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Compulsory membership of pension schemes and the free movement of services in the EU

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Abstract
Mandatory pension participation in the Netherlands is currently under review. This article examines the manner in which the system of mandatory participation in sectoral pension funds is presently organised as well as future proposals from the perspective of the freedom to provide services. It also briefly reviews mandatory participation in Belgium, Denmark, Germany, France and Sweden and asks whether it constitutes a barrier to the freedom enshrined in Article 56 TFEU. Restrictions of this freedom in the field of mandatory participation are too easily excused in the Netherlands by pointing to decisions by the European Court of Justice (ECJ) in which it judged the system to be permissible. These decisions, however, were made from the perspective of competition law, and not on the basis of Article 56 TFEU. Grounds for justifying restrictions to this freedom exist, although different justifications are available for direct and indirect discrimination. The article questions how mandatory participation in the Member States considered in this article fare from this perspective?

Keywords
mandatory participation, 56 TFEU, occupational pensions, services, The Netherlands, competition

Introduction

An often-heard reason for making participation in a pension scheme mandatory is to protect future retirees from their own myopia when it comes to retirement planning by forcing them to save. In addition, mandatory participation can lead to cost savings created by

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economies of scale that result from forcing a large number of individuals to join a pension scheme.[1]

In the Netherlands there are approximately €1300 billion in pension assets – accrued in no small part thanks to mandatory participation – and this leads to a compelling case study of whether mandatory participation complies with EU law. Mandatory participation in a pension fund in the Netherlands is currently regulated by the *Wet verplichte deelneming in een bedrijfstakpensioenfonds* (The Act on Compulsory Membership of a Sectoral Pension Fund 2000) or 'Bpf Act' (Wet Bpf 2000).

According to the explanatory memorandum to the Bpf Act, the rationale for making participation in a sectoral pension fund mandatory is twofold. First, its aim is to eliminate competition between employers in respect of the pension arrangements that they offer their employees. This supposedly prevents a race to the bottom in terms of employment conditions.[2] Second, there is the social goal of ensuring that all employees within a given sector have identical pension arrangements in order to protect weaker workers,[3] adding a solidarity element.[4] For these reasons, mandatory participation is valued highly by Dutch government.[5] The explanatory memorandum to the Act explains that mandatory participation has played a significant role in increasing pension fund participation.[6]

Occupational pensions in the Netherlands are actually only *quasi*-mandatory. This means that, while in principle there is no statutory obligation for all employed persons to be affiliated to an occupational (second pillar) pension scheme, collective agreements make participation mandatory for employees within the respective sector. The result is that participation in occupational schemes is near-universal at more than 90 per cent of Dutch employees.[7]

The social partners in the Netherlands design the scheme and its features in these collective labour agreements. At the request of a 'significant majority' of a particular sector of industry, the Minister of Social Affairs can make participation in the occupational pension scheme mandatory by extending the application of the collective agreement to all parties defined in it. In the Netherlands, only Dutch *pensioenfondsen*, which must have the legal form of a *stichting* (i.e., a foundation) may operate a mandatory sectoral scheme. Non-Dutch pension providers are therefore excluded from operating mandatory sectoral pension schemes. This requirement is the main focus of this article.

This article explains, first, how mandatory participation is organised in the Netherlands and in a selection of other EU countries and, secondly, assesses the system of (quasi) mandatory participation from the perspective of European law and European Court of Justice (ECJ) case law. However, because of the size of the Dutch schemes, the focus of this article is mainly on the Netherlands. In addition, the article also assesses whether mandatory participation in a scheme, instead of a fund, is compatible with EU law. This assessment takes place, *inter alia*, in light of proposed legislative changes that are outlined in section 2.4 below. These proposed Dutch legislative changes may, if enacted, link mandatory affiliation to a pension scheme rather than to the pension fund.

1. Chen and Beetsma (2015).
2. Heemskerk (2015).
3. *Ibid*.
4. Schols-van Oppen (2015).
5. van der Poel (2013).
6. Explanatory Memorandum to the Sectoral Pension Funds Act 2000, *Kamerstukken II* 2000/01, 27 073, nr. 3.
7. Chen and Beetsma (2015).

The main question that is addressed here is: can a justification be found in EU law for mandatory participation in a pension fund and/or in a pension scheme?

Mandatory participation in the Netherlands

Current state of affairs

In the Netherlands, there are two main types of mandatory participation.[8] First, there is the so-called *kleine verplichtstelling*, or 'small mandatory participation', which refers to the obligation on an employee to participate in their employer's pension scheme. This type of mandatory participation is part of the employment conditions and the government is generally not involved. Rather, the obligation arises out of the employment contract or collective labour agreement. This type of mandatory participation does not in principle seem to preclude the free movement of services, since the employer seems free to choose a provider, that may be based in a Member State other than the Netherlands.

The second main type of mandatory participation concerns the *grote verplichtstelling*, or 'large mandatory participation.' This type was established by the Bpf Act. As a consequence of this Act, participation in a pension scheme for employers and employees in certain sectors of industry is mandatory through government intervention, and only Dutch *pensioenfondsen*, which have the legal form of foundations, are eligible to operate such schemes.[9]

Finally, a third type of mandatory participation will also be discussed briefly. This concerns mandatory participation in a pension scheme as enshrined in the '*Wet verplichte beroepspensioenregeling'* (Wvb Act or Wvb) in English: the Mandatory Professional Pension Schemes Act (see below, paragraph 1.1.2). Certain parallels can be drawn between the Wvb Act and the proposed changes to the Bpf Act.

The Dutch sectoral pensions Act 2000 (Wet Bpf 2000)

The Bpf Act empowers the Dutch Minister of Social Affairs and Employment to make participation in a sectoral pension fund (known in the Netherlands as a *bedrijfstakpensioenfonds*, or 'Bpf') of a particular sector of industry mandatory at the request of a 'significant majority' of social partners in that sector.[10] In order for the majority to be deemed significant, the number of employees working at the requesting businesses must represent at least 60 per cent of the total number of workers employed within the sector. Under certain conditions, a lower ratio may be classified as significant, but any percentage under 50 per cent cannot yield a significant majority under any circumstances.[11]

The consequence of the Minister's decision to make participation mandatory is that, in principle, all those who fall within its scope must participate in the sectoral pension fund. This mechanism can also be found in Belgium, France and Germany. It applies to employers as well as employees, regardless of whether or not they are organised in a trade union or employers' association, and whether or not they want to participate.[12] Because of this policy, over 75 per cent of

8. Goudswaard (2013).
9. Article 1 of the Dutch Pensions Act.
10. Article 2 Act on Compulsory Membership of a Sector Pension Fund 2000.
11. Schols-van Oppen (2015).
12. Heemskerk (2015).

Dutch employees who have some type of pension arrangement participate in a mandatory sectoral pension scheme.[13]

In accordance with the Act, mandatory sectoral pension schemes may be operated only by a *pensioenfonds*, a Dutch pension fund. This arises out of the definition of what a sectoral pension fund is under the Dutch Pensions Act, to which the Bpf Act refers. The Pensions Act distinguishes between a 'pension fund' and a 'pension institution'. It defines a sectoral pension fund as a *pensioenfonds.* A *pensioenfonds*, in turn, is defined as; 'a foundation [in Dutch: *stichting*] which is not a Premium Pension Institution (PPI) [. . .].'[14] A Bpf must, therefore, be constructed according to the legal form *stichting*, a Dutch foundation, thereby excluding non-Dutch providers.

In contrast to this, the Pensions Act defines a foreign pension *institution* as an institution *that has its domicile in a member state other than the Netherlands* and is incorporated independently of any contributing company or sector with the purpose of providing work-related pension benefits. Based on these definitions, participation in a non-Dutch pension provider cannot be made mandatory,[15] and this has indeed been affirmed by the Minister of Social Affairs and Employment.[16]

Mandatory participation seems largely responsible for the enormous size of Dutch sectoral pension funds. ABP, the pension fund for the government and education sectors, is the country's largest with assets amounting to 351 billion euros at the end of 2015[17] as well as nearly three million[18] participants in 2013. A number of safeguards have been built into Dutch law in order to prevent unfair competition between these vast funds – profiting from significant scale economies – and other pension institutions, such as insurers, in the Netherlands. The most noteworthy of these safeguards is the so-called 'domain delineation'. According to this principle, mandatory sectoral pension funds may in principle only operate within their own sector or enterprise.[19] Ring-fencing, meaning the legal separation between the schemes, is not allowed for mandatory sectoral pension funds and, finally, a mandatory sectoral fund's board must consist of representatives of employees and employers.[20]

According to the Act's explanatory memorandum, the existence of mandatory participation is justified by the social ends that these sectoral pension funds pursue; they feature a high degree of solidarity between a variety of cohorts.[21] Indeed, according to the ECJ this social goal is what justifies mandatory participation, which inherently distorts competition, from the perspective of competition law.[22]

13. *Ibid*.
14. Article 1 of the Dutch Pensions Act, note 10 above.
15. van Meerten (2012).
16. *Kamerstukken II* 2006/07, 28 294, 29.
17. ABP Website, available at: https://www.abp.nl/over-abp/actueel/nieuws/kwartaalbericht-q4-2015.aspx [17 March 2017].
18. First Pensions Website, available at: http://www.firstpensions.nl/content/pdf/14-19_sector_in_cijfers.pdf [27 July 2016].
19. Articles 116 et seq Pensions Act. Pension funds in the Netherlands have used their bylaws to expand their domain, a notable example is the mandatory sectoral pension fund PGB, see *Kamerstukken II* 2014/15, 32 043, 237.
20. Chen and Beetsma (2015).
21. Explanatory Memorandum to the Sectoral Pension Funds Act 2000, *Kamerstukken II* 2000/01, 27 073, 3.
22. *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Albany)* (C-67/96) [1999] EU: C:1999:430.

Nevertheless, it might be argued that having in place a system that requires the provider to be a Dutch entity – as is practice under the current Bpf Act – is in violation of the freedom to provide services. This is explored below.

Wet verplichte beroepspensioenregeling (Wvb)

As indicated above, another type of mandatory participation in the Netherlands was created by the *Wet verplichte beroepspensioenregeling* (Wvb) the Mandatory Professional Pension Schemes Act. The Wvb concerns professions rather than the industry sectors that the Bpf Act applies to. These professions include dentistry, veterinary medicine, physiotherapy, medical specialisms, midwives, maritime pilots, independent artists, etc.[23]

The Wvb was implemented in 2006, replacing the 1972 *Wet betreffende verplichte deelneming in een beroepspensioenregeling*, and works in a manner similar to the Bpf Act. The difference between the two Acts is that in the Wvb it is the *scheme* rather than the *fund* to which affiliation is made mandatory by the minister.[24] The choice of pension provider under the Wvb seems to be left open for the professional association (the pension association) responsible for organising the pension scheme, the *beroepspensioenvereniging*. The scheme can, therefore, in principle be operated by one of the three categories of Dutch pension providers – pension funds, insurance companies and Premium Pension Institutions (PPI)[25] – or a pension provider from another Member State.[26]

Given this availability to choose for a provider from another Member State, the Wvb appears not to be, in principle, an obstacle to the free movement of services. There is, however, a caveat. Under the Wvb, the administration of the mandatory scheme may be operated by only one provider for the entire profession. This provider is chosen by the pension association. In this respect, freedom of choice under this type of mandatory participation also appears to be limited. Whether or not the pension association must take account of the rule on free movement is discussed in section 3 below.

Future plans

As of early 2017, the Netherlands is still embroiled in a debate over the future of its pension system. Famed for being one of the world's best,[27] the Dutch system is now in need of an overhaul in order to keep up with the times. It was criticised by the European Commission for placing a high burden on wage earners through high contribution rates and inequitable distribution of risks to younger age groups, notably through non-indexation.[28]

Demographic change and low interest rates are catalysts for these discussions.[29] The key themes are, among others, more transparency and simpler schemes, sustaining solidarity and the clarification of responsibilities.[30]

23. Kuiper (2013).
24. Article 5 of the Mandatory Professional Pension Schemes Act.
25. van Meerten (2008).
26. Article 8 of the Mandatory Professional Pension Schemes Act; see also van der Poel (2013). Schemes can also be operated by providers from third countries, see van den Hout (2013).
27. The Netherlands' system was ranked no. 2 in the Melbourne Mercer Global Pension Index 2015, Available from: http://www.globalpensionindex.com/wp-content/uploads/Infographic.pdf [17 March 2017].
28. European Commission (2017).
29. Klijnsma (2016b).
30. Klijnsma. (2015a).

Also part of the debate is the ongoing trend towards pension fund consolidation: it is expected that the number of pension funds will shrink from approximately 300 to 200 during 2017.[31] This consolidation is taking place with a view to ensuring the sustainability of pension funds as well as reining in costs and improving governance. Mandatory sectoral pension funds are also affected by these concerns. In that context, efforts by the Dutch legislator to widen the possibility for mandatory sectoral funds to consolidate are ongoing.

One of these efforts was the creation of a new genus of the species *pensioenfonds*; the *algemeen pensioenfonds*, or general pension fund (Apf) and the discussion of the possibility of allowing mandatory sectoral pension funds to consolidate or convert into an Apf. The Apf is a new type of pension fund that was created in order to achieve economies of scale and to save costs by allowing struggling smaller funds to consolidate.[32] This is also in line with one of the objectives identified in the so-called Dutch pension dialogue (a public consultation) undertaken to provide employers and employees with greater freedom of choice.

The Act that created the Apf[33] has been in force since 1 January 2016.[34] The Apf can operate a multitude of pension schemes for different employers. It may apply ring-fencing to different pensions schemes: the statutes of the Apf determine which pension schemes are financially separated and which schemes are grouped together in a collectivity circle.[35] The Apf appears to break with the tradition whereby ringfencing by a *pensioenfonds* was in principle forbidden.[36]

At the time of discussion of the legislative proposal in 2014-2015, the possibility of opening up the Apf to mandatory sectoral pension funds was broached. This option was ultimately not included in the proposal, as the State Secretary did not wish to risk delaying the implementation of the Apf act over concerns related to competition law.[37] Priority was given to enabling troubled smaller, non-mandatory pension funds to consolidate into an Apf.[38] The State Secretary did, however, announce that the matter would be explored in more detail.[39]

This pledge culminated in a report (the report) by, *inter alia*, an economic research agency named SEO.[40] The purpose of the report was to explore under which circumstances it would be possible to give mandatory sectoral pension funds (Bpf) access to the Apf. The conclusion was that this could be done by amending the Bpf Act such that it would work in a manner similar to the WvB. Thus, the mandatory aspect would shift from the *fund* – as is required currently by Article 2 of the Bpf Act – to the *scheme*.[41] Giving a Bpf (in which ring-fencing is not allowed) access to an Apf requires a balancing act to satisfy both the desire of mandatory sectoral pension funds to consolidate on the one hand, and to respect the conditions for the justification of mandatory participation set out by ECJ case law as well as the proper functioning of the pension market, on the other.[42]

31. Preesman and Boschman (2016).
32. *Kamerstukken II* 2014/15, 34 117, 3.
33. The General Pension Fund Act, Stb. 2015, 549.
34. Decree of 23 December 2015 to set the date of entry into force of the General Pension Fund Act and the Law of 23 December 2015 amending the General Pension Fund Act, *Stb.* 2015, 550.
35. Degelink and Lutjens (2016).
36. Article 123(1) of the Dutch Pensions Act.
37. Lutjens (2016b).
38. Kamerstukken II 2014/15, 34 117, nr. 9.
39. *Ibid*.
40. Kok, van der Lecq, Lutjens et al. (2015).
41. Klijnsma (2016a).
42. Kamerstukken II 2015/16, 32 043, nr. 291.

Initially, the plan seemingly allowed only Bpf and Apf style pension funds to operate mandatory sectoral pension schemes.[43] However it appears that this idea has been abandoned: the report,[44] and the letter from the State Secretary[45] with which she presented the report to Parliament, point out that under future laws, any second-pillar pension provider may, in principle, operate a mandatory sectoral pension scheme, including providers from other Member States. At first glance, this would alleviate any concerns over the freedom to choose providers from other Member States, since the requirement that a mandatory sectoral scheme may only be operated by a *pensioenfonds* would be lifted.

At the same time, Members of Parliament proposed an amendment to the proposed Apf legislation allowing mandatory sectoral pension funds to merge – which is already currently possible – while, however, allowing them to maintain separate assets (we prefer to call this 'quasi ring-fencing') which does not seem currently possible.[46] Nevertheless, the Dutch Council of State advised that the proposal could put at risk the justificatory grounds for the violation of competition law for mandatory participation as drawn up by the ECJ,[47] since it would then be possible to separate 'good risks' from 'bad risks' and that competition could be distorted.[48] As a consequence, this amendment was dropped.[49]

It appears that a modification of the current mechanism of mandatory participation hinges upon the fate of the proposal to allow mandatory sectoral pension funds to consolidate or convert into an Apf. It is unclear whether this modification will materialize, as the State Secretary is currently exploring another option for mandatory sectoral funds to merge, apparently not involving the Apf. Under the most recent plans, a maximum of three mandatory sectoral funds would be allowed to merge and be allowed to maintain separate assets for up to five years.[50] This would allow consolidating mandatory sectoral funds to avoid cross-subsidizing one another if one has a lower funding ratio, while still complying with the Dutch government's – debatable[51] – interpretation of the ECJ's verdict on mandatory participation in relation to competition law. For this option, it does not appear necessary to change the mechanism of mandatory participation in such a way to allow any institution other than a *pensioenfonds* to operate mandatory schemes, as two merging sectoral pension funds still constitute a *pensioenfonds*. Should, therefore, the current system of mandatory participation remain the same in prescribing a Dutch *pensioenfonds* as the only possible institution, a breach of Article 56 TFEU still seems evident.

Before analysing the Dutch proposal and the systems of mandatory participation in place in a few other EU Member States from the perspective of the Freedom to provide services, an overview of relevant EU law and case law will be provided.

43. van Meerten (2015b).
44. Kok, van der Lecq, Lutjens et al. (2015).
45. Klijnsma (2015b).
46. *Kamerstukken II* 2014/15, 34 117, nr. 17.
47. *Albany, Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Brentjens)* (C-115/97-117/97) [1999] EU: C:1999:434; *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven (Drijvende Bokken)* (C-219/97) [1999] EU: C:1999:437.
48. Raad van State, Advies W12.15.0221/III/Vo of 17 September 2015.
49. *Kamerstukken II* 2014/15, 34 117, nr. 37, 2.
50. *Kamerstukken II* 2016/17, 32 043, nr. 351.
51. Foppes and Kuiper (2017).

Mandatory participation and the freedom to provide services

Introduction

Article 56 TFEU guarantees the freedom to provide services and is one of the cornerstones of the EU's Single Market. The Article contains a prohibition against any restriction of the freedom to provide services,[52] and the Court has made it clear in its jurisprudence that any form of discrimination against a service provider on the ground of nationality as well as any other barriers restricting the provision of services is contrary to the freedom enshrined in the Article.[53] Even minor restrictions are prohibited.[54]

The ECJ has developed in its case law a number of criteria that may justify *non-discriminatory* restrictions on the free movement clauses in the Treaty.[55] In *Gebhard*,[56] the Court ruled that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'

In the case of *direct discrimination* – such as a distinction on grounds of nationality – only the exceptions enumerated in Article 52 TFEU provide reasons to justify such measures.[57] These grounds are public policy, public security and public health. The grounds for justifying restrictions that apply *without* discrimination differ from those that apply *with* discrimination,[58] although it is sometimes difficult to tell the difference.[59] Generally speaking, it can be said that a breach of discriminatory measures is harder to justify than a breach of a non-discriminatory clause.[60]

(Non)-discriminatory measures

In principle, the Treaty takes precedence over the IORP II Directive ('the Directive').[61] Like the Treaty, the Directive also contains provisions that are relevant to the free movement of services in relation to compulsory membership. Preamble 22 of IORP II proclaims that 'Without prejudice to national social and labour legislation on the organisation of pension systems, *including compulsory membership* [italics added by authors] and the outcomes of collective bargaining agreements, IORPs should have the possibility of providing their services in other Member States upon receipt of authorisation from the competent authority of the IORP's home Member State.'

Mandatory participation was subject to the ECJ's scrutiny in a number of cases, albeit mainly from the perspective of competition law. The Court reasoned in *Albany*, a case concerning a Dutch mandatory sectoral pension scheme, that the collective agreement making affiliation to a pension

52. Chalmers, Davies and Monti (2014).
53. *Säger v Dennemeyer* (C-76/90) [1991] EU: C:1991:331.
54. *Corsica Ferries France v Direction générale des douanes* (C-49/89) [1989] EU: C:1989:649.
55. Kennedy (2011).
56. *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (C-55/94) [1995] EU: C:1995:411.
57. Wahlberg (2014).
58. *Commission v. Italy* (C-388/01) [2003] EU: C:2003:30.
59. van der Beek (2003).
60. *Ibid*.
61. Craig and Búrca (2015).

scheme mandatory, falls outside the ambit of competition law. As a consequence, so does the decision by public authorities to make affiliation to a sectoral pension fund compulsory. The Court also decided that, while granting an exclusive right to the fund at issue constituted a violation of the competition rules, such a violation was justified due to the essential social function that the fund fulfils.

Thanks to the qualification by the ECJ of the services offered by the pension providers in *Albany* and in *AG2R*[62] as services of general economic interest (SGEI) the mandatory pension schemes at issue in *Albany* and the French compulsory healthcare costs insurance scheme at issue in *AG2 R* were able to benefit from the exception in Article 106(2) TFEU. Article 106(2) TFEU provides that undertakings entrusted with services of general economic interest are subject to the rules on 'in particular' competition, unless the application of those hampers the performance of the tasks assigned to them.

Nevertheless, the fact that a certain agreement or action – in this case the request to make participation to a sectoral pension fund mandatory – the government act making such a decision. as well as the conduct of the sectoral pension funds, would be acceptable under the provisions of competition law does not mean that such matters are equally allowed under the freedom of movement provisions.[63] The ECJ has decided to this effect in *Commission v. Germany*[64] and *Viking*,[65] contrary to the Dutch Supreme Court.[66] The cases decided by the Dutch Supreme Court were not only decided before the IORP I directive, but the justificatory grounds differ when tested against discrimination on nationality as explained above.

On the other hand, because of the phrase 'in particular' in Article 106(2) TFEU, there is an 'outspread assumption' that Article 106 (2) TFEU can also be used to justify a restriction of, *inter alia*, the free movement rules.[67] Unfortunately, the ECJ has thus far left unused an invitation to clarify the relationship between the exception of Article 106(2) TFEU and Article 56 TFEU. Those who support this opinion[68] put forward the idea that the justifications used in *Albany* under the competition rules can also be used to justify any breach on freedom of movement rules.

The case of *Kattner Stahlbau*[69] was about mandatory participation in a social insurance scheme for labour-related accidents. The ECJ said that, although the regulation of social security matters is a prerogative of the Member States, that prerogative must be exercised in accordance with the freedom to provide services. This means, in particular, that the freedoms afforded by the Treaties under the freedom to provide services must be adhered to. The ECJ says that the manner in which the system was set up in *Kattner* may constitute a restriction on the freedom to provide services, as it 'hinders or renders less attractive, or even prevents, directly or indirectly, the exercise of that freedom'[70] both for insurance companies established in other Member States to offer their services in the Member State concerned, as well as the freedom of businesses that are affected to select a provider from abroad.

62. *AG2 R Prévoyance v Beaudout Père et Fils SARL* (C-437/09) [2011] EU: C:2011:112.
63. van Meerten (2012).
64. *Commission v. Germany* (C-271/08) [2010] EU: C:2010:426.
65. *Viking* (C-438/05) [2007] EU: C:2007:772.
66. van der Poel (2013).
67. Neergaard (2013).
68. Drijber (2007); van der Poel (2013).
69. *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* (C-350/07) [2009] EU: C:2009:127.
70. *Ibid*.

The ECJ finds, however, that such a restriction may be justified by overriding requirements relating to the public interest. Such restrictions must be in accordance with the proportionality principle and must be suitable to attain the objective pursued. There was no instance of direct discrimination in this case.

Nevertheless, mandatory affiliation to a *national* fund – by law and under certain circumstances by a decision by social partners – appears to be an obstacle to the freedom to provide services that is *directly* discriminatory. IORPs from other Member States would no longer be able to offer their services in the State that has made affiliation to a domestic fund compulsory. Again, this is subject to a different exception from the public policy exception in Albany, as this would be a matter of direct discrimination, which can be justified only by the exceptions contained in Article 52 TFEU, rather than by the rule-of-reason justification in Albany.[71] With respect to the current system of mandatory participation in the Netherlands, there appears to be no valid reason why the provider of mandatory sectoral pension schemes *must* be a Dutch *Pensioenfonds*.

To summarise the preceding paragraphs of this section, restrictions on the freedom to provide services are, in principle, permissible. Nevertheless, a distinction must be made between discriminatory restrictions and non-discriminatory restrictions.[72] Discriminatory restrictions on the freedom to provide services, for example if national pension funds are treated more favorably than providers from another Member State, can be justified on the grounds mentioned in Article 52 TFEU. Non-discriminatory measures 'must be applied in a non-discriminatory manner, i.e. they must be justified by overriding reasons based on the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain that objective.'[73]

The UNIS case

What is more, the Court recently ruled that, when public authorities exercise an exclusive right – such as a ministerial decision to extend the application of a collective agreement to appoint a single body for the administration of an insurance or pension scheme – the principle of transparency must be complied with.[74] This principle stems from the principles of equal treatment and non-discrimination. According to the ECJ in *UNIS*, this principle does not necessarily require a public call for tenders, but it does require 'a degree of publicity sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed.'[75] So, while Member States may create exclusive rights for certain service providers, the principle of transparency must be complied with.

In a similar vein, the social partners must abide by the same requirements mentioned in the preceding paragraphs when selecting a pension provider. The ECJ pointed out in *Viking* that it is settled case-law that the requirements on the fundamental freedoms apply not only 'to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.'[76] The social partners

71. van Meerten (2016).
72. van Meerten (2015a).
73. *Gräbner* (C-294/00) [2002] EU: C:2002:442.
74. *UNIS* (C-25/14 and C-26/14) [2015] EU: C:2015:821.
75. *Ibid*.
76. *Viking* (C-438/05) [2007] EU: C:2007:772.

are, therefore, obliged to take into account the same requirements as public authorities. This, taken together with the ECJ's decision in *UNIS*, means that the principle of transparency, stemming from the principles of equal treatment and non-discrimination that must be observed in the context of Article 56 TFEU, must also be complied with by the social partners. This applies even in circumstances such as those in the Netherlands, where affiliation can be made mandatory only to one type of Dutch pension provider: a *bedrijfstakpensioenfonds*. To state – as some authors do – that the principle of transparency does not apply because it is not possible under the current framework of the Wet Bpf to include other pension providers[77] appears to be, in the eyes of the authors, a logical fallacy: it appears to show merely that the Dutch legislator did not give sufficient consideration to European law requirements by excluding, a priori, other providers.[78]

For these reasons, too, the fact that the IORP (II) Directive contains the phrase '[w]ithout prejudice to national social and labor law [. . .] including compulsory membership' with respect to cross-border activity cannot lead to a conclusion that article 12 of the IORP II Directive *allows* for the exclusion of non-Dutch pension providers for the operation of mandatory sectoral pension schemes.[79]

Concluding remarks on The Netherlands

Considering the preceding paragraphs, it seems that the manner in which mandatory participation is arranged in the Netherlands could not survive a test against the freedom to provide services. It directly excludes non-Dutch providers from the market for mandatory occupational pensions. The only justificatory grounds for such direct discrimination are those enumerated in Article 52 TFEU: public policy, public security and public health. None of these grounds seem to offer compelling reasons to justify the exclusion of non-Dutch providers.

By making participation in the scheme mandatory as proposed by the Dutch legislator, and therefore allowing free choice with respect to the provider, it seems that the apparent obstacle to the free movement of services could be done away with. Indeed, in this case the social partners may choose from any type of provider in the second pillar, including non-Dutch providers.

SEO, the economic research agency that was commissioned by the State Secretary to investigate this possibility, concluded in its' 2015 report that the plans to link mandatory participation with the scheme rather than the fund is not in violation of either the EU's competition rules nor its rules on free movement.

First, with respect to competition law, the SEO report explains that, under the new plans, the collective action taken by the social partners to make affiliation to a particular scheme mandatory falls outside the scope of competition law. It bases this conclusion on ECJ case-law, in which it was decided that collective agreements fall outside the ambit of the competition rules due to the nature and purpose of such agreements.[80]

Nevertheless, in later case law it was made clear that even collective labour agreements can contravene competition law. In *FNV KIEM*,[81] on the setting of minimum fees for self-employed

77. Witte (2016).
78. van Meerten (2016).
79. Lutjens (2016a), for example states – without giving further reasons - that this phrase allows for the exclusion of foreign provides.
80. See Kok, van der Lecq, Lutjens et al. (2015). The report makes reference to the *Albany* case.
81. *FNV KIEM* (C-413/13) [2014] EU: C:2014:2411.

service providers, the ECJ held that provisions in a collective labour agreement for self-employed persons are not exempt from competition rules, unless these self-employed persons are in a position comparable to that of employees. The same considerations could also apply to the decision by the social partners to request the Minister for Social Affairs and Employment to make affiliation to a Bpf by all self-employed persons within a sector of industry mandatory.[82]

The SEO report is based on a scenario in which *one* provider for the mandatory sectoral pension scheme is chosen and this is then made mandatory for the entire sector by a government decision.[83] That appears to be in line with the wishes of the State Secretary.[84] Not only does this raise the question of how this proposal will change the status quo, but it also appears that the form of mandatory participation suggested by SEO could jeopardise the justifications for mandatory participation accepted by the ECJ.[85]

That problem is exacerbated by the fact that the social partners choose the provider for the entire scheme. Nevertheless, it seems unlikely that the same persons who designed the scheme and that are on the board of a certain pension fund (see above) allow for the scheme be operated by *another* pension fund with *other* social partners on board. It is therefore not unthinkable that this plan will bring about very little change compared to the current situation.

Second, the ECJ allowed mandatory participation to exist because of the essential social function that mandatory sectoral pension funds fulfil.[86] But, the SEO report appears to suggest that the new proposed scenario may lead to more individual schemes with less solidarity – caused arguably in part by the possibility for the Apf to ring-fence – and that there will be sufficient pension providers willing to operate mandatory schemes.[87] The reduction of competitiveness that results from the solidarity of the scheme was among the reasons that justified the existence of the exclusive right for the pension provider. The reduced solidarity of the scheme and the fact that there may be sufficient competition on the market puts this justification for mandatory participation at risk.[88] This could be different if participation to the scheme were mandatory but the selection of a provider was unrestricted.[89]

With respect to the freedom to provide services, the SEO report does rightly – albeit superfluously - concede that making the decision for the provider binding must comply with Articles 56 and 57 TFEU.[90] In particular, in referring to *Kattner*, the report established that such an act must not be detrimental to the possibility for non-Dutch providers to offer their services in the Netherlands or make it more difficult for Dutch service recipients – the social partners – to receive the services of a foreign provider. It sees no a priori reason to exclude a non-Dutch provider capable of operating a scheme. Nevertheless, considering the previous paragraph, it can be argued that the proposal in the SEO report could conceivably still violate the freedom to provide services. Given

82. Boumans (2016).
83. Kok, van der Lecq, Lutjens et al. (2015).
84. Klijnsma (2015b).
85. Borsjé (2016).
86. *Albany, Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Brentjens)* (C-115/97-117/97) [1999] EU: C:1999:434; *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven (Drijvende Bokken)* (C-219/97) [1999] EU: C:1999:437.
87. Borsjé (2016).
88. *Ibid*.
89. *Ibid.*
90. Kok, van der Lecq, Lutjens et al. (2015).

the fact that there will, ultimately, be mandatory participation to one pension fund – that is, after the social partners have selected a scheme and after the Minister has extended the collective agreement for it to apply to all employers and employees in a sector – the social partners and the Minister must bear in mind the requirements presented in this section.

An important question, therefore, is how a change to mandatory participation in a scheme will be implemented in practice. Once the change has been made to make schemes – rather than funds – mandatory, will the ministerial decisions that have made affiliation to those mandatory sectoral pension funds remain in force? Whether or not this happens, a situation should be avoided in which it is the pension funds themselves that will decide whether and under what circumstances employers may leave the fund.

The conflict of interest created by such discretion for the pension funds could also violate competition rules.[91] Under the government decree on exemptions and fines under the Bpf, the mandatory sectoral pension funds already possess this power when it comes to requests from employers to be granted an exemption form mandatory participation to the sectoral pension scheme.[92] Advocate General Jacobs, when delivering his Opinion in the *Albany* case, determined that these practices were contrary to competition law when commenting on the decree that was in force at the time.[93] He noted the conflict of interest of the pension fund, which 'occupies simultaneously the role of judge and party' in balancing the interests of the employers and the pension fund.[94] The new exemption rules, in force since 2000, still features a system whereby the pension fund itself may assess whether or not it grants an exemption to an employer who wishes to exit the fund.

Comparison: mandatory participation in a selection of Member States

Introduction

Now that the Netherlands has been studied in detail, it is appropriate to examine how systems of mandatory participation have been organised in other Member States and to ask whether these also feature a system that excludes providers from other Member States. The countries discussed below feature two separate models when it comes to mandatory participation. In Denmark and Sweden, collective agreements regulate most of the areas of labour law and largely substitute for statutory legislation and apply to all employees in a particular sector without government intervention.[95,96] In Germany, France, Belgium and the Netherlands, a government act is required to extend the application of collective agreements. In both cases, it is clear that the case law described in this article, and the requirements of the freedom to provide services as well as the principle of transparency, apply to both models.

Sweden

Occupational pensions in Sweden are, as in the Netherlands, quasi-mandatory through collective bargaining. What is unique about Sweden (and Denmark) is that there is no possibility for

91. See, for instance, *France* v *Commission* (C-202/88) [1990] EU: C:1990:64; *Tranchant* (C-91/94) [1995] EU: C:1995:374 and *GB-INNO-BM* (C-18/88) [1991] EU: C:1991:474 cited by A-G Jacobs in his opinion in *Albany*.
92. Decree on exemptions and fines on the Sectoral Pensions Act 2000, Stb. 2014, 531.
93 Opinion A-G Jacobs in *Albany*.
94. *Ibid*.
95. Hasselbach (2010).
96. Adlercreutz and Nyström (2010).

government intervention to make collective agreements generally binding.[97] The country's 'robust collective bargaining system with mandatory occupational pension coverage' is the foundation of occupational pensions in Sweden.[98]

About 90 per cent of Swedish employees are covered by an occupational pension scheme.[99] There are four main schemes in Sweden, with a number of additional schemes covering smaller sectors.[100] The four main schemes are: (i) the SAF-LO scheme for blue-collar workers, (ii) the ITP scheme for white-collar workers, (iii) the PA 03 scheme for central government employees and (iv) the KAP-KL scheme for county council and municipal employees. Each of the collective agreements is managed by an administrative body that collects the pension contributions paid by the employees and employers, and redirects the funds to the insurance company chosen by the employee.[101] The administrative bodies managing the schemes also select a number insurance companies from which the employee can then choose. These administrative bodies, in turn, are managed by the social partners, who select and negotiate the conditions for the providers of pension services.

Because Sweden's quasi-mandatory occupational pension system is based on collective agreements, there appears to be no formal legislation setting any requirements as to the nationality of the provider.

Denmark

The system for collective bargaining is highly regulated, but not by formal legislation as in, for example, the Netherlands. The Danish regulation is the consequence of the September Compromise of 1899, in which employers' associations recognised the fact that workers have the right to organise in trade unions and, vice versa, these trade unions accepted the employers' right to management. This September Compromise is still considered to be the basis of the Danish labour market today 'where the vast majority of employment terms and conditions are determined by agreement between the labour market parties as opposed to statutory regulation.'[102] This means that there are relatively few statutory labour and employment rules in Denmark.[103] Those that do exist are typically a consequence of EU law.

As in the Netherlands and Sweden, Denmark's second pillar consists of quasi-mandatory occupational pension schemes that complement the flat-rate, universal public pension.[104] In all three countries, the statutory pension is aimed at poverty relief, while the second pillar's role is to supplement the basic provision and to maintain living standards proportionally. Like Sweden's system, the system for occupational pensions in Denmark was created by collective bargaining processes rather than by a legislative process.[105] There is no possibility for the government to

97. Sebart (2015).
98. Anderson (2015).
99. *Ibid*.
100. Barr (2013).
101. Bovenberg, Cox and Lundbergh (2015).
102. PWC (2009).
103. *Ibid.*
104. Beier Sørensen and Dengsøe (2011).
105. Hansen, Hougaard Jensen and Sephensen (2015).

extend the application of a collective agreement.[106] Around 80 per cent of Danish workers are members of an occupational pension scheme.[107]

The social partners determine the design and content of pension schemes in collective agreements, and the resultant schemes are the direct results from such bargaining.[108] This means that these schemes are contractual. The social partners also decide on the company that administers the pension scheme.[109] There is no formal legislation on this subject in Denmark.[110] Given the absence of such legislation, there appears to be no formal obligation for the social partners to opt for a Danish provider.

Germany

Although the public pension system in Germany is dominant,[111] second-pillar arrangements are becoming more prevalent as trust in the public scheme wanes[112] and public benefits were cut in recent reforms.[113] The importance of such schemes for future retirement incomes is also on the rise.[114] Germany features some occupational schemes that have been made mandatory by collective agreements. Although not nearly as prevalent as in the other countries under review in this article, the coverage rate of occupational pensions in Germany increased significantly between 2001 and 2011. The percentage of private enterprises offering occupational pension plans grew from 31 per cent to 50 per cent.[115] Nevertheless, this growth has slowed since 2009. The German government aims to increase coverage by making pure DC plans, that are currently disallowed-by-law, possible. This proposal would effectively do away with an employer's '*Subsidiärhaftung*' enshrined in §1(1) of the Company Pensions Act (*Betriebsrentengesetz*, BetrAVG).[116]

The pension benefit obligation – the amount of money an employer must pay into the pension scheme – can result from an individual contract, in which the employer and the employee agree to the employee's participation in a pension scheme, or from a collective agreement.[117] The agreement is binding on the parties to it without becoming part of the employment agreement. Like the Netherlands, and unlike Sweden and Denmark, the Federal Ministry of Labour and Social Affairs can extend the applicability of a collective agreement to make it generally applicable.[118] The consequence of an *Allgemeinverbindlicherklärung* is that also those employees and employers who were not parties to the agreement will be bound to it.[119]

An aspect of German law that could be problematic from the perspective of European law is the fact that the BetrAVG allows only five types of implementation alternatives, or *Durchführungswege*. These are listed in §1(1) and represent an exhaustive list. Non-German market participants

106. Bruun (2007).
107. Centraal Planbureau (2015).
108. Thode (2010).
109. Pensam website, see https://www.pensam.dk/pension/PDFfiler/Andet/Hvem%20bestemmer.pdf [11 July 2016].
110. *Ibid.*
111. Hufeld (2015).
112. Ettel and Zschäpitz (2016).
113. Wiß (2015).
114. Wiß (2011).
115. Bundesministerium für Arbeit und Soziales (2012).
116. Mercer (2015).
117. Welker (2005).
118. § 5 Tarifvertragsgesetz.
119. Derbort, Herrman, Mehlinger and Seeger (2012).

that do not match the specifications of any of the five implementation alternatives are therefore excluded from the market.

Belgium

Public pensions make up roughly 80 per cent of the retirement income for the elderly in Belgium.[120] Approximately 45 per cent of the working-age population is covered by an occupational pension scheme.[121] Three quarters of sectoral pension schemes are administered by insurance companies, while 11 sectoral pension schemes are administered by IORPs. All new schemes are administered by an insurance company.[122] Roughly 1.5 million Belgian workers were covered by sectoral pension scheme as of April 2015.

Supplementary pension plans originate from collective agreements established by the social partners: the representative bodies for employers and employees who are represented in the Joint Committee of the sector. The social partners design the sectoral pension scheme in this Joint Committee,[123] which has sole responsibility for implementing, altering or closing a pension scheme.[124] The collective agreement that establishes the sectoral pension plan must be of valid and must have been made generally applicable by the King.[125]

As in the other countries that feature the possibility of making a collective agreement generally applicable, the extension of collective agreements implies that employers and employees that are not parties to the collective agreement are bound by it.[126] Any failure to comply with the obligations specified in the collective agreement is met with criminal and administrative sanctions.

In accordance with Article 8 of the Belgian Act on Supplementary Pensions (Wet Betreffende de Aanvullende Pensioenen/WAP) the collective agreement determines the pension scheme's rules. It also refers to the choice of provider. The provider is a *pensioeninstelling*, which is defined in Article 3, § 1, 16°. This provision refers to the institutions specified Books II and III act of 23.03.2016 relating to the statute for and supervision of insurance and reinsurance undertakings, or the institutions specified in Article 2, 1 of the act of 26.10.2006 concerning the supervision of institutions for occupational pensions. The two books of the aforementioned act make a distinction between insurance and reinsurance companies governed by Belgian law and foreign law. Article 2, 1 of the act of 26 October 2006 defines a *pensioeninstelling* as an institution, regardless of legal form, that has been established for the purpose of providing occupational retirement benefits. It follows from this definition that there is no nationality requirement.

France

The French pension system is almost entirely based on a pay-as-you-go mechanism. This goes for the statutory scheme as well as for mandatory occupational schemes.[127] The strong reliance on

120. OECD (2013).
121. *Ibid*.
122. FSMA (2015).
123. Section III of the Explanatory Memorandum to the Act on Supplementary Pensions (WAP).
124. Hendrickx (2013).
125. Article 10 of the Act on Supplementary Pensions (WAP).
126. Section III of the Explanatory Memorandum to the Act on Supplementary Pensions (WAP).
127. Naczyk and Palier (2010).

generous pay-as-you-go public pensions initially crowded out funded private pensions. For many professions, the statutory scheme is complemented by a mandatory-by-law occupational scheme, such as the *régimes complémentaires obligatoires* for private-sector employees. These were established by collective agreements and are managed exclusively by two federations controlled by the social partners: and AGIRC which sets the rules for the pension institutions that manage the schemes.[128] Since the decision by the social partners to comply with Regulation (EEC) 1408/71, AGIRC and ARRCO schemes have been 'quasi-first-pillarised'[129] and therefore do not strictly fall under the second pillar as defined by the OECD. Nevertheless, cuts in these schemes started the gradual growth of funded private pensions.[130]

With respect to non-statutory occupational pensions, there are three main types of scheme.[131] These can all be made mandatory by a decision of the competent minister, who may extend the application of collective agreements that contain, *inter alia*, pension stipulations.[132] There are so-called 'Art. 39' DB schemes and 'Art. 83'[133] DC schemes, as well as PERCO.[134] 'Art. 39 schemes have been generally offered to a limited number of senior managers employed in large companies [. . .]',[135] while Art. 83 schemes cover a larger number of workers. Article 39 and Article 83 schemes may be administered by insurance companies, pension funds and mutual societies.[136]

PERCO was introduced in 2003 by the so-called 'Fillon reform' that placed more emphasis on funded, private pensions. PERCO is an optional funded, defined contribution scheme.[137] A PERCO scheme can be operated by a *Fonds commun de placement d'enterprise* (FCPE) or a *Societé d'investissement à capital variable* (SICAV).[138] Although all three types of occupational pension schemes are predominantly company-level schemes, they can be sector-wide. PERCO plans are organised at firm level or by the social partners at sectoral level,[139] while Art. 39 and Art. 83 plans can also be offered to only a limited group of workers within a company.[140]

Ordonnance no. 2006-344 of 23 March 2006 has transposed the IORP Directive into French law. Its Article 8 states that non-French IORPs can offer their services in the field of PERCO, provided they comply with labour law and social law applicable in France, since PERCO falls within the material scope of the IORP Directive. According to the ordinance, they benefit from the same tax and social treatment as other PERCO providers.[141]

The ordinance also applies to the occupational retirement business of insurance companies, in particular to articles 39 and 83 of the General Code of Taxation, while it explicitly excludes

128. *Ibid*.
129. *Ibid*.
130. Naczyk and Palier (2011).
131. *Ibid.*
132. Article L.911-3 of the French Social Security Code.
133. These schemes are named after the articles of the French General Code of Taxation in which they are enshrined.
134. Stevens (2006).
135. Naczyk and Palier (2010).
136. Naimi (2007).
137. Rossi Manganotti (2015).
138. *Ibid*.
139. Palier (2010).
140. Naczyk and Palier (2010).
141. Rapport au Président de la République relatif à l'ordonnance n° 2006-344 du 23 mars 2006 relative aux retraites professionnelles supplémentaires (JORF du 24 mars 2006).

obligatory-by-law occupational pensions. Providers from other Member States or EEA nations may be selected for those schemes.[142]

Concluding remarks

Mandatory participation has, so far, been justified mainly from the perspective of competition law by the ECJ. The same justifications that were used under competition law may (*inter alia* 106 TFEU) also apply to the freedom of movement provisions.

What may justify the breach is the high degree of solidarity of pension schemes. Nevertheless, several other developments in the Netherlands may 'weaken' this solidarity, such as reduced risk sharing through the possible abolition of the average contribution rate and the linking of the retirement age to life expectancy.[143] In addition, at the time of the ECJ's assessment of Dutch mandatory participation, defined benefit arrangements were still the norm. With the increased shift to defined contribution arrangements, one may question whether mandatory participation in its present form still complies with the ECJ's criteria.[144]

The plans to allow mandatory sectoral pension funds to join, or convert into, an Apf may also be detrimental to the justification of mandatory participation. Once mandatory participation is converted into an obligation to become affiliated with a scheme rather than a fund, and a greater number of pension schemes are operated by an Apf, the foundation of the justification may begin to crumble, owing *inter alia* to the fact that ring-fencing is possible within the Apf, which could be detrimental to the schemes' solidarity.[145] The opportunity to switch between providers and schemes creates increased competition, which may harm the system's social character.[146] The argument that ring-fencing was allowed by the ECJ, and thus, ring-fencing would not endanger the mandatory participation, must be seen in conjunction of the other criteria that justify mandatory participation.[147] It cannot be used as a stand-alone argument.

The test against 106 TFEU seems a limited approach regarding compulsory membership to a scheme and/or fund. The fact that Dutch law currently allows only Dutch funds to carry out such schemes, to the exclusion a priori of non-Dutch providers, appears difficult to justify. The developments around the Apf, described above, make the justification of Dutch-style mandatory participation as a concept difficult to uphold. The contrast with other Member States makes the existence of this system all the more puzzling, as none of them appear have in place a formal prohibition from choosing a provider from another Member State, while some even explicitly allow this.

From the perspective of the freedom to provide services, the assumption that current arrangements in the Netherlands are in accordance with the requirements of Article 56 TFEU should not be made too quickly. The social character of mandatory participation to the scheme at issue in *Albany* was cited to justify restrictions on competition. The affordability of the scheme, the absence of risk selection and various other characteristics led the ECJ to conclude that mandatory participation was allowable. Nevertheless, the freedom to provide services was not invoked and there is reason

142. Article L. 143-4 of the Social Insurance Code.
143. Chen and Beetsma (2015).
144. van Meerten (2015a).
145. Borsjé (2016).
146. *Ibid*.
147. Maatman (2017).

to believe that this might have led to a different outcome, given the different grounds applicable to Article 56 TFEU. There appears to be no valid reason to exclude non-Dutch providers from the market to attain those goals, certainly if a foreign provider can offer the same pension scheme with conditions equivalent to or better than those that a Dutch provider offers. The developments around the Apf could go some way to alleviating some of the apparent discord between mandatory participation and the freedom to provide services, but only if the Dutch legislator implements a new form of mandatory participation in accordance with EU requirements. Nevertheless, the requirements of this freedom must be adhered to by social partners when selecting a pension provider.

Some authors argue[148] that the proposed changes in the Netherlands are not sufficient to undermine the solidarity that currently justifies mandatory participation. Nevertheless, this does not, as the authors of this article propose, go for the 'blind' selection of a national pension provider without taking into account the requirements of the freedom to provide services.

These conclusions also apply to mandatory participation in other Member States of the EU. Having in a place a system that is ultimately liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State[149] by implicitly or explicitly making affiliation to a provider from another Member State is forbidden. Exceptions to this prohibition are allowed only under strict conditions: they must be justified by overriding requirements relating to the public interest, be non-discriminatory and must be necessary and appropriate to attain the pursued objective.[150] In the case of direct discrimination, only the grounds enumerated in Article 52 TFEU provide reasons to justify such measures.[151]

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148. See, for example, van der Poel (2013).
149. *Arblade* (Joined Cases C-369/96 and C-376/06) [1999] EU: C:1999:575.
150. van Meerten (2012).
151. Wahlberg (2014).

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