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REPORT

Neglected and Exploited: The Plight of EU Migrant Workers at the Hands of Dutch Temporary Work Agencies

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TABLE OF ABBREVIATIONS

Term	Abbreviation
Arbeidstijdenwet (Working Hours Act)	Artw
Basic regulation (Council regulation (EC) 883/2004 of the European Parliament and of the Council, on the coordination of social security systems)	BR
Basis Registratie Personen (Municipal Personal Records Database)	BRP
Burgerservicenummer	BSN
Burgerlijk Wetboek (Dutch Civil Code)	DCC
Collectieve Arbeidsovereenkomst (Collective Labour Agreement)	CLA
Committee of Experts on the Application of Conventions and Recommendations	CEACR
European Union	EU
Implementing Regulation (Council regulation (EC) 987/2009 of the European Parliament and of the Council, laying down the procedure for implementing Regulation.	IR
International Labour Organisation	ILO
Registratie Niet-Ingezetene (Register on Non-Residents)	RNI
Stichting Normering Arbeid	SNA
Stichting Naveling CAO voor Uitendkrachten	SNCU
Temporary Work Agencies	TWAs
Wet Arbeidsvoorwaarden Gedetacheerde Werknemers in de Europese Unie (Terms of Employment Posted Workers in the EU Act)	WagwEU
Wet Arbeid Vreemdelingen (Foreign Nationals Employment Act)	WAV
Wet Allocatie Arbeidskrachten Door Intermediairs (Placement of Personnel by Intermediaries Act)	WAADI
Wet Minimumloon en Minimumvakantiebijslag (Minimum Wage and Holiday Allowance Act)	WML

EXECUTIVE SUMMARY

EU migrant workers face several obstacles when working in the Netherlands, the most prominent being the zero-hour contracts containing a temporary employment clause.[1] These contracts function on a 'no work, no income' basis. Combined with a lack of knowledge about their social rights, migrant workers are in danger of being exploited. Further problems migrant workers encounter are the merger of housing and labour contracts, poor working conditions, poor access to information and legal help, problems with the Burgerservicenummer (the mandatory registry, and social security number) and the limited mechanisms and its effectiveness of the Dutch Labour Inspectorate.

The International Labour Organisation's (ILO) Private Employment Agencies Convention of 1997 (C181) provides an extensive legal framework for regulating the practices of TWAs.[2] The Netherlands is party to the Convention, and thus obliged to comply with the statutory obligations contained therein. Pursuant to the Conference Committee on Application of Conventions and Recommendations' direct requests and observations, this report selects some of the Convention's provisions for further scrutiny – i.e., those provisions with which the Netherlands' compliance is concerning. The focus lies with the accreditation of TWAs; issues of equal treatment and the charging of fees and costs to migrant workers. This report contends that domestic legislation and collective agreements are not reflective of the international legal framework's statutory requirements. Of particular concern is the delegation of accreditation to private entities; the unequal dismissal regimes applicable to migrant workers and regular workers; and the charging of fees and costs to migrant workers.[3]

Accordingly, the recommendations contained herein largely echo some of the advice expressed by the Roemer Commission report and the advice by the Dutch Sociaal-Economische Raad (SER).[4] Whilst measures must be taken to ensure better compliance with C181, the report is

[1] Art. 7:691(2) Burgerlijk Wetboek van 1 Januarie 1992 (amended 2020) ('DCC').
[2] Convention (No.181) Concerning Private Employment Agencies (adopted 19 June 1997, entered into force 10 May 2000) 2115 UNTS 249 art 1(b) ('C181').
[3] C181 arts 5(1); 7; 11; 10; 12; 14.
[4] Aanjaagteam Bescherming Arbeidsmigranten, 'Geen tweederangsburgers: Aanbevelingen om misstanden bij arbeidsmigranten in Nederland tegen te gaan' (2020) ('Roemer Commission Report'); 'Sociaal -Economische

cognisant of the Dutch government's current budgetary restrictions. Hence, the forthcoming recommendations – particularly those addressing the accreditation system – set out a long-term plan for achieving compliance.

At the European level, Directive 2008/104 sets the minimum standards which all member states must provide to ensure a fair labour market. Directive 2008/104 establishes a balanced approach which guarantees the respect for the migrants' labour rights and the flexibility of the market.[5] The Netherlands has implemented the majority of its obligations under Directive 2008/104. However, some inconsistencies with regards to Articles 5 and 6 are present.[6] Article 5 mandates equal treatment relating to wages. Under the Directive, social partners are allowed to derogate from this principle if 'an appropriate level' of protection is provided.[7] Currently, Dutch legislation allows for social partners to derogate from the principle of equal treatment relating to pay with no guarantee of 'an appropriate level' of protection.[8] This leaves extensive room for appreciation for the social partners. Moreover, Article 6 requires the hiring company to inform migrant workers about any vacant posts in their undertaking, giving them the opportunity to find permanent employment akin to regular workers. At present, Dutch legislation explicitly excludes temporary work agencies from this obligation; hindering the possibility of migrant workers acquiring stable, permanent employment.[9]

The EU social security coordination rules have been passed to facilitate the adequate functioning of social security systems of the member states, in cases of cross-border provision of work and services.[10] This determines which social security system EU migrant workers are subject to once they utilize their free movement rights. This report focuses on sickness benefits, unemployment benefits, insurance, and aggregation of periods.

Beleid 2021 – 2025: 'Zekerheid voor Mensen, Een Wendbare Economie en Herstel van de Samenleving' (Ontwerpadveis 21/08, June 2021) ('SER Advice').

[5] Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L 325 ('Dir 2008/104').

[6] Dire 2008/104 arts 5; 6.

[7] Dir 2008/104 art 5(3)

[8] Art. 8(4) Wet Allocatie Arbeidskrachten Door Intermediairs van 14 Mei 1998 ('WAADI').

[9] Art. 7:657(2) DCC.

[10] See Council regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1 ('Reg 883/2004'); Council regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems [2009] OJ L 284 ('Reg 987/2009).

The Social Security Coordination Regulations have been correctly implemented regarding unemployment benefits, and the Dutch legal framework is compliant with the Regulations on this subject.[11] However, there are issues regarding the aggregation of unemployment benefits because migrant workers fail to register their Dutch addresses, and due to TWAs not organizing unemployment insurance properly. Secondly, Dutch legislation for 'phase A employment contracts' is not in compliance with the social security coordination schemes on sickness benefits, seeing the lack of offering those benefits. Thirdly, the Dutch system for the coordination of social security of unemployment benefits, sickness benefits and proper administration is non-compliant with the Regulations since migrant workers face unnecessary obstacles in organizing proper administration. Fourth, migrant workers do not have equal access to social security as Dutch nationals. Therefore, the principle of non-discrimination; the principle on aggregation; and the principle that social benefits should be exportable to other member states are not properly guaranteed in the Netherlands at the moment.[12]

[11] Ibid.
[12] Reg 883/2004 arts 4; 6; 7.

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1. INTRODUCTION

On 2 June 2021, the Sociaal Economische Raad ('SER') submitted the 'Advice Labour Market' (the advice), after reaching agreement with Dutch labour unions.[13] The advice presents fundamental and much needed changes to the labour market, in particular for EU migrant workers.[14] If the advice is adopted in the new coalition agreement, this could lead to a substantial revision of Dutch labour law.

Accordingly, the COVID-19 pandemic has been an important factor prompting calls for revision, specifically in relation to the legal position of EU migrant workers. EU migrant workers, par excellence, work on location: they work as cleaners, supervisors on location and as agricultural workers. Often, they live in overcrowded housing which leads to easier transmission of Covid-19.[15] EU migrant workers have been hit disproportionately by the COVID-19 crisis, in terms of health but in terms of job insecurity and the risk of losing their homes as well.[16]

Moreover, the Dutch labour market is the most flexible in Europe.[17] Estimates suggest that the flexible employment sector constitutes approximately 40% of the total employed labour force, of which 400 000 – 700 000 are EU migrant workers.[18] A strong flexible employment sector is associated with various benefits – for the economy, businesses, employed and unemployed persons.[19] However, it also allows many deleterious and exploitative labour practices to be

[13] SER Advice (n 4).
[14] Ibid.
[15] Ellen de Visser, 'Wordt de Ene Bevolkingsgroep Harder Geraakt door Corona dan de Andere?' (*de Volkskrant,* 13 October 2020) <https://www.volkskrant.nl/nieuws-achtergrond/wordt-de-ene-bevolkingsgroep-harder-geraakt-door-corona-dan-de-andere~ba23f6d9/?referrer=https%3A%2F%2Fwww.google.com%2F> accessed 27 June 2021.
[16] See Radboud UMC, 'Migranten in de Frontlinie. De Effecten van Covid-19 Maatregelen op Arbeidsmigranten Werkzaam in Cruciale Sectoren' Radboud University Network on Migrant Inclusion (RUNOMI) working report <https://www.radboudumc.nl/nieuws/2020/onderzoek-radboudumc-naar-effecten-covid-19-maatregelen-op-arbeidsmigranten> accessed 27 June 2021.
[17] Bastiaan Starink, 'Flexibility is a Key Factor in Revitalising the Dutch Labour Market' (*PWC*) <https://www.pwc.nl/en/topics/blogs/flexibility-is-a-key-factor-in-revitalising-the-dutch-labour-market.html> accessed 27 June 2021.
[18] Lecture by Mr. Rafael Polo Guardo to Fair Work and Equality Law Clinic Spanish Team (16 March 2021); —, 'Flexwerk in Nederland en de EU' (*CBS*) < https://www.cbs.nl/nl-nl/dossier/dossier-flexwerk/hoofdcategorieen/flexwerk-in-nederland-en-de-eu> accessed 27 June 2021.
[19] See Kim van Eyck, 'Flexible Employment: An Overview' (2003) ILO Seed Working Paper No. 41, 1.

utilised by TWAs, which, simply put, deteriorate the socio-economic standing of migrant workers.[20]

At the root of EU migrant workers' vulnerability lies the use of zero-hour contacts which contain a temporary work clause. In essence, these contracts translate to no work, no income, and if there is work, migrant workers will receive the bare minimum in remuneration. Not being knowledgeable about their social rights (on the national level as well as on EU level) are detrimental for migrant workers, and the zero-hour contract with a TWC sets the legal framework which creates the space for exploitation.

Accordingly, this report's primary objective is to examine whether Dutch labour law is adhering to its supranational obligations. The situation of Spanish migrant workers has been the focus of the research for this report. The obstacles migrant workers encounter begin in their home member states, where recruiters paint an inaccurate picture about working in the Netherlands. At the forefront is the promise of 40-hour work weeks. However, the reality is that most migrant workers receive zero-hour contracts with a temporary work clause, which does not guarantee stable employment.[21]

Once arrived in the Netherlands, EU migrant workers face a number of other obstacles, which will be described in Section 2 of this report. Given that the Netherlands is an EU Member State and a contracting party of the ILO Private Employment Agencies Convention of 1997 ('the Convention/ C181'), there is an abundance of international labour standards with which the Netherlands is obliged to comply.[22] Section 3 will therefore contain a descriptive analysis of the legal framework governing labour relations between migrant workers and TWAs. This analysis will occur at the international, European, and domestic levels. The analysis' main goal is to

[20] Pablo L. Calle *et al*, 'Bienvindos al Norte: Explotación de la Nueva Emigración Espanõla en el Corazón Logistico de Europa' (2020) 105 *Estudios*, 18; Roemer Commission Report (n 4) 5; FNV, 'Eerlijke Arbeidsmigratie in een Socialer Nederland' (2020), 1 ('FNV Report').
[21] Lecture by Mr. Rafael Polo Guardo (n 18).
[22] For example, Reg 883/2004; Dir 2008/104; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18 ('Dir 96/71'); Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173 ('Dir 2018/957).

provide clarity as to the complex and immense applicable law.[23] Moreover, it will highlight the hierarchy between the applicable laws and the need for effective implementation in order to achieve a good harmonization. In turn, Section 4 assesses whether or not Dutch law implements the supranational legal framework correctly. Lastly, Sections 5 and 6 offer concluding remarks, and recommendations to improve the legal and practical situation relating to EU migrant workers in the Netherlands.

[23] Specifically, DCC; Wet op de Collectieve Arbeidsovereenkomst van 2007 ('Collective Labour Agreements Act'); Collectieve Arbeidsovereenkomst Nederlandse Bond van Bemiddelings- en Uitzendondernemingen 2019 – 2020 ('CLA NBBU'); Collectieve Arbeidsovereenkomst Algemene Bond Uitzendondernemingen ('CLA ABU') 2019 – 2020; WAADI.

2. THE PROBLEMS FACED BY EU MIGRANT WORKERS

This section will document the reality of the situation faced by EU migrant workers working in the Netherlands. The following obstacles will be discussed: the use of zero – hour contracts, the merger of housing and labour contracts, lack of knowledge of rights, poor working conditions, poor access to information and legal help, the BSN problem (the mandatory registry number) and the Dutch Labour Inspectorate's complaint mechanisms and effectiveness.

2.1. Zero-Hour contracts with a temporary work clause

EU migrant workers are recruited in their home member states by TWAs.[24] Often, the employment contract is signed in the home member state, under false pretences. Once arrived in the Netherlands, it appears migrant workers are most often employed through 'zero-hour contracts' or similar flexible employment contracts.[25] The zero-hour contract system is part of the flexibility of the Dutch labour market as discussed in the introduction. Zero-hour contracts containing a temporary work clause are detrimental because they augment the unstable and insecure situation of migrant workers. Migrant workers are not guaranteed consistent and regular work, often being summoned at arbitrary times; and when there is work, migrant workers receive the bare minimum in remuneration.[26] Hence, no work, no income.

These issues derive from the recruitment phase. Migrant workers have often been informed that they will work 40 hours a week. In practice, however, only working for eight hours per week is not uncommon.[27] Their dependence upon their employers means that complaining might result in them being fired. Not having access to information about labour rights plays a role in this dynamic, enhancing the dependency between migrant workers and their employers.[28]

[24] Roemer Commission Report (n 4), 20.
[25] Lecture by Mr. Rafael Polo Guardo (n 18).
[26] Roemer Commission Report (n 4), 13.
[27] Ibid 28.
[28] Lecture by Mr. Rafael Polo Guardo (n 18).

2.2. Merger of labour and housing contracts

In the Netherlands, the merger of employment and housing contracts for migrant workers is common practice.[29] In practice, the TWA also becomes the migrant worker's landlord. Hence, the employer is in complete control of the migrant worker's employment and living situations. This may lead to abuse by the landlord/employer.[30] The rental fee is often automatically subtracted from the salary, and often migrant workers pay high rental costs for poor living situations.[31] Additionally, the employer can subtract the travel costs for commuting between home and the workplace.[32] Some employers place migrant workers in houses located far from the workplace, which leads to large amounts of subtractions from the worker's income.[33]

Furthermore, reports show that migrant workers are forced to pay rent for a mattress (€100), and share houses suitable for small families, with 8-10 people migrant workers.[34] This arrangement serves to increase their living costs.[35] Combined with the zero-hour contracts, their insecurity is amplified. Even if a migrant worker is unable to work, their living costs increase, placing them in debt with their employer. Additionally, if migrant workers lose their employment, they also lose their homes.[36]

2.3. Lack in housing and resistance from locals

The Dutch housing market is saturated; there is a housing shortage affecting all prospective renters and buyers, especially migrant workers who rent accommodation on a limited budget. For them, living in overcrowded apartments has become normal.[37] The Kenniscentrum Arbeidsmigranten (knowledge centre for migrant workers) spoke of a shortage of 150.000 beds for migrant workers in 2020.[38]

[29] Roemer Commission Report (n 4), 44.
[30] Ibid 35.
[31] Ibid 14; 16.
[32] Ibid 14.
[33] Ibid 15.
[34] Ibid 16; Calle *et al*, (n 20) 73 – 4.
[35] FNV Report (n 20) 3.
[36] Roemer Commission Report (n 4) 3.
[37] Ibid.
[38] Ibid 35.

Local resistance to housing projects aimed at migrant workers is prevalent. There are examples of municipalities which have had plans to construct buildings specifically for migrant workers, which were followed by organized demonstrations by locals and local parties with the purpose to stop the projects.[39] The combination of appealing and organizing demonstrations has proven to work in certain cases, for example in Westland municipality, as the KRO-NCRV documentary 'Arbeidsmigranten' shows.[40] This makes for two other problems migrant workers face, directly and indirectly. Because of the housing shortage, there are not enough houses to begin with. Combined with the local resistance, the houses will not even begin to be built.[41] This also complicates proper registration, as discussed under Section 2.8.

2.4. Lack of knowledge of rights

Migrant workers are poorly informed about their rights, even though they enjoy rights under Dutch law, and under international and EU law. Employment agencies exploit this lack of knowledge, as Sections 2.1 – 2.3 above have shown. Moreover, when migrant workers are knowledgeable of their rights and initiate complaint procedures, often they are dismissed.[42] The agency then moves on to other networks of prospective migrant workers whose knowledge about the working conditions in the Netherlands is lacking.[43] This means that TWAs, which ought to inform their workers about their social rights, are benefitting from withholding that information. Migrant workers have little chance to gain insight into their rights, since there is a language barrier and very limited contact with local authorities, lawyers, or others and NGO's.[44] This means their social rights are improperly enjoyed (if at all). However, even educated about their rights, the merger of employment and rental contracts makes it difficult to claim those rights.

[39] KRO-NCRV (Pointer), 'Arbeidsmigranten' (*KRO-NCR,* 3 May 2021) < https://pointer.kro-ncrv.nl/onderzoeken/arbeidsmigranten#gs.4xp90a> accessed 27 June 2021.
[40] Ibid.
[41] Roemer Commission Report (n 4) 38.
[42] Lecture by Mr. Rafael Polo Guardo (n 18).
[43] Ibid.
[44] Roemer Commission Report (n 4) 3.

2.5. Poor access to information and (legal) help

Access to legal help is difficult for migrant workers: they struggle with language problems, they are not aware of the legal procedures, they (naturally) cannot assess their own legal position sufficiently and they have little help in the social environment to overcome these barriers.[45] There are a few options present for migrant workers to get legal help, such as going to the 'Juridisch loket' [legal office] or taking collective action through labour unions.[46] However, these options are not sufficient enough to ensure their protection. Additionally, the information provided here is often only available in Dutch or English and there are costs involved with seeking legal assistance.[47]

2.6. Poor working conditions

Dutch law strictly regulates working conditions. However, as mentioned in Sections 2.4 and 2.5, migrant workers are unaware of their rights. Furthermore, it is cheaper for employers to not invest in improving working conditions. Production pressure tends to be high, which can lead to long workdays – longer than Dutch law permits.[48] The Dutch Labour Inspectorate is the body assessing working conditions. However, it is impossible to check every company. Without employee complaints, or reports from the public prosecutor's department, there is a small chance that the Dutch Labour Inspectorate will be notified of the poor working conditions at a specific company. Mentioned above, migrant workers are discouraged from reporting because they do not know their rights which enables employers to maintain these poor working conditions. Some authors label these working conditions as modern slavery.[49]

2.7. Sick employees

Migrant workers' zero-hour contracts may include a temporary agency clause. According to two applicable collective agreements: *Algemene Bond Uitzendondernemingen* ('ABU') and the *Nederlandse Bond van Bemiddelings en Uitzendondernemingen* ('NBBU') employers can

[45] Roemer Commission Report (n 4) 57.
[46] Lecture by Dutch Labour Inspectorate representative to Fair Work and Equality Law Clinic Spanish Team (16 March 2021).
[47] —, 'Hoe we werken' (Juridisch Loket) <https://www.juridischloket.nl/hoe-we-werken/> accessed 27 June 2021.
[48] Art. 5:3 Artw.
[49] Ibid.

dismiss sick employees as long as employees reside in phase A of the contract.[50] Phase A is applicable as long as the employee has not worked more than 78 weeks at the hiring company. As a result, migrant workers may be dismissed during the first 78 weeks of their employment if they fall ill.

2.8. Temporary registration number

Registration helps the Municipal Personal Records Database (BRP) keep track of how much tax a household owes, manage emergencies, and monitor the population. Registration in the Netherlands is mandatory; if done improperly individuals are subject to a €325 fine.[51] EU migrant workers need a BSN as well.[52] This is needed for all administrative issues in the Netherlands. This includes opening a bank account, receiving a wage, visiting a doctor, getting health insurance, and applying for benefits.[53] To receive a BSN, workers must register in the Register for Non-Residents (RNI), after which they are referred to as a 'non-resident.'[54] The RNI is part of the Personal Records Database (Basisregistratie Personen, BRP). A BSN does not imply that persons have permission to work in the Netherlands, nor does it entail the right to residence and employment.[55] The BSN will be registered in the RNI permanently. This means migrant workers do not need to apply for a new BSN if they go home and decide to come back for another short stay later. If workers remain in the Netherlands for more than 4 months, they must register as a resident living in the Netherlands, at the local municipality. This registration needs to be done within 5 days after arrival in the Netherlands. If a person decides to stay longer than the first planned 4 months, they will also need to register as a resident.[56]

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[50] Art 10 (1) CLA ABU.
[51] —, 'Boete bij onjuiste inschrijving of verkeerde informatie in de BRP' (Gemeente Amsterdam) <https://www.amsterdam.nl/veelgevraagd/?productid=%7BA4EA6649-265F-468B-9905-23EAEFE7CA77%7D#case_%7BB3003BC2-2A8B-42AE-A550-EC8F302625AB%7D> accessed on 27 June 2021.
[52] National Office for Identity Data, Ministry of the Interior and Kingdom Relations, 'Registration in the Dutch Register of Non-Residents (RNI) for a short-term stay in the Netherlands' (*Information Leaflet)* <https://www.government.nl/documents/leaflets/2018/07/01/registration-for-a-short-term-stay-in-the-netherlands> accessed 27 June 2021.
[53] Lecture by Dutch Labour Inspectorate (n 46).
[54] National Office for Identity Data (n 52).
[55]Ibid.
[56] Ibid.

Nevertheless, despite registration being mandatory, the majority of migrant workers do not register as residents because they are either unaware of the obligation or daunted by the complexity of the process.[57] Additionally, when insurance is organized by an employer and a migrant worker loses his job, the insurance is cancelled. Consequently, they are not protected in case of health problems, because they do not have insurance. This entrenches their vulnerability, since they do not have access to medical care, for example.[58]

2.9. Labour inspectorate: lack of complaint mechanism/information point

The Dutch Labour Inspectorate enforces and promotes compliance with WML, Artw; WAV; WAADI; WagwEU.[59] It is possible to contact the Inspectorate to report complaints about working conditions, offer tips about illegal labour, exploitation and/or payment below the statutory minimum wage, notifications, reports and applications for exemptions (such as the removal of asbestos, child labour, et cetera) and report a fraud crime (anonymously) in the field of work and income (benefits, tenures, subsidies, possible exploitation of employees).[60] Furthermore, it is possible to file an anonymous claim regarding serious organized crime in work and income or the possible exploitation of employees in the labour market, when public reporting could endanger the reporting person or third parties which can be passed on to the Criminal Intelligence Unit of the Inspectorate.[61]

In reality, migrant workers do not complain to the Inspectorate.[62] Instead, they usually report to NGOs that analyse the situation and report to the Inspectorate on their behalf. Nonetheless, when the Inspectorate receives a claim there must be a permission from the migrant worker to investigate the claim, otherwise it is not accepted because it may infringe the right to privacy.[63] Furthermore, the cooperation between the inspection services is poor. There is little

[57] Lecture by Mr. Rafael Polo Guardo (n 18).
[58] Ibid.
[59] Wet Minimumloon en Minimumvakantiebijslag van 27 November 1968 ('WML'); Arbeidstijdenwet van 23 November 1995 ('Artw'); Wet Arbeid Vreemdelingen van 21 December 1994 ('WAV'); WAADI; Wet Arbeidsvoorwaarden Gedetacheerde Werknemers in de Europese Unie van 1 Juni 2016 (WagwEU').
[60] —, 'Netherlands: Labour Inspection Structure and Organisation' (*ILO*) <https://www.ilo.org/labadmin/info/WCMS_156052/lang--en/index.htm> accessed 27 June 2021.
[61] Lecture by Dutch Labour Inspectorate (n 46).
[62] Ibid.
[63] Ibid.

understanding of information sharing in the triangle of employment (the Inspectorate), transport (police) and housing (municipality).[64] Multidisciplinary action is not taken quickly enough because of lack of cooperation between those institutions.[65]

[64] Roemer Commission Report (n 4) 51.
[65] Lecture by Dutch Labour Inspectorate (n 46).

3. APPLICABLE LEGAL FRAMEWORK

This section contains a descriptive analysis of the legal framework governing labour relations between migrant workers and TWAs. The goal is to simplify the volume of applicable law, thus making it easier to identify possible issues of non-compliance.[66] Additionally, the hierarchy between the applicable laws will be highlighted, as well as the need for them to be effectively implemented in the domestic legal framework. The legal framework will begin at the international level with the ILO. Thereafter, the European level will be addressed through EU primary and secondary legislation, and jurisprudence. Lastly, the current Dutch labour law will be expanded upon, thereby providing a reference point for the examination on implementation in Section 4.

3.1. International law: International Labour Organisation

The ILO is a tripartite, international organisation, composed of 'governments, employers and workers' representatives.'[67] To attain the objective of further developing and protecting 'human and labour rights' around the world, the ILO convenes 'General Conferences […] at least once per year' with a view to adopting proposals for international conventions or, alternatively, recommendations.[68] For ratified conventions, a member state must act (implement legislation) to give effect to the convention's provisions within its jurisdiction – the actions taken must appear in an annual report, communicated to the International Labour Office.[69] This obligation is somewhat misleading. The ILO's CEACR has stated that reports pertaining to general ILO conventions (those not considered fundamental or pertaining to governance) must be 'provided every six years.'[70] The CEACR is tasked with assessing the implementation of ILO standards by the member states.[71] For recommendations – considered 'non-binding guidelines' acting as

[66] DCC; Collective Labour Agreements Act; CLA NBBU; CLA ABU; WAADI.
[67] —, 'Mission and Impact of the ILO' (*International Labour Organisation*) <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed 27 June 2021.
[68] ILO Constitution art 19(1).
[69] ILO Constitution art 22.
[70] —, 'Committee of Experts on the Application of Conventions and Recommendations' (*International Labour Organisation*) <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm> accessed 2 May 2021; International Labour Organisation, *Handbook of Procedures Relating to International Labour Conventions and Recommendations* (International Labour Standards Department, 2019), para. 36(b)(ii).
[71] ILO, *Handbook* (n 70) para 14.

appendices to the conventions – states are notified of more detailed actions which they should explore, to properly implement the convention in question within their jurisdiction.[72]

Importantly, when governments submit reports to the ILO, the CEACR is entitled to respond through observations and/or direct requests.[73] On the one hand, observations are reserved for 'more serious or long-standing cases of failure to fulfil obligations,' targeting discrepancies between the implemented legislation and practices (or lack thereof) and the ILO standards to which the state must adhere.[74] Whilst their primary goal is to highlight defects in the member state's law and practice, they are also used to address progress.[75] On the other hand, direct requests form part of a constant dialogue between the CEACR and the member states, addressing intricate issues raised by the member states' governments in their reports. Further, they clarify points raised in the governments' reports.[76]

In the present case, the Private Employment Agencies Convention of 1997 ('C181'), and its accompanying observations and direct requests, are important. This is true for two reasons. First, the Netherlands ratified C181 in 1999. Therefore, it is obliged to take all necessary measures to implement the convention's provisions. Second, C181 creates a supranational legal framework applicable to the case of migrant workers; it seeks to regulate TWAs who provide 'labour market services consisting of employing workers with a view to making them available to a third party […] [the] user enterprise.'[77] In light of the issues highlighted in Section 2, certain articles contained in C181 merit closer attention, ensuring that their objectives and constituent elements are clarified. Given the nature and contents of observations and direct requests, specific provisions addressed therein will be of particular importance.

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[72] —, Conventions and Recommendations' (*International Labour Organisation*) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 2 May 2021.
[73] Report of the Committee of Experts on the Application of Conventions and Recommendations (2019), Report III, Part A, para. 70 ('CEACR Report 2019'); ILO, *Handbook* (n 70) para. 62.
[74] CEACR Report 2019 (n 73) para. 70
[75] Ibid.
[76] Ibid.
[77] C181 art 1(b).

3.1.1. Private Employment Agencies Convention of 1997 (C181)

The ILO's observations and direct requests are the most logical points of departure for this report because their purpose is to address possible defects in the member state's laws. For the Netherlands, the CEACR focused on issues of equal treatment and the regulation and supervision (accreditation) of TWAs as important issues within the Dutch context.[78]

As to the issue of equal treatment, four provisions are of importance. As a preliminary point, Article 2(2) makes the Convention's articles applicable 'to all categories of workers and all branches of economic activity'. In conjunction with Article 5(1) C181 on the principle of equality, the Convention, in theory, ensures equal treatment between regular and migrant workers.[79] The principle is expounded upon in Articles 11 and 12, which determine member state obligations towards migrant workers, as well as those undertaken by TWAs relating to specific employment issues.[80] The most important of these issues, considering the problems faced by migrant workers, include equal and adequate protection in relation to 'working conditions […] social security benefits […] occupational safety and health [and] compensation in case of insolvency.'[81] Cumulatively, these four provisions create an extensive equal treatment regime with which member states must comply.

As to the issue of regulation, Article 10 C181 obliges member states to ensure that its 'most competent authority' – i.e., the domestic labour inspectorate – provides for the necessary means and methods for receiving and investigating 'complaints, alleged abuses and fraudulent

[78] See Report of the Committee of Experts on the Application of Conventions and Recommendations (2014) Report III, Part 1A, 433 – 4 ('CEACR Report 2014'); Report of the Committee of Experts on the Application of Conventions and Recommendations (2012), Report III, Part 1A, 729 – 30 ('CEACR Report 2012'); Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2020, published at the 109th ILC session in 2021) ('Direct request 2020'); Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2014, published at the 104th ILC session in 2015) ('Direct request 2014'); Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2009, published at the 99th ILC session in 2010) ('Direct request 2009'); Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2007, published at the 97th ILC session in 2008) ('Direct Request 2007').

[79] C181 art 5(1): 'In order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.'

[80] See C181 arts 11 and 12.

[81] C181 arts 11(c); (e); (i) and 12(c); (d);(h).

activities' attributable to private employment agencies (TWAs).[82] Importantly, the competent authority is obliged to include 'the most representative employers and workers organisations' in, presumably, establishing the requisite means and methods for investigating labour abuses.[83] Second, Article 14 C181 – specifically, paragraph 2 – states that the convention's implementation at the domestic level is entrusted to the member states' labour inspectorate or other competent public bodies.

Another provision of interest, identified due to the problems expressed in Section 2, is Article 7 C181.[84] The provision dictates that TWAs may not 'charge directly or indirectly, in whole or in part, any fees or costs to [their] workers.'[85] Furthermore, Article 7(2) stipulates that, exceptions to the prohibition are permissible if they apply to 'certain categories of workers, as well as specified types of services.'[86] Hence, the Article 7(2) exception cannot be used for all flex-workers, even if properly justified. It simply cannot be used as an all-inclusive labour policy or practice.

3.2. European Union Law

The Netherlands is a dualistic system. Hence, EU law must first be implemented in Dutch law before it has effect. Importantly, EU law needs to be effectively and efficiently implemented and handled by the member states. The following sub-sections describe the EU legal framework that is relevant for EU migrant workers. The focus lies with the Treaty on the Functioning of the European Union (TFEU), Directive 2008/104, and both regulations on the coordination of the social security coordination schemes.[87] Regulations have general application and are binding and directly applicable in the member states, whereas directives describe results to be achieved in a way that suits the member states.[88]

[82] C181 art 10.
[83] Ibid.
[84] C181 art 7.
[85] C181 art 7(1).
[86] C181 art 7(2).
[87] TFEU; Dir 2008/104 arts 4; 5 and 6; Reg 883/2004; Reg 987/2009.
[88] TFEU art 288.

3.2.1. Primary Law – TEU and TFEU

The free movement of people is one of the four freedoms upon which the EU's internal market is predicated.[89] Article 45(1) TFEU establishes the free movement of workers within the EU. A relationship of subordination (employer-employee relationship) must be present, whereby the individual 'for a certain period of time […] performs services for and under the direction of another person in return for which he receives remuneration.'[90] In this regard, host member states must ensure that EU workers, who exercise their free movement rights to work within their jurisdictions, are not confronted with discriminatory policies or practices in matters of 'employment, remuneration and other conditions of employment.'[91] For the present case, Article 45(3)(c) TFEU is important because it allows EU citizens to reside and work in a host member state, whilst benefiting from the same labour law rights as those enjoyed by national workers.[92] In the ensuing sub-sections, the most pertinent secondary legislation applying to migrant workers will be addressed.[93]

3.2.2. The coordination of social security benefits

The coordination of social security schemes falls within the framework of the free movement of persons and is aimed at contributing to their standard of living and employment conditions.[94] Currently, the rules are included in Regulation (EC) no. 883/2004, (Basic regulation: 'BR') and in Regulation (EC) no. 987/2009 (Implementing Regulation: 'IR').[95] The BR applies to nationals of member states (workers and ex-workers), stateless persons and refugees residing in a member state.[96] Therefore, migrant workers also enjoy the rights of the fundamental basic principles of aggregation of periods; namely equal treatment, export of benefits, and the principle of one applicable legislation and administrative cooperation.

The rules on social security stem from primary EU law; Article 48 TFEU is the basis for the rules on the coordination of social security.[97] Additionally, Article 34 of the Charter of

[89] Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C 326 art 26 ('TFEU').
[90] Case 337/97 *C.P.M Meeusen v Hoofdirectie van de Informatie Beheer Groep* [1999] ECR-I 3304, para. 13
[91] TFEU art 45(1).
[92] TFEU art 45(3)(c)
[93] Dir 2008/104; Dir 2014/67; Dir 96/7; Dir 2018/957; Dir 987/2009.
[94] Reg 883/2004 preamble; art 1.
[95] Reg 883/2004; Reg 987/2009.
[96] See Reg 883/2004 art 2(1).
[97] TFEU art 48.

Fundamental Rights explicitly recognizes the entitlement to social security, and the protection of entitlement for migrant workers.[98] The principle of good administration [chapter 5 of the Charter] also applies: citizens have the right to have their affairs handled impartially, fairly and within a reasonable time.[99]

The rules intend to cement the coordination of social security systems of the member states. Thus, determining which system a mobile citizen (and migrant workers) is subject to once they utilise their free movement rights. Furthermore, these rules aim to prevent EU citizens from being left without social protection or having double coverage in their country of residence and the country where they stay. The former refers to the citizen's home member state; the latter to their host member state.[100] Each member state is free to determine the features of its own social security system. In essence, to determine which benefits are being provided (1); the conditions for eligibility (2); the calculation of benefits (3); and what contributions have to be paid (4).[101] This concerns all branches of social security (pension, unemployment, and sickness benefits). The national provisions must respect the principle of equal treatment. The ensuing sub-sections focus on sickness benefits, unemployment benefits and benefits in respect of accidents at work and occupational diseases, as stated in Article 3 (1) (a); (f); (h) BR.[102]

The Administrative Commission is the body responsible for the proper coordination of the social security system, as per Articles 71 and 72 BR.[103] The commission comprises a representative of the government of each EU country and a representative of the commission. It deals with administrative matters, questions of interpretation concerning the regulations on social security, and is responsible for promoting collaboration between EU countries.[104] Furthermore, the European Labour Authority (ELA) ensures compliance with the rules on labour mobility and social security coordination. This is a new (additional) inspection and enforcement body, of

[98] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1 arts 34; 48.
[99] Ibid art 41.
[100] Reg 883/2004 preamble; art 1(j); (k).
[101] Reg 883/2004 art 1(c); (l); (t); art 21(a).
[102] Reg 883/2004 art 3(1)(a); (f); (h).
[103] Reg 883/2004 arts 71; 72.
[104] Reg 883/2004; arts. 71; 72.

which its objectives, its tasks and structure are further determined in Regulation 2019/1149.[105] The ELA will facilitate the cooperation of social security bodies of the EU member states and improve the implementation in practice of EU social security coordination rules. This report will not address this Regulation any further because full capacity of the ELA is expected to be reached in 2024, which limits its impact at the moment.[106] However, in the future, the ELA will likely be beneficial for all EU migrant workers.

Importantly, for the Regulations to be applicable, there needs to be a cross-border element – in essence, the situation is not regarded as wholly internal.[107] This means that the Regulations are applicable to persons who are legal residents in one member state and who have the nationality of another member state (home and host member state) or who have used their free movement rights in the past.

The social security coordination rules are subject to four leading principles. The first is the principle of non-discrimination.[108] This principle entails the prohibition for member states to apply better rights for their 'own' nationals: there may not be (direct or indirect) detrimental treatment for intra-EU migrants/migrant workers. The second principle regards the single state rule: there must be clarity about competences of the member states and the prevention of conflicts of law needs to be actively pursued. This goes for positive conflicts, under which an accumulation of rights can come into existence, as for negative conflicts in which there is a lack of rights.[109] The third principle on aggregation states that there cannot be a loss of (accrued) benefit rights due to migration.[110] The fourth principle states that social benefits should be exportable to other member states, as stated in Article 7 BR, for migrant workers to be able to move around and not lose their (accrued) benefits.[111]

[105] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority amending Regulations (EC) 883/2004, (EU) 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 [2019] OJ L 186.
[106] Ibid.
[107] Reg 883/2004 art 2(1).
[108] Reg 883/2004 art 4.
[109] See Reg 883/2004 arts 11 – 13. These provisions refer to conflicts of jurisdiction. A positive conflict of jurisdiction occurs when two or more member states claim their right and authority. A negative conflict occurs when two or more member states refuse to act on a certain case, on the grounds of their lack of authority.
[110] Reg 883/2004 art 6.
[111] Reg 883/2004 art 7.

(1) Access to social security: the BSN

In Section 2, on the problems that migrant workers face in the Netherlands, the role of proper administration in terms of residency is crucial for access to the social security system. Administration in the Netherlands is done via the BSN number. The BSN facilitates interaction with the Dutch authorities and is needed for starting a job, opening a bank account, and deducting taxes. It is also needed to gain access to the social security system, to be able to use healthcare and to apply for benefits. Additionally, the BSN is used to combat identity fraud and misspelled names.[112] In this subsection, the report focuses on the problems that arise from lacking a BSN when access to health and unemployment benefits are needed for migrant workers.

EU migrant workers who will be working in the Netherlands for less than 4 months need a BSN.[113] To receive a BSN, workers need to enrol in the Register on Non-Residents ('RNI'), after which they will be referred to as a 'non-resident.' The RNI is part of the Personal Records Database (Basisregistratie Personen, 'BRP'). A BSN does not imply that persons have permission to work in the Netherlands, nor does it entail the right to residence and employment. The BSN will be registered in the RNI permanently for non-residents, persons who do not reside in the Netherlands permanently. This means migrant workers do not need to apply for a new BSN if they go home and decide to come back for another short stay later. If workers plan on staying in the Netherlands for more than 4 months, they will need to register as a resident of the Netherlands at the local municipality. This registration needs to be done within 5 days after arrival in the Netherlands. Family members will need to be registered as well.

Under the EU social security coordination system, the location where the labour is performed determines the legislation applicable to a specific worker.[114] This means that persons receive social security benefits from the member state where they are working at the time. This clarifies why proper administration of worker's residency is so important, and thus being registered as a resident in the Netherlands.

[112] Wet Basisregistratie Personen art 2.7.
[113] National Office for Identity Data (n 52).
[114] Reg 883/2004 art 2(1).

Briefly, the definition of 'residence' is 'the place where a person habitually resides.'[115] The ECJ has determined that the state of residence 'is the state in which the workers, although occupied in another member state, continues habitually to reside and where the habitual centre of his interests is also situated.'[116] Length and continuity before the person concerned moved, the length and purpose of the absence, the nature of the occupation found in the other member state and the intention of the person concerned, as it appears from all the circumstances, need to be taken into account in determining residency.[117] There can be habitual residence in the member state in which the person works, if there is an intention to reside there and if that person has completed an appreciable period of residence there.[118]

However, the interpretations by the ECJ leave room for interpretation. There was ongoing disagreement between member states in determining a person's place of residence. The IR, discussed below, offers a (partial) solution for this legal vacuum. Disagreement on this crucial administrative matter can be detrimental to the person concerned, as applicable legislation and entitlement to benefits cannot be determined whilst a person's residency status remains unclear.

(2) Residency and registration

Since the above-mentioned case law on the place of residence still left room for interpretation, Article 11 of Regulation 987/2009 ('IR') was introduced to provide clarification.[119] If the member states' institutions share different views on the determination of the residence of a person, 'these institutions shall establish by common agreement the centre of interests of the person concerned, based on an overall assessment of all available information relating to relevant facts, which may include, as appropriate.'[120] Two crucial elements are: (1) the duration and continuity of presence on the territory of the member state concerned, and (2) the person's situation.[121] The interests of the person concerned are the focus; the situation of each person should be treated individually, and none of the elements are given precedence over one another.

[115] Reg 883/2004 art 1(j).
[116] Case 76/76 *Silvana Di Paolo v Office national de l'emploi* [1977] ECR I-315, para. 17.
[117] Ibid para. 20.
[118] Case 90/97 *Robin Swaddling v Adjudication Officer* [1999] ECR I-1090, para. 33.
[119] Reg 987/2009 art. 11.
[120] Ibid.
[121] Case 90/97 *Robin Swaddling v Adjudication Officer* [1999] ECR I-1090, para. 29.

If the elements listed in Article 11 (1) IR do not offer a decisive outcome, Article 11 (2) IR functions as a 'tiebreaker.'[122] In such circumstances, the intention of the person concerned and especially the reasons for that person to move, become decisive. The person's intention does not need to be explicit and can be assessed according to the circumstances concerning their relocation.[123] This offers more clarity and less detriment to persons under the regulation, and consequently for migrant workers. However, as described above, the nature of the construction with working for TWAs prevents migrant workers from even asking for help, let alone letting it come that far that member states or institutions come to determine the formal residency in order to gain access to the social security system.

(3) Unemployment benefits

As briefly mentioned, the social security includes unemployment benefits.[124] EU migrant workers have to register with the employment services in the member state where he/she has last worked, and claim unemployment benefits there, unless this person resides in another country.[125] Chapter six BR describes the basic rules concerning unemployment benefits, for example in relation to family members or when a person resides in a different member state than where he/she works, for example in the case of seasonal workers. Chapter five and further of the IR describes additional rules for implementation of the BR.

Migrant workers in the Netherlands who work for TWAs are typically persons who reside in a member state other than the competent member state. They differ from frontier workers, since they return to their home state less frequently than once a week. Article 65 (3) BR offers persons who have become unemployed the right to choose between claiming benefits in the state of their last (working) activity, or in the member state of residence.[126] The benefits are 'exportable:' EU migrant workers who claim benefits in the member state of their last activity can export the benefits to the state of residence along the lines of Article 64 BR. These persons do have to register as a job seeker in both member states.[127] In principle, exportability of benefits is possible

[122] Reg 883/2004 art 11(1); (2).
[123] Reg 987/2009 art 11 (2).
[124] Reg 883/2004 recital 13 and 32; arts 64 - 65a, 87(1); Reg 987/2009 arts 56, 70.
[125] Reg 883/2004 arts 11(3)(c), 65.
[126] Reg 883/2004 art 65(3).
[127] See Reg 883/2004 art 64(1)(a); (b).

for a period of three months, which may be extended to six months maximum.[128] During this period, the individual receives benefits from the member state in which he/she last worked.[129]

(4) The principle of aggregation

Aggregation requires that a period of employment and insurance completed in one member state, and under their legislation, are considered for the entitlement to benefits under the legislation of another member state, when necessary.[130] Article 48 TFEU and Article 61 BR state special rules for aggregating periods for the purpose of granting and determining the length of unemployment benefits.[131] Article 61 (1) BR makes a distinction between two types of (national) legislation. Namely between legislation that makes entitlement or the length of such benefits subject to the completion of periods of insurances, and legislation which states that entitlement is conditional on the completion of periods of employment or self-employment.[132] It also follows from Article 61 (1) BR that all periods of insurance must be considered for assessing entitlement to unemployment benefits by the competent state, without further examination into their nature.[133] This must happen irrespective of whether a person was employed, self-employed, and irrespective of other periods that are considered equal to being insured. However, Article 61 (2) BR states that aggregation is only applied to EU migrant workers who have completed their most recent periods of insurance, employment, or self-employment in the state where the benefit has been claimed.[134]

(5) Sickness benefits

Article 3 (1) sub a BR states sickness benefits for short stay are also covered under the social security coordination rules.[135] To clarify, a definition of 'benefits in kind' was inserted into the regulation for the purposes of Title three, chapter 1, which concerns sickness, maternity and equivalent paternity benefits. Member states are 'intended to make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care. This includes

[128] Reg 883/2004 art. 64(1)(c).
[129] Reg 883/2004 art 65(5)(b).
[130]Reg 883/2004 art 6.
[131] TFEU art 48; Reg 883/2004 art 61(1).
[132] Reg 883/2004 art 61(1).
[133] Reg 883/2004 art 61(1).
[134] Reg 883/2004 art 61(2).
[135] Reg 987/2009 recitals 16 - 17, arts 22-26, 29-3; Reg 883/2004 arts 1(va), 4, 17-20, 20 - 28, 31 - 35.

long-term care benefits in kind.'[136] It also entails benefits relating to accidents at work and occupational diseases, as in title three chapter 2 of the Basic Regulation.

The extensive definition is in place to prevent misunderstanding and to prevent detrimental effects on migrant worker's rights to sickness benefits in a cross-border situation. The rules are in place to grant EU migrant workers access to healthcare, under the same conditions as nationals of the member state in question. If payment is necessary under these circumstances, the European Health Insurance Card (EHIC) will help them prove their right to urgent medical treatment.[137] In short, this means temporary EU migrant workers have the right to receive sickness benefits in kind, such as healthcare and medicines, in the country of residence, regardless of the insurance status.

3.2.3. Directive 2008/104: Temporary Agency Work

On 19 November 2008, the European Parliament and the Council of the European Union promulgated the Directive 2008/104/EC ('the Directive').[138] The Directive aims to promote flexibility all through Europe. The purpose of the Directive is to benefit migrant workers by giving them an equal treatment regarding pay, maternity leave and leave entitlement compared to permanent workers in the user-undertaking immediately from the first day of employment.

Article 1 of Directive 2008/104/EC on Temporary Agency Work defines its scope. Two concepts that are involved are 'worker' and 'economic activity.'[139] This article provides that the Directive applies to 'workers' with a contract of employment or employment relationship with a TWA who are assigned to user undertakings to work temporarily under their supervision and direction.

Article 2 of the Directive aims to ensure the protection of migrant workers, and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers. This principle is respected by recognising TWAs as employers, while considering the need to establish a suitable framework for the use of temporary agency

[136] Reg 883/2004 art 1(va)
[137] Reg 883/2004 art 19.
[138] Dir 2008/104.
[139] Dir 2008/104 art 1.

work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.[140]

Article 4 gives an overview of the restrictions and prohibitions, which are allowed on the following grounds: grounds of general interest relating in particular to the protection of migrant workers, requirements of health and safety at work and the functioning of the labour market.[141]

The principle of non-discrimination in Article 5 determines that TMWs are to be treated at least as favourable as national workers when it comes to basic working and employment conditions. This article allows derogations from this principle for open-ended contracts providing pay between assignments, to uphold collective labour agreements or based on agreements of social partners.[142]

The quality of work is laid down in Article 6. This article requires that migrant workers should be informed about vacant posts in the hiring company and that member states should support migrant workers to conclude a contract with the hiring company after the assignment.[143]

3.2.4. Directive 96/71: Posting of Workers

Directive 96/71 (the 'Directive') concerns the posting of workers in the framework of the provision of services and regulates the posting of workers by an undertaking in one member state, while employed at an undertaking in a different member state.[144] The Directive sets the minimum standards to be ensured by the host member state, which must reflect the minimum standards applicable to the local workers of that member state. 'A "posted worker" means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'.[145]

Article 1(3) of the Directive states that there must be an employment relationship between the employer, in the sending member state, and the posted worker. This relationship must be

[140] Dir 2008/104 art 2.
[141] Dir 2008/104 art 4.
[142] Dir 2008/104 art 5(2) – (3).
[143] Dir 2008/104 art 6.
[144] Dir 96/71 art 1.
[145] Dir 96/71 art 2(1).

maintained during the whole period of posting.[146] Hence, the sending undertaking has a service contract with the undertaking in the member state where the posted worker will actually perform labour. Workers who work as posted workers are of a different category than migrant workers, who move to another member state in order to seek employment and live there.[147] This and the updated directives on the posting of workers have been implemented in Dutch legislation through the WagwEU. Seeing the focus of this report, on EU migrant workers, this Directive and the following implementing and enforcement directives on the posting of workers will not be discussed further.

3.3. Dutch law

3.3.1. Dutch Civil Code

On 1 April 1997, Title 7.10 DCC regarding the employment contract was introduced.[148] The Flexibility and Security Act, the Work and Security Act and the recent Balanced Labour Market Act have altered Title 7.10 DCC by allowing for more flexible labour relations.

The classic labour agreement is regulated under 7:610 DCC. This article does not specify how many hours a migrant worker works per month; therefore, a zero-hour contract is also possible. However, due to the legal presumption under 7:610b DCC, if an employment contract has lasted at least three months, the amount of the hours of work in the next month shall be deemed to be equal to the average amount of the hours of work per month in the preceding three months. Title 7.10 DCC allows for an employment contract for a definite or an indefinite period. The employment contract for a definite period ends by operation of law when the time period specified by agreement or by law has expired.[149] The DCC limits the number of successive employment contracts for a definite period in Article 7:668a DCC.[150] From the day that an employment contract for a definite period between the same parties lasts longer than 36 months,

[146] Dir 2008/104 art 1(3).
[147] Milan Remáč, 'Posting of Workers – Part of the Expected Labour Mobility Package – Main Instruments: Directive 96/71 and Directive 2014/67' (Briefing Implementation Appraisal, European Parliament, 2015), 3.
[148] Guus J.J. Heerma van Voss, *Asser Algemeen* (2020) 7-V 2020/5.
[149] Ibid 2020/326.
[150] Ibid 2020/336.

the agreement is considered to have been entered into for an indefinite period. Also, the fourth successive employment contract for a definite period between the same parties is automatically deemed to have been entered into a contract for an indefinite period.

Concerning the contract for an indefinite period, the DCC provides for a closed system of grounds of dismissal. This closed system ensures a high level of protection for employees. However, migrant workers barely ever receive a contract for an indefinite period hardly ever reach the level of a contract for an indefinite period. Additionally, Article 7:670 DCC contains provisions relating to the prohibition of termination.[151] A key part of this article is the prohibition of termination of employment during an employee's illness. Article 7:629 DCC dictates that the employer should continue paying wages during sickness.[152]

The DCC contains specific provisions for temporary agency workers – thus, including migrant workers within its scope. The temporary agency worker has a special place in the DCC.[153]Article 7:690 DCC defines the temporary employment contract as a special type of employment contract.[154] The starting point that a temporary employee has a 'normal' employment contract with the associated legal protection is subject to certain a number of exceptions, also referred to as the 'relaxed regime.' An important deviation can be found in Article 7:691(2) DCC.[155] This article, also known as the temporary employment clause, ensures that the employment contract between the temporary worker and the temporary employment agency ends at the time when the user company terminates the posting for any reason whatsoever. This temporary employment clause may be agreed in the temporary employment contract by means of a collective agreement for a maximum period of 78 weeks along the lines of Article 7:691(8) DCC.[156]

Under Article 7:632 DCC, the employer may deduct all debt-claims he or she has against the employee. This settlement can also relate to rental costs.[157] However, settlement cannot take

[151] Art 7:670 DCC.
[152] Art 7:629 DCC.
[153] Rik H.M. Kroese, 'Het zieke uitzendbeding in de uitzend-cao' TRA 2018, 57.
[154] Art 7:690 DCC.
[155] Art 7:691(2) DCC.
[156] Art 7:691(8) DCC.
[157] Art. 7:632(1)(e) DCC.

place on the part of the wage up to the amount referred to in Section 7 of the Minimum Wage and Minimum Holiday Allowance Act. Thus, the employer cannot deduct any rental costs from the wage of an employee earning the minimum wage along the lines of 7:632(2) DCC. [158]

3.3.2. CLA Act

The Collective Labour Agreement Act (the CLA Act) defines the Collective Labour Agreement (the CLA) in Article 1(1) as an agreement between one or more employers' associations and one or more employees' associations regarding, exclusively or mainly, employment conditions. In practice, CLAs do not only contain provisions on wages, pensions and holidays, but also on all kinds of social policy issues, such as: training policy, promoting employment of vulnerable groups, career and mobility policy and sustainable employability.[159] The most important legal effect of the CLA is its normative effect, which means that the employment conditions of the CLA are reflected in the employment contract. The CLA models the employment contract, but that only happens when the employer and the employee are bound by the CLA (art. 9 and 12 CLA Act).[160]

According to Article 9(1) of the CLA, there are two requirements for being bound by the CLA.[161] The first requirement is membership of the applicable association. An employer is bound by a CLA if he or she is or becomes a member of an employers' organisation which concludes a CLA or is itself a party to that agreement. An employee is bound by a CLA if he is or becomes a member of a trade union which has (co-) concluded the CLA. The second requirement for being bound by the CLA is involvement. For the CLA to influence the employment contract, the employer and employee must be involved in the CLA, i.e., the CLA aims to regulate employment conditions for the employment relationship between the employer and the employee. This can be deduced from the scope of the CLA.

To determine whether the employer and employee are complying with the CLA, each clause in the employment contract must be compared with the relevant CLA clause.[162] Thus, if the CLA

[158] Art 7:632 DCC.
[159] Niels. Jansen, *De werknemerachtige in het sociaal recht* (2018) 8.2.2.
[160] Hendrik L. Bakels, *Schets van het Nederlandse arbeidsrecht* (2017) 5.2.3.
[161] Ibid.
[162] Ibid.

entitles an employee to an overtime allowance, the employer and employee cannot exclude that right, even if the agreed wage were to be higher than the CLA wage, including the overtime allowance. Such deviations are null and void and are replaced by the relevant CLA provisions.

Based on Articles 12 and 13 of the CLA Act, prescriptive CLA provisions form part of employment contracts concluded by bound employers with bound employees, and it is therefore these persons who, by appealing to the court, can enforce the provisions pertaining to these employment contracts.[163] However, it is important to keep in mind that compliance with the employment contract, not compliance with the collective labour agreement, is claimed in court.

3.3.3. CLAs ABU and NBBU

Two major CLAs apply in the temporary agency work sector: the ABU CLA and the NBBU CLA.[164] The Federation of Private Employment Agencies (ABU) and the Dutch Association of Intermediary Organizations and Temporary Employment Agencies (NBBU) are the largest employer's associations in temporary work. The ABU CLA is declared universally applicable. The ABU has more than 500 members and represents over 65% of the temporary employment sector. The NBBU represents approximately 1,200-member temporary employment agencies; these agencies are mainly smaller and medium-sized temporary employment agencies. ABU and NBBU conclude their CLAs with the same parties and – following lengthy joint negotiations with all parties concerned – the content of the new CLAs is the same as it was before.

Pursuant to Article 7:691(7) of the DCC, deviation from the 26-week period is only possible by means of a CLA to the employee's detriment.[165] In the CLAs for temporary agency workers, this is done in the so called 'phase system'. For the sake of clarity, the ABU terminology is used. The NBBU phase system is the same except that the name differs. Phase A is called phase 1/2 at NBBU, phase B is called phase 3, and phase C is called phase 4.

[163] Ibid.
[164] Maarten Tanja, *Flexibele arbeidsrelaties* (2021) 5.8.1.
[165] Art 7:691(7) DCC.

3.3.4. Contract Phases

(1) Phase A

Temporary employees work in phase A for as long as they have not worked more than 78 weeks for the same temporary employment agency.[166] This phase lasts 78 weeks. Each week in which work has been done (even if it is only one day) counts as a week.[167] If no work is done in a week, it does not count towards the 78-week period. If there is a gap of 26 weeks or more between two work periods, the counting of weeks in phase A starts again.

The legal standing of the temporary agency worker is the following:

- The starting point in phase A is that the temporary employment contract is always entered into 'for the duration of the posting'[168] because the 'relaxed' regime applies. As a result, the contract ends by operation of law as soon as the client terminates the posting.
- The obligation to continue paying wages pursuant to Article 7:628(1) DCC may be expressly excluded by the parties in the temporary employment contract. If that happens, the temporary employee in phase A is only entitled to wages for the period in which he actually worked.[169]
- The rule concerning consecutive contracts for a definitive period of Article 7:668a DCC does not apply. No matter how many temporary employment contracts are concluded during this period, a contract for an indefinite period will never arise.[170]
- The obligation to continue paying wages in the event of sickness pursuant to Article 7:629 DCC has no effect.[171] As soon as the temporary agency worker reports sick, this will be regarded as a request by the user company to terminate the placement.

(2) Phase B

A temporary employee enters phase B once the temporary employment contract is continued after completion of phase A, or if a new temporary employment contract is concluded with the same temporary employment agency within 26 weeks of the completion of phase A. In addition,

[166] Tanja (n 164) 5.8.4.2.
[167] Art 2(e) CLA ABU.
[168] Art 10(1)(b) CLA ABU.
[169] Art 22(1) CLA ABU.
[170] Art 10(1) CLA ABU.
[171] Art 15(2) CLA ABU.

the current CLAs explicitly allows for the possibility of departing from the phase system in a positive way and entering phase B earlier[172]. Phase B lasts four years.[173]

The legal standing during phase B improves the temporary agency worker considerably in comparison to phase A:

- The temporary agency worker always works on the basis of an agency work employment contract for a definite period. It is no longer possible to apply the 'relaxed' regime in this phase.
- The principle of 'not performing labour yet entitled to wage' pursuant to Article 7:628(1) DCC cannot be excluded. Therefore, if a temporary employment contract has been concluded for a period of four months and the hirer terminates the assignment contract prematurely, the temporary employee will be entitled to wages until the four-month period has expired.[174]
- The rules on succession of contracts for a definite period of Article 7:668a DCC do apply, but in a different form. The conversion into a contract for an indefinite period takes place after four years or when the seventh temporary employment contract in phase B is concluded.[175]
- The obligation to continue paying wages in the event of illness pursuant to Article 7:629 DCC applies. If the temporary agency worker becomes ill during the term of the agency work employment contract in phase B, he or she will be entitled to continued payment of 90% of the wages during the first year of illness (and for as long as the agency work employment contract continues), and to 80% of the wages during the second year of illness.[176]

[172] Art 10(5) CLA ABU.
[173] Tanja (n 164) 5.8.4.3.
[174] Unless the TWA has lawfully imposed a penalty, as referred to in Section 6 of the CLA ABU on account of the temporary employee's actions.
[175] Art 10(2b) CLA ABU.
[176] Art 25(6) CLA ABU.

(3) Phase C

Temporary agency workers enter phase C once the agency work employment contract is continued after completion of phase B, or if a new secondment agreement is concluded within 26 weeks of the completion of phase B with the same TWA.[177] The legal standing of temporary agency workers during phase C is essentially the same as that of an ordinary employee with a contract for an indefinite period. If the TWA has no more work for the temporary employee, the temporary employment contract will have to be terminated in accordance with the general rules of dismissal in the DCC. If a temporary employee enters a temporary employment contract again with the same temporary employment agency within 26 weeks of the end of the temporary employment contract, he shall immediately enter phase C.[178] Though, if the interruption lasts 26 weeks or longer, the temporary agency worker is back at square one in phase A.

(4) Dispute Resolution Committee

Pursuant to Article 40 of the ABU CLA, the TWA and the temporary agency worker may submit a claim to the Dispute Resolution Committee in relation to the execution or application of the CLA, the determination of suitable work or the job classification in the case of application of the remuneration mentioned in the CLA.[179] If the CLA is not used properly by a TWA, the temporary agency worker should contact the TWA within three weeks to find a suitable solution. If no solution is found, the temporary agency worker may submit a complaint within four weeks to the TWA. The TWA will decide on the complaint within three weeks. If the temporary agency worker does not agree with the decisions of the TWA, he or she may bring the dispute before the Dispute Resolution Committee within four weeks. The Dispute Resolution Committee determines its working methods by means of regulations. These also regulate the composition in which the Dispute Resolution Committee can deal with a dispute.

3.3.5. WAADI

The WAADI entered into force on 1 July 1998.[180] The Act's third chapter (Articles 7a through 12) contains provisions that are important for temporary employment agencies, temporary employees, and user companies. In 2012 the Act was drastically amended following the

[177] Tanja (n 164) 5.8.4.4.
[178] Art 10(3)(c) CLA ABU.
[179] Art 40 CLA ABU.
[180] Tanja (n 164) 5.14.1.

requirement of the European Temporary Agency Work Directive (Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work).

(1) Relevant provisions

Article 8 WAADI regulates the relationship between the wages and other benefits of the posted workers and those of comparable workers employed by the user company.[181]

'Corresponding remuneration' refers to remuneration in the same scale as that for equal or similar jobs in the user undertaking. Other allowances refer to allowances for travelling time, travelling expenses, boarding house costs, coffee money and other expenses deemed necessary. Along the lines of Article 9 WAADI, an employer who acts as an intermediary between the posted worker and the hirer may not demand any consideration from this worker for this intermediary service.[182] Article 10 WAADI prohibits the posting of workers in the event of a labour dispute within the user undertaking or part of this undertaking. The purpose of this prohibition is to avoid disturbing the effectiveness of collective actions. No workers may be posted during collective actions.[183] Seconded employees who are already working in the company of the hirer may continue to work there. The condition is, however, that these employees are not used to doing the work of those taking part in the actions. They must not influence the course of the actions. According to Article 11 WAADI, the person who posts workers must provide them with information on the required professional qualification prior to the posting. [184]At that time, the hiring company must also provide the worker with a document containing information on the specific characteristics of the job to be filled.

(2) Enforcement of the WAADI

The enforcement of the standards contained in the WAADI is largely left to individuals and interest groups of employers and employees.[185] With the abolishment of the licensing system, an important part of the control and enforcement by the government has disappeared. Articles 13 to 15 WAADI do mention governmental supervision of compliance with the law. [186] Article

[181] Eva Cremers-Harman, *Flexibele arbeidsrelaties* (2021) I.3.4.3.
[182] Art 9 WAADI.
[183] Art 10 WAADI.
[184] Art 11 WAADI.
[185] Cremers-Harman (n 181).
[186] Arts 13;15 WAADI.

15 WAADI provides for a specific regulation for the supervision of the hiring out of workers.[187] The article stipulates that the worker concerned, the employer, the works council or personnel representative body and the employees' and employers' organisations are to be notified if an investigation shows that the regulations on the hiring out of workers have not been complied with.

[187] Art 15 WAADI.

4. ANALYSIS OF IMPLEMENTATION IN THE NETHERLANDS

This report's primary objective is to establish whether the Netherlands is properly implementing the applicable legal frameworks into its domestic legislation and practices. Whilst it successfully complies with the majority of its supranational and regional obligations, certain discrepancies are evident and have been highlighted above. The ensuing section delves further into these issues of implementation, addressing the international and European legal frameworks to which the Netherlands is party.

4.1. International Law: International Labour Organisation

As the Netherlands ratified C181 in 1999, it is obliged to take all necessary measures to implement the convention's provisions. Failure to do so may result in the utilisation of a variety of procedures enumerated in Articles 26 to 34 of the ILO Constitution ('ILOC'). Briefly, such procedures may include mandatory cooperation with a commission of inquiry [Art. 26(3) ILO Constitution] or referral to the International Court of Justice [Arts. 29(2) and 30 ILO Constitution]. Whether or not these procedures are utilised depends upon the Netherlands' ability to rectify the succeeding issues of non-compliance. Accordingly, there are three issues which the Netherlands must focus on to improve compliance with C181. Namely, the system of self-regulation in the temporary work agency sector, the issue of equal treatment and the charging of fees and costs to workers.

4.1.1. The system of self-regulation

Articles 10 and 14 of C181 require that the activities of TWAs are regulated by a competent public entity, and not a private body.[188] Article 14(2) C181 is explicit in this regard, classifying the domestic labour inspectorate, or a similar public body, as the most competent entities for ensuring compliance with the ILO's labour standards.[189] In the absence of exceptions to this rule, the delegation of certain supervisory activities to private bodies breaches the Convention. That said, in the Netherlands TWAs are monitored through a system of self-regulation. The Dutch government has described this system as 'a mixture of public rules and private

[188] C181 arts 10; 14.
[189] C181 art 14(2).

commitment.'[190] Articles 13 and 15 of the WAADI attempt to implement the regulatory obligation enshrined in the Convention.[191] Currently, private entities are at the forefront of regulating the accreditation of TWAs – in essence, their ability to provide services to prospective labourers. In this regard, the Foundation for Standardisation of Labour ('SNA') and the Foundation Compliance with CLA for Temporary Agency Workers ('SNCU') are of notable importance.[192] Prior to 1997, TWAs were accredited through a mandatory licensing system controlled by the government. However, post 1997, a certificate system has been implemented, of which private entities – the SNA and SNCU – control. Briefly, the certificate system proves to prospective labourers that the TWA in question fulfils certain requirements, which in turn, categorises it as a trustworthy agency. Importantly, the possession of a certificate does not preclude a TWA from providing services. It simply indicates to prospective labourers that the TWA in question is trustworthy, thus shielding them from possible exploitative practices.

Evidently, the Dutch Labour Inspectorate is not heavily involved with the accreditation of TWAs. Instead, it focuses on other aspects which mandate compliance; for example, the 'minimum wage, working time, working permits, placement of personnel by intermediaries and health and safety.'[193] This sort of arrangement – the delegation of accreditation to private entities – is concerning for two reasons.

First and foremost, Article 14(2) C181 leaves no room for appreciation; the implementation of the Convention must be delegated to the national labour inspectorate or a similar public body. The involvement of private entities is advantageous for reducing the costs and staffing requirements of an already over-extended Dutch Inspectorate; the current accreditation system fails to comply with Article 14(2) C181. Whilst the passing of the Sham Construction Act ('WAS'), in 2015, as well as the availability of €50 million for labour inspections for 2021 is positive, the fact remains that accreditation is not undertaken by the government; instead, it is delegated to private parties. Secondly, the current accreditation system has not curtailed the prevalence of mala fide TWAs. In 2011 labour union FNV estimated that approximately 5,000

[190] Direct request 2014.
[191] Arts 13; 15 WAADI.
[192] See Piet Renooy, 'Labour Inspection Strategies for Combating Undeclared Work in Europe: The Netherlands' Regioplan (2013), 44; CEACR Report 2014 (n 78) 433 – 4.
[193] Direct request 2014.

– 6,000 fraudulent TWAs were operating in the Netherlands.[194] In the absence of current statistics, the extent of the problems faced by migrant workers indicates that the prevalence of these types of TWAs has not diminished. In the CEACR's direct request from 2020, the Dutch labour inspectorate that out of 12,000 regulated TWAs, 'numerous unregistered [ones]' remain.[195]

Importantly, the system of self-regulation has been flagged by the CEACR in the majority of observations and direct requests addressed to the Netherlands, requesting the state to demonstrate how the current system complies with Articles 10 and 14 of C181.[196] This only serves to exemplify the fact that the current system is not compliant with C181. Whilst the involvement of private entities in the regulatory system may assist in alleviating the operational burden from the Dutch labour inspectorate, C181 requires that a public body be at the forefront of enforcing its provisions. As a result, this report concludes that Articles 13 and 15 of the WAADI do not comply with Articles 10 and 14 of C181.

SYSTEM OF SELF-REGULATION

- Accreditation of TWAs is **delegated to private entities** - e.g., SNA and SNCU. The Dutch labour inspectorate is not involved in approving/licensing TWAs.
- Achieving accreditation (a certificate) is **not a prerequisite for offering temporary employment services.** Accreditation simply denotes the trustworthiness of a TWA.
- The Dutch system **fails to comply with C181** because accreditation is not entrusted to a public authority; this breaches Article 14(2) C181 and has been highlighted by the CEACR on numerous occasions.
- Lack of public involvement, coupled with the non-compulsory nature of the current system, creates more exploitative opportunities because **fraudulent TWAs are allowed to operate** and offer services.
- Considering the Dutch labour inspectorate's budgetary constraints, and the practical constraints on exercising its mandate (see section 1.9), **exploitation is uncovered after the fact, as opposed to being prevented before it can materialise.**

[194] CEACR Report 2012 (n 78) 729 - 30
[195] Direct Request 2020.
[196] See CEACR Report 2014 (n 78) 433 – 4; CEACR Report 2012 (n 78) 729 – 30; Direct request 2020; Direct request 2014; Direct request 2009; Direct request 2007.

4.1.2. Issues of equal treatment

Article 5(1) of C181 enshrines the principle of equal treatment. This report asserts that the Netherlands fails to observe the principle in two instances – the dismissal of migrant workers and working conditions.

As to the first instance, the 'temporary employment clause' in Article 7:691(2) DCC is the domestic provision at issue. In effect, it allows migrant workers to be dismissed without reason within the first 26 weeks of employment.[197] This is discriminatory because regular workers benefit from a legally prescribed closed system of employment, which forbids the dismissal of workers without following a host of legal procedures. For example, regular workers must be provided with a valid reason for dismissal.[198] Thereafter, their dismissal will only come into effect if they agree with the dismissal – which can also be revoked up to 14 days after expressing agreement.[199] If the regular labourer disagrees with the dismissal, the employer must seek approval from the Employee Insurance Agency – only for economic reasons or long-standing incapacity if the worker – or from a sub-district court – reserved for unsatisfactory performance and other reasons mentioned in Article 7:669(3) DCC.[200] Accordingly, the rights afforded to regular workers are far more extensive and protective when compared to migrant workers (and other flex-workers).

The precarious situation affecting migrant workers is augmented when considering the Article 7:691(2) DCC and Article 15(1) of the CLA ABU, which allows flex-workers to be dismissed if they report an illness to their user company; it is regarded as a request by the user company to terminate the placement.[201] Comparatively, regular workers may never be immediately dismissed for being ill, since this would be contrary to the prohibition of dismissal during illness.[202] Lastly, if dismissed, the employer is obliged to provide a 'transition payment,' to compensate the dismissed employee for costs incurred whilst they search for new

[197] Art 7:691(2) DCC.
[198] Art 7:669 DCC.
[199] Art 7:669 DCC; See generally RVO, 'Dismissal Procedures and Protections' (*Business.gov.nl*, 23 February 2021) <https://business.gov.nl/regulation/dismissal-procedures/> accessed 27 June 2021.
[200] Art 7:670a(1) DCC; Ibid.
[201] Art 15(2) CLA ABU.
[202] Art 7:670(1).

employment.[203] The contrast between the dismissal regimes applicable to traditional and migrant workers is stark; equality is non-existent.

Considering the situation induced by the Covid-19 pandemic, the situation of migrant workers has worsened. Certainly, the nature of flexible working ought to be accounted for in this regard – this report does not propose to equalise traditional and flexible forms of labour. That said, it does seek to highlight the fact that migrant workers are not given a fair chance, similar to that afforded to traditional workers, to amend their performance before having their employment contract terminated, or to recover from illness before being dismissed.

As to the second instance, Article 5(1) in conjunction with Articles 11 and 12 of C181 ensure that migrant workers are afforded equal and adequate protection in relation to 'working conditions […] social security benefits […] occupational safety and health [and] compensation in case of insolvency.'[204] Considering the problems faced by migrant workers in Section 2 – particularly the fact of poor working conditions, there is cause for concern regarding the Netherlands' adherence to Articles 11 and 12 of C181. Whilst Dutch law strictly regulates working conditions, the reality for some migrant workers does not match these otherwise high domestic labour law standards ensured in traditional labour relationships. As stated in Section 2.6, production demand tends to be high, which can also lead to long workdays; longer than Dutch health and safety at work legislation allows. Working conditions also concern for example, temperature at the workplace, good climate control, or access to daylight and fresh air.[205] As indicated in Section 2.6 has become apparent over the last few years, these conditions are not observed for many migrant workers.[206] Combined with the lack in providing sickness benefits for these types of temporary migrant workers, the Netherlands is not complying with Articles 11 and 12 C181.

[203] Ibid; RVO, 'Transition Payment' (*Business.gov.nl*) <https://business.gov.nl/regulation/transition-payment/> accessed 25 June 2021.
[204] C181 arts 11(c); (e); (i) and 12(c); (d);(h).
[205] Lecture by Dutch Labour Inspectorate (n 46).
[206] Lecture by Mr. Rafael Polo Guardo (n 18).

EQUAL TREATMENT

- The dismissal regime applicable to migrant workers, employed through zero-hour contracts containing temporary employment clauses, **fosters inequality** when compared to the regime applicable to regular workers.
    - Migrant workers are susceptible to being fired without warning or reason, and **wholly dependent upon the impulse of the TWA.**
    - The fact that migrant workers can be **fired for falling ill** (augmented by the Covid-19 pandemic) but regular workers receive assistance until they can return to work is a testament to the system's unfairness.

- Inequality is also present when assessing the **working conditions** some migrant workers must endure.

4.1.3. The charging of fees and costs to workers

As indicated in Section 2.2, migrant workers often have their employment and housing contracts merged, meaning that their employer(s) also become their landlords.[207] In practice, the rental fee is automatically subtracted from the migrant worker's salary.[208] Additional deductions from the migrant worker's salary – e.g., transport costs – is a prominent practice.[209] Not only does the practice contravene Article 7(1) C181 – which prevents the charging of fees or costs of any kind to workers; it also contravenes Article 7:632(1)(e) DCC and Section 7 of the Minimum Wage and Minimum Holiday Allowance Act. Whilst Dutch law formally complies with its obligation under the Convention, in practice, it fails to properly observe the prohibition mentioned in Article 7(1) C181. Accordingly, this report contends that the current practice falls outside the parameters set by Article 7 C181. The automatic subtraction of the rental and transport costs is hardly 'in the interest of the workers concerned' because migrant workers – particularly Spanish migrant workers – often work for less than the minimum wage.[210]

Hence, the Netherlands successfully complies with most of its obligations under the Convention. It fails, however, in three important areas – the accreditation of TWAs; the equal treatment of migrant and regular workers; and in the charging of fees and costs to workers.

[207] Roemer Commission Report (n 4) 35.
[208] Ibid 15.
[209] Ibid.
[210] FNV Report (n 20) 3.

CHARGING OF FEES AND COSTS

- The combination of employment-rental contract mergers; the placement of workers far from work; and the automatic deduction of travel costs from migrant workers' wages constitutes the charging of fees and costs to workers.
- Whilst the Dutch Civil Code and Minimum Wage and Holiday Allowance Act prohibit the charging of fees and costs to workers earning a minimum wage, **the practice remains prevalent in the context of migrant workers.**
- These practices are **shown to have detrimental effects on migrant workers, placing them in precarious situations with their employers**. Accordingly, they cannot be construed as beneficial for the TMW.
- Definitively, the charging of these fees and costs to workers **breaches Articles 7 C181.**

4.2. European Union Law

The Netherlands is obliged to implement EU law correctly, effectively, and efficiently. As mentioned before, the Netherlands is a dualistic system, meaning that EU law must first be implemented into Dutch law. Therefore, EU law and Dutch law need to be compared to see whether Dutch law is compliant with EU law. The following sections will address Dutch issues of non-compliance with the Directive 2008/104, and both regulations on the coordination of the social security coordination schemes.[211] Seeing this report focuses on EU migrant workers, Directive 96/71 will not be discussed in this chapter.[212]

4.2.1. Directive 2008/104/EC on Temporary Agency Work

Directive 2008/104/EC ('the Directive') is incorporated into the Dutch legal framework by the WAADI, the DCC, and the temporary work sector itself through CLAs ABU and NBBU. Whilst the Directive is generally implemented well, some discrepancies are evident. Accordingly, this section provides an overview of the inconsistencies between the Directive and its implementation into Dutch legislation. This Directive is applicable since migrant workers are generally temporary workers.

[211] Reg 883/2004; Reg 987/2009.
[212] Reg 96/71.

(1) Equal treatment relating to pay

Article 5(1) in combination with Article 3(1) f and Article 3(2) paragraph 1 of the Directive establishes the principle of equal treatment in relation to basic working conditions and the payment of wages.[213] Unless compliant with the derogations contained in Articles 5(2) and (3), member states implementing legislation cannot depart from the principle of equal treatment.[214] This is true because the Article 5(2) is limited in its scope, applicable only to migrant workers who have a permanent contract of employment.[215] However, given that migrant workers generally fail to reach the stage of a permanent employment contract, Article 5(2) lacks relevance for migrant workers.

As to Article 5(3) of the Directive, social partners may derogate from the principle of equal treatment when 'an appropriate level' of protection is offered.[216] The Directive stresses that 'the overall protection of temporary agency workers should be ensured.'[217] Under Dutch law, Article 8 WAADI stipulates that TWAs should pay migrant workers' wages equal to those earned by other workers in the hiring company. Article 8(4) of the WAADI allows for social partners to derogate from this principle. However, Article 8(4) WAADI remains silent about ensuring 'an appropriate level of protection for migrant workers, it is entirely up to social partners to safeguard this level of protection which can lead to abuses and poor work conditions such as low wages especially with the system of self- regulation.[218] The manner in which Article 8(4) WAADI is framed grants social partners too much room for appreciation. Hence, it does not comply with the Directive.

This also relates to the subtracting of rental (and other) fees from migrant workers' wages, which leads to wages below minimum wage. Article 7:632(2) DCC clearly states that subtractions of the wage may never result in offering wages below the minimum wage. Even though the Dutch law is compliant in this sense, the practice is not. Therefore, the practice of subtracting fees

[213] Commission, 'Report from the Commission to the European Parliament, The Council, The European Economic and Social Committee and Social Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work' COM(2014)176 final, 5 – 7 ('European Commission Report')
[214] Dir 2008/104 art 5(2); (3).
[215] Dir 2008/104 art 5(2).
[216]Dir 2008/104 art 5(3).
[217] European Commission Report (n 213).
[218] Ibid.

below minimum wage is not compliant with Article 5(3) of the Directive, 'an appropriate level' of protection is not being offered.[219]

(2) Informing about vacancies

Article 6(1) of the Directive declares that migrant workers should be informed of any vacant posts in the hiring company to give them the same opportunity as other workers in that undertaking to find permanent employment.[220] This should occur by means of general announcement.[221] Article 6(1) of the Directive is implemented in Article 7:657 DCC, and states that employers should inform employees, who are employed based on a fixed-term contract, about vacant posts regarding contracts for an indefinite period. Though, it should be noted that Article 7:657(2) DCC explicitly excludes TWAs, which means that migrant workers do not enjoy the same opportunities of obtaining a contract for an indefinite period as other employees in the undertaking with a fixed-term contract.[222] This only serves to augment the fragile and precarious situations affecting migrant workers in the Netherlands. Definitively, Article 7:657(2) DCC is not compliant with Article 6(1) of the Directive.

IMPLEMENTATION TAW DIRECTIVE

- The desired aim of the directive on TAW is to reach a balance between the interested parts, however the implementation shows inaccuracies:
  - Article 5 establishes a balance which allows derogations, however the **national legislation cannot undermine the Principle of Equal Treatment.**
  - The possibility under the Dutch legislation **(Article 8(4) WAADI)** for social partners to **derogate from this principle without any limitation is alarming.**
  - The practice of **subtracting fees** below minimum wage is **not compliant with Article 7:632(2) BW** and Article 5(3) of the Directive, since '**an appropriate level' of protection is not being offered.**
  - These possibilities **breach the proclaimed balance in the Article 5 of the Directive 2008/104.**

- TAWs have the **right to be informed about vacant posts in the hiring company**, in order to have the same opportunities as other workers.
  - However, **Article 7:657 (2) of Dutch Civil Code excludes TWAs**, which do not allow TAWs to be informed.
  - Therefore, **Article 7:657 (2) breaches Article 6 of the Directive 2008/104.**

[219] Dir 2008/104 art 5(3).
[220] European Commission Report (n 213) 13 – 14
[221] Dir 2008/104 art 6.
[222] Art. 7:657(2) DCC.

4.2.2. EU rules on social security coordination

At the European level, the EU social security coordination rules have been passed to facilitate the adequate functioning of social security systems of the member states, in cases of cross-border provision of work and services.[223] This determines which social security system EU migrant workers are subject to once they utilize their free movement rights. The principles which guide the application/functioning of these schemes are (1) the principle of non-discrimination, (2) the single state rule, (3) the principle on aggregation. and (4) the principle that social benefits should be exportable to other member states.[224]

In the Netherlands, the role of proper administration of residency is crucial for access to the social security system. This is because migrant workers and inactive workers receive social security benefits from the member state where they are working at the time of their registration. The IR offers more clarity in cases when member states share different views on the determination of the residence of a person.[225] The social security coordination systems are in place to prevent EU citizens from being left without social protection or having double coverage in their country of residence and the country where they stay.

In the Netherlands, the extent and nature of implementation of the BR and IR, at the domestic level, is unclear. Regarding the proper registration of residence, the Regulations have not been implemented fully. Whilst at first glance the law appears to implement correctly, the reality dictates otherwise. Dutch law is not compliant with regards to the aggregation of unemployment benefits, due to the administration issues. Also, the implementation of the rules governing sickness benefits are not compliant with the BR and IR.

Assessing the Regulations' implementation, specifically the issue of sickness benefits, there are issues with the temporary contracts, under which most migrant workers are employed. As described under Section 3.3.3 on Dutch Law, the CLAs work with a contract 'phase-system.' Under Article 7:629 DCC there is an obligation for employers to continue paying wages in case

[223] Reg 883/2004; Reg 987/2009.
[224] Reg 883/2004 arts 4; 6; 7; 11 - 13.
[225] Reg 987/2009 recital 1.

of sickness.[226] This can be categorized as sickness benefits, as in the Regulations. However, under a 'phase A contract', the obligation to continue paying wages in the event of sickness pursuant to Article 7:629 DCC has no effect.[227] As mentioned in Section 3.1, on the implementation of the ILO convention, workers are let go without compensation. As soon as a migrant worker reports sick, this will be regarded as a request by the user company to terminate the placement. This is problematic from an ILO perspective and from a European perspective.

EU migrant workers generally have zero-hour contracts with TWAs. Under these types of contracts there is no obligation for the TWAs to provide sickness benefits. Article 3(1)(a) BR states that sickness benefits for short stay are also covered under the social security coordination rules.[228] In essence, this means temporary EU migrant workers have the right to receive sickness benefits in kind, such as healthcare and medicines, in the country of residence, regardless of the insurance status. When reported sick, while working as a temporary employee, no benefits will be provided by the TWA. Therefore, the Dutch legislation for 'phase A contracts' is not in compliance with the social security coordination schemes on sickness benefits.

Since TWAs usually organize (health) insurance for their employees, having the contract suspended means no longer being insured. This is due to the high amount of flexible and zero-hour contracts, and the CLAs that allow employers and TWAs to not take proper care of residency registration, or insurance for their (migrant) employees. Even though migrant workers can, in theory, get access to urgent medical treatment using the European Health Insurance Card ('EHIC'), it is not clear for all migrant workers that such a system is in place. Importantly, the EHIC can only be used in case of urgent medical treatment.[229] This prevents migrant workers from having equal access to sickness benefits, which might also limit the aggregation of social security benefits, which could be detrimental if they move to another member state.

As mentioned above, this influences the aggregation of insurance periods and periods of unemployment as well. Proper registration at a Dutch address is needed to apply for insurance

[226] Art 7:629 DCC.
[227] Art 7:629 DCC.
[228] Reg 883/2004 arts 1(va); 4; 17 - 20; 22 - 28; 31 - 35; Reg 987/2009 recital 16 - 17; arts 22 - 26; 29 - 32.
[229] —, 'Employment, Social Affairs and Inclusion: European Health Insurance' (*European Commission*) < https://ec.europa.eu/social/main.jsp?catId=559&langId=en> accessed 27 June 2021.

and for unemployment benefits. Since migrant workers generally do not register at an address, insurance cannot be arranged.[230] TWAs are obliged to provide migrant workers with insurance as well. However, when TWAs do not arrange this properly and end this insurance when a migrant worker has been let go, migrant workers' insurance will not be arranged. This means migrant workers do not have equal access to insurance and unemployment benefits. This also prevents migrant workers from aggregating periods of insurance. This is detrimental if they move to another member state as well.

On the issues of unemployment benefits and proper administration in terms of residency, Dutch law appears to be compliant with the EU social coordination schemes. However, in practice, this does not seem to be the case. This touches upon the principle of indirect discrimination, as defined in detail in the *Bosman* case and Article 48(2) TFEU.[231] Direct discrimination on the grounds of nationality is prohibited, and measures which are indirectly discriminatory must be 'necessary and proportionate' to the achievement of their legitimate objective.[232]

Migrant workers face unnecessary obstacles in organizing proper administration in the Netherlands, which cannot be seen as 'necessary and proportionate' – to the achievement of their legitimate objective.[233] Therefore, it could be argued that the Dutch system for the coordination of social security does not provide a fair and equal access for EU migrant workers working for TWAs to unemployment and sickness benefits. Due to the principle of proper administration, this is non-compliant with the obligations deriving from the EU social security coordination Regulations.

The Regulations on social security do not include a positive obligation for member states to actively inform EU migrant workers on their rights, to practice their rights. However, as this report shows, migrant workers do not have equal access to social security, when compared to Dutch nationals. Therefore, the principle of non-discrimination [Article 4 BR], the principle on aggregation [Article 6 BR] and the principle of exportability of social benefits to other member states [Article 7 BR] are not properly guaranteed in the Netherlands now.

[230] Lecture by Mr. Rafael Polo Guardo (n 18).
[231] Case C-415/93 *Bosman v UEFA* [1995] ECR I-04921.
[232] Ibid, para 73.
[233] Ibid.

Since awareness about possible legal procedures or help from Dutch lawyers is also lacking in this context, claiming their rights is not an option. TWAs take advantage of migrant workers' lack of knowledge and awareness and exploit their vulnerable position. This results in a situation in which the social security unemployment benefits and proper administration are formally in place and accessible for migrant workers. However, in practice they are not.

It is expected that the Netherlands will need more migrant workers in the future, due to the fast-aging Dutch population.[234] Therefore, a truly accessible system which secures social security rights for migrant workers is needed. This will be further discussed under the concluding remarks and recommendations in Sections 5 and 6.

IMPLEMENTATION OF SOCIAL SECURITY REGULATIONS

The Social Security Coordination Regulations have been correctly implemented with regards to unemployment benefits. However, **Dutch implementation is non-compliant on the following**:

- Due to a **lack of address registration** and due to TWAs not organizing unemployment insurance properly, aggregation on unemployment benefits cannot happen properly.
- Dutch legislation for **'phase A contracts' is not in compliance** with the social security coordination schemes on sickness benefits, seeing the **lack of offering sickness benefits**.
- The Dutch system for the coordination of social security of unemployment benefits, sickness benefits and proper administration is non-compliant with the Regulations since **migrant workers face unnecessary obstacles in organizing proper administration.**
- **Migrant workers do not have equal access to social security as Dutch nationals.**
    - Therefore, the principle of non-discrimination, the principle on aggregation, and the principle that social benefits should be exportable to other member states are not properly guaranteed in the Netherlands.

[234] Joep de Beer *et al*, 'Bevolking 2050 in Beeld Drukker, Diverse en Dubbelgrijs: Deelrapport Verkenning Bevolking 2050' (Nidi, CBS 2020), 80 - 5.

5. CONCLUSION

Whilst the Netherlands successfully complies with the majority of its international and regional obligations, within the context of the temporary employment of EU migrant workers, there are certain areas where compliance must be improved. Importantly, the ensuing concluding remarks should be understood in light of the Dutch Social Economic Council's ('SER') recent advice on the Netherland's temporary employment sector.[235]

Regarding its international obligations under the Private Employment Agencies Convention of 1997 (C181), the Netherlands is failing to comply in three areas. First, the current system of self-regulation delegates accreditation of TWAs to private entities, ignoring the obligation in Article 14(2) C181 which entrusts the Convention's implementation to a public entity – i.e., the Dutch labour inspectorate. Whilst cognisant of the capital constraints affecting the Dutch labour inspectorate, the current system fails to observe the Netherlands' international obligations. Second, the issues of equal treatment emerge mostly in the context of employee dismissal. Whereas regular workers benefit from a protective dismissal regime, migrant workers, employed through zero-hour contracts containing temporary employment clauses, are effectively unprotected from sudden dismissals.

The inequalities between regular and migrant workers are further perpetuated because regular workers who fall ill, will not only receive compensation for their time away but their employers will act with due diligence to get them back to work. Contrarily, migrant workers may be dismissed under identical circumstances. This trend continues when assessing the disparities in working conditions enjoyed by migrant workers and regular workers. Third, the Netherlands succeeds in legally prohibiting the charging of fees and costs to workers, when such activity would be detrimental – for example, charging additional costs to minimum wage workers. That said, practice does not coincide with the law because TWAs charge migrant workers – who generally earn minimum wage – for a host of ancillaries. Thus, the Netherlands fails to comply with Article 7(1) C181 because the practice which the provision seeks to outlaw is still being utilised, despite being implemented in the domestic legal framework.

[235] SER Advice (n 4).

Regarding its obligations under EU law, particularly, the Directive 2008/104 and the Regulations on Social Security the Netherlands is failing to comply. This mainly concerns the principle of equal treatment of migrant workers regarding basic working conditions and equal opportunities towards vacant posts and the four leading principles of the social security coordination Regulations (principles of non-discrimination and aggregation and the right to proper administration).

As to the Regulations on the coordination of social security, the Netherlands correctly implements its obligations on unemployment benefits.[236] However, it fails to comply with the Regulations' provisions on sickness benefits, the aggregation of unemployment benefits due to TWAs not organizing unemployment insurance properly. There is no proper administration in place, and migrant workers face unnecessary obstacles in organizing proper administration. Therefore, the Netherlands has failed to properly implement the four leading EU principles of the social security coordination Regulations. As to Directive 2008/104, the Netherlands implemented most of its obligations properly, however, fails to comply with Article 5 and 6, which undermines the principle of equal treatment of temporary agency workers regarding basic working conditions and equal opportunities towards vacant posts.

Definitively, this report shows the situation of EI migrant workers needs to be improved. In particular, Spanish migrant workers face unnecessary obstacles and are subjected to poor living and working conditions by the practices of TWAs. If the SER advice is adopted in the new coalition agreement, this could lead to a much-needed substantial revision of Dutch labour law and of the position of EU migrant workers.[237]

[236] Reg 883/2004; Reg 987/2009.
[237] SER Advice (n 4).

6. RECOMMENDATIONS

International labour law: the Private Employment Agencies Convention of 1997 No. 181

- Acknowledging the Dutch Labour Inspectorate's capital constraints, and the impairment caused by the Covid-19 pandemic on the Dutch economy and the government's spending power.[238]
- Understanding that a complete and immediate switch to a mandatory accreditation system entrusted to the labour Inspectorate is not feasible.
- Recognising the logistical value in delegating the accreditation of TWAs to private entities, ***calls for*****:**
    - A return to a publicly regulated system of accreditation in which the Dutch Labour Inspectorate is entrusted with closer oversight of the activities of private entities tasked with accrediting TWAs.[239]
    - The enactment of a mandatory accreditation system whereby all operational TWAs in the Netherlands must be accredited/certified to legally provide temporary employment services.

- Cognisant of the nature and importance of flex-working for the Dutch economy, as well as the positives it can bear for both employers and employees.
- Emphasising the importance of the principle of equal treatment within the context of employment*,* ***calls for*****:**
    - The amendment of Article 7:691 DCC – particularly paragraphs one and three – thus affecting the use of the temporary employment clause mentioned in Article 7:691(2) DCC. Currently, migrant workers may be dismissed immediately, without reason, during the first 26 weeks of employment. Whilst cognisant of the nature and importance of flex-working for the Dutch economy, the temporal scope of the provision augments the vulnerability and instability affecting migrant workers. That time period should be reduced to 12 weeks, thereby

[238] Rijksoverheid, 'Draft Budget: The Netherlands' (2020) <https://ec.europa.eu/info/sites/default/files/economy-finance/2021_dbp_nl_en.pdf> accessed 25 June 2021, 4 - 6.
[239] SER Advice (n 4) 8.

respecting the nature of flex-working but also ensuring migrant workers are more stable in the Netherlands.

- The abandonment of Article 15(2) CLA ABU which allows TWAs to immediately dismiss migrant workers who fall ill.[240] Retention of Article 15(2) CLA ABU would only foment the prevalence of inequality between regular and migrant workers, further entrenching vulnerability of migrant workers.
- The devotion of additional focus by Dutch labour inspectorate to supervising compliance with legislation regulating working conditions.[241]

- Recognising the formal compliance of Dutch law with Article 7 C181, this report reiterates that, in practice, the Netherlands fails to observe its obligation under the convention, which prohibits the charging of fees or costs of any kind to workers in situations when such actions are to the detriment of the worker.
- Emphasising the importance of allowing minimum wage workers to retain and decide upon the use of their salary, this report ***calls for*:**
  - Enhanced oversight by the Dutch labour Inspectorate over the implementation of Article 7:632(1)(e) DCC and accompanying legislation.[242]
  - Increased capacity for investigations into TWAs/hiring companies who engage in the practice. This is obviously subject to economic recovery pursuant to the coronavirus pandemic, and the ability for additional capital to be allocated to the labour Inspectorate.

European Union Law

Social Security Regulations

- Emphasising the importance of having migrant workers register with the RNI for administrative matters in the Netherlands.[243] The report ***calls for***:
  - Actively informing EU migrant workers on social security benefits and the importance of registering properly when they visit the registration counter at the

[240] Art 15(2) CLA ABU.
[241] For example, the Arbeidsomstandighedenwet (Working Conditions Act) and Artw (Working Hours Act).
[242] For example, the WML (Minimum Wage and Holiday Allowance Act).
[243] Lecture by Dutch Labour Inspectorate representative to Fair Work and Equality Law Clinic Spanish Team (16 March 2021).

RNI. The RNI employees should address these matters, as well as providing migrant workers with:

- Informative leaflets
- Legal information booths with legal advisors, for example with workers from the 'Juridisch loket,' should be installed at the RNI offices.
- Translated information on finding free legal assistance needs to be provided there, by offering information verbally, and by offering pamphlets with information and clear points of contact (phone number, e-mail address, other addresses with information/legal points).

- Organizing proper administration in this way is an obligation the Netherlands has on the basis of the EU social security coordination scheme, as described above in section 3.2.4. In addition, reduce the maximum duration of 'phase A contracts' as in of the ABU CLA to 26 weeks (3 months) and create the obligation to continue paying wages in the event of sickness pursuant to Article 7:629 DCC (for regular workers). This will be more compliant with the social security coordination schemes on sickness benefits.

Directive 2008/104

- Develop a definition for 'an appropriate level of protection' in the Article 8(4) WAADI, in order to guarantee protection to workers regarding equal pay and comply with Article 5 of the Directive. In this way, it is possible to respect the Article 8 of WAADI creating boundaries to the social partners. The definition of an appropriate level of protection shall be in accordance with Article 3 (1) (1) and (2), and Article 5 (1) (a) and b) of the Directive.
- Amendment of Article 7:657(2) DCC, so as to include TWAs within the provision's purview. Migrant workers must be informed of vacant posts in the same manner as regular workers.
- Reiterates the need to improve the efficiency of the Dutch Labour Inspectorate's supervision. This could be attained through an on-line reporting desk similar to that mentioned in Article 7 WagwEU, which obliges member states to appoint a contact person, thus allowing for more effective supervision.

Ancillary Recommendations

- Cognisant of the fast-aging Dutch populace, and the importance of migrant workers for the future of the Dutch economy, this report ***calls for*:**[244]
    - Promotion of the presence of EU migrant workers in the Netherlands by educating the populace about the importance of migrant workers for the Dutch economy.

[244] de Beer *et al* (n 234) 80 – 5.

7. LIST OF AUTHORITIES

7.1. Table of Cases

Case Name
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Case C-415/93 Bosman v UEFA [1995] ECR I-04921
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7.2. Table of Legislation

7.2.1. International Law

Title	Provisions
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Convention (No.181) Concerning Private Employment Agencies (adopted 19 June 1997, entered into force 10 May 2000) 2115 UNTS 249	1(b); 5(1); 7; 10; 11(c)/(e)/(i); 12(c)/(d)/(h); 14
Declaration Concerning the Aims and Purposes of the International Labour Organisation (26th Conference Session Philadelphia 10 May 1944)	I(a)

(1) ILO Direct Requests

Direct Request 2007	Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2007, published at the 97th ILC session in 2008)
Direct Request 2009	Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment

	Agencies Convention of 1997 (adopted in 2009, published at the 99th ILC session in 2010)
Direct Request 2014	Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2014, published at the 104th ILC session in 2015)
Direct Request 2020	Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Private Employment Agencies Convention of 1997 (adopted in 2020, published at the 109th ILC session in 2021)

(2) ILO Observations

Observation 2011	Report of the Committee of Experts on the Application of Conventions and Recommendations (2012), Report III, Part 1A
Observation 2013	Report of the Committee of Experts on the Application of Conventions and Recommendations (2014) Report III, Part 1A

7.2.2. European Law

(1) Primary Law

Title	**Provisions**
Charter of Fundamental Rights of the European Union [2000] OJ C 364/1	34; 48
Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C 326	26; 45(1)/(3)(c); 46; 48; 153(2)

(2) Secondary Law

Title	**Provisions**
Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18	1; 2(1)

Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1	Recital (13)/ (32); 1(j)/ (k); 2(1); 3(1)(a)/(f)/(h); 11(3)(c)/(e); 12; 13; 16; 17; 18; 19; 20; 21; 22; 23; 24; 25; 26; 27; 28; 31; 32; 33; 34; 35; 64(1)(a)/(b) /(2); 65(3)/ (5)(b); 65a; 71; 72; 87(1)
Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L 325	1; 2; 3; 4; 5(2)/ (3); 6
Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) 883/2004 on the coordination of social security systems [2009] OJ L 284	Recital (1)/ (16)/ (17); 11; 22; 23; 24; 25; 26; 29; 30; 31; 32; 33; 56; 70
Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173	[redacted]

7.2.3. Dutch law

Title	**Provision**
Arbeidstijdenwet van 23 November 1995	5:3
Burgerlijk Wetboek van 1 January 1992 (amended 2020)	7:632(1)(e); 7:657(2); 7:669(3); 7:670(1); 7:670a(1); 7:668a; 7:690; 7:691(2)/ (8)
Collectieve Arbeidsovereenkomst Nederlandse Bond van Bemiddelings- en Uitzendondernemingen 2019-2020	[redacted]
Collectieve Arbeidsovereenkomst Algemene Bond Uitzendondermingen van 1 January 2020	2(e); 10(1)(b)/ 3(c)/ 5; 15(2); 22(1); 25(6); 40
Wet Allocatie Arbeidskrachten Door Intermediairs van 1 July 1998 (amended 2021)	8; 9; 10; 11; 13; 15
Wet Arbeidsvoorwaarden Gedetacheerde Werknemers in de Europese Unie van 1 Juni 2016	[redacted]

Wet Basisregistratie Personen van 3 Juli 2013	2.7
Wet Minimumloon en Minimumvakantiebijslag van 27 November 1968	[redacted]
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ANNEX I: IMPORTANT CASE LAW OF THE EUROPEAN UNION

CASE	FACTS
Case 41-74 Yvonne van Duyn v Home Office [1974]	Van Duyn, a Dutch national associated with Scientology, was refused entry to the UK on the basis of that association. Van Duyn claimed the British Government infringed Article 45 (3) of TFEU by denying her an entry permit to work at the Church of Scientology. The Free Movement of Workers Directive 64/221/EEC Article 3(1) also set out that a public policy provision had to be 'based exclusively on the personal conduct of the individual concerned'. The UK had not done anything to expressly implement this element of the Directive. The freedom of movement for workers between Member States can only be restricted by reasons of public policy, public security, public health, or overriding reasons of public interest as created by the Court of Justice. Van Duyn could be validly refused entry to the UK if her personal conduct justified the refusal on the basis of one or more of the above restrictions. Despite the lack of clarity as to the scope of the concept of 'personal conduct', the Court of Justice of the European Union held that Mrs. Van Duyn was entitled to invoke the Directive directly before her national court. Moreover, if the Directive did not have direct effect, then it would lose its relevance. Therefore, a directive may become directly effective if unimplemented or implemented incorrectly to prevent negative implementation effects on individuals.
Directive 2008/104: TWA	
C-681/18 JH v. KG [2020] ECR I-	Case brought from Italy on following temporary contracts with the same 'inlener': although it seems to be conflicting with directive 2008/04/EG, Mr. Hoogeveen says it is not (p. 13). Italian temp worker was hired for 33 months by one 'inlener'. Italy has a maximum of 36 months for temp workers, and the judges have asked preliminary questions because it was unsure if this was in line with art. 5 (5) of the directive.

	The JH/KG judgment indicates that it is up to the national judge to assess the legal qualification regarding the requirement of temporariness. In doing so, the court may look closely at the precise role of the temporary employment agency or payroll company and examine whether the hirer makes use of successive temporary employment constructions for permanent work. If no objective justification can be given for the hirer's use of successive contracts to hire out the same temporary worker repeatedly, and if the duration of the activities exceeds what can reasonably be considered temporary, this is a serious indication of abuse. In that case, the court can look through the construction and determine that an employment contract exists with the hirer, because a real temporary employment contract was never concluded. This does bring more legal uncertainty and therefore it is preferable for the legislator to act. Court rules that the directive is a guideline and that it does not determine which specific measurements member states need to take in order to prevent abuse of art. 5 (5) directive. The same goes for the question whether such long contracts can only be legitimate if there is clear need for it in terms of production, organisation or replacing staff. The court rules art. 5 directive brings about two different obligations: to prevent indirect discrimination (temp/permanent workers), and that member states need to take 'appropriate measures' to prevent the recurring temp contracts in order to circumvent the directive. Mr. Hoogeveen concludes that Dutch labour law is not conflicting with the directive and that there are enough safeguards in place to protect workers who work for 'inleners' or TWAs.
Case C-216/15 Betriebsrat der Ruhrlandklinik GmbH v Ruhrlandklinik gGmbH [2016] ECR I-	Definition of EU worker. Definition of EU worker. The ECJ considered the terms 'employee' and 'employment relationship' in the Temporary Agency Workers Directive to mean that it follows from the wording of the relevant provision that 'employee' within the meaning of the Directive means any person who carries out work and is protected on that basis in the Member State concerned. In the same judgment, the ECJ considered that it follows from Article 1(1) of Directive 2008/104/EC and Article 3(1)(c) that this

	Directive applies not only to workers who have concluded a contract of employment with a temporary agency but also to those workers who have an employment relationship with such an agency.
Case C-533/13 Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy [2015] ECR I-	The Court ruled on the issue of 'Review of Restrictions or prohibitions' of the use of temporary work. The Court declared that Art. 4(1) of Directive 2008/104/EC must be interpreted as addressing only the competent authorities of Member States and imposing on them the obligation to review the restrictions or prohibitions, so, as to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified. Therefore, the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on the grounds of general interest within the meaning of Art. 4(1).
Dutch Law	
Case no. 16/01359, HR [2017] Directive 2008/104: TWA	Repeats the Ruhrlandklink judgment for Dutch law. In brief, the Supreme Court considered - also referring to the obligation to interpret in conformity with the directive - that the concept of employment contract of Section 9a of the Act also includes the employment relationship as a self-employed person. The outcome was that the former temporary agency worker was thus prevented, contrary to Section 9a of the Act, from working on a self-employed basis for the company that had previously hired him as a temporary agency worker. The judgment of 17 April 2017 concerns the interpretation of the concept of employment contract as referred to in Section 9a of the Waadi, an article that - as stated above - must be regarded as the implementation of Article 6(2) of the Directive. It could therefore be argued that the considerations of the Supreme Court in this respect cannot simply be applied to the question of the scope of the Directive. But it follows from the considerations of the ECJ in the Ruhrland judgment that anyone who performs work and is

	protected on that basis in the relevant Member State falls within the scope of the definition of the Directive. Art. 6 (2) of the Directive has the same wording as the scope clause of the Directive.
Case no. 200.252.841/01, Amsterdam court [2020]	In this case, the so-called pay ratio standard of the Waadi is central. This standard means that the posted worker is entitled to at least the same employment conditions as those that apply to employees in similar positions in the employ of the company where the posting takes place. The pay equivalence standard is based on Article 5 of the European Temporary Agency Work Directive and relates to 'essential working conditions', which are exhaustively listed in the Temporary Agency Work Directive (Article 3(1)(f) of the Temporary Agency Work Directive). This concerns remuneration, working hours, overtime, breaks, rest periods, night work, holidays and public holidays. In principle, temporary workers must therefore receive the same remuneration in these working conditions as employees of the user company working in an equal or similar position. However, on the basis of the Temporary Agency Work Directive, Member States, when implementing it, may give the social partners the option of laying down working and employment conditions that deviate from the standard in a collective agreement. The condition set by the Directive is that an adequate level of protection of the temporary agency worker is provided. In the Netherlands, the pay equivalence standard is implemented in Section 8(1) of the Waadi. The possibilities for departure by means of a collective agreement are regulated in Section 8, subsection 4 (new, previously subsection 3) of the Waadi. The only condition set in this provision for a derogation from the main rule (in the case of a collective agreement of the hirer) is that, if the duration of the derogation is limited in time, the collective agreement must provide for an arrangement preventing abuse through successive periods of posting. In practice, this means an almost unconditional possibility to deviate from the main rule of Section 8 (1) of the Waadi, which has been used in the ABU CLA for many years. The employee in this case raised two fundamental questions: (1) whether the Dutch legislator has correctly implemented the Temporary Agency Work Directive, and (2) whether there is still an adequate level of protection with regard to the derogations included in the ABU collective agreement as regards

	remuneration. With reference to the legislative history of the Waadi and the Wab, the court ruled that the employee in this case had not brought forward enough to be able to assume that the Temporary Agency Work Directive had not been implemented correctly by the Dutch legislator, and that he had not sufficiently substantiated his claim that, in the case of the relevant deviations, the ABU collective agreement would not take into account the general protection of temporary agency workers prescribed by the Temporary Agency Work Directive. The employee in this case therefore did not receive a reply. The question remains whether the basically unlimited options that the Waadi offers to depart from the wage ratio standard for temporary agency workers by means of a collective agreement meet the requirement of an adequate level of protection of the temporary agency worker as prescribed in the Temporary Agency Work Directive. In this connection, see also the notes by Pronk under 'See also' in JAR 2019/71 (with Hof Den Haag 15 January 2019) and JAR 2019/237 (with Hof Den Haag 13 August 2019), in whose opinion the option of an exemption for temporary agency workers in the Waadi is not in line with the Directive. However, most temporary agency workers are not entitled to such a level of protection, as the ABU Collective Labour Agreement and the provisions therein deviating from the pay equivalence rule with regard to the hirer's remuneration are usually declared generally binding (recently again from 11 July 2020 to 31 May 2021).

ANNEX II: NOTES ON THE SER ADVICE IN REFORMING THE DUTCH LABOUR MARKET

On 2 June 2021, the Social and Economic Council (SER) presented advice ('the advice') for reforming the labour market.[245] Employers' associations and trade unions agreed with the SER's advice on 2 June 2021. For temporary migrant workers, the advice presents the possibility of some fundamental changes, specifically in relation to on-call contracts and temporary employment contracts.

The advice's main points, regard the limitation of the current extreme flexibility of the Dutch labour market. The advice abolishes on-call contracts and replaces them with basic contracts to which at least a quarter hour standard applies, which will make the wage of the migrant worker more predictable. However, on-call standard contracts can still be used for students.

Regarding temporary employment contracts, and the chain scheme (renewal of fixed-term contracts) the advice imposes significant changes. The mandatory certification system, which was abolished years ago, will be effective once again. Furthermore, the maximum duration of both phase A and phase B of the ABU CLA will be reduced. Phase A will be 52 weeks instead of 78 weeks and phase B will contain a maximum of 6 temporary contracts in 2 years contrary to the current maximum of 6 temporary contracts in 4 years. As a result, the maximum duration for temporary contracts will be set at 3 years.

A few exemptions for fixed-term seasonal work for the duration of three months are foreseen, without the possibility to deviate from them in a collective labour agreement. The interruption periods that are effective under the current ABU CLA will also be repealed. It is foreseen that the use of temporary agency workers will be only for peaksand substitution of sick employees and temporary contracts will have a maximum duration of three years. Lastly, the advice prescribes that the employment conditions of the temporary agency worker must be equal from day one to those of employees in equivalent positions.

[245] SER Advice (n 4).

The advice can be adopted in the new coalition agreement, which could lead to a substantial revision of Dutch labour law. If this is the case, the conclusions of the report enclosed 'Neglected and exploited: the plight of EU migrant workers at the hands of Dutch Temporary Work Agencies' would become (partially) obsolete.