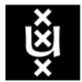
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Labour Exploitation of Polish Migrant Workers in the Netherlands

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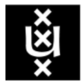
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EXECUTIVE SUMMARY

Subject matter

This report focuses on Polish migrant workers who are often subjected to exploitation while working for private temporary employment agencies in the Netherlands that are regulated by Dutch law.

Purpose of the report

The first part of the report provides a description of Dutch regulations on temporary employment agencies and its compliance with the ILO Private Employment Agency Convention 1997 and European Union law - more notably, the Directive on Temporary Agency Work (2008/104/EC), the Revised Posted Workers Directive (2018/957/EU) amending the Posted Workers Directive (96/71/EC) and the Regulations on Social Security such as Regulation (EC) No 883/2004 and Implementing Regulation 987/2009. Analysing the above could indicate whether the Netherlands appropriately implements international and European provisions. The second part of the report focuses on issues associated with temporary employment agencies, namely zero-hour contracts; no return costs; account settlement and wage deductions; sickness benefit procedures UWV; and scope of labour inspection competence. These issues frequently impact the well-being of Polish migrant workers. Therefore, the report examines whether international and European Union law contains provisions that could potentially regulate and offer remedies for these issues. Finally, possible recommendations are provided to improve the lives of Polish migrant workers.

Methods of analysis

The report uses a descriptive approach, especially in the first chapters where it elaborates on issues Polish migrant workers face while working in the Netherlands. The report continues to analyse Dutch law and relevant provisions of international law and European Union law that govern the operation of temporary employment agencies. After the objective evaluation, the paper analyses possible incompatibility with the ILO Private Employment Agency Convention 1997 and relevant European Union Directives. The paper continues with a discussion of a number of focus issues directly linked to temporary employment agencies and their legality. The paper takes a diagnostic approach where it looks at Dutch law more critically so as to find more connections between issues related to work agencies and law. Lastly, the paper provides the reader with possible recommendations as to tackle the problems elaborated upon in the report, thus providing a prescriptive analysis.

Results

General remarks:

The report concludes that the Netherlands, on the one hand, complies with the temporary employment agencies Convention and Directive on Temporary Agency Work. On the other hand, there are several issues associated with the regulations provided by both international and

EU law. For instance, the ILO-Convention does not explicitly call for a public licensing system. Therefore, the system of certification is mostly private which the government does not directly control. Reports of malicious practices are thus still common within the private sector. This raises the issue of effectiveness of the Convention itself. Moreover, the Netherlands also complies with the EU directive, however, it is found to do the bare minimum, deviating from the Directive where possible, complicating rather than improving lives of the migrant workers.

Focus Issues:

- There are also no obligations to regulate the flexibility of zero-hour contracts. Some changes are possible through the collective labour agreement, however that would require the willingness of the parties to the collective agreement to apply to remedy some of the issues. A social agreement has been drafted by social partners stating the willingness to no longer use zero-hour contracts, and instead replace them with fixed hour contracts that can be filled flexibly.
- Neither in Dutch law nor in international and EU law can obligations be found to reimburse travel costs, especially costs covering travels back home. In other words, no obligations have been found calling for states to offer reimbursement so that migrant workers could safely return to their country of origin. This could cause homlessness and human rights violations. This particular issue is also closely linked with the employment contract being tied with housing.
- Moreover, direct obligations concerning the swift account settlement with migrant workers after contract termination are likewise not explicitly included in the relevant international and EU regulations. Thus, even if the waiting period for the accounts to be settled is very problematic for the migrant workers in the Netherlands, the Dutch legislation in this regard is compliant with both international law and EU Directives. The identified problem concerning the lack of a swift account settlement is of a practical and not legal character. The Dutch legislation regulating the problem of wage deductions is also compliant with both international and EU law. Provisions included in the ABU-CLA grant broad protection to migrant workers against questionable wage deductions. However, also here the identified problem is due to poor enforcement.
- Migrant workers experience difficulties due to the long duration of UWV sickness benefit procedures because the contracts of migrant Phase A workers are automatically terminated when the worker falls ill and the accommodation is terminated with the contract. Nevertheless, the rules are the same for Dutch workers and the equal treatment principles of EU and ILO law are not violated by Dutch implementing provisions of sickness and benefit procedures.
- The competences of the Dutch labour Inspectorate (Inspectorate SZW) are in compliance with Article 14(2) of ILO Convention 181 which states that the national Inspectorate has to oversee the Convention's provisions into national legislation. In spite of this, workers face difficulties in filing complaints about labour abuses due to the generalist structure of the Inspectorate which include monitoring labour standards as well as undocumented

employment and labour fraud. Further difficulties arise because the investigative procedure of the inspectorate cannot be triggered by individual complaints made by workers.

Recommendations

Possible solutions are mentioned in the report to try and overcome the focus issues elaborated upon in the second part of the paper.

- **Zero-hour contracts:**
    - Phase A could be effectively shortened through the collective agreement. Therefore, rather than allowing 78 weeks the collective agreement could indicate 26 weeks instead, adding a higher level of protection for migrant workers. Furthermore, the same agreement could also come with an obligation, calling employers to respect a guarantee of a two-month minimum wage, regardless of the number of hours worked.
    - A social agreement has been reached by social partners. This agreement proposes legal change regarding zero-hour contracts. The agreement advises the government to no longer allow the use of zero-hour contracts and instead proposes fixed hour contracts that may be filled in flexibly. In connection to the previous recommendation, it also proposes to shorten the period of a phase A contract where the agency clause is permitted, to 12 months.
- **Travel costs:**
    - Campaigns should be deployed by the Polish government so that future migrant workers are better informed of possible unpleasant situations associated with employment agencies. Moreover, these campaigns could provide help in case of emergency. Several non-governmental organisations offering help could also be listed.
- **Account settlement and wage deductions:**
    - The general recommendation would be to reintroduce the compulsory system of state licensing to eliminate the malicious temporary employment agencies.
    - Regarding the problem of account settlement, the ABU-CLA could be revised in order to replace the rule of next pay term with a rule mandating an immediate account settlement.
    - Furthermore, template letters requesting the payment of due benefits together with instructions as to how they should be filled in could be published on the website of the Polish embassy.
    - Finally, the Polish embassy, in cooperation with some of the Dutch NGOs, could offer online workshops or short video clips aimed at improving the knowledge of Polish migrant workers regarding the basic principles of Dutch labour law.
- **Sickness benefit procedures UWV:**
    - Disconnect the employment agreement from housing to prevent homelessness in case of dismissal and during UWV procedures

  - Enable better registration by allocating the responsibility for proper registration to the agencies. Ensure that municipalities properly register migrant workers and include actual address of residence
  - Deem invoking the agency clause in case of sickness contrary to art. 7:670 (1) DCC, to ensure sick pay facilitated by agencies instead of leaving migrant workers dependent on UWV benefits.
- **Scope of Labour inspection competences:**
  - To encourage workers to approach the Inspectorate with complaints, a relationship of trust needs to be established. One way to establish this is by increasing the active information flow from the Inspectorate SZW to Polish migrant workers, for instance by free seminars on the ambitions and competences of the SZW.
  - Another solution to the issue of distrust between the workers and the Inspectorate SZW is the separation of competences of the Inspectorate SZW. This will entail a departure from the generalist model of the Inspectorate and should be given effect to by distributing illegal work and fraud competences solely to law enforcement and the immigration authorities.
  - A higher number of inspectors need to be hired in order to make labour abuses more visible and combat them more effectively.

Reintroduction of public licensing system:

  - Private SNA-certification should be abolished as it has not proven to be effective. In spite of the alleged administrative burdens that a system of public licensing of private employment agencies imposes on the government, it needs to be reinstated in order to reduce the high number of agencies and to prevent malicious agencies from entering the labour market.

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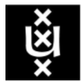
TABLE OF CONTENTS

Table of Contents 6
List of abbreviations 7
1. Introduction 9
1.1. Issue 9
2. Legal Framework 11
2.1. Dutch Law 11
Dutch civil code 11
The WAADI and Temporary employment collective agreements 12
2.2. International Law 15
2.2.1. International Labour Organisation 15
2.2.2. Private employment agencies Convention, 1997 (No. 181) 15
2.2.3. Compliance with international law by the Netherlands 17
2.2.4. Implementation of the ILO Convention 181 18
2.3. EU Law 22
2.3.1. Directive on Temporary Agency Work (2008/104/EC) 22
2.3.2. Implementation of the Directive on Temporary Agency Work 24
2.3.3. Posted Workers directives 26
2.3.4. Coordination of Social Security at EU level 28
3. Focus Issues 33
3.1. Zero-hour contracts 33
3.2. Return Costs 36
3.3. Account settlement and wage deductions 38
3.4. UWV Sickness benefit procedures 43
3.5. Scope of Labour inspectorate competences 45
4. Recommendations 49
4.1. Zero-hour contracts 49
4.2. Return Costs 51
4.3. Account settlement and Wage Deductions 52
4.4. UWV sickness and benefit procedures 54
1.1. Scope of Labour inspectorate competences 55
1.2. Other recommendations 56
2. Discussion 57
3. Conclusion 58
Bibliography 60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LIST OF ABBREVIATIONS

ABU-CLA - Federation of temporary employment agencies

AMU - Regulation of Malicious Agencies

Arbobesluit - Working Conditions Decree

Arboregeling - Working Conditions Regulations

Art. - Article

AWB - General Administrative Law Act

AWGB - Equal Treatment Act

CLA - Collective Labour Agreements

CNV - National Federation of Christian Trade Unions

DCC - Dutch Civil Code

ECHR - European Convention on Human Rights

ECtHR- European Court of Human Rights

Enforcement Directive - Posted Workers Enforcement Directive of 2014

EU - European Union

FNV - Netherlands Trade Union Confederation

ILO - International Labour Organisation

KvK - Dutch Chamber of Commerce

NBBU-CLA - Dutch Association of Intermediary Organisations and Temporary Employment Agencies

NGO - Non-governmental organisation

SAE - Social Affairs and Employment Inspectorate

SER- Social-Economic Council

SNA - Private Sector Quality Mark

SNCU - Foundation for Compliance with the Collective Agreements for Temporary Employees

SNF - Flexible living Standards Foundation

SZW - Dutch Labour Inspectorate

TAW Directive - Directive on Temporary Agency Work of 2008

TFEU - Treaty on the Functioning of the European Union

UWV - Employee Insurance Agency

WAADI - Labor Law Allocation by Intermediaries

WML - Minimum Wages and Minimum Holiday Allowance Act

Ziektewet - Sickness Benefits Act

1. INTRODUCTION

The report presents a number of issues associated with the relationship between Polish migrant workers and temporary employment agencies across the Netherlands. By examining international law and European Union law this report aims to identify issues of compliance with the above mentioned international regimes. Moreover, once possible issues are recognised, this report provides recommendations to improve compliance of Dutch law on temporary employment with international and EU-law and to offer remedies for the issues Polish migrant workers face. In addition, concrete issues are explored, such as zero-hour contracts which form an important operational part of temporary employment agencies in the Netherlands and which are seen to have negative implications for labour migrants in the country. Other issues under scrutiny are the costs of the workers' return to their place of residence which are usually not covered by the temporary employment agencies; the prolonged time agencies usually take in order to settle any remuneration and reserved funds; sickness benefits procedures; and the labour inspectorate's competences in the Netherlands.

To provide a coherent report, this paper is divided into six sections that are followed with subsections. The first section is the introduction which presents the issue and its relevance. Section two provides an objective legal framework that effectively explores Dutch law and relevant provisions within international and European Union law, at the same time examining the compliance of the former with the latter. The third part elaborates on issues directly related to temporary employment agencies and Polish migrant workers, also exploring any provisions within international and European Union law that could help to address these problems. The above is followed with a discussion that further highlights the findings of the report by elaborating on the meaning, importance and relevance of established results. The fifth section provides possible recommendations to the problems provided in the second part of the report. Section 6 concludes the report.

1.1. Issue

The increasing inequality around the world every year forces more people to cross borders to find better employment opportunities far away from their home countries.[1] Between 1990 and 2013 alone the number of international migrants worldwide increased by 77 million from 154 million to 232 million per year.[2] A significant part of global migration is caused by the temporary and seasonal opportunities in more economically advanced states designed for work related to

[1] 'Rising inequality affecting more than two-thirds of the globe, but it's not inevitable: new UN report' (UN News, 21 January 2020) <https://news.un.org/en/story/2020/01/1055681> accessed 31 May 2021.
[2] United Nations, 'International migrant stock: By destination and origin 2013' Department of Economic and Social Affairs, Population Division Database. <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> accessed 20 April 2021.

manufacturing, construction, domestic work, agriculture and many other sectors that do not require extensive and specialised training.[3]

Traditionally, this process is viewed as beneficial. It allows more efficient supply and demand for labour forces. Companies can obtain workers more easily and the workers they obtain are able to earn higher wages than they would earn for similar positions in their home countries. Nonetheless, in sharp contrast to the economic efficiency argument, this liberalisation of the labour market has exposed migrant workers to exploitation and abuse.

Free movement of persons, The European Union's cornerstone, encourages migration from one EU member state to another.[4] The Republic of Poland joined the European Union in 2004 resulting in the increased migration flow of Polish migrants to the Netherlands. When the Netherlands lifted all its restrictions to the labour market in 2007, the Polish population became one of the largest incoming immigrant groups in the country.[5] Considering that migrant workers are usually unfamiliar with the language of the country they decide to migrate to, they are subjected to work opportunities facilitated by labour recruiters and employment agencies which often employ workers while still in their home countries. By 2015 almost 70% of the Polish working force in the Netherlands was employed by temporary employment agencies.[6]

In part, due to their complex and non-transparent character, these agencies are mentioned in a substantial number of reports concerning the exploitation and unequal treatment of workers worldwide and are described frequently as ungoverned and ungovernable.[7] The entire operation within private agencies is highly complex and difficult for the governments willing to regulate it, to navigate within it. According to the ILO, this is how malicious recruitment agencies are able to commit abuses while hiding behind the notion of a positive contribution to the labour market.[8] This report will attempt to illuminate the issues Polish migrant workers face arising from the flexible labour relationships permitted in the Netherlands, namely temporary employment agency contracts. This paper will offer a legal framework regarding these relationships and through legal analysis provide recommendations to solve these issues.

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[3] ILO 'Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities' (2015) No. 1/2015, 1.
[4] Treaty on the Functioning of the European Union, Article 25.
[5] Centraal Bureau voor de Statistiek, *Jaarrapport Integratie 2012* (Centraal Bureau voor de Statistiek 2012) <https://www.cbs.nl/nl-nl/publicatie/2012/51/jaarrapport-integratie-2012> Accessed 30 May 2021.
[6] 'Geringe toestroom van Bulgaarse en Roemeense werknemers' (*Centraal Bureau voor de Statistiek*, 18 January 2015) <https://www.cbs.nl/nl-nl/nieuws/2015/05/geringe-toestroom-van-bulgaarse-en-roemeense-werknemers> Accessed 30 May 2021.
[7] ILO, 'Global labour recruitment in a supply chain context' (2015) ILO Fair recruitment initiative series; No. 1, 3.
[8] ILO (n3), 2.

2. LEGAL FRAMEWORK

2.1. Dutch Law

The three main sources of labour law, in order of hierarchy, are *statutory law*, mainly stipulated in book 7 title 10 of the Dutch Civil Code (hereinafter DCC), *Collective Labour Agreements* (hereinafter CLA) and *individual employment agreements.* The Netherlands is a monistic country, therefore all EU law is directly applicable. Once EU regulations come into place they will be implemented in Dutch Law. However, this is not necessary for citizens to rely on EU law in a Dutch court of law. Most EU labour law has either been incorporated in the Dutch civil code or via separate laws.[9] International provisions that the authorities ratify have supremacy over national law, including the Constitution itself, Acts of Parliament and subordinate legislation.[10]

To understand Dutch labour law, it is important to explain how the statutory law regulates in relation to other law sources. The statutory provisions are sometimes of supplementary law (deviation by the parties is then permitted), but – to protect the employee – often also to a greater or lesser extent of a mandatory nature. For example, there are statutory laws (increasing in level of mandatory nature): (1) where deviation is only valid in writing, (2) where deviation is only possible by collective labor agreement or, failing this, by written agreement with the works council or the employee representation, (3) where deviation is only valid under a collective agreement or by arrangement by or on behalf of a competent administrative body, or (4) mandatory law (deviation is null and void or voidable). Therefore, the Dutch Civil Code prescribes boundaries to the freedom of contract between the agency and the Polish worker when drafting the individual employment agreement. The Collective Labour Agreements sometimes allows social partners to deviate from the Dutch Civil Code. This is the general Dutch legal framework of labour law.

Dutch civil code

The temporary employment agency contract is regulated and defined in Article 7:690 of the DCC. This Article stipulates that the temporary employment agency contract is an employment contract in which the employee is made available by the employer to a user company to perform work under the supervision and direction of the user company. Three parties are involved in the temporary employment relationship (triangular employment relationship): the temporary employment agency, the temporary worker, and the user company. The relationship between the temporary worker and the agency is an employment relationship. The temporary work agency

[9] WHACM Bouwens and others, *Schets van het Nederlandse arbeidsrecht* (Deventer: Wolters Kluwer 2019) 3.1.1.
[10] Joseph Fleuren, 'The application of Public International Law by Dutch Courts' (2010) 57/2 Netherlands International Law Review 245, 246.

and the user company are jointly and severally liable for the wages.[11] Between the user company and the agency there is a contract for the provision of services.[12] The Allocation of Workforce by Intermediaries Act (hereinafter WAADI) provides regulations for this relationship. The relationship between the temporary worker and the user company is not defined by a contract.[13] However, the user company is liable for damages that the temporary worker may suffer during his work activities and for payment of wages if the agency fails to pay them.[14]

The general regulations of labour contracts set out in title 10 book 7 of the DCC are also applicable to the temporary employment agency contract. However, Article 7:691 DCC provides special regulations for the temporary employment agency contract that deviate from the regular dismissal protection provided in book 7 of the DCC. For regular labour contracts Article 7:668a DCC prevents the possibility of a so-called revolving door arrangement, where employers are able to enjoy cheap labour through successive agreements of employment.[15] This is achieved by ensuring a permanent employment contract after three consecutive temporary contracts or if for longer than three years temporary contracts between the same parties have been concluded. However, Article 7:691 par. 1 DCC limits the scope of this regulation where temporary employment agency contracts are concerned, it stipulates that Article 7:688a DCC is only applicable to temporary employment agency contracts after 26 weeks. These 26 weeks can be expanded to 78 weeks if agreed upon per collective labour agreement.[16] Furthermore, Article 7:691 par. 2 DCC makes it possible for the agency to draft a clause, the so-called agency clause, that ensures the temporary employment agency contract ends by operation of law if the temporary worker is dismissed by the user company. These are the rules that provide exceptions from the general labour law in book 7 of the DCC for the temporary employment agency contract.

The WAADI and Temporary employment collective agreements

An important piece of legislation concerning temporary employment agency contracts is the WAADI (Allocation of workforce by Intermediaries Act). The WAADI provides regulations for commercial job placement services, including temporary employment agencies. The act entered into force on July 1st 1998. The third chapter contains provisions relevant for temporary employment agencies (Article 7a - 12). In 2012 the Act was changed due to the implementation

[11] art. 7:616a DCC.
[12] art. 7:400 DCC.
[13] WHACM Bouwens and others, *Schets van het Nederlandse arbeidsrecht* (Deventer: Wolters Kluwer 2019) 3.1.3.
[14] art. 7:658 par. 4 DCC;7:616a DCC.
[15] Koster-Mulder 'Opvolgend werkgeverschap en de uitzendovereenkomst' (19th edition, Deventer: Wolters Kluwer 2015) 4 ArbeidsRecht 8
2015.
[16] art. 7:691 par. 7 DCC.

of the European Directive on temporary agency work (Directive 2008/104/EC).[17] Furthermore, on the 1st of July 2012 an amendment was made to introduce an obligation to register for temporary employment agencies.[18] As will be discussed later in the report, the WAADI is where most European Union law and international law on temporary agency work is said to be implemented.

Another important piece of legislation are the collective labour agreements (CLA) concerning temporary agency workers. The two important collective agreements are the Dutch Association of Intermediary Organizations and Temporary Employment Agencies CLA and the Federation of temporary employment agencies CLA (hereinafter the NBBU-CLA and ABU-CLA). Both collective agreements have more or less the same content. The ABU was declared generally binding per June 11 2020 till May 31 2021, therefore all employees and employers in the temporary employment agency sector were bound by the collective agreement.[19] Due to the nearly identical content and the fact that the ABU-CLA was generally binding til the 31st of May 2021, the report will focus on the ABU-CLA. Interesting aspects of the ABU-CLA are the articles regarding the formation of a temporary employment agency contract and the phase-system that is used. Once someone is registered with an employment agency, they are not yet regarded as an employee but as a candidate for future temporary agency work. Therefore, the aspiring employee is not yet obligated to accept temporary work and the agency is not obligated to offer the candidate work.[20] According to Article 9 paragraph 2 of the CLA, the contract is concluded when the temporary worker actually commences the agreed work, unless otherwise agreed upon in the contract. Accepting an offer to work is therefore not enough for the realization of the temporary work agency contract.[21]

The second interesting aspect of the CLA is the phase-system. The phase-system is a deviation from the before mentioned 26-week period stipulated in Article 7:691 paragraph 1 DCC.[22] The phase-system consists of three phases: A, B and C.[23] Each phase comes with increased strength of the temporary worker's legal position. A temporary worker is in phase A as long as she/he has not worked for longer than 78 weeks for the same agency. Each week that a temporary worker has actually worked counts as a week and if there is a gap of 26 weeks or more the count

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[17] WHACM Bouwens and others, *Schets van het Nederlandse arbeidsrecht* (Deventer: Wolters Kluwer 2019) 4.3.2.
[18]JP Kroon & P De Casparis, 'Flexibele arbeidsrelaties' (Deventer: Wolters KLuwer 2021) 5.14.1 <www.navigator.nl/document/idpassec7884e1c34344b2aefdff4f62af2ad8?ctx=WKNL_CSL_402> accessed 30 May 2021.
[19] Members of the NBBU are exempted from the ABU, however is not relevant because they are identical
[20] art. 4 ABU-CLA; art. 7:610 DCC.
[21] JP Kroon & P De Casparis, 'Flexibele arbeidsrelaties' (Deventer: Wolters KLuwer 2021) 5.8.3 <www.navigator.nl/document/idpassec7884e1c34344b2aefdff4f62af2ad8?ctx=WKNL_CSL_402> accessed 30 May 2021.
[22]art. 7:691 par. 7 DCC.
[23] Note that the phase -system is substantively the same in the NBBU-CLA, however the phases are numbered.

restarts.[24] The legal position of a worker with a Phase A contract is as follows: the starting point in phase A is that the contract is entered into for the duration of the posting unless otherwise agreed upon. As a result, the contract ends by operation of law when the user company terminates the posting. No matter how many employment contracts are concluded between the temporary worker and the agency within the 78 weeks, permanent employment will never be realized in this period.[25] Furthermore, the obligation to continue to pay wages, regulated in Article 7:628 paragraph 1 DCC, may be excluded by agreement. Consequently, phase A workers are only entitled to the wages for the period they actually worked.[26] Also the obligation to continue to pay wages in case of illness does not apply.[27] As soon as the temporary worker falls ill this is classified as a request from the user company to end the posting and the temporary agency contract ends by operation of law due to the agency clause.[28] There are some compensatory benefits to ensure some income during illness such as sickness benefits that can be requested.[29]

Phase B is entered into if the temporary employment agency contract is continued after completing phase A, or if within 26 weeks of completing phase A a new temporary employment agency contract is concluded with the same agency. It is possible to enter phase B at an earlier moment if agreed upon by the agency and the temporary worker.[30] Phase B lasts for four years and allows a maximum of six separate temporary employment agency contracts. If there is a break of 26 weeks in between, phase B ends and the temporary worker begins once again in phase A. The legal position of the worker improves in phase B compared to phase A. The biggest changes are that there is a possibility to conclude a permanent contract, the obligation to continue to pay wages as stipulated in Article 7:681 paragraph 1 DCC may no longer be excluded, after the four-year period or when concluding the 7th consecutive employment agreements, the contract converts into an open-ended employment agreement and finally the obligation to pay wages during illness can no longer be excluded.[31]

The last phase C commences after the completion of phase B. When entering phase C the temporary employment agency contract becomes open ended by operation of law. The agency

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[24] art. 2 par. e ABU-CLA; exceptions apply for workers that have reached the state pension age, art. 35 ABU-CLA.
[25] exclusion of art. 7:688a DCC.
[26] art. 22 par. 1 ABU-CLA.
[27] exclusion of art. 7:629 DCC; art. 15 par. 2 ABU-CLA.
[28] art. 7:691 par. 2 DCC; There has been a recent ruling by the district court in the Hague that the termination of the agreement by operation of law due to illness in these situations may be contrary to the prohibition of termination of employment during an employee's illness according to art. 7:670 sub 1 DCC; ECLI:NL:GHDHA:2020:460.
[29] JP Kroon & P De Casparis, 'Flexibele arbeidsrelaties' (Deventer: Wolters KLuwer 2021) 5.8.4.2 <www.navigator.nl/document/idpassec7884e1c34344b2aefdff4f62af2ad8?ctx=WKNL_CSL_402> accessed 30 May 2021.
[30] art. 10 par. 5 ABU-CLA.
[31] JP Kroon & P De Casparis, 'Flexibele arbeidsrelaties' (Deventer: Wolters KLuwer 2021) 5.8.4.3 <www.navigator.nl/document/idpassec7884e1c34344b2aefdff4f62af2ad8?ctx=WKNL_CSL_402> accessed 30 May 2021.

clause no longer plays a role in phase C. In the final phase the legal position of a temporary worker is more or less the same as a regular employee with a permanent employment contract. If a temporary worker is dismissed in phase C, regular dismissal law applies.

2.2. International Law

2.2.1. International Labour Organisation

The International Labour Organisation is the United Nations agency founded in 1919 by the former League of Nations. As of 2021, it has 187 member states from which it employs almost 2.700 people.[32] The organisation has a distinctive form of governance based on tripartism to ensure cooperation between the governments, employers and workers.[33] Therefore, all policies and programmes considered by the organisation require the approval of three main bodies that represent the framework mentioned above, the International Labour Conference, the Governing Body and the International Labour Office. The main objectives of the organisation are aimed at promoting rights at work; encouraging accessible, productive, and sustainable work and enhancing social protection against labour exploitation through treaties and Conventions.[34] Considering the active participation of the organisation in the development of labour standards worldwide, it is one of the main contributors to international labour law.[35] One of its contributions is reflected in the Private Employment Agency Convention concluded in 1997 elaborated below so as to further protect rights of workers.

2.2.2. Private employment agencies Convention, 1997 (No. 181)

The ILO, in order to enhance the effectiveness of labour market and workers' rights, drafted the Private Employment Agencies Convention 1997 (hereinafter ILO Convention (no. 181)), to provide some parameters for recruitment, minimise abuse of workers and ensure smooth operation of the market..[36] However, it should be noted that the introduction of the Convention also enhanced liberalisation of the market. Considering that liberalisation of the market is often associated with an unregulated character, workers' rights are particularly vulnerable, especially when working for a private sector. Therefore, an unregulated market often contradicts workers' rights.[37] Many of the articles aim to provide protection for migrant workers to ensure collective

[32] ILO, 'History of the ILO' (2021) <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> accessed 20 April 2021.

[33] ILO, 'National Tripartite Social Dialogue: An ILO guide for improved governance' (2013), 12.

[34]ILO, 'Mission and Impact of ILO' (2021) <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed 20 April 2021.

[35] Sena Arslan, 'Role Of International Labour Organization In Development Of Labour Law' (2020) Klinic: Law and Consulting <https://www.kilinclaw.com.tr/en/role-of-ilo-in-development-of-labour-law-kilinc-law/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 20 April 2021.

[36] temporary employment agencies Convention 1997, Preamble.

[37] ILO 'temporary employment agencies, promotion of decent work and improving the functioning of labour markets in private services sectors' (2011) GDFPSS/2011, 4.

bargaining, freedom of association, equality of treatment and the banning of child labour as called for in Article 4, 5 and 9 of the Convention.[38] Moreover, Articles 11 and 12 call for the member states to ensure that they take the necessary measures to adequately protect workers employed by the agencies and determine and allocate the respective responsibilities of the employment agencies in relation to (i) freedom of association; (ii) collective bargaining; (iii) minimum wages; (iv) working time and other working conditions; (v) statutory social security benefits; (vi) access to training; (vii) occupational safety and health; (viii) compensation in case of occupational accidents or diseases; (ix) compensation in case of insolvency and protection of workers claims; (x) maternity protection and benefits, and parental protection and benefits.[39] The Convention additionally provides measures that the member states are urged to comply with in order to maintain the purpose of the Convention. They are briefly described in Articles 3(2), 8(2), 10 and 13 and 14. Article 3(2) calls for states to provide appropriate licensing and certification to inform workers about the conditions governing the operation of private employment agencies.[40] Article 8(2) stipulates the possibility of a bilateral treaty between one member state, where workers mainly come from and another member state within which migrants tend to look for employment opportunities. For the time being, the only treaty between the Republic of Poland and the Netherlands is the Cultural Agreement which called for close partnership in regard to education, science and culture.[41] There has never been an agreement stipulating extra protection for Polish migrant workers in the Netherlands. Article 10 calls for authorities to put in place appropriate bodies to investigate complaints, alleged abuses and fraudulent practices concerning the activities of temporary employment agencies. Article 13 requires the temporary employment agencies to provide national authorities with reports about their activities. It also urges the governments to arrange for close collaboration between them and private employment agencies. Lastly, Article 14 calls for the states to put in place appropriate remedies to compensate for possible violations by the temporary employment agencies.

Essentially, even though the ILO and the Convention do influence its members, it is the responsibility of the member state to ensure compliance, considering that, unlike other international regimes, there is no international authority within the ILO to enforce standards for labour migration.[42] The question remains whether the Netherlands complies with the articles of the Convention which call for the protection of workers and implementation of appropriate measures to ensure said protection.

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[38] ILO (n3) 20.
[39] Private Employment Agencies Convention, 1997 (No. 181) / Ibid, 20
[40] ILO (n3) 20-21.
[41] 'Poland In Netherlands' (Gov.pl) <https://www.gov.pl/web/netherlands/bilateral-relations> accessed 31 May 2021.
[42] Guy Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 International Journal of Comparative Labour Law and Industrial Relations 61, 62-63.

2.2.3. Compliance with international law by the Netherlands

The Netherlands has a long history enshrined in the development of international law. The Supreme Court of the Netherlands declared on numerous occasions that treaties concluded by the Netherlands were binding on its citizens further confirming the monistic approach of the country's legal system.[43] In other words, self-executing provisions of treaties and of resolutions of international organizations are binding upon natural and legal persons.[44] Moreover, international provisions that the authorities ratify have supremacy over national law, including the Constitution itself, Acts of Parliament and subordinate legislation.[45] Consequently, considering that the Netherlands has ratified the temporary employment agencies Convention of 1997, it is under the obligation to comply with its provisions.

Two years after the Netherlands ratified the ILO Convention 181 in 1999, the then incumbent Minister of Foreign Affairs claimed that Dutch law was already in compliance with all of the Convention's provisions.[46] The Minister recognised that the Convention's provisions were in line with the government's purpose of liberalising the labour market to more effectively, bring together supply and demand of labourers in the Dutch labour market.
The liberalising nature of the ILO Convention enabled a key change in the Dutch employment law framework and Article 3 of the Convention especially enabled the abolishment of the system of public licensing for temporary employment agencies in 1998. This was subsequently replaced by a private system of certification.[47] The Dutch implementation of the Convention is primarily dealt with in the WAADI, which was implemented July 1st 1998 and which has outwardly adopted the primary definitions of the Convention without deviation.[48]

The core elements of the ILO Convention have all been adopted into Dutch law. The prohibition of discrimination is complied with by means of Article 1 of the Dutch constitution, the Equal Treatment Act (Algemene Wet Gelijke Behandeling, AWGB) and has been adopted into Article 3(3) WAADI as well. The important principle of equal pay has been firmly established in the Minimum Wages and Minimum Holiday Allowance Act (Wet Minimumloon en Minimumvakantiebijslag, WML) and Article 8 WAADI. The same obligation to equal pay has been transposed in the applicable ABU-CLA as well.

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[43] Joseph Fleuren, 'The application of Public International Law by Dutch Courts' (2010) 57/2 Netherlands International Law Review 245, 246.
[44] Ibid 246.
[45] Ibid 246.
[46] *Kamerstukken I/II* 1998/99, 26601, nr. 262.
[47] See: Michael Wynn, 'Power Politics and Precariousness: The Regulation of Temporary Agency Work in the European Union' in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (New York: Routledge 2014) 48-69; ILO temporary employment agencies Convention (Adopted 19 June 1997, entered into force 10 may 2000) C181.
[48] Placement of Personnel by Intermediaries Act 1998 (NL).

2.2.4. Implementation of the ILO Convention 181

This subsection explains how some of the core provisions of the Convention have been implemented into the Dutch legal system and analyses whether protection is sufficient and to what extent insufficiencies are attributable to the implementing legislation. As previously stated, the WAADI contains a substantial part of the implementation and some of its provisions are therefore examined more closely.

Article 1(2) Convention 181 – Definition of Worker

It is important to establish whether the scope of the WAADI aligns with what has been set out in the ILO Convention. Article 1(2) of the Convention adopts an inclusive approach to the definition of a worker and states that jobseekers also fall into the scope of protection. The definition of a worker is to be interpreted in line with Directive 2008/104/EC on Temporary Agency Work which states that "worker" means any person who, in the Member State concerned, is protected as a worker under national employment law;". Due to the more extensive reach of the WAADI, not only workers that are formal employees under Dutch law are included, but a broader definition applies. This means that self-employed workers can fall under the WAADI's scope as well. Furthermore, Article 3 WAADI stipulates that agencies are prohibited from receiving payment from jobseekers for the facilitation of employment.[49] The broad interpretation of "worker" under the WAADI is therefore in compliance with Article 1(2) of ILO Convention (no. 181).

Article 2 Convention 181 - Private Employment Agencies

Article 2 of the Convention furthermore allows for specific exceptions to the protective framework to be made with regard to individual branches of workers, provided that adequate protection is ensured nonetheless. The possibility offered by Article 2 has been adopted into Article 12 WAADI which stipulates that both the needs of workers as well as the needs of a balanced labour market may justify the enactment of special rules for specific branches of the private employment agency market. Article 12 furthermore allows for specific employment sectors to be subjected to a duty of operating with a publicly granted license. Considering that there are no major deviations from Article 2 of the Convention in the implementation, Article 12 WAADI is compliant with the Convention.

Article 3(2) Convention 181 - System of licensing or other appropriate regulation of Agencies

The Netherlands used a public system of licensing for temporary employment agencies until 1998. With the introduction of the WAADI, the Netherlands abolished the system arguing that it was not sufficiently effective in tackling malicious practices and laid down excessive administrative burdens.[50] In 2012, the Dutch government introduced the AMU (the Regulation

[49] E. Verhulp, "Platformwerkers verdienen meer! Over de toepasselijkheid van de WAADI op platformarbeid" Arbeidsrecht 2018/1 4.
[50] M. Tanja, 'Flexibele Arbeidsrelaties' (Deventer: Wolters Kluwer, 2021) 5.14.

of Malicious Agencies). The design of this program was self-regulatory and aimed to deal with the systematic violations of labour and fiscal laws committed by temporary employment agencies in the Netherlands. Self-regulation in this instance meant the private-based licensing approach to employment agencies. In a letter, two years later in 2014, the then incumbent Minister of Social Affairs and Employment re-evaluated the policy and reconsidered the possibility of a licensing system for agencies.[51] The Minister recognized that the self-regulatory model is unable to control the malicious ones.[52] In 2014, the Social Affairs and Employment Inspectorate (SAE Inspectorate) drew the conclusion that the approach taken in 2012 unambiguously indicated that the self-regulatory approach was insufficient as it did not effectively deter or cease malicious practices in the private employment agency sector.

The Minister concluded that the private employment agency sector would be provided with one more chance to self-regulate and if that were to be ineffective, a new approach would be adopted the following year.[53] In determining the effectiveness, it was considered that the private sector's quality mark (SNA) would have to ensure proper compliance with the CLA standards and increase the value of accreditation. Currently, in 2021, the system of self-regulation is still in place, even though it has been concluded over the past years on several occasions, by a variety of actors involved, that the goals set out by introducing this system have never been achieved.[54] The 'last chance' that was given to the system in 2014, thus turned out not to be an ultimatum after all. Although the WAADI provides for special regimes of licensing for certain branches within the labour market, the public licensing system is still lacking, which has contributed to the constant increase of employment agencies entering the market without being subjected to proper screening and without running the risk of being eliminated from the market through a withdrawal of their license.[55] For comparative purposes it is important to note that most EU member states have in fact abided by a public system of licensing for temporary working agencies.[56]

To conclude, the private SNA certification system is formally in compliance with the ILO Convention (no. 181). Nevertheless, it is clear that the system shows obvious flaws and is in need of change in order to tackle malicious agencies. With respect to the issue of governance and licensing, this report provides recommendations in Section 4.

Article 4 Convention 181 - Freedom of association and collective bargaining

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[51] *Kamerstukken II* 2013/14, 17050, nr. 473.
[52] *Kamerstukken II* 2013/14, 17050, nr. 473 1.1.
[53] Ibid.
[54] See for example: Aanjaagteam bescherming arbeidsmigranten, *Geen Tweederangs Burgers, aanbevelingen om misstanden bij arbeidsmigranten in Nederlands tegen te gaan* (2020).
[55] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016).
[56] Gijsbert van Liemt, "temporary employment agencies in the Netherlands, Spain and Sweden," Sectoral Activities Department, Sector Working Paper 290 (2013).

Article 4 of Convention 181 states that member states shall ensure that the right to freedom of association and collective bargaining for employees recruited by temporary agencies is safeguarded. Article 3(2) of the WAADI has implemented this into the Dutch legal system. To this end, Article 3(2) prohibits agencies from providing user companies where workers are on strike with replacement workers. Dutch law therefore complies with Article 4 of the Convention.

Article 5 Convention 181 - Equality of treatment

Article 5 of the Convention urges member states to ensure equal treatment of workers and to introduce non-discrimination obligations in national legislation. The more general obligation not to discriminate on the basis of nationality resting on employers is dealt with under the General Equal Treatment Act (Algemene Wet Gelijke Behandeling, AWGB).[57]
Dutch legislation has, apart from general non-discrimination law and equal treatment of workers, further implemented more specific legislation on the equal treatment of temporary agency workers.[58]

Equal pay (Art. 12(b), Art. 11(c)) and equal working conditions (Art. 12(c), Art.11(d))

Article 8 of the WAADI stipulates that temporary agency workers are to enjoy equal employment conditions to the workers who are directly employed by the relevant user company in the same or comparable positions. Per amendments introduced to Article 8(1) in 2012, the equal treatment obligation relates not only to equality of pay, but also to other rights and obligations derived from CLA agreements and other non-legislative rules, examples of which are working hours and vacation pay.[59] The totality of these supplementary equality obligations for employers are the implementation of Article 5(1) of the Directive on Temporary Agency Work (2008/104/EC). As per Article 8(4) WAADI, employers can deviate from these rules in accordance with the applicable CLA, but only temporarily, and labour contracts need to ensure that abuse through sequential short contractual periods is not possible (See section 2.1.1. revolving door arrangement). The non-discrimination obligations embedded in Article 8(3)(b) WAADI are equivalent to the non-discrimination obligations of Article 5 of the Convention. Therefore, Dutch law complies with Article 5 of the Convention.

Equality of pay and working conditions as defined in Article 8 WAADI are theoretically speaking a far-reaching right for temporary agency workers and imposes an important obligation on employers. The fact is however that the principle of Article 8 is not easily guaranteed. First of all because as per Article 8(4), the ABU-CLA prevails over the main rule in Article 8.[60] Secondly, Article 15(1) WAADI sets out that enforcement of non-compliance with articles other than Article 7a (registration duty), including Article 8, is dealt with at the public level solely by

[57] Equal Treatment Act 1994 (NL)
[58] Art. 1 Dutch Constitution; Equal Treatment Act 1994 (NL); Art. 3(3) WAADI.
[59] Evert Verhulp 'commentaar op art.8 Waadi' T&C Arbeidsrecht [...] OSCOLA?
[60] ABU-CLA for Temporary Agency Workers 2019–2021 Chapter 3 18-28. [...]

the deliverance of a report by the Inspectorate SZW which must be distributed to the worker, the employer and other relevant stakeholders. The possibility of criminal sanctions for violations other than Article 7a is not present, which means that a temporary agency worker who has been subjected to unequal treatment by his employer is forced to resort to private legal proceedings for a claim of specific performance or damages.[61] The Inspectorate SZW draws up reports which the worker can rely on in court proceedings to enforce compliance by the employer with the CLA.[62]

It is recognised that the private nature of enforcement of complaints in the private employment agency branch omits to achieve wholesome justice, especially for labour migrants who do not speak the language of their host country. Polish labour migrants are more unlikely to successfully complete court proceedings for a variety of reasons. In a premature stage, problems arise due to the lack of knowledge Polish workers possess regarding the competences, function and purpose of the Inspectorate SZW. Due to this confusion, complaints are often not lodged until workers have left their position, if they are lodged at all.[63] Another issue is the unfamiliarity of Polish workers with the Dutch language and legal system, which reduces their motivation to launch legal proceedings against the agencies for non-compliance with Chapter 3 provisions of the WAADI, such as those based on Article 8.[64]

The practical enforcement issues are burdensome for Polish migrant workers. Nevertheless, Dutch law is essentially in compliance with the protection of workers standards set out in Article 11 and Article 12 ILO.[65]

Considering the above, in a formal sense, the ILO Convention (no. 181) is implemented wholly in the Netherlands and the Dutch relevant legal provisions are compliant with the Convention.[66] Nevertheless, the ways in which these provisions have been implemented are not undisputed. The Netherlands, as opposed to most other countries around the world, uses a self-regulatory system governing temporary employment agencies.[67] The lack of a public licensing system is not a violation of the Convention, as Article 3(2) of the Convention accounted for the possibility of certification or other means of appropriate regulation in national law. In spite of the system's compliance with the Convention, Workers Unions The Netherlands Trade Union Confederation (FNV), the largest active trade union in the Netherlands, and The National Federation of

[61] Grapperhaus/Verhulp, in: T&C Arbeidsrecht 2012, art. 15 WAADI. [...] OSCOLA?
[62] Inspectorate SZW 'Cao-nalevingsonderzoeken van de Inspectie SZW dragen bij aan eerlijk werk', (*Inspectie SZW*) <https://www.inspectieszw.nl/publicaties/rapporten/2017/08/22/cao-nalevingsonderzoeken-van-de-inspectie-szw-dragen-bij-aan-eerlijk-werk> Accessed 24 June 2021.
[63] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 66.
[64] Ibid.
[65] F.C.A. van Haasteren, "Fatsoenlijke flexibiliteit : de invloed van ILO-conventie 181 en de regelgeving omtrent uitzendarbeid" leiden University repository (2012) 468-469.
[66] Ibid 466.
[67] Ibid 425-469; Note: On page 468-469 of this article, Table 9.6 gives a systematic account of each issue in ILO Convention 181 and the equivalent implementing Dutch legal provisions.

Christian Trade Unions (CNV) in the Netherlands have both withdrawn from the SNA-certification system in 2016. The assemblage of measures introduced in 2013 to combat malicious practices were not effective in the following years proving the reason for FNV's and CNV's departure from the SNA regulatory system.[68] The Unions established that malicious agencies received the SNA-certification in spite of their harmful practices. Considering that Dutch law is compliant with the Convention but that the protection of temporary agency workers is insufficient, it is concluded here that the ILO Convention (no. 181) is no longer able to serve as an effective benchmark for the protection of workers in the Netherlands.

2.3. EU Law

As emphasized in the introduction, this report focuses on the problem of the exploitation of Polish migrant workers who are employed through temporary employment agencies in the Netherlands. Accordingly, EU law is inevitably of high significance. Multiple EU Directives exist shaping Dutch law and strengthening international law regulating the subject matter in question. Even if EU directives, contrary to EU regulations, grant significant freedom for the Member States to choose the appropriate measures, those States are still obligated to "achieve the objectives set by the directive".[69] Additionally, "transposition into national law must take place by the deadline set when the directive is adopted (generally within two years)".[70] Thus, an analysis of EU law relating to migrant workers employed through temporary employment agencies in the Netherlands will introduce important contributions to the discussion devoted to the compliance of Dutch legislation with the relevant EU law.

2.3.1. Directive on Temporary Agency Work (2008/104/EC)

The first and most relevant directive applicable to, among others, Polish migrant workers in the Netherlands, is the Directive on Temporary Agency Work of 2008 (hereinafter 'TAW Directive').[71] This Directive "is a tool to lay down minimum protection and rights for TAWs, which is its social policy side; at the same time it couples the laid down 'flexicurity' principles and market regulation of the sector, which is its employment policy side".[72] It should also be noted that this Directive is a result of long negotiations and represents a compromise solution

[68] F.C.A. van Haasteren, "Fatsoenlijke flexibiliteit : de invloed van ILO-conventie 181 en de regelgeving omtrent uitzendarbeid" leiden University repository (2012) 442.
[69] EC, 'Types of EU law' <https://ec.europa.eu/info/law/law-making-process/types-eu-law_en> accessed 2 May 2021.
[70] Ibid.
[71] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L 327 (TAW Directive).
[72] Helen Frenzel, 'The Temporary Work Agency Directive' (2010) European Labour Law Journal 1,119,126. <https://journals.sagepub.com/doi/pdf/10.1177/201395251000100011 > accessed 31 May 2021. See also Article 2 of this Directive.

"between the principle of equal treatment of both temporary agency and user undertaking workers and the removal of prohibitions and restrictions on temporary agency work".[73]

In terms of the substantive provisions of the Directive, an important principle of equal treatment is included in Article 5(1). According to this provision, "the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, *at least those* that would apply if they had been *recruited directly* by that undertaking to occupy the same job (emphasis added)".[74] Thus, this principle requires the equal treatment of workers employed through temporary employment agencies to workers employed by the user undertaking on the basis of a normal employment contract. However, the principle of equal treatment applies only when *basic working and employment conditions* are at stake. According to Article 3(1)(f)(i-ii), those are: "(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; [and] (ii) pay"[75]. Therefore, one may observe that the TAW Directive does not apply to, among others, the right to parental leave, social security rights, and protection against dismissal.[76]

Furthermore, there are some relevant exemptions applicable to the general principle contained in Article 5(1). Firstly, according to Article 5(2) of the Directive, workers who have a *permanent* employment contract with the work agency may be excluded from the protective scope of this principle. Secondly, Article 5(3) of the TAW Directive establishes another exemption according to which collective labour agreements may establish rules that derogate from the principle of equal treatment regarding temporary agency workers. Importantly, this provision can be understood as either allowing for better working and employment conditions for temporary agency workers but also lower standards (meaning that workers employed directly through the user company would enjoy better basic working and employment conditions).[77]

Regarding the enforcement of the TAW Directive, Articles 9 and 10 are of special relevance. According to Article 9(1), the EU Member States are free to introduce legislation or to permit the conclusion of collective labour agreements that are more favourable to the workers concerned.[78] Furthermore, according to Article 9(2), while implementing the TAW Directive, the Member States also cannot use the Directive as a basis to justify "a reduction in the general level of protection of workers in the fields covered by this Directive".[79] Particularly important to the findings of this report, could be Article 10(1) of the Directive, in accordance with which,

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[73] Alessandra Sartori, 'Temporary Agency Work in Europe: Degree of Convergence Following Directive 2008/104/EU' (2016) 7 *European Labour Law Journal* 109, 111. <https://journals.sagepub.com/doi/pdf/10.1177/201395251600700106> accessed 31 May 2021.
[74] Article 5(1), TAW Directive.
[75] Ibid, Article 3(1)(f)(i-ii).
[76] Helen Frenzel, 'The Temporary Work Agency Directive' (2010) 1 European Labour Law Journal 119,127. <https://journals.sagepub.com/doi/pdf/10.1177/201395251000010011> accessed 31 May 2021.
[77] Ibid, 129.
[78] Article 9(1), TAW Directive.
[79] Article 9(2), TAW Directive.

the EU Member States are obliged to "provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings".[80] In the second part of this Article, it is added that the Member States shall, in particular, "ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced".[81]

To conclude, it can be argued that the TAW Directive offers a minimum floor of protection to temporary agency workers.[82] They are granted the right to 'basic working and employment conditions' which must be equal to the conditions enjoyed by the workers employed directly through the company, as discussed above. However, important issues, such as parental leave, social security rights, and protection against dismissal were not included in the definition of those 'basic working and employment conditions'. Besides that, EU Member States have a broad margin of appreciation when defining their own understanding of 'basic working and employment conditions'. Importantly, one might also argue that by allowing collective labour agreements to depart from the principle of equal treatment, one risks putting temporary agency workers at a significant disadvantage. This is the case in the Netherlands, where collective labour agreements are more lenient than actual legislation regarding termination of contract during the phase A of employment, as mentioned in section 2.2.2.

2.3.2. Implementation of the Directive on Temporary Agency Work

This section will further discuss how according to the Dutch government the Directive has been implemented. Parliamentary papers explain how each article of the directive has been implemented in Dutch law. Article 7:690 DCC's and the WAADI's definition of the temporary work agency contract is consistent with the definition given in the directive. This report will focus on the most important articles that offer protection to temporary workers. Articles 5, 6 and 7 of the TAW Directive will be discussed.

Article 5 of the Directive, regarding equal treatment, is said to be implemented in Article 8 of the WAADI. This is also where the implementation of the equal treatment principle of the ILO Convention (no. 181) is reflected, as mentioned in section 2.2.4. As discussed previously, Article 8 of the WAADI offers an equal treatment obligation regarding equal pay and all essential working conditions referred to in Article 5(1) of the Directive. According to Article 5(3), the directive allows member states to deviate from the requirement of equal treatment only if agreed upon through collective agreement and if the overall protection of the temporary agency workers is respected. Consequently, Article 8 of the WAADI offers an option to deviate from the

[80] Article 10(1), TAW Directive.
[81] Ibid.
[82] Helen Frenzel, 'The Temporary Work Agency Directive' (2010) 1 European Labour Law Journal 119, 126. <https://journals.sagepub.com/doi/pdf/10.1177/201395251000010011> accessed 31 May 2021.

stipulated equal treatment regulation through collective agreement. The conditions required by the Directive to do so, are stated in section 2.2.4. of the report.

Article 6 of the Temporary Agency Work Directive ensures access to employment, collective facilities and vocational training. Article 8c of the WAADI provides an obligation for the user companies to inform temporary workers of vacant posts; this is in compliance with paragraph 1 of Article 6 of the directive. Furthermore, Article 9a of the WAADI contains the prohibition (Article 6 par. 2 of the directive) of clauses that in any way prevent an employment contract between the user company and the temporary worker. Finally, Article 8a and 8b of the WAADI ensure equal access to amenities provided by the user company.[83]

Article 7 of the Directive concerning the representation of temporary agency workers is provided for in Article 3 third paragraph, part b of the Works Councils Act. Temporary workers must be included by the temporary employment agencies when determining the number of employees for the mandatory establishment of a works council or a staff representation. Persons who have been in service for more than six months have the right to vote and those who have been in service for more than a year can stand for election. This also applies to temporary workers. If a temporary worker works for more than 24 months at the same user company, he will also receive co-determination rights in the user company.

These are the important articles that need implementation in order to protect temporary workers when working in the Netherlands. In light of the aforementioned, the Netherlands has succeeded in legally implementing the relevant substantive articles of the TAW Directive in Dutch legislation and is therefore legally compliant with the Directive. However, as will be discussed later in the report, the level of non-compliance with specific regulations in place by the Dutch temporary employment agencies is significant. Therefore, one might be prompted to argue that the Netherlands is in breach of Article 10(1) of the TAW Directive, according to which, "Member States shall provide for appropriate measures in the event of non-compliance with this Directive by temporary-work agencies or user undertakings".[84] Nevertheless, as will be explained below, the non-compliance with Article 10 of the TAW Directive could not be established in this report because the five focus areas under consideration are largely not covered by the TAW Directive.

[83] *Kamerstukken* II 2010/11, 32895, nr. 3, (MvT)
[84] Article 10(1), TAW Directive.

2.3.3. Posted Workers directives

Revised Posted Workers Directive 2018/957/EU amending Posted Workers Directive 96/71/EC

Both the Posted Workers Directive of 1996[85] and the Revised Posted Workers Directive of 2018[86] apply in situations of *posting* of workers. Situations of this kind occur mostly when “a worker, employed by an employer established in a Member State of the Community (...) and under a contract which is most probably regulated by the law of that home State, is seconded for temporary work to another Member State of the Community (the “host State”)”.[87] According to Article 1(3)(c) of the 1966 Directive, posting of workers by temporary employment agencies to work in a Member State, constitutes one of the three types of posting to which the Directives apply. The two Posted Workers Directives are relevant to the subject matter under consideration because in practice, Polish migrant workers employed by temporary employment agencies in the Netherlands, are often treated as posted workers to which the Directives apply, despite the fact that they are legally classified as temporary agency workers.[88]

Regarding the substantive scope of the Posted Workers Directives, the fundamental principle is included in Article 3 of the 1996 Directive, as amended by the Revised 2018 Directive. According to the old provision, only some hard-core (minimum) labour law standards of the host State were applicable to the posted workers. Those standards included, among others, maximum work periods and minimum rest periods; minimum paid annual holidays; *minimum* rates of pay, health, safety and hygiene at work.[89] Nevertheless, this rule was amended by the Revised Directive and there is no longer any reference to minimum conditions, but a provision granting equal treatment to posted workers regarding those issues.[90] However, according to Article 3(7) of the 1996 Directive, this rule applies only to the extent that the rules applicable to the posted workers are more favourable in the host state than those in force in the home state of a posted worker. In most cases, however, Dutch regulations will be more favourable to Polish posted workers than the relevant Polish law.[91]

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[85] 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 (1996 Directive).
[86] Directive (EU) 2018/957 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 (Revised 2018 Directive).
[87] Paul Davies, 'Posted Workers: Single Market Or Protection of National Labour Law Systems?' (1997) 34 Common Market Law Review 571, 571.
<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/34.3/138714> accessed 31 May 2021.
[88] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 14 and 42.
[89] Article 3, 1996 Directive.
[90] Article 1(2), Revised 2018 Directive.
[91] For instance, the minimum wage in the Netherlands is much higher than the one applicable in Poland - EUR 1,701.00 in the Netherlands compared to EUR 614,1.00 in Poland. In a majority of cases, the workers would be entitled to a higher remuneration under the Dutch law than under the Polish law. As a result, the Dutch rules would be more favourable to them.
See: For the Netherlands: <https://www.government.nl/topics/minimum-wage/amount-of-the-minimum-wage>
For Poland: <https://countryeconomy.com/national-minimum-wage/poland>

In terms of the relevance of the two Posted Workers Directives for the issue at hand, one might be inclined to argue that the two Posted Workers Directives are not important in this regard, because Polish migrant workers have been employed in the Netherlands to work in that country. Nonetheless, this line of reasoning, even if probably correct from a theoretical point of view, is not reflected in practice.[92] In fact, often situations occur where Polish migrant workers were employed in Poland through some branches of temporary Dutch agencies and then were posted to work in the Netherlands. As a result, even if they work in the Netherlands under the direct supervision of Dutch temporary employment agencies, they are treated as posted workers in the meaning of Article 1(3)(c) of the 1996 Directive.[93] In consequence, those workers have less rights than migrant workers who are not qualified as posted workers, but as migrants who use their right to free movement of workers within the EU (Article 45 TFEU).

Posted Workers Enforcement Directive (2014/67/EU)

The Posted Workers Enforcement Directive of 2014 ('Enforcement Directive')[94] "aims to improve the implementation and enforcement of Directive 96/71/EC".[95] Thus, it mostly regulates "issues such as abuse and circumvention of posting rules, joint liability in subcontracting chains and sharing of information between EU countries".[96] To achieve those goals, the Enforcement Directive "imposes measures to prevent any circumvention or abuse of the rules, as well as the obligation to establish proportionate and effective sanctions".[97] The Directive also strengthens the protection of posted workers' rights and reduces barriers to the free provision of services.[98]

In terms of the substance, Article 4 of this Directive is devoted to the issues of 'identification of a genuine posting and prevention of abuse and circumvention'.[99] Regarding the identification of cases involving a genuine posting, this article provides "for factual elements (...) that are

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[92] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 14 and 42.
[93] Ibid, 43.
[94] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159 (Enforcement Directive).
[95] 'Directive 1996/71 - Posting of workers in the framework of the provision of services' (*Parlamentaire Monitor*) <https://www.parlementairemonitor.nl/9353000/1/j4nvk6yhcbpeywk_j9tvgajcor7dxyk_j9vvij5epmj1ey0/vitgbghz9oyd>, accessed 31 May 2021.
[96] Ibid.
[97] Cinzia Peraro, 'The Enforcement of Posted Workers' Rights Across the European Union' (2017) 2 Freedom, Security and Justice: European Legal Studies 114, 117-118. <http://elea.unisa.it/bitstream/handle/10556/2511/FSJ.2017.II_PERARO.7DEF.pdf?sequence=1&isAllowed=y> accessed 31 May 2021.
[98] Ibid, 118.
[99] Article 4, 2014/67/EU Directive.

considered indicative and non-exhaustive and do not need to be satisfied in every posting case".[100]

Furthermore, Article 5 of the Enforcement Directive aims to improve access to information and obligates EU Member States "to make available and free of charge any information on the terms and conditions of employment and on collective agreements applicable to posted workers via a single official national website".[101]

Other Articles of the Enforcement Directive mostly regulate the issues of administrative cooperation between relevant authorities of EU Member States (Articles 6-8), monitoring compliance (Articles 9-10), as well as enforcement (Articles 11-12). Additionally, the Directive provides that "administrative penalties and fines imposed on service providers for failure to respect the applicable rules in one EU country can be enforced and recovered in another".[102]

Whether the Netherlands has properly implemented these three EU directives concerning the posting of workers is not of a direct concern for the report because those directives are not, as of principle, applicable to temporary agency migrant workers. Important is to illustrate that if indeed agencies are unlawfully treating temporary agency workers as posted workers, they will be functioning along a wrong set of guidelines. In order to prevent this there must be improved registration of temporary agency workers as recommended by a report issued by the Dutch Ministry of Social Affairs and Employment concerning the problematic situation regarding migrant temporary agency workers.[103] If done so, visibility of the situation will improve and therefore proper enforcement will be realised.[104]

2.3.4. Coordination of Social Security at EU level

For the field of social security "the EU provides common rules to protect social security rights of European citizens when moving within Europe".[105] "Modernised coordination" of social security systems at the EU level consists of Regulation (EC) No 883/2004[106] and the

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[100] Cinzia Peraro, 'The Enforcement of Posted Workers' Rights Across the European Union' (2017) 2 Freedom, Security and Justice: European Legal Studies 114, 118. <http://elea.unisa.it/bitstream/handle/10556/2511/FSJ.2017.II_PERARO.7DEF.pdf?sequence=1&isAllowed=y> accessed 31 May 2021.
[101] 'Stepping up the enforcement of EU legislation on the posting of workers' (EUR-lex, 13 October 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ac10508> accessed 31 May 2021.
[102] Ibid.
[103] Geen tweederangs burgers, 2020.
[104] More about registration can be found in section 3.4. and 4.4.
[105] Milan Remac, 'Coordination of social security systems: Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' (2017) EP Briefing Implementation Appraisal, 2. <https://www.eerstekamer.nl/eu/documenteu/pe_593783_briefing_implementation/f=/vkbjiyktanuq.pdf> accessed 20 May 2021.
[106] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] (Regulation 883/2004).

Implementing Regulation 987/2009[107]. However, those two Regulations do not establish a single European social security system. In accordance with Article 4 (2)(b) TFEU and Article 151 TFEU, the competence regarding issues pertaining to social security is a shared one and therefore regulated at individual level of Member States.[108] As a result, different national social security systems exist and Member States make their own decisions concerning the key aspects of their national policies.[109] Nevertheless, even if Member States remain free to have their own social security policies in place, "the coordination regulation determines under which country's system an EU citizen is insured where two or more countries are involved".[110] The main rule here is that the law of the country of employment is the applicable law.[111] Moreover, for the sake of the discussion below, a 'competent Member State' or a 'competent institution', within the meaning of Regulation 883/2004, in most cases is the institution in a Member State "with which the person concerned is insured at the time of the application for benefit".[112]

Regulation 883/2004 "lays down the rules protecting social security rights of European citizens, and occasionally also the rights of third persons, when moving within Europe".[113] This Regulation is very broad in scope and covers different social security benefits, including, healthcare benefits in kind, benefits related to work accidents, as also unemployment benefits.[114] Notably, the Regulation, according to Article 2(1), applies to "nationals of a Member State (...) who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors".[115] Furthermore, according to Article 11(1)(a) of the Regulation 883/2004, "a person can be covered by social security in only one Member State" (the principle of exclusiveness).[116] Usually, as already emphasized above, it will be the state where the person is employed, in line with the *lex loci laboris* principle.[117] However, there

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[107] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284 (Implementing Regulation).; Note: Regulation 883/2004 was amended by Regulation 988/2009.
[108] Milan Remac, 'Coordination of social security systems: Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' (2017) EP Briefing Implementation Appraisal, 2. <https://www.eerstekamer.nl/eu/documenteu/pe_593783_briefing_implementation/f=/vkbjiyktanuq.pdf> accessed 20 May 2021.
[109] Ibid.
[110] Aoife Kennedy, Zahra Boudalaoui-Buresi, 'Social Security Cover in Other Member States' (2021) Fact Sheets on the European Union, 1. <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.3.4.pdf> accessed 31 May 2021.
[111] Ibid.
[112] Article 1(q)(i), Regulation 883/2004
[113] Milan Remac, 'Coordination of social security systems: Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' (2017) EP Briefing Implementation Appraisal, 2.
[114] Ibid. See also Article 3(1) of the Regulation 883/2004.
[115] Article 2(1), Regulation 883/2004.
[116] Ger Essers, Katrin Distler, 'Guide for Mobile European Workers' (2011) European Trade Union Confederation, at 16.
[117] Ibid.

are certain exceptions to this general rule as is the case for instance with posted workers to whom the social security laws of the country of origin of posting apply.[118]

Regarding substantive provisions, Regulation 883/2004 establishes several general principles to govern social security systems within the EU. Firstly, Article 4 of the Regulation, lays down the principle of equality of treatment (or the principle of non-discrimination). Furthermore, Article 5 establishes the principle of equal treatment that applies specifically to benefits, income, facts or events. According to that provision, the benefits and income received in one Member State as also facts and events that occurred in that Member State, should have the same legal effect in another Member State.[119] Moreover, according to Article 6 "periods of insurance, employment, including self-employment or residence built up in one of the Member States, should be recognized and taken into account when calculating benefits and entitlements in another Member State" (the principle of aggregation of periods).[120] Finally, the principle of exportability is included in Article 7 of the Regulation and states that beneficiaries can "'export and receive their cash benefits in any other Member State".[121]

There are many different provisions that govern different social security benefits. However, of importance for this report are the provisions applicable to healthcare benefits in kind, unemployment benefits, as also the sickness benefits/sick pay. In this regard, rules that might be of relevance to Polish temporary migrant (and posted) workers in the Netherlands, are laid down in Articles 11-12 and Articles 17-35 of the Regulation 883/2004 as also Articles 22-32 of the Implementing Regulation 987/2009.

Healthcare benefits in kind

The provisions that regulate healthcare benefits in kind "are based on the notion that insured persons and their family members are to receive health insurance benefits (...) regardless of their circumstances and where they reside".[122] Under the Regulation 833/2004, 'benefits in kind' are understood as benefits "provided for under the legislation of a Member State which are intended to supply, make available, pay directly or reimburse the cost of medical care and products and services ancillary to that care", including long-term care benefits.[123] Those healthcare benefits in kind apply in the Member State of residence even if it is not a Member State where the persons

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[118] Ibid.
[119] Milan Remac, 'Coordination of social security systems: Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' (2017) EP Briefing Implementation Appraisal, 3.
[120] Ibid.
[121] Ibid.
[122] ILO, 'Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009' (2010), 15. <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_166995.pdf > accessed 27 May 2021.
[123] Art. 1(va)(i), Regulation 883/2004.

(workers) are insured.[124] Furthermore, in accordance with Article 19 of the Regulation, healthcare benefits in kind should also be provided to insured persons who stay (not reside) in a Member State where they are not insured.[125] Nevertheless, this provision can only be applied to "the benefits in kind which become necessary on medical grounds" during the period of the stay in a Member State that is not a competent Member State.[126]

Therefore, Polish migrant workers who reside and are insured in the Netherlands receive the healthcare benefits in kind in accordance with the Dutch law (Article 11(3)(a) of the Regulation). The provisions concerning healthcare benefits in kind discussed above are especially relevant to Polish posted workers who work in the Netherlands but are insured in Poland. They are also relevant to migrant workers who, in breach of the Dutch law, work without an employment contract in the Netherlands and are not insured in the Netherlands but in Poland. Moreover, those provisions are also of importance to temporary Polish migrant frontier workers who live, for instance, in Belgium or Germany but work in the Netherlands.[127]

Unemployment benefits

The issue of unemployment benefits is regulated under Articles 61-65 of the Regulation 833/2004 and Articles 54-57 of the Implementing Regulation. Firstly, in accordance with Article 61 of the Regulation 883/2004, the periods relevant for unemployment benefits are aggregable. Furthermore, in accordance with Article 62 of the Regulation, "the amount of benefits is based on the salary or professional income received during the person's last activity in the Member State providing the benefit".[128] Finally, per Article 64(1)(a) of the Regulation, it is possible to transfer the unemployment benefit to another Member State in order to search for work in that second Member State if, i.a. "the person is registered as an unemployed person in the competent State for at least four weeks (the length of time may be reduced at the discretion of the State institution)".[129] This means that migrant workers who are unemployed in a Member State where they worked, can transfer their unemployment benefit to a different Member State, if at least four weeks have passed since the registration of the unemployment. However, some discretion is given to relevant authorities of Member States who can shorten this waiting period.[130]

[124] Article 17, Regulation 883/2004.
[125] Article 19(1), Regulation 883/2004.
[126] Ibid.
[127] 'Frequently asked questions - Sickness, maternity and paternity' (EC Europa) <https://ec.europa.eu/social/main.jsp?catId=857&langId=en&intPageId=974> accessed 31 May 2021.
[128] ILO, 'Coordination of Social Security Systems in the European Union: An explanatory report on EC Regulation No 883/2004 and its Implementing Regulation No 987/2009' (2010), 27. <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_166995.pdf > accessed 27 May 2021.
[129] Ibid. Note: Besides the four-weeks period of registration as an unemployed in the competent Member State, the person would also have to register as an unemployed in the Member State to which she goes to search for work. (Article 64(1)(b) of the Regulation 883/2004)
[130] Article 64(1)(a), Regulation 883/2004.

Sick pay / Sickness benefit

In general terms, sick pay is understood as "the continued, time limited, payment of (part of) the worker's salary by the employer during a period of sickness".[131] Sickness benefits, being different from the sick pay, are usually paid by the social security schemes in the form of "a fixed rate of previous earnings or a flat-rate amount".[132] Furthermore, as already discussed above, social security benefits are not harmonized but only coordinated at the EU level. Thus, in accordance with Article 11(3)(a) of the Regulation 883/2004, Polish temporary migrant workers are subject to the law of the Netherlands while working in that country.[133] This means that regarding sick pay and sickness benefits, "a national mix of labour law, collective agreements and social protection regulation" of the Netherlands applies.[134] No substantive protections concerning the eligibility for and amount of sick pay/sickness benefits can be found under EU law.

Contrary to Article 11(3)(a) that applies to migrant workers and mandates the application of the Dutch social security law, in accordance with Article 12(1) of the Regulation 883/2004, posted workers "are sent on temporary assignment and remain insured for social security in their home Member State for a maximum duration of 24 months".[135] As discussed above, it is a common practice that Polish migrant workers are often treated as posted workers to whom lower protections apply. Thus, Polish posted workers are not insured in the Netherlands and Polish social security law applies to them during their stay in the host country. For instance, in order to receive the healthcare benefits in kind, discussed above, Polish posted workers would first have to apply for the European Health Insurance Card.[136] Posted workers would also not be eligible for the sickness benefits in the host country. Polish social security law applies to posted workers, therefore they would have to apply for sickness benefits in Poland. Taking into consideration the comparison between minimum wages in Poland and the Netherlands, this would be disadvantageous to Polish posted workers.[137]

[131] Slavina Spasova, Denis Bouget and Bart Vanhercke, 'Sick pay and sickness benefit schemes in the European Union: Background report for the Social Protection Committee's In-Depth review on sickness benefits' (2016) European Social Policy Network (ESPN) - European Commission, 8.
[132] Ibid.
[133] See also: Ger Essers, Katrin Distler, 'Guide for Mobile European Workers' (2011) European Trade Union Confederation, 64.
[134] Slavina Spasova, Denis Bouget and Bart Vanhercke, 'Sick pay and sickness benefit schemes in the European Union: Background report for the Social Protection Committee's In-Depth review on sickness benefits' (2016) European Social Policy Network (ESPN) - European Commission, 8.
[135] Milan Remac, 'Coordination of social security systems: Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004' (2017) EP Briefing Implementation Appraisal, 3.
[136] Ger Essers, Katrin Distler, 'Guide for Mobile European Workers' (2011) European Trade Union Confederation, 57.
[137] Sickness benefits are dependent upon wages of the workers - the minimum wage in the Netherlands is much higher than the one applicable in Poland - EUR 1,701.00 in the Netherlands compared to EUR 614,1.00 in Poland.
See: For the Netherlands: <https://www.government.nl/topics/minimum-wage/amount-of-the-minimum-wage>
For Polnd: <https://countryeconomy.com/national-minimum-wage/poland>

Conclusion

To conclude, on the one hand, the two EU Regulations under consideration to some extent benefit Polish migrant workers in the Netherlands. They establish ground rules upon which the different national systems of social security must be based within the EU. As a result, for instance, the principle of non-discrimination or the principle of exportability can be relied on by Polish migrant workers to claim their social security benefits within the Netherlands. Therefore, even if no full harmonization is intended to be achieved, migrant workers are entitled to multiple arrangements that favour their mobility. Nevertheless, at an EU level there are no substantive provisions that could offer a higher level of protection to Polish temporary migrant workers in the Netherlands. The Dutch law on social security applies and non-compliance with EU law in this regard is difficult to establish.

3. FOCUS ISSUES

3.1. Zero-hour contracts

The first issue that was brought to our attention was the fact that many Polish workers are being recruited abroad and employed through zero-hour contracts.[138] Zero-hour contracts are flexible labour agreements that qualify as on-call agreements. An agreement qualifies as an on-call agreement when there is no number of working hours specified in the agreement and the obligation to pay wages as stated in Article 7:628 paragraph 1 DCC is excluded. Therefore, all phase A temporary work agency contracts are on-call agreements.[139]

These agreements do not give the workers any guarantee that work will be provided for them once they arrive in the Netherlands. Zero-hour contracts are common within the Netherlands, and they are an example of the growing flexibility within labour relationships.[140] However, due to the unique flexibility of labour relationships in the Netherlands, Polish workers are unaware and inexperienced with such relationships. This amount of flexibility is not common in other countries and therefore Polish workers do not expect these types of employment contracts. When workers are recruited in Poland, they are often ill- or misinformed about the number of hours they will work and about the flexibility of their contract. Therefore, they are faced with less hours than expected.[141] The flexible labour relationship allows agencies and user companies to demand unconditional flexibility from workers. To slightly remedy this the newly implemented Balanced Labour Market Act states that temporary workers may refuse a shift if they have not been informed about the shift at least four days prior to the shift, and in case the agency cancels

[138] Geen tweederangs burgers 2020.
[139] 'Oproepovereenkomst volgens de Wab'
< https://www.abu.nl/kennisbank/wab/oproepovereenkomst-volgens-de-wab/ > Accessed 30 May 2021.
[140]Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 20.
[141] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 20.

a shift within four days prior a worker is entitled to the expected wage.[142] This can be shortened to 24 hours prior through the collective labour agreement. However, some workers only know of a shift as late as the evening before, but they are unlikely to refuse it due to the uncertainty of work and the extent to which they are dependent on their employment agreement, fearing dismissal.

Furthermore, as soon as a temporary worker may enter a higher phase (as discussed in par. 2.2.2.), which offers more security and better wages, the agencies often dismisses the temporary worker and discusses rehiring them after a certain amount of time to prevent them from entering phase B. During this time, they must live off of unemployment benefits. This is just one of the tactics used to prevent temporary workers from entering phase B. In relation to this, agencies often include an agency clause in the contract that results in the end of the contract by operation of law when a temporary worker has worked 78 weeks, so as to prevent the start of phase B. By doing so the agencies and user companies ensure that the workers stay in a lower phase (usually phase A) which prevents them from obtaining more rights and leaves them in the unsecure labour relationship.[143]

Due to the flexibility of the zero-hour contracts, temporary agency workers end up in a weaker position as opposed to having an open-ended agreement. As aforementioned, temporary agency workers are highly dependent on their agency for i.a. housing, transportation and insurance, due to package deals offered when concluding an employment agreement. The costs for the services are deducted from their hourly wage. The zero-hour contract may result in less worked hours than a temporary worker may desire. This results in less paid hours, but continuous deductions for other services causing increasing debts with their employer.[144] However, the deductions for rent are limited to 25% of the statutory minimum hourly wage.[145] These deductions will be thoroughly discussed in section 3.3. Furthermore, due to the dependency of the workers on the employment contract and the uncertainty of their situation (due to the zero-hour contracts with an agency clause which result in dismissal in case of illness), workers feel pressured to continue working when they are sick or are uncomfortable complaining about their housing- or work circumstances in fear of dismissal.

Dutch law offers some remedies for the uncertainty arising from the on-call zero-hour contract. Article 7:628a(5) states that in case of an on-call agreement the employer is obligated to offer the employer a permanent labour agreement after 12 months of employment. Based on the hours worked in the preceding 12 months, the contract will offer the number of hours accordingly. The employee is not obligated to accept this offer. This article also applies to temporary agency workers, but does not really help them as long as it is possible to exclude the obligation to pay

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[142] Wet Arbeidsmarkt in Balans; art. 7:628a sub 3 DCC.

[143] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) p 20

[144] Geen tweederangs burgers 2020, 28.

[145] Geen tweedrangs burgers 2020, 13.

wages when there is no work. The agency worker would then be able to claim a certain number of hours after a year's work, but the agency is not obliged to pay him when there is no work. Furthermore, if workers are promised an amount of hours in their home country, before being employed, they are able to claim these hours in a court of law. However, this is difficult due to the language barrier and lack of knowledge on what legal remedies Polish workers have when they experience injustices. Besides the previous mentioned obstacles, proving such oral agreements is very difficult.

Dutch law therefore does not offer sufficient remedies for the problems that arise due to the zero-hour contracts. European Union law and the ILO, also do not seem to offer a restriction to these types of labour agreements. The Directive for Temporary Agency Work does not offer an article that could obligate the Netherlands to implement different statutes concerning temporary agency workers. The Dutch law discussed above is applicable to both Dutch and migrant workers, and therefore does not present a problem regarding the equal treatment obligation. However, Article 11 of the Private Employment Agency Convention, 1997 (No. 181) stipulates the state's obligation to adequately protect temporary agency workers in regards to working time and working conditions. As aforementioned international treaties are directly binding upon natural and legal persons, therefore temporary agency workers could appeal to this provision in the Dutch national court. It may be possible to argue that the Netherlands has not sufficiently protected temporary agency workers in regards to working hours and conditions.

It is clear that this problem has not gone unnoticed by relevant institutions such as the Social and Economic Council of the Netherlands (Sociaal-Economische Raad; hereinafter SER). Not only migrant workers but also Dutch citizens have experienced the negative consequences of working under a zero-hour contract. Recently a 'social agreement' (flexakoord) was drafted where social partners state that they no longer wish to use zero-hour contracts. The agreement proposes that employers must provide the certainty of a number of fixed hours, but are allowed to fill them in flexibly. The agreement is part of a recommendation drafted by the SER and has been approved by the Dutch Trade Union Confederation. Furthermore, the recommendation explicitly mentions better working conditions for temporary agency workers. Improvements such as higher wages, a maximum employment of three years for temporary agency work and the period in which an agency clause is permitted is to be shortened to twelve months. It also proposes that temporary agency work needs to be limited to seasonal work and as replacements for sick employees.[146] The recommendation will be considered by the new government, however it is uncertain how many of the recommendations will be adopted.[147]

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[146] 'Nieuw akkoord van vakbeweging en werkgevers moet flexwerk beperken' <https://www.volkskrant.nl/nieuws-achtergrond/nieuw-akkoord-van-vakbeweging-en-werkgevers-moet-flexwerk-beperken~b922824e/> (accessed 22 June 2021).

[147] 'Bonden en werkgevers: geen nulurencontracten meer, doorbetaald tijdelijk verlof werknemers' <https://nos.nl/artikel/2383283-bonden-en-werkgevers-geen-nulurencontracten-meer-doorbetaald-tijdelijk-verlof-werknemers> .

3.2. Return Costs

Polish labour migrants come to the Netherlands in search of better work opportunities with higher wages than similar jobs in Poland could provide for them. According to Eurostat, the average hourly labour wage in Europe was €28.5 by 2020. In comparison, the Netherlands scores more than €35 in 2020, one of the highest hourly labour wages in Europe, whereas Polish hourly labour wage barely rises above €10.[148] Upon arrival in the Netherlands, workers usually do not have a sufficient amount of money to rent an apartment or apply for insurance. Consequently, temporary employment agencies recruit their workers in their home countries and offer them with a 'package' of services which include work, transportation to the Netherlands, health insurance and housing. Considering that the majority of Polish migrants are employed via private agencies while still residing in Poland, such 'all-inclusive' opportunities are welcomed by the workers.[149] However, this dependency on agencies can lead to a variety of exploitative abuses. The magnitude of the dependency on the agency is often intensified by the fact that Polish workers often do not have the financial means to return back home and no means to do so are offered by the employer.[150]

With minimum wage and housing provided by the agency, Polish workers may find themselves in degrading conditions. Employers often ask workers to work overtime which is often not being paid for.[151] It has been found that Eastern Europeans often accept long working days amounting to 60-70 working hours a week.[152] Considering the circumstances, workers occasionally plan to come back to their home countries. However, the choice to come back home is very difficult due to the lack of appropriate funds. Employers in the Netherlands are not obligated by any law to compensate for possible travel costs back to the country of origin, unless stated differently in the contract.[153] According to the ABU-CLA:

> *'The private employment agency will provide information on travel from and to the country of origin. The private employment agency may offer to take care of travel arrangements. The temporary agency worker is not under any obligation to accept these travel arrangements'.*[154]

In other words, temporary employment agencies are to provide information regarding the possibility of travel reimbursement. However, Article 36(7) does not obligate agencies to

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[148] Eurostat, 'Wages and labour costs' (2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Wages_and_labour_costs#Labour_cost_components> accessed 30 April 2021.
[149] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 28.
[150] CLA Article 36(7) / Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 28.
[151] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 20.
[152] Marije Braakman, Saskia van Bon, Gregor Walz and Igor Boog, 'Severe forms of Labour Exploitation Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States' (2014) Social Fieldwork Research (FRANET), 27.
[153] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 34.
[154] CLA Article 36(7).

provide for such travel arrangements neither does the Private Employment Agencies Convention nor Directive 2008/104, or the Posted Workers Directives. Considering the above, upon leaving the agency due to, for instance, the expiration of their contract via an agency clause, workers are left with no housing, insurance or means to come back home. Coming back to Poland, therefore, becomes difficult considering the high prices of transportation. These and other circumstances could be linked to the growing number of homeless people in the Netherlands. The report by OECD indicates an increase by 28% of the homeless population between 2010-2016.[155] Even looking for help becomes problematic due to the language barrier. It has been reported that almost all organisations based in the Netherlands face problems when communicating with Eastern European residents.[156]

If the above is not properly addressed, the issue could become a human rights problem as being unable to come back home forces people to work to ensure housing, as is the case of housing being dependent on employment with the agency. For instance, Articles 4 and 8 of the European Convention on Human Rights (hereinafter the ECHR) could be relevant in these situations. The former not only calls for states to refrain from anything that could amount to forced or compulsory labour but it also imposes a substantive obligation on states to ensure that no private actors use anything prohibited under the Article to any individual within the jurisdiction of that member state.[157] Moreover, in case of violation, states also bear procedural obligations to engage in the effective investigation of allegations of abuse.[158] Therefore, considering that the Netherlands is a party to the ECHR, the issue of forced labour of Polish migrants, due to the lack of alternatives such as returning home, if not properly investigated by the Netherlands, could be argued as a violation of Article 4. Article 8, concerns the right to respect for private and family life. It is one of the most open-ended rights within the ECHR and can be interpreted so as to work in favour of migrant workers, especially if they are deprived of means to come back to their home countries and reunite with their families.[159] There have been a number of cases regarding family reunification and preservation that possible applicants could rely on to make their cases and argue that the issue described above stops them from reunifying with their families back home. Although the Court usually considers them in the context of associated circumstances, if properly argued, workers could see the right being extended to their problem associated with travel costs.[160]

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[155] OECD, 'Homelessness Population' (2020) < https://www.oecd.org/els/family/HC3-1-Homeless-population.pdf> accessed 30 April 2021, 7.
[156] Marije Braakman, Saskia van Bon, Gregor Walz and Igor Boog (n141), 20.
[157] Siliadin v France App no 73316/01 (ECtHR, 26 July 2005) para 82
[158] Council of Europe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights' (2007), 32 / Kaya v Turkey App no 22535/93 (ECtHR, 28 March 2000)
[159] Ibid, 43.
[160] Council of Europe, 'Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights' (2007), 32 / Kaya v Turkey App no 22535/93 (ECtHR, 28 March 2000), 44.

The incompatibility with the Convention rights could urge the government to regulate the issue of no reimbursement for travel costs. Consequently, providing appropriate legal remedies to tackle the problem. Especially, considering the monistic approach of the government to international law and high record of compliance with the Court's case law.[161] However, it is important to remember that the European Court of Human Rights (hereinafter ECtHR) would be difficult to use because in order to use the Convention's protection system, one must exhaust domestic remedies or be able to prove that there are no such remedies.[162] In other words, a potential Polish migrant would have to go to the domestic court first in order to ever argue before the ECtHR. This is almost impossible, for example, for an employee who is made redundant in phase A because he did not want to work overtime or because he became ill.

3.3. Account settlement and wage deductions

Account Settlement and Wage Deductions

Another problem identified in this report concerns the issue of settling accounts between temporary employment agencies and migrant workers once employment contracts are terminated. 'Account settlement' refers primarily to the payment of all of the due money to migrant workers, including an expected salary and any sums held in reserve by temporary employment agencies, for instance, a holiday allowance.

Current practice shows that migrant workers find themselves in a difficult position when they want to receive those payments swiftly after contract termination.[163] A reason for this can be found in Article 7:623 para 1 DCC and in Article 29(2) ABU-CLA. According to the latter provision:

> *When the agency work employment contract with agency clause ends and no new agency work employment contract is entered into, any unused reserves for holiday leave, public holidays, short-term absence / special leave, and the holiday allowance will be paid out in the next pay period. This also goes for the accrued compensation hours.* (…)[164]

Thus, the general rule is that after contract termination, the expected sums will be paid out only in 'the next pay period'. Therefore, migrant workers need to wait, sometimes for one month, until they receive the money owed to them by temporary employment agencies. Even if this rule does not seem to be overly problematic for regular workers in the Netherlands, it might cause specific problems to Polish migrant workers who would like to settle their accounts before their return to Poland, for instance, to cover the return costs.

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[161] Erik Larson, Wibo van Rossum, Patrick Schmidt 'The Dutch Confession: Compliance, Leadership and National Identity in the Human Rights Order' (2014) 10/1 Utrecht Law Review 96, 112
[162] ECHR, Article 35
[163] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 71.
[164] Article 29(2), ABU CLA.

'Package deals' are commonly used in the Netherlands.[165] Polish migrant workers, who lose jobs at short notice, are often left without housing and insurance. These workers are left in position where they urgently need money to meet their basic needs, find a new job or return to their country of origin. If accounts were settled simultaneously with the time of contract termination, the situation of migrant workers in the Netherlands could be improved. Nevertheless, it does not seem that this renders non-compliance with the relevant international and EU law. It is primarily because neither the ILO Convention (no. 181) nor the TAW Directive order an immediate account settlement after contract termination. Regarding the ILO Convention (no. 181), according to Article 11(c), Contracting States should only provide for the compliance of temporary employment agencies with the rules regarding 'minimum wages'. There is no requirement that those wages (and other allowances) should be paid to the worker immediately at the time of contract termination. Furthermore, the situation is similar concerning EU law. Notably, the TAW Directive establishes the principle of equal treatment with regard to pay, but it does not present any specific conditions concerning the settlement of accounts.[166] The same applies to the two Posted Workers Directives discussed above.

Therefore, it is suggested that Dutch law is not in breach of relevant international or EU law. Based on the principle of equal treatment, as included in the TAW Directive, it might be argued that it is compliant with EU law, which requires the equal treatment of migrant workers employed through temporary employment agencies to the workers who are employed directly by the user company. The rule applicable to both types of those workers is the same - according to Article 7:623(1) DCC, both of them would receive the due remuneration in the next payment round. Under Dutch law, there is no faster option available to any other category of workers. Therefore, it is concluded that the problem concerning the account settlement and payment of due wages, is more of a policy issue rather than one of legal non-compliance. Furthermore, the real causes of these issues are both 'package deals' and the weak protection of temporary agency workers under the Dutch labour law. If temporary Polish migrant workers had an appropriate notice period enshrined in their employment contracts and if the housing was not connected to their employment, it is likely that the problem of swift accounts settlement would not cause as many difficulties.

Wage Deductions

Many reports relevant to the subject matter in question frequently emphasize that different questionable deductions are often seen on pay slips of (Polish) temporary migrant workers.[167] It is claimed that "the complexity of the pay slips is a major barrier for workers in terms of claiming

[165] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 28.
[166] See Articles 1(f)(ii) and 5 of the TAW Directive.
[167] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 25.

their rights”.[168] Even if some deductions are understandable to such workers, some of the charges are too high compared to the services offered by the agencies.

Deductions for housing are among the common types of fees that are included on pay slips of Polish migrant workers. This is due to the aforementioned package deals, where “recruitment agencies typically offer accommodation to recruited workers as part of the package deal, and deduct costs for the provided accommodation from the workers’ pay”.[169] Nevertheless, the housing offered by some temporary employment agencies has been repeatedly reported to be “notoriously bad”.[170] Even if a few improvements were made, the critique persists.[171] It is a big problem for Polish migrant workers, because they often do not have any other available option for accommodation other than the one offered by temporary employment agencies. Frequently, “they have no stable contracts to show to real estate owners and have no savings to rely on if employment is low during several months of the year”.[172] Those are the main reasons why, regardless of an inadequate standard of living, Polish migrant workers decide to accept the housing offered by their temporary employment agencies. However, according to Dutch regulations, deductions for housing can at maximum be equal to 25% of the minimum income and in order to do so, agencies must meet SNF standards for housing.[173] It is clear from countless sources that certain temporary employment agencies do not comply with the minimum standards of living, and are therefore in breach of the prescribed regulations.[174]

Regarding the legal framework, salary deductions for housing are allowed per Article 36 ABU-CLA. Nevertheless, this article contains several important conditions that should be fulfilled for it to be legal. Firstly, according to Article 36(1) ABU-CLA, the housing arrangement offered by the employment agency shall be voluntary (optional). It means that the migrant workers cannot be forced to accept the housing from the agency. Secondly, according to Article 36(2) ABU-CLA, the housing offered by temporary employment agencies shall meet certain specific standards if the worker is charged for it. Those standards are discussed in Appendix V of the ABU-CLA, in which they refer to the SNF standards of living.

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[168] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 25.
[169] Ibid, 30.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] ‘Buitenlandse werknemers huisvesten’ <https://ondernemersplein.kvk.nl/buitenlandse-werknemers-huisvesten/>accessed 31 May 2021.
Note: The SNF standards refer to occupation, sanitation, hygiene, safety, and many other features of the workers’ accommodation.
[174] Eefje de Volder, ‘Protecting migrant workers from exploitation in the EU: workers’ perspectives: Country report Netherlands’ (2017) Social Fieldwork Research (FRANET), 24-25. <https://fra.europa.eu/sites/default/files/fra_uploads/netherlands-selex-ii-report_en.pdf> accessed 20 June 2021. See also: ‘Bijna zestig arbeidsmigranten aangetroffen in verwaarloosde boerderij, pand ontruimd’ https://www.volkskrant.nl/nieuws-achtergrond/bijna-zestig-arbeidsmigranten-aangetroffen-in-verwaarloosde-boerderij-pand-ontruimd~b3c783d3/?utm_source=link&utm_medium=app&utm_campaign=shared%20content&utm_content=free.

Furthermore, according to Article 36(4), the charges deducted by the agencies for housing "cannot exceed the actual costs of the housing".[175] This provision becomes especially important if one takes into consideration that the standard of living is reported to be particularly low at those locations but workers are still charged for adequate housing. Thus, the situation concerning housing should be seen as an alarming signal that should be taken into account while debating future reforms concerning Polish migrant workers in the Netherlands.

Moreover, Article 38 of ABU-CLA is also fundamental to the problem of wage deductions. It is a general provision that allows the migrant workers to "authorize the private employment agency in writing to make payments from his wage on his behalf"[176]. Moreover, similarly to Article 36(4) ABU-CLA discussed above, Article 38(2) ABU-CLA also requires that "deductions from the payable wage for housing and travel expenses (…) can never exceed actual costs incurred".[177] Thus, it can be observed that the temporary employment agencies are not allowed to make additional profit on those services. Notably, Article 38(4) ABU-CLA states that "any deduction from the wage must be specified on the pay slip in writing" as also that "the temporary agency worker received a summary of possible deductions, in the language of the temporary agency worker's country of origin"[178].

Besides deductions to cover rent for housing, it is also common for agencies to incorporate health insurance in the package deals.[179] Agencies will then deduct the premium for health insurance from the Polish worker's wage. This is permitted by law as long as the employee has agreed to this by granting the agency power of attorney to do so on his or her behalf.[180] The deduction may even be deducted from the minimum wage, but up to a maximum amount yearly prescribed by Dutch authorities.[181] Agencies are also obligated to provide their employees with their health insurance policy. However, according to the Roemer report, previously mentioned, there are instances where Polish workers do not receive a copy of their health insurance policy or other proof of insurance. Consequently, Polish workers are often unaware of having health insurance and are therefore wary of seeking proper health care when necessary.[182] Even more severe are situations reported where temporary employment agencies deduct the health insurance premiums but fail to conclude proper health insurance on behalf of the Polish worker.[183] This is another example of practices that are contrary to Dutch law, but occur due to a lack of enforcement to ensure that these practices end.

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[175] ABU-CLA, Article 36(4).
[176] Ibid, Article 38(1).
[177] Ibid, Article 38(2).
[178] Ibid, Article 38(4).
[179] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 28.
[180] Article 7:631 sub 1 DCC.
[181] Article 7:631 sub 1 DCC.
[182] Geen tweederangs burgers, 2020, 41.
[183] Geen tweederangs burgers, 2020, 41.

Apparently, there is a gap between the applicable laws, on the one hand, and the actual situation in which Polish migrant workers find themselves, on the other hand. Inaccurate housing conditions and questionable deductions written in Dutch on pay slips of migrant workers do not reflect the arrangements provided in CLAs, such as ABU-CLA, or the guidance concerning the SNF housing standards.[184] Furthermore, Article 7(1) of the ILO Convention (no. 181) states that "temporary employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers"[185]. Moreover, even if an exception allowing such deductions is provided in the Convention (Article 7(2)), those fees should still be charged "in the interest of the workers concerned".[186] It is questionable, however, that charges for "expensive and substandard" housing, deductions for non-purchased health insurance and other unclear wage deductions would benefit the workers concerned, as demanded by an exception placed in Article 7(2) of the ILO Convention (no. 181).[187]

Therefore, the ILO Convention (no. 181) establishes some protections regarding wage deductions by temporary employment agencies. Those protections are to a significant extent strengthened by the provisions included in the ABU-CLA and the guidance given by the Dutch Government. Furthermore, according to the Posted Workers Directives, "after 12 months, posted workers are entitled to all the Dutch terms and conditions of employment of Dutch labour legislation and of universally binding collective labour agreement conditions".[188] It means that after 12 months, posted workers will receive the same strong protections regarding wage deductions enshrined in collective labour agreements as migrant workers have in the Netherlands. Thus, it can be concluded that Dutch legislation, especially the ABU-CLA, are in compliance with the standards prescribed by the relevant international and EU law. Nevertheless, it does not imply that the problem does not exist in practice. Conversely, the level of non-compliance with the applicable Dutch law by temporary employment agencies regarding questionable wage deductions is high. The situation becomes even more problematic when one takes into consideration the difficulties Polish migrant workers face when enforcing their rights to proper housing and proper wages. Firstly, in accordance with Article 24(7) of the Working Conditions Act, the Dutch Labour Inspectorate ('SZW') is only obligated to act upon requests from "works council or a staff representation body, or by an association of employees".[189] It

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[184] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 25.
See also: 'Buitenlandse werknemers huisvesten'
<https://ondernemersplein.kvk.nl/buitenlandse-werknemers-huisvesten/> accessed 31 May 2021.
[185] Article 7(1), 1997 Temporary Employment Agencies Convention.
[186] Ibid.
[187] European Union Agency for Fundamental Rights, 'Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives' (2019), 52. <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-severe-labour-exploitation-workers-perspectives_en.pdf> accessed 29 April 2021.
[188] 'To which terms of employment are posted workers entitled?' (Ministry of Social Affairs and Employment) <https://english.postedworkers.nl/faq/frequently-asked-questions/wageu/to-which-terms-of-employment-are-posted-workers-entitled> Accessed 31 May 2021.
[189] art. 24:7 Working Conditions Act.

means that the Inspectorate is not under a duty to investigate individual complaints from the Polish migrant workers. The SZW will also not claim correctly calculated wages for the workers in prosecution cases (if instituted).[190] Furthermore, investigations by the SNCU often do not prove to be sufficiently helpful to the Polish migrant workers who still need to start civil proceedings to enforce their rights against the temporary employment agencies.[191] Consequently, Polish workers abstain from enforcing their labour rights and seeking remedies due to cost and complexity of the civil law proceedings.[192]

3.4. UWV Sickness benefit procedures

Another issue which arises concerning Polish temporary agency workers is the access to sickness benefits in case of illness. The problem mainly concerns workers with a phase A contract. Although the obligation to continue to pay wages in case of illness stated in art. 7:629 DCC applies, this regulation offers no remedy for a temporary agency worker in phase A. In phase A employers are permitted to include the agency clause which allows the agency to terminate the agreement when a temporary worker calls in sick.[193] This is almost always the case.[194] Polish migrant workers are therefore left with no income and shall have to rely on sickness benefits, which they must request from the Employee Insurance Agency (henceforth UWV). UWV procedures for requesting sickness benefits can take weeks to receive a notification whether you are eligible for benefits. As aforementioned, the package deals used, regarding these labour relationships, include housing, and thus Polish workers are often found without housing or income whilst dealing with illness and waiting for a reply from the UWV about benefits.

Basic health insurance is mandatory and labourers are compulsorily covered by employee insurance schemes in the Netherlands. Usually, temporary agency workers are insured for medical care via the agency and the premium costs are deducted from their wage, again due to the offered package deals. The employee insurance is a compulsory insurance of which the premiums are paid by the employer. The employee insurance is the grounds on which workers can claim sickness benefits, provided by the UWV. When a temporary agency worker in phase A, calls in sick, the user company will request a new temporary worker and will therefore end the employment of the ill worker.[195] The temporary agency contract will therefore end by operation of law due to the agency clause. The ill worker must then apply for sickness benefit (Ziektewet-uitkering) and will have the right to sickness benefits from the moment stipulated in

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[190] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 72.
[191] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 56.
[192] Ibid, 66-67.
See also: Eefje de Volder, 'Protecting migrant workers from exploitation in the EU: workers' perspectives' (2017) Social FieldWork Research (FRANET), 35.
[193] art. 7:691 lid 2 DCC; art. 10 lid 1 sub b ABU.
[194] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 20.
[195] See: footnote nr. 27; ECLI:NL:GHDHA:2020:460.

Article 29(2) under c of the Sickness Benefits Act (Ziektewet).[196] According to this article, the ill worker will be able to request sickness benefits after three days of illness which commences after the end of the contract. Per Article 15(1) of the ABU the temporary work agency contract ends with immediate effect. The ABU obligates the agency to compensate the workers for one day of waiting in case of illness which is incorporated in their wage.[197] The compensation is included in the hourly wage and will therefore not be paid after calling in sick and during the workers waiting period in case of illness.

The main problem addressed by the Polish embassy is the time that Polish migrant workers must bridge when waiting for the UWV to make a decision about their sickness benefits request. Article 72c of the Sickness Benefit Act obligates the UWV to make a decision within thirteen weeks. However, the UWV mentions on its website that they will send a letter with the decision within four weeks.[198] A temporary worker must wait at least four weeks and possibly up to thirteen weeks only to hear whether they are eligible to receive a sickness benefit. Once, Polish workers receive sickness benefits it is possible to export these benefits to Poland. However, this means that a Polish worker must apply for another decision regarding the exportation of the benefit and will therefore have to wait another four weeks. The UWV has the authority to ask an applicant for benefits to take part in medical examinations or other inquiries on location to assess their situation.[199] If an applicant does not agree to these examinations or inquiries, the UWV has a right to refuse benefits.[200] This is problematic for the Polish workers, because they will have to stay in the Netherlands to await and adhere to these procedures.

Another problem with applying for sickness benefits is that it requires a social security number which you receive once you have registered at the municipality of residence. However, many municipalities refuse to register persons living at addresses that aren't designated for residential purposes, fearing for the legitimization of such living accommodations.[201] Therefore, many Polish workers are not even able to register for sickness benefits in the first place, because most living arrangements are provided in holiday accommodation.[202] Not only the lack of registration, but also the improper registration, namely with a Polish address or as a non-resident, makes it difficult for insurance agencies to contact and inform Polish migrant workers. Again, this is an enforcement issue due to the fact that there is a registration obligation provided by law that is not being adhered to. Furthermore, as with the zero-hour contracts, the issue for migrant workers is the close connection of housing with the labour contract and the impossibility to wait for a

[196] A temporary employment agency contract is qualified as a labour agreement ex. art. 7:750 DCC due to art. 7:690 DCC.
[197] art. 25 sub 4 ABU.
[198] 'Ik ben ziek en heb geen werkgever (Ziektewet)' (UWV) <https://www.uwv.nl/particulieren/ziek/ziek-zonder-werkgever/na-ziekmelding/detail/mijn-ziektewet-uitkering/wanneer-krijg-ik-mijn-ziektewet-uitkering> accessed 30 May 2021.
[199] Article 28 Sickness benefits act (Ziektewet).
[200] Article 45j Sickness benefits act (Ziektewet).
[201] Geen tweederangs burgers 2020, 30-31.
[202] Geen tweederangs burgers 2020, 30-31.

long period in the Netherlands due to homelessness. Once the labour contract is terminated the Polish workers will lose their housing and are therefore unable to stay in the Netherlands to comply with the UWV procedures. The issue of homelessness has been discussed in section 3.2. and the lack of enforcement issue will be discussed in section 3.5.

As for the legal compliance with EU regulation on social security discussed in section 2.3.4, we believe that that the problem lies with the issues mentioned before and not with compliance with EU law. The procedures introduced for the sickness benefits are in compliance with the general principles of equality of treatment (or the principle of non-discrimination), exportability and accumulation of benefits as discussed in the previous paragraph. The procedures and its lengthiness is equal for both Dutch and non-Dutch workers. Article 76(4) of Regulation 883/2004 states that both parties, institutions and persons covered by this regulation have an information duty. The institutions also have an administrative duty to inform the concerned persons within a reasonable period of time. In regards to a reasonable period of time, in the Netherlands, the processing and decision terms of the General Administrative Law Act (Algemene wet bestuursrecht: Awb) apply.[203] A reasonable period of time according to this act is in any case expired if the administrative authority has not issued a decision within eight weeks of receipt of the application, if no term has been provided by law. However, there is a period provided by law, which is the 13 weeks stated in article 76c of the Sickness Benefits act. There are no available EU judgements that could further clarify the reasonable term meant in art. 76(4) of the relevant Regulation. As far as we can understand, there are no EU-regulations regarding the lengthiness of the procedures or obligations of applicants in said procedures that could render these practices unlawful.

3.5. Scope of Labour inspectorate competences

The Inspectorate social affairs and employment (Hereinafter 'Inspectorate') is the entity responsible for monitoring labour law, compliance and issues of social security. Its purpose is to analyse risks in the labour market, including the ones that may be legally sound but cause problems of abuse and exploitation in practice. To increase efficiency, it is common for the Inspectorate to work closely together with other governmental and non-governmental units.[204] The Inspectorate publishes their findings in reports and notifies policy makers of problematic labour dealings they encounter. It is noteworthy that the Inspectorate deals not only with matters to protect employees from employers, but it also scrutinizes illegal behaviour by employees such as the use of fraudulent identities by migrant workers.[205] With respect to temporary employment agencies the Inspectorate focuses primarily on malicious agencies and their practices. The focus issues include but are not limited to labour exploitation, working hours, health issues, human

[203] Vakstudie Nederlands Internationaal Belastingrecht, art. 76 Verordening (EG) 883/2004, aant. 2.
[204] Inspectorate SZW (*Inespectorate SZW*) <https://www.inspectieszw.nl/inspectie-szw> Accessed 24 June 2021.
[205] Inspectorate SZW 'Taken' (*Inespectorate SZW*) <https://www.inspectieszw.nl/inspectie-szw/taken> Accessed 24 June 2021.

trafficking, minimum wage and vacation pay.[206] To this end, the Inspectorate is obliged to monitor, detect and signal to relevant stakeholders their findings.[207] The competences of the Inspectorate thus relate to monitoring and enforcing compliance of labour law, but also includes crime fighting. This type of structure known as 'generalist' is not unique to the Netherlands. Countries such as France, Portugal and Spain also have generalist labour Inspectorates.[208] It has been expressed that such a structure can lead to a lack of focus on safety and health standards at work due to increased focus on issues such as documentation of workers.[209] The labour inspectorate is also the primary enforcer of the Working Conditions Act.[210] The framework of working conditions legislation in the Netherlands is laid down in first instance in the Working Conditions Act and is subsequently elaborated on in the Working Conditions Decree (Arbobesluit) and the Working Conditions Act (Arboregeling). These laws are applicable to all kinds of labour relationships, including flexible ones such as zero-hour contracts.[211] According to Article 32 of the Workings Conditions Act, the labour Inspectorate has all the normal competences of a monitoring entity, which allows them for instance to enter buildings and confiscate materials and samples. Article 33 stipulates that employers and employees are obligated to provide the Inspectorate with all the information it requires.

In 2010, the Dutch government had to allocate its resources creatively in the aftermath of the financial crisis. Various government entities were hit by the economization and the Labour Inspectorate was one of them. A reduction in quantity and quality of the inspectorate was the result and it was argued then that this was not in line with the ILO Labour Inspection Convention of 1947, which had been ratified by the Netherlands in 1951.[212] The competences attributed to labour inspectorates are all laid down sufficiently in the Dutch implementing acts. But over the years, budget cuts have made enforcement less frequent and less effective.[213] Workers union FNV filed a complaint with the ILO regarding alleged non-compliance of the Netherlands with Article 10 of ILO Convention (no. 181) (number of inspectors). The Dutch Government's response to the complaint and the publicity that followed in 2011 was that they believed there was no issue of compliance with the Convention and that they expected that the collectivization of inspectorates into the now more generalized Inspectorate SZW would lead to higher effectiveness.[214] A constraint here was that the obligation of a sufficient number of inspectors is

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[206] Ministerie SZW 'Toezicht en handhaving inspectie SZW' (*Ministerie SZW*) <https://www.arboportaal.nl/onderwerpen/inspectie-szw> accessed 1 June 2021.
[207] Inspectorate SZW (*Ministerie Sociale Zaken en Werkgelegenheid)* "Wat doet de inspectie SZW?" (2019).
[208] David Walters, "Labour inspection and health and safety in the EU" Hesamag 14 (2016) 13.
[209] Ibid 13.
[210] W.G.A. Hazewindus et al., 'Handhaving van de Arbeidsomstandighedenwet' (2021) Hugo Sinzheimer Instituut 5.
[211] Ministerie SZW, 'Wat staat er in de Arbowet?' (*Arboportaal*) <https://www.arboportaal.nl/onderwerpen/arbowetgeving/wat-staat-er-in-de-arbowet> Accessed 25 June 2021.
[212] Jan Popma and Willemijn Roozendaal. 'Inkrimping Arbeidsinspectie in strijd met ILO Verdrag 81' (2011) ARBAC 1.
[213] Ibid 3.
[214] Kamerstukken II 2010/11, 25 883, nr. 189, 6.

not substantiated by a concrete number or percentage which made it easier for the government to argue that the obligation posed by Article 10 is met. Nevertheless, the ILO does maintain that in a country with a developed economy, the number of inspectors relative to the numbers of employees should be 1:10000. Aware of the existing shortcomings, the number of inspectors is on the rise and the Inspectorate aims to recruit 250 more employees between 2019 and 2022 of which the majority shall be inspectors.[215]

Enforcement by the Inspectorate SZW

The Inspectorate adopts an approach based on recurrent abuses and or violations of labour laws. The rationale behind this is that all actors involved in the labour force are initially personally responsible for compliance with the relevant laws and only if they continuously or severely fail to do so, does the Inspectorate step in. In line with this, is the acknowledgement of self-regulatory regimes such as the private SNA-certification method which has been adopted in the private employment agency branch. It is part of the Inspectorate's responsibilities to evaluate the intention and efficiency of such self-regulatory systems.[216] Although the Inspectorate aims for deterrence through communication and self-regulatory strategies rather than corrective measures, it does have competences to impose administrative sanctions and to initiate criminal proceedings under the guidance of the public prosecutor's office. The Inspectorate is also allowed to initiate 'preventive shutdowns' and shutdowns subsequently, meaning the shutdown of work in a company that has been warned and failed to comply with the warning.[217]

Enforcement of temporary employment agencies Legislation

The Inspectorate SZW is responsible for monitoring and ensuring compliance with the WAADI. Article 7(a) of the WAADI imposes an obligation on any entity that acts as an intermediary in the placement of personnel to register as such with the Dutch Chamber of Commerce (Kamer van Koophandel, KvK). Article 16 states that non-compliance with Article 7(a) constitutes a violation which may be subject to administrative sanctions. Article 18 consequently permits the Inspectorate to impose administrative fines on those that commit a violation of the registration duty. The height of the fine is dependent upon the number of workers placed and can add up to a maximum of 76.000 euros.[218]

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[215] Inspectie SZW, 'Jaarverslag 2019' 43.
[216] Inspectorate SZW (Handhavingsmethoden en vormen van toezicht) (*Ministerie Sociale Zaken en Werkgelegenheid)* <https://www.inspectieszw.nl/inspectie-szw/handhavingsmethoden-en-vormen-van-toezicht#:~:text=Bij%20regelovertreding%20kan%20de%20Inspectie,de%20aanpak%20van%20strafbare%20feiten> Accessed 24 June 2021.
[217] Inspectorate SZW, 'Sancties en handhavingsmethoden' (*Inespectorate SZW*). <https://www.inspectieszw.nl/inspectie-szw/sancties-en-handhavingsmethoden/preventieve-stillegging> Accessed 24 June 2021.
[218] E. Verhulp, *T&C Arbeidsrecht*, (Commentaar op art. 19 Waadi, Wolters Kluwer, 2020).

Sham Arrangements

The works council, representative bodies and the trade unions can request the Inspectorate to investigate employers on the basis of Article 8 WAADI. These requests often demonstrate that the employers, failing to meet their CLA obligations, make use of various sham constructions which are often referred to as 'creative job placement'.[219] These arrangements amend the legal status of the employer in order to avoid responsibilities under temporary agency laws and the CLA, which allows escape from the equal working conditions and equal pay rules of Chapter 3 of the ABU-CLA. Common arrangements of this nature are contracting and subcontracting. The existence of sham arrangements increases the difficulty of monitoring compliance for the Inspectorate SZW as combating these arrangements is time consuming and often requires judicial proceedings.[220]

Individual Complaint Procedure

The regular complaint procedure for alleged violations of labour law is available for complaints relating to working conditions, minimum wage obligations and worker exploitation. For alleged violations, it is possible to file complaints anonymously in order to guarantee the safety of the complainant.[221] The application form for complaints states that the Inspectorate does not deal with complaints relating to the validity of employment contracts or CLA agreements as that lies outside the sphere of their competences. The application form further encourages the complainant to contact the respective local council or fire brigade for complaints regarding accommodation issues.[222]

Considering the Inspectorate's divergent administrative and criminal competences, migrant workers are often hesitant to contact the Inspectorate.[223] Therefore, it has been suggested that the competences to ensure safe working conditions and the competences regarding detection of fraudulent employment and organized crime within companies should be separated in order to overcome issues of distrust and to stimulate effective reporting to the Inspectorate.[224]

Notwithstanding, it should be noted that a large number of workers do however file complaints with the inspectorate. A larger issue therefore is that in the event that a worker does file a complaint, the inspectorate is often unable to resolve the issue. The inspectorate is not obligated

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[219] Jan Cremers, "De Moeizame Jacht op CAO Ontduikers" Tijdschrift over Arbeidsverhoudingen (2017) 15.
[220] Ibid.
[221] Inspectorate SZW, 'Complaints, Tips and Reports' (*Inespectorate SZW*) <https://www.Inspectorateszw.nl/contact/complaints-tips-notifications-and-reports> Accessed 24 June 2021.
[222] Inspectorate SZW, 'FORM for submitting a complaint to the Inspectorate SZW (the Ministry of Social Affairs and Employment) about a possible violation of social laws whilst working in the Netherlands.' (*Inespectorate SZW*) <https://fd8.formdesk.com/arbeidsinspectie/klachtenformulier_English/?get=1&sidn=5ec5e094fd54420ab9cf76ab12706981> Accessed 24 June 2021.
[223] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) p 58.
[224] Ibid.

to deal with complaints relating to working conditions when they are made by individual workers, but is only obligated to start an investigation when the works council, the trade unions or the personnel representative body request such an investigation. This follows from Article 24(7) of the Working Conditions Act. Another reason why complaints made by individual workers are left unresolved is that the inspectorate is simply understaffed when compared to the competences they must carry out. As previously stated in this section, the inspectorate aims to increase the number of inspectors to this end.[225]

Article 14(2) of the ILO Convention (no. 181) states that the relevant labour Inspectorate has to oversee implementation of the Convention's provisions into national legislation. The implementing provisions in the WAADI fall under the scope of the labour Inspectorate SZW, which means that Dutch law formally complies with the Convention in this respect. Due to the fact that article 10 of ILO Convention (no. 181) does not pose numerical demands regarding the amount of inspectors, there is also no issue of compliance. In light of the above, the issues pertaining to the range of competences of the Inspectorate SZW are not a matter of compliance with international or EU obligations, but a result of the generalist structure of the Inspectorate that, along with the inability of the inspectorate to deal effectively with workers' complaints has resulted in an unclear picture for migrant workers of what the Inspectorate SZW stands for. This is in part due to the self-regulatory character of labour legislation as it stands currently, which has shown to be ineffective while enforcement by the inspectorate itself has empirically shown to be a highly effective instrument to combat labour abuses.[226]

4. RECOMMENDATIONS

4.1. Zero-hour contracts

Neither Dutch, European nor international law offers a substantive solution to the problem of zero-hour contracts. The only legal means in which more security could be reached is if phase A, in which most Polish workers find themselves, is shortened through collective agreement. The law allows the period in which workers are in phase A, where zero-hour contracts are permitted, to be increased to a maximum of 78 weeks by collective agreement[227]. In the 78 weeks there is no obligation for the agency to offer a permanent labour agreement, no matter how many consecutive temporary labour agreements have been concluded. This same regulation also allows the agency clause which allows immediate termination of the labour contract between temporary worker and the agency when the user company dismisses the temporary worker. By collective labour agreement this 78-week period may be diminished to the prescribed minimum of 26 weeks.

[225] Ministerie van Sociale Zaken en Werkgelegenheid, Inspectie SZW, 'Meerjarenplan 2019-2022' 35.
[226] Jan Popma and Willemijn Roozendaal. 'Inkrimping Arbeidsinspectie in strijd met ILO Verdrag 81' (2011) ARBAC 8.
[227] art. 7:691 DCC.

Moreover, low levels of organisation within the temporary agency work sector means workers with flexible contracts are in a weak bargaining position and are less able to claim their labour rights.[228] This is why this could offer a legal remedy but in practice it may not offer a solution. As for the problems concerning low income due to lacking working hours, the report issued by Emile Roemer[229] offers a recommendation that could alleviate the problem. The report suggests an obligation agreed upon through the collective labour agreement where the temporary migrant worker is entitled to a minimum of two months full-time minimum wage, regardless of the actual number of hours worked. Costs for this guaranteed minimum wage can be shared by the employment agency and the user company in their agreement.[230] This would prevent Polish migrant workers from being faced with unexpected low amounts of hours and prevent them from building up a debt or having to rely on savings to get by. If this cannot be established through the collective labour agreement then the report suggests making it a generally applicable legal obligation.

The directive on Temporary Agency Work encourages member states to adopt measures that offer a higher level of protection for temporary migrant workers than laid down in the Directive.[231] If indeed the new Dutch government decides to adopt the recommendations in the social agreement (flexakoord), this could offer a higher level of legal protection for temporary agency workers, including Polish workers. The recommendations offer both the use of fixed contracts instead of zero-hour contracts and the shortening of the period within which the agency clause is permitted. This would result in a much higher level of security for Polish workers and could therefore offer the much-needed remedies to the issues discussed.

Besides these legal possibilities to remedy the problem, many issues can be resolved or prevented if proper information is conveyed to Polish migrant workers in Poland, when they are being recruited. The suggestion of a guarantee of two months minimum wage could contribute as an incentive to properly inform Polish migrant workers. If the temporary employment agencies have to pay for the guaranteed salary and therefore carry the risk of less available work hours, it will increase their due diligence to make sure they are recruiting suitable candidates and providing the hours they have conveyed to the migrant workers in their home country.[232] As will be discussed further in the upcoming recommendations, proper information and management of expectations can offer a practical and quicker remedy than legal remedies. This may be a solution for the immediate future, however for structural change legal changes are necessary.

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[228] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 48.
[229]Chairman of the booster team that issued the report: Geen tweederangs burgers 2020; Report issued by the Dutch Ministry of Social Affairs and Employment concerning the problematic situation regarding migrant temporary agency workers.
[230]Geen tweederans burgers 2020, 29.
[231] art. 9 sub 1 of the Directive on Temporary Agency Work.
[232] Geen tweederans burgers 2020, 29.

4.2. Return Costs

Due to the lack of appropriate provisions under Dutch law as well as international and European Union law the issue of return costs remains unsolved. There is no single obligation within the law that explicitly calls for the temporary employment agencies to reimburse the cost of travels. Other than Article 36(7) of the ABU-CLA, which does not stipulate an obligation of the employer to pay for transport, only to inform on whether there is such reimbursement available, there are no regulations concerning this issue. The possible solution to the problem would, therefore, have to be a political one. The governments, especially of origin countries of migrant workers like Poland, could deploy campaigns or create institutions which could educate people on the possible disadvantages associated with labour migration and the rules that come with it. They could effectively inform future migrant workers on the issues elaborated upon in the report such as the zero-hour contracts or no return costs so that workers could come more prepared, and perhaps with a secured way back home in case of emergency. Eventually, in combination with other strategies, the need for a legislative framework could emerge in the future. Alternatively, they could produce soft policies that discourage people from migrating without appropriate information, effectively shaping public perception on, for instance, temporary employment agencies abroad.[233]

A number of awareness-raising campaigns on different issues are already circulating around the world. They are designed to capture the attention of the public which is then appropriately informed about a specific problem and promotes a plan of action so as to overcome it.[234] The message is to be distributed by platforms, such as social media, TV or newspapers. It is, however, important to focus on a specific group that the issue resonates the most with.[235] For instance, informative campaigns on smoking and its health risks are easily accessible on most of the governments' websites. The Australian government has recently launched an informative campaign about smoking where it used TV adverts, digital apps and a website which not only informs about health problems associated with smoking but also provides people with phone numbers that everyone could reach so as to look for help.[236] This example could be used in relation with temporary employment agencies based abroad. The Polish government could then use its available resources and provide people with appropriate information on regulations in the Netherlands. This way Polish workers could be informed on the issues elaborated in the report, especially considering reimbursement for travels. Moreover, if such websites are to be used, they could also offer help in case of any unpleasant situation arising abroad. This might include phone numbers to appropriate institutions in the Netherlands or in Poland, free legal advice over the phone or possible help from non-governmental organisations operating in Europe.

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[233] Janet A. Weiss and Mary Tschirhart, 'Public Information Campaigns as Policy Instruments' (1994) 13/1 Journal of Policy Analysis and Management 82, 93.
[234] Ibid, 85.
[235] Ibid, 86.
[236] 'National Tobacco Campaign' (Australian Government, 22 July 2020) <https://www.health.gov.au/initiatives-and-programs/national-tobacco-campaign> accessed 30 May 2021.

Another way to create a more comfortable environment for Polish migrant workers could be a bilateral solution between the Netherlands and Poland which could provide for an additional blanket of protection for Polish workers. The possibility of such an agreement is also encouraged in Article 8(2) of the ILO Convention (no. 181). There have already been a number of diplomatic agreements between Poland and the Netherlands since 1919. However, the first cultural cooperation emerged upon the signing of the Cultural Agreement between the Government of the Polish People's Republic and the Government of the Kingdom of the Netherlands.[237] It has enabled close partnership in culture, education and science. This could be used as a framework for a new agreement that could call for a better protection of Polish migrant workers, especially if employed by temporary employment agencies.

As a last resort, Polish migrants could also be encouraged to look for help in international institutions such as the ECtHR. Considering the issues elaborated above, several rights called for in the ECHR could be found in violation. Therefore, if there is a violation, the Dutch government would have to adjust its policy or law to prevent any future violations. However, for this to happen, applicants have to exhaust local remedies first. In other words, if a worker chooses to bring a case before the ECtHR, one would have to use the domestic courts first.[238] This rule is associated with subsidiarity principle of the Court considering that domestic courts are better suited to hear individual cases.[239] Having elaborated the above, perhaps the best way to defend one's right would be to refer directly to domestic courts in the Netherlands. According to statistics of the Council of Europe, the Netherlands has one of the lowest number of cases pending before the Court.[240] This would indicate strong compliance of the Netherlands with the ECHR. Therefore, if a case is brought before the domestic court, a worker would be more likely to have his right upheld, even before ever bringing the case to Strasburg.

4.3. Account settlement and Wage Deductions

Dutch legislation concerning the problem of account settlement and wage deductions is compliant with the relevant international and EU law. Nevertheless, despite this formal compliance, multiple problems appear in practice. As highlighted above, temporary employment agencies in the Netherlands often do not comply with the relevant standards concerning account settlement and wage deductions. To improve the level of non-compliance and eliminate the malicious agencies, a general recommendation at this point would be to reintroduce the compulsory system of state licensing that would apply to temporary employment agencies.[241]

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[237] 'Poland In Netherlands' (Gov.pl) <https://www.gov.pl/web/netherlands/bilateral-relations> acessed 31 May 2021
[238] ECHR 1948, Article 35(1)
[239] Mark E. Villige, 'The Principle of Subsidiarity in the European Convention on Human Rights' in *Promoting Justice, Human Rights and Conflict Resolution through International Law (*Brill 2007) 623-624
[240] 'Violation by Article and by State' (*European Court of Human Rights* 2020) <https://www.echr.coe.int/Pages/home.aspx?p=reports&c> accessed 25 June 2021
[241] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 53 and 70.

Furthermore, regarding swift account settlement after contract termination, one of the possible reform options could be to amend the relevant Dutch regulations to better reflect the situation of migrant workers and not regular ones, as is the case currently. Multiple variants for the reform of this kind are possible. Nevertheless, the most beneficial for the migrant workers would be to amend the ABU-CLA. More specifically, Article 29(2) ABU-CLA could be revised to make the payment of all sums held in reserves by the temporary employment agencies mandatory at the time of contract termination and not at the time of next pay term. Consequently, migrant workers would receive the money owed immediately at the time of contract termination. This would eliminate multiple problems concerning the late payment of expected allowances and wages. However, it is quite a radical reform option and the support from trade unions would be necessary to amend the ABU-CLA.

Moreover, Polish migrant workers sometimes do not receive the benefits owed even after the lapse of the waiting period.[242] For instance, they are not paid for the last month of their work. Keeping in mind that migrant workers rarely know the Dutch labour law in detail and often face language barriers, it should be made easier for them to claim the due benefits. The Polish embassy could publish on its website template letters written in Dutch or English and translated to Polish which migrant workers could use to claim their unpaid benefits. For instance, in accordance with Article 7:625 DCC, those template letters could state that if wages are not paid in time, the employee is entitled to an increase in his/her salary up to 150% of it. We believe that the availability of the proposed templates would limit the need for legal consultations and empower the workers to claim their rights. Possibly, some instructions concerning how the letters should be filled in could also be published on the embassy's website.

Wage deductions by temporary employment agencies in the Netherlands, are legal as long as they meet clearly defined criteria included in the ABU-CLA and the Minimum Wage Act. As highlighted above, they should not amount to more than 25% of the minimum wage and they should also be compliant with the relevant standards (as regards the housing and insurance).[243] If aligned with those requirements, deductions of this kind are then also compliant with international and European law. However, temporary employment agencies have been trying to bend the law to their benefit. In this regard, "the complexity of the pay slips is a major barrier for workers in terms of claiming their rights, as they simply do not understand if the pay slips are correct and conform to Dutch law".[244] In order to improve the position of Polish migrant workers vis-a-vis the temporary employment agencies, the Polish Embassy, in cooperation with the relevant Polish institutions, could organize some online workshops concerning the most

[242] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 67.
[243] 'Welke kosten voor huur en zorgverzekering mag ik inhouden op het minimumloon van mijn werknemer?' (Rijksoverheid) <https://www.rijksoverheid.nl/onderwerpen/minimumloon/vraag-en-antwoord/kosten-voor-huur-en-zorgverzekering-inhouden-op-minimumloon-werknemer> accessed 25 June 2021.
[244] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016), 25.

relevant principles of Dutch labour law and possible mechanisms to receive help.[245] Those online workshops could be attended by volunteer migrant workers who would have a possibility to improve their knowledge concerning the Dutch labour law. To organize workshops of this kind, the Polish embassy could consider cooperation with different NGOs active in the sphere of protection of rights of the migrant workers in the Netherlands, for instance, FairWork. Nonetheless, if this form proves to be too complex, other, less demanding awareness raising mechanisms could be considered, including short video clips and brochures available online in Polish.

Besides informing and empowering Polish migrant workers regarding their rights, insurance agencies should offer easier accessibility to their health insurance policies. If online access was provided in multiple languages, Polish workers would be better informed about their coverage, and whether they are even insured. Finally, proper registration and consequently a social security number is necessary for Polish workers to get health insurance and access to information about their health insurance. The solutions offered by proper registration are discussed in the following section.

4.4. UWV sickness and benefit procedures

As set out in Section 3.4, the problems caused for migrant workers by the lengthy UWV sickness benefit procedures are not necessarily the result of non-compliance with EU social security laws. Problems arise for Polish workers when either applying for sickness benefits or once applied taking part in UWV procedure. As stressed before, a social security number is necessary in order to apply for sickness benefits, and as a migrant worker it is difficult to register due to various reasons already discussed in section 3.4. Therefore, registration should be possible for migrant workers even if they live in accommodation that is not designated for residential purposes. Registration procedures should also be more accessible for migrant workers, and the responsibility for registration of the migrant workers should lie with the agencies. Proper registration of Polish migrant workers, including the registration of the actual address of residency would also offer a solution for other issues, as it makes the migrant workers more visible for the system.[246]

A problem for migrant workers, especially phase A workers with agency clauses in their contracts is present due to the close connection between housing and employment. solutions to this problem can either be to disconnect housing contracts from employment contracts to decrease the level of dependency, and to provide housing after dismissal. The agency clause seems to offer a loophole to the prohibition of termination of employment during an employee's illness. Therefore, another solution would be if the possibility to dismiss a migrant worker in phase A in case of sickness due to the agency clause was deemed unfair in line with art. 7:670(1)

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[245] Eefje de Volder, ‘Protecting migrant workers from exploitation in the EU: workers’ perspectives’ (2017) Social FieldWork Research (FRANET), 43.
[246] Geen tweederangs burgers, 31-32.

DCC.[247] The regional court of Den Hague accepted such a judgement in 2020.[248] Through current law there may be a possibility to contest the end of the contract in case of sickness which would result in sick pay offered by the agencies instead of the need to enter UWV procedures.

Regarding the UWV procedures, the Netherlands does have the discretion to shorten waiting times for decisions made by the UWV, but we suspect that due to administrative reasons this may not be possible.[249]

4.5. Scope of Labour inspectorate competences

The failings of the self-regulatory regime of temporary employment agencies has increased the number of abuses in the workplace in the Netherlands. With the number of labour migrants continuously on the rise, a strong labour inspectorate is required to ensure that abuse is limited and combatted effectively. The most obvious recommendation in this respect is for the government to allocate more budget to the Inspectorate in order for more inspectors to be recruited and more investigations to be conducted subsequently. As mentioned in section 3.5, the inspectorate is currently in the process of recruiting more personnel, which, in light of the yardstick for the number of inspectors found in Article 10 of the ILO Labour Inspection Convention is imperative considering the high number of workers and the high complexity of the labour market.

Regarding the issue of apprehensiveness on the side of migrant workers to complain to the Inspectorate SZW, it is imperative to establish a closer relationship of trust between the migrant workers and the Inspectorate. Workers are often unsure of what the Inspectorate can do for them and whether it is safe to talk to the Inspectorate due to the Inspectorate's ambiguous competences, but workers also fear dismissal or retaliation by their employer. Considering the critique on the generalist structure of the inspectorate, a solution to this issue, which has been offered in previous works already, is the separation of competences of the Inspectorate SZW. Detection of labour abuses and detection of illegal employment, social security and labour market fraud are highly contrasting competences of the Inspectorate. FairWork has pointed out that effectively, the latter of those competences are carried out in active collaboration with the Dutch immigration authorities. It should be noted however that this issue is more troublesome for non-EU migrant workers than for Polish migrant workers, as the former face deportation upon discovery of undocumented labour.[250] The separation of competences should entail a departure from the generalist model of the Inspectorate and should be given effect to by distributing illegal work and fraud competences solely to law enforcement and the immigration authorities. This way, it will become clearer for all parties involved in the labour market what

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[247] The prohibition of termination of employment during an employee's illness.
[248] Gerechtshof Den Haag 17 March 2020, ECLI:NL:GHDHA:2020:460.
[249] A reasonable term according to Dutch administrative law is 4 weeks which is applicable to most administrative decisions.
[250] Katrin McGauran and others, *Profiting from Dependenc*y (FairWork and Somo 2016) 59.

the competences of the '*labour inspectorate*' are and the increased visible independent character of the inspectorate will be a more adequate implementation of Article 6 of the ILO Labour Inspection Convention.

Further, to combat the lack of knowledge on part of the workers, the active flow of information needs to be increased. Although the competences of the Inspectorate SZW are explained on their website and the complaint forms are available in Polish, more needs to be done to educate migrant workers in order to protect them from labour abuses. One way of realising this could be by offering temporary agency migrant workers a free (online) seminar on the ambitions and the competences of the SZW. These seminars could be shared with the workers by the local municipalities or NGO's, considering that the agencies themselves are untrustworthy at times or at least perceived as untrustworthy. It is acknowledged however that this approach would require further inquiries into the willingness of workers to participate in such educational activities and the effects of such information seminars.

4.6. Other recommendations

The recommendations and suggestions made have been chosen primarily because they are relevant to the focus issues discussed in section 3 and have not been discussed extensively in other reports to this date. Next to these, there are other solutions presented to the problems posed in this document which have been discussed at length in existing reports and literature and which are instrumental to the improvement of the labour market for Polish temporary migrant workers in the Netherlands. One of these recommendations is the reintroduction of a public licensing system for temporary employment agencies, which was discussed briefly in section 2 of this report in relation to Article 3(2) of the ILO Convention (no. 181). In spite of the compliance of the Dutch private SNA certification system with the Convention, this report argues, as many others have already, that the private certification system has proven to be unequipped. Consequently, a public system of licensing needs to be introduced. Due to explosive growth of temporary employment agencies that resulted from the abolishment of the licensing system when the Waadi was introduced, transparency of enforcement was compromised. A public licensing system would decrease the number of agencies, specifically the number of malicious agencies. This would make enforcement more transparent and more effective, thereby solving to some extent the enforcement issues.[251]

[251] For more information on the effects of a system of public licensing see for instance: Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016); Gijsbert van Liemt, "temporary employment agencies in the Netherlands, Spain and Sweden," Sectoral Activities Department, Sector Working Paper 290. (2013);

5. DISCUSSION

Having analysed the relevant Dutch regulations and its compliance with appropriate international and European Union law, the results found were in line with the expectations, yet at the same time there was hope for some discrepancies associated with non-compliance considering the number of issues arising out of the operation of temporary employment agencies. The focus issues described in this report, do not seem to stem from non-compliance with EU and international law. This is because the focus issues do not fall within the scope of the provisions provided in the discussed law, and is therefore unable to offer any remedies for the focus issues.

An interesting development which lies beyond the analytical part of this report but which needs to be mentioned for contextual purposes is the recently concluded social agreement (flexakkoord) by the employers and employees' representatives which, if transposed into legislative acts by the new formation of the Dutch government, will change the legal landscape of flexible employment drastically.[252] The accord, presented on 2 June by the Social-Economic Council (SER) contains many proposed changes to the labour market of which arguably the most relevant of all for Polish migrant workers would be the elimination of zero-hour contracts, which is to be replaced by contracts with a minimum number of hours per quarter.[253] Further, the agreement adopts an alternative to the Phase system of the ABU-CLA which will entail that an employee is to receive a regular labour contract after a maximum of three temporary agreements.[254] Naturally however, there have been concerns already that the social agreement will not be given weight unless the legislature adopts it in a highly-compliant manner. On top of this, there is an expectation that employers will find new ways to legally circumvent the protective framework through the invention of new 'creative' constructions.[255]

Even if these possible improvements for the legal protection of workers in the Netherlands were to become a reality, it is important to realize that this report has demonstrated that it is not a mere inadequacy of the law that underlies the issues faced by Polish migrant workers, but a lack of enforcement of which malicious agencies take advantage on a regular basis. The high level of reliance of the workers on the agencies due to the package deals, is one of the main reasons why each of the focus issues are so problematic. Even though these package deals could prove pragmatic and efficient, they must either be better regulated in order to reach this potential, or employment agreements must no longer include housing, insurance and transportation through

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[252] SER, 'Sociaal-economisch beleid 2021-2025: Zekerheid voor mensen, een wendbare economie en herstel van de samenleving' Ontwerpadvies 21/08 (2021).

[253] Performa HR, 'Sociale partners sluiten mega-akkoord over arbeidsmarkt' (*Performa HR, 9 June 2021)* <https://www.performa-hr.nl/nieuws/sociale-partners-sluiten-mega-akkoord-over-arbeidsmarkt/> Accessed 24 June 2021.

[254] Ibid.

[255] Gijs Herderscheê en Marieke de Ruiter, 'Er ligt een langverwacht sociaal akkoord, en nu? (*De Volkskrant,* 2 June 2021) <https://www.volkskrant.nl/nieuws-achtergrond/er-ligt-een-langverwacht-sociaal-akkoord-en-nu~b828030d/?referrer=https%3A%2F%2Fwww.google.com%2F> Accessed 24 June 2021.

wage deduction.Moreover, the introduction of the social agreement into law, if done properly, will take a number of years, which is a period of time during which Polish migrant workers will continue to face issues in the Dutch labour market for which more expeditious remedies are required.

6. CONCLUSION

The primary goal of this report was to assess the compliance of Dutch law concerning (Polish) migrant workers with both international law and European Union law. To achieve this, five focus issues were taken under closer examination, including zero-hour contracts, return costs, account settlement and wage deductions, sickness benefit procedures UWV, and the scope of labour inspection competences. It was established that even if multiple problems exist in those five focus areas, those problems are mostly due to improper surveillance and enforcement rather than non-compliance with international or EU law. Therefore, the primary conclusion to be drawn from this report is that Dutch law is formally compliant with the relevant international and European laws and regulations concerning the focus issues. This does not affect the possibility that issues that have not been discussed can offer grounds for non-compliance.

Nevertheless, regardless of the formal compliance of the Dutch rules with international and EU law, significant problems concerning Polish migrant workers in the Netherlands exist. The source of those problems was twofold. Firstly, some of the focus issues under consideration are not (yet) specifically regulated under international, EU law or even Dutch law. As a result, a lacuna is created between the difficulties that the Polish migrant workers face, on the one hand, and the capacity of the Dutch institutions to address those problems without a relevant legal basis, on the other hand. Even if multiple practices seem to be unjust from the moral point of view, they are allowed from the legal point of view if the agencies are not acting in breach of Dutch regulations.

Furthermore, the second source of the problems that currently exist, should be sought in the process of execution of the relevant Dutch provisions that are supposed to address the problems under consideration. It should be noted that temporary employment agencies have been constantly trying to 'adjust' the law to their business needs and preferences. As a result, considering the fact that many Polish migrant workers neither know the Dutch labour law nor speak foreign languages at an advanced level, the agencies often do not inform the workers about the rights that those workers have in the Netherlands. Consequently, Polish migrant workers do not enforce their rights simply due to the lack of relevant information. Thirdly, it is clear that Dutch temporary employment agencies deliberately violate the law.[256] Health insurance premiums are deducted from wages, whilst no actual insurance has been provided for their employees. Housing is provided and the rent is deducted from the wages, but too often the housing is severely below the standards that are mandatory according to the collective labour

[256] Katrin McGauran and others, *Profiting from Dependency* (FairWork and Somo 2016), 6.

agreements. Those are only some of the many examples where numerous intentional breaches of the applicable Dutch law by the temporary employment agencies have been reported. Thus, to address this problem, there exists a need to strengthen the present supervision and enforcement authorities within the Netherlands. Nevertheless, even if the level of non-compliance with the applicable laws and CLAs by the Dutch temporary employment agencies is significant, the breach of Article 10 of the TAW Directive was not established. It is because the five focus issues are not within the scope of this Directive. It is possible to argue that EU law therefore does not provide sufficient protection through the relevant directive in this situation.

All in all, the situation of Polish migrant workers employed through temporary employment agencies in the Netherlands is undoubtedly a complex one. The five focus issues discussed in this report represent only a minor part of the problems that migrant workers face while staying in the Netherlands. In accordance with the findings of this report, it is time for the Dutch government to reflect on the ongoing promotion and facilitation of triangular employment relations and flexible labour agreements in the Netherlands.[257]

[257] Ibid, 71.

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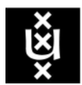

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