In this document, I present observations on the proposed legislation Wet internationalisering in balans, specifically focusing on the rationale outlined in the Memorie van toelichting. I will focus my comments on the compatibility of the proposed measures with EU law, particularly when it comes to the free movement provisions of the Treaty on the Functioning of the EU (TFEU). Addressing the proposed measures of the Dutch government in light of these EU law provisions is important with regard to both students and staff members of universities, who come from EU Member States other than the Netherlands and / or who do not speak the Dutch language. While the primary focus is on students, the principles governing free movement equally apply to staff, whether they are employees or independent service providers. This is because the legal tests developed over the years by the Court of Justice of the EU (CJEU) have become uniform across the different freedoms of movement: economically or non-economically active persons, service providers, employees, etc.

The relevant TFEU provisions applicable to free movement apply when there is link with the EU: e.g. the person moving to another Member State has the citizenship of the EU. This is why, from an EU law perspective, the degree of protection afforded by EU law to EU citizens may legally be higher than the degree of protection afforded to non-EU citizens. Put simply, national laws that discriminate against third-country nationals are not prohibited by the EU law provisions. In this respect, the approach outlined on pages 39 to 42 of the Memorie van toelichting, dealing with a limitation of the number of students having access to educational programs, is not necessarily problematic from an EU law perspective, as long as it speaks of a difference in the treatment between EU and non-EU citizens, and not of a distinction between Dutch citizens and citizens of other EU Member States. It is important to observe that, as far as I can see, this distinction between EU and non-EU citizens is present only on pages 39 to 42 of the Memorie van toelichting, and not in the text of Article 6.5a of the proposed Wet internationalisering in balans. In other words, the vague formulation of the article itself, could allow for different treatment of Dutch and non-Dutch but EU students. If such a difference in treatment would exist in practice, this would infringe EU law and would consequently need to be justified by the Dutch government. As the case-law of the CJEU suggests (e.g. Bressol) justifying the need for such a national measure is a very difficult task to achieve.

Given the information above, I find it confusing that the Memorie van toelichting refers to EU-law arguments in sections that supposedly refer to non-EU citizens (e.g., page 40 of the Memorie van toelichting). In my opinion, the application of EU law relates more to the language requirements embedded in Article 7.2 (and 7.2a) of the proposed Wet internationalisering in balans, as discussed on pages 42 and 43 of the Memorie van toelichting. This is because it is these proposed measures that affect non-Dutch or non-Dutch speaking EU citizens (staff members or students). The impact of these measures must be tested against the EU law provisions dealing with free movement.

I find the analysis provided in section 5.2 (and for that matter also in section 5.1) of the Memorie van toelichting incomplete, when it comes to the relationship between the proposed Wet internationalisering in balans and the relevant EU law provisions (Articles 18 and 21 TFEU for students, Article 45 TFEU for workers, Articles 49 and 56 TFEU for service providers, and all the secondary legislation adopted pursuant to these Treaty articles). For

example, on pages 42 and 43 it is stated that providing education in the national language of a Member State is in line with the division of competences in the EU. Indeed, Article 6 TFEU provides that the EU may only support, coordinate or supplement the actions of the Member States, when it comes to education. It is furthermore stated that EU law cannot impose an obligation to provide education in a different language. Though true, the Memorie van toelichting stops here, and does not refer to the strong statement made by the CJEU in the same judgment quoted in footnote 52 (C-391/20 Letse taalzaak). Namely, par. 59 and 83 of that judgment state that "[w]hile EU law does not detract from the power of [the] Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity, [...] the fact remains that, when exercising that power, Member States must comply with EU law." The choices made by the Member States in this respect cannot justify "a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms."

How can such undermining of the EU citizens' rights occur? This takes me to the legal tests used by the CJEU. The discussion in the Memorie van toelichting is again incomplete. It speaks of direct discrimination (in section 5.1), and it insists on indirect discrimination in section 5.2.2: the government recognizes that it is easier for students with a Dutch-language pre-education to follow a Dutch-language further education. Following the same logic, I would also add that it is easier for Dutch citizens to be hired by Dutch universities than for non-Dutch citizens. These are measures that breach the EU free movement legal provisions. What is striking is that the Memorie van toelichting does not refer to the third broader category of measures (in addition to direct & indirect discrimination) which also infringe the EU free movement law provisions. This type of measures limit market access, or make access to an activity less attractive for the EU citizens who would otherwise exercise their right to free movement: job seekers / workers searching for employment in a different Member State, students applying for programs in a different Member State, etc. In Letse taalzaak (par. 61) the CJEU clearly states: "[all] measures which prohibit, impede or render less attractive the exercise of the freedom guaranteed by [the] TFEU must be regarded as restrictions […]." For example, if the proposed Wet internationalisering in balans enters into force, EU students are unlikely to apply for access to Dutch programs if they know that the majority of courses must be provided in Dutch. In other words, they are deterred from exercising their right to free movement. The fact that they could apply to programs offered in other Member States, or they could study in their home Member State, is irrelevant from the EU free movement law perspective. At the end of the day, it does not matter why the students are migrating from one Member State to another, what matters is whether students are discouraged to do so or not. A further example relates to non-Dutch speaking employees or EU citizens from other Member States searching for jobs at universities in the EU. Such EU citizens would be less likely to apply for jobs at Dutch universities, knowing that they will have to teach and perform other employment-related tasks in a language they do not speak. Par. 62 to 64 of Letse taalzaak are very illustrative, in this respect. Importantly, in par. 64 the Court states that these types of measures also restrict the free movement rights of already employed EU citizens who "exercised [the] freedom [of movement], before the adoption of the [national law in question]. […] those nationals will have to adapt their curriculum to the requirements of that law, which may involve considerable costs, in

particular as regards a large part of [the] administrative and teaching staff." Therefore, these measures breach the EU free movement provisions.

Speaking of infringements of the TFEU free movement provisions, it is important to stress the benchmark against which a national measure is judged as being discriminatory or limiting 'market' access. The Court does not assess the cases it judges in abstract, or in a legal vacuum. It will not label a national measure as infringing EU law, while comparing it to a hypothetical, absolutely flawless national law. The benchmark relates to the context existing prior to the adoption of the national law which is assessed. If the Court is asked to assess the compatibility of the Wet internationalisering in balans with EU law, it will take into account the direction of national regulations in the recent past. Therefore, it will inevitably observe the investments made by the Dutch government into internationalization, which in turn signalled to the interested potential EU migrants – students and potential academic staff – that the Netherlands is an attractive academic 'market'. A shift away from that direction, which inevitably deters such migration, would very likely be deemed as restriction of the fundamental freedom of movement.

The Memorie van toelichting, on page 43, seems to accept that the proposed measures regarding language constitute infringements of EU free movement law, through indirect discrimination (while omitting the 'market access' discussion I mentioned above). When such infringements exist, the proposed national measure may still be lawful, if appropriately justified. Such justification entails: 1) the existence of an overriding public interest recognized by EU law as worth protecting; and 2) pursuing that objective in a proportionate manner. In Bressol, par. 71, the Court states clearly: "it is for [the national] authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments."

Some general remarks first: regarding the existence of such an overriding interest, it has to be clear that the reasons that a Member State puts forward cannot be, under any circumstances, economic in nature, since such an approach amounts to protectionism, which EU law does not tolerate. Therefore, any arguments regarding financial burdens, or as it was the case in Bressol, "the fear of an excessive burden on the financing of higher education" cannot justify an infringement of EU law. In my opinion, following this logic, addressing the housing crisis through the proposed measures (especially those related to language) is inappropriate.

The overriding public interest incorporated in the proposed Wet internationalisering in balans seems to revolve around the idea of protecting the Dutch language and culture. This is a genuine and legitimate interest to be pursued, acknowledged as such by the CJEU in its case-law. See in this respect par. 66 to 70 of Letse taalzaak, where the Court also recognizes the important role education plays for the fulfilment of such a goal. What I find problematic is one particular statement made on page 43 of the Memorie van toelichting, which argues that it is important that Dutch is still dominant as a working language on the labour market.

Why is this so? Which segment of the labour market are we talking about here? Retail? Legal? Healthcare? Online advertisement? Import / export activities? Academia? All of them? In the absence of clarifications in this respect and very importantly, in the absence of evidence why the labour-related considerations in particular are singled out as important elements justifying an infringement of EU citizens' fundamental freedoms, this remains purely a blanket statement, to which no particular weight should be attached in the analysis. The Memorie van toelichting simply states that one of the goals of education is preparation for the labour market. I find this insufficient substantiation of the needs of the labour market. Is there solid evidence that the labour market struggles because of too many non-Dutch speakers and this creates problems for the functioning of this sector? And once again, which particular segment of the labour market experiences such problems? Adopting broad language-related measures, with a view to the entirety of the labour market, rather than a specific narrowly identified segment (e.g., the healthcare sector as it was the case in Bressol) might very well be a measure that goes beyond what is needed to achieve the legitimate public interests that the Dutch government might have in mind. This is a matter regarding proportionality of the measures concerned, to which I will come back below.

Moving on, the CJEU in Bressol (par. 53 and 66 to 70) accepted that the prevention of risks related to the public interest may be accepted as justifications of infringement. In other words, ex-ante protective measures may be adopted to prevent deterioration of the status quo. However, the standard for adopting such measures (which restrict the free movement rights of EU citizens) is higher than for adopting measures ex-post, namely to address already existing negative effects related to the public interest concerned. In this context, is the proposed Wet internationalisering in balans meant to address already existing issues related to the Dutch language and culture, or is it meant to prevent such issues from occurring? In the case of the former, evidence must be provided as to the deterioration that has already occurred. In case of the latter, the risks of such problems materializing must actually exist and must be genuine – see par. 66 and 71 of Bressol. Furthermore, the causal relationship between the national measures proposed and the objective pursued must be established. In the words of the Court (par. 69): "[t]he assessment of such a link will depend inter alia on a prospective analysis which will have to extrapolate on the basis of a number of contingent and uncertain factors and take into account the future development of the […] sector concerned, but also depend on an analysis of the situation at the outset, that is to say, as it currently stands." Such analysis is demanding, as the Court highlights in par. 71: it must be "supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to [the interest concerned]." The level of detail and precision of such an analysis is illustrated by the Court in par. 72 to 78 of the Bressol judgment. I will not elaborate on this further as these details can be retrieved from the judgment itself. I will conclude this matter by simply pointing to the Court's reasoning in par. 79: when adopting measures such as the ones proposed in the Wet internationalisering in balans, the national authorities must "[reconcile], in an appropriate way, the attainment of that objective with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students […]. The restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to obtain the objectives pursued and must allow sufficiently wide access by those students to higher

education." Has the Dutch government performed this type of analysis for the proposed Wet internationalisering in balans?

The excerpts above point to the second part of the process of justifying an infringement, namely, the proportionality of the proposed national measures. Proportionality entails a number of tests that must be performed in order to assert whether the national measures restricting the EU citizens' freedom of movement is suitable and necessary to attain the goal of protecting Dutch language and culture and whether the goal in discussion can be achieved by adopting less restrictive means. I find no proportionality assessment when it comes to the infringement of EU law in sections 5.1 and 5.2 of the Memorie van toelichting, with the exception of the, if I may say, odd statement on page 43 (last paragraph of section 5.2.2), that the proposed measures leave sufficient room for the retention of fully foreign language courses. If this is the proportionality analysis performed for ensuring consistency of the Wet internationalisering in balans with EU free movement law, I find it blatantly insufficient.

The Court spends significant time in the Letse taalzaak judgment (par. 71 to 87) to discussing proportionality concerns. It is true that the Letse taalzaak judgment the issue was connected with providing courses solely in the language of that Member State. Nevertheless, a great deal of the proportionality arguments discussed there are relevant to the measures proposed in the Wet internationalisering in balans, if not for any other reason, to outline the type and breadth of the analysis that the national authorities must perform in order to ensure that the national law is in line with EU law. First, in par. 74 and 75, the Court accepts that "a Member State's legislation which provides for an obligation on higher education institutions to use, in principle, the official language of that Member State appears to be suitable for attaining the objective of defending and promoting that language. […] That said, it must be pointed out that the legislation in question can be regarded as capable of ensuring that objective only if it genuinely reflects a concern to attain it and is implemented in a consistent and systematic manner." The question that one may ask in this respect is whether the Memorie van toelichting engages in such an analysis. Importantly, does the Dutch government pursue the objective of protecting the Dutch language in a consistent and systematic manner? This means also in areas other than higher education. Is there solid evidence provided in the Memorie van toelichting of how this endeavour is pursued? In absence of such analysis the measures contained in the proposed Wet internationalisering in balans might be deemed disproportionate.

Second, regarding the necessity test and the test of the less restrictive means, the Court makes it clear that Member States enjoy discretion as to the measures they deem capable of achieving the objectives of their policies and this choice is not coloured by the opinions of other Member States – par. 82 and 83 of Leetse taalzaak. In par. 84 and 85 the Court states that a system that imposes the use in education of only the language of that Member State, with no exceptions, "would exceed what is necessary and proportionate for attaining the objective pursued by that legislation, namely the defence and promotion of that language. [Such a system does not take] account of reasons that may justify different higher education courses of study being offered in other languages." This last assertion is important to my mind, because it places the emphasis on the reasons why education in other languages is important. That is why, in par. 85 and 86, the Court states that "Member States may

introduce, in principle, an obligation to use their official language in those courses, provided that such an obligation is accompanied by exceptions that ensure that a language other than the official language may be used in the context of university education. […] [S]uch exceptions should, in order not to exceed what is necessary for that purpose, allow the use of a language other than [the official language of that Member State], at least as regards education provided in the context of European or international cooperation, and education relating to culture and languages other than [the official language of that Member State]." This means that, especially when taking into account the context in which the proposed Wet internationalisering in balans is put forward, namely one characterized by long-term internationalization efforts and investments, education in a language other than Dutch is important. The wording chosen by the Court (i.e. "at least") suggests that for a national measure not to be deemed disproportionate, education in a language other than the official language should go beyond merely marginal programs in the context of European or international cooperation. My interpretation here would be that the Wet internationalisering in balans should allow for foreign language education going beyond Erasmus cooperation and other programs of this kind only.

Turning to assessing whether the provisions of the Wet internationalisering in balans meet the test of less restrictive measures, as far as infringing the free movement right of EU citizens is concerned, the analysis in the Memorie van toelichting should provide convincing answers in this respect. Is there a less restrictive measure than the two thirds Dutch language courses ratio, when it comes to the non-Dutch(-speaking) EU citizens whose free movement rights are infringed, while at the same allowing the protection of Dutch language and culture? Is this formula sufficient to meet the demands of the CJEU in Leetse taalzaak, regarding European and international cooperation? The burden of elucidating such questions rests on the national authorities proposing the legislation, authorities that must provide well-substantiated explanations as to why the proposed measures (such as the 2/3 & 1/3 ratio) do not go beyond what is necessary to attain the goal of protecting Dutch language and culture. Once again, one must not forget that education-related choices made by Member States, legitimate as they may be, must not come at the cost of EU law and commitments made, and certainly not at the cost of infringing EU citizens' fundamental rights.

A final note which relates to a question one often hears in the current context, namely, "But why can any other EU Member State have education only in their official language?". The core of the response is: the Netherlands, through its earlier investments and policy choices, voluntarily made itself an attractive (educational) market for EU citizens. This is in line with EU law. Other countries – for various reasons – have not done so at least with respect to education. This is also in line with EU law. Rolling back the attractiveness of the market has to be justified from an EU law perspective as it restricts fundamental rights of EU citizens. The burden of proving the necessity of protecting a given interest and of proving that this protection is done in a proportionate manner, rests with the Member State. Importantly, the proportionality is judged not in relation to what other Member States are doing but in relation to EU law (i.e., the restrictions that the EU citizens would experience).