Accompanying note on mandatory participation and competition law
10 February 2020

In the Dutch pension system mandatory participation plays a crucial social role in ensuring a broad coverage of pension accrual within a company or sector and preventing competition on labour costs within sectors. With the framework agreement new pension contracts are introduced and the uniform premium system is abolished, but the crucial social role is unchanged and the permitted restriction of competition law is therefore in our view still justified.

Mandatory participation
There are two types of mandatory participation in the Dutch pension system:

1. When social partners agree to a pension scheme as part of a collective bargaining process and they can prove to be sufficiently supported by individual employees and employers, the minister of Social Affairs and Employment can make participation mandatory for all employers and consequently their employees in a sector. Goal of this mandatory participation is to prevent competition between employers on remuneration and working conditions (preventing a race-to-the-bottom). The permitted restriction of competition law is not relevant for this type of mandatory participation. This note therefore focuses on the next type of mandatory participation.
2. Social partners can also agree to the exclusive execution of the collectively agreed pension scheme by a particular pension funds. Again, if they can prove to be sufficiently supported by individual employees and employers, the minister of Social Affairs and Employment can make execution of the pension scheme by this pension fund mandatory for all employers and employees in a sector. As a Dutch pension fund by EU law is classified as an undertaking, this is a restriction of EU competition law.

Reasoning for permitting the restriction
Mandatory participation in a pension fund is crucial for solidarity between employees and employers and for realising the social perspectives of not only an adequate pension, but also an affordable one. Mandatory participation in a fund ensures maximal coverage and large economies of scale. The costs of executing the pension scheme are lower than without mandatory participation and the costs saved can directly benefit employees and pensioners.

Solidarity is expressed through – among others – an obligation to accept every participant and risk sharing between participants. Without these expressions of solidarity the pension scheme may not be economically viable without mandatory participation.

This essential social aspect was reason for the restriction of competition law to be permitted by the EU Court of Justice. While the restriction is permitted, it required a limitation of the business operations of pension funds. There are limitations on the products they are allowed to offer and on the markets they are allowed to offer them on. These limitations create a clear separation between the social function of pension funds and the more commercial function of – for example – insurance companies.

The framework agreement does not change the character of or reasoning for mandatory participation. The restriction of competition law should in our view still be permitted.

The framework agreement and the self-employed
While there are no current plans to create a general obligation for the self-employed to save for their retirement, nor are there plans to have the system of mandatory participation apply generally to the self-employed, the framework agreement does announce measures to make saving for retirement easier for this group.

Firstly, the uniform premium system will be abolished so pension accrual will become more actuarially fair. In the current system premiums paid and pension accrual are not actuarially linked, so it could be the case that an employee who halfway through his working career decides to become self-employed has paid more in premiums than he would get in pension accrual if he would have stayed in employ of an employer. The framework agreement resolves these incentives that distort the choice to be an employee or be self-employed.

Secondly, the framework agreement notes social partners and self-employed interest groups will examine how to make it easier for the self-employed to save for their retirement. A couple of options are mentioned, among which auto enrolment and variable premiums.

Thirdly, social partners are thinking about experiments in which the self-employed can save for their retirement in the second pillar. The government is investigating how it can facilitate these experiments through experimentation legislation.

Fourthly, it will be investigated whether it is possible and desirable to create a tax system that is independent from the form of employment in its treatment of retirement savings (i.e. harmonize the tax treatment of occupational and individual pensions).