

FIDE XXIX Congress
The Hague 2020

NATIONAL COURTS AND THE ENFORCEMENT OF EU LAW: THE PIVOTAL ROLE OF NATIONAL COURTS IN THE EU LEGAL ORDER

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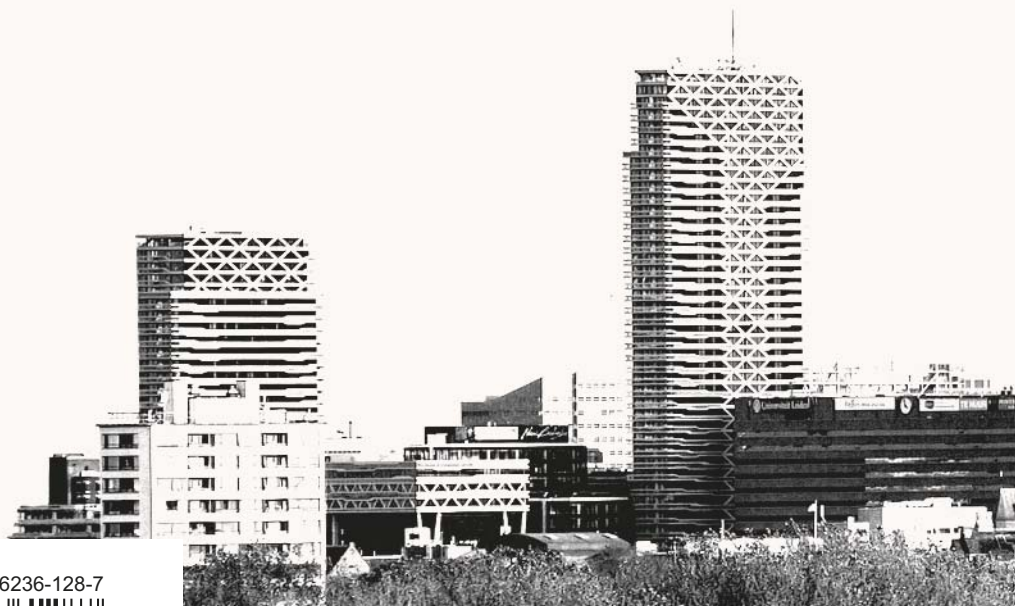
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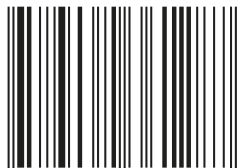
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FIDE XXIX Congress
The Hague 2020

National Courts and the Enforcement of EU Law

**NATIONAL COURTS AND THE
ENFORCEMENT OF EU LAW**

THE PIVOTAL ROLE OF NATIONAL COURTS IN THE EU LEGAL ORDER

**LES JURIDICTIONS NATIONALES ET
L'APPLICATION DU DROIT DE L'UNION**

LE ROLE CENTRAL DES JURIDICTIONS NATIONALES DANS L'ORDRE
JURIDIQUE DE L'UNION

**NATIONALE GERICHTE UND DIE
DURCHSETZUNG DES EUROPARECHTS**

DIE ENTSCHIEDENDE ROLLE NATIONALER GERICHTE IN DER
RECHTSORDNUNG DER EUROPÄISCHEN UNION

The XXIX Congress in The Hague, 2020

Congress Publications Vol. 1

Editors: Marleen R. Botman and Jurian Langer

General Rapporteur: Michael Dougan

Institutional Rapporteur: Michał Bobek

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THE NETHERLANDS

*Hanneke van Eijken and Maartje Verhoeven**

QUESTION 1

Because of the limited size permitted, this section only points out the conclusions of the analysis of a number of cases concerning the horizontal effect of general principles and Charter of Fundamental Rights of the EU (hereafter “Charter”) provisions in Dutch caselaw.¹ Note that the cases analysed concern mainly substantive law cases; cases on procedural law are not the main focus of the research. The application of general principles and Charter provisions – especially the prohibition of age discrimination – in civil proceedings between private parties has in some cases resulted in the disapplication of national legislation – be it seldomly – and in the ineffectiveness of clauses in collective agreements.

1.1 Terminology

In civil law literature the term ‘direct horizontal effect’ is used for the situation in which a rule of Union law *as such directly* confers rights and imposes obligations on private parties and applies to assess the lawfulness of conduct of a private party or the validity of a judicial act.² In general, Dutch courts and Advocates General reject the direct horizontal effect of fundamental rights, including Charter provisions.³

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1 A more comprehensive analysis of (Dutch and foreign) cases and the legal remedies determined in these cases can be found in I.V. Aronstein, Remedies for infringements of EU law in legal relationships between private parties (dissertation Radboud University) Deventer, Wolters Kluwer, 2019.

2 Such as articles 45, 56, 101, 102, and 157 TFEU. Cf. A.S. Hartkamp, European law and national private law. Effect of EU law and European human rights law on legal relationships between individuals, 2nd ed., Cambridge/Antwerp: Intersentia 2016, no. 12. M. Fornasier, ‘The impact of EU fundamental rights on private relationships: direct or indirect effect?’, European Review of Private Law, Vol. 23, No. 1, 2015, pp. 29-46. And possibly a number of Charter provisions too: cf. A.S. Hartkamp, ‘Rechtstreekse doorwerking van het EU Handvest van de grondrechten in privaatrechtelijke rechtsverhoudingen’, Ars Aequi, Vol. 68, No. 3, 2019, pp. 218-224.

3 E.g. District Court Rotterdam, 12 April 2017, ECLI:NL:RBROT:2017:2771, para. 4.13. Opinion Advocate-General De Bock, 23 June 2017, ECLI:NL:PHR:2017:553, paras. 4.13-4.14. Supreme Court of the Netherlands,

In EU law-oriented journals the compatibility review of national legislation with Union law – i.e. the technique applied in, for example, *Mangold*,⁴ *Küçükdeveci*,⁵ and *Dansk Industri*⁶ – is often referred to as horizontal *direct* effect.⁷ In civil law literature, however, the technique is referred to as *indirect* horizontal effect,⁸ because the effect of the general principle or Charter provision is achieved only *via* the compatibility review of national legislative provisions and not to scrutinise the legal relationship between private parties.⁹

1.2 Review of national legislation

Dutch courts – both lower courts, appeal courts and the Supreme Court – have assessed the substantive compatibility of Dutch legislative provisions against general principles of EU law and Charter provisions, in particular the principle prohibiting age discrimination.¹⁰ Generally, in the cases analysed, courts apply a proportionality review: they assess whether the Dutch provision is objectively justified by a legitimate aim, and whether the provision is appropriate and necessary to achieve the aim pursued.¹¹ It has not occurred often that in civil proceedings national legislation concerning *substantive law* was deemed incompatible with Union law. Yet, in a recent case, an appeal court deemed a Dutch legislative provision in *procedural law* incompatible with article 47 of the Charter.¹²

1 December 2017, ECLI:NL:HR:2017:3053, para. 5.1.1. Opinion Advocate-General Timmerman, 27 October 2017, ECLI:NL:PHR:2017:1221, para. 3.38. And see the remarkable case (on fundamental freedoms) of the Court of Appeal Arnhem-Leeuwarden, 2 June 2015, ECLI:NL:GHARL:2015:3913, paras. 4.11-4.13.

4 CJEU 22 November 2005, C-144/04, *Werner Mangold v Rüdiger Helm (Mangold)*, ECLI:EU:C:2005:709.

5 CJEU 19 January 2010, C-555/07, *Seda Küçükdeveci v Swedex GmbH and Co. KG (Küçükdeveci)*, ECLI:EU:C:2010:21.

6 CJEU 19 April 2016, C-441/14, *Dansk Industri*, ECLI:EU:C:2016:278.

7 Cf. Opinion Advocate-General Tanchev in C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V (Egenberger)*, ECLI:EU:C:2017:851, para. 44. R. Schütze, 'Direct effects and indirect effects of Union law', in R. Schütze and T. Tridimas, *Oxford Principles of European Union Law*, Oxford: Oxford University Press, 2018, pp. 265-299.

8 E.g. Hartkamp, 2016, no. 21.

9 This observation is in line with the remark made in the questionnaire that in these cases the horizontal effect hinges upon the 'public law question': M. Dougan, *National courts and the enforcement of EU law*, Questionnaire Topic 1 - FIDE XXIX Congress, The Hague, 2020, p. 3.

10 See e.g. District Court Amsterdam, 12 July 2013, ECLI:NL:RBAMS:2013:5344/ECLI:NL:RBAMS:2013:4852, paras. 6-18; District Court Groningen, 21 November 2011, ECLI:NL:RBGRO:2011:BU8666; Central Appeals Tribunal, 26 April 2010, ECLI:NL:CRVB:2010:BM1699; and the Opinion of Advocate-General Niessen of 13 April 2015, ECLI:NL:PHR:2015:521. Supreme Court of the Netherlands, 20 April 2018, ECLI:NL:HR:2018:651, paras. 3.3.1-3.4.

11 Cf. Supreme Court of the Netherlands, 20 April 2018, ECLI:NL:HR:2018:651; Court of Appeal 's-Hertogenbosch, 2 February 2017, ECLI:NL:GHSHE:2017:345, paras. 3.19 and 3.21.

12 Court of Appeal 's-Hertogenbosch, 1 February 2018, ECLI:NL:GHSHE:2018:363.

1.3 *Review of collective agreements*

In a number of cases, Dutch civil courts have reviewed the compatibility of clauses in *collective employment agreements* with Union law, especially – again – the general principle prohibiting age discrimination. Strictly speaking, collective agreements are legal relationships between private parties, because they are drafted by social partners and not by the national legislature. This means that the general principles and provisions of Union law against which a collective agreement is reviewed, in this sense, have direct horizontal effect: as such they impose rights and obligations upon private parties.¹³ Dutch civil courts apply the proportionality test to assess whether a clause in a collective agreement is compatible with Union law. When it is compatible with Union law it remains intact,¹⁴ when it is incompatible it is ineffective (either because it is disapplied, or because it is null and void, or alternatively, annulled – the particular courts were not univocal about this).¹⁵

Apart from the direct scrutiny of collective agreements, we are not aware of (other) examples of cases in which a general principle or a Charter provision was directly applied to conduct or juridical acts of private parties.

QUESTION 2

The Dutch courts have unreservedly accepted the supremacy of EU law. It can therefore be said that the need to avoid or resolve potential conflicts with national legal principles – by incorporating such concerns in fundamental principles of EU law – may be a less urgent matter in the Netherlands. Be that as it may, the following examples do show a degree of balancing of the principle of supremacy of EU law against other (European) fundamental principles.

In a 2014 judgment concerning the retroactive adjustment of a standard flat rate, the Trade and Industry Appeals Tribunal held that this would violate the principle of legitimate expectations, especially as national authorities had a margin of discretion in setting this rate and therefore no clear violation of EU law could be established.¹⁶ However, more

13 Cf. Court of Justice 12 December 1974, Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo (Walrave and Koch)*, ECLI:EU:C:1974:140; CJEU 15 December 1995, C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman (Bosman)*, ECLI:EU:C:1995:463.

14 E.g. Supreme Court of the Netherlands, 13 July 2012, ECLI:NL:HR:2012:BW 3367, paras. 5.6-5.8.

15 E.g. District Court Amsterdam (in interlocutory proceedings), 21 February 2011, ECLI:NL:RBAMS:2011:BP6875 (and ECLI:NL:RBAMS:2011:BU5771), paras. 1.4-1.7, 1.11, 1.12 and 13; District Court Amsterdam, 5 January 2015, ECLI:NL:RBAMS:2015:40, paras. 12 and 13.

16 Trade and Industry Appeals Tribunal, 30 December 2014, ECLI:NL:CBB:2014:489, para 7.1.

recent caselaw shows that the Trade and Industry Appeals Tribunal still upholds the ECJ's strict interpretation of the European principle of legitimate expectations – laid down in the *Agroferm*¹⁷ judgment – where it concerns clear EU law obligations.¹⁸

The Trade and Industry Appeals Tribunal did take a slightly different approach in a case where it concerned a claim for damages (compensation for loss resulting from an administrative act). The case concerned a commercial laboratory which had received an appointment to execute certain official phytosanitary checks, contrary to an EU directive which held that these checks could only be performed by a public entity. The Trade and Industry Appeals Tribunal there held that the Dutch government itself had contributed to the misinterpretation of EU law, which was unforeseeable for the laboratory. Relying on the *national* principle of legitimate expectations, the Court deemed this sufficient ground to award the compensation for loss and also granted a reasonable term for the laboratory to adapt its business model, arguing that this reasonable term was not in violation of the European principle of loyal cooperation.¹⁹

However, it appears from a recent reference for a preliminary ruling by the Trade and Industry Appeals Tribunal that it is not entirely sure to what extent it believes that national principles of law can be invoked to limit EU law as it asked the ECJ whether the national principle of legal certainty could be invoked for this purpose. It will have to be awaited what the Trade and Industry Appeals Tribunal decides in a follow-up judgment before this point is further clarified.²⁰ In another recent judgment, this time delivered by the Supreme Court, it also seemed that the national principle of legal certainty²¹ could be relied upon against a supplementary assessment of value added tax that was due as it turned out that EU law did not confer a right to an exemption from taxes.²² It held in particular that, on account of the principle of legal certainty, tax payers cannot be deprived retroactively of rights that were acquired in compliance with the caselaw of the highest judicial authority, even if it is later found out that this was incompatible with an EU law directive. Interestingly, the Supreme Court held that EU law could not affect this position as the relevant provision of the directive cannot be relied upon against an individual (prohibition of inverse direct effect).

17 CJEU 20 June 2013, C-568/11, *Agroferm A/S v Ministeriet for Fødevarer, Landbrug og Fiskeri (Agroferm)*, ECLI:EU:C:2013:407.

18 See for instance: Trade and Industry Appeals Tribunal, 25 August 2016, ECLI:NL:CBB:2016:266, para. 7.

19 Trade and Industry Appeals Tribunal, 27 June 2008, ECLI:NL:CBB:2008:BD5867, para 5.7.3.

20 Trade and Industry Appeals Tribunal, 18 December 2018, ECLI:NL:CBB:2018:662, para. 26.

21 For this interpretation see also this case note: R. Ortlep, 'Nationale rechtszekerheidsbeginsel in relatie tot de effectuering van het Unierecht. Verbod van omgekeerde verticale werking', AB Rechtspraak Bestuursrecht, Vol. 8, No. 75, 2019, para. 1.

22 Supreme Court of the Netherlands, 7 December 2018, ECLI:NL:HR:2018:2260, AB 2019/75, paras. 2.4.6 and 2.4.7.

In the judgments discussed above, in which priority was actually conferred on a principle of law over an EU obligation, this seemed to concern, on each occasion, a national legal principle. However, the Dutch caselaw also provides examples where priority was conferred upon a general principle of EU law to the detriment of another provision of EU law. In a judgment delivered by the Supreme Court concerning a supplementary assessment of value added tax in response to a suspicion of tax fraud, it was held that, as far as concerns decisions liable to adversely affect an individual's interests, article 48 of the Charter concerning the rights of defence must be upheld.²³ It is clear from the judgment that, under certain conditions stipulated by EU law, this may restrict the effective enforcement of the VAT Directive. A second example is derived from a judgment by the District Court Amsterdam concerning criminal proceedings that were initiated against the defendant for having violated the obligation to notify orders or transactions involving scheduled substances. The court held that the provision constituting the offence did not meet the requirement of *lex certa* – with this message the court appeared to address both the national and EU legislature.²⁴

In our opinion the above examples of Dutch caselaw do not necessarily imply a balancing of supremacy of EU law if the counterweight is provided by principles of *EU law*. It is perhaps more logical to view this as giving priority to fundamental principles of EU law over other sources of EU law, e.g. rights and obligations stipulated in a regulation or directive. Also in respect of the ECJ's judgments mentioned in the clarifications to the questionnaire, it may be asked whether they signify a balancing of supremacy of EU law. Admittedly, there is room for discussion whether the ECJ's judgment in *M.A.S. and M.B.*²⁵ applied the principle of legality under EU law or that it bowed to the Italian principle which applies to limitation periods too as this is considered to be part of substantive law rather than procedural.²⁶ The answer to this question also determines the question whether the supremacy of EU law was qualified or not by that judgment.

23 Supreme Court of the Netherlands, 10 July 2015, ECLI:NL:HR:2015:1809, AB 2015/275, para. 2.4.2 et seq.

24 District Court Amsterdam, 31 October 2008, ECLI:NL:RBAMS:2008:BG4853, para. 5.

25 CJEU 5 December 2017, C-42/17, *Criminal proceedings against M.A.S. and M.B. (M.A.S. and M.B.)*, ECLI:EU:C:2017:936.

26 See S. Haket, 'Rechtseenheid en de tenuitvoerlegging van het Unierecht door de nationale rechter in een geïntegreerde rechtsorde', *Ars Aequi*, No. 3, 2018, pp. 245-253, p. 247.

QUESTION 3

3.1 *Mutual recognition instruments in Dutch criminal law*

The cases on the application of mutual recognition instruments, mostly involve European Arrest Warrants (hereafter “EAW”)²⁷ In such cases the District Court of Amsterdam is the (sole) competent court of first instance. The judgment of the District Court can only be subject to cassation in the interest of the law at the Supreme Court. Therefore, the judgment of the District Court can be executed immediately. Since the entry into force of Framework Decision (hereafter “FD”) 2002/584/JHA, the District Court Amsterdam has been an important actor in clarifying the FD by requesting preliminary rulings; 13 out of the total of 40 preliminary questions were asked by the District Court Amsterdam and led to several important judgments, such as *Poplawski I*,²⁸ *Poplawski II*,²⁹ and *Dworzecki*^{30,31}

In general, the defences with regards to EAW requests can be categorised in article 4 of the Charter (article 3 European Convention on Human Rights (hereafter “ECHR”), article 47 Charter (article 6 ECHR) and procedural defences.

3.1.1 **EAW and article 4 Charter**

According to the District Court Amsterdam, the issuing state is responsible to ensure that the requested person will not be subjected to treatment or punishment which violates article 4 of the Charter. States have the responsibility to prevent that the execution of an EAW would lead to the violation of fundamental rights of the requested person. This is no different in light of the fact that the issuing state is a party to the ECHR or that there are obligations on the basis of EU law to surrender person on the basis of the principle of mutual trust.³²

27 In the period of the 1st of January 2016 until the 11th of June 2019, there are 818 cases on www.rechtspraak.nl that match ‘EAB’.

28 CJEU 29 June 2017, C-579/15, *openbaar ministerie v Daniel Adam Poplawski (Poplawski I)*, ECLI:EU:C:2017:503.

29 CJEU 24 June 2019, C-573/17, *Criminal proceedings against Daniel Adam Poplawski (Poplawski II)*, ECLI:EU:C:2019:530.

30 CJEU 14 May 2016, C-108/16 (PPU), *openbaar ministerie v Pawel Dworzecki (Dworzecki)*, ECLI:EU:C:2016:346.

31 Eurojust, Case Law by the Court of Justice of the European Union on the European Arrest Warrant, The Hague, October 2018. V. Glerum and K. Klomp, ‘Reflecties van de Internationale Rechtshulpkamer (2)’, *Trema*, Vol. 1, No. 4, 2019.

32 District Court Amsterdam, 22 February 2011, ECLI:NL:RBAMS:2011:BP5390. T.P. Marguery, *Transfer of Prisoners in the European Union - Towards a better balance between Fundamental Rights and Mutual Trust*, Oisterwijk, the Netherlands, Wolf Legal Publishers, 2018, pp. 210-211.

The District Court applies the same two levelled test as developed by the CJEU in the joined cases of *Aranyosi and Căldăraru*,³³ to determine whether a EAW cannot be executed on the basis of a (possible) violation of article 4 Charter.³⁴

According to the District Court Amsterdam, the existence of a concrete risk for the requested person should be considered as a temporary situation, which can be rectified by the issuing state within a reasonable period of time. If the period of time has expired and the issuing state did not provide any complementary information, the Court will disallow the request of the public prosecutor to consider the EAW.³⁵

In general, the caselaw shows that the issuing states can be divided into three categories. The first category consists of issuing states where no evidence exists that their detention facilities could be in violation with article 4 of the Charter, and no refusal grounds for the execution of the EAW are found.³⁶

The second category contains issuing states where evidence exists on the violation of article 4 in specific detention facilities, but there is no evidence that the whole detention system would lead to a risk of violation.³⁷ The court will request information on the place where the requested person will be detained, the detention space, and other conditions.³⁸

The last category of issuing states, are states of which evidence exists on the violation of article 4 of the EU Charter in detention facilities. In such a case, the court requests information of the issuing state to ensure that the requested person will not be subjected to a violation of article 4 Charter.³⁹

3.1.2 EAW and article 47 of the Charter

The cases that concern article 47 Charter violations can be divided in *in absentia* judgments, and the rest category consisting of EAWs concerning execution and prosecution. Whether

33 CJEU 5 April 2016, C-404/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen (Aranyosi and Căldăraru)*, ECLI:EU:C:2016:198.

34 Marguery, 2018, p. 214 et seq. District Court Amsterdam, 28 February 2017, ECLI:NL:RBAMS:2017:1269.

35 Marguery, 2018, p. 219. District Court Amsterdam, 26 January 2017, ECLI:NL:RBAMS:2017:414.

36 E.g. Belgium (District Court Amsterdam, 20 March 2018, ECLI:NL:RBAMS:2018:1596), Croatia (District Court Amsterdam, 12 October 2017, ECLI:NL:RBAMS:2017:7514), Italy (District Court Amsterdam, 5 June 2016, ECLI:NL:RBAMS:2016:4597), Poland (District Court Amsterdam, 8 February 2018, ECLI:NL:RBAMS:2018:655) and Hungary (District Court Amsterdam, 18 October 2016, ECLI:NL:RBAMS:2016:6884)

37 E.g. District Court Amsterdam, 13 February 2018, ECLI:NL:RBAMS:2018:863.

38 E.g. the UK (District Court Amsterdam, 29 March, ECLI:NL:RBAMS:2019:2381), Czech Republic (District Court Amsterdam, 8 August 2017, ECLI:NL:RBAMS:2017:5781), France (District Court Amsterdam, 14 May 2019, ECLI:NL:RBAMS:2019:3673), Portugal (District Court Amsterdam, 9 May 2017, ECLI:NL:RBAMS:2017:3041 and 3043), and Sweden (District Court Amsterdam, 26 January 2017, ECLI:NL:RBAMS:2017:440).

39 E.g. Romania (District Court Amsterdam, 15 August 2018, ECLI:NL:RBAMS:2017:5888), and Bulgaria (District Court Amsterdam, 4 April 2019, ECLI:NL:RBAMS:2019:2563).

the judge may execute a EAW based on an *in absentia* judgment depends on whether the conditions of article 12 and 12a *Overleveringswet* have been met.⁴⁰

With regards to the rest category, the test of *Aranyosi and Căldăraru*, and *LM*⁴¹ is applied. If all questions are answered positively, the requested state may not execute the issued EAW.

Currently, this test plays an important role in EAWs issued by Poland. A distinction can be made between prosecution EAWs and execution EAWs. In case of a prosecution EAW, article 47 only plays a role if judgment was given after the autumn of 2017.⁴² In case of an execution EAW, the current situation can give rise to the court to suspend the EAW of Poland and requests additional information on the protection of the right to a fair trial by the competent authorities.⁴³ However, if there is no real risk that an individual's fundamental right to an independent court will be violated, the EAW is still executed.⁴⁴

3.1.3 EAW and procedural grounds

In the joined cases of *OG and PI*⁴⁵ the CJEU determined that an 'issuing judicial authority', within the meaning of article 6(1) of FD 2002/584, does not include any offices or bodies that are exposed to the (in)direct risk of being subjected to directions or instruction of the executive power (e.g. a Minister of Justice). Consequently, the District Court Amsterdam determined that an EAW issued by the German prosecution office does not comply with the requirement of said article.⁴⁶

Considering *Poplawski I*, courts may refuse an execution EAW if a national or a foreign national is in possession of a residence permit of indefinite duration in the territory of the requested Member State, if execution of a sentence is guaranteed; willingness to execute a EAW is not sufficient. If execution is not possible, a Member State will have to transfer the requested person. The District Court Amsterdam follows this line of reasoning, by requesting whether the execution of the sentence can be guaranteed by the prosecutor.⁴⁷

40 Marguery 2018, p. 223. District Court Amsterdam, 10 May 2019, ECLI:NL:RBAMS:2019:3588.

41 CJEU of 25 July 2018, C-216/18 (PPU), *Criminal proceedings against LM*, ECLI:EU:C:2018:586.

42 Cf. District Court Amsterdam, 26 March 2019, ECLI:NL:RBAMS:2019:3164.

43 District Court Amsterdam, 23 May 2019, ECLI:NL:RBAMS:2019:3805.

44 District Court Amsterdam, 26 April 2019, ECLI:NL:RBAMS:2019:3629.

45 CJEU 27 May 2019 in joined Cases 508/18 and 82/19 (PPU), *Minister for Justice and Equality v OG and PI*, ECLI:EU:C:2019:456. This case led the Dutch legislator to propose a change in procedure, where the investigation judge (*rechter-commissaris*) is now responsible for issuing a request.

46 District Court Amsterdam, 29 May 2019, ECLI:NL:RBAMS:2019:3942.

47 District Court Amsterdam, 19 January 2019, ECLI:NL:RBAMS:2019:391.

3.2 *Immigration courts and the application of mutual recognition instruments*

In the first half of 2019, the Netherlands issued outgoing requests and implemented transfers. If the Dutch Immigration and Naturalisation Service (hereafter “IND”) rejects an application, the asylum seeker may appeal the decision at a District Court. If the Court also rejects the application, the asylum seeker may lodge an appeal against the decision to the Council of State.

3.2.1 **Schengen and article 4 Charter**

In general, the Netherlands may assume on the basis of mutual trust that the Member State, where the person will be transferred to, will not subject the person in question to inhumane or degrading treatment within the meaning of article 4.⁴⁸ However, in light of the case of *M.S.S. v. Belgium and Greece*⁴⁹, the Dutch courts ruled that this assumption may be rebutted, if there is reasonable doubt, based on substantive grounds, that the fundamental right will be violated after his transfer. It is up to the claimant to prove whether such a situation has occurred.⁵⁰

In general, Dutch caselaw on the transfer of foreign nationals and article 4 shows that the responsible states can be divided into two categories. The first category consists of responsible states where no evidence exists that their asylum procedure and reception conditions could be in violation with article 4. In these cases, the courts and/or the Council of State concludes that there are no grounds that prohibit the transfer of the foreign national.⁵¹

The second category contains responsible states where, evidence exists on the violation of article 4 in their asylum procedure and reception conditions. Consequently, the transfers of foreign nationals under the Dublin system are systematically suspended, such as with Hungary and Greece.⁵²

Furthermore, there are cases where, in light of the facts and circumstances of the case, evidence exists on the violation of article 4. However, these cases do not justify the verdict that in every case the circumstances of the asylum procedure and reception conditions would lead to a violation of article 4. There are a few cases in which the District Court has suspended the transfer of an asylum seeker to the Member States of Greece (before the

48 E.g. District Court The Hague, 22 January 2019, ECLI:NL:RBDHA:2019:1903.

49 *M.S.S. v. Belgium and Greece*, ECHR (2011), No. 30696/09.

50 District Court The Hague, 30 November 2018, ECLI:NL:RBDHA:2018:14417.

51 E.g. Germany (District Court The Hauge, 22 January 2019, ECLI:NL:RBDHA:2019:1903), Belgium (District Court The Hague, 20 July 2017, ECLI:NL:RBDHA:2017:8788), France (District Court The Hague, 8 May 2018, ECLI:NL:RBDHA:8145), Croatia (District Court The Hague, 10 July 2018, ECLI:NL:RBDHA:2018:8264) and Switzerland (District Court The Hague, 19 February 2019, ECLI:NL:RBDHA:2019:1478).

52 Council of State, 26 November 2015, ECLI:NL:RVS:2015:3663; Kamerstukken II 2017/18, 2499.

suspension of transfers by the Secretary of State) and Italy, because of specific individual circumstances such as (mental) health problems and age.⁵³ Consequently, the State Secretary is responsible to take a decision on the application of the asylum seeker. However, the caselaw of the Council of State shows that an article 4-defence is mostly unsuccessful.⁵⁴

In this respect, the transfer of asylum seekers to Italy under the Dublin Regulation is noteworthy. Although the judgments of the Council of State continuously show the strict application of the principle of mutual trust (referred to by the Council of State as the “principle of interstate trust”),⁵⁵ the caselaw of the Dutch District Courts is somewhat equivocal.⁵⁶ This fragmented line of reasoning raises questions with regard to the limits of mutual recognition in respect of human rights and highlights that this form of interstate cooperation is under pressure.

3.2.2 Schengen and article 47 Charter

In light of the case of *M.S.S.*⁵⁷, the assumption that article 47 Charter will not be violated may be rebutted - despite the principle of mutual trust - if there is reasonable doubt, based on substantive grounds, that an individual’s right to a fair trial will be violated after his transfer. It is up to the claimant to prove whether such a situation has occurred. In the last four years, such defences have not been successful.⁵⁸

QUESTION 4

Case allocation has been a topic of debate in the Netherlands since a long time.⁵⁹ The allocation of cases is in the hands of the board of the court or, in the case of the Supreme Court and the Council of State, respectively the president and the president of the Department.

53 District Court The Hague, 7 August 2018, ECLI:NL:RBDHA:2018:9792 (Greece); District Court The Hague, 26 July 2017, ECLI:NL:RBDHA:2017:9056 (Italy).

54 E.g. Council of State, 12 June 2019, ECLI:NL:RVS:2019:1861; Council of State, 27 June 2019, ECLI:NL:RVS:2019:2042.

55 E.g. Council of State, 27 June 2019, ECLI:NL:RVS:2019:2042.

56 E.g. District Court The Hague, 28 June 2019, ECLI:NL:RBDHA:2019:6493, where the Dutch District Court suspended the transfer to Italy contrary to District Court The Hague, 13 August 2019, ECLI:NL:RBDHA:2019:8594.

57 *M.S.S. v. Belgium and Greece*, ECHR (2011), No. 30696/09.

58 E.g. District Court The Hague, 4 February 2019, ECLI:NL:RBDHA:2019:1267.

59 M.L. van Emmerik and Y.E. Schuurmans, ‘Meer transparantie bij rechterlijke zaakstoedeling dringend gewenst’, *Nederlands Juristenblad*, Vol. 12, No. 593, 2016. Compare also in English: Ph.M. Langbroek, and M. Fabri, *The Right Judge for each Case, a comparative study of case assignment and impartiality in 6 European countries*, Antwerp, Intersentia, 2007, p. 270.

In administrative regulations, each court determines which factors can be taken into account. This includes factors such as the general judicial experience, the specific knowledge in a certain area of law and individual circumstances that affect the employability of the court. It is a catalog of fairly vague circumstances that may be taken into account.⁶⁰ It does not provide clear and predictable rules. Also, clear rules on when a case is assigned to a single judge and when it is assigned to a chamber of 3 judges (particularly in civil and administrative procedures) do not exist. In practice, this often depends on the person that is responsible for the planning (often on the level of administrative support) who decides which case is assigned to a session of a particular judge. Judges in the Netherlands are used to exchange cases with colleagues informally when necessary. Such exchange occurs in case of illness or planning problems, but also appearances of bias are often dealt with informally. Instead of starting formal resignation proceedings, they will exchange the case in which they might appear biased with a colleague.

Research shows that the method of allocation of cases actually has an impact on perceived independence by judges.⁶¹ Moreover, in sensitive cases examples exist in which the individuals concerned complained about the case allocation and argued that the allocation to a particular judge or chamber did not uphold the appearance of impartiality.⁶² The Dutch legal system has no reply to such allegations other than to indicate that the court is deemed to be based on its function to be impartial. That may be true, but it is precisely this observation that the European standard is presenting case allocation from the European Network of Councils for the Judiciary (ENCJ) to determine whether the individual characteristics, different experience and expertise of judges should not play a role in the case allocation.

*“Discussions raised the question of whether the individual characteristics or the judge should be taken into account while allocating a case or not. After long discussions the final decision was that every judge is a competent professional and that personal / individual features should not influence the quality of his / her work”.*⁶³

60 These administrative regulations are published in the *Staatscourant* and on the internet website of the court concerned.

61 F. van Dijk, F. van Tulder and Y. Lugten, Independence of judges: judicial perceptions and formal safeguards, Working Paper Council for the Judiciary, 2016, p. 20.

62 See for instance District Court The Hague, 21 april 2010, ECLI:NL:RBSGR:2010:BM1744 (Chipshol) and District Court Alkmaar, 7 Juli 2011, ECLI:NL:RBALK:2011:BR0820.

63 European Network of Councils for the Judiciary (ENCJ), Minimum Judicial Standards IV: Allocation of Cases, ENCJ-Report 2013-2014, p 7.

In 2012, a commission has been installed to provide a ‘national code for the allocation of cases’. In May 2019, after years of discussions on concepts, this national code has been adopted. It has to be awaited what this will lead to in practice.

QUESTION 5

With regard to the influence of the EU principle of effective judicial protection on the Dutch system of judicial protection and standing rights, two issues deserve further attention.

The first issue relates to access to the administrative courts. In principle, Dutch law allows a wide access to these courts for every natural or legal person whose interest is directly affected by a decision. This group includes third parties and general interest NGOs. However, as a result of the so-called relativity requirement of article 8:69a General Administrative Law Act (GALA), parties cannot rely on grounds relating to rules or principles which do not aim to protect their interests. This requirement applies to both, purely domestic grounds and to grounds based on EU law. Obviously the latter may cause tension with the EU principle of effective judicial protection.

Dutch administrative courts have ‘solved’ this tension by applying the relativity requirement in EU law cases in a way that is supposed to be consistent with the principle of effective judicial protection.⁶⁴ On the basis of the principle, individuals are entitled to have their grounds assessed if they relate to EU law which confers rights on them that should be enforceable before the courts. In this regard, the national courts refer to the CJEU’s caselaw.⁶⁵ Whether EU legislation confers rights on individuals, depends on their personal scope, which is determined by the courts on the basis of the substance and purpose of the EU legislation involved. Quite often this analysis leads to the conclusion that the EU rules in question do not confer rights on the individuals relying on them, and that the relativity requirement prevents the EU rules from being assessed by the courts. This is for instance the case if a company relies on EU environmental rules to prevent the establishment of competing businesses nearby, at least insofar these rule aim at improving the environment only and not at regulating competition as well. The same happened when proprietors of real estate for services purposes relied on the Services Directive and the free movement of services of article 49 Treaty on the Functioning of the European Union (hereafter “TFEU”),

64 Cf. Council of State, 18 May 2016, ECLI:NL:RVS:2016:1295; Central Appeals Tribunal, 21 February 2017, ECLI:NL:CRVB:2017:607; Trade and Industry Appeals Tribunal, 3 September 2018, ECLI:NL:CBB:2018:440.

65 CJEU 11 November 2004, C-216/02, *Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen v Burgenländische Landesregierung*, ECLI:EU:C:2004:703; CJEU 13 January 2005, C-174/02, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën (Streekgewest Westelijk Noord-Brabant)*, ECLI:EU:C:2005:10.

to prevent the construction of new real estate for services purposes in the same area.⁶⁶ According to the Council of State the proprietors could not rely on these EU rules, as their interests were contrary to the interest protected by the EU rules. Finally, the requirement may exclude the assessment of possible breaches of EU state aid rules. According to the CJEU, these rules aim at the protection of competitors, who suffer the negative effect of the distortion of competition created by the possibly unlawful state aid, and of those who are subject to a tax which is an integral part of the state aid measure.⁶⁷ If individuals do not qualify as such, the relativity requirement precludes the assessment of their state aid related complaints.⁶⁸

In the literature, the application of the relativity requirement in EU law cases is generally considered to be consistent with EU law.⁶⁹ However, some authors are more critical, because they doubt whether national courts can decide on the personal scope of an EU rule without referring the matter to the CJEU.⁷⁰

The second issue concerns state liability for breaches of Union law by means of formal legislation, i.e. legislation established jointly by government and parliament. First, it should be noted that in the landmark case of *Habing* the Dutch Supreme Court has ruled that under Dutch constitutional law the state is liable for every breach of directly effective international and Union law by the formal legislator,⁷¹ insofar the strict Union condition of a sufficient serious breach does not apply.

Secondly, to establish a compensation right under Dutch law, the rule infringed must intend to offer protection against the damage as suffered by the injured person. This liability relativity requirement⁷² resembles the liability condition prescribed by the CJEU, that the rule infringed must have been intended to confer rights on individuals.⁷³ In the case of *EnergyClaim* the Supreme Court has integrated both requirements by stating that in EU liability cases both, national and EU law, require that the rule infringed aims, at least as well, at the protection of the proprietary interests of the injured party or that these interests

66 Council of State, 18 May 2016, ECLI:NL:RVS:2016:1295.

67 C-174/02, *Streekgewest Westelijk Noord Brabant*.

68 Council of State, 2 November 2016, ECLI:NL:RVS:2016:2892; Central Appeals Tribunal, 21 February 2017, ECLI:NL:CRVB:2017:607.

69 M.R. Botman, 'Het relativiteitsvereiste en het Unierecht', *JBplus*, No. 2, 2017/2, pp. 145-161; R. Ortlep and R.J.G.M. Widdershoven, 'Hoofdstuk VI – Rechtsbescherming', in S. Prechal and R.J.G.M. Widdershoven (eds), *Inleiding tot het Europees bestuursrecht*, Nijmegen, *Ars Aequi Libri*, 2017, pp. 368-379.

70 W. Knibbeler, 'A critical loss? De ACM verliest zaak over marktafbakening zakelijk post bij College', *Markt en Mededinging*, No. 3, 2019, pp. 125-130.

71 Supreme Court of the Netherlands, 18 September 2015, ECLI:NL:HR:2015:2722 and ECLI:NL:HR:2015:2723 (*Habing*).

72 It should be distinguished from the relativity requirement of article 8:69a GALA, discussed above, as the former limits the possibility of awarding damages, while the latter limits the assessment of certain legal grounds.

73 CJEU 5 March 1996 in joined Cases 46/93 and C-48/93, *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd*, ECLI:EU:C:1996:79.

are so closely connected with the directive's aim that the damage sustained falls within the protective scope of the directive.⁷⁴ The latter part of this phrase is derived from the CJEU's judgment in *Juta Leth*, to which the Supreme Court explicitly refers.⁷⁵

From *EnergyClaim* it is apparent that the integrated national/EU relativity requirement may seriously restrict the compensation rights of injured parties. The case was about state liability for the late transposition of the Energy Performance of Buildings Directives, which require an energy certification of buildings conducted by qualified experts. *EnergyClaim*, an association representing these experts, had filed a claim for liability as its members (the experts) had suffered loss and damages because of the transposition failure. At the end, the Supreme Court rejects the claim because *EnergyClaim* does not fulfil the national/EU relativity requirement. According to the Supreme Court the directives aim at positive environmental effects by improving the energy performance of buildings. Although they foresee the involvement of experts for the energy certification of buildings, this does not imply that the directives aim at protecting the economic and financial interest of the experts or that the damage sustained falls within their protective scope. The Supreme Court sees no reason to refer the matter to the CJEU, because the application of (also) the EU relativity requirement is considered an *acte clair*.

QUESTION 6

According to statistics of the CJEU regarding requests for preliminary rulings, the Netherlands is ranked nr. 3 with 1048 preliminary references in the period 1952-2018.⁷⁶ In 2018, Dutch courts referred 35 cases to the CJEU.

In relation to preliminary references, three themes emerge in caselaw and literature in relation to preliminary references: (i) the duty to refer in case of conflicting judgments by national courts, (ii) the extent of a duty to state reasons for a decision not to refer and (iii) the liability of the Dutch government for judgments of the highest courts in which a reference was not made.

6.1 *A duty to refer in case of conflicting judgments by national courts?*

Following *X and Van Dijk* and *Ferreira* significant discussions in literature and in the Dutch courts continue on the application of the *Cilfit* criteria. The Council of State has

⁷⁴ Supreme Court of the Netherlands, 19 October 2018, ECLI:NL:HR:2018:1973 (*EnergyClaim*).

⁷⁵ CJEU 14 March 2013, C-420/11, *Juta Leth v Republik Österreich, Land Niederösterreich (Juta Leth)*, ECLI:EU:C:2013:166.

⁷⁶ Only Germany and Italy have referred more preliminary questions to the Court of Justice of the European Union. See: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/_ra_2018_en.pdf.

recently repeatedly held that conflicting judgments regarding EU law of lower courts does not mean that an *acte clair* does not exist⁷⁷. On the other hand, the Tribunal for Trade and Industry in an interim judgment dated 6 February 2018⁷⁸, referred questions to the CJEU based in particular on the consideration that other courts in the Netherlands had expressed a different interpretation of EU law as a result of which an *acte clair* could not be assumed.⁷⁹

It remains difficult for lower courts to be confronted with a judgment by Dutch higher courts that in spite of their judgment to the contrary, the interpretation of EU law of a highest court should be characterised as an *acte clair*. This can be illustrated by a case involving coal taxation, the Court of Appeal of 's-Hertogenbosch extensively examined as to whether the relevant levy is compatible with Directive 2003/96.⁸⁰ The Supreme Court annulled the judgment of the Court of Appeal, without asking preliminary questions, assuming an *acte clair*. In legal literature the question has been raised how this approach can be reconciled with the desire to ensure transparency of judicial activity.⁸¹

6.2 *A duty to state reasons for a decision not to refer*

The fundamental question whether a duty to state reasons for not referring a question exists, in a case where an applicant demands a reference, has until now not definitively been settled by the Supreme Court and is subject to continuing debate. In *KLM/piloten*,⁸² the Supreme Court held that in its previous judgment of 2012, it had extensively addressed the arguments of the parties relying on EU law and it could have come to a sufficiently motivated judgment that no reasonable doubt could exist about the interpretation of EU law. In her opinion the Advocate-General has reiterated (para. 6.33) that article 6 ECHR does not lead to a duty to refer for the Supreme Court in this case and that the absence of an explicit motivation for this choice is also not a violation of article 6 ECHR (para. 6.34.3) in this case.

77 See Council of State, 13 May 2016, ECLI:NL:RVS:2016:1383; Council of State, 13 May 2016, AB 2016/356, ECLI:NL:RVS:2016:1384; Council of State, 13 May 2016, ECLI:NL:RVS:2016:1624; Council of State, 13 April 2016, AB 2016/195, ECLI:NL:RVS:2016:890 and see H. Sevenster and C. Wissels, 'Laveren tussen Ferreira en Van Dijk', in M. Bosma et al., *Liber amicorum Henk Lubberdink*, The Hague, Raad van State, 2016, pp. 83-93.

78 Trade and Industry Appeals Tribunal, 6 February 2018, AB 2018/84, ECLI:NL:CBB:2018:10.

79 CJEU 2 May 2019, C-98/18, *T. Boer and Zonen BV v Staatssecretaris van Economische Zaken*, ECLI:EU:C:2019:355.

80 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

81 J.E.J. Prins, H. Griffioen and D. Broeders, 'Naar een transparante rechtspraak. Geen glans zonder wrijving', in D. Broeders et al. (ed.), *Speelruimte voor transparantere rechtspraak*, The Hague, Wetenschappelijke Raad voor het Regeringsbeleid, 2013, p. 25-114.

82 CJEU 2 May 2019, C-98/18, *T. Boer and Zonen BV v Staatssecretaris van Economische Zaken*, ECLI:EU:C:2019:355.

6.3 *State liability based on refusal to refer*

A recent trend comprises the increased intensive attention for State liability in the context of *Factortame* and *Köbler*⁸³ in light of refusals of the Dutch courts against the decisions of which there is no judicial remedy under national law to invoke article 267, third paragraph, TFEU.

The Supreme Court found that the refusal to make a reference was justified since in the proceedings leading to the contested judgment the Supreme Court extensively considered Union law. The single statement made by a litigant that article 267 TFEU has been infringed, is not sufficient to establish State liability. Under Dutch law it is now clear that a violation by a court to make a reference as such is not sufficient for liability but that a substantial rule should have been violated.

6.4 *Situations where a litigant has subsequently sought redress against the refusal to refer as a matter of ECHR law*

Until now, the European Court of Human Rights (hereafter “ECtHR”) rendered a judgment in three cases where applicants relied on article 6 (1) ECHR, complaining that the Dutch Supreme Court and a Dutch district court had refused to refer questions to the CJEU.⁸⁴

In its *Baydar* judgment, the ECtHR refers to a judgment of the Dutch Supreme Court which was adopted after the Supreme Court decision in *Baydar*, in which the Dutch Supreme Court explained that an application of Section 80a or 81 of the Judiciary Act (“Wet RO”) implies that there is no need to seek a preliminary ruling. The Supreme Court had ruled that such a reference means that the *Cilfit* criteria are met. Such a summary reason is accepted by the ECtHR in the Dutch context. In Dutch legal literature questions have been raised about this approach, in particular because the summary reasoning under the Judiciary Act would not make clear which of the three *Cilfit* criteria is decisive.⁸⁵

Both the Supreme Court and the Council of State have now in two judgements made an attempt to explain how they apply their competence for a concise motivation.⁸⁶ This

83 CJEU 30 September 2003, C-224/01, *Gerhard Köbler v Republik Österreich (Köbler)*, ECLI:EU:C:2003:513.

84 *Stichting Mothers of Srebrenica v The Netherlands*, ECHR (2013), No. 65542/12; *Chylinski and Others v. the Netherlands*, ECHR (2015), No. 38044/12; *Baydar v The Netherlands*, ECHR (2018), No. 55385/14.

85 Cf. J.T. Claassen and J. Krommendijk, case note ECtHR 2018/142, part 7, 2018. See also, J. Krommendijk, ‘Open Sesame!': Improving Access to the ECJ by Obliging National Courts to Reason Their Refusals to Refer’, *European Law Review*, 2017, pp. 46-62.

86 Supreme Court of the Netherlands, 7 June 2016, ECLI:NL:HR:2016:1005; Supreme Court of the Netherlands, 11 September 2012, ECLI:NL:HR:2012:BX0146. Council of State, 3 April 2019, ECLI:NL:RVS:2019:1060; Council of State, 3 April 2019, ECLI:NL:RVS:2019:1061. See also: R. Ortlep and R.J.G.M. Widdershoven, ‘Staat niet aansprakelijk voor niet prejudicieel verwijzen’, *Overheid and Aansprakelijkheid*, No. 20, June 2019, pp. 44-51.

continuing debate did also provoke (rejected) complaints submitted to the European Commission in order to apply for infraction procedures against the Netherlands.⁸⁷

In the context of admissibility in relation to article 6 ECHR claims before the ECtHR it has been argued by the Dutch government that applicants would have failed to exhaust available domestic remedies by not bringing an action in tort against the state before the civil courts on the grounds that the refusal to refer was unlawful.⁸⁸ The ECtHR has rejected this line of reasoning by pointing out that the tort remedy should be an effective one, available in practice at the relevant time.

6.5 *Situations where a litigant has subsequently sought redress against the refusal to refer as a matter of Union and/or national law?*

Since 2014, there have been six known cases based on *Köbler*-liability.⁸⁹ In these cases, no violations have been found, although some cases are still under appeal.

As to the conditions to be satisfied for the Dutch State to be required to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which the State is responsible, the Supreme Court⁹⁰ has held in *KLM/Piloten* that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.⁹¹ In this connection, the Supreme Court in *KLM/Piloten* notes that, for liability to be established under the *Köbler*-criteria, it is not sufficient for a court to have infringed EU law, such infringement moreover has to be manifest.⁹²

87 Reference is made to the complaint of eight criminal lawyers in 2015: T. Dieben et al., 'Notice of refusal of the Amsterdam District Court to refer cases to the CJEU for a preliminary ruling in EAW cases' (2015), www.jahae.nl/wp-content/uploads/2015/08/150730-Brief-EC-EAB-vragen-HvJ-EU-ex.-bijlagen.pdf and <https://scheersadvocatuur.nl/wp-content/uploads/2017/03/klacht-EC-motivering-prejud.pdf>, visited 10-01-2020.

88 Cf. *Schipani and others v. Italy*, ECHR (2015), No. 38369/09 and *Baydar v The Netherlands*, ECHR (2018), No. 55385/14, paras. 33-35.

89 Court of Appeal The Hague, 15 January 2019, ECLI:GHDHA:2019:183; Supreme Court, 21 december 2018, ECLI:NL:HR:2018:2396; Court of Appeal The Hague, 20 November 2018, ECLI:NL:GHDHA:2018:3432; District Court The Hague, 6 June 2018, ECLI:NL:RBDHA:2018:6681; District Court The Hague, 23 November 2016, ECLI:NL:RBDHA:2016:14190 and District Court The Hague, 15 April 2014, ECLI:NL:RBDHA:2014:5228.

90 The Supreme Court of the Netherlands is the highest court in the fields of civil, criminal and tax law in the Netherlands and the highest competent court for actions brought on the basis of the *Köbler* caselaw in conjunction with article 6:162 of the Dutch Civil Code.

91 Supreme Court of the Netherlands, 21 December 2018, ECLI:NL:HR:2018:2396.

92 See also judgment in C-224/01, *Köbler*, in particular para. 53.

In *KLM/Piloten*, the Supreme Court did not find an (manifest) infringement. Furthermore, the Supreme Court held it was not obliged to give a more explicit motivation regarding the fact that no preliminary questions were asked.

There are no *established* refusals by a superior court to comply with its obligation to refer a matter of EU law to the CJEU.

QUESTION 7

7.1 *The duty to interpret national law in conformity with EU law*

The first interesting trend is found in the Supreme Court's caselaw and refers to the point of guidance provided in the ECJ's caselaw that it must be presumed that the legislature intends to comply with the directive.⁹³ In the *Wandelvierdaagse*⁹⁴ judgment, which was delivered in tax law proceedings, the Supreme Court ruled that a consistent interpretation is not frustrated by a concrete interpretation derived from a historical interpretation if the provision's wording leaves room for a consistent interpretation. In those circumstances, the principle of legal certainty does not require protection of individuals who consulted a rule's parliamentary history to determine their legal position and acted accordingly. This would only be different if the relevant rule's parliamentary history contains statements that unequivocally express a conscious intention of the legislature to depart from the directive.⁹⁵ It is noted that the latter seems to be a rather theoretical possibility. This approach has been characterised as a 'modification of the general interpretative framework'.⁹⁶ Taking into account the traditionally flexible nature of the Dutch interpretative framework, it can be said that the duty of consistent interpretation is applied here as a superior interpretative rule as far as it fixates the subordinate role of conflicting parliamentary intent.⁹⁷ This approach is also found in subsequent judgments.⁹⁸

In a Supreme Court judgment concerning the Transfers of Undertakings Directive, the national provision's wording was clearly not in line with the directive. The Supreme Court referred to a previous judgment (that was delivered in a purely internal context) and considered that a provision's formulation is not always decisive for the meaning that

93 CJEU 5 October 2004, C-397/01 to 403/01, *Pfeiffer*, ECLI:EU:C:2004:584, para. 112.

94 Supreme Court of the Netherlands, 10 August 2007, ECLI:NL:HR:2007:AZ3758, AB 2007/291.

95 Supreme Court of the Netherlands, 10 August 2007, ECLI:NL:HR:2007:AZ3758, AB 2007/291, para. 3.4.

96 M.H. Wissink, 'Interpretation of Private Law in Conformity with EU Directives', in A.S. Hartkamp et al. (eds), *The Influence of EU Law on National Private Law*, Deventer, Kluwer, 2014, p. 148.

97 S. Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts*, Mortsels, Belgium, Intersentia, 2019, p. 241.

98 See, for instance, Supreme Court, 21 September 2012, ECLI:NL:HR:2012:BW5879, AB 2012/367, para. 5.1.3.

should be attributed to it. Referring to, among others, the presumption of the intention to comply, it held that there was all the more reason not to confer a decisive role upon the national provision's text in this instance.⁹⁹ However, in our view there was not an absolute prioritisation of the presumption *vis-à-vis* grammatical interpretation in the judgment.¹⁰⁰

But there is also an issue. It is recalled that the *Kolpinghuis* judgment established that the duty of consistent interpretation cannot be the basis for the determination or aggravation of criminal liability.¹⁰¹ Despite the absence of authority on this point, a judgment delivered by the Council of State in 2009 extended this limitation and rejected a consistent interpretation as it provided the basis for imposing an administrative fine (i.e. an administrative sanction).¹⁰² On account of the scope of Article 49 of the Charter and article 6 of the ECHR this now seems to have been a correct decision. An issue does, however, derive from the Council of State's *KOMO* judgment. This judgment took things even further by holding that a consistent interpretation was impossible as such an interpretation cannot provide the basis for administrative enforcement (which concerns administrative action that is not of a punitive nature).¹⁰³ It is unclear on what basis the Council of State deemed it possible to connect the situation before it to the ECJ's *Kolpinghuis* judgment (which is based on the principle of *nullum crimen, nulla poena sine lege*). Secondly, the effectiveness of EU law directives would be significantly decreased if the duty of consistent interpretation, which is perhaps the primary tool for ensuring the effect of directives in the Member States' legal orders, is able to confer a different meaning on provisions of national law, but it would not be permitted to enforce this if individuals did not comply with the modified understanding of national law.

7.2 *The relation between the Directive and general principles of private law*

In a test case between *Nationale-Nederlanden* and a policyholder, *Van Leeuwen*, the Court of Rotterdam referred preliminary questions to the CJEU.¹⁰⁴ In essence, the Court asked

99 Supreme Court, 5 April 2013, ECLI:NL:HR:2013:BZ1780, NJ 2013/389, paras. 3.6.5-3.7.

100 S. Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts*, Mortsel, Belgium, Intersentia, 2019, pp. 245-246.

101 Judgment of 8 October 1987 in Case 80/86, *Criminal proceedings against Kolpinghuis*, ECLI:EU:C:1987:431, para. 13.

102 Council of State, 4 March 2009, ECLI:NL:RVS:2009:BH4621, AB 2009/156, para. 2.6.2.

103 Council of State, 8 June 2016, ECLI:NL:RVS:2016:1613, AB 2016/273, para. 10.3.

104 CJEU 29 April 2015, C- 51/13, *Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus Van Leeuwen (NN/Van Leeuwen)*, ECLI:EU:C:2015:286.

whether the provisions of the Directive¹⁰⁵ preclude an insurance company, on the basis of general principles of domestic law such as the ‘open or unwritten rules’, from being required to provide policyholders more information than was prescribed in 1999 in the RIAV implementing the Directive.

The CJEU ruled that the Directive does not preclude an insurance company, on the basis of unwritten domestic law rules from being required to send additional information, provided that the information required is (i) clear and accurate, (ii) necessary for the policyholder to understand the commitment and (iii) ensures a sufficient legal certainty to policyholders and insurance companies.

7.3 *Application NN/Van Leeuwen-judgment CJEU by national courts*

Subsequent Dutch caselaw led to academic discussion and shows divergent views on the interpretation of these principles.¹⁰⁶ Therefore, the scope of the (pre)contractual information obligations of life insurers varies depending on the specific view of the court on the relation between the information obligations of the RIAV and the general principles of private law.

In a ruling on a collective action initiated by the claim organisation ‘Vereniging Woekerpolis’¹⁰⁷, the Court of Rotterdam held that insurers were not required to provide more information than what was specifically required by the RIAV and that general principles of private law could not justify additional obligations. In addition, the court highlighted that in the Netherlands, in a first stage, only the minimum information obligations from the Directive were implemented. Furthermore, the Court highlighted that legal certainty would be jeopardised if the insurer would retroactively be confronted with the obligation to provide more information. This approach was also followed by the Court of Appeal of Arnhem-Leeuwarden¹⁰⁸ and the Court of Midden-Nederland in 2019.¹⁰⁹

In 2017, the Court of Noord-Holland¹¹⁰ ruled that the ‘public’ (pre-)contractual information obligations established in the RIAV do not preclude imposing additional

105 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC, OJ L 360, 9.12.1992, p. 1–27.

106 See amongst others: D. Busch and T.M.C. Arons, ‘Van woekerpolissen, rechtszekerheid en privaatrechtelijke gevolgen door een Luxemburgse bril’, *Ars Aequi*, Vol. 64, No. 9, 2015; P.M. Leerink, ‘Hof van Justitie oordeelt dat informatieverplichting van levensverzekeraars verder kan gaan dan RIAV 1998 destijds voorschreef’, *Nederlands Tijdschrift voor Burgerlijk Recht*, No. 4, 2015.

107 District Court Rotterdam, 19 July 2017, *Vereniging Woekerpolis.Nl v NN*, ECLI:NL:RBROT:2017:5654.

108 Court of Appeal Arnhem-Leeuwarden, 29 January 2019, *x v Aegon Levensverzekering N.V.*, ECLI:NL:GHARL:2019:813.

109 District Court Midden-Nederland, 6 February 2019, *Vereniging Woekerpolis.Nl v ASR Levensverzekering N.V.*, ECLI:NL:RBMNE:2019:307.

110 District Court Noord-Holland, 20 December 2017, *Vereniging Woekerpolis.Nl v SRLEV N.V.*, ECLI:NL:RBNHO:2017:10528.

requirements in the pre-contractual phase based on the principles of private law. Putting special emphasis on the special duty of care of the Dutch private law system, the Court concluded that the insurer had not complied with its (pre-)contractual information obligations. The Court of The Hague¹¹¹ held the same year that the private law duty of care had to be interpreted in the light of the information obligations of the RIAV. Since these obligations were satisfied, the company did not violate obligations by not providing a warning on a specific risk. A similar approach was followed by the Court of Rotterdam in March 2019.¹¹²

7.4 *Concluding remarks*

The caselaw shows a divergent interpretation of the effect of EU law (i.e. the Life Insurance Directive) on private law. Consequently, the conditions set out in NN/Van Leeuwen are interpreted differently by the Dutch courts thereby showing a lack of consistent interpretation of EU law and the caselaw of the CJEU. Since the appeal in many cases is pending, it is not excluded that preliminary questions will be referred to the CJEU in order to further clarify the relationship between the information obligations of the Directive and the possibility to apply the principles of Dutch private law.

111 District Court Den Haag, 28 June 2017, Vereniging Woekerpolis.Nl v Aegon Levensverzekering N.V., ECLI:NL:RBDHA:2017:7072.

112 District Court Rotterdam 27 March 2019, Consumentenbond v Nationale Nederlanden Levensverzekeringsmaatschappij N.V., ECLI:NL:RBMNE:2019:307.

