Observations of the Dutch Government
referring to complaint no. 3346, Landelijke Belangenvereniging

Introduction
On 28 December 2018, Landelijke Belangenvereniging (LBV) submitted to the International Labour Organisation (ILO) a complaint against the Dutch Government regarding the application of the Assessment Framework Declaration of Universally Binding Status of Provisions of collective agreements.

LBV is an employees' organisation that for the most part concludes legally effective collective agreements covering individual companies or groups of companies.
Besides, LBV is also one of the employees' organisations engaged in the negotiation of the collective agreement covering a significant majority of the persons active in the staffing industry.

When employers' organisations and employees' organisations conclude a legally effective collective agreement covering a significant majority of the persons active in a certain industry, they may apply for an order of the Minister of Social Affairs and Employment declaring certain provisions of this collective agreement universally binding.
Under such an order, those provisions of this collective agreement apply to all employers and employees in the industry concerned (provided that the companies carry out activities falling within the scope of the collective agreement). This means that provisions of other collective agreements concluded in the same industry, which are less favourable for the employees, cannot be applied.
However, there are two exceptions to the rule. The parties, which concluded the collective agreement of which provisions are declared universally binding, themselves can exclude employers who have concluded a collective agreement covering only their individual company or a subsection of the industry. Alternatively, employers who have concluded a collective agreement covering only their individual company may apply for exemption from the order by the Minister of Social Affairs and Employment. In case of a collective agreement covering a subsection of an industry, the parties to this agreement can apply for exemption on behalf of their members who are bound by this agreement.

According to LBV, the Minister of Social Affairs and Employment has, since 2016, been pursuing a stricter policy with respect to granting exemptions. Exemptions are no longer granted at all or granted on a very limited scale, not even in cases where exemptions were granted in the past. LBV alleges that the Dutch government is discouraging rather than promoting the conclusion of collective agreements by (smaller) employers' organisations and employees' organisations, thus infringing trade union rights incorporated in articles 2 and 3 of ILO Convention 87, articles 2, 3 and 4 of ILO Convention 98 and articles 5 and 8 of ILO Convention 154.

National Regulations
Pursuant to the *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* (Declaration of Universally Binding and

Non-Binding Status of Provisions of Collective Agreements Act)[1], the Minister of Social Affairs and Employment is authorised to declare universally binding provisions of collective agreements which apply for a significant majority of persons employed in an industry.
A declaration of universally binding status is intended to support the establishment and contents of collective agreements on employment terms and conditions, with a view to preventing that non-bound employers and employees compete by undercutting each other on employment terms and conditions. When the provisions of a collective agreement are declared universally binding, these provisions are binding on all employers and employees working in the industry to which the collective agreement relates.

An order declaring universally binding status can only be issued on request of one or more employers or employers' organisations or employees' organisations who are party to the respective collective agreement. An application for a declaration of universally binding status is published in the *Staatscourant* (Government Gazette). Interested parties have the right to raise objections. Objections are, as a rule, submitted to the parties applying for the order declaring universally binding status, and may also be submitted to the *Stichting van de Arbeid* (Labour Foundation)[2], asking them to respond. The Minister takes the objections and the responses into account in the decision-making process.

Aside from that, the Minister is authorised to grant companies or subsections of an industry, upon a request to that effect, an exemption from an order declaring universally binding status. Such exemptions are intended to offer a way out in cases where companies and subsections of an industry can in all fairness not be required to be bound by provisions that have been declared universally binding. Granting an exemption, therefore, consists in making an exception to the general rule.

The legislation specifies neither an obligation for the Minister, nor a right for applicants when it comes to a declaration of universally binding status or an exemption. It is a case of a discretionary power of the Minister's.

The *Besluit aanmelding van collectieve arbeidsovereenkomsten en het verzoeken om algemeen verbindend verklaring* (Notification of Collective Agreements and Applications for Declarations of Universal Binding Status Decree)[3] contains rules in more detail relating to an application for an order declaring universally binding status. It requires both specification of the relevant provisions of the collective agreement and the period for which universally binding status is requested. Parties must also state if any employment relationships (companies or subsections of an industry) should be excluded.
The Decree also lays down how employers who concluded a legally effective collective agreement covering only their own company or – in case of another legally effective collective agreement for a subsection of an industry– the parties to the agreement covering an

[1] https://wetten.overheid.nl/BWBR0001987/2019-01-01 (in Dutch available only)

[2] The *Stichting van de Arbeid* is a consultative organ of management and labour, consisting of representatives of representative central employees' and employers' organizations.

[3] https://wetten.overheid.nl/BWBR0010051/2015-07-01 (in Dutch available only)

subsection of an industry on behalf of their members, may apply for exemption to the Minister of Social Affairs and Employment.

The *Toetsingskader Algemeen Verbindend Verklaring CAO-bepalingen* (Assessment Framework Declaration of Universally Binding Status Provisions of collective agreements)[4] contains policy rules regarding the order declaring universally binding status of provisions of collective agreements and regarding exemptions. Paragraph 7 relates to the granting of exemption.

An application for exemption can only be submitted by employers or parties that have concluded a legally effective collective agreement. It is also required that the parties to the collective agreement are independent in respect of each other. This latter requirement prevents employees' organisations to be incited to conclude a separate collective agreement in order to be able to apply for exemption.

Exemption is granted by the Minister if compelling arguments make clear that application of the provisions to be declared universally binding for an industry cannot reasonably be required of certain companies or a subsection of an industry. Compelling arguments are in particular located in specific characteristics of the companies that make them, on essential aspects, different from those for which the provisions to be declared universally binding are meant.
The separate employee benefits packages are not assessed.

The response of the Dutch government
The Dutch government would first like to draw attention to the fact that, in 2008, LBV (among other parties) submitted a complaint to the ILO[5] regarding an amendment to the Assessment Framework Declaration of Universally Binding Status that took effect on 1 January 2007, which added consideration of the specific circumstances of a case to the process of deciding whether or not to grant an exemption from an order declaring universally binding status. This amendment ended the situation that was deemed undesirable where an exemption was granted more or less automatically when applicants fulfilled the requirements of having concluded their own legally effective collective agreement and being independent from each other. At the time, the complainants claimed that this amendment to the Assessment Framework Declaration of Universally Binding Status undermined the continued existence of the organisations (smaller trade unions and employers' organisations) and infringed on the freedom of collective bargaining. The Committee on Freedom of Association concluded at the time that the amendment to the Assessment Framework Declaration of Universally Binding Status does not infringe on the principles of freedom of association and collective bargaining, seeing no reason for further investigation. This conclusion was adopted by the Governing Body of the ILO.

[4] https://wetten.overheid.nl/BWBR0028909/2017-09-23 (in Dutch available only)

[5] No. 2628

The present complaint relates to the application of the Assessment Framework Declaration of Universally Binding Status in practice. Application of the Assessment Framework Declaration of Universally Binding Status is claimed to have changed since 2016, allegedly undermining the continued existence of (smaller) trade unions and employers' organisations and infringing on the freedom of collective bargaining.

In this respect, the Dutch government notes the following.

The way in which applications for exemption are assessed has not changed.
Applications for exemption are always assessed based on current regulations, the policy framework, jurisprudence, and possible relevant developments that have taken place in, for example, the industry or sector to which the application relates.
This means that it is checked if the applicant has entered into its own legally effective collective agreement, if the applicant is independent from the other party to the collective agreement, and if the specific characteristics of the company(ies) or the subsection of the industry that come(s) under the collective agreement differ on essential points from those of companies that are considered part of the target group for the collective agreement for the industry, of which the provisions have been declared universally binding, to such a degree that application of these provisions cannot be required.
Objections raised following an application for exemption are taken into consideration, but are not decisive in their own right. The decision on an exemption is not made subject to these objections.
The contents of collective agreements are not compared to each other either.
An exemption granted is valid through to the expiry date of the relevant order declaring universally binding status. Every time a new order declaring universally binding status is issued, a new application for exemption must be submitted. Therefore, having been granted exemption previously is not a decisive factor in assessing a later application for exemption either.

As for the present complaint, the Dutch government would like to draw attention to the fact that there have been several relevant developments in the segment of the labour market on which LBV's activities are focused, as well as in national jurisprudence.

In the early years of this millennium, a new type of company entered the labour market, the payroll company. Payroll companies, or payroll service providers, are companies that take care of Human Resources-related matters for an employer, in the sense that they enter into employment contracts with the employees who work for an employer, handling all associated functions, including wage payment. The employees work at and under the supervision and direction of the actual employer, who is billed by the payroll company for all Human Resources-related services provided.
Given that these payroll companies did not engage in recruitment and selection, and did not employ intermediaries, they were initially assumed to be a separate industry. In 2006, a special interest group for payroll companies, Vereniging voor Payrollondernemingen (VPO), also established its own collective agreement. At the time, the parties to the collective agreement for the staffing industry exempted the (members of the) parties to VPO's collective agreement from subsequent orders declaring universally binding status of collective

agreement provisions for the staffing industry. The Minister has taken this into account in assessing other payroll companies' applications for exemption. In the past, the Minister has granted payroll companies an exemption from universally binding provisions from the collective agreement for the staffing industry based on the fact that the specific company characteristics differed from those of companies that, on average, came within the scope of the collective agreement for the staffing industry (i.e. the conventional temping agencies). The perception that the activities of payroll companies differ substantially from those of temping agencies has changed gradually over time.
There has been no VPO collective agreement since 2012, and VPO ceased operations in 2016. Following the dissolution of VPO, its members joined the largest employers' organisation in the staffing industry which assumed responsibility for looking after the interests of employers who provide staffing services without recruitment and selection. This employers'organisation is one of the parties engaged in the collective agreement for persons active in the staffing industry. Various payroll companies have been applying the collective agreement for the staffing industry without any problems.

In this context, it is also important to note that the Supreme Court of the Netherlands (the highest court in the Netherlands), in a ruling dated 4 November 2016[6] in the Care4Care/StiPP case, has ruled that all triangular relationships under employment law are to be defined as specified in Sections 7:690 and 7:691 of the Netherlands Civil Code and that this requires neither that work performed at the third party be temporary, nor that it involves an active allocation role (i.e. matching supply and demand). This means that all employment contracts where the employer seconds the employee to a third party to, as part of a contract awarded to this employer, perform work under the supervision and direction of the third party are to be considered staffing contracts. It has thus been confirmed that there is no substantial difference between the activities of a temping agency and those of a payroll company.

Needless to say, these developments have affected decisions to grant or not grant payroll companies an exemption from an order declaring universally binding status of provisions of a collective agreement for the staffing industry.
Applicant companies that were previously granted an exemption based on the perception that their specific company characteristics differed from those of companies that, on average, came under the scope of the collective agreement for the staffing industry were - to prevent a change without prior notice - still granted an exemption on a temporary basis. The exemption granted to these applicants included a notice stating that any future decisions on the granting of an exemption from universally binding provisions from the collective agreement for temporary employees and the social fund for temporary employees, would take legal and other developments into account.

[6] https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:2356&showbutton=true&keyword=ECLI%3aNL%3aHR%3a2016%3a2356 (in Dutch available only)

In its complaint, LBV also cites statistics showing a clear drop in the number of applications for exemption over the past few years, which LBV puts down to the fact that the Minister of Social Affairs and Employment is categorically rejecting such applications.
The Dutch government is of the opinion that LBV takes a rather one-sided approach to the figures. Falling numbers of exemption applications could also be due to the fact that most exemption applications submitted over the 2007-2018 period related to the business services sector, with the majority relating to the staffing industry within that sector. It could therefore very well be that many parties, based on the shift in the definition of the activities of payroll companies and associated jurisprudence, simply felt they did not need an exemption anymore. Also when a declaration of universally binding status is not requested for an industry-wide collective agreement, the number of applications for exemption will automatically drop. Aside from that, it should be noted that rejection of an exemption application may also proceed on formal grounds, such as when the applicant has not established a legally effective collective agreement.
As for LBV's complaint that the Minister of Social Affairs and Employment were unable to provide accurate figures, it must be noted that an application submitted in any one year will not necessarily also have produced a decision in that same year, meaning that the number of applications submitted may differ from the number of decisions.

The Dutch Government holds the view that the regulations and the way in which these regulations are implemented in the Netherlands are not contrary to the provisions of ILO Conventions 87, 98 and 154, mentioned by LBV.

ILO convention 87 awards employers and employees the right to freely join an employers' organisation or an employees' organisation of their choice, while also awarding such employers' organisations and employees' organisations the right to organise and perform their activities in complete freedom. The government is in no way allowed to curtail these rights or impede the exercise thereof.
ILO convention 98 stipulates that employers' organisations and employees' organisations must be adequately protected against interference in each other's affairs and that it must be prevented that employers' organisations place employees' organisations under their control. Aside from that, the government must promote voluntary collective bargaining between employers' organisations and employees' organisation with a view to establishing collective agreements.
ILO convention 154 also deals with the government's duty to promote collective bargaining.

The Dutch government does not see how current regulations and practices with respect to declarations of universally binding status and the granting of exemptions in the Netherlands contravene these conventions.

The ILO also considers the instrument of a declaration of universally binding status, within the context of the aforementioned ILO conventions 87, 98, and 154, as a form of support for the right of collective bargaining. The ILO's "Collective Agreements Recommendation" (R91,1951) clearly states that the government can, wherever possible and at the request of the parties to a collective agreement governing the majority of the persons working in an industry, take measures to broaden the scope of this collective agreement.

In the Netherlands, a declaration of universally binding status is issued at the request of the parties to a collective agreement, the Minister cannot unilaterally decide to declare provisions of a collective agreement universally binding.
Through a declaration of universally binding status, certain employment terms and conditions become applicable throughout the entire industry in question, and these can subsequently not be deviated from in a way that is to an employee's disadvantage. These employment terms and conditions are made by employers' organisations and employees' organisations jointly, and those organisations also determine which companies are to be considered part of the industry governed by their collective agreement.
Employers' organisations and employees' organisations are free to enter into collective bargaining with each other to establish a collective agreement. More favourable provisions in a collective agreement for a subsection of an industry or for a specific company are generally left intact by a declaration of universally binding status. The parties to a collective agreement for a subsection of an industry or an individual company have and retain full freedom to agree their own employment terms and conditions.
The claim that the Dutch government's actions are standing in the way of the establishment of collective agreements is untenable.

What is also untenable is the claim that the government, in its granting and not granting of exemptions, is infringing on trade unions' freedom and right to free collective bargaining on employment terms and conditions.
It is primarily up to the parties to a collective agreement to define the scope of it and decide whether certain companies and subsections of an industry are to be excluded.
When the parties to the collective agreement do not provide for exclusion themselves, the Minister of Social Affairs and Employment can make use of his authority to grant exemption. The intention behind giving the Minister the authority to grant exemptions from a declaration of universally binding status is, in fact, to make it possible to take into account the fact that while the declaration of universally binding status will in most cases serve its purpose (i.e. to prevent competition based on employment terms and conditions), it may in some cases lead to well-founded objections from certain companies because their situation differs substantially from that of the companies for which the collective agreement from which certain provisions have been declared universally binding was initially established. The government only provides a possibility to get an exemption in cases where companies and subsections of an industry can in all fairness not be required to be bound by provisions that have been declared universally binding.
The right of free collective bargaining and the freedom of association are not at stake.

Conclusion
The Dutch government holds the view that the - unchanged - policy with respect to the granting of exemptions from an order declaring universally binding status of provisions of a collective agreement is in compliance with the provisions of ILO conventions 87, 98, and 154 cited by LBV. Given that violation of these conventions has not been proven, LBV's complaint must be deemed unfounded.

Additional information

Legal procedures
At this time, there are a total of eleven procedures pending in the Netherlands that deal with the non-granting of an exemption and that involve (a collective agreement of) LBV. Most of these procedures relate to an exemption for payroll companies.

Appeal proceedings have been brought before the courts of Amsterdam, Gelderland and Overijssel by three individual payroll companies regarding rejection of an application submitted by LBV for exemption from the order declaring universally binding status of provisions of the collective agreement for the staffing industry and the social fund for the staffing industry. In these cases, the declaration of universally binding status is valid from 18 April 2018 to 31 May 2019.

The Dutch Council of State's Administrative Justice department is currently handling six further appeal cases brought by payroll companies with which LBV has established a company-specific collective agreement. These cases concern denials of exemption from the order declaring universally binding status of provisions of successive collective agreements for the staffing industry with different terms over the 2016-2019 period.

And finally, there are two objection procedures ongoing that were initiated by LBV, which the Minister of Social Affairs and Employment is currently processing. These cases concern rejection of exemption applications for companies that process natural stone. The matter under review here is whether the characteristics of these companies differ from companies governed by the collective agreement for the building finishing contractors industry on essential points, given that the companies in question process natural stone at a workshop, while finishing contractors process stone on site where a building is being fitted out and finished. A decision has not yet been made on the objection.

Over the 2016-2018 period, three lawsuits brought by LBV at the court of Rotterdam regarding the rejection of an application for exemption from the order declaring universally binding status of the collective agreement for the staffing industry did not result in a ruling because LBV withdrew the appeals. LBV's reason for withdrawing the appeals was that the subject and arguments were the same as those of several other procedures initiated by payroll companies that had already progressed to the appeal stage (i.e. the abovementioned proceedings before the Council of State's Administrative Justice department), prompting LBV to decide to await the outcome of those proceedings first.

An objection lodged by LBV regarding the declaration of universally binding status of provisions of a collective agreement for the building finishing contractors industry was declared manifestly inadmissible, because a declaration of universally binding status cannot be appealed or objected to.

Additional comments of the Dutch government regarding complaint 3346 (LBV)

On 2 July 2019 LBV sent further information to the International Labour Organisation regarding complaint 3346. The Dutch government was requested to respond as soon as possible.

The information brought forward by LBV concerns the 'Bedenkingenrapportage 2018' (Objections Report 2018) drawn up by the Ministry of Social Affairs and Employment, in which information is presented (in as much as relevant to the complaint) about requests submitted in 2018 for dispensation from collective bargaining agreement (CAO) provisions declared to be universally binding, the decisions taken on requests for dispensation in 2018, and the decisions taken in 2018 subsequent to submitted objections to primary decisions. Apart from the numbers, the purport of the decisions (dispensation granted or refused) is also specified. Finally, tables are presented in which the numbers are set out for the period from 1 January 2007 to 31 December 2018.

In particular LBV sees support for its argument that the Minister of Social Affairs and Employment 'structurally, systematically and without exception' refuses all requests for dispensation and that (smaller) employer and employee organisations are discouraged from entering into CAOs as a result, in (the part of) the table setting out the numbers of dispensation requests that were granted and refused in the years 2016, 2017 and 2018 (2016: 4 granted and 31 refused; 2017: 0 granted and 5 refused; 2018: 0 granted and 14 refused). According to LBV this underlines the importance of the complaint in question.

The Dutch government has already indicated in its previous response to the complaint that no conclusions can be drawn about the policy for granting dispensation on the basis of the figures alone.

In this regard the Dutch government draws to your attention the following matters:

A dispensation request may be refused on both formal and substantive grounds.
It may be refused on formal grounds if the applicant does not have a valid CAO, if the dispensation request was submitted subsequent to interim amendment of a collective agreement whereby the scope of application clauses of that CAO were not amended, or if a dispensation request was submitted too late.

This was the case in 19 of the 31 dispensation requests that were refused in 2016, since the applicants for dispensation did not have a valid CAO of their own.
In 2017 all 5 of the decisions refusing dispensation were taken on the basis of a substantive assessment.
In 2018, 2 of the 14 rejected dispensation requests were refused on the basis of not having a valid CAO. In the other 12 cases the refusal was based on a substantive assessment. An assessment was made as to whether the specific company characteristics of the applicant essentially differed from those of companies which come under the scope of the CAO provisions declared to be universally applicable. A refusal means that no compelling arguments were brought forward to support the conclusion that application of this CAO could not be required. In 9 of those 12 cases, dispensation was requested from the CAO for the staffing industry, whereby the requests were submitted by or on behalf of payroll companies. The background to refusals in this category has already been described in detail by the Dutch government in its initial response. To the extent that dispensation requests were submitted by payroll companies who challenged the refusal of their request for dispensation for previous periods in which a CAO was declared universally binding, their dispensation requests for later periods were also refused in 2018 in anticipation of the outcome of the proceedings. It is expected that the Administrative Jurisdiction Division of the Council of State will deliver judgement in appeal cases this autumn.

The Dutch government furthermore points out that the 'Objections Report 2018' also shows that initially unfavourable primary decisions were reversed after additional information regarding specific company characteristics had been provided during the objection procedure, which led to another judgement. This too refutes the assertion that a policy of refusing dispensation requests 'structurally, systematically and without exceptions' is being pursued.

Finally we can report that in 2019 (up to July) 3 dispensation requests were granted and 1 refused. The reason for the refusal was that the request had been submitted too late.