

# Position Paper

‘About the legal position of international truck drivers in the international road freight transport. The position as seen from the Netherlands.’

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## 1. Introduction

### 1.1. The sense project

This position paper is written in light of the SENSE project. SENSE is a project funded by the European Commission in which research is conducted on the topic of European transport legislation. This project aims to contribute to solving problems in the field of EU transnational road transport by contributing to the understanding of the legal setting at the national, EU and comparative level.<sup>1</sup>

### 1.2. Objectives of the position paper

The purpose of this position paper is to provide a better understanding of the the Dutch perspective regarding transnational road transport. In this paper we will focus on the legal, social and political perspectives on this topic. Besides describing the legal point of view and Dutch law, we also present the point of view of several important stakeholders. We will discuss the current legal position, detect occurring problems and provide a glimpse of potential solutions.

### 1.3. Methodology

In light of the objectives of this research, we were compelled to employ juridical dogmatic as well as empirical research methods. To gather our data, we used other research journals and conducted several semi-structured interviews with a selection of key stakeholders. For the employers' and employees' organizations, a questionnaire consisting of thirteen open-ended questions was used.<sup>2</sup> A different questionnaire was used for the Inspections, consisting of eight open ended questions.<sup>3</sup> In this way the questions were specific to the interviewed stakeholder. This method is used to get the relevant information from each of the stakeholders to get a complete view of the Dutch perspective regarding the international road transport sector. During the interviews, which lasted on average one hour, there was enough room for discussion and follow up questions, due to the open-ended questions. If it was deemed that the position or opinion of a respondent was unclear, targeted follow-up questions were asked.

The participants of the interviews were selected in such a way that all different types of actors were involved. We finally interviewed four different types of actors, namely: Trade unions, employers' organizations, the inspections and a researcher in the road transport area.

- Foundation VNB-FNV (*Stichting VNB-FNV*): Foundation, part of trade union FNV which is established solely for the road transport sector. FNV is the largest Dutch trade union that has approximately 1.100.000 members
- TLN (TLN, *Transport en Logistiek Nederland*): Employers' organization solely for the transport sector.
- Inspectorate of Social Affairs and Employment (hereinafter: 'Inspectorate SZW') (*Inspectie Sociale Zaken en Werkgelegenheid*): the Dutch governmental agency that is competent with the enforcement of social laws regarding inter alia minimum wage.

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<sup>1</sup> European Union, Project Sense, available at <http://www.project-sense.eu> (last accessed 1 April 2019)

<sup>2</sup> See annex 1 for an overview of the questionnaire.

<sup>3</sup> See annex 2 for an overview of the questionnaire.

- Inspectorate Human Environment and Transport Inspectorate (hereinafter: ‘Inspectorate ILT’) (*Inspectie Leefomgeving en Transport*): the Dutch governmental agency that is competent with the enforcement of social laws regarding inter alia labour standards.
- Researcher at the university: we also interviewed a researcher that is promoting on a case study of the international road transport sector, specifically regarding sham constructions.

#### *1.4. Introduction Dutch context of the international road transport sector*

The Netherlands takes an important position in the international freight transport. The Netherlands is one of the biggest international transporters in Europe.<sup>4</sup> This transport consists for the most part of outbound transportation: more than 50% of the total transport in 2017 was outbound transportation.<sup>5</sup> However, this position is under pressure due to increasing competition from foreign transporters. In a report of the Policy Research Corporation and NEA an increase was observed in the share of foreign carriers in international transport from or to the Netherlands from approximately 29% to 36%.<sup>6</sup> In the period of 1990-2005 the Policy Research Corporation observed a growth of the international transport by foreign transporters of 100% against a growth of approximately 48% of international transport by Dutch transporters.<sup>7</sup>

Due to the unification of the internal market, more and more Dutch transport companies are moving their economic activities to other Member States.<sup>8</sup> By moving their company to other Member States, or by using so called posted workers<sup>9</sup> from other Member States, they can avoid the application of Dutch national law and the application of Dutch Transport-collective labour agreements (hereinafter: “CLA”) on the labour contracts. This is attractive for Dutch transport companies because of the lower wages and less labour protection in other Member States. These developments make that the legal position of international truck drivers is uncertain. There are also uncertainties about how far such legal constructions may go and whether or not the Dutch law may be left out (fully) of application with regard to the employment contract.<sup>10</sup>

This position paper aims at providing more information about the legal position of the international truck driver under Dutch law. In chapter 2, the manner in which international labour law is implemented in the Dutch national law is described. In chapter 3, some Dutch case law about the position of international truck drivers is discussed. In chapter 4, the political discussions in the Netherlands with respect to EU transport is described. In chapter 5, an insight is given on the remuneration and working conditions in the Netherlands. In chapter 6, the social dialogue and social partners are regarded, along with their point of view about the legal position of the truck drivers. In chapter 7, the sanctions and enforcement mechanisms in the Dutch law are being described. In chapter 8, the media coverage on the

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<sup>4</sup> Policy Research Corporation and NEA, 2007 p. 18.

<sup>5</sup> Goederenvervoer; vervoerwijzen, vervoerstromen van en naar Nederland (wegvervoer 2017), *opendata.cbs.nl*.

<sup>6</sup> Policy Research Corporation en NEA, 2007 p. 19.

<sup>7</sup> Policy Research Corporation en NEA, 2007 p. 18.

<sup>8</sup> A.A.H. van Hoek, M.S. Houwerzijl, De toepassing van de Nederlandse cao’s op buitenlandse chauffeurs in het goederenvervoer over de weg, *Centre for the Study of European Contract Law Working Paper Series No. 2017-02*, 2017, p. 6.

<sup>9</sup> Memorandum part 3: The Posting of Workers Directive with a specific focus on EU cross-border road transport p. 3.

<sup>10</sup> See a.o.: A.A.H. van Hoek, M.S. Houwerzijl, De toepassing van de Nederlandse cao’s op buitenlandse chauffeurs in het goederenvervoer over de weg, *Centre for the Study of European Contract Law Working Paper Series No. 2017-02*, 2017.

topic of social dumping is being described. In the final chapter 9, a conclusion is given and a way forward is being described.

## **2. Implementation of EU Law**

### 2.1. Implementation in the Netherlands

The Posted Workers Directive (96/71/EC) (hereinafter: “PWD”) and the Enforcement Directive (2014/67/EU) (hereinafter: “ED”) are both implemented in Dutch law in the Terms of Employment Posted Workers in the European Union Act (hereinafter: “WagwEU”), which is effective since 18 June 2016.<sup>11</sup> Before the WagwEU, there was the Terms of Employment Cross-Border Work Act, but this act has been withdrawn when the WagwEU entered into force. The purpose of the WagwEU is – in short – to avoid social dumping and to deal with sham employment and to implement the PWD and ED.

The personal scope of the WagwEU is the same as the PWD’s scope and can be found in article 1 (5) WagwEU: ‘a worker who, in the framework of transnational provision of services, for a limited period, carries out his or her work in the territory of a Member State other than the State in which he or she normally works’. Added to the PWD definition is that foreign law has to be applicable to the worker’s labour contract. This definition makes clear that posted workers are subject to the WagwEU. However, with regard to the road transport sector, the WagwEU only seems to apply in situations of cabotage, since the Dutch Ministry of Social Affairs (hereinafter: “Ministry SZW”) has decided that only cabotage falls under the definition of genuine posting.<sup>12</sup> More about this matter will be discussed later on.

If the WagwEU applies, it has specific consequences: employers are obliged to assign certain minimum terms of employment to the personnel that come to the Netherlands to perform temporarily work. These minimum terms are also known as core terms of employment and consist of specific parts of Dutch labour law. Moreover, it is also important that when a foreign employer gets to work in a sector in which a universally binding collective agreement applies, the core of the terms of employment from this collective agreement also applies.<sup>13</sup>

### 2.2. Issues

Of course, there are some issues in the field of road transport in light of the implementation of the PWD and the ED. We will discuss a couple of them and try to find a possible solution to the issue.

#### *The abuse of social security A1 certificates (ED)*

When a (self-)employed posted person works temporarily in the territory of the Netherlands and is not subjected to the Dutch social security system, he or she is given an A1 certificate by the social security institution of the State in which this person is covered by the social security system.<sup>14</sup> The conditions for posting can be found in Regulation 883/2004 and Regulation 987/2009. These regulations only apply for persons who are or have been subject to the social security legislation of one or more Member States (article 2 Regulation 883/2004).

Unfortunately, these A1 certificates are subject to abuse. If a Dutch social security institution suspects fraud or misuse with respect to the A1 certificate, the only thing they can do is contact the social security institution of the sending state,<sup>15</sup> even if an A1 certificate should not have been given.<sup>16</sup> This construction makes it hard to deal with fraud and misuse. A solution here could be to make it possible to impose

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<sup>11</sup> You can find a fact sheet of the WagwEU at [www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act](http://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act) (last checked on 15 January 2019).

<sup>12</sup> General Memorandum The Netherlands, p. 20.

<sup>13</sup> General Memorandum The Netherlands, p. 10 and also Memorandum part 3: The Posting of Workers Directive with a specific focus on EU cross-border road transport, p. 8.

<sup>14</sup> Memorandum part 4: The EU coordination of the social security systems of the Member States and its applicability in cross-border road transport, p. 29-32.

<sup>15</sup> General Memorandum The Netherlands, p. 21-22.

<sup>16</sup> HvJ EG 10 February 2000, C-202/97 (*Fitzwilliam*).

finances, if there really is a situation of for example fraud or misuse. However, this should be decided on a European level and cannot just be decided by the Dutch legislator.

#### *The denial of the existence of a labour relation through bogus self-employment (ED)*

In the Dutch implementation, no explicit distinction is made between a posted worker and a posted self-employed worker. However, when a dispute arises about the status of the worker, only the Dutch definition of an employee is to be taken into account.<sup>17</sup> Since the Dutch definition of worker does not include (bogus) self-employed workers, it is easy to circumvent the legislation on this point because a bogus self-employed worker only rarely is included in the Dutch definition of worker.<sup>18</sup> To avoid this kind of misuse of the Dutch legislation, a solution could be to extend or to adjust the Dutch definition of worker. However, it might not be that simple, since there has been an ongoing debate about this definition for quite some years.<sup>19</sup>

#### *The use of artificial arrangements as letterbox companies (ED)*

Letterbox companies are being used by Dutch companies to avoid the jurisdiction of the Netherlands. Through letterbox companies in, for example, Bulgaria or Poland, these Dutch companies fall outside the Dutch jurisdiction and - among other things - the social security system. This construction makes it possible to give drivers a lower wage and to pay fewer social contributions.<sup>20</sup> Since letterbox companies can come and go within a few hours, it is hard to deal with them and to enforce rules. A solution here could be to come up with a system which automatically exchanges information between EU authorities. This information could be about the beneficial ownership or the identity of directors of the letterbox companies.<sup>21</sup>

#### *Deficient enforcement (ED)*

During our investigation it became clear that the biggest issue coming up with the ED is the deficient enforcement. Due to divided opinions in the Parliament, the Inspections are not getting enough or even sufficient resources to deal with misuse and fraud. There are way too less inspectors and this results in a small chance of getting caught. Also, bureaucracy in the Inspections may be a problem to be taken into account. So there is more than enough space for malicious companies to exploit their employees. A solution here is to sharpen the enforcement, but this is dependent on the political opinions. During our interview with the Inspectorate SZW amongst others became clear that in the coalition agreement it is decided that the 'enforcement chain' (the Inspectorate SZW amongst others) is getting 50 million EUR extra. This is an increase of nearly 150% and can be seen as a big step forward.

#### *The concept of the habitual place of work (PWD)*

The mandatory aspects of the Dutch law will apply if the habitual place of work of someone is in the Netherlands (article 8 (1) Rome I). The PWD goes further and stipulates that the core terms of the receiving state are applicable in case of posting. However, it is most of the times hard to determine

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<sup>17</sup> General Memorandum The Netherlands, p. 31.

<sup>18</sup> A. R. Houweling (red.) e.a., *Loonstra & Zondag. Arbeidsrechtelijke themata I*, Den Haag: Boom juridisch 2018, p. 135-182.

<sup>19</sup> See a.o.: M. Westerveld, 'Van 'afhankelijke' en 'autonome' zzp'ers. En het grijze gebied daartussenin', *TRA* 2013/46, A.R. Houweling, 'ZZP: wat wil, moet en doet het arbeidsrecht ermee?', *Arbeidsrecht* 2011/37 and G.C. Boot, 'Arbeidsrechtelijke bescherming van afhankelijke zzp'er', *TRA* 2012/84.

<sup>20</sup> Memorandum part 3: The Posting of Workers Directive with a specific focus on EU cross-border road transport, p. 30-31.

<sup>21</sup> This and more solutions can be found in Houwerzijl, Mijke, François Henneaux and Edoardo Traversa (2016), A hunters game : how policy can change to spot and sink letterbox-type practices, Brussels: ETUC, p. 39-41, <https://www.etuc.org/publications/hunters-game-how-policy-can-change-spot-and-sink-letterboxtype-practices#.WdVSV8aJLIU> (last checked on 31 March 2019).

whether a truck driver falls within the scope of the PWD. If a truck driver falls under the PWD, article 8 (2) Rome I stipulates that his habitual place of work has not changed.

But if a truck driver does not fall within the scope of the PWD, he might fall under the scope of article 8 (1) Rome I. In order to fall under this scope, the habitual of place of work has to be the Netherlands. Unfortunately, most of the work is not performed *at* the territory of a state, but *from* this territory. The issue here is that the Netherlands will not always be the habitual place of work for truck drivers and this means that the mandatory aspects of the Dutch law will not be applicable. A solution would be to make an exception for truck drivers, so that the Dutch law also applies if someone works *from* the territory of the Netherlands.

#### *Genuine posting (PWD)*

As mentioned above, the Dutch legislator only considers cabotage as a genuine posting situation and only in that situation does the WagwEU apply. This means that the core terms and the Dutch CLA would only apply in situations of cabotage and it might rule out all other international transport. There are different views on this matter in parliament. The court of appeal ruled that international transport does not fall under genuine posting.<sup>22</sup> Obviously, a solution would be to make the WagwEU applicable to all kinds of international road transport.

#### *Limited time (PWD)*

Just like the PWD,<sup>23</sup> the WagwEU does not give a definition or an interpretation of the term *temporarily*. This causes issues, because if there is no maximum period for posting, it is also possible for these posted workers to fall under the scope of Rome I and to lose the extra protection of the PWD.<sup>24</sup>

Since article 8 (2) Rome I stipulates that the rules of the habitual place of work apply in case a worker is only temporarily working in another country, the posted worker will not be entitled to the hard core terms of this temporarily place of work.<sup>25</sup> However, some of the rules might fall under the scope of article 8 (1) and/or 9 Rome I and offer some protection to the posted worker.

Misuse of this causes issues for the posted workers and makes social dumping possible. A solution here might be the revised PWD. The revised PWD enhances the protection of workers, posted for a duration of twelve (and a maximum of eighteen) months. Hopefully, when this is implemented in the WagwEU, posted workers will be better protected against exploitation.<sup>26</sup> However, the Commission recognizes the specificity of the highly mobile international road transport sector and they indicated that sector specific legislation would be suited for this sector. So the revised PWD will apply to drivers only from the date of entry into force of this specific road transport sector legislation.<sup>27</sup>

So, there are a lot of issues coming up with the WagwEU and most of them are not easy to solve. On most of the topics a decision on a European level would help, but not all the Member States acknowledge the foregoing as issues and they do not all support the possible solutions.

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<sup>22</sup> Court of Appeal 's-Hertogenbosch 28 May 2013, ECLI:NL:GHSHE:2013:CA1457 vs. Court of Appeal 's-Hertogenbosch 24 May 2016, ECLI:NL:GHSHE:2016:2011.

<sup>23</sup> Memorandum part 3: The Posting of Workers Directive with a specific focus on EU cross-border road transport, p. 16.

<sup>24</sup> I.S.H. Janssen, 'Het voorstel ter herziening van de Detacheringsrichtlijn: een tussenstand', *TRA* 2018/19.

<sup>25</sup> If the worker qualifies as a posted worker, he or she will be entitled to the core terms of Dutch law (article 3 PWD).

<sup>26</sup> Memorandum part 3: The Posting of Workers Directive with a specific focus on EU cross-border road transport, p. 26.

<sup>27</sup> See for a factsheet [http://europa.eu/rapid/press-release\\_MEMO-16-467\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-467_en.htm) (last checked on 12 March 2019).



### **3. Case law**

In this section we will discuss some spare Dutch case law regarding labour law in the international road transport sector. Recently the Dutch Supreme Court (hereinafter: “DSC”) ruled two interesting (landmark) judgements about the applicable law on the labour agreement under Rome I and about the PWD. The various cases have come to different outcomes regarding the applicable law to the

employment contracts and the applicability of the PWD. In some cases, Dutch law was deemed applicable,<sup>28</sup> in other cases it was the law of the formal (eastern European) employer.

### *3.1. Silo-Tank*

Recently, the DSC further clarified the criteria which courts have to use when determining which law is applicable to an employment contract in the international road transport sector.<sup>29</sup> In this case, a Dutch transport company used a Hungarian subsidiary (Silo-Tank) for the posting of Hungarian truck drivers in international transport. The Court of Appeal ruled that Hungarian law was applicable and the PWD did not apply. In cassation, the DSC further clarified the criteria and steps that should be followed when deciding what law is applicable to an employment contract with a cross-border element. When parties have not made a forum choice, article 8 (2) Rome I stipulates that the law of the country where the work is habitually carried out is applicable. Article 8 (4) Rome I stipulates that when from the circumstances as a whole the contract is more closely connected with another country, the law of that country is applicable. Having said that, the DSC looked at the habitual place of work, and cited the Koelsch and Schlecker judgements. The DSC concludes that with regard to the habitual place of work, it is that place in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer. To decide what those greater part of the obligations is, particular attention should be paid to: the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. The DSC explicitly emphasises that you always have to look at all the factors which characterise the activity of the employee, not just those points of sight. Regarding the exception of article 8 (4): when the contract is more closely connected to another country, the DSC ruled according to the Schlecker judgement, that the court needs to take into account all the elements which define the employment relationship and particular attention should be paid to the country in which the employee pays taxes on the income and the country in which he is covered by social security schemes and pension, sickness insurance and invalidity schemes. Once again, the DSC emphasises that this is only the case in exceptional circumstances. With this judgement, the DSC explicitly applies the rules of international private law (Rome I) to the international transport sector, and further clarifies the criteria the CJEU has laid down.

### *3.2. Preliminary questions*

A second important recent judgement of the DSC regards the scope of applicability of the PWD and the WagvEU with specific attention to the international transport sector.<sup>30</sup> The DSC confirmed that the PWD might be applicable to the situation in which Hungarian truck drivers are brought to the Netherlands to carry out international transport services from Dutch territory in western Europe. The DSC asked the CJEU to further clarify of the scope of the PWD by preliminary ruling. It asked whether article 1 (1 and 3) PWD stating to the territory of a Member State should be interpreted strictly, or also includes ‘to or from the territory of a Member State’, which is often the case in international road transport. The answer to this preliminary question is thus of vital importance for the whole European road transport sector regarding the PWD. Furthermore, DSC asked the CJEU the notion of CLA’s which have been declared universally applicable. The DSC wants to know whether this has to be interpreted according to national law provisions or that it has to be interpreted autonomously. Finally the DSC asked

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<sup>28</sup> Court of Appeal ‘s-Hertogenbosch 28 May 2013, ECLI:NL:GHSHE:2013:CA1457 vs. Court of Appeal ‘s-Hertogenbosch 24 May 2016, ECLI:NL:GHSHE:2016:2011.

<sup>29</sup> Dutch Supreme Court 23 November 2018, ECLI:NL:HR:2018:2165, following to the ruling of the Court of Appeal ‘s-Hertogenbosch 2 May 2017 ECLI:NL:GHSHE:2017:1874.

<sup>30</sup> Dutch Supreme Court 23 November 2018, ECLI:NL:HR:2018:2174.

whether applying more stringent provisions in universally not binding CLA's can be considered as a breach of the freedom to provide services ex article 56 TFEU.

This quick overview of case law learns that the highly mobile nature of the international road transport sector makes it very hard to apply international (private) law provisions. The DSC has taken the opportunity to ask the CJEU for a preliminary ruling about some crucial factors regarding the applicability and scope of the PWD. The ruling of the CJEU can be of vital importance for the European jurisprudence regarding the international road transport sector.

#### **4. Political discussions on EU transport**

##### *4.1. Posting as a discussed topic*

The media attention, the campaigns of unions, the outcomes of various investigations and the calls of employers and employees make that the topic of posted workers is regularly subject of debate in Dutch

politics. For example, on 23 November 2016 the committee of Social Affairs and Employment held a roundtable discussion on malpractices within the road transport sector. The committee spoke with various experts, such as the Inspectorate SZW, representatives of unions and researchers. Employees and employers within the road transport sector were also given the opportunity to provide input.<sup>31</sup>

During our interviews with TLN and FNV it became clear that both organizations agree on the fact that enforcement of rules is lacking. The understaffing at the inspectorate makes that the probability of detection is little. Before proceeding with new legislation, the already existing legislation should be enforced. This would make quite a difference in the transport sector.

#### 4.2. EU Mobility Package

The European Commission's Mobility Package is a collection of three initiatives regarding the governance of commercial road transport in the European Union.<sup>32</sup> The first package was released in May 2017, in which eight legislative proposals have been made, including one regarding the posting of workers. The second package was released in November 2017 and the third and final package was released in May 2018. The legislative proposals aim to on the one hand create a level playing field in the EU and on the other hand to improve the working conditions of drivers.

The proposal holds that provisions with respect to minimum wage and minimum paid holidays from the PWD will be applicable on international road transport if the driver is working for at least three days in one month in a Member State with a higher pay rate. This threshold of three days does not apply to cabotage. The provisions will apply to cabotage from the first day onwards.<sup>33</sup>

At the request of the Minister of Infrastructure and Water Management, Ecorys has conducted research on the effects of the EU Mobility Package on the Dutch road transport sector. The outcome of the research with respect to the posting of workers was that the proposal will lead to a reduction of the costs for foreign transport companies that are active in the international road transport from and to the Netherlands. For both the Dutch transport companies that are internationally active as for their foreign competitors the administrative burdens will be reduced, according to the report.<sup>34</sup>

On 4 December 2018, the European transport ministers have reached a number of important political agreements on the EU Mobility Package. It is however still a general approach. The position of the European Council with respect to the posting of workers is that, as opposed to the legal situation today, drivers will also be subjected to the legislation on the posting of workers. However, special provisions that are adjusted to the nature of the driver's work are yet to be proposed.

The initial proposal of applying the posting rules after three days does not appear in the agreement. The position of the EU Council is that the rules on the posting of workers are applicable from the first day onwards on crosstrade transport and cabotage operations. Transit and bilateral transport are excluded

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<sup>31</sup> See <https://www.tweedekamer.nl/nieuws/kamernieuws/rondetafelgesprek-over-misstanden-transportsector> (last checked on 31 March 2019).

<sup>32</sup> See <https://www.iru.org/where-we-work/europe/europe-overview/european-commission-mobility-package> (last checked on 31 March 2019).

<sup>33</sup> *Kamerstukken II* 2016/17, 34 734, 7, p. 3.

<sup>34</sup> *Kamerstukken II* 34 734, 19, p. 2.

from the posting rules.<sup>35</sup> The Netherlands voted in favour of the Mobility Package I at the Transport Council on 3 December 2018.

The first part of the Mobility Package was put to the vote on 10 January 2019, but the Transport Committee of the European Parliament did not take a decision on the major part of the Mobility Package. The Transport Committee, comprising MEPs specialized in transport, only adopted the proposal on cabotage.<sup>36</sup> With respect to the first Mobility Package, the Dutch government stands for the pursuit of an international level playing field for companies and employees in order to prevent competition on employment conditions between employees from different Member States. With regard to the proposed application of the PWD on the road transport, the Netherlands believes that the exceptions on the application of this Directive in international road transport should be limited. With cabotage operations there should be no exceptions on the application of the Directive.<sup>37</sup> The Netherlands stands for equal pay for equal work, also when applying the PWD on the road transport. The Netherlands believes that it is of importance to on the one hand improve the social protection of the driver and to on the other hand not confront the business world with unnecessary administrative burdens.<sup>38</sup>

## **5. Remuneration and working conditions**

### *5.1. Legislation on remuneration and working conditions*

The Dutch Act on Minimum Wages and Minimum Holiday Allowances (hereinafter: “WML”) applies to the drivers if they fall within the scope of the PWD because it is a so-called core term. The WML

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<sup>35</sup> Outcome of the 3658th Council meeting Transport, Telecommunications and Energy Brussels, 3 and 4 December 2018, 15084/18.

<sup>36</sup> See <https://www.transport-online.nl/site/99189/tln-geen-besluit-mobility-package-bewijst-nut-om-pakket-uit-te-pakken/> (last checked on 14 January 2015).

<sup>37</sup> *Aanhangsel Handelingen II* 2017/18, 2999.

<sup>38</sup> *Aanhangsel Handelingen II* 2018/19, 541, p. 3.

contains certain minimum wages and minimum holiday allowances, which are normally adjusted each year. In 2019 the minimum full-time wage is € 1.615,80 per month for an adult worker (22 years or older).<sup>39</sup> According to the Ecorys' report the wage for (national) truck drivers in 2017 was € 2.028,86.<sup>40</sup>

Core terms besides the WML are: The Working Hours Act, the Allocation of Workers by Intermediates Act, the Working Conditions Act and the Equal Treatment Act. The foregoing acts are not explicitly mentioned in the WagwEU, since the legislator stated that these already fall under the scope of article 9 Rome I.<sup>41</sup> This also means that if a situation cannot qualify as posting, the foregoing acts also apply, because they are overriding mandatory provisions (article 9 Rome I). If a universally applicable collective agreement applies in the sector in which a foreign worker is posted, he or she is entitled to the core terms of this agreement. This means terms regarding:

- 1) maximum working hours and minimum rest hours;
- 2) the minimum number of day's holiday (during which the obligation of the employer exists to pay a wage) and extra holiday allowances;
- 3) minimum wage;
- 4) conditions for making employees available;
- 5) health, security and hygiene at work;
- 6) protecting measures with regard to the terms of employment and working conditions of children, youths, pregnant employees or employees who recently gave birth to a child; and
- 7) equal treatment of men and women, as well as other provisions regarding non-discrimination.

Article 2 WagwEU also stipulates that some of the articles of the Dutch Civil Code apply, like the obligation for an employer to give the employee a pay slip that specifies the wage and an obligation to pay the wage cashless. Obligations like these can be helpful in order to prevent social dumping.

## 5.2. Practice

During our interview with FNV it became clear that the truck drivers are not getting paid according to this Dutch minimum wage. Workers from within the EU (mostly Eastern Europe) often get a monthly salary according to the minimum wage in their home country, which mostly is 250 EUR to 550 EUR.<sup>42</sup> Workers from countries outside the EU, like Moldavia, Ukraine and Philippines, are getting a much lower salary which is mostly only 100 EUR per month. Apart from this monthly salary, the drivers receive daily allowances to cover the costs that the drivers make during their job. This daily allowance is about 33 EUR. In reality the drivers try to save the most of this and they only use 10 EUR per day and save the rest of it for their families at home. So the daily allowances are the largest part of their remuneration, but the drivers are just building social security rights over their basic salary and not over the allowances. So if a driver gets sick or retires, he is just entitled to rights over the 100 to 550 EUR. The drivers are mostly getting their salary paid in the currency of their home country, but the daily allowances are paid in euros.

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<sup>39</sup> See <https://www.rijksoverheid.nl/onderwerpen/minimumloon/bedragen-minimumloon/bedragen-minimumloon-2019> (last checked 21 March 2019).

<sup>40</sup> *Ecorys report on the effects of the Mobility Package of the European Commission*, p. 32. The minimum full-time wage in 2017 was € 1.565,40 so the international truck drivers earned 130 per cent of the minimum wage.

<sup>41</sup> *Kamerstukken II 1998/99*, 26 524, nr. 3, p. 2-3 and *Kamerstukken II 2015/16*, 34 408, 3, p. 6.

<sup>42</sup> See for the actual minimum wages in the EU [https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Minimum\\_wage\\_statistics](https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Minimum_wage_statistics) (last checked on 21 March 2019).

So it is safe to say that the truck drivers are getting paid much less than the actual Dutch minimum wage. The most distressing part about these underpaid drivers is that they do have knowledge about how much their employer should be paying them. In fact, they possess several contracts with the minimum wages for different Member States, according to the FNV. If they are driving through the Netherlands, they are able to show the authorities a Dutch contract, if they are driving through France, they are able to show a French one and so on. It might be safe to say that this can involve forgery. When the FNV asks the drivers how they feel about this, they answer that they do know that their employer is a criminal or showing criminal behaviour, but that this is the only way to have a job. So they shut their mouths and keep working under these scandalous circumstances.

It might not come as a surprise that also the legislation about working and resting hours is not complied with. The truck drivers should be able to go every weekend to their families, but in practice they stay in the cabins of their trucks. The truck drivers also camp on the parking lots, because their employers are not paying them enough to afford the costs of a hotel. The working conditions of the truck drivers are distressing, but sadly the exploitation keeps going on. The FNV takes the view that the working conditions are much worse than social dumping, because there is a lot of criminal behaviour and they prefer to use the term ‘socially economically criminal’. According to FNV, the employers are on purpose not complying with the Dutch legislation and seeking for more opportunities to exploit the truck drivers.

If a truck driver starts a procedure against his employer, he almost always wins the case, according to FNV. But you might say that this is just a drop in the ocean: (letterbox) companies are able to pop up and disappear within a few hours and there is a low chance of getting caught because the institutions responsible for enforcement are understaffed. And even if a company is getting caught, they mostly have already anticipated the fine. Also, however the material rules are clear, they are very difficult to enforce, according to Inspectorate ILT. Inspectors have difficulties gathering the evidence needed to impose a fine. This is a time-consuming exercise, which makes enforcement more difficult, and undermines the repressive effect of imposed fines.

### *5.3. Merely passing through*

The Inspectorate SZW checks whether employers comply with, amongst other legislation, the WML and can impose fines on employers who underpay their employees.<sup>43</sup> The Inspectorate SZW takes the view that the Dutch minimum wage should always be paid when someone is working in the Netherlands and is really strict about it.<sup>44</sup> So the question whether the WML should also apply if drivers are merely passing through is a so-called hot topic. Not everyone thinks the rules should be enforced this strict and they point out the ratio of the WML. The ratio of the WML is to ensure a fair standard of living in the Netherlands.<sup>45</sup> But why should the WML have to apply if truck drivers are merely passing through? Is that even reasonable? The truck drivers will probably spend their money in their habitual place of work or their home country and there is most likely a lower standard of living. Therefore, not everyone in the Netherlands agrees that enforcement of the WML is reasonable.<sup>46</sup>

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<sup>43</sup> See <https://www.loyensloeff.com/en-us/news-events/news/benefitsbit-dutch-inspectorate-szw-wrongly-imposed-fine-on-cyprian-shipping-company> (last checked on 3 January 2019).

<sup>44</sup> See <https://www.inspectieszw.nl/actueel/nieuws/2017/04/14/overheidsdiensten-onderzoeken-uitbuiting-op-riviercruiseschepen> for an example (last checked on 15 January 2019). In this case the Inspectorate SZW imposed fines because the workers on certain cruise ships were not paid according to the WML, even though they were only shortly in the Netherlands.

<sup>45</sup> *Kamerstukken II* 1967/68, 9574, p. 16.

<sup>46</sup> E.J.A. Franssen, ‘De mobiele werknemer en het minimumloon’ *ArbeidsRecht* 2018/16.

#### *5.4. Remuneration based on posting or simultaneous employment rules*

Obviously, international truckdrivers are driving through more than one Member State. This makes it hard to determine whether a driver is in a situation of continuously posting or simultaneously employment.<sup>47</sup> Because of the broad range of working arrangements that can apply, it is not possible to determine in advance whether the remuneration is based on posting or simultaneously employment.<sup>48</sup> So the remuneration might be based of posting of simultaneous employment rules.

#### *5.5. Mostly inbound posting*

The WagwEU applies to both inbound and outbound drivers. The situation of inbound posting occurs most often in the Netherlands. Only one article in the WagwEU applies to outbound posting and all the other articles apply to inbound posting. In the case of inbound posting it is obligated to apply the legislation of the sending state as well as the more beneficial Dutch core terms.

#### *5.6 Conclusion*

There is a lot of legislation in the Netherlands on minimum wages and working conditions of truck drivers, but in practice some employers do not comply with this legislation in order to generate higher profits. This can possibly result in distressing inhumane situations and social dumping.

## **6. Social dialogue**

### *6.1. How are social partners and stakeholders included*

The Netherlands is known for its strong consultation model, the so called “*Poldermodel*”. Roughly said, this means that employers, trade unions and the government negotiate with each other about the labour conditions and wages of employees.

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<sup>47</sup> The Practical Guide of the EC gives examples to indicate whether a situation is posting of simultaneously employment: “Practical Guide on the applicable legislation in the EU, the EEA and in Switzerland”, available on the website of the European Commission.

<sup>48</sup> General Memorandum The Netherlands, p. 13 and also Kamerstukken II 2015/16, 34 408, nr. 3, p. 6.



This consultation takes place at national, sectoral and enterprise level. At national level there is the Labour foundation (*Stichting van de Arbeid*), which advises the government on labour topics. The three largest trade unions are members of this foundation. Furthermore, you have the Social and Economic Council (*Sociaal-Economische Raad*), which is the main advisory body to the Dutch government and parliament. The council consists of members representing the employers, members representing the trade unions and members appointed by the Dutch government.

At the sectoral level the social partners can enter into collective labour agreements. The sector-specific consultations are aimed at improving and harmonising working conditions and also, in some cases, improving the economic and competitive position of the sector concerned.<sup>49</sup> In the case of road transport the most important social partner for the employers is TLN. The employees are mostly represented by the FNV and the Christian National Trade Union (hereinafter: “CNV”). These social partners together came up with the Collective agreement on terms and conditions of Employment for Professional Goods Transport by road and mobile crane rental, which is the current CLA in the road transport sector.<sup>50</sup> The sectoral CLA applies to all enterprises belonging to the transport branch.

At the enterprise level the collective labour agreement applies merely to a specific employer. In this case, there will be a works council which regulates a collaboration between employers and employees.

## 6.2. How can the social partners take action?

The social partners have a major influence on the composition, implementation and enforcement of the collective labour agreement. To conclude collective bargaining agreements, a trade union and employers’ organization must meet two specific requirements. First of all, the organizations must have legal personality. Secondly, the articles of association of these associations must specifically stipulate their power to conclude collective bargaining agreements. The minister usually leaves the definition of the scope of the collective labour agreement to the parties of that collective agreement. Also, conflicts about the working of the collective labour agreement will usually be solved through collective consultation by the social partners. The social partners can for example issue a petition.<sup>51</sup> Furthermore, trade unions may provide individual legal assistance to employees when their rights are infringed. When this happens on a large scale and the employer refuses to negotiate on better employment conditions the social partners can organise a strike<sup>52</sup> for better working conditions.

According to article 4 of the Dutch Act on the declaration of collective labour agreement universally binding (hereinafter: “Wet AVV”), the social partners can ask the Ministry of SWZ to make the agreement universally binding. By doing so, the CLA changes from an agreement between social partners into objective law. According to a research of Van Hoek and Houwerzijl a universally binding CLA can be considered being a priority rule.<sup>53</sup> This means that the CLA can be applicable, even when foreign law governs the individual employment contract.<sup>54</sup> Social partners are furthermore entitled to

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<sup>49</sup> COM(98)322 of 20 May 1998, p 7.

<sup>50</sup> The English version of this agreement can be found on: [https://www.fnv.nl/site/alle-sectoren/caos/caos/9034/TLN\\_Beroepsgoederenvervoer-cao\\_2017-2019\\_Engels.pdf](https://www.fnv.nl/site/alle-sectoren/caos/caos/9034/TLN_Beroepsgoederenvervoer-cao_2017-2019_Engels.pdf).

<sup>51</sup> See <https://www.fnv.nl/sector-en-cao/alle-sectoren/agrarisch-groen/nieuws/teken-petitie-tegen-social-dumping/>.

<sup>52</sup> Article 6 (4) European Social Charter.

<sup>53</sup> A.A.H. van Hoek, M.S. Houwerzijl, De toepassing van de Nederlandse cao’s op buitenlandse chauffeurs in het goederenvervoer over de weg, *Centre for the Study of European Contract Law Working Paper Series No. 2017-02*, 2017. p.59-60.

<sup>54</sup> Article 9 Rome I.

grant powers to a specific foundation under private law, which is in charge of ensuring that a generally applicable collective labour agreement is abided by. That foundation typically is entitled to impose a civil penalty to employers who are in violation of the collective labour agreement at stake.<sup>55</sup>

Although the social partners have a fair amount of freedom in making the CLA, this freedom is limited by article 2 (6) Wet AVV. According to this article, CLA parties can no longer exclude the application of certain collective labour agreement provisions to employees seconded to the Netherlands.

### 6.3. *Particular interests of the social partners in the transport sector*

#### 6.3.1. *Employees' organizations*

The two major trade unions in all transport sectors are the FNV and the CNV Vakmensen. These organizations are the usual counterparts of the employer organizations by the composition of the CLA.<sup>56</sup> The focus will be on the FNV, since they are the most active one in the transport sector.

The employees' organizations are trying to protect the truck drivers from exploitation and harsh working conditions. They tend to do so by, among other things, going to parking places, talking to truck drivers and defending their interests in the social dialogue. In addition, they also bring individual issues to light in order to create more awareness of the position of truck drivers in the public debate. The main interest of the employees' organization in particular is that enforcement of the rules that already exist will be improved. They notice the harsh conditions under which drivers have to work and state that the legislation has forbidden this for a long time, but due to a lack of enforcement the employer is getting away with it.

According to the employee organizations the Mobility Package is a good initiative now that fair and better rules are always good, but then again, the enforcement must also be better otherwise it still will not change anything. The legislation should be simpler, more uniform and, above all, better enforceable.

#### 6.3.2. *Employers' organisations*

The Netherlands knows two employer organisations for the road transport sector: *Koninklijk Nederlands Vervoer* (KNV) and TLN. However, the focus in this paper will be on the TLN, because this is the sectoral organisation for companies active in the road haulage of freight. For the purpose of this position paper we have also interviewed TLN. TLN has a strong social infrastructure with the unions. They not only see each other at the collective bargaining table but also have periodic consultations.

During our interview with TLN, it became clear that the Dutch employers' and employees' organizations agree fairly well in terms of goals. However, the perspectives from which the situation is being viewed do differ. TLN looks from the position of the Dutch transport companies. From this position it is undesirable to have a foreign transport company offer the exact same service for a much lower cost due to lower wages. Wages make a big part of the total cost of transport, so competition on these wages can be quite profitable. This can lead to unfair competition. TLN is of the opinion that foreign drivers are welcome on the Dutch labour market, however they do need to fall under the Dutch CLA in order to prevent unfair competition.

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<sup>55</sup> General Memorandum the Netherlands p. 37.

<sup>56</sup> Parties to the current Collective Agreement on Terms and Conditions of Employment for Professional Goods Transport by road and mobile crane rentals 2014-2017 are (1) TLN; Vereniging Verticaal Transport on the one part, and (2) CNV Vakmensen, FNV Bondgenoten, De Unie on the other side.

What also comes to the fore in the employers' organization is that it is said that the problem is not so much with the regulations but with the enforcement of those regulations. The employers' organization has also been calling for more enforcement along the way for years. This is also an important point from the employers to prevent unfair competition. Furthermore, they also argue for less complex regulations. In some situations, regulations seem to miss their goal. This is partly due to the lack of enforcement. Together with the Unions they put forward a joint position with regard to the mobility package.

## **7. Enforcement and sanctions**

Enforcement of Dutch labour law is divided in civil enforcement – individually by the employer and employee, and collectively by trade unions – and administrative enforcement by the Inspectorate SZW and the ILT Inspectorate.

### *7.1. Administrative enforcement and inspections*

The Inspectorate SZW, closely working together with the ILT Inspectorate, takes care of retaining and supervision of various Dutch acts regarding to labour standards, such as the Working Time Act, Working

Conditions Act, Waadi, Act on Foreign Workers, WML, Wet AVV, and the WagwEU. As described earlier, the WagwEU is the Dutch implementation act of the PWD. Enforcement of the WagwEU is delegated to the Inspectorate SZW. As lined out earlier, due to the highly mobile nature of the international transport sector, the applicability of the WagwEU should be determined in a case-by-case basis. It is very difficult for the Inspectorates to scale up the enforcement of these provisions in the international road transport sector, inter alia due to lack of capacity and the complex nature of the rules and the use of letterbox companies.

Enforcement of the WagwEU is delegated to the Inspectorate SZW (article 5 WagwEU). When noticing a violation of the WagwEU, the Inspection may impose an administrative fine of maximum 20.750 EUR.<sup>57</sup> For violation of other acts regarding labour standards and working conditions, like the Working Conditions Act and the Act Foreign Workers, those administrative fines may be even higher. Recently the District Court Limburg approved a fine of 160.000 EUR for two road transport companies violating the Act Foreign Workers.<sup>58</sup> The inspectorate can also order for periodic penalty payment, and close the working place for maximum of three months, when labour standards are consistently violated. Noted be that the administrative fines imposed can be qualified as a ‘criminal charge’ ex article 6 European Convention on Human Rights. Under Dutch law, imposing criminal sanctions on non-compliance is exceptional and only possible in cases in which the employer acts in compliant, knowing that, or ought to have known that this causes direct danger for the life or health of employees. No case law has been published about criminal procedures against employers in the road transport sector.<sup>59</sup>

## *7.2. Civil enforcement*

The role of the Inspectorates can be deemed to be limited to enforcement of labour standard provisions. Many (primary) labour law provisions are however laid down in the Dutch Civil Code, which can (only) be enforced by civil law remedies. Provisions such as minimum wage, pension, sickness, etc. are mainly enforced by civil suits, started by the employee individually, or by trade unions collectively. The employee or trade union will argue that those Dutch provisions are applicable to the contract pursuant to i) article 8 Rome I; and/or ii) article 3 PWD and article 2 WagwEU.

### *7.2.1. Dutch civil enforcement provisions*

In theory, those enforcement measures, civil and administrative, are quite clear, but in practice, especially in the international road transport sector, difficulties arise in enforcing the rights workers ought to have. This can be assigned to several reasons. First of all, regarding civil actions, parties to the contract have to take initiative to start procedures. This may be hard because of the isolated position international truck drivers seem to have. They often live on the road and in their vehicles and do not speak English. Also, drivers may fear their income when they initiate a suit against their employers. According to FNV, this is merely the case for third-country-nationals, which are highly dependent on their employer. These circumstances often make it difficult to activate those workers.

Another complicating factor are the notorious letterbox companies. These letterbox companies, which are often quick-changing legal entities, are being set up by western-European (transport) companies in

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<sup>57</sup> This amount is the maximum administrative fine for first offenders. In case of repeat offenders this fine can be doubled.

<sup>58</sup> See for a recent administrative fine Rechtbank Limburg 23 February 2018, ECLI:NL:RBLIM:2018:1780 and <https://www.inspectieszw.nl/sectoren/transport-en-logistiek/nieuws/2018/11/08/boete-transportbedrijf> (last checked on 15 January 2019).

<sup>59</sup> Although, in other employment sectors, criminal sanctions have been imposed regarding to violating the Working Conditions Act, see: Rechtbank Oost-Brabant 30 October 2018, ECLI:NL:RBOBR:2018:5270.

order to evade Dutch law. With a spiderweb of legal entities, those companies make (mis)use of the shortcomings of (enforcement of) Rome I and the PWD. In recent case law, the DSC asked preliminary questions to the Court of Justice of the European Union regarding the interpretation and the scope of the PWD. One of the main shortcomings of the PWD regarding the international transport sector is the premise that posted workers are temporarily working *in* another country than in the country *in which* they normally work. This does not fit the practice of the international transport sector, in which truck drivers are working *from* another country than in which their formal employer is situated.<sup>60</sup> Due to the apparent shortcoming of the PWD and the (mis)use of the complex and non-coherent set of European labour law standards, an ideal environment for fraudulent cross-border business activities using letterbox companies is being created.<sup>61</sup>

The Netherlands tries to fight sham constructions, *inter alia*, by the Act on Combating Sham Arrangements. The main goal of this act is to tackle fraud and abuse.<sup>62</sup> This act provides (chain) liability rules which are more stringent than those laid down in the ED. With these more stringent measures, the Netherlands make use of their discretionary power according to article 12 (4) ED. This act mainly concerns chain liability for remuneration. If work is carried out by several companies *c.q.* intermediaries, the employer and its clients are jointly and severally liable for the remuneration expenses of the employee. In other words, the employee cannot only address the employer which is on the individual employment contract, but also the contractor and subcontractor. Dutch legislation regarding this chain liability is considered explicitly applicable to the transport sector. Vital though not always clear is whether these Dutch law provisions are applicable to the contract pursuant to Rome I and/or the PWD. Also, criticism has been expelled due to the fact that this act seems to lack specific measures regarding ‘multiple chains’, which is mostly the case in the (transnational) transport sector.<sup>63</sup>

### 7.3. Collective actions and the role of trade unions

Trade unions are an important actor in Dutch labour law. This is mainly due to the role CLA’s play in in Dutch labour law. In this respect it’s noteworthy that the CLA relevant for the transport sector are universally binding, which means it’s binding for all parties operating in the transport sector, regardless whether they are party to the CLA.

The Collective Labour Agreements Act (hereinafter: “CLA Act”) delegates the power of promoting and enforcing the CLA’s to the trade unions. Trade unions may impose collective actions on behalf of the union itself, or on behalf of its employees, even when they are no direct party to the CLA.<sup>64</sup> The trade unions thus play an important role in the enforcement of the rights and obligations laid down in the CLA’s. Trade unions not only may initiate claims to enforce compliance with Dutch law and CLA’s, but when a company does not act compliant, it may also impose a civil penalty (article 15 and 16 CLA Act). The non-compliant company can be held liable for all the damages that is caused by the non-compliance. This is not just compensation for the members, but can be extended to damages caused to the trade union itself, *i.e.* loss of trust and non-pecuniary damages.<sup>65</sup>

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<sup>60</sup> General Memorandum the Netherlands, p. 33.

<sup>61</sup> Mijke Houwerzijl, François Henneaux & Edoardo Traversa (2016), A hunters game : how policy can change to spot and sink letterbox-type practices, Brussels: ETUC <https://www.etuc.org/publications/hunters-game-how-policy-can-change-spot-and-sink-letterbox-type-practices#.WdVSV8aJLIU>.

<sup>62</sup> *Kamerstukken II*, 34108, 3.

<sup>63</sup> See *i.e.* E.J.A. Franssen, *Ketenaansprakelijkheid in het internationale wegtransport: een papieren tijger?!*, *Tijdschrift Vervoer & Recht* 2017, 3, p. 102 *e.v.*

<sup>64</sup> Court of Appeal ’s-Hertogenbosch 28 May 2013, ECLI:NL:GHSHE:2013:CA1457.

<sup>65</sup> See *i.e.* Dutch Supreme Court 2 November 1979, ECLI:NL:HR:1979:AB7397.

Besides this civil law enforcement, including civil penalties, there is a small role for the Inspectorate SZW. When parties have reasonable suspicion that a company does not comply with a universally binding CLA, it can request the Inspectorate SZW to start an investigation. The Inspectorate SZW drafts a report, which can be used by the trade unions in a civil suit against the company at stake.

Another, non-legal, way of ‘enforcement’ used by Dutch (and Belgian) trade unions is the use of media and social media. More about this is explained in chapter 8.

## **8. Media coverage**

### *8.1. The reporting on social dumping*

The competition in the transport sector of the Netherlands has risen. The image of Eastern European drivers taking part in the Dutch road transport sector for lower wages has become ordinary in the Netherlands.<sup>66</sup> This development has drawn the attention of the media. Social dumping as a phenomenon is frequently cited by the media. Some striking examples of headlines read as follows: ‘Slaves of the A2’,<sup>67</sup> ‘Trucks in the race to the bottom’<sup>68</sup>, ‘Cheap foreign workers get people’s jobs’<sup>69</sup> and ‘Dutch shipyards exploit Romanians’.<sup>70</sup> News items like these have even led to parliamentary questions being

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<sup>66</sup> General Memorandum the Netherlands, p. 16.

<sup>67</sup> <https://maastricht.pvda.nl/wp-content/uploads/sites/318/2013/10/DDL-achtergrondartikel-1.pdf> (last checked on 10 January 2019)

<sup>68</sup> <https://www.groene.nl/artikel/vrachtwagens-in-de-race-naar-beneden> (last checked on 10 January 2019).

<sup>69</sup> <https://www.telegraaf.nl/nieuws/884736/goedkope-buitenlander-krijgt-werk-niederlander> (last checked 10 January 2019).

<sup>70</sup> <https://nos.nl/artikel/2090752-nederlandse-scheepswerven-buiten-roemenen-uit.html> (last checked 10 January 2019).

asked to the Minister of Social Affairs and Employment in the House of Representatives. In the past months, the media attention has only increased due to new legislation on this subject.<sup>71</sup>

## 8.2. Perspectives on market freedoms and protection of the national labour market

### 8.2.1. The Social partners

#### 8.2.1.1. FNV

The social partners in the Netherlands frequently speak out against social dumping. The Dutch trade union FNV has for example issued a petition to fight social dumping.<sup>72</sup> The FNV believes that every driver has the right to be paid in conformity with the CLA that is applicable on national truck drivers. This allows for fair competition, preserving jobs and less exploitation of foreign truck drivers.<sup>73</sup> The FNV and the Belgian BTB (Belgian Transport Workers Union) are also running a media campaign against companies that are involved in social dumping practices. An example is their Ikea campaign on social dumping. The unions show that social dumping not only burdens the social position of drivers in the EU, but that social dumping also leads to drivers being subjected to degrading circumstances.<sup>74</sup>

The FNV believes that a better enforcement of the rules is indispensable for creating a fair level playing field in Europe. Therefore, the capacity of the Inspection has to be increased and the penalties have to be proportionate to the economic advantage of the violation. The FNV believes that the penalties are too low and the chances of being caught minimal.<sup>75</sup>

A few years ago, the term social dumping was not used that easily. Now, the term has become very common. As stated earlier, FNV however believes that calling the situation ‘socially economically criminal’ would be even more adequate. FNV is also regularly the source for news items and they are not dissatisfied by the way malpractices are being reported. It was never deemed necessary to make rectifications.

#### 8.2.1.2. TLN

TLN is an advocate of healthy competition and fair rules for everyone, next to adequate enforcement. TLN is a proponent of the free movement of goods within the EU, provided that it takes place on equal conditions.

During our interview with TLN, it became clear that TLN understands the media attention for social dumping practices, but believes it should be put in the right perspective. TLN argues that the companies that are involved in social dumping practices should not be considered to represent the entire road transport sector. The majority of the companies are not involved in these practices. However, the government should be tough on the companies that do practice social dumping. The government should enable a level playing field for both employers and employees.<sup>76</sup>

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<sup>71</sup> J.H. Even, *Balanceren met detacheren* (oratie Rotterdam ESL) Den Haag: Boom Juridisch 2018, p. 73.

<sup>72</sup> <https://www.fnv.nl/sector-en-cao/alle-sectoren/agrarisch-groen/nieuws/teken-petitie-tegen-social-dumping/> (last checked 10 January 2019).

<sup>73</sup> <https://www.fnv.nl/sector-en-cao/alle-sectoren/transport-en-logistiek/nieuws/petitie-slechte-eu-plannen-transportsector/> (last checked 10 January 2019).

<sup>74</sup> General Memorandum the Netherlands p. 35.

<sup>75</sup> <https://www.fnv.nl/site/alle-sectoren/sectoren/transport-en-logistiek/890969/nieuws/1408969/voorstellen-mobility-package.pdf> (last checked 10 January 2019).

<sup>76</sup> Position paper TLN t.b.v. hoorzitting/rondtafelgesprek ‘Uitbuiting en transport’ d.d. 23 november 2016, 2016D44237.

Also, TLN stated that the impact of this media attention should not be underestimated. Great and grand statements in the media can harm companies and it is therefore important that before you publish an article you are certain of what you are saying. It happens that the media tries to expose a company while the investigation on this company has barely started. And when the results of the investigation are much less worrisome than initially proclaimed by the media, this is less newsworthy.

### 8.2.2. Government

The Netherlands is a proponent of a strong internal market. This makes a fair and social road transport sector indispensable.<sup>77</sup> The WagwEU is an implementation of the PWD and the ED. The aim of the WagwEU brings together the aims of both Directives: a better enforcement of the provisions that serve to protect posted workers and preventing social dumping by applying the core employment conditions.<sup>78</sup> In the Explanatory Memorandum the Minister is of the opinion that the WagwEU fits perfectly within the efforts of the government to improve equal pay for equal work in the same workplace. The WagwEU is therefore according to the Dutch government of value in restoring the balance between market freedoms and protecting employees' rights.<sup>79</sup> Next to the WagwEU, the Act on Combating Sham Arrangements is also a body of legislation that aims to protect the Dutch labour market in the event of cross-border labour. This act aims, among other things, to protect the Dutch labour market in the case of sham constructions with an international dimension. It aims at creating a level playing field and preventing unfair competition.<sup>80</sup>

The Netherlands foresees some issues for the Dutch labour market when relying too much on market freedoms. Consequently, in the Netherlands there is less support for the internal market.<sup>81</sup> Some circumstances that have led to this decreased level of support have been summed up in the Labour Migration report issued by the SER in 2014. Examples of these circumstances are the global financial crisis and the increasing unemployment at the time the report was drafted, the lack of enforcement of wage policies and employment conditions, the rising of triangular relationships constructed to bypass conditions of employment and social security obligations and the exploitation of migrant workers.<sup>82</sup> Similar criticism can be noticed in the Explanatory Memorandum on the WagwEU.<sup>83</sup> The government states that with the expansion of the European Union, the socio-economic differences between the Member States have increased. Economic freedom is increasingly misused through sham constructions in order to attain cost advantages at the expense of workers.<sup>84</sup>

With regard to the free movement of workers, the government believes the problems are limited. Workers are after all generally treated equally, meaning there is a level playing field. This is different with the free movement of services. The government has observed that companies can compete with their competitors in terms of labour costs. This can have a negative impact on terms of employment and social security.<sup>85</sup> The former Minister SZW stated that in order to keep enjoying the benefits of free movement, we must be prepared to combat its negative side effects, ranging from displacement to exploitation.<sup>86</sup>

<sup>77</sup> Report Transport Committee 3 december 2018, bijlage bij *Kamerstukken II* 2018/19, 21501, 33, 737, p. 2.

<sup>78</sup> A.R. Houweling (red.) e.a., Loonstra & Zondag. Arbeidsrechtelijke themata I, Den Haag: Boom Juridisch 2018, p. 732.

<sup>79</sup> *Kamerstukken II* 2015/16, 34 408, 3, p. 2 (MvT).

<sup>80</sup> A.R. Houweling (red.) e.a., Loonstra & Zondag. Arbeidsrechtelijke themata I, Den Haag: Boom Juridisch 2018, p. 737.

<sup>81</sup> J.H. Even, *Balanceren met detacheren* (oratie Rotterdam ESL) Den Haag: Boom Juridisch 2018, p. 91.

<sup>82</sup> The Social and Economic Council of the Netherlands' recommendation entitled *Arbeidsmigratie*, 10 December 2014, recommendation no. 14/09, p. 9.

<sup>83</sup> J.H. Even, *Balanceren met detacheren* (oratie Rotterdam ESL) Den Haag: Boom Juridisch 2018, p. 91.

<sup>84</sup> *Kamerstukken II* 2015/16, 344 08, 3, p. 1-2 (MvT).

<sup>85</sup> J.H. Even, *Balanceren met detacheren* (oratie Rotterdam ESL) Den Haag: Boom Juridisch 2018, p. 92 – 94.

<sup>86</sup> L.F. Asscher en D. Goodhart, 'Code Oranje voor vrij werkverkeer binnen EU', *de Volkskrant* 17 August 2013.



## **9. Conclusion**

It is safe to say that there are tensions in the European road transport sector. On the one hand there are countries that emphasize on the importance of free movement of workers and services and that want to use these freedoms in order for their economy to flourish, and on the other hand there are countries that emphasize the importance of a level playing field and equal pay for equal work under the same conditions. The Netherlands belongs to the latter group.

In the WagvEU and WAS there are already several measures included to enforce the core terms of employment more sufficiently. Examples are the possibility to collect fines across the border, various administrative statutory obligations for companies that perform temporary work in the Netherlands, the obligation to have documents such as payslips available at the workplace and the obligation to provide information on the request of the Inspectorate SZW. Another important measure is the so-called duty to report. This obligation holds that foreign service providers have to report in advance where, when and with whom they will perform work in the Netherlands. The service recipient on the other hand is obliged to check both the existence and the content of the report. However, this obligation is not effective yet. A digital system has yet to be made where the report can be submitted. The legislator did express its intention to make an exception on this obligation for the transport sector (cabotage not included), because of the fact that it is difficult to conclude whether or not a construction falls within the ambit of the PWD.

However, a recurring problem is still the lack of enforcement of the regulations in the Netherlands. This hinders the regulations of having effect. This lack is – among other things – caused by the fact that it is rather difficult to enforce the rules, but also because of understaffing. It is clear that the problems in the transport sector will not solve themselves, so adequate enforcement is very important.

The European Union consists of many different countries with different identities and interests. To hope that one day we will all think and act exactly the same and hold the same interests is not only naïve, but also undesirable. The beautiful thing about the European Union is namely that despite our differences, a certain sense of unity is present. This sentiment is an important key for all parties to make concessions and come with a solution that every party agrees on. A balance must be struck and this can only be done together. A clear-cut solution is not yet present, but project SENSE is the evidence that, at least in academia, the willingness to work together and create a solution is there.

## **Annex I: Questionnaire employers' and employees' organizations**

1. What is your relationship with other stakeholders, like employers/employees' organizations, Inspections, etc.? Is there any cooperation between those and how is your cooperation organized?
2. Do you have some sort of cooperation with international or foreign stake holders in other member states? If yes, how is this cooperation organized, how do you feel about the cooperation and what could be improved? If no, do you deem it necessary that cooperation with those parties is being organized?
3. In what way is social dumping an urgent problem in the Dutch road transport sector? What is your opinion about social dumping?
4. What is your opinion regarding the European legislation, specifically the Road Mobility Package?
5. What are, in your opinion, (other) problems in the transnational road transport sector? What can and/or should be improved?
6. In what way are you part of the social dialogue in the Netherlands and/or European Union?
7. What's your opinion regarding the social dialogue in the Netherlands? Is this, in your opinion, an effective way to tackle the problems in the transnational road transport sector?
8. What are your objectives in the social dialogue? What do you want to achieve? Is this (always) successful?
9. In the Netherlands, civil enforcement plays a key role. What's your opinion in your own role in this play?
10. In your opinion, how can enforcement of legislation in the transnational road transport sector best be organized? How could we improve the current system of enforcement?
11. What is your opinion regarding the way media cover items regarding the transnational road transport sector? Does the media-coverage match your opinion?
12. How can Dutch and/or European politics improve battling the problems in the transnational road transport sector?
13. What are current initiatives you exploit regarding the (working)conditions in the transnational road transport sector?

## **Annex II: Questionnaire Inspections SZW and ILT**

1. What (type of) sanctions are being used to enforce the legislation regarding posting of workers? Are those sanctions, in the opinion of the Inspection, sufficient?
2. What is the chance, in the international road transport sector, of being caught violating or evading legislation?
3. In what currency is the salary of the posted truckdrivers being paid? Is this in Euros or in currency of the home country?
4. In some cases, truckdrivers are in the Netherlands only for a short period of time, for instance as a transit. Is the Inspectorate of the opinion that all legislation should be applied in those cases (like with cruise ships)?
5. Is the salary being paid pursuant to posting of workers or constitutently working in more than one member state?
6. How are the inspectors being used? Are they mainly used doing inspections or doing research?
7. Is there cooperation between the Inspection and foreign enforcement agencies regarding the enforcement of legislation in the transnational road transport sector? If yes, how is this cooperation organized, how does the Inspection feel about the cooperation and what could be improved?
8. Is there cooperation between the Inspection and trade unions and other stakeholders regarding transnational road transport? If yes, how is this cooperation organized, how does the Inspection feel about the cooperation and what could be improved? If no, does the Inspection deem it necessary that cooperation with those parties is being organized?