To whom it may concern, but specifically:
National Associations for Volunteer Firefighters
European Fire & Rescue Services
The 27 Member States of the European Union
The European Parliament
The Dutch Ministry of Justice and Safety and partners

Attachment with this letter: Cuyvers, A. & Bogaard, G. (2021). 'The legal space for fire service volunteers under European law'. *The compatibility of the Dutch system of volunteer fire services with EU law*. Leiden: Leiden University.

L.s.,

With this letter, the Dutch Association for Volunteer Firefighters would like to share its views regarding the Matzak-ruling and its consequences for voluntarism. Rudy Matzak, a retained firefighter in Nijvel (Belgium), sued the city for compensation for his services as a volunteer firefighter. The European Court concluded in 2018 that "stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes" must be regarded as working time. The ruling has led to significant turmoil amongst different European member states that (heavily) rely on volunteer firefighters for the primary incident and disaster response. In line with the ruling, the Netherlands concluded earlier that no distinction exists between volunteer and professional firefighters and that volunteer firefighters are, in fact, discriminated part-time workers.

As a result, the Dutch government proposed to enlarge the difference between volunteer and professional firefighters. Central in this solution was the differentiating between education and tasks, where professional firefighters would receive additional education and are responsible for multiple tasks in firefighting, opposed to volunteer firefighters. The Dutch Association for Volunteer Firefighters (VBV) challenges a) the proposed solution by the Dutch government and b) the implications of the ruling by the European Court for volunteer firefighters in the Netherlands. The Association felt supported by findings of legal experts in this field and proposed that there are serious arguments to defend in court that EU law leaves enough legal space for traditional volunteer firefighters.

Based on the report of the legal experts, the Dutch Minister of Justice and Security indicates now that voluntarism in the fire service in the Netherlands is essentially possible within the current European legislation and regulations. During her contacts in Europe, she will draw attention to the findings of the legal experts. After all, many EU countries, including Brussels, are looking for a solution to ensure the volunteer-based emergency response systems and protect workers' rights.

We want to present this viewpoint and its supporting documentation in the following.

Like many other European member states, the Netherlands heavily relies on volunteer firefighters for the daily incident and disaster response. Volunteer firefighters make up 82% of the Dutch firefighting service, totaling at 18.857[1] persons in 2019. Consequently, as the Matzak ruling touches upon the core of voluntarism, the basis of the Dutch fire services is unstable. Supported by Dutch legal experts we propose that EU-member states follow a less strict interpretation of European law, giving legal space for professional voluntarism in fire services. Historically European law regularly has clashed with national constitutional law, and the court has often exhibited legal creativity in applying European rulings.

Central in the proposition for applying creativity is that limitation of European ruling is inherently necessary for protecting societal goals and interests. Voluntarism is recognized by both European as national and can even be coupled with Dutch constitutional tradition. As such, we propose that voluntarism is an inherent exception, and such professional voluntarism does not conflict with European law on labor. The French government has already changed national law to embed and consolidate civil participation in line with this.

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Similarly, the concluding remarks of the European Commissioner for Jobs and Social Rights in 2019 in the European Parliament give space to maintain voluntarism in Europe.

For both the European Union and its member states, it is of utmost importance to recognize voluntarism and give space for an inherent exception on European rulings regarding labor time. To facilitate this, we call upon collective action with all firefighting unions, associations and organizations, and governments of individual member states to embed the principle of inherent exception for voluntarism in law or soft-law.

Long since European member states have recognized volunteer firefighting as the core of the incident- and disaster response, society heavily relies on man and woman's day-to-day unlimited and altruistic commitment to make society a safer place. With the increasing professionalization of firefighting services, the work is still founded on the core fundaments of voluntarism. We now need to stand together and take a stance to prevent unforeseen collateral damage by European law from destroying an indispensable and vital construct for public safety.

With kind regards and hoping for your support,

On behalf of the Dutch Association for Volunteer Firefighters,

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[1] As of January 1st, 2019 (Source: CBS)

The legal space for fire service volunteers under European law[1]

The compatibility of the Dutch system of volunteer fire services with EU law[2]

1. Introduction

EU law protects employees, and rightly so. Wherever someone works, full-time or part-time, they deserve full protection. Moreover, this right is only becoming more important in the age of Amazon and Uber. But the broad protection of employees under European law seems to create an unintended victim: the volunteer. Where volunteers execute comparable work to employees, and where they receive (very limited) remuneration, they qualify in principle as employees under EU law. As a result, they should be treated absolutely equally, for example in terms of payment and pension. But what is the point of, and legal scope for, volunteering if, under EU law, you are forced to become an employee?

This may, at first glance, not seem much of a problem - who would object to more rights? But at both a practical and a societal/constitutional level, this unintended restriction of volunteering can result in serious problems. The specific case of the volunteer fire service illustrates this. The volunteer fire service in the Netherlands is so professional that most volunteers do similar work to the 'professionals' when called out. This is fortunate, because most fire services depend entirely on these volunteers. Both the voluntary nature of the work and the equality are important to these volunteers: they want to be real firemen, not glorified helpers wearing a fireman's helmet. Because they are so professional, and receive small remuneration of, on average, just under €2,000 per year, the government is concerned that all fire service volunteers will qualify as employees under EU law. To prevent this, the government seems to be opting for so-called task differentiation: volunteers must execute such different work than 'professionals' that they no longer qualify as employees. This hits the volunteers right in their heart as firefighters. Purely out of fear of EU employment law, the entire organisation of the voluntary fire service in the Netherlands is therefore being turned upside down and the legal horse is being put before the social cart. The volunteers and society lose. Recently, Newshour reported that 15% are considering hanging up their helmets if the plans for task differentiation go ahead.[3]

The case of the volunteer fire service thus also illustrates the broader social/constitutional problem. Firstly, broad interpretation of EU law can make voluntary work impossible, for instance because it is unaffordable for the organisations concerned to employ the volunteers or because volunteers do not want to be employed. Secondly, this EU logic can force volunteers to do less valuable or less interesting work than 'professionals'. As in the case of the fire service, this can affect both the added value and self-worth of volunteers: the volunteer pilot of the ambulance helicopter wants to fly, not change the oil. The volunteer who works in the school or sports club canteen makes the same sandwiches as a hired

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[2] This is an unofficial translation of a legal memo in Dutch which has been prepared for the Standing Committee on Justice and Security. An abridged and adapted version of this report has been accepted by the Netherlands Law Journal (*NJB*)for publication.

[3] 'Risk of empty fire service if reforms continue', News Hour Wednesday 26 May 2021.

employee. Thirdly, and most fundamentally, this strict European law approach can undermine the important role of volunteering in our society. After all, the essence of volunteering is that the work is done voluntarily, and not as an employee for remuneration. In the Netherlands, volunteering even constitutes a part of our underlying constitutional philosophy: in the House of Thorbecke, the social participation of professional volunteers is consciously relied[4] on. The undermining of volunteering therefore also affects this social/constitutional core and can result in an unnecessary impoverishment of our society. The professional volunteer is someone we must embrace and support, and for whom there must therefore also be legal scope.

This contribution explores the legal space that can be found, claimed or created under EU law to safeguard volunteering. In order to make this analysis specific and of applied interest, this analysis focuses on the case of the volunteer fire service: does EU law indeed necessitate the differentiation of tasks or the employment of all volunteer firefighters?

Our argument is that, by looking not just at EU employment law but also at some doctrines in wider EU law that have previously been used to create legal safety nets for unnecessarily broad effects of EU law, there is a good chance of creating this scope. Indeed, we argue that the EU and EU law itself will even be grateful to the Netherlands if the Netherlands shows the legal courage to point out and defend this legal scope. Moreover, even if our legal arguments were not followed in Luxembourg, which is a realistic option, the legal, financial and social risks for the Netherlands would be limited. In any case, these will be many times lower than implementing full task differentiation at this stage.

To test these arguments, section two first sets out the standard approach under EU employment law, based in part on the legal analysis conducted for the State. With this approach, which is based on a careful but risk-averse application of EU law, a choice must be made between either an adequate form of task differentiation or regular employment for all fire service volunteers. Section three formulates three alternative approaches under EU law. Primarily, it is argued that it is *inherent* to being a volunteer that certain parts of EU employment law do not apply to genuine volunteers. Alternatively, it is argued that safeguarding volunteering itself is a legitimate concern that is proportionately served by the current system. Finally, perhaps less far-reaching objective differences can be found between different categories of fire service volunteers to make task differentiation unnecessary. Section four briefly discusses why the risk of a negative court ruling that would force the current Dutch system to be overturned is limited in any event. Section five concludes with a more general conclusion regarding the importance of recognising volunteering for EU and Dutch law.

2. EU legal framework and the orthodox approach: the professional volunteer as employee

The State's conclusion that there is a real risk that volunteer firefighters qualify as part-time employees under EU law and are therefore entitled to equal treatment as professionals is

[4] G. Boogaard, 'Scope through rules. Rules for civil society, in: Ministry of the Interior and Kingdom Relations, Scope in rules. Essay collection, The Hague 2020, p. 48-54.

based on a careful and, in itself, correct analysis by the State Advocate as well as Professor Verburg, who was consulted as an external expert.[5] This section will describe the essence of this analysis and the EU legal framework contained therein, and otherwise refers to these public opinions.

The European law analysis starts with the autonomous EU concept of employee. Under primary EU law, a person qualifies as an employee if he/she 'for a certain period of time executes work for another person under his authority and receives remuneration in return'.[6] This work must also be 'real and actual', which depends, inter alia, on whether this is 'usually executed on the labour market'.[7]

Fire service volunteers execute real and actual work under the authority of others.[8] The remuneration they receive for this varies. Some volunteers work many hours and are also 'quartered in barracks'. As the remuneration is partly linked to the number of hours worked, this group also receives a relatively higher remuneration. However, the majority of volunteers work with an opt-out: they are never obliged to respond to a call. Even these volunteers with an opt-out receive financial remuneration. This remuneration is relatively low, averaging around €2,000 per year. However, this remuneration is partly based on the number of hours worked.[9] The CJEU has already considered relatively low remuneration, or even remuneration in kind, adequate for qualifying as an employee, certainly in the context of part-time work.[10] Also because the amount of the remuneration for volunteers is partly based on the number of hours worked, it can also be said that this remuneration constitutes consideration for the work executed. As a result, the conclusion can be drawn that even volunteers with an opt-out may qualify as employees under EU law.[11]

The next step in the EU legal analysis is based on the Part-Time Directive.[12] In line with the general protective purpose of EU employment law, this directive aims, inter alia, to combat

[5] Pels Rijcken & Droogleever Fortuijn, ' Legal position of firefighters in the context of European and international legal rules' (November 2018), appendix to the letter to the House of Representatives dated 10 December 2019, and Prof. L. Verburg LL.M, 'Problem-solving approaches for maintaining fire safety (the current organisation and working method in respect of volunteering in the fire service) within the existing legal frameworks' (15 May 2019), appendix to the letter to the House of Representatives dated 24 June 2019. The State Advocate concludes thereby that there is a 'real risk that elements in the legal position of volunteer firefighters are in conflict with the standards under European and international legislation'.

[6] See for this CJEU Case 66/85 Lawrie Blum ECLI:EU:C:1986:284 par. 17, and for a more recent confirmation CJEU Case C-147/17, Sindicatul Familia Constanţa et al. ECLI:EU:C:2018:926, par. 41. NB for more specific regulations, a different definition of worker can apply. See for example CJEU Case C-85/96 Martínez Sala, ECLI:EU:C:1998:217 par. 31, and CJEU Case, C-256/01, Allonby ECLI:EU:C:2004:18 par. 63.

[7] See for this CJEU Case C-456/02 Trojani ECLI:EU:C:2004:488, paras. 23-24.

[8] See on this point also CJEU Case C-518/15 Matzak ECLI:EU:C:2018:82, para. 30.

[9] See article 19:13 up to and including 19:20 CAR-UWO. The remuneration of fire service volunteers is based on an annual allowance, an hourly amount for exercises and courses, an hourly amount for firefighting and emergency assistance, a consignment allowance and an hourly amount for long-term presence.

[10] See for this, for example, CJEU Case 196/87 Steymann ECLI:EU:C:1988:475, para. 14. For the low threshold in the case of part-time work, see for example CJEU Case 53/81 Levin ECLI:EU:C:1982:105, par. 17, CJEU Case 139/85 Kempf ECLI:EU:C:1986:223 and CJEU Joined Cases C-22/08 and 23/08 Vatsouras ECLI:EU:C:2009:344.

[11] See also Verburg, inter alia paragraph 4.

[12] Directive 97/81/EC of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC OJ [1998] L 14, p. 9-14.

discrimination against part-time employees. To this end, Clause 4 of the Part-time Directive states the following:

> 'In respect of employment conditions, part-time employees shall not be treated in a less favourable manner than comparable full-time employees solely because they work part-time, unless the difference in treatment is justified by objective reasons.'

Therefore, part-time employees may not be treated less favourably unless there is an objective justification for this. According to Clause 3, a part-timer is someone whose normal hours of work are 'less than those of a comparable full-time worker'. A 'comparable full-time worker' is again defined as 'a full-time worker employed in the same establishment under the same type of employment contract or employment relationship, *executing the same or similar work* or exercising the same or similar duties (...)'. As a result, the qualification as a part-time worker depends in particular on whether part-time employees *execute the same or similar work* as full-time employees.[13]

In the case of fire service volunteers, the differences, both among volunteers and between volunteers and professionals, are found primarily in the obligation to turn up for duty and not so much in the nature of the work executed during calls. Roughly speaking, three categories of fire service volunteers can be distinguished. The *free inflow* volunteers can be called but have no obligation whatsoever to turn up when called. In most cases, they do not even have to pass on their availability. For this reason, fire services that depend entirely or largely on this type of volunteer (the majority) apply a coverage rate of 250%. In contrast, *tied inflow volunteers* state their availability themselves. They are then required to respond to a call during the specified times. They must also stay within a certain distance from the barracks during their on-call periods. Fire service volunteers *quartered in barracks* may also still state themselves when they want to be on-call or not. However, they must be at the barracks when they are on-call so that they can turn out immediately.

Once they have been called out, on the other hand, all types of volunteers and professionals execute largely the same work, depending on their rank.[14] Volunteers are also subject to the same requirements in terms of education, practice and training as professionals. Volunteers are therefore fully involved in extinguishing a fire and, as stated in the introduction, this is exactly what the volunteers want.

Because volunteers essentially execute the same or similar work as professionals when responding to calls, the understandable conclusion of both the State Advocate and Verburg is that they are probably part-time employees.[15] According to the State Advocate, the *Wippel*

[13] Analogously, for the interpretation, reference can be made to CJEU Case C-309/97, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse ECLI:EU:C:1999:241 and CJEU Case C-574/16, Grupo Norte Facility ECLI:EU:C:2018:390

[14] See also Pels par. 5.6.6. and the conclusion of the Rotterdam School of Management (RSM) and Erasmus University that in the Fire Service there is in principle one type of volunteer who does the same work as the professional employee', report, p. 22.

[15] Verburg does note, however, that especially the gradual intermediate steps between free inflow and professional make this conclusion more likely: if there were only professionals and only free inflow, the conclusion could therefore be different. Verburg also advocates a more holistic approach than an almost exclusive focus on the nature of the work executed; see inter alia Verburg par. 17 and 19.

exception does not apply, partly in view of the later ruling of the CJEU in *O'Brien*.[16] Because the volunteers qualify as part-time employees, they are in principle entitled to the same employment conditions as professionals, unless there is an objective justification for treating them differently.[17] However, for such an objective justification three strict conditions must be met: the unequal treatment must 1) serve a legitimate aim, and must 2) be appropriate and 3) necessary to realise this aim.

On the basis of an enquiry among the parties concerned, the State Advocate considers the legitimate aim to be primarily the safeguarding of capacity and safety. Equalising the employment conditions of volunteers and professionals would result in less capacity, as a result of which safety would not be sufficiently guaranteed. Although the State Advocate states that further research on this point may be advisable,[18] he considers a justification on this ground implausible, particularly because it is not sufficiently clear why alignment would result in less capacity.[19] As a second possible legitimate aim it was stated that treatment as a part-time worker could be detrimental to the sense of community and assistance, for example because there would be less 'incentive' to become a volunteer. The State Advocate does not seem to see much point in this but can 'imagine that further research will be conducted into the possible social effects of changing the current legal position of fire service volunteers'.[20] However, even if an objective justification can be found under these grounds, this can only apply to volunteers with an opt-out (free inflow). According to the State Advocate, volunteers without an opt-out are already so similar to part-time employees that preventing alignment can never be proportionate.[21] According to the State Advocate, it is particularly important in this assessment that alignment does not necessarily mean that the opt-out is eliminated. After all, part-time employees can also work with a free call. Because the opt-out can be retained, it is therefore never really a problem to regard volunteers as part-time employees. Verburg adds that the name of volunteer can also be retained, even if, legally speaking, these are part-time employees.[22] This de facto equates the essence of volunteering with the opt-out: as long as an opt-out remains, every employment relationship is in fact adequately equivalent to volunteering, and it can therefore never be proportionate to *not* treat volunteers in the same way as (part-time) employees.[23]

The State Advocate therefore concludes that tied volunteers and volunteers quartered in barracks in any case qualify as part-time employees, and that there is no objective justification for treating these two categories of volunteers differently. As far as the 'free

[16] Pels does discuss the possible application of *Wippel* for the free inflow, but does not consider it convincing. Verburg (in particular par. 8-13) takes a more nuanced approach and states that *Wippel* is still good law, but that the question of comparability should be approached holistically. This possible ground for derogation will be discussed in more detail in par. 3.3.

[17] Employment conditions is a very broad concept in this context, encompassing almost all employee rights, including the hourly wage, continued payment of wages during holidays, holiday allowance and pension rights. See also Pels par. 5.5.3 and CJEU case C-399/92 Helmig ECLI:EU:C:1994:415 and CJEU case C-360/90 Bötel ECLI:EU:C:1992:246

[18] Pels, par. 5.8.7.

[19] Pels, par. 5.8.19

[20] Pels, par. 5.8.23. The State Advocate also discusses a number of other possible grounds, mostly of an economic nature, which in our analysis cannot constitute a legitimate objective under European law.

[21] See also Pels, par. 5.8.29.

[22] Verburg, par. 22.

[23] See e.g. Pels, par. 5.8.31.

inflow' is concerned, the State Advocate sees a 'real risk' that this group will qualify as part-time employees. In addition, the State Advocate cannot conclude that there is an objective justification for not treating volunteers who join the free inflow volunteers as part-time employees, although this conclusion may change on the basis of further research. In this context, therefore, 'further research may be necessary'.[24] As a result of this qualification, the State Advocate subsequently concludes 'that it is plausible that the various groups of fire service volunteers are entitled to the same conditions of employment as the professional fire service'.[25]

In the following section, we attempt to contribute to this further research. As stated, our primary claim is that, apart from the actual employment conditions such as an opt-out, being a volunteer itself may offer sufficient legal scope under EU law not to qualify the free inflow fire service volunteers as part-time employees and to justify a difference in treatment.

3. A legal alternative: the inherent value of volunteering

Under the safe standard approach, there is therefore a real risk that even free inflow volunteers are part-time employees. Because employing all volunteers is considered unfeasible, the only alternative seems to be to not allow volunteers to do the same work as professionals, with everyone losing out. The net effect of the very broad protection offered by European employment law is therefore that the legal scope for professional volunteers disappears. Of course, bogus schemes must be avoided, and volunteering must not be used as an excuse for intentional or unintentional exploitation. But, conversely, we believe that European employment law must not, and need not, be an obstacle to genuine volunteering.

As the analyses by the State Advocate and Verburg show, there appears to be little scope within standard EU employment law to justify unequal treatment of fire service volunteers. However, in our analysis this scope can be found in the wider EU, certainly when one focuses on the importance of volunteering as such. It happens more often than not that a rule of EU law, in itself good and well-intentioned, appears to have too wide an impact, thereby having an undesirable restrictive effect on socially desirable practices. For example, freedom of movement law can have an undesirable effect on national sports competitions, or competition law can frustrate effective and desirable integrity agreements between lawyers or compulsory pension schemes. Certainly, where general and broadly interpreted rules of European law unintentionally and materially unnecessarily stand in the way of socially desirable, or even nationally constitutionally protected practices, the CJEU has often had to show some legal creativity in order to reconcile the European social aims.

What we are primarily proposing is that the legal logic of the exceptions that the CJEU has created in these cases is applied by analogy to protect the professional volunteer. To this end, we wish to apply, by analogy, to EU employment law some precedents from outside EU

[24] Pels, par. 5.9.3. As the possible applicability of the general EU principle of equal treatment here results in the same question (and conclusion) about justification, we will not deal with this separately. Where and when a justification exists to treat volunteers differently under the Part-Time Directive, this scope also exists under the general principle of equal treatment, insofar as this applies alongside the more specific standard of equal treatment in the Part-Time Directive.

[25] Pels, par. 5.12.2

employment law, which lie more at the intersection of EU internal market law and EU constitutional law. Alternatively, we think that, partly on the basis of this case law, it may be possible to objectively justify a distinction between fire service volunteers and professionals with volunteering as a legitimate objective. As a final option, it can be argued that *Wippel* certainly does provide an adequate legal basis to obtain the necessary legal scope from the CJEU, in particular for free inflow volunteers.

3.1. Inherent exceptions under EU law

In various contexts, the CJEU has held rules of European law, including the principle of equal treatment, inapplicable because a difference in treatment was *inherent to* the given context. This section discusses this case law, and states why it might also apply to (fire service) volunteers.

A first relevant example concerns sports. Many sports have an economic dimension, for example because of salaries received, prize money, or sponsoring. As soon as an activity is economic and cross-border, the European free movement rules and the competition rules apply in principle. However, the full application of these rules can result in undesirable outcomes, as is aptly illustrated by *Walrave and Koch* and other examples where sport and free movement crossed paths.[26]

Mr Walrave and Mr Koch were both 'pacers' at track races (for a fee), which meant that they rode their motorbikes in front of cyclists so that they could cycle in their wake. However, the *Union Cycliste Internationale* (UCI) stipulated that, as of 1973, for World Cups the pacer had to be of the same nationality as the cyclist.

Partly because they provided their services in return for payment, Walrave and Koch were in principle covered by the freedom of movement. They therefore had a right not to be discriminated against. However, the UCI rule directly discriminated against Walrave and Koch on the basis of their nationality. They therefore challenged the UCI rule under EU law.

As a result, the CJEU was faced with the question of whether it wanted to intervene, on the basis of freedom of movement law, in the organisation of international sports tournaments, which often make distinctions based on nationality. Imagine a World Cup where country teams are not allowed to discriminate on the basis of nationality! For our case on volunteer firefighters, it is now particularly interesting that the CJEU did not attempt to objectively justify the discrimination. It chose a more radical solution: rules that only relate to sport were qualified as non-economic, and therefore fell completely outside the scope of EU law. Assessing the EU ban on discrimination, the CJEU stated the following:

> 'However, that prohibition does not extend to the composition of sports teams, in particular in the form of national teams, since the formation of those teams is relevant only to sport and, as such, does not constitute an economic activity;

[26] CJEU Case C-36/74 Walrave and Koch ECLI:EU:C:1974:140. For a further analysis, see S.C.G. Van den Bogaert, B, Van Rompuy & A. Vermeersch, 'European Sports Law', In: S.F.H. Jellinghuis (Ed.) Capita sportrecht (Oud-Turnhout: Gompe & Svacina 2021), p. 95.

> However, that restriction on the scope of the provisions in question may apply only for its proper purpose;
>
> That it is for the national court to qualify, in the light of the foregoing, the activity that is subject to its ruling and, in particular, to decide whether or not, in the sport in question, the pacer and the cyclist form a team.'[27]

Although Walrave and Koch themselves were clearly economically active, EU law did not apply to the UCI's exclusion rules insofar as they had the interests of sport as their own objective. In other words, because the relevant rules had a sporting objective, they were inherently non-economic and freedom of movement law did not even apply.

This exception for 'purely sporting rules' has been confirmed repeatedly, including in *Dona*. That case concerned the rules of the Italian Football Association. These rules actually provided that only professional or semi-professional players of Italian nationality were allowed to participate in matches. The CJEU recognised that professional or semi-professional footballers are, in principle, covered by the free movement of services or employees, and thus fall within the scope of EU law.[28] Nevertheless, as in *Walrave and Koch*, the Italian discriminatory rule did not fall within EU law because it served a sporting objective:

> 'However, that these provisions do not preclude a rule or practice whereby foreign players are excluded from participation in specific matches for non-economic reasons related to the specific nature and context of those matches and which therefore concern *exclusively the sport as such*, as is the case, for example, in matches between national teams from different countries;
>
> However, that restriction on the scope of the provisions in question must be limited to their genuine objective;
>
> That it is for the national court to qualify the activity subject to its ruling in the light of the foregoing;'[29]

Now, there is little doubt about the fact that the Italian football competition is an economic activity, and that football players in this competition are economically active. Yet the Italian rules, which directly discriminated on the basis of nationality, did not fall under EU law. They were therefore permissible without the need for objective justification. In *Meca-Medina*, the CJEU subsequently ruled that the anti-doping rules of the IOC, also an economically rather active entity, were not subject to EU competition law.[30]

The CJEU seems to apply this exception mainly where there is a genuine, *bona fide* link between the rules and the organisation of sport itself, and in particular (in) national representation in sporting competitions.[31] Sport is an important social phenomenon, and the

[27] Walrave and Koch, paras. 8-10.
[28] CJEU Case C-13/76, Dona ECLI:EU:C:1976:115, paras. 12 and 13.
[29] Dona, para. 14-16.
[30] CJEU Case C-519/04 P Meca-Medina ECLI:EU:C:2006:492. In that case, the Commission and the General Court followed the 'purely sporting rule' exception, but the CJEU itself opted for a Wouters-like approach, which will be discussed in more detail below.
[31] See also CJEU Joined Cases C-51/96 and C-191/97 Deliège ECLI:EU:C:2000:199.

CJEU is obviously prepared to be legally creative, and to leave a lot of scope, if the aim is genuinely to secure national representation in sporting competitions. When this is not the case, and economic interests of individuals or clubs prevail, this exception does not apply.[32]

A second example of an inherent exception can be found in the so-called Albany ruling.[33] In *Albany*, an undertaking argued that the collective labour agreement obligation to participate in a specific pension fund infringed EU cartel law. Strictly speaking, this was indeed an agreement between several undertakings that could qualify as a cartel agreement. However, the CJEU emphasised the social objectives of the EU and the important role that collective labour agreements play therein. To leave sufficient scope for this, the CJEU subsequently chose to declare the cartel ban inapplicable to these types of social agreements:

> 'Although a certain restrictive effect on competition is inherent to collective agreements between organisations of employers and of employees, the attainment of the social political objectives pursued by such agreements would be seriously impeded if the social partners were required to comply with Article [101(1)] of the Treaty in their joint efforts to improve working and employment conditions.
>
> It therefore follows from a *helpful and coherent interpretation* of the provisions of the Treaty, read in conjunction with each other, that agreements which, with such objectives, are concluded in the context of collective negotiations between social partners should be regarded, by reason of their nature and objective, as *not falling within the scope of Article [101(1)] of the Treaty*.'[34]

As with sports, the CJEU therefore chose to completely exclude collective labour agreements from EU cartel law because of their inherent social purpose and high social importance.[35] This approach can also be recognised in rulings in which the CJEU does not qualify insurers with a purely social character as undertakings, as a result of which they do not fall under EU competition law, either.[36] As the CJEU stated, '[t]heir activity, based on the principle of national solidarity, lacks any profit motive and the benefits paid are statutory benefits, which do not depend on the amount of the premiums.'[37]

[32] For example, in particular in Bosman, the CJEU seems to have restricted the scope of this exception further. See CJEU Case C-415/93 Bosman ECLI:EU:C:1995:463, paras. 76 and 128. See in this connection also further CJEU Case C-176/96 Lehtonen and Castors Braine ECLI:EU:C:2000:201, CJEU Case C-438/00 Kolpak ECLI:EU:C:2003:255 para. 54, CJEU Case C-265/03 Simutenkov ECLI:EU:C:2005:213 paras. 38-39, and CJEU Case C-152/08 Kahveci ECLI:EU:C:2008:450 paras. 31-32 as well as, albeit more indirectly relevant, CJEU Case C-22/18 TopFit and Biffi, ECLI:EU:C:2019:497, para. 53.

[33] CJEU Case C-67/96 Albany ECLI:EU:C:1999:430.

[34] Albany, paragraphs 59-60.

[35] For subsequent confirmations and applications of CJEU see, inter alia, Brentjens, EU:C:1999:434, para 57, CJEU Drijvende Bokken, EU:C:1999:437, para 47; CJEU Pavlov et al., C-180/98-C-184/98, EU:C:2000:428, para 67; CJEU Van der Woude, EU:C:2000:475, para 22.

[36] As with sport, the social objective must then be the guiding principle, and not secondary. See, for example, CJEU Joined Cases C-262/18 P and C-271/18 P Dôvera zdravotná poist'ovňa ECLI:EU:C:2020:450.

[37] See, inter alia, CJEU Cases C-159/91 and C-160/91 Poucet and Pistre ECLI:EU:C:1993:63, paras. 15 and 18 and CJEU Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, AOK Bundesverband ECLI:EU:C:2004:150, para. 47.

A third example of inherent exceptions can be found in the so-called *Wouters* approach.[38] This case concerned the prohibition by the Netherlands Bar Association for lawyers and accountants to exercise their professions in an integrated manner. Some lawyers and accountants argued that this ban was an infringement of EU freedom of movement law and EU competition law. The CJEU acknowledged that lawyers engage in an economic activity and that the Bar Association is an association of undertakings within the meaning of Article 101(1) TFEU. Because the prohibition on integrated business operations also restricts interstate competition, the cartel prohibition in principle therefore applies to this type of prohibition. Again, however, the CJEU decided not to declare EU law applicable:

> 'However, it should be noted that not every agreement between undertakings or every decision of an association of undertakings that restricts the freedom of action of the parties or of one of them automatically falls under the prohibition in Article [101] (1) of the Treaty. In applying this provision to a particular case, regard must be given first to the overall context in which the decision of the association of undertakings was made or takes effect, and, more specifically, to its objectives, which in this case are linked to the need to adopt rules of organisation, competence, deontology, supervision and liability, which offer the end-users of legal services the necessary guarantee of integrity and experience and ensure the sound administration of justice. Thereupon it is necessary to examine whether the restrictive effects ensuing therefrom on competition are *inherent to these targeted objectives*.
>
> In the light of the foregoing considerations, the answer to the second question must be that a national regulation such as the Cooperation Regulation 1993, adopted by an institution such as the Netherlands Bar Association, *does not infringe* Article [101](1) of the Treaty since that institution could reasonably take the view that, notwithstanding the effects restrictive of competition ensuing therefrom, the aforesaid regulation is necessary for the proper practice of the profession of lawyer, as organised in the Member State concerned.'[39]

Here, too, the CJEU does not apply EU competition law to agreements between undertakings because these agreements are *inherently* required to secure certain socially desirable goals, such as the integrity of legal service provision. In doing so, the CJEU does not make use of the grounds for justification set out in Article 101(3) TFEU but creates an additional exception, not included in the Treaty, to the applicability of EU law itself. However, in *Wouters* the CJEU did conduct a necessity check, whereby the exception to the applicability of EU rules only applies if an agreement is not only inherent but also necessary to safeguard the interest in question.

These inherent exceptions created by the CJEU are also in line at a conceptual level with the exceptions and justifications for national rules that in principle conflict with EU law contained in Articles 4(2) TFEU and 106(2) TFEU. Article 4(2) TEU states that the EU shall respect, inter alia, the 'national identities' of Member States, as reflected in their basic political and constitutional structures. This provision does not give *carte blanche* to Member

[38] CJEU Case C-309/99, Wouters ECLI:EU:C:2002:98.
[39] Wouters, paras. 97 and 100.

States to infringe EU law under the pretext of national identity.[40] Also, under EU law, the ultimate application and interpretation of this provision rests with the CJEU. At the same time, this provision does articulate a certain respect for national values and practices of fundamental importance, such as perhaps volunteering, and offers scope to balance these against the importance of the full application of EU rules.[41]

This same scope for balancing is included in Article 106(2) TFEU on Services of General Economic Interest (SGEI), such as public transport. In principle, EU competition law also applies to SGEIs, which are inherently provided via the market. However, these rules do not apply 'insofar as the application of these rules would prevent the execution, in law or in fact, of the particular tasks entrusted to them'.[42] For example, it may be necessary to give a bus company state support, or an exclusive right, in order to maintain unprofitable bus routes. In such cases the social objective behind the SGEI outweighs the full application of EU rules, and derogation from EU law is allowed.[43]

On the basis of the above examples, it is clear that certain EU rules are sometimes not applicable when non-application of these rules is inherently necessary to safeguard important social objectives or interests. To our knowledge, such an exception has never been explicitly applied by the CJEU in the context of EU labour law. However, we see no good reason why the CJEU should not allow an exception to certain rules of EU labour law where this exception is inherently necessary to safeguard an important social interest such as volunteering, especially since the importance of volunteering is recognised both nationally and Europe-wide, and even can be linked to the constitutional tradition in the Netherlands. This approach would also contribute to the convergence within EU law itself, where the CJEU strives for convergence and consistency both within the freedom of movement and between the different areas of EU law.[44] Also from this perspective, it would be logical, for example, to follow a Wouters-like approach in EU labour law as well, if this could safeguard important social objectives.

Further support for the application of this approach in employment law can moreover be found in a recent opinion of AG Saugmandsgaard øe in *B.K.*[45] This case concerns the application of the Working Time Directive to military personnel. B. K. was a non-commissioned officer in the Slovenian army. Once a month, he had on-call duty at his barracks for a week. However, he was only granted eight working hours of on-call time per day for this work. The remaining hours were regarded as on-call time at the workplace, for

[40] See e.g. CJEU Case C-438/14, Bogendorff von Wolffersdorff, EU:C:2016:401, para. 64 and CJEU Case C-202/11, Las EU:C:2013:239, para. 26. See also the opinion of AG Maduro in CJEU Case C-213/07 Michaniki.
[41] 41 See, for instance, the approach of the CJEU in CJEU Case C-208/09 Sayn-Wittgenstein and CJEU Case C-391/09 Runevič-Vardyn and Wardyn EU:C:2011:291.
[42] Art. 106(2) TFEU.
[43] For a more detailed analysis on this point, see P.J. Slot, M. Park and A. Cuyvers, Services of general (economic) interest looked at more closely. Market and Competition, 2007 p. 101 ff.
[44] See within the freedom of movement for example the development in case law since CJEU case C-55/94 Gebhard ECLI:EU:C:1995:411. Of course, there are also examples where the CJEU deliberately does not converge, such as with the Keck exception or horizontal direct effect in the free movement of goods. See, for example, CJEU Case C-171/11 Fra.Bo ECLI:EU:C:2012:453 and CJEU Case C-384/18 Commission v Belgium (Accountants) ECLI:EU:C:2020:124. At the same time, the overarching tendency is to strive for convergence where possible.
[45] CJEU Case C-742/19 B. K. t. Republika Slovenija (Ministrstvo za obrambo) ECLI:EU:C:2021:77.

which he received only an on-call allowance of 20% of normal pay. As a result, the sensitive question arose of whether and to what extent the Working Time Directive also applies to military personnel: What if the enemy slyly waits until the maximum working time is up?[46]

The AG reached the conclusion that military personnel are employees under EU law, and that the Working Time Directive applies to them in principle. However, according to the first subparagraph of Article 2(2) of the Working Time Directive, it does not apply 'when particular aspects *inherent to certain public service activities*, i.e. in the armed forces or the police, or in certain activities in the context of the civil protection services, prevent its application'. The AG concurs with this exception, which in terms of logic corresponds to the inherent exceptions recognised by the CJEU discussed above. He thereby concludes that, in principle, the Working Time Directive must be followed in the case of military personnel, unless the military personnel execute specific activities, such as missions or training, 'of which the special aspects *inherent* thereto prevent the application' of, inter alia, the Working Time Directive.[47] In this way, the AG is of the opinion that 'the members of the military personnel, as employees, have rights to safety, security and health and safety at work, which are granted to them by the CJEU (...) in a balanced manner with the needs of the armed forces.'[48]

The above examples show that EU law repeatedly recognises exceptions where this is 1) necessary to serve 2) an important national societal objective that 3) is also recognised in EU law, and when 4) there is an inherent tension between serving these societal objectives and full application of rules of EU law. If this is the case, the CJEU sometimes considers EU law not to apply at all, provided that 5) the national rules genuinely and primarily aim to serve these social objectives and 6) they do not go beyond what is necessary to serve these objectives. Like the AG in B.K., EU law thus attempts to reconcile, in a balanced manner the application of EU rules with important societal objectives.

In our opinion, such an inherent exception can also be advocated for voluntary work and the application of EU labour law. Volunteering constitutes a fundamental social interest, both for the EU and for the Netherlands.[49] Although volunteering, and more specifically the volunteer fire service, may not fall under the Dutch national identity within the meaning of Article 4(2) TFEU *strictu sensu*, volunteering is, moreover, closely connected to Dutch constitutional history and culture. Thorbecke already considered volunteering to be an important connecting factor between government and citizens. Moreover, volunteers fulfil a crucial social role, as has become clear again during the COVID pandemic. However, as the example of the fire service volunteer shows, there is an inherent tension between (professional) volunteering and certain parts of EU employment law. When volunteers do the same work as 'professionals', they must have the same employment conditions as these professionals under EU law. At the same time, it is inherent to volunteering that work is done

[46] This is a free rewording of Asterix and Obelix and the British, where Caesar cunningly waits for Tea Time to attack.
[47] Conclusion of AG Saugmandsgaard øe in CJEU Case C- 742/19 B. K. t. Republika Slovenija (Ministrstvo za obrambo) ECLI:EU:C:2021:77, para 105.
[48] Idem, par. 93.
[49] See also the European Charter on the Rights and Responsibilities of Volunteers of 2012, which was partly realised with the support of the European Commission, available at: <https://ec.europa.eu/citizenship/pdf/volunteering_charter_en.pdf>

without, or at least *not because of*, consideration such as salary, pension or holidays. As soon as the volunteer is obliged to accept salary and other forms of remuneration, the essence of volunteering is undermined. After all, voluntary work is the antithesis of paid work, so compulsory paid work is inherently contrary to the essence of voluntary work.

Analogous to *Walrave and Koch, Albany, Wouters,* and *A.B*., it can therefore be argued that the Part-Time Directive is partly inapplicable to genuine volunteering as long as the actual aim is to enable citizens to contribute to society as a volunteer and the exception does not go beyond what is necessary to leave the inherent essence of volunteering intact. This means that, for each working condition, it can be separately determined whether its application would inherently run counter to volunteering, which will be the case in particular for forms of compulsory payment or compensation and employment. Many other employment conditions that offer crucial protection are not in conflict with volunteering, and therefore continue to apply to volunteers.[50] Examples include rules on equal treatment between men and women, safety and protection, or training and education.[51] Treating men and women equally will never stand in the way of genuine volunteering. In addition, this exception can only apply where the actual purpose is to ensure genuine volunteering, not where there are de facto employees who are simply labelled as volunteers. For this reason, we believe that the inherent volunteer exception applies in particular to free inflow volunteers, and possibly also to tied inflow volunteers. However, in the case of volunteers quartered in barracks, it is more logical to qualify this group as part-time employees under EU law.

Viewing volunteering as an inherent exception therefore strikes a balance between the crucial protective objective driving EU labour law on the one hand, and the social importance of genuine volunteering on the other, precisely when volunteers become so good that they can do the same work as paid employees. This creates crucial legal scope for genuine volunteering, in all sectors of society, and does not stand in the way of the social aims that European law itself also pursues. EU employment law and European integration more generally, does not aim to obstruct professional volunteers. As with the other inherent exceptions recognised by the CJEU, this exception therefore also prevents EU law from creating unnecessary victims amid socially/constitutionally desirable practices, thereby also contributing to the legitimacy and social intelligence of EU law itself.

For these reasons, this approach to the inherent exception is our preferred one. It provides a structural, systematic solution to volunteering in general, is in line with the logic of EU law, and increases the social heart and mind of the EU without unduly curtailing protection of employees. At the same time, we emphasise that the CJEU has never applied this exception and that this proposal is therefore based on an analogous application of already exceptional case law. This analogous approach can therefore be rejected by the CJEU. This risk is increased by the general protective aim underpinning EU labour law, which will rightly look

[50] Consider, for example, the Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) and the Directive on the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2006/54/EC).
[51] As such, our approach is also in line with CJEU Case C-518/15 Matzak ECLI:EU:C:2018:82. After all, this case concerned on-the-job safety and protection of volunteer firefighters. On this point, there is no inherent conflict between the EU standards and volunteering, so the EU standards apply in full and no exception applies.

sceptically at the argument that certain people voluntarily do not want equal treatment.[52] Nonetheless, this exception fits within the logic of EU law and, in our opinion, it is a limited risk that can and must be taken, both in the interest of the fire service volunteers and of EU law itself.[53] In addition, the Netherlands can, in the event of proceedings, also derive a subsidiary argument from volunteering as a ground for justification.

3.2. Volunteering as a legitimate aim for objective justification

As discussed, unequal treatment of part-time employees may be permitted under the Part-Time Directive if such treatment is objectively justified. This again requires that the unequal treatment serves a legitimate aim in an appropriate and necessary manner. Both the Advocate General and Verburg see little chance of objective justification. This is particularly because they mainly assume the safeguarding of capacity and safety as the relevant legitimate aim. They state that the distinction in terms of employment conditions between volunteers and professionals may not be suitable and necessary to serve this legitimate aim, partly because the opt-out can also be maintained for part-time employees.

However, this analysis changes if one does not consider the safeguarding of capacity and security but the *safeguarding of genuine volunteering* as a legitimate aim. The crucial consequence of changing the underlying legitimate aim is that the proportionality test must then also focus on this new legitimate aim. In other words, the legally relevant question becomes whether the distinction in employment conditions between volunteers and professionals is appropriate and necessary to *maintain genuine volunteering*. The answer thereby no longer depends on the actual question of whether sufficient firefighters will remain if all volunteers become part-time employees. Instead, the question becomes whether unequal treatment in terms of employment conditions is appropriate and necessary to maintain the voluntary nature of the fire service.

This seems to us to be clearly the case: by not giving fire service volunteers the same employment conditions as part-time employees, one guarantees that they will continue to do fire service work because of their willingness to contribute as volunteers, and not for the employment conditions. The suitability is hence a given. The next question is whether the unequal treatment is also *necessary* to maintain the voluntary nature. On the one hand, one can argue that the distinction is not necessary because even with part-time work an opt-out can continue to apply, allowing individuals to still 'voluntarily' choose whether they want to come to work or not. On the other hand, it seems more convincing to argue that for genuine volunteering to take place, it is necessary that the work is not done on the same employment conditions as employees. As soon as volunteers have exactly the same employment conditions as employees, the characteristic element of volunteering disappears. Moreover, the example of fire service volunteers shows that the only realistic alternative to genuine volunteering seems to be task differentiation. It can be argued that this is an even more far-

[52] It is important to note, however, that the exception we advocate is not the same as the 'voluntary' renunciation of rights by employees, which is logically not permitted under EU employment law. It concerns a broader exception that can only apply if the general context shows that there is genuine volunteering.
[53] See also the discussion in par. 4 where we explain that even if the CJEU did not go along with this exception, the actual risk for the State would still be limited.

reaching encroachment on volunteering than not being treated unequally with respect to some employment conditions, also because task differentiation is actually equivalent to completely abolishing genuine volunteering for certain professional tasks. Finally, it must be taken into account that the unequal treatment would only concern those employment conditions that in fact conflict with the essence of volunteering. The unequal treatment does not thereby go beyond what is strictly necessary to safeguard the essence of volunteering, making the measure as a whole necessary and therefore proportional.

In this assessment it is also important that the CJEU often leaves Member States and national courts some discretion in making this consideration. This discretion is greater in particular when there is an evident social interest and when, to put it bluntly, it is credible that the Member State is genuinely engaged in serving a social interest and does not simply want to use an excuse to get out of EU law.[54] Certainly because the fire service is an old and deeply-rooted social tradition with a constitutional basis, and the call to retain the voluntary nature of the service comes precisely from the volunteers themselves, it seems plausible to us that the Netherlands can count on a significant margin and some understanding from Luxembourg when implementing the proportionality test, if the CJEU does not already leave this test entirely up to the national court.

Therefore, even if the Netherlands were not able to invoke an inherent exception, in our opinion there is at least a real chance that the Netherlands could objectively justify unequal treatment of fire service volunteers based on the legitimate aim of safeguarding genuine social volunteering as such. However, this is subject to the condition that this unequal treatment is limited to those employment conditions that are truly necessary for volunteering and applies only to genuine volunteers and not to individuals who are in fact employees but are labelled as volunteers for improper reasons.

3.3. Alternative grounds for making an objective distinction

The principle of equal treatment applies only to equal cases. Unequal cases do not have to be treated equally. An alternative way of preventing volunteers from being treated equally to professionals is therefore to show that they are not already equal, or to change their position in such a way that they do not become unequal. Task differentiation is, of course, one way of achieving precisely this. However, there may be other ways to demonstrate or create a sufficient difference.

A first way is to follow the *Wippel* ruling. In this case, the CJEU ruled that the on-call worker *Wippel*, who was allowed to refuse a call to work, was not comparable to a full-time worker and was therefore not entitled to the same employment conditions. This was the case because the full-time worker was not entitled to refuse a call. This right to refuse is, of

[54] As an example of extreme discretion, see in particular the scope left to Member States in the regulation of gambling. See for instance CJEU Case C-42/07 Liga Portuguesa ECLI:EU:C:2009:519 and CJEU Case C- 203/08 Betfair ECLI:EU:C:2010:307 and further S.C.G. Van den Bogaert and A. Cuyvers, 'Money For Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' Common Market Law Review 48 (4), p. 1175 and S.C.G. Van den Bogaert and A. Cuyvers, 'Let it be? The regulation and allocation of gambling licenses at the EU and Member State level', in: C. Adriaanse, F.J. van Ommeren, W. den Ouden and C.J. Wolswinkel (Eds.), Scarcity and the State: The Allocation of Limited Rights by the Administration (Intersentia, 2016), p. 299.

course, precisely the difference between volunteers and professionals, especially in the free inflow profile. As a result, an analogous application of *Wippel* is obvious.

However, the State Advocate strongly doubts the applicability of *Wippel*, especially because this ruling would have been superseded by *O'Brien*. This is because it is precisely the fact that the CJEU did not apply *Wippel* in *O'Brien* and that in *O'Brien* the CJEU strongly emphasised the content of the work.[55] However, like *Verburg*, one must question the rather categorical conclusion drawn from this that *Wippel* is no longer good law, especially since *O'Brien* does not discuss the working on-call basis at all. This is also logical because *O'Brien*, as a recorder, was '*entitled to* fifteen hearing days per year' and could also be 'obliged to hold a hearing for up to thirty days'.'[56] Unlike *Wippel*, *O'Brien* was therefore not a free on-call worker, as a result of which the CJEU logically did not apply *Wippel* and placed more emphasis on the content of the work.[57] In addition, in *O'Brien* both the CJEU and AG Kokott quoted *Wippel*, without indicating that they want to derogate from this ruling.[58] The CJEU also still referred to *Wippel* in later case law.[59] This is a further indication that *Wippel* is still good law.[60]

Unlike in *O'Brien*, an absolute right to refuse calls (the opt-out) does apply, certainly in the case of free inflow volunteers. Therefore, the facts for these fire service volunteers are closer to *Wippel* than to *O'Brien*. On this basis alone, it is therefore defensible in law that these volunteers do not have to be treated equally to professionals. This argument is further strengthened if, again with Verburg, a more holistic approach is taken whereby all relevant circumstances of the case are considered. In this holistic approach, for example, the special social nature and history of the volunteer fire service in the Netherlands must be taken into account.[61] Moreover, according to *O'Brien*, it is potentially relevant that there are differences in how volunteers and professionals are appointed and dismissed.[62] It must also be taken into account that there are some differences between the activities of volunteers and professionals. For example, both free inflow and tied inflow volunteers execute little to no work at the barracks themselves. Viewed in isolation, it is perhaps a bit of a stretch to say that they do not do the same or compatible work. But if one *combines* the on-call basis with all these existing differences in work, this may provide a sufficient basis to argue that volunteers and professionals do not do the same work, and therefore do not have to be treated the same under the Part-Time Directive. Although this argument is of course not 100% certain, and also depends on the margin that the Dutch and European judge will leave

[55] O'Brien par. 61-62.
[56] See the Conclusion of AG Kokott in O'Brien, par. 9
[57] Note in this respect that AG Kokott, who also wrote the conclusion in Wippel, therefore only discusses this precedent with regard to the concept of employee, and not at all with regard to the impact of working on-call on comparability with a full-time employee.
[58] See, for example, O'Brien para. 33. Of course, the CJEU is not always explicit when it derogates from a ruling, but the earlier citing of a consenting opinion is an indication that no categorical break was intended.
[59] See CJEU Case C-147/17 Sindicatul Familia Constanţa ECLI:EU:C:2018:926, para. 39 and CJEU Case C-152/11 Odar ECLI:EU:C:2012:772, para. 67. Both again do not discuss on-call work, but do quote Wippel.
[60] In this context, see also CJEU Case C-357/89 Raulin ECLI:EU:C:1992:87, in which the CJEU already stated that working on-call may prevent the qualification as an employee.
[61] In this context, also compare the emphasis that the CJEU places on 'the nature' of the work in par. 42 of O'Brien.
[62] O'Brien par. 45.

here, it is an argument that certainly seems to have a chance of succeeding, and can be presented to a judge with decency.

If, however, there are currently insufficient differences between professionals and (certain) volunteers to justify different treatment, the second strategy is to create sufficient differences, without thereby going as far as complete task differentiation. For example, one may wonder what degree of differentiation would be sufficient, especially in combination with the opt-out, to allow for different treatment in terms of employment conditions. Another approach would be to adjust the remuneration structure. After all, volunteers only qualify as employees under EU law because they receive some form of remuneration for their work, which is higher than a mere reimbursement of expenses. As soon as this remuneration ceases, or loses its nature as remuneration for work, volunteers will therefore no longer qualify as employees. Certainly, for the large group of volunteers who receive around €2,000 or less per year in remuneration, and who clearly do not do it for this, there may be legal scope for this. A different structure of the remuneration could be considered, for example by making it not or much less dependent on the number of hours worked. This would make the relationship between the work and the salary less strong, which may have an impact on the qualification as an employee. It would also be possible to align more closely with the actual reimbursement of expenses, including immaterial costs, instead of rewarding hours worked.[63] Naturally, this is not a simple route to take, partly because employment law rightly offers protection against bogus schemes. But where a different remuneration structure is genuinely in keeping with the voluntary nature of much fire service work, and when remuneration is really a side issue for most volunteers, there may be adequate legal scope here.

4. The very limited risk of legal enforcement

In the above analysis, we described why there are at least realistic arguments under European law to defend the difference in employment conditions between volunteers and professionals. However, in the overall picture it is also important to be clear about the likelihood of legal proceedings at all. This is pretty small.

The Dutch treatment of fire service volunteers can be confronted with European law in two ways. The first way is if a fire service volunteer goes to the Dutch courts and relies on EU law to get the same employment conditions as a professional. Partly on the basis of practice to date and our discussions with representatives of the volunteer fire services, this seems to us to be a *very* limited risk. It is precisely the fire service volunteers who oppose the qualification as a part-time worker and the risk of task differentiation that would result from that. Even if a case arises, a human solution for this individual case seems more appropriate than a change in the system.[64] In addition, the greatest dissatisfaction, if any, seems to be

[63] In this regard, it should also be noted that under the Wages and Salaries Tax Act 1964 (Wet op de Loonbelasting 1964), Article 2, paragraph 6 of the Wages and Salaries Tax Act 1964 states that volunteers who only receive allowances or benefits in kind with a combined value of €150 per month and €1500 per calendar year are not considered to be employees as defined by the Wages and Salaries Tax Act 1964. It may be possible to align with this, or to raise this limit slightly, especially where costs incurred may still be deducted.

[64] Certainly, where the Dutch system is based on a defensible interpretation of EU law, it seems very unlikely to us that, in the event of a successful action, a court would order the payment of all volunteers with

on the part of the volunteers quartered in barracks who would prefer to become professionals but do not have the opportunity to do so. As stated above, this is also the group for which the appeal to volunteering is the least strong and for which it would more likely make sense to look for a solution in the area of working part-time. In doing so, task differentiation would not be necessary because this group would then become professionals.

Moreover, even if a volunteer were to go to the Dutch courts, the chance of a preliminary ruling is extremely small. For example, Dutch judges asked the CJEU a total of 'only' 36 preliminary questions in 2019. Thus, the likelihood that an already unlikely Dutch case concerning volunteer firefighters will result in a preliminary ruling is rather low, although this likelihood naturally increases if important and new questions of European law arise.

The second way in which the Dutch system can reach the CJEU is via infringement proceedings instituted by the European Commission.[65] The Commission has complete discretion as to whether or not to commence infringement proceedings.[66] In this respect, the Commission decides primarily on the basis of its own enforcement priorities. In the case of the fire service volunteers, the chance of an infraction approaches absolute zero in our opinion. This is a file with hardly any impact on the internal market and which does not fall within the Commission's enforcement priorities. Moreover, even if there is an infringement of EU law, it is not an obvious or deliberate infringement in a socially sensitive area.

The likelihood of a negative court ruling and of infringement proceedings against the Netherlands therefore seems relatively small. Of course, this in itself is not a decisive argument. The Netherlands simply has to respect EU law, whether the chance of being caught is high or low. Nevertheless, the relatively small chance of a court ruling, certainly from Luxembourg, is a relevant factor in the overall assessment. This is certainly the case when there are *bona fide* arguments to assume that Dutch law is at least defensible under EU law, and the alternative is to turn the entire existing system of volunteer fire services upside down as a precaution out of fear of an - in itself still uncertain - application of European law. In view of the enormous costs and impact of, for example, task differentiation, waiting for any eventual legal proceedings and relying on the arguments set out above is the prudent choice, at least in so far as the fear of European law is the real motive behind the reorganisation. Moreover, if, unexpectedly, there is a court ruling that decides against the current system, there is always still the opportunity to implement the plans for task differentiation only then.

When making this consideration, it is also important to take into account that the Netherlands is not alone in this. Many more Member States rely on volunteering for their fire services. This means that, should the Netherlands be concerned about the possible conflict of the current system with European law, a political avenue is open to it as well. For example, together with other Member States with voluntary fire services, including the heavyweights France and Germany, it can be examined whether existing regulations can be amended to guarantee that volunteering is allowed under EU law. The explicit exception for military duties in the Working Time Directive, which was central to *B.K.*, could be a model for this. As

retroactive effect. Moreover, this risk would already exist now, and would continue to exist for the period prior to task differentiation.

[65] See Article 258 TFEU.

[66] See already CJEU Case C-247/87 Starfruit ECLI:EU:C:1989:58.

there are no impending court cases or infringement proceedings, the Netherlands has plenty of time for this. Moreover, a broadly supported political initiative on this point alone could be relevant should a case ever reach the CJEU. After all, such an initiative would strengthen the legal arguments of the Netherlands and show the CJEU that several Member States see the importance of creating sufficient legal scope for voluntary action under EU law.

5. If it ain't broke, don't fix it

Based on the above analysis, we conclude that there are sufficient serious arguments to defend in court that EU law leaves scope for the genuine fire service volunteer. Task differentiation is therefore not necessarily required by EU law. We emphasise that there is indeed a risk that a Dutch court or the CJEU could reach a different conclusion. At the same time, this risk seems limited to us. Moreover, the damage of changing the whole system now, out of extreme caution, based on a limited risk seems to us many times greater than leaving the system intact and defending it vigorously in the already improbable event of a court case. It should also be taken into account that the attitude towards the volunteer fire services can have much wider effects on all volunteers in the Netherlands, especially where they are so good that they come close to being professionals. In view of this great importance for the future, it also seems appropriate to us to seek political support for volunteering in Brussels, and where necessary to embed this in legislation or soft-law. After all, it is of central importance for both the Netherlands and the EU to recognise volunteering and to give it scope. Let us be proud and happy that there are people who take on important social tasks as volunteers and do so just as well as paid staff. We need more of them, not less, and EU law need not and should not be used to undermine something so beautiful.[67]

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[67] See also more generally M. Sandel, What Money Can't Buy: The Moral Limits of Markets (Penguin, 2013).