for 'multiple jobholders', which often might include platform workers, to report their accrued working times to all their employers, is difficult to enforce.[52]

Another issue might be the scope of the exception to certain provisions of the *Artw* , laid down in Article 2:1:1 section 1a Dutch Working Time Decree (*Arbeidstijdenbesluit*). Article 17 of the Directive allows derogations when the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves. Said provision of the Dutch Working Time Decree defines such employees as employees earning at least three times the statutory minimum wage. It is doubtful whether this quantitative translation of Article 17 in Dutch law is in conformity with the Directive. Recently, the Amsterdam Court of Appeal voiced doubts on this issue.[53] It could be argued that the approach taken in the Dutch Working Time Decree is too simplistic: a high wage does not always imply autonomous determination of working time by employees.

In conformity with the CJEU case law, the *Artw* makes at distinction between working time and rest time. However, in practice, it is rather difficult for employers to distinguish between employees who are 'on call' (but free) and employees who are 'available' on short notice (but strictly speaking do not work). Notably, while the Directive defines working time and rest time as mutually exclusive, the *Artw* contains some limitations for putting employees 'on call', even though that time cannot be considered to be working time in the sense of the Directive.

Another current issue is forfeiture of paid annual leave and the applicability of the (statute of) limitations. The right to paid leave expires if it is not taken within six months after the year in which it was accrued. An exception to this applies if the employee was reasonably unable to take the leave. Moreover, pursuant to Article 7:642 Civil Code (*BW*) this right expires after five years, under the general rules on limitation. The Court of Appeal of The Hague held that an employer must inform an employee about his right to paid leave and encourage him to take it. In addition, the employer must prove that the employee was able to do so. Only then does the right to vacation expire after six months.[54] Also, the Court infers from the case-law of the CJEU that the five-year limitation period is not applicable, as the limitation period cannot be reconciled with the principle laid down in Article 7 of the Directive (and Article 31(2) CFR), according to which an acquired right to paid annual leave at the end of the reference period and/or from a national the right established transfer period cannot lapse if the employee has not been able to take his leave.[55]

Platform work

C. Platform work is not (yet) regulated in the Netherlands. While initially there was no intention to legislate, with a view to the innovation that these new business models can bring,[56] the current Dutch government has expressed a desire to clarify and, where necessary, improve the position of platform workers.[57] The Dutch government supports the ambitions of the proposed EU directive to improve the

[52] Article 15(6) Artw.
[53] ECLI:NL:GHAMS:2021:3519.
[54] ECLI:NL:GHDHA:2021:2386.
[55] CJEU C-214/16 (*King*), para. 56. Cf. CJEU C-684/16 (*Max-Planck*), para. 54.
[56] *Parliamentary Papers II* 2017/18, 29544 en 33009, nr. 837.
[57] *Parliamentary Papers II* 2021/22, 35230, nr. 4; 2021/22 25883, nr. 431; 2020/21, 29544, nr. 1028, p. 15-17.

working conditions in platform work.[58] So far, the social partners do not play a major role in this development, as platforms rather lobby the government,[59] while trade unions follow a litigation strategy against wrongful classification of platform workers as self-employed. Most cases have been initiated by FNV, the largest trade union in the Netherlands.

Until now, most rulings concern *Deliveroo*. After two contradictory rulings by the lowest court in 2018,[60] the Court of Appeal confirmed in 2021 that Deliveroo's meal delivery riders and drivers work on the basis of an employment contract, rather than being self-employed.[61] That the wages were set unilaterally by Deliveroo and that Deliveroo has far-reaching monitoring possibilities, mainly through continuously tracking the driver's GPS location, was deemed indicative of an employee status. As detailed and individualized instructions are not required for the standardized, low-skilled nature of the work and the riders could not in a truly entrepreneurial way make use of the substitution/subcontracting clause in their contracts, these elements were not deemed counter-indicative of an employee status. Deliveroo appealed and the case is now pending before the Dutch Supreme Court. According to the Advocate-General, the court of appeal's decision should be upheld. The Supreme Court's decision is expected in late December 2022.[62] Meanwhile, the Court of Appeal has ruled in two judgments that Deliveroo is covered by the collective labour agreement (CLA) for the transport sector and is considered a participant in the professional transport pension fund. Among other things, these rulings mean that Deliveroo must apply the CLA retroactively from 2015 to its delivery riders and pay pension contributions.[63] Deliveroo has announced plans to exit the Dutch market before the end of 2022.[64]

There has been one ruling regarding *Uber* cabdrivers in the Netherlands, classifying these workers as employees and deeming relevant CLAs applicable.[65] However, the Court of Appeal suspended the enforcement of this ruling during the pending appeal.[66] Thus, Uber does not have to comply with the verdict until a final judgment is rendered in the appeal proceedings.
In a judgment concerning *Helpling*, cleaners were deemed temporary agency workers employed by the platform.[67] This judgment was based on a broad interpretation of the term 'user undertaking', as including also private households. In an investigation report on Temper, the Netherlands Labour Authority concluded that the platform is a temporary work agency, instead of a 'freelancers platform'.[68] In Summer 2022, trade unions FNV and CNV were allowed by the court to continue their proceedings against Temper, demanding that the platform (retroactively) applies the CLA for the Temporary Work Agency sector. The FreeFlexers Foundation set up and funded by Temper has been deemed by the court as a non-independent and therefore not-representative (yellow) union.[69]

As observed by Hiessl,[70] there has been a significant degree of cross-fertilisation between courts in EU Member States. Dutch Court rulings have referred to relevant CJEU judgments[71]

The relationship between EU law and international labour law

D. International labour law and the Conventions of the International Labour Organisation (ILO) in general do not have direct effect in the Dutch legal order with exception of a couple of conventions

[58] COM(2021)762; *Parliamentary Papers* II 2021/22, 21501-31, nr. 652.
[59] DutchNews.nl, 'Online platforms want 'social accord' for workers but without the unions', 2021 (online).
[60] ECLI:NL:RBAMS:2018:5183; ECLI:NL:RBAMS:2019:198.
[61] ECLI:NL:GHAMS:2021:392.
[62] ECLI:NL:PHR:2022:578.
[63] ECLI:NL:GHAMS:2021:3978 and ECLI:NL:GHAMS:2021:3979.
[64] NL-TIMES, 'Deliveroo plans to exit the Dutch market by the end of November after 7 years', 2022 (online).
[65] ECLI:NL:RBAMS:2021:5029.
[66] ECLI:NL:GHAMS:2022:2080.
[67] ECLI:NL:GHAMS:2021:2741.
[68] Netherlands Labour Inspectorate report of February 2021 (Temper).
[69] ECLI:NL:RBAMS:2022:4035 and ECLI:NL:RBAMS:2022:4423.
[70] C. Hießl (2022), 'The classification of platform workers in case law: A cross-European comparative analysis', *CLPJ* vol. 42(2), p. 8.
[71] CJEU C-692/19 (*Yodel*); CJEU C-413/13 (*FNV Kunsten*).

regarding social security law, that contain detailed and unconditional provisions.[72] ILO conventions are, however, mentioned regularly in national court judgements. A conflict between EU law and an ILO convention is the issue in a summary judgement of the North-Holland court in a conflict between (again) Ryanair and the trade union of pilots (*VNV*). VNV asked for admission of VNV-members of other airlines to the negotiations on labour standards with Ryanair. Ryanair refused because the company was afraid that confidential information would get in the hands of competing companies. Ryanair used Directive 2016/943/EU (GDPR) and Article 101 TFEU to protest the admission. The district court in North-Holland did not accept the position of Ryanair as fundamental labour rights were at stake.[73]

The ESC is mentioned often in Dutch case law. As explained above, for the right to strike, Article 6(4) ESC has a cardinal importance in Dutch law. This provision is deemed by the Dutch courts to have direct effect. Many other provisions of the ESC do not have direct effect.[74] Sometimes courts do not address the question whether a provision from the ESC has direct effect at all.[75]

Question 8

A new frontier for EU social policy?

A. Apart from views in academia there seems to be, in general, no demand for new regulatory developments in EU social policy. The Dutch government and the Dutch Parliament tend to be critical in relation to demands for more 'social Europe'. In a government document on the future of the social dimension of the EU from May 2019 the government set out its views.[76] Although there was support for the EU Pillar of Social Rights, the Dutch government contended that a future-oriented social policy of the EU should stay within the existing delineation of regulatory competencies between the EU and the member states and of the financial frameworks. Hence, the subsidiarity and proportionality principles are paramount for the Dutch government in the area of EU social policy.
The dominant approach of Dutch governments has been to treat EU social policy (only) as a by-effect of the internal market. The internal market is deemed of key importance for the Netherlands but it is acknowledged that free movement of persons has undoubtedly an influence on the social structure of both home and host member states. The main preference of the Dutch government is for a deeper and fairer internal market. Unfair competition on labour costs and 'social benefit tourism' may endanger the coherence and solidarity within the EU. Therefore, the Dutch government supported both the revision of the Posting of Workers Directive and the launch of the EU Platform on Undeclared Work, as well as more recently, the European Labour Authority (ELA). The ELA could play an important role in the implementation and enforcement of EU rules.

Role of EU law with respect to self-employment

B. EU law is considered to apply only to workers. In particular, the cases *FNV Kunsten,*[77] dealing with the scope of the *Albany*-exception and *Ruhrlandklinik* concerning the scope of the Temporary Agency Directive 2008/104, have impacted Dutch law.[78] In both cases, the formal legal characterisation of the employment relationship under national law was not deemed decisive. This implies that persons who do not have the status of worker under national law on the ground that they did not conclude a contract of employment, but who are substantially not in a different position, can or should in some circumstances be entitled to the same protection as employees.

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[72] E.g. ILO C-103 on mothership benefits, see a court decision in this respect, ECLI:NL:CRVB:1996:AL0666.
[73] ECLI:NL:RBNHO:2018:7350. This court also referred in its summary decision to the *Albany* decision of the CJEU.
[74] For Article 1 ESC, the right to work, see ECLI:NL:RBDHA:2021:7433 concerning persons from the Bahama's who referred to this provision.
[75] For example a case on Articles 13 (the right to social and medical assistance for persons without sufficient means) and 14 ESC (the right to benefit from social welfare services), ECLI:NL:CRVB:2018:512.
[76] *Parliamentary Papers II* 2018/19, 21501-31, nr. 527. The advice of the Dutch Social and Economic Council (SER) titled 'Prioriteiten voor een fair Europa' (Priorities for a fair Europe) is also of importance.
[77] CJEU C-413/13 (*FNV Kunsten*).
[78] CJEU C-216/15 (*Ruhrlandklinik*).

In reaction to societal worries about a growing group of vulnerable (bogus) self-employed workers the Dutch Competition Authority (*Autoriteit Consument en Markt: ACM*) issued in 2020 practical rules of thumb on how to apply *FNV Kunsten:* if a self-employed worker *de facto* works side-by-side with one or more employees, and is indistinguishable from those employees in day-to-day operations, s/he is not considered to be an undertaking within the meaning of the Dutch Competition Act and can therefore be covered by a collective labour agreement (CLA).[79]
The Dutch Supreme Court has applied the *Ruhrlandklinik* judgment in rulings of 2017 and 2022.[80] A temporary employment agency who deploys a worker to a user undertaking is banned by Dutch law from hindering that worker to enter directly into the service of that user undertaking.[81] In such a situation, a non-compete clause in the contract between the agency and the worker can therefore not be enforced. The Supreme Court held that the non-compete clause cannot be enforced either by an agency in a contract with a self-employed, in situations where it is established that this person is not materially different in its relationship with the temporary employment agency from an employee of the agency.

Question 9

EMU impact

The national social law and policy so far is not directly affected by the European Semester and the Country Specific Recommendations. Partly, this is due to the fact that the Netherlands government has been able to comply with the criteria of the Stability and Growth Pact related to the EMU.

In recent years, the following Country specific recommendations were given in the field of social policy:

2019:

- Reducing the debt bias for households and the distortions in the housing market – limited progress
- Ensure that the second pillar of the pension system is more transparent, inter-generationally fairer and more resilient to shocks – some progress
- Implement policies to increase household disposable incomes - some progress
- Reduce incentives for the solo self-employed, while promoting adequate social protection for solo self-employed – limited progress

2020:

- Take all necessary measures to effectively address the pandemic – not relevant anymore
- Strengthen the resilience of the health system – some progress
- Mitigate the employment and social impact of the crisis – substantial progress
- Promote adequate social protection for the self-employed – limited progress

2021:

- No recommendations in the social field

In 2022 the Country Report mentions as key challenges in the social area:

- Limiting tax incentives that favour debt-financed home ownership
- Addressing shortcomings in the second pillar pension system by implementing the 2019 and 2020 pension agreement
- Reducing labour market segmentation and promoting adequate social protection for the self-employed

[79] ACM Guidelines 2020, para 29.
[80] ECLI:NL:HR:2017:689.
[81] Article 9a Wet Allocatie Arbeidskrachten door Intermediairs (Waadi).

- Addressing labour shortages to support the implementation of investments, notably by activating untapped labour and up- and reskilling measures

In the social field the recommendations did not always have a successful follow-up yet, though on several aspects reports are produced or legislation is proposed that may lead to measures, such as the Borstlap-report and a report of the Social-Economic Council on the labour market segmentation, flexibility in labour relations and life-long learning, various reports on the position of the self-employed, the proposed bill in order to implement the new second pillar pension system and a recent letter of the Minister of Social Affairs and Employment on labour market shortages.

The recommendations tend to emphasise structural problems in the Netherlands' economy that are also recognised by national economists and are debated in politics. They contribute to the awareness of urgency in these matters. However, the practical influence of the recommendations is rather limited, as the national discussion seems to be most dominant and government as well as Members of Parliament do not often refer to the recommendations.

Question 10

Limited impact of social rights in the EU Charter in Dutch case law and administrative practices.

Only 78 cases referring to articles from Chapter IV of the Charter have been found in Dutch case law. An analysis of these judgments shows, firstly, that in many cases the courts solely determine that national legislation does not implement Union law and that therefore the Charter is not applicable by virtue of Article 51(1) thereof.[82] Secondly, in none of the examined cases the courts rely on Article 52(2) of the Charter to limit or hamper the scope of social rights under the Charter. However, in some cases the courts seem to easily combine a social right under the Charter and (specific articles of) EU secondary law.[83] In that regard, the Charter article does not appear to have an autonomous content anymore.[84] Thirdly, regarding Article 52(5) of the Charter, there is no indication that social rights are considered (only) as principles. Lastly, it is remarkable that in quite some cases the courts do not mention the Charter while one or both of the parties explicitly invoke it.

Regarding specific articles of the Charter there are some interesting judgements. By a district court it was ruled that Article 28 of the Charter does not have direct effect.[85] According to this court judgment said article merely entails a normative instruction, to which the Netherlands gave substance by means of legislation. Article 31 of the Charter also produced interesting case law in the Netherlands. In horizontal situations the courts have considered that employees can rely on Article 31(2) of the Charter and that this provision entails an obligation for the employer.[86] In these cases, the courts refer to the *Max Planck* case.[87]

Two judgements about Article 34 of the Charter are also interesting. In one case a district court declares that a provision of the regulation on benefits for asylum seekers and other categories of foreigners 2005 – which leaves the claimant out of all of the arrangements – is contrary to Article 34(2) of the Charter.[88] In another case, the highest administrative court in social security law matters rules that the social right in Article 34(2) of the Charter is a part of the general principles in Union law which means that certain regulations are required to be interpreted in conformity with this article.[89]

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[82] See e.g. ECLI:NL:CRVB:2021:1840, para. 4.3.
[83] For example, this is done in a judgment of the an appeals court where Article 31(2) Charter is cited in conjunction with Article 7 Directive 2003/88.
[84] ECLI:NL:GHDHA:2021:2386, para 5.19.
[85] ECLI:NL:RBAMS:2019:7456, para. 25. This case death with a horizontal relationship.
[86] ECLI:NL:RBGEL:2020:1361; ECLI:NL:RBNHO:2021:4427; ECLI:NL:GHARL:2021:8899;:NL:RBDHA:2022:2997.
[87] CJEU C-684/16 (*Max-Planck/Shimizu*).
[88] ECLI:NL:RBDHA:2018:7055, para. 4.11.
[89] ECLI:NL:CRVB:2018:2878, para. 7.1.8.

Furthermore, there are no concrete indications that the Charter's social rights would be considered as less important than other fundamental rights. However, literature examining the Charter in its entirety, shows that the articles in the Solidarity Chapter are not invoked as often as the articles in the Chapters on for example Justice and Freedom.

Finally, outside the scope of the Chapter IV, there are articles closely related to social rights as well. For example, Article 17 of the Charter (the right to property) is often cited in the context of pension law and is considered to offer protection against curtailment of pension entitlements.

Question 11

Protection of social rights in the context of international trade and global supply chains

This socially highly relevant topic is being addressed in various ways in the Netherlands. Rules on public procurement are sometimes used to foster social rights, particularly regarding inclusion of persons with a distance to the labour market. Furthermore, agreements promoting international responsible business conduct (so called IMVO covenants) have been concluded for various sectors and many companies have a code of conduct, while multinational companies based in the Netherlands subscribe to the OECD Guidelines. Mandatory due diligence legislation has been adopted, but is not yet enacted, as the Dutch government decided to wait on adoption of a legislation instrument at EU-level.

Question 12

The IMVO covenants bring together various sustainability spearheads, including climate. The Climate Act has as its main goal to achieve 95% greenhouse gas reduction in the Netherlands by 2050 compared to 1990. On June 24, 2015, Urgenda, along with 900 co-plaintiffs, won a Climate Case against the Dutch State. The court ordered the State to reduce greenhouse gas emissions by 25% in 2020 compared to 1990. That verdict was upheld by the highest Dutch court on December 20, 2019.

Question 13

Citizenship/civic education in the Dutch education system

Citizenship/civic education in the Dutch education system primarily focusses on instilling knowledge of political institutions, stimulating social competences and inspiring civic morality, preparing pupils and students for active and adequate participation as citizens and workers within their local and national society. In the past twenty years Dutch education policy has put increasing efforts in formulating citizenship-oriented *general* tasks and *specific* goals that educational institutions should pursue. Since 2006, the Acts on primary and secondary education contain a general mission statement concerning civic education. In 2021, these Acts have been amended to specify more clearly that schools shall promote active citizenship and social cohesion, focusing on:

1. Instilling respect for and knowledge of the basic values of the democratic constitutional state as enshrined in the Constitution – democracy, fundamental rights, separation of powers - and acting in accordance with the spirit of these basic values at school;
2. Developing the social and societal competencies that enable the pupil to be part of and contribute to the pluralistic, democratic Dutch society;
3. Teaching knowledge of and respect for differences in (e.g.) religion, gender, sexual orientation;
4. Ensuring a school culture that is in accordance with the spirit of these values.

However, there is not yet a separate subject in the national curriculum specifically devoted to citizenship/civic education. Nevertheless, there are citizenship-related learning goals - defined in subordinate legislation - to be realized in various subjects like history, social studies, philosophy etc., such as learning about the main institutions and the status of citizens within the Dutch and the EU

political system; endorsing generally accepted values; understanding the basics of various belief-systems; and developing respect for diversity in society. Likewise, legislation on vocational education does not provide for civic education through a specific subject. This is true as well for higher education. Nevertheless, the constitutional norms and principles regulating the Dutch state and guaranteeing the rights of citizens are essential in legal studies, political science and philosophy. Furthermore, European citizenship also is a basic element in these and other studies. However, European citizenship is not primarily taught as a normative concept, but as a legal-technical, theoretic or political construct.

Hence, there have been various legislative initiatives stressing the relevance of citizenship education. At the same time, there is room for improvements. In part there is not yet an independent separate subject, citizenship education being dependent on being integrated in other subjects. In part the wordings of the learning goals are still rather vague, and to a certain extent lack in focus. The legislator and the education field are in the process of further operationalization of the goals of citizenship education.

Feasibility of implementation of Union values in mainstream education

The introduction to Question 13 contains rather broad reflections concerning the implementation within mainstream education of the Union values in Article 2 TEU. These reflections seem to assume that these values have an independent source in the EU legal order. It should not be overlooked, however, that these EU values also can be found in the constitutional order of the member states, and that these values primarily are derived from and inspired by the national constitutional traditions, not vice versa. Furthermore, numerous member states including the Netherlands are increasing their efforts to educate their pupils and students – through citizenship education - about their national political system and to stimulate the communication skills and normative attitudes necessary to maintain, develop and strengthen that system. That is already a very complicated and difficult assignment, albeit essential in the light of current trends towards political and social fragmentation. To extend the national mission – possibly to be prescribed into national school systems - to provide for a normative European educational foundation serving the development of supranational cohesion and solidarity might be asking too much, in light of the already great difficulties in realizing cohesion and solidarity at the local and national level. Moreover, it could intrude too much into the heart of state autonomy in this field, contrary to Article 4(2), Articles 165 and 166 TFEU.

Question 14

Developments regarding fundamental social rights related to democracy and the rule of law

Recently, a large scandal occurred in the Netherlands with the recovery of child care allowances, which led to the fall of the government in 2020 and was investigated by the Dutch Parliament and the Venice Commission of the Council of Europe.[90] It revolved around the impact of data driven fraud policies of the Taxation Authorities which are responsible for paying out the child care allowances.

The system is designed in such a way that the allowance was paid with little *ex ante* verification as an advance payment upon an application by the parents setting out an estimate of the childcare costs for the following year. The relevant legislation was interpreted by the Tax and Customs Administration as the so-called 'all or nothing approach', so that even if a parent had acted in good faith but neither the parent or the childminder could provide proof of the required administrative details, the parent had to repay the full amount for the whole year. The 'all or nothing approach' contributed to high recoveries of childcare allowances for large number of parents. There was no mitigating policy allowing for any proportionality test or a hardship clause. Algorithms were *de facto* biased against citizens of foreign ethnical origin. The consequences for victimized parents have been terrible. They were hunted down without exception or recourse to critical judicial scrutiny. Many parents appealed to administrative courts and some of them won their cases at first instance. In these cases, Tax and Customs

[90] European Commission for Democracy through Law, 'Netherlands - Opinion on the Legal Protection of Citizens', Opinion No. 1031/2021, 18 October 2021.

Administration appealed to the highest administrative court, the Administrative Jurisdiction Division of the Council of State, which however confirmed the 'all or nothing approach'.

The Venice Committee concluded that the shortcomings in individual rights protection uncovered in the Childcare Allowance Case were indeed serious and systemic and involved all branches of government. Yet, the committee also observed that eventually the rule of law mechanisms in the Netherlands did work. Indeed, the reports of the Ombudsman, the Parliamentary inquiry committee into the scandal, and the legislative amendments have shown the reaction of the different mechanisms in the Dutch system. In the meantime, a lot of soul searching is going on as to how to improve the system of checks and balances. Amongst others, this includes calls for an improved system of judicial protection of fundamental rights as contained in the Dutch constitution, including fundamental social rights.

Question 15

See answer 8a.