Vereniging Orde van Registeradviseurs Nederland v. The Netherlands

Statement of facts

1. The Order of Chartered Advisors (*Orde van Registeradviseurs* or 'OvRAN') is a Dutch professional association of accountants. All its members are presently, or have been, members of the Royal Netherlands Institute of Chartered Accountants (*Koninklijke Nederlandse Beroepsorganisatie van Accountants* or 'NBA'), the sole public association allowed under the laws of the Netherlands, with a membership of 21.723 end 2018.

2. All members of OvRAN fully qualify as accountants, but they wish not to be or remain member of the NBA. At present, under article 2, third paragraph, of the Law on the Accountancy Profession (*Wet op het accountantsberoep* or 'Wab'), such membership is compulsory for anyone wishing to be registered in the Dutch accounting register, which is maintained by the NBA. In accordance with article 41, Wab, only NBA members who are registered may use the academic titles "Registered Accountant" (*Registeraccountant* or 'RA') or "Administrative Accountant" (Administrative Accountant or 'AA').

3. Under article 41 of the Wab, only those who are included in the aforementioned register (and, thus, who are member of the NBA), are allowed to publicly present themselves as "accountant" and to use the titles "RA" or "AA", even while this is an academic qualification. The right to use that academic title ceases when membership of the NBA ceases. This arrangement is unique in comparison to other professional organisations in the Netherlands.

4. Article 12, paragraph 6 of the Wab prescribes that the NBA board should strive for having a balanced composition, representing the various categories of accountants according to the nature of their work. In practice, however, decisive voting power in the board and in all important committees is held by the top 4 largest accounting firms in the Netherlands, colloquially also known as the "Big Four": Ernst & Young, PwC, Deloitte, and KPMG. Efforts by the applicant organisation and others to break this dominance have all failed because of the internal regulations of the NBA: the 'Big Four' companies have the ability to send enough employees to vote in general meetings so that no proposal will pass without their agreement.

5. It is therefore OvRAN's opinion that the NBA is in practice driven by a "Big Four cartel".[1] Through the NBA, they impose strict accounting regulations on members, from which they then cleverly exempt themselves using network definitions in Dutch law through specialised departments outside the network. This is to the detriment of

[1] This statement is elaborated upon in the attached document by the applicant: "*NBA is in practice driven by a "Big Four cartel".*

the vast majority of the other members of the NBA as many of these regulations hinder other activities (bookkeeping, providing tax and/or legal advice, human resources, corporate finance, etc.). By the end of 2018, public auditing activities were exercised by just 2,681 accountants with authority for statutory audits. *BigFour* partners among these 2,681 accountants are a minority. In the domestic procedure, the claim was not disputed that 58.7% of all NBA members are not accountants at all as the public understands that term. That 58.7% is forced to remain a member of the NBA as a training certificate and in order not to lose the associated title.

6. To end this domination and regulatory discrimination, four members of OvRAN requested the NBA on 22 October 2008 to be registered in the Dutch accounting register without membership of the NBA. On 19 October 2009, OvRAN requested the Dutch Ministry of Finance to change the Wab to allow its members who are otherwise to be registered in the Dutch accounting register without the compulsory membership of the NBA. Both administrative procedures, based on Article 11 ECHR, were eventually rejected by the highest Industrial Appeals Tribunal (*College van Beroep voor het bedrijfsleven* or 'CBb'), on 15 February 2011 and 18 August 2014 respectively, as the Tribunal held that Article 11 of the Convention is not applicable to public law associations.

7. On 12 August 2011 an application was lodged at your Court (case no. 51016/11, "Ovran and Others v. the Netherlands"). By decision of 21 April 2015, the Third Section declared the application inadmissible for non-exhaustion of domestic remedies.

8. Consequently, on 29 March 2016 OvRAN commenced civil proceedings against the Kingdom of the Netherlands, applying for the court to find that the compulsory membership of the NBA for accountants was in violation of, inter alia, Articles 11 of the Convention, and Article 1 of the First Protocol.

9. These claims were rejected by the District Court of The Hague on 22 February 2017. OvRAN's appeal was subsequently rejected by the High Court of The Hague on 3 April 2018.

10. The cassation appeal filed by OvRAN was subsequently rejected by the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) on 6 December 2019. Throughout the proceedings, the main arguments as forwarded by the applicant can be summarised as follows.

11. The NBA is an entity which does not have or fulfil a solely or predominantly public function, neither in theory nor in practice. It therefore falls within the scope of Article 11. Membership is (directly or indirectly) compulsory for anyone using or wishing to use the academic title "Registered Accountant" (Registeraccountant or 'RA') or "Administrative Accountant" (Administrative Accountant or 'AA') or to present themselves as "accountant". There is no justification of the compulsory membership

of the NBA. Moreover, any public functions exercised by the NBA can be assumed by other organisations, such as the applicant organisation itself. There is thus a violation of Article 11 of the Convention.

Statement of violations

12. The freedom of association as enshrined in Article 11 entails a prohibition of compulsory association (*Chassagnou v France*). Art 11 must be interpreted in the light of article 20 (2) of the United Nations Universal Declaration of Human Rights which states: "No one may be compelled to belong to an association."

13. In order to be a registered accountant in the Netherlands and to use the academic title “RA” or “AA”, one is obliged under the laws of the Netherlands to be a member of the NBA. In so far, this is a case of compulsory membership. Limitations to the right not to be a member of an association are accepted under very narrowly defined circumstances only. The second paragraph of Art 11 describes these limited circumstances: they must be "prescribed by law, necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

14. A relevant question is, then, whether the NBA qualifies as an “association” in the sense of Art 11. The Court has found that it is not for national law to define this: “If Contracting States were able, at their discretion, by classifying an association as “public” or “para - administrative”, to remove it from the scope of Art 11, that would give them such latitude that it might lead to results incompatible with the object and purpose of the Convention, which is to protect rights that are not theoretical or illusory but practical and effective …." (*Chassagnou v France*; para 100). The Court has found, furthermore, that purely public associations do not fall within the scope of Art 11 (*Le Compte, Van Leuven and De Meyere v Belgium*). However, an association which performs only in part a public function does fall under the scope of Art 11 (*Sigurjonsson v Iceland*).

15. Important to the applicant’s argument are the judgments in the case of *Herrmann v Germany*. In its judgment of 20/01/2011, the Fifth Section declared the application inadmissible to the extent that it complained about obligatory membership of a hunting association, finding that the association was a public law institution outside the scope of Art 11, rendering the complaint incompatible *ratione materiae*. The Grand Chamber, to which the case was subsequently referred, was unable to adjudicate this reasoning, as it found in its judgment of 26/06/2012: “the Court no longer has jurisdiction to examine the complaints under Article 11, taken alone and in conjunction with Article 14 of the Convention, which were declared inadmissible by the Chamber". Thus, the reasoning of the Fifth Section could not be assessed by the Grand Chamber.

16. In the Court's case law, criteria have been established in order to determine the nature of an association. The applicant argues that when these criteria are applied, the NBA must be considered an association within the scope of Art 11. It is true that the NBA is a public body established by law. However, as the Court has repeatedly found, that is not in itself sufficient to declare it outside the scope of Art 11, as States must be prevented from declaring associations "public" and thereby circumventing the protections offered by Art 11. The applicant argues, that the strict nature of the permissible exceptions to Art 11 in its second paragraph implies that the criteria for excluding an association from the scope of Art 11 altogether are necessarily also strictly applied.

17. As the applicant has established in the domestic procedure, 58.7% of all NBA members are not accountants at all as that term is understood by the public. They may be retired accountants, or have moved to other jobs or, in many cases, they have never been accountants in the first place. The NBA therefore does not advance the interests of accountants as such or of accountancy in general. To the applicant, it is thus unclear what the NBA really advances.

18. As stated above, the NBA is moreover dominated by the "Big Four" firms. Rather than a public institution, the NBA is thus a vehicle for those four big private firms to advance their private interests. In the light of the Court's jurisprudence, notably *Sigurjonsson v Iceland*, this means that Article 11 is applicable.

19. The domestic courts, not following the argument that Art 11 was applicable in the present case, have failed to assess whether the obligation for accountants to join the NBA is acceptable in the light of the second paragraph of Art 11. If they would have made that assessment, the result would have had to be that Article 11 was violated.

20. Membership of the NBA is (indirectly) compulsory for accountants, who could otherwise not (fully) exercise their profession and use their (academic) title. The applicant refers to the cases of *E Sigurdur a. Sigurjónsson* (taxi-driver), *Redfearn* (member political party) and *Vogt* (teacher). In *Vördur Olofsson v Iceland* the Court confirmed in par. 46: "Furthermore, regard must also be had in this context to the fact that the protection of personal opinions guaranteed by Articles 9 and 10 of the Convention is one of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both a positive and a negative right to freedom of association (see Chassagnou and Others, cited above, § 103; Young, James and Webster, cited above, § 57; Sigurður A. Sigurjónsson, cited above, § 37; and Sørensen and Rasmussen, cited above, § 54)".

21. As the Court made clear in *Young, James and Webster v UK*: "Accordingly, it strikes at the very substance of this Article [11] to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions."

22. The applicant organisation stresses that it is contrary to its convictions, and to those of its members to be a member of an association dominated by its largest competitors, the “Big Four cartel”.

23. The applicant stresses that no restrictions may be placed on the exercise of free association other than to the extent necessary in a democratic society. This is accentuated among others in the Grand Chamber judgment in *Chassagnou v. France*. Violations of art. 11 based on “necessary” were motivated by the Grand Chamber as follows. In par. 112 "The term “necessary” does not have the flexibility of such expressions as “useful” or “desirable”. In par. 117 the Grand Chamber found that only indisputable imperatives can justify interference with enjoyment of a Convention right" and "compel a person by law to join an association such that it is fundamentally contrary to his own convictions goes beyond what is necessary to ensure that a fair balance is struck between conflicting interests and cannot be considered as proportionate to the aim pursued." In par. 121 the Grand Chamber found that "the Government have not put forward any objective and reasonable justification for this difference in treatment". More recently, these findings were confirmed in *Mytilinaios Kostakis v Greece*.

24. A comparison may be made to the ‘BIG-register’; the Dutch register of medical professionals. Article 14, paragraph 5 of the Law on Professions in the Individual Healthcare (BIG law) provides that “Registration in an recognised register of medical specialist is not dependent on the membership of that organisation [of medical specialists - applicant].” In Le Compte, the Court required, in par. 65, that the setting up of a public law association "must not prevent practitioners from forming together or joining professional associations." And it is clear that the NBA prevents professionals trained and qualifying as accountant to join OvRAN as an alternative for the NBA, as they would by losing academic titles, qualifications, license and practice as public accountant. This criterion of negative compulsory or forced association is extensively elaborated in many ECHR cases.

25. In this respect it is relevant to note that in the domestic procedure it was established that duly organised professional associations of lawyers and accountants like the NBA are defined by the European Court of Justice as associations of undertakings within the meaning of art. 101(1) TFEU. And art. 101(1) TFEU forbids all decisions by associations of undertakings that might have as an effect the prevention, restriction or distortion of competition. Moreover, EU Regulation 1/2003 reverses the burden of proof to the association of undertakings.

26. This implies that the NBA must prove that its regulations do not prevent, restrict or distort competition. But only one counter argument was raised in the domestic procedure against the claim that the “Big Four cartel”, through the NBA, imposes strict regulations on members from which they exempt themselves. That counter

argument was that NBA regulations apply to all NBA members equally. That is true, but it overlooks the fact that size matters. And size is needed to dispose of enough staff working in specialised departments outside the network and not manned by NBA members. The background of these Dutch court decisions is closely related to the 2011 verdict of your Fifth Chamber in the case of Hermann v Germany, setting almost all public law institutions outside the scope of Article 11. That reasoning could not be assessed by the Grand Chamber.

27. In conclusion: The NBA is an entity which does not have or fulfil a solely or predominantly public function, neither in theory nor in practice. It therefore falls within the scope of Article 11. Membership is (directly or indirectly) compulsory for anyone using or wishing to use the academic title “Registered Accountant” (Registeraccountant or ‘RA’) or “Administrative Accountant” (Administrative Accountant or ‘AA’) or to present themselves as “accountant”. There is no justification of the compulsory membership of the NBA. Moreover, any public functions exercised by the NBA can be assumed by other organisations, such as the applicant organisation itself. There is thus a violation of Article 11 of the Convention.

On the admissibility

28. This application was filed within the time limit of Article 35 of the Convention, as extended exceptionally by the Court in view of the Covid-19 situation.

29. Mr. Spil is authorised to represent the Applicant Organisation by virtue of the fact that he is chairman of the board, and can represent the organisation jointly with the Secretary (see Aricles of Association, art. 10, paragraph 2). The current Secretary, Mr Boer has authorised Mw Spil in this respect. Please find the Articles of Association, an extract from the Chamber of Commerce registration and the authority signed by Mr Boer attached.