
GENERAL MEMORANDUM

THE NETHERLANDS

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1. Brief introduction to Dutch law

a. General background

Sources of Dutch labour law

Dutch employment law is relatively complex. It is not consolidated into a single code, but laid down in many different legal sources. The most important general source is title 10 book 7 of the Dutch Civil Code (hereinafter DCC), which arranges mostly in a compulsory fashion the general rules applicable to employment agreements. Next to the DCC, other rules which shape the individual employment contract are laid down in specific Acts such as on the statutory minimum wage level, health & safety, working time and equal treatment.

Besides labour law with a view to the individual relationship between employer and employee (often referred to as employment law), there are Acts on more collective and societal aspects of the regulation of the labour market: such as on collective bargaining (there is no Dutch legislation on the right to strike), collective dismissals and co-determination rights of employees in undertakings, temporary agency work (matching supply and demand on the labour market) and labour migration. It should be noted that collective labour agreements (hereinafter CLAs) are, in practice, often an important source of labour law for most employers and employees.

Case law (made in ordinary courts, there are no specific labour courts in the Netherlands), settling individual and collective labour disputes by interpreting the body of statutory law, CLA-provisions and international law (which has an automatic entry into the Dutch legal system), constitutes an important source of labour law as well.

Personal scope

There is no general differentiation between white and blue collar employees, nor between employees and workers, although a limited number of rules only apply to employees earning beneath a given salary whilst others apply to a marginally larger group than just employees. Save that last exception, there is a relatively sharp distinction in legal consequences between employment agreements and agreements that arrange working relations in another fashion (such as the independent contractor, who may sometimes resemble the employee).

Employee protection

In general, employees have a strong, protected legal position in the Netherlands. There is for instance a statutory minimum wage, including a compulsory entitlement to holiday allowance of 8% over the wages. Furthermore, there is extensive employee protection when it comes to termination of the employment agreement on the employer's initiative. Specific rules have to be met in order to allow the employer to terminate the employment agreement. Moreover, a preventive dismissal assessment is in force: the employer generally either has to obtain a dismissal permit from a government agency prior to terminating the employment agreement by notice or needs to request the court to have the employment agreement dissolved. The employee is, as a rule, entitled to a statutory severance payment (*transitievergoeding*) upon

termination of the employment agreement, if this has lasted at least 24 months and is terminated on the employer's initiative. In the Netherlands there is furthermore a relatively strong protection in place for employees who are considered to be in a disadvantageous position, such as employees who are ill.

Sources and brief description of Dutch social security law

Dutch social security law is laid down in a number of legal sources (laws and decrees), predominantly with a public law character. A main distinction can be made between laws concerning social insurance benefit schemes (*sociale verzekeringen*) and social welfare benefit schemes (*sociale voorzieningen*). Whereas social insurance is funded from compulsory contributions, social welfare benefits are financed from central governmental funds. The most important social welfare benefit scheme is social assistance, laid down in the so-called Participation Act (*Participatiewet* or *PW*). The PW enacts an ultimate social safety net, granting a minimum income to anyone legally residing in the Netherlands who has insufficient means to support himself/herself, meaning little or no other income (including other benefits) and few personal assets (if any). As a rule the amount of social assistance benefits is related to the statutory minimum wage (70 to 90 percent of the minimum wage level). People who receive social assistance are required to accept generally acceptable labour. The implementation of the PW is assigned to the municipalities.

Social insurance can be subdivided in national insurance (*volksverzekeringen*), covering all residents, and employee insurance (*werknemersverzekeringen*), covering, in principle, employees only (including civil servants, but excluding employees/civil servants who have reached the mandatory age of eligibility to the basic pension AOW, which is currently 65 years and 9 months). A commonality between the two insurance systems is that they are funded from the contributions paid by respectively residents and employees/employers. Both systems are compulsory, meaning that all residents or employees are automatically insured and pay contributions.

The Social Insurance Bank (Sociale Verzekeringsbank, or SVB) is responsible for the application of the national insurance system (the Care Needs Assessment Centre (CIZ) is involved for long-term care assessment), while the Institute for Employee Insurance (Uitvoeringsinstituut Werknemersverzekeringen, or UWV) handles employee-related benefit schemes.

National insurance covers the following social benefits: flat-rate basic state pension (*Algemene Ouderdomswet, AOW*), child benefits (*Algemene Kinderbijslagwet, AKW*), survivor benefits (*Algemene nabestaandenwet, Anw*) and Long-term care (*Wet langdurige zorg, Wlz*).

Employee insurance covers the following social benefits: unemployment benefits (*Werkloosheidswet, or WW*), sick leave (*Ziektewet/Loondoorbetaling bij ziekte*), disability benefits (*Work and Income according to Labour Capacity Act; Wet werk en inkomen naar arbeidsvermogen, or WIA*). The level of these benefits amounts, as a rule, to 70-75 % of the daily wage, with a maximum of the maximum daily wage. The maximum daily wage in the Netherlands is currently EUR 202,- per day. The sick leave system has two main characteristics. The first characteristic is the obligation of an employer to continue payment of all or most of a sick employee's salary, for a period of up to two years, pursuant to Article 7:629 of the Dutch Civil Code. The second is that, in the absence of such an employer, the sick person is entitled to protection through the Sickness Benefits Act (*Ziektewet, ZW*).

Supplementary employee-related benefit entitlements

On top of the compulsory employee-related benefit schemes provided for by law (illness, incapacity for work, unemployment), many sectors have made sectoral agreements (collective labour agreements) regarding supplementary benefits applicable to employees in those sectors. For example paying compensation in case of illness from the first sick day or topping up the statutory benefit level. Incidentally, these collective labour agreements also cover benefits for employees which are not, as such, social security benefits. For instance, they may set out rights to training or reintegration measures for surplus staff, or they may make some costs of childcare reimbursable. Also, occupational pension schemes are collectively organised and of a quasi-mandatory character. They may be organised at the firm, sectoral, or professional level.

Healthcare system

There is no obligation for the employer to provide for a health care insurance or life insurance. The Dutch healthcare system is based on (private) health insurance, which is mandatory for all residents (*Zorgverzekeringswet*). All residents are required to have a health insurance covering, among other things, family medicine, maternity care, pharmaceuticals and hospital care. Individuals may choose any insurance company, and can opt for supplementary insurance. The system does not differentiate between different types of workers such as salaried, self-employed or non-standard employed workers. Employers are not obliged to offer health insurance. However, on a voluntary base, many employers offer access to discounted collective health insurance to their employees, up to a legal maximum of 10 per cent. For residents with lower incomes, the government provides an income-dependent health insurance allowance.

Personal scope

In the Netherlands, the benefits schemes that apply to self-employed persons without personnel ('solo-entrepreneurs'; zzp) differ from those applying to employees (including non-standard workers). The latter are exclusively eligible for employee-related benefits. The residence-based schemes, including the healthcare system, national insurance schemes and the entitlement to a means-tested benefit covered by the Participation Act are covering both employees and solo-entrepreneurs. Moreover, both solo-entrepreneurs and employees have the right to (at least) 16 weeks of maternity leave.

General information on Dutch labour law and social security law

For a more detailed overview, we refer to:

- Labour law in the Netherlands, Antoine Jacobs, 2015 Wolters Kluwer
- Social Security Law in the Netherlands, Frans Pennings, 2017 Wolters Kluwer
- An online memorandum on labour law that can be found on the following website: http://knowledge.leglobal.org/wp-content/uploads/LEGlobal_Memo_Netherlands.pdf
- For more details on the Dutch social security system with references to government websites see: https://www.expatica.com/nl/about/Dutch-social-security-system-explained_100578.html#SocialSecuritySystem

b. Overview judicial system

The Netherlands is divided into 11 district courts, 4 courts of appeal and 1 Supreme Court. There are no specialized labour courts or social security courts in the Netherlands, only ordinary courts. For more information on the Dutch court system, see [this website](#).

c. Role of social partners

Social dialogue

Social partners are important when it comes to entering into CLAs, which will be discussed later. More in general, the Netherlands (still, although it seems to be losing some of its dominance) is known for its strong consultation model (*Poldermodel*) within the industrial relations. This takes place on national, sectoral and enterprise level.

Examples of the social dialogue at national level are the roles of the Labour Foundation (*Stichting van de Arbeid*) and the Social and Economic Council (*Sociaal-Economische Raad*). The Labour Foundation is a national consultative body organised under private law. Its members are the three largest trade unions and the three largest employers' confederations. The Foundation advises the government on labour-related topics. The Social and Economic Council is the main advisory body to the Dutch government and the parliament on national and international social and economic policy. The Council is financed by industry and is wholly independent from the government. It represents the interests of trade unions and industry, advising the government on all major social and economic issues. The composition of the Social and Economic Council reflects the social and economic relations in the Netherlands. It consists of members representing the employers, members representing the trade unions and independent or "Crown" members appointed by the Dutch government.

At sectoral level social partners may enter into collective labour agreements. These collective labour agreements apply to an entire industry or branche of industry.

At enterprise level trade unions may enter into a collective labour agreement as well. This collective labour agreement applies merely to a specific employer. At enterprise level, in the Netherlands, a works council (*ondernemingsraad, OR*) promotes and protects the interests of the employees within a company. Works councils have to be set up by any entrepreneur carrying on an enterprise in which normally at least 50 persons are working. The works council has several rights, such as the right to render advice in the event of major decisions and measures and the right of consent in the event of certain changes regarding terms of employment. Furthermore, the entrepreneur shall have to provide the works council with all the information and data they may reasonably be deemed to require in order to perform their duties.

Trade unions, employers' organisations and employers may conclude collective bargaining agreements. Trade unions and employers' organisations must, by law, meet two specific requirements in order to be able to conclude such agreements. First, organisations should be associations, and therefore must have legal personality. Second, the articles of association of these associations must specifically stipulate their power to

conclude collective bargaining agreements. The associations do not have to meet specific statutory requirements concerning independency and representativeness.

Social partners play an important role in fostering compliance and enforcement of rules. This will be discussed in part 4, c, I under c.

Social partners in the Netherlands

In the Netherlands, at the national level, there are three employers' associations: VNO- NCW for the larger and medium-sized enterprises (affiliated at the European level to Business Europe), MKB Nederland for small and medium-sized enterprises (affiliated at the European level to UEAPME) and LTO Nederland for agriculture (affiliated at the European level to COPA). Employers are in general relatively well organised: among larger companies the association level is almost 100 percent, for the whole economy between 50 and 60 percent of all firms is a member of an association. Smaller firms are organised to a substantially lower degree. There are also three national-level labour confederations: the social-democratic FNV, the Christian-democratic CNV and the white-collar Unie VCP. FNV and CNV are affiliated at the European level to ETUC. Approximately 20 percent of Dutch workers are organised; in international perspective union density in the Netherlands is fairly moderate. Traditionally, all national-level organisations, both the employers and the unions, are 'federations of federations'; they represent sector-level, independent employers' associations and labour unions, which do the actual collective bargaining to which the firms are affiliated directly. However, since the end of 2014, the largest Dutch trade union federation FNV is organised in a mixed model: some sectoral trade unions are still member of the national federation, but most sectoral unions have merged with the federation into one big organisation. Below, we will discuss the Dutch employers' associations and trade unions in the road transport.

Social partners in Dutch road freight transport

Employer organisations

The representation of employers demonstrates the fragmentation of the sector according to economic activity, but all employers' associations are affiliated to the national-level VNO-NCW. There are two 'umbrella' organisations for the road transport sector in the Netherlands, KNV and TLN. Both organisations represent the interests of their members on trade as well as social issues and both organisations are members of the national employers' association VNO-NCW, which is again a member of UNICE, and of the European International Road Union (IRU).

Transport and Logistics Netherlands (*Transport en Logistiek Nederland, TLN*) is the sectoral organisation for companies active in the road haulage of freight. TLN represents its members at the collective bargaining table as well as in the development of transport policies, and is affiliated to the IRU.

The Royal Dutch Transport (*Koninklijk Nederlands Vervoer, KNV*) is the employers' association for companies active in people's transport. The association mainly represents firms in passenger's transport but also has a division for the road haulage of freight. The internal organisation also reflects the distinction between the various subsectors in passenger's transport. *KNV Goederen* (road haulage of freight) used to represent most larger companies in the road haulage of freight. KNV Goederen used to conclude its own collective agreement

with the unions, but since 2014 they joined the so-called 'TLN CLA'. VVT is the Association of Vertical Transport ('*Vereniging voor Verticaal Transport*'), which represents firms active in transporting heavy freight and mobile cranes. This employer organisation is a party to the 'TLN CLA' as well. In 1998, the Commission started a legal procedure against VVT because of a supposed cartel, which caused the bankruptcy of the predecessor of VVT, the FNK. The VVT is member of the European Association of Heavy Haulage Transport and Mobile Cranes (<http://estaeurope.eu/>).

Employee organisations

In the Dutch road transport sector, membership density varies across subsectors. Organisational density in the road haulage of freight is about 30 percent, which is still above the national average of 20 percent. In public transport however, organisational density lies around 60 percent, due to the history of the companies as former state-owned companies. The two major trade unions in all transport sectors (road transport, aviation, as well as the other transport sectors) are FNV (sector transport) and CNV vakmensen.

FNV is a merger of catholic and social-democratic Confederations of Dutch trade unions (*Federatie Nederlandse Vakbeweging*). Until the end of 2014 transport workers were organised in the *Vervoersbond FNV* (Union of Dutch Transport Workers). Currently, this former trade union is now an integral part of FNV, only visible as a separate 'sector' within this trade union federation. Trade union members in the transport sector are represented by working groups such as 'freight transport' and 'passenger's transport'. FNV is a member of ITF and ETF.

CNV Vakmensen is a member of the Christian National Union Confederation (*Christelijk Nationaal Vakverbond*). The organisation represents employees in industry, food production and transport. CNV is a member of ITF and ETF.

In the road haulage of freight, FNV and CNV are the usual counterparts of employer organisations as signatories to the multi- employer collective wage agreements in road haulage. Under the current CLA 2014 – 2017 (see below) trade union *De Unie*, representing white-collar employees (affiliated to *vakcentrale voor professionals VCP*; trade union federation for professionals) also participates in the collective agreement.

Collective labour agreements (CLAs)

Employment relations are largely influenced by CLAs. A CLA is an agreement concluded between one or more employers, or associations of employers, and one or more trade unions, principally or exclusively setting out the terms of employment. CLAs apply to a vast majority (over 80%) of all employment agreements. A 'normal' (as opposed to a generally binding) CLA only applies if both the employer and the employee are bound by the CLA. The employer who concluded that CLA or is a member of the employers' organisation that concluded that CLA, is bound by the CLA. The employee that is either member of a contracting trade union or accepted the applicability of the CLA by contract, is also bound by that CLA. If, however, a CLA is extended by a decree of the Minister of Social Affairs, that extended CLA applies by law to all employment agreements concluded or to be concluded within the term of the extension decree that fall within the scope of application of the (by then) binding CLA: a so-called universally binding collective agreement. The scope of application of the CLA that is declared universally binding, commonly refers to a specific sector. The extension procedure is

surrounded by many rules and safeguards, that are set out in detail in the Act on the declaration of collective labour agreement universally binding (*Wet AVV*).

Trade unions may provide employees individual legal assistance when their rights are infringed. If this occurs on a large scale, and in particular when the employer refuses to enter into negotiations on better employment conditions, the trade unions may start collective actions, including strikes. The right to collective action is not embedded in any statute or the constitution. This right has been derived by the Dutch Supreme Court from article 6.4 of the European Social Charter, a stipulation which, according to the Supreme Court, has direct effect through our predominantly monistic regime in the Netherlands.

Collective labour agreements in the transport sector

The most important CLA in the transport sector is the Collective Agreement on Terms and Conditions of Employment for Professional Goods Transport by road and mobile crane rentals.¹ The English version of this agreement can be found on [this website](#). In addition to this English translation, a Polish information brochure is also available on [this website](#).

The CLA aims to secure the applicability of the PWD as much as possible. Article 73 of this CLA is a charter provision and reads as follows:

- 1. The employer is obliged to stipulate in subcontracting agreements, executed in or from the employer's company located in the Netherlands, entered into with independent contractors who act as employers, that their employees are granted the same basic working and employment conditions of this CAO [this CLA], if this results from the directive concerning the posting of workers (detacheringsrichtlijn), as well as if the law of a country other than the Netherlands is chosen.*
- 2. The employer is obliged to inform the employees referred to in paragraph 1 of this article about the basic working and employment conditions that apply to them.*
- 3. Paragraphs 1 and 2 of this article do not apply if the workers referred to in paragraph 1 of this article fall directly within the scope of this CAO, because the entire CAO applies to them in any way.*

¹ Parties to the 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. Moreover, bipartite agreements between TLN, KNV and FNV, CNV exist covering the Governance of an Occupational Pension Fund and the Governance of an Occupational Training Fund.

2. Implementation

a. Implementation of the parts from Module 1

i. Fundamental freedoms

Mostly fundamental freedoms apply without any further implementation. There are implementation acts on some topics relating to these fundamental freedoms – such as implementation acts based on the Directive 2006/123/EC on services in the internal market - although they do not bear relevance with regard to this project.

ii. Private international law

Obviously, the regulations Brussels I and Rome I do not require any implementation under Dutch law. Book 10 of the DCC generally refers to these rules but also makes clear that the regulations supersede in any event.

iii. Posting of workers directive (including Enforcement directive)

On 18 June 2016, the Terms of Employment Posted Workers in the European Union Act (hereinafter *WagwEU*) became effective, simultaneously withdrawing the previous act, the Terms of Employment Cross-Border Work Act (*Waga*). The *WagwEU* is the Dutch implementation act of the Posted Workers Directive (96/71/EC) and the Enforcement Directive (2014/67/EU). Employers from other EU countries who temporarily perform services with their personnel in the Netherlands (posting of workers) are subject to the *WagwEU*.

Since the entering into force of the *WagwEU*, the personal scope of application is the same as in the Posting of Workers Directive (Art. 1, fifth indent, *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 definition in the PWD is that “foreign law is applicable to his/her labour contract”.

If it applies, there are specific consequences. Employers are obliged to assign certain minimum terms of employment to the personnel that come to the Netherlands to temporarily perform work. The so-called core of terms of employment consists 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 apply. Hereinafter, we will focus both on core terms of employment deriving from Dutch labour laws as from these terms deriving from universally binding collective agreements.

Core of the terms of employment from Dutch labour laws

The core of the terms of employment always consists of the following Dutch labour laws:²

- i. The Minimum Wage and Minimum Holiday Allowance Act;
- ii. The Working Hours Act;
- iii. The Working Conditions Act;
- iv. The Placement of Personnel by Intermediaries Act (Waadi) and;
- v. The Equal Treatment Act.

When relevant, we will provide an overview of the main substantive rules in these labour laws:

Ad i) The Minimum Wage and Minimum Holiday Allowance Act

The Act on Minimum Wages and Minimum Holiday Allowances (*Wet minimumloon en minimumvakantiebijslag; WML*) contains certain minimum wages and minimum holiday allowances, which are normally adjusted each year. In 2018 the minimum full-time wage is € 1.594,20 per month, € 367,90 per week and € 73,58 per day for an adult worker. Lower rates are laid down for young workers between the ages of 15 and 22. Minimum wages cannot be paid in cash but must be transferred into the bank account of the employees involved. Save a limited number of statutory exceptions, setting off or compensating costs to the detriment of the employee causing the actual salary payment to that employee to drop below the minimum wage level is prohibited. Employees are entitled to a minimum of 8% holiday allowance (paid once a year) as well. Finally, the salary pay slips of the employees posted to the Netherlands must meet specific requirements (they need to be clear and transparent).

Ad ii) The Working Hours Act

The number of working hours depends on the sector of industry and the kind of labour performed. The Working Hours Decree (*Arbeidstijdenbesluit*) provides exceptions and additions for certain industries, inter alia the transport sector.

There is no specific Dutch legislation on compensation for working overtime. Whether overtime will have to be compensated, should follow from what was agreed in the employment contract, employee handbook or - if applicable - collective labour agreement.³

Ad iv) The Placement of Personnel by Intermediaries Act (Waadi)

Conditions for hiring out workers, in particular on provision of workers by temporary employment agencies, are laid down in the Temporary Agencies Act (*WAADI*). The most important provision of the WAADI relevant for the WagwEU is Article 8: unless a (universally applicable) collective agreement provides otherwise, temporary workers are entitled to the same wage and other allowances as comparable workers in the industry where the worker is temporarily carrying out his work.

² Please note that these Acts are not mentioned in the WagwEU, since they are considered to be of a 'special mandatory character' in the meaning of Article 9 Rome I.

³ Hoge Raad 2 oktober 2009, ECLI:NL:HR:2009:BI9633.

Hard core terms of employment from universally binding collective agreements

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 hard core terms of employment from this collective agreement also apply. The posted workers are entitled to the provisions of the universally binding collective agreement which deal with:

- a) maximum working hours and minimum rest hours;
- b) the minimum number of day's holiday, during which the obligation of the employer exists to pay a wage, and extra holiday allowances;
- c) minimum wage (for more information, we refer to 4, c under ii)
- d) conditions for making employees available;
- e) health, security and hygiene at work;
- f) 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;
- g) equal treatment of men and women, as well as other provisions regarding non-discrimination

Whether a universally binding collective agreement applies can be checked on: <http://cao.minszw.nl/>, which is only available in Dutch. We will elaborate on the relevant universally binding collective agreements in the transport sector under 3.

When obligations in the labour laws are not observed, the Inspectorate of Social Affairs and Employment (*Inspectie SZW*) may impose a fine. If the core provisions from the universally binding collective agreement are not observed, employees and/or social partners may institute an action against the employer (see 4, sub c, i under a).

iv. Social security

In cross-border situations with other EEA Member States and Switzerland, Regulations 883/2004 and 987/2004 are applicable. The rules determining the applicable social security legislation have exclusive effect. This means that a person cannot be simultaneously subject to the legislation of two or more Member States ('single state principle').

An employed or self-employed (posted) person who works temporarily in the territory of a State to the social security system of which he/she is not subject, is normally given an A1 certificate by the social security institution of the State in which this person normally works. This is a document issued by the competent body of the sending State which proves that the persons concerned remain subject to the legislation of this Member State.

A1 certificates can also be provided for situations in which a person normally pursues activities in two or more Member States. In such cases the 'single state principle' prevents application of the law of the habitual place of work (*lex loci laboris*; the state-of-employment principle). The competent Member State has to be identified on the basis of the residence of the worker concerned and/or the place of the establishment of the

employer(s). In the assessment several sometimes vaguely formulated notions such as where a "substantial part" of the worker's activities is performed, play an important role. With the help of concrete examples, a Practical Guide provides guidance to the competent institutions in order to clarify the notions used and also provides tools on how to assess these notions for all kinds of specific groups, such as international transport workers.⁴

International road transport workers driving through different MS to deliver goods are – according to the Practical Guide - an example of persons working 'simultaneously' in two or more Member States. In general, it can be said that in such situations coinciding activities are a normal aspect of the working pattern and that there is no gap between the activities in one Member State or the other. However, it will not always be easy to know whether these workers are continuously posted or whether they work simultaneously in two or more Member States. Given the broad range of working arrangements that can apply in this sector, it would be impossible to suggest a system of assessment which would suit all circumstances. Therefore, the Practical Guide provides extensive guidance in dealing with the particular working arrangements which apply in the international transport sector.

In the Netherlands, the competent institution for issuing an A1 certificate is the *Socialeverzekeringsbank (SVB)*. More information is available on its website:

https://www.svb.nl/int/en/id/direct_regelen/e_101_aanvragen/voorwaarden_aanvraag_a1_e101_verklaring.jsp

v. European Social Dialogue

The Dutch social partners mentioned above are active in the road freight sector and member of national and European social partners who participate in the European (Sectoral) Social Dialogue. There are no specific implementation acts as to (possible) national implementation of agreements reached within the European Sectoral Social Dialogue. The agreements that are implemented by decision of the Council to date have all been the implementation of directives. These directives resulting from the European Social Dialogue have been implemented in the same fashion as other directives. Agreements that are to be implemented autonomously, have been implemented by the national social partners without needing a new legal basis.

b. Implementation of (selected) EU law on road transport

Specific rules and regulations applicable in the Dutch freight transport by road concerning road transport are largely determined by the **relevant European rules and regulations**. They also cover certain rights of employees, including international truck drivers in the road haulage sector. The **most important of these are:**

⁴ "Practical Guide on the applicable legislation in the EU, the EEA and in Switzerland", available on the website of the European Commission. The official documents on which the Administrative Commission for the Coordination of Social Security Systems has agreed and its decisions and recommendations are available on this website: <http://ec.europa.eu/social/main.jsp?catId=868>

- Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons carrying out mobile road transport activities
- Directive 2006/22/EC of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC
- Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport (rules on driving times, breaks and rest periods for drivers)
- Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator
- Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market
- Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport
- Commission Implementing Regulation (EU) 2016/480 of 1 April 2016 establishing common rules concerning the interconnection of national electronic registers on road transport undertakings and repealing Regulation (EU) No 1213/2010 (Text with EEA relevance), C/2016/1723, OJ L 87, 2.4.2016, p. 4–23

In ***the Netherlands*** these directives and regulations are implemented and specified by the instruments listed below.

Regarding **working time and rest hours**, a number of deviating regulations – based on the Working Hours Act and the Working Hours Decree – may only be applied if the work is performed within a particular sector, such as road transport. In principle the Working Hours Act applies for everyone who works for an employer, so for all employees, including interns, temporary employees and seconded employees. In a number of cases the Working Hours Act also applies for self-employed. This is the case for situations in which the safety of third parties is also at stake, such as in transport sectors.

- *Directive 2006/22/EC* on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC is implemented in the Netherlands by Article 8:1 (3) in conjunction with Article 5:12 Arbeidstijdenwet (*Working Hours Act*).
- *Directive 2002/15/EC* and (specific parts of) *Regulation 561/2006* and *Regulation (EU) No 165/2014* were implemented in the Netherlands by the following Ministerial Decree: *Besluit van 14 februari 1998, houdende nadere regels inzake de arbeids- en rusttijden in of op voertuigen, aan boord van vaartuigen en voor loodsen (Arbeidstijdenbesluit vervoer; ATB vervoer)*, most recently adapted per 1 July 2017, *Stb. 2017, 278*. Specifically for Road Transport provisions in Chapter 2 of the Working Time Decree Transport apply (provisions 2.1:1 to 2.7:6). Also the following Policy Guidelines are applicable: *Beleidsregel boeteoplegging Arbeidstijdenwet en Arbeidstijdenbesluit vervoer (wegvervoer) 2016*. Ministry Infrastructuur en Milieu is responsible.

- Specific details of Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport are implemented in the Royal Decree *Regeling houdende regels met betrekking tot de verstrekking en het gebruik van tachograafkaarten (Regeling tachograafkaarten)*, Stb. 2016, 6956.⁵

Regarding specific conditions to pursue the **occupation of road transport operator and access to the international road haulage market**:

- Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 are implemented by the Act *Wet van 30 oktober 2008 tot wijziging van de regeling van het beroepsgoederenvervoer en het eigen vervoer met vrachtauto's*, Stb. 2008, 492 (*Wet wegvervoer goederen*), most recently changed, 14 December 2016, Stb. 2016, 378, the Royal Decree *Besluit van 14 juni 2013, houdende uitvoering van de Wet wegvervoer goederen en houdende wijziging van het Besluit personenvervoer 2000 en het Besluit justitiële en strafvorderlijke gegevens (Besluit wegvervoer goederen)*, Stb 2013, 234 and the Decree *Regeling tot uitvoering van de Wet wegvervoer goederen*, Stcrt. 2009, 75 (*Regeling wegvervoer goederen*), adapted in 2013, enacted from 1 July 2013 (most recent changes enacted 1 July 2016), including sanctions on non-compliance to Regulation (EC) No 1072/2009 on common rules for access to the international road haulage market.
- Commission Implementing Regulation (EU) 2016/480 of 1 April 2016 establishing common rules concerning the interconnection of national electronic registers on road transport undertakings and repealing Regulation (EU) No 1213/2010 (Text with EEA relevance), C/2016/1723, OJ L 87, 2.4.2016, p. 4–23, is implemented by the National and International Road Transport Organisation (*Nationale en Internationale Wegvervoer Organisatie, NIWO*).⁶ Road hauliers in the EU must have one or more licences. In the Netherlands, they must apply for licences from the National and International Road Transport Organisation (NIWO). The licence required depends on the destination of the cargo you are transporting. Application and operationalization of The Electronic Register of Roadtransport Undertakings (ERRU) is the responsibility of the NIWO. See <http://www.niwo.nl/?Pageid=208>
- Regulation (EC) No 1072/2009 concerning cabotage is applied, monitored and enforced by the Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport, ILT*): If a transport company from an EU member state transports goods between 2 points within the borders of another Member State, this will constitute cabotage. Carriers may undertake no more than 3 cabotage trips in another country. After that, they have to cross the border again. See Website⁷: <http://www.ilent.nl/>

⁵ Regeling van de Minister van Infrastructuur en Milieu, van 16 februari 2016, nr. IENM/BSK-2016/19348, tot wijziging van de Regeling controleapparaten 2005, de Regeling tachograafkaarten en de Regeling erkenning en keuringsbevoegdheid APK in verband met verordening (EU) Nr. 165/2014.

⁶ See www.niwo.nl.

⁷ The ILT collaborates with the Inspection SZW (labour and social Inspectorate) and with the social partners compliance organisation VNB. Kamerstukken II 2012/13, 17 050, nr. 428, p. 10 (bijlage) 221; M. van Essen & W. Brinkman, 'Handhaving van CAO-afspraken: ervaringen in zeven sectoren, Utrecht: A- advies oktober 2013, p. 18.

3. National framework on transnational transport

a. Introduction and most important problems⁸

The Netherlands traditionally has a strong transport sector, but the sector has suffered big losses since the financial crisis of 2007, with professional transport trips having declined from a total of 34,586 in 2007 to 28,860 trips in 2012. Growth was recorded again in 2014. However, competition in the sector has risen and the use of flexible contracts – also used to circumvent social security payments and sick pay – as well as Eastern European drivers, who are paid less than Dutch drivers, has become common in Dutch road transport. According to the Dutch Federation of Trade Unions (FNV), Dutch transport companies started moving to Eastern Europe in around 2006, to register their staff in Eastern European countries with the help of legal advisors, often using letterbox companies. Expertise in regulatory circumvention has since been built and improved; for instance, companies set up more intricate schemes and ensure that the phone is answered at the Eastern European offices. First, Poland was popular, now Bulgaria and Romania are becoming more popular; the trade union also reports cases of letterbox companies located in Germany. Although the use of Cypriot letterbox companies employing Dutch drivers receives a lot of media attention and has been declared illegal by the district Court of Amsterdam,⁹ the FNV argues it is not the main location for avoidance schemes in the Dutch transport sector, with only four to five Dutch transport companies known to use the ‘Cyprus route’.

According to FNV Transport and media reports cited in the SOMO report of June 2016, drivers contracted by letter-box companies get a basic wage according to the letterbox jurisdiction (the monthly basic wage for Polish drivers is between €300 and €500, in Romania and Bulgaria about €200) plus an allowance for expenses. This allowance is for work-related costs, such as meals on the way, showers or toilets and is obligatory under Dutch law; it cannot be considered a wage. Although the drivers earn a net salary of €1,000 to €1,700 a month, only €200 of that total amount is an actual wage, the rest being allowances. This is disadvantageous for workers from a social perspective: they build up pension rights only on the €200, and when they fall ill, they only receive the basic wage level of €200 a month. Some drivers (such as those working for Vos Transport, for instance) also allegedly get a bonus above a certain amount of kilometres, according to the trade union, FNV; this is prohibited by Article 10.1 of EU Regulation 561/2006 on driving and rest times, as well as by Dutch law, for road safety reasons. The resulting violation of the sector’s Collective Labour Agreements (CLAs) has led to numerous trade union actions and protests. The problems in the Dutch road transport sector concerning

⁸ The information below draws on Katrin McGauran, *The impact of letterbox- type practices on labour rights and public revenue*, Chapter 4, Labour rights violations in the Dutch transport industry SOMO Amsterdam June 2016, p. 33. <https://www.etuc.org/publications/impact-letterboxtype-practices-labour-rights-and-public-revenue#.WgogNHmnIU>

⁹ Rechtbank Amsterdam, 25.3.2016, ECLI:NL:RBAMS:2016:1638, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2016:1638> NRC.nl, Rechter verbiedt ‘Cyprus-route’ truckchauffeur, 29 March 2016, <http://www.nrc.nl/handelsblad/2016/03/29/arbeidsmarkt-rechter-verbiedt-cyprus-route-truck-1605182>.

perceived malpractices have been brought to the attention of the Dutch Parliament in November 2016.¹⁰ These problems in particular relate to:

- the abuse of (foreign) social security certificates (the so-called A1-form),
- irregularities with rest and working time and the tachograph,
- the denial of the existence of a labour relation (through bogus self-employment or the use of foreign intermediaries),
- the use of artificial arrangements (such as letterbox companies, see above), and
- the lack of serious assessment on the genuine character in the licensing procedure.
- Dutch CLA provision on 'charters' is very difficult to enforce in practice

b. Focus points:

i. Private international law (country of work and set of core rights)

In many cases involving international road transport, there have been discussions on private international law topics, in particular on applicable law. Questions on the competency of the Dutch court hardly occur.

Competent Court

In most situations the company litigated against is a Dutch company. In that situation the Dutch court will surely have competence. This is different should a company not situated in the Netherlands be subject to litigation in the Netherlands. This rarely has happened. There are some examples though. For instance, the question of competency of the Dutch court has been raised in litigation between a number of Hungarian employees and their Hungarian employer, Silo-Tank. This case concerned the Dutch limited liability company Van den Bosch B.V. ('VdB'), a company that is active in the road transport sector. One of its sister companies is situated in Hungary, Silo-Tank. VdB has entered into agreement with Silo-Tank, that is in consequence responsible for the transport of goods from the establishment of VdB ('charter agreement'). Silo-Tank uses its own drivers. These drivers receive instructions from VdB. VdB pays their wages, but these are subsequently charged to Silo-Tank and social security premiums and taxes are paid in Hungary. The employees from Silo-Tank state that they have performed their work in or at least from the establishment of VdB in the Netherlands. The tachograph and board computers are registered in the name of VdB. The employees have an email address and obtained a certificate in the Netherlands in the VdB Academy. VdB uses the same slogan as Silo-Tank. A third company, situated in the Netherlands, performs instructions, planning and administration activities. Holidays must be requested in the Netherlands. Newsletters are sent from the Netherlands. The tank passes of the drivers are registered in the name of VdB. The sister companies rent their equipment from a Dutch limited liability company. The employees state that they are actually employed by VdB instead of Silo Tank, or in any event their employment terms are subject to the laws of the Netherlands. The contract with Silo-Tank is according to the employees to be considered as a sham construction. The employees initiate proceedings against both VdB and Silo Tank.

¹⁰ Brought to the fore e.g. by Jan Cremers, researcher at Tilburg University, at the Dutch parliamentary committee for social affairs and labour on 23 November 2016 in a round table dedicated to abuses in the transport sector.

Silo-Tank challenges the competency of the Dutch court. The court of first instance finds that the employees claim that they have habitually worked in the Netherlands. Due to that claim, the court assumes competency based on article 19 par. 2 under (a) regulation 2001/44. In appeal Silo-Tank does not raise this defence anymore. The Court of Appeal assumes competency. Under the system of the recasted regulation 1215/2012, there would have been little doubt that the Dutch court would have competency. The employees could have referred to article 8 of regulation. As the Dutch court is competent in relation to the Dutch company VdB, is also competent in relation to Silo-Tank as both cases are closely connected.

Applicable law

More problems are in place determining the law that applies to the employment contracts of the drivers. Here we can see that courts sharply distinguishes between the situation that the employment agreements are subject to Dutch law under the rules of the Rome Convention/Rome I Regulation and the situation that the Posted Workers Directive applies.

The aforementioned VdB case highlights this difference. The District Court assessed that in case Dutch law applies to the employment agreements of the Hungarian drivers on the basis of article 6 of the Rome Convention/article 8 Rome I Regulation, all (mandatory) aspects of Dutch law apply. If, however, Hungarian law applies to these agreements, Dutch law does not apply, unless the PWD applies, in which case the core terms of employment deriving from Dutch labour law apply. In the underlying case, the Court of Appeal Den Bosch ruled that the employment agreements of the Hungarian drivers did not contain a choice-of-law clause. It acknowledged that the ECJ has ruled in the *Koelzsch* case (C-29/10) that in international road transport the employee is considered to habitually work in the country in which the place is situated (i) from which the employee carries out his transport tasks, (ii) receives instructions concerning his tasks and organises his work, and (iii) where his work tools are situated. The Court of Appeal did, incidentally, not explicitly mention the criterion of the ECJ that it must also determine the place where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks. According to the Court of Appeal, the employees habitually work in or from Hungary, and their employment agreements are in any event more closely connected to that country. The Court of Appeal held in that regard:

- Silo-Tank is situated in Hungary and also performs work that is unrelated to VdB;
- The employees are domiciled in Hungary, pay their taxes and are insured under social security law in that country;
- The employees received pay as of the moment they left Hungary;
- The transport works only partially (both in mileage and in time) takes place in the Netherlands;
- Under these circumstances the mere facts that the transport started in the Netherlands and ended there, and the employees received instructions from VdB in the Netherlands, are insufficient to lead to the conclusion that the Netherlands is the country of habitual work.

This meant according to the Court of Appeal that Dutch law does not apply on the basis of the Rome Convention/Rome I Regulation. However, on 23 November 2018, the Dutch Supreme Court ruled that the Court of Appeal did not correctly underpin its application of Art. 8(2) and/or Art. 8(4) of the Rome I Regulation. Therefore the case now has to be looked at again and has to be decided by the Arnhem-Leeuwarden Court of Appeal.¹¹

¹¹ HR 23 november 2018, ECLI:NL:HR:2018:2165.

ii. Posting?

It is not always easy to assess whether international transport drivers fall within the ambit of the *WagwEU*. As referred to above, the personal scope of application of the *WagwEU* is the same as in the Posting of Workers Directive. In the former implementation Act, however, the Netherlands refrained from including a definition of posting in the implementation measures. This caused confusion *inter alia* because in the (domestic) Dutch legal terminology the term 'posting' may be used to describe intra-group posting (type b) or posting by TWAs (type c), but contracting and subcontracting (type a) would not be included in the term.

In the parliamentary history of the *WagwEU*, special attention has been paid to the international transport sector. The legislator held that, besides merchant navy undertakings as regards seagoing personnel, the *WagwEU* also applies to the transport sector. Having said that, in the transport sector particularly, it is hard to determine whether a certain arrangement falls within the ambit of the Posted Workers Directive. This should be decided on a case-by-case basis. Problematic is the concept of a habitual place of work, of the (literal) obligation that a posted worker should work at the territory of the host state and not 'from' that territory, the interpretation of 'a limited period', repeated postings, what is a genuine posting employer (see below under 'letterbox-companies').

This problem can be witnessed as well in the aforementioned VdB cases. As previously mentioned, VdB has entered into agreement with Silo-Tank, that is in consequence responsible for the transport of goods from the establishment of VdB ('charter agreement'). The Dutch trade union FNV demands application of the core employment conditions deriving from the CLA Goederenvervoer to the employment agreements of the foreign employees executing the charter agreements, suing Van den Bosch B.V. and its two sister companies ('VdB c.s.'). VdB c.s. refuse to apply these conditions, arguing that the PWD does not apply to this situation.

According to the District Court the activities as performed by the sister companies fall within the definition of transnational secondment. VdB subcontracted these sister companies. Article 1(3)(a) of the Posted Workers Directive (PWD) applies. Furthermore, the situation as referred to in Art. 1(3)(c) PWD may apply as well. VdB's statement that the Posted Workers Directive solely applies should the foreign driver perform its work exclusively or in majority within the borders of the Netherlands is false and is therefore rejected. The District Court furthermore assesses whether there is genuine secondment, applying the Enforcement Directive 2014/67/EU. It concludes that the sister companies perform substantial activities. The Court of Appeal takes a different view. It holds that the current situation could fall within the ambit of article 1(3)(a) PWD. VdB, however, disputes that the Posted Workers Directive can apply in a situation in which the work is not performed *in* the Netherlands, but rather *from* the Netherlands. Although that last criterion may apply when establishing the applicable law under the Rome I Regulation, it does in the opinion of VdB not apply to the Posted Workers Directive.

The Court of Appeal Den Bosch follows that point of view. Articles 1.1 and 1.3 of the Posted Workers Directive stipulate that the posting needs to take place 'to the territory of a Member State', not *from* the territory of a Member State. The same applies to article 2 of the Posted Workers Directive, where it clarifies that 'posted worker' carries out his work in the territory of a Member State other than the State in which he normally works, as opposed to *from* another Member State. The same wording can be found in the opinion of Advocate General Wahl in his opinion in the case C-396/13. The Posted Workers Directive therefore does not apply to situations as the underlying. A broad interpretation of the Posted Workers Directive, that would not only include working in another Member State but also working from another Member State, wouldn't do justice

to the Posted Workers Directive, which wants to serve the freedom of services as well as protection of the internal market of the Member State involved. Which Member State should be protected when 'working from' would apply? The country of the party who instructed the company performing the charter agreement? Or the country in which most time is spent driving? Or the country in which the freight is barged and unloaded? Moreover, the original proposal of the Commission of the Posted Workers Directive (Com 91, 230 def 346) referred to providing services *in* another Member State, and deemed it unnecessary to add a list of exceptions. According to the Court of Appeal, the combination of article 1 and 2 of the Directive already made it clear that the Directive does not apply to, *inter alia*, international road transport.

However, the Dutch Supreme Court confirmed that Hungarian truck drivers might possibly be covered by the Posting of Workers Directive if they are brought to the Netherlands to carry out international transport services from Dutch territory. The Supreme Court has asked the Court of Justice of the European Union to provide further guidance on the precise scope of the PWD.¹² In particular, it asked clarification on how to interpret Art. 1(1) and Art. 1(3) PWD in conjunction with Art. 2(1) PWD with regard to the situation of an international truck driver sent by his Hungarian employer to carry out work from the Netherlands. The Supreme Court asks if special meaning should be attached to the specific mode of posting (for intra-concern) or the specific mode of transport (such as cabotage). Another question posed to the CJEU concerns the interpretation of the notion 'collective agreements which have been declared universally applicable' in Art. 3(1) and Art. 3(8) PWD. The referring Dutch Supreme Court wonders whether (or to what extent) national law definitions are decisive, or whether an autonomous EU interpretation on the basis of the PWD prevails. Finally, the question is posed whether it is in breach with Art. 56 TFEU on the freedom to provide cross-border services within the EU, if a service provider would be contractually bound to apply the terms of a CLA which is not generally binding (see the 'Charter' provision in Art. 73 of the Dutch road transport CLA as explained above on p. 9).

Business trip?

In the Netherlands, no sharp distinction is made between posting and business trips. If an international assignment falls within the ambit of the WagwEU, it is considered posting in the framework of transnational service provision within the EU.

iii. Cabotage

In case of cabotage transport (a transport company from another Member State transports goods between two different locations in the Netherlands) there is a genuine posting situation according to the legislator. In case there is a contract between the service provider in another Member State and a transport company in that Member State arranging for the transportation of goods for a client in the Netherlands, no posting of workers is involved.

¹² HR 23 november 2018, ECLI:NL:HR:2018:2174. This ruling was welcomed as a major victory for Dutch trade union FNV in its fight to secure equal pay for equal work in the transport sector. See also: <http://www.itfglobal.org/en/news-events/press-releases/2018/november/netherlands-supreme-court-hands-down-two-important-rulings-for-road-transport-workers/>

In situations of cabotage the Dutch WagwEU applies. However, it is not clear if in situations of bilateral, third country and transit operations the Dutch CLA or minimum wages would apply. The Dutch Ministry of Social Affairs has up till now communicated that the PWD in road transport is only applicable in the case of cabotage. That means that according to the present state of play the Dutch CLA only applies when drivers execute transports within The Netherlands (cabotage). There has been a debate in The Netherlands about the question if the posting of workers should also involve international transports. In the important court of appeal case of VdB against FNV,¹³ this was settled in the negative.

iv. Intermediary

Since the 'Wet allocatie arbeidskrachten door intermediairs' (abbreviated as Waadi and translated as the Allocation of Workers by Intermediates Act) came into force in 1998, the licensing system (that allowed temporary agency work solely if the company had obtained a specific license allowing it to hire out temporary agency workers) was abolished. This means that from, from that time, every company may second employees, without having to obtain a license.

There have been questions about the legal status of the temporary employment contract for a long time. More in specific, there had been a debate for many years whether the temporary agency worker worked on the basis of an employment agreement or not, and if so, with whom (either the temporary working agency or the recipient). These questions has been answered upon the enactment of the Flexibility and Security Act, since the 1st of January 1999. It arranged by law (article 7:690 of the Dutch Civil Code) that the temporary agency worker works on the basis of an employment contract with the agency. This temporary employment agreement is a subcategory of the 'normal' employment contract. Basically this means that the temporary employment agency and the temporary agency worker have the same rights and obligations, with a few exceptions though. The law allows more flexibility with regard to fixed term contracts ending by operation of law. The employment agreement with the temporary agency worker can also be terminated with more ease when the recipient ends its assignment with the temporary working agency, and this stops hiring that worker.

Temporary employment agencies must abide the WAADI. The most important provision of the WAADI relevant for the WagwEU is Article 8: unless a (universally applicable) collective agreement provides otherwise, temporary workers are entitled to the same wage and other allowances as comparable workers in the industry where the worker is temporarily carrying out his work. As of July 2012, the WAADI arranges that temporary employment agencies must be registered in the Commercial Register of the Chamber of Commerce. The WAADI, however, only applies if the temporary employment agency receives a payment for assigning the temporary employment agency worker to the recipient. It furthermore does not apply when employees are supplied to other legal entities within the same group of companies. In these circumstances, therefore, a company that is not a temporary employment agency may supply workforce to another company. There are no specific regulations in place for this type of hiring out employees.

In particular with regard to supplying employees within the same group on a transnational basis, there may be a debate about where the employment agreement really is situated.

¹³ Hof Den Bosch 2 May 2017, ECLI:NL:GHSHE:2017:1873 and ECLI:NL:GHSHE:2017:1874 .

v. Social security

Dutch case law regarding the binding force of 'posting certificates' (A 1 and old E-101 forms) is in conformity with the (so far)¹⁴ consistent line in the case law of the Court of Justice in this respect. This case law leaves institutions of the host countries in daily practice 'with empty hands' when they suspect fraud or misuse; in principle the portable documents A 1 issued by a competent institution in 'the sending state' are binding and shall be accepted by the institutions in other MS, unless withdrawn by the issuing institution. Art. 5 (2-4) Regulation 987/2009 stipulate a procedure for questioning the validity of documents with a role for the Administrative Commission. Apart from the cases mentioned below, which concern issues regarding the scope of EU regulations on coordination of social security law, the Dutch courts did not pose challenging preliminary questions to the EU Court regarding the binding force of 'posting certificates' (A 1 and old E-101 forms), such as the Belgian courts did.

In a case referred to the CJEU in 2014, *X and Van Dijk*, the *Gerechtshof* (court of appeal) in *Den Bosch* asked preliminary questions on the application of the social security provisions of Regulation 1408/71 to Rhine boatmen falling under the international Rhine Agreement. In its judgment in these joined cases C-72/14 and C-197/14, the Court decided that a posting certificate (in these cases the old E101) attesting the applicable legislation under the multilateral agreement on the social security of Rhine boatmen, does not produce the same binding effect as a certificate attesting the applicable legislation under the Regulation 1408/71 (now replaced by Regulation 883/04).

On 8 August 2017, the *Centrale Raad van Beroep* (the Dutch court of appeal in matters of social security law) lodged a request for a preliminary ruling in the case *Sociale Verzekeringsbank v D. Balandin and Others* (Case C-477/17).¹⁵ The case concerns posting certificates issued to a Russian and a Ukrainian Ice-skater who work every year a few weeks in the Netherlands for Holiday on Ice Services B.V. and from there, are also assigned to carry out their ice-skating activities in shows in several other EU countries. The Question referred reads: 'Must Article 1 of Regulation No 1231/2010 1 be interpreted as meaning that third-country nationals (TCN), who live outside the European Union, but who work in various Member States on a temporary basis for an employer who is established in the Netherlands, may invoke (Title II of) Regulation No 883/2004 2 and Regulation No 987/2009 3?' In his Opinion,¹⁶ A-G Wahl proposes to answer this question in the negative. The workers concerned do not have a residence permit nor a work permit in the Netherlands (neither on the basis of EU law nor NL law), being the country from which they were sent to the other Member States. Therefore, this is not a situation (that should be) catered for in the social security coordination rules. According to A-G Wahl, A1 forms should never be issued in this situation, nor in similar situations where the workers with nationality from a non EEA-State do not really (on a stable basis or at least for the entire period during which they are working in the EU and seek social security coverage) fulfill the requirements of legal residence in one Member State; namely in this case the Netherlands.

¹⁴ But see the deviating Opinion of the A-G of 9 November 2017 in the pending case C-359/16 (Altun), as discussed in Module 1 memorandum on the EU Coordination of the social security systems of the Member States and its applicability in cross-border road transport, at p. 29.

¹⁵ See for the referring judgment of the CRvB of 4 August 2017 ECLI:NL:CRVB:2017:2914.

¹⁶ Opinion A-G Wahl, Case C-477/17, 27 September 2018 ECLI:EU:C:2018:783

A-G Wahl denies that the so-called VanderElst case law, facilitating the posting of TCN workers by a service provider based in an EU Member State, would be applicable to this case, since the starting point is here as well that the TCN worker should be lawfully resident and habitually employed by the company in the sending Member State. Although Holiday on Ice is established in the Netherlands, the TCN workers stay each year only for a couple of weeks in NL for training (their employment status during this weeks is not fully clear on the basis of the given facts in this Opinion, but at least Dutch law does not require a work permit for this short stay, which implies that the TCN workers in this case are not fulfilling the condition of 'habitual employment' in the Netherlands). In sum, this is really 'too thin ice' to skate on in order to be eligible for the status sought under the Regulations on social security coordination.

Interestingly, as A-G Wahl points out in point 90 of his Opinion, Holiday on Ice does have the possibility to obtain residence permits for its TCN workers based on the Single Permit Directive.

Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands) lodged on 25 September 2018 — AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank

Last but not least, the Dutch court of appeal in matters of social security law (*Centrale Raad van Beroep*) lodged a request for a preliminary ruling in the case *AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank* (Case C-610/18). This case concerns the road transport sector.

The following questions are referred regarding the predecessor of Regulation 883/04.

A. Must Article 14(2)(a) of Regulation (EEC) No 1408/71¹ be interpreted as meaning that, in circumstances such as those of the cases in the main proceedings, an international truck driver in paid employment is to be regarded as being a member of the driving staff of:

(a) the transport company which has recruited the person concerned, to which the person concerned is de facto fully available for an indefinite period, which exercises effective control over the person concerned and which actually bears the wage costs; or

(b) the company which has formally concluded an employment contract with the truck driver and which, by agreement with the transport company referred to under (a), paid the worker a salary and paid contributions in respect thereof in the Member State where that company has its registered office and not in the Member State where the transport company referred to in (a) has its registered office;

(c) both the company under (a) and the company under (b)?

B. Must Article 13(1)(b) of Regulation (EC) No 883/2004² be interpreted as meaning that, in circumstances such as those of the cases in the main proceedings, the employer of an international truck driver in paid employment is considered to be:

(a) the transport company which has recruited the person concerned, to which the person concerned is de facto fully available for an indefinite period, which exercises effective control over the person concerned and which actually bears the wage costs; or

(b) the company which has formally concluded an employment contract with the truck driver and which, by agreement with the transport company referred to under (a), paid the worker a salary and paid contributions

in respect thereof in the Member State where that company has its registered office and not in the Member State where the transport company referred to in (a) has its registered office;

(c) both the company under (a) and the company under (b)?

In the event that, in circumstances such as those of the cases in the main proceedings, the employer is regarded as being the undertaking referred to in Question 1A(b) and in Question 1B(b):

Do the specific conditions under which employers, such as temporary employment agencies and other intermediaries, can invoke the exceptions to the country-of-employment principle set out in Article 14(1)(a) of Regulation (EEC) No 1408/71 and in Article 12 of Regulation (EC) No 883/2004 also apply by analogy, wholly or in part, to the cases in the main proceedings for the purposes of Article 14(2)(a) of Regulation (EEC) No 1408/71 and of Article 13(1)(b) of Regulation (EC) No 883/2004?

In the event that, in circumstances such as those of the cases in the main proceedings, the employer is regarded as being the company referred to in Question 1A(b) and in Question 1B(b), and Question 2 is answered in the negative:

Do the facts and circumstances set out in this request constitute a situation that is to be interpreted as an abuse of EU law and/or an abuse of EFTA law? If so, what is the consequence thereof?

vi. Minimum wage

In general (not specific for the road transport sector), in 2018 the minimum full-time wage is € 1.594,20 per month, € 367,90 per week and € 73,58 per day for an adult worker.

Minimum wage includes the following:

- the applicable periodic wage on the pay scale;
- the applicable reduction in working hours per week/month/year/period;
- surcharges for overtime, shifted hours, irregular hours, including public holiday allowance and shift allowance;
- interim pay rise;
- expense allowance: travel expenses and travel time allowance, board and lodging costs and other costs that are necessary on account of performing the work;
- increments;
- end-of-year bonuses;
- extra holiday allowances,

Not included in this minimum wage are the following:

- entitlements to additional occupational pension schemes;

- entitlements to social security exceeding the statutory minimum;
- fees above the wage for expenses to be incurred by employees in connection with the posting for travelling, housing or food.

Save a limited number of statutory exceptions, setting off or compensating costs to the detriment of the employee causing the actual salary payment to that employee to drop below the minimum wage level is prohibited.

The minimum wages for the road transport sector are laid down in collective agreements.

In 2007, private enforcement of the Dutch Minimum Wage Act was complemented with administrative enforcement, which means that the Inspectorate SZW can impose a fine if it finds that an employer violates the minimum wage law. Currently, this fine varies between € 500 in case of less than 5 per cent underpayment for a period of one month to € 10,000 in case of more than 50 per cent underpayment for at least six months.

The effective monitoring and enforcement of the minimum-wage legislation has become increasingly complicated due to the strong growth of atypical employment relations, such as (bogey) self-employed, on-call contracts, payroll contracts, posted workers, contracting and labour migrants. Often, it is not immediately clear whether these employment relations are covered by the minimum wage law. Consequently, companies may hire workers on these kinds of contracts to circumvent minimum-wage legislation (and also other types of legislation, regarding social insurance, employment protection and working conditions).

To combat the abuse of these non-standard employment relations, in June, 2015, the Parliament passed the Act on fighting sham arrangements (*Wet Aanpak Schijnconstructies, WAS*). This law introduces a number of measures regarding (minimum) wage payment, in particular:

The obligation to specify wage components; the prohibition of cash payment; the prohibition of deductions from the wage to compensate for costs that are incurred by the employer; however, deductions, for housing and health insurance are still allowed, on certain conditions and up to a certain maximum); the minimum is wage also applicable to assignment agreements (called 'ovo') based on piece rates.

The WAS also introduced chain liability for wages. See below under c, iv Chain liability.

4. Monitoring and enforcement

a. Information and transparency

Information for workers posted from the Netherlands

Art. 3 WagwEU is addressed to posted workers sent from the Netherlands to another Member State. It states that these workers, irrespective of the law applicable to their employment contract, may also be entitled to rights stemming from the implementation Act of the PWD in the country where they are posted to. Thus, this provision may be seen as a way of guaranteeing respect for the minimum protection of the place of work. It may also be seen as a way of informing posted workers from the Netherlands about their rights under the PWD.

Moreover, as per the implementation of 'the written statement' directive (91/533/EEC) information is to be given to personnel which is seconded or posted abroad. Directive 91/533 was adopted a few months after the first draft was presented by the Commission for what has become the PWD. The interrelationship between Directive 91/533 and the PWD was emphasized during the implementation process of the latter Directive. In the transposal stage, the Commission expressed its belief that compliance with the requirements laid down in Directive 91/533 should facilitate the implementation of the PWD and in particular the process of comparing the home state's and host state's provisions on minimum wages and paid holidays.

Article 4 Dir. 91/533 regarding expatriate employees concerns employment abroad of a duration of at least one month. It imposes obligations on firms whose employees are required to work in another country. These staff may be migrant workers under Article 45 TFEU or posted workers under Article 1(3) of the Posted Workers Directive 96/71¹⁷ The employee must be handed at least a written declaration which, besides the information mentioned in Article 2(2) of Dir. 91/533,¹⁸ contains the following information:

- a) the duration of the employment abroad;
- b) the currency to be used for the payment of remuneration.

¹⁷ This covers the situation where undertakings take one of the following transnational measures:

(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or

(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.

¹⁸ Article 2(1) obliges an employer to inform the employee of the essential aspects of the contract or the employment relationship. As regards the content of the information Article 2(2) lists the following: (a) name and address of the employer and the employee, (b) place of work, (c) title, grade, nature of the work or a brief specification or description of the work, (d) date of commencement, (e) the expected duration, if time limited, (f) the rights to paid annual leave, (g) the length of the periods of notice, (h) the remuneration and frequency of payment, (i) the length of the normal working day or week and (j) where appropriate, collective agreements which apply. This provision is implemented in Art. 7:655 (1) DCC. Moreover, two other aspects which must be contained in the written or electronic statement:

- Whether the contract is a contract of secondment referred to in art. 7:690 Dutch civil code (Art. 7:655 (1)(m) DCC)
- Whether the employee will join an occupational pension scheme (Art. 7:655 (1)(j) DCC)

Where appropriate

c) the benefits in cash or kind attendant on the employment abroad

and

d) the conditions governing the employee's repatriation should be included.

The information referred to in paragraphs b) and c) may, according to Article 4(2) Dir. 91/533 be given in the form of references to laws, regulations and administrative or statutory provisions or collective agreements governing those particular points.

In the Netherlands this provision is implemented in the Dutch Civil Code (DCC). Expatriates are specifically addressed by (Art. 7:655 (1)(k) DCC), which provides that the written or electronic statement must contain: "if the employee will work outside the Netherlands for a period in excess of one month, the duration of that work, the accommodation, the applicability of Netherlands social security legislation, or a specification of the constituent bodies responsible for administering that legislation, the currency in which payment will be made, the allowance to which the employee is entitled and the manner in which the return has been arranged".

The particulars referred to in Art. 7:655(1)(k) DCC (concerning work abroad) shall be provided before departure (Art. 7:655(3) DCC).

On top of the items listed in Art. 4 of the Directive, the Dutch provision requires also a written or electronic statement about "accommodation" and the applicability of Dutch social security legislation.

The second section of Art. 4 of the Directive is not transposed in Dutch law, so that one must conclude that all this information must be given in a written or electronic statement and not by reference to other sources.

It is submitted that both deviations of the Directive are allowed as they are more favourable to the employees (see Art. 7 of the Directive).

Consequences in case of violation

What is the sanction if a Dutch employer doesn't comply with the Directive 91/533/EC, and fails to provide a written statement?

Art 7:655(5) Dutch Civil Code reads: 'an employer who refuses to provide a statement or includes incorrect particulars in it, is liable to the employee for the resulting damage caused.' A standard penalty (poena privata) is not provided (such as for instance the one in art 7:668(3) DCC for non-observation of the obligation to inform in writing the employee about the termination of a fixed-term contract: the penalty of one monthly wage). Also no reversal of the burden of proof has been included in or rewarded in case law on the basis of Art 7:655 DCC.

The fact that there are hardly any cases where employees request liability for damages, shows the weakness of the Dutch implementation of Art. 8 of Directive 91/533.

However, it is sometimes argued and also once affirmed by a Court of Appeal (see Court of Appeal 's-Gravenhage 31 January 2012, LJN BW 148, JAR 2012/144) that the obligation to provide the employee with a written or electronic statement of the essentials of his contractual relationship can also be derived from the bona fides principle in Dutch Labour Law (Art. 7:611 DCC). This opens the possibility that in case the

transposition of Directive 91/655 falls short of providing a basis for a legal claim based on art. 7:655 DCC, such a basis can also be found in Art. 7:611 DCC.

A (rebuttable) presumption, for example that the worker is supposed to have a permanent employment contract, has been advocated but is not yet part of positive (case) law.

In its Advise 14/09 of December 2014, p. 92 to the Dutch Government the Dutch Social-Economic Council (in which the Dutch Social Partners hold the majority of the seats) has written:

“In case of posting of workers, just like in the case of free movement of persons, information about the rules and the rights and obligations of employees is essential. In that respect the Council asks attention to Directive 91/533/EEC. This Directive orders what information the employer has to provide at least to the employee about his contract of employment and working conditions. It needs clarification that the Directive is also applicable in case of posting of workers. Moreover the Directive should be more than is the case actually, be adapted to the position of the posted worker – elements for that sake are: the duration of the posting, the elements of the wage and tax-free compensation of costs as well as the applicable working conditions in the country to which the worker shall be posted”.

Information made available to service providers and workers posted to the Netherlands

The national authorities from the countries within the EU (should have) provided the European Commission with information on posting.¹⁹ The website Europa.eu shows a link to a Dutch website where one can download a fact sheet with information about the WagwEU.²⁰ This is a two-page document where one can find basic information about terms and conditions of work for posted workers in the Netherlands and about the monitoring and enforcement of the rules. The fact sheet also refers to a (Dutch) website where one can check whether a universally binding collective agreement applies. Moreover, businesses are specifically addressed through the website: <https://business.gov.nl/guides-for-doing-business/hiring-staff/guide-for-posting-employees-to-the-netherlands/>.

b. Monitoring (administration, notification)

1. Overview road transport sector

The transport sector is formed by actors such as transport companies, manufacturers, importers and dealers, industry associations, employers' and workers' organizations and the Ministry of infrastructure and the Environment. In addition, a number of other actors with specific tasks are active in the transport sector. First of all, these are the licensors, such as National and International Road Transport Organisation *NIWO*, quality management institute *Kiwa*, and municipalities and provinces. The Human Environment and Transport Inspectorate (ILT) performs most of the supervisory tasks in the transport sector. The CCV Division (Contact Commission Competence) of the CBR (Dutch Driving Test Organisation) takes care of almost all examinations for truck drivers in the Netherlands and certifies the compulsory periodic training. Insurers offer the sector not only insurance against losses, but in some cases also develop initiatives to prevent the damage. Regarding

¹⁹ See: http://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm?linksbox=1

²⁰ See: <https://www.government.nl/documents/publications/2016/10/20/factsheet-terms-of-employment-posted-workers-in-the-eu-act>

working conditions in the road transport sector, the Inspectorate ILT closely collaborates with the Inspectorate I-SZW and the Ministry of Employment and Social Affairs (SZW), see also below under c, a (inspection authorities).

Specific administrative measures concerning posting

The *WagwEU* includes several measures to ensure that the core terms of employment can be enforced more adequately. For example, inspection services from the Member States can exchange information with each other and imposed fines can be collected across the border. In addition, there are a number of administrative statutory obligations for companies who are going to perform temporary work in the Netherlands. It involves four aspects:

1. The obligation to provide information, if requested, to the Inspectorate SZW which is required to enforce the *WagwEU*;
2. The obligation to have certain documents such as payslips and summaries of working hours available at the workplace (or have them digitally available at once);
3. The duty to report: foreign service providers must report in advance about where and when and with which employees work will be performed in the Netherlands. The service recipient in the Netherlands has to check whether the report has been made and whether it is correct.
4. The obligation to appoint a contact person who functions as a point of contact and who can be contacted by the Inspectorate SZW.

The failure to comply with the first two obligations will be regarded as a violation as from 18 June 2016 and may therefore be punished with an administrative fine.

2. Notification system

The duty to report will become effective at a later moment when a digital system is ready to submit the report. This means that at this moment no reports have to be submitted by the service provider and verified by the service recipient. It should furthermore be noted that the legislator expressed its intention to make an exemption on the general duty to report for road transport, with the exception of cabotage transport. The reason for this is that, in the transport sector particularly, it is hard to determine whether a construction falls within the ambit of the Posted Workers Directive. As previously mentioned, this should be decided on a case-by-case basis. Consequently, a general duty to report is not suitable for the transport sector. Also, the duty to report at all times would place a disproportionate burden when transport takes place frequently.

A more limited duty to report for self-employed persons will also apply later. In order to tackle bogus self-employment, self-employed persons working in specific sectors (for now not including transport) of the industry must also comply with the obligation to provide information and a more limited obligation to have a number of documents available at the workplace (whether or not in digital form).

Besides these forms of enforcement, social partners may play a role as well in enforcing the compliance with the *WagwEU*, as discussed in part 4.2 of this memorandum.

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c. Enforcement

i. General

a. Inspection authorities

In the Netherlands there are two Inspections that supervise the compliance with labour legislation in the transport sector. These are the Inspection SZW, which falls under the Ministry of Social Affairs, and the Inspection for Environment and Transport (*ILT*), which falls under the Ministry of Infrastructure and Environment.

The Inspection SZW supervises the compliance with the Working Time Act, the Working Conditions Act (*Arbowet*), the *Waadi*, the Act on Foreign Workers (*Wav*), the *Wml*, the *WagwEU* and finally the *Wet AVV*. The powers the Inspection SZW has are laid down in these acts in combination with the 'Aanwijzingsregeling toezichthoudende ambtenaren en ambtenaren met specifieke uitvoeringstaken op grond van de SZW-wetgeving'. The Inspection SZW has the authority to impose penalties on employers if they don't comply with rules and regulations deriving from these acts. The Inspection SZW can also impose an order for periodic penalty payments (*last onder dwangsom*) if the employer does not cooperate with the Inspectorate SZW by refusing to give the requested information and/or documentation. Furthermore the Inspection SZW can decide to close down the work for a maximum period of 3 months. Finally, if a penalty is imposed and/or the work has been closed down, the Inspection SZW can decide to make this information public.

The *ILT* has also the authority to check the employer on the compliance with the Working Conditions Act and the Working Time Act. In consequence, both the Inspection SZW and the *ILT* can verify the compliance with these two acts.

b. Sanctions, including public prosecution

Finally, the police can check the compliance with the Act on Foreign Workers and the compliance with the Working Times Act. Non-compliance with the Working Times Act will almost always be dealt with by the

Inspection. It only qualifies as a criminal offence when the transport safety is in serious danger. This may be the case when Working Time Act provisions were violated and a traffic accident (that caused injury) occurred. In general, non-compliance with administrative provisions on working time will not result in a serious danger for the transport safety. Usually, there will be no direct causal link between the transport safety and non-compliance with administrative provisions such as the Working Times Act. Public prosecution is reserved only for serious offences, where the situation is so dangerous or the employer so culpable, that a penalty alone would not bring justice.

c. Miscellaneous

In the Netherlands, there is no alternative dispute resolution in the transport sector in place yet.

ii. Minimum wages (working hours)

Semi-legal arrangements to circumvent host country wage level

For more than a decade²¹ attention has been drawn to notorious semi-legal arrangements such as:

- on the pay roll for the statutory minimum wage per month, based on a 40-hour working week. In reality the worker makes > 60 hours per week. How is this possible? The Minimum Wage Law does not lay down an hourly minimum wage because the number of hours in a working week can differ from one business to another. The law lays down a minimum monthly wage for everyone in full-time employment. This makes it relatively easy to use the semi-legal arrangement mentioned.²²
- pay on a regular wage level, but (excessive) deduction of costs for tools, working clothes, accommodation etc. Since

As already mentioned under section 3,a (introduction), drivers contracted by so-called letter-box companies get a basic wage according to the letterbox jurisdiction (the monthly basic wage for Polish drivers is between €300 and €500, in Romania and Bulgaria about €200) plus an allowance for expenses. This allowance is for work-related costs, such as meals on the way, showers or toilets and is obligatory under Dutch law; it cannot be considered a wage. Although the drivers earn a net salary of €1,000 to €1,700 a month, only €200 of that

²¹ See A.A.H. van Hoek en M.S. Houwerzijl, 'De Europese werknemer en het Nederlandse arbeidsrecht', *SMA* 2006/10, p. 432-453

²² The introduction of an hourly minimum wage would be an obvious choice. However, this will cause transition problems in sectors with a longer or shorter standard workweek than would correspond with the new hourly norm. If the hourly minimum wage would be calculated on the basis of a 40-hours workweek, then full-time employees in a sector with a shorter standard workweek would receive less than the current level. In the case of a 36-hours workweek, this would mean a 10 per cent reduction of the monthly minimum wage. These transition problems have prevented the introduction of an hourly minimum wage when discussed in, e.g. 2003 (TK 2004, 16-17) in the past. However, the introduction of an hourly minimum wage in Germany incited the Minister of Social Affairs and Employment to reconsider the option of introducing an hourly minimum wage for the Netherlands. However, in October 2016 the proposal to Parliament on changing the law with regard to the youth minimum wages has remained silent about the hourly issue. Interestingly, the monitoring by the Labour Inspectorate for the enforcement of the minimum wage has since 2011 compared payments with the hourly minimum wage that corresponds to a 40-hour week.

total amount is an actual wage, the rest being allowances. This is disadvantageous for workers from a social perspective: they build up pension rights only on the €200, and when they fall ill, they only receive the basic wage level of €200 a month. Some drivers (such as those working for Vos Transport, for instance) also allegedly get a bonus above a certain amount of kilometres, according to the trade union, FNV; this is prohibited by Article 10 .1 of EU Regulation 561/2006 on driving and rest times, as well as by Dutch law, for road safety reasons.

In a Dutch case between Portuguese and English subsidiaries of the Atlanco Rimec group on the one hand and the Dutch parties to the collective labour agreement in the construction industry on the other hand, the 'posted' workers involved were, according to their employment contracts, explicitly and solely hired for a specific construction project in the Netherlands. Therefore, according to the Dutch court, their 'habitual' country of work under the contract was the Netherlands. As a consequence, Dutch law was deemed to be objectively applicable to the employment contracts of the workers pursuant to Article 8(2) Rome I.²³

As a result, as was reported by a Swedish website,²⁴ Atlanco had to repay the housing cost for all Portuguese and Polish workers that were working on a tunnel in the Dutch city of Maastricht. Atlanco deducted almost 1000 euros a month per worker for a small room²⁵ whilst the CLA stipulated that housing should be provided by Atlanco without charge. Also, it became clear that Atlanco Rimec didn't pay pension premiums for the workers for more than three years. Although that was obligatory. By not paying the premiums the workers were cheated out of 3,5 million euros that Rimec had to pay to a pension fund within 7 days after the verdict.

However, not all foreign workers should get their money back, the court said. Most Portuguese workers settled the dispute in 2014 with a pay of a little less than half the money that was unrightfully deducted from their salary. They had to sign a waiver that they would not claim more money. Beside the Portuguese that didn't sign the waiver, at least 70 Polish workers never got anything back from the three year deductions from their salary. By estimate Atlanco Rimec had to repay 2.5 million euros to these workers. The Court gave the company 14 days to do so.

The total claim amounts to 6 million euros against Atlanco Rimec. The chance that Atlanco Rimec daughter Rimec ltd would pay this was virtually non-existent. In court the Rimec-solicitor already said the daughter company was almost broke. Rimec ltd has already changed its name to Mecra. According to Atlanco Rimec sources they Irish company is sold to an unknown foreign investor. Atlanco Rimec boss Michael O'Shea is said to have left the company.

²³ Rechtbank Midden Nederland 22 July 2015, ECLI:NL:RBMNE:2015:5393.

²⁴ <http://www.stoppafusket.se/2015/07/24/atlanco-rimec-loses-dutch-court-case-on-all-counts/>

²⁵ The Portuguese workers stayed in rented houses which were due to be demolished. These houses were rented out by a Dutch housing corporation to Atlanco Rimec for approximately 450 Euro per month. The Portuguese workers, who stayed with three or four workers in such a house, had to pay a monthly rent of 968 Euro to Atlanco Rimec. So, the Portuguese workers clearly got exploited. Atlanco Rimec deducted a big amount from the salaries of the workers under the guise of 'logistical costs'. Investigative journalism by the regional newspaper *Dagblad de Limburger* revealed the abusive practices of posted workers at the construction of the A2-highway in Maastricht, which led to a Report of an Expert Committee A2 Maastricht (2013).

iii. Bogus work/letterbox firms

Bogus self-employment, distinction between (posted) employee / self-employed

The Dutch implementation act does not contain any provision on the concept of 'worker' as opposed to self-employed. No explicit distinction is made between a posted worker and a (posted) self-employed worker. But parliamentary documents and the applicable legislation for posted workers under Dutch law show that only the Dutch definition of an employee is to be taken into account in case a question should arise about the status of the worker. In this respect no problems have arisen such as the ones that led to ECJ judgments in cases like *Barry Banks / Fitzwilliams* in the framework of Reg. 1408/71 (now Reg. 883/04). Still, the practical problem underneath is not easy to tackle: although certain branches prefer to work with self-employed workers who would surely be unveiled as employees if all facts were known, in practice it is very difficult to prove this.

How does one recognize a posted worker and as a result apply the WagwEU? First of all these workers are difficult to find because they often work quite insulated from the Dutch workers. And when they would be found, language problems and a lack of interest occur, because (most of the) posted workers have nothing to gain with a judicial procedure about their status.

'Creative use' of the rules on posting of workers (e.g. by establishing letterbox companies)

Controversial cases include the setting up of letter box companies which then hire workers specifically to 'post' them to other Member States and incidences of consecutive 'postings' of a single worker to a single Member State by different 'employers' in different Member States. A key feature of letterbox companies is that they can be very quickly, simply and cheaply set-up and wound down. Indeed, such entities may be established and disbanded in a matter of a few hours, making supervision very difficult.

In the road transport sector ample use is made of so-called 'letter box practices'. This refers to the practice that companies (often subsidiaries of the company in the host state) are incorporated in a certain jurisdiction only for the purpose of posting ('reflagging'). The worker might actually be made to work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. The absence of genuine activities in the country of origin may be combined with repeated postings, in which the 'posted' worker is working in a specific Member State on an (almost) permanent basis.

For example: a Dutch road transport company may contract with a Polish company (which may or may not be a subsidiary company established for that purpose) for the provision of manpower or the subcontracting of transport services. Such outsourcing or subcontracting has a considerable impact on the Dutch transport market. Moreover, when the Polish worker used for the services regularly works from the Netherlands rather than Poland, his labour contract has a close link with the Dutch labour market. This would merit protection according to Dutch labour standards. However, the PWD does not offer a solution to this problem when the transport service itself is largely performed outside the Netherlands, because its system is based on the premise that posted workers are working temporarily *in* another country than the one *in* which they normally work. The system does not seem to fit the situation in which someone is working *from* a country, as is the case in international transport.²⁶

²⁶ Van Hoek/Houwerzijl, *Report for the Dutch social partners in transport: De toepassing van Nederlandse cao's op buitenlandse chauffeurs in het goederenvervoer over de weg. Op de viersprong van transportrecht, arbeidsrecht, vrij verkeer en IPR: Eindrapportage uitgebracht aan de sociale partners in de transportsector*, Radboud University

Conclusions from an ETUC study on letterbox-practices,²⁷ including a Dutch case study in road transport (case De Vos): The regulatory framework related to the letterbox phenomenon is stretched over various national and EU policy areas, with non-coherent, contradictory or even conflicting rules. Of particular concern is that regulatory action taken in one field is often quickly undermined by another. 'Silo thinking' has opened-up avenues that allow firms to build up a smokescreen and circumvent rules and safeguards. In all this uncertainty and complexity, one thing is sure: the current situation creates an ideal environment for malafide cross-border business activities. The danger of lacunae is in practice most urgent when the worker does not have a relevant connection with the country of establishment of the service provider.²⁸ This again underlines the importance of ensuring that each service provider involved should perform a 'genuine activity' in the Member state where the posted worker habitually works and therefore should be a genuine undertaking.

iv. Chain liability

In order to tackle fraud and abuse, the Act on Combating Sham Arrangements (*Wet Aanpak Schijnconstructies*) became effective. The Dutch government decided to provide for more stringent liability rules under national law with regard to the scope and range of subcontracting liability than stated in the Enforcement Directive. If work is carried out in the service of an employer in the performance of a contract for services or a contract for works, the employer and its client shall be jointly and severally liable for the settlement of the remuneration due to the employee. If work is carried out in the service of the employer in the performance of one or more contracts entered into between a client, a provider of services or a contractor, each client who gave instructions shall be liable.

In The Netherlands, the law also provides for such liability in sectors other than construction industry (thereby using the liberty it has been given in article 12 sub 4 of the Enforcement Directive). As of 1 January 2017, subcontracting liability also applies for road transport. This is considered to be an overriding mandatory provision as referred to in article 9 of the Regulation no 593/2008 on the law applicable to contractual obligations (Rome I). The law provides for subcontracting liability when the work is carried out in The Netherlands. There is no subcontracting liability when the goods are loaded and unloaded outside The Netherlands. This exception is explicitly provided by law for the situation in which a foreign truck driver only drives through The Netherlands on his way to a destination in another country without loading or unloading his cargo in The Netherlands, while the agreement is governed by the law from another country and where most elements relevant to the situation are located in a country other than The Netherlands.

Nijmegen 2008. (*The Application of the Dutch Collective Agreements to the Employment Contracts of Foreign Truck Drivers Active in the Transport of Goods by Road in the Netherlands – On the Intersection between Transport Regulation, Labour Law, Free Movement and Private International Law*) (January 2, 2008). Available at SSRN: <https://ssrn.com/abstract=2930153> or <http://dx.doi.org/10.2139/ssrn.2930153>.

²⁷ 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>

²⁸ Many fraudulent situations involve posted (temporary agency) workers who never actually have been employed on the territory of the Member State of establishment of the employer (although this state would allegedly be his habitual place of work).

v. Social security (Challenging PD-A1 forms)

In 2011, several transport companies in the Benelux countries received an offer by AFMB Ltd to transfer their workforces to an intermediate company in Cyprus, AFMB Ltd, with reference to the changes in the coordination of social security as a result of the replacement of the old Regulation 1408/71 by Regulation 883/2004, offered to act as employers for the workforce. This case of advertising for regulatory avoidance, in this case specifically social security contributions and taxes, gained media attention in the Netherlands. Legally based in Cyprus, and administered by a public accountants firm that acts as a director or secretary for some 230 other businesses, the company AFMB advertised the following in Dutch on its homepage:

“In times when the economic climate is ‘cold and rainy’, as an international carrier or self-employed driver you need to keep your costs as low as possible. You are dealing with declining revenues and your margins have been under pressure for some time. Also, you will be faced with competition from low-wage countries within the European Union. AFMB Limited offers you customised advice on cost control. We offer, among others, opportunities to substantially reduce your labour costs and relieve your administrative burden. Drivers who want to become a freelancer or drivers who are self-employed, we help with our unique concept on the road. [...]”

AFMB offered payroll services for Dutch transport companies that meant they did not have to pay social security contributions in the Netherlands anymore for their employed truck drivers. The original employer of the truck drivers would become the ‘client’ and would only receive an invoice for supplying services, whilst the truck drivers would continue to work for the original employer. AFMB Ltd presented itself as a group of companies with wide experience in contracting, payroll administration and other services in the maritime sector, hotel and catering sector. By opening an office in Cyprus, it claimed, it was legitimate to offer a Cypriot employment contract to the drivers, even though they did not live there and never visited the island. AFMB had already ‘organised’ a licence through the Dutch Ministry of Transport and had received the assignment to act as an institution that was licensed “to temporarily make personnel in the haulage sector available”. A similar licence was procured from the German Federal Employment Agency.²⁹

The AFMB case is noteworthy because its advertisement encouraged individual truck drivers to use this scheme too; some of whom took the opportunity to reduce their own social security contributions: social insurance for unemployment and occupational disability insurance and pension contributions are lower in Cyprus. After media coverage and public pressure, the Dutch Ministry of Social Affairs took action against this so-called ‘Cypriot route’, and the scheme was declared illegal. Some drivers challenged this decision in court, but lost. Now they face a repayment of social contributions, in some cases amounting to thousands of Euros.³⁰

Had AFMB Ltd. tried to rely on a ‘posting arrangement’, than the Dutch competent institution *SVB* would probably not have been able to target this company effectively. However, in comparison to the division of

²⁹ See Jan Cremers, *EU Economic Freedoms and Social Dumping*, in Bernaciak, M. (ed.), *Market Expansion and Social Dumping in Europe*, 2015, Routledge, p. 184 and Transport online, *Sociale Verzekeringsbank pakt Cyprusroute AFMB Limited aan*, 26.11.2013, <http://www.transport-online.nl/site/42403/sociale-verzekeringsbank-pakt-cyprusroute-afmb-limited-aan-video>.

³⁰ *Chauffeurs Cyprusroute ontvangen belastingaanslag*, 5 November 2015, <https://belastingdienst-in-beeld.nl/chauffeurs-cyprusroute-ontvangen-belastingaanslag/> Ariane Kleijwegt, *De Telegraaf*, *Financiële strop ‘Cypriotische’ chauffeurs*, 6 November 2015, http://www.telegraaf.nl/dft/nieuws_dft/24707382/___Financiële_strop___Cypriotische___chauffeurs___html.

competences between sending and host state in situations of posting, a much more balanced approach exists with regard to assessing the applicable law in situations of working in two or more Member States:

Article 16 Reg. 987/2009 provides that a person who pursues activities in two or more Member States has to inform the competent authority of the Member State of residence. This institution has to determine the legislation applicable to the person concerned. The determination must be made without delay and shall initially be on a provisional basis. The institution in the place of residence must then inform the designated institutions in each of the Member States in which an activity is pursued and where the employer's registered office or place of business is located of its determination. The applicable legislation shall become definitive if it is not contested within two months by the other designated institutions. Where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more Member States, at the request of one or more of the institutions designated by the competent authorities of the Member States concerned or of the competent authorities themselves, the legislation applicable to the person concerned shall be determined by common agreement.

Unfortunately, there are many more service providers offering similar schemes using Liechtenstein or Hungary as an intermediary. Cremers notes that "[t]he general trend to deregulate has led to a marginal assessment before licenses are provided [...]. Hence, free establishment made it possible to open a company in another country with no staff, an office that is no more than a letter box, and with no activities in the country of registration. These companies are subsidiaries of existing transport companies or are owned by economic opportunists in pursuit of easy money."³¹

vi. Redress: individual and collective (civil) redress

Redress in civil procedures

The rights and obligations of employees are not only laid down in the abovementioned laws, but also in the Dutch Civil Code. The governmental institutions cannot enforce the clauses of the Civil Code, this can only be done by individual employees or trade unions if they represent these employees.

Dutch courts have competence in case of claims on the Dutch employment conditions that apply due to the posting of workers, in case the work has been temporarily performed in the Netherlands.

When it comes to the enforcement to pay the salary, the employee cannot only address his/her employer, but also the contractor of which the employer (service provider) is a direct subcontractor. This contractor can in addition to or in place of the employer, be held liable by the worker with respect to any outstanding salary. If both the employer and his customer do not pay the salary, the employee can try to address a contractor higher in the chain of contractors.

Collective redress

A trade union is entitled to establish the nullity of a provision in the individual employment agreement that deviates from a collective labour agreement to which it is a party, even without having to establish its interest in such an action. The trade union may demand specific performance and/ or payment of damages. The Supreme Court even allowed a trade union that was not a party to the collective labour agreement to demand

³¹ Jan Cremers, EU Economic Freedoms and Social Dumping, in Bernaciak, M. (ed.), Market Expansion and Social Dumping in Europe, 2015, Routledge, p. 184.

specific performance (but not payment of damages) from the employer who breached the normative provisions of the collective labour agreement. The trade union was allowed legal standing in court on the basis of a specific article in the Dutch Civil Code, which entitles associations to serve the interests of a group of persons, provided that their articles of association stipulate so.

In case of a generally binding collective labour agreement some additional rules apply. Although the extension decree is itself an act of public law, it should be noted that the enforcement of binding collective labour agreements still is a private matter. According to the legislator, the extension decree and the collective labour agreements envisage governing individual employment agreements, and are therefore part of private law. Consequently, violating provisions of applicable binding collective labour agreements should normally result in civil actions, as opposed to public sanctions. It is worth mentioning that social partners are entitled to 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.

There is an exception to the aforementioned rule that enforcement of binding collective labour agreements is a civil matter. Should one of the parties that requested the extension of the collective labour agreement, or the foundation (if any) that has been put into place in order to monitor the compliance of the collective labour agreement, have reasonable suspicion that a company does not comply with the binding collective labour agreement and should it consider bringing the matter to court, it can request that the Minister of Social Affairs investigates said company on such a compliance. This can assist the party's furnishing of proof. The actual investigation is performed by the Inspectorate SZW.³²

A same kind of cooperation between social partners and a foundation on the one hand and the Inspectorate SZW on the other applies to the compliance with employment conditions of the Netherlands with regard to the posting of workers to the Netherlands. Information derived from the Inspectorate SZW originating from other Member States can be passed on to these social partners and/or foundation. Although not yet in force, the Minister of Social Affairs can furthermore tip the social partners or foundation with regard to information obtained through the notification obligation incumbent on the service provider. This enables the social partners and/or foundation to assess whether that service provider is compliant in regard to its obligations under the WagwEU.

Naming and shaming

Every year several situations of exploitation or abuse of foreign workers feature in the Dutch media. These stories usually do not distinguish between EU and non-EU workers, illegal and regular migrants, posted workers and workers making use of their right to free movement. Contentious examples often feature the road transport sector. The Belgian BTB (Belgian Transport Workers Union) and the Dutch trade union FNV-Bondgenoten are running a media campaign against companies that organize social dumping practices. The Ikea campaign which they are running at present is a good example of this

³² A report analysing the compliance was recently published: Cremers, J. (2017). Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers n.a.v. het Sociaal Akkoord 2013. Tilburg: Tilburg Law School, https://pure.uvt.nl/portal/files/16689636/Boekje_3_jaar_naleving.pdf. Cremers, J.M.B. (2017). The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. Tilburg: Tilburg Law School. [https://pure.uvt.nl/portal/en/publications/the-enhanced-inspection-of-collectively-agreed-working-conditions\(84f3d048-ed4f-4038-abc3-48c9c36c7732\).html](https://pure.uvt.nl/portal/en/publications/the-enhanced-inspection-of-collectively-agreed-working-conditions(84f3d048-ed4f-4038-abc3-48c9c36c7732).html)

(http://www.youtube.com/watch?v=wvyBRaE_U78). They draw attention to the fact that social dumping does not only put pressure on the social position of all drivers, Eastern European drivers as well as other drivers in the EU, but also subjects them to degrading circumstances.

5. Literature

There are a few relevant publications in The Netherlands. Most publications describe new developments in Dutch law (such as the implementation act WagwEU). Other publications are comments on case law. There are two articles with a specific focus on the transport sector.³³

i) General literature in English on Dutch employment and social security law

- A. JACOBS, "The Netherlands", in *International Encyclopaedia for Labour Law and Industrial Relations*, (Deventer: Kluwer Law International), loose-leaf
- ANTOINE JACOBS, *Labour law in the Netherlands*, 2015 Wolters Kluwer
- FRANS PENNING, *Social Security Law in the Netherlands*, 2017 Wolters Kluwer

ii) Specific (Dutch/English) literature on cross-border work, including on international road transport, in Dutch context

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- FRANSSSEN, E.J.A., 'De mobiele werknemer en het minimumloon', *ArbeidsRecht* 2018/26

³³ E.J.A. Franssen, 'Concurrerende arbeidsvoorwaarden in het internationale wegtransport', *TVR* 2016-2, p. 37 http://www.uitgeverijparis.nl/scripts/read_article_pdf.php?id=1001261554 and

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6. Case law

District courts

1. District Court Roermond 10 August 2011, ECLI:NL:RBROE:2011:BR4863

In this case, Polish drivers, who are posted in the Netherlands, carry out most of their work in the Netherlands. The generally binding collective agreement (cao voor het Beroepsgoederenvervoer) and the Minimum Wage and Minimum Holiday Allowance Act (WML) apply to the Polish drivers and, therefore, the employer is obligated to pay the minimum wage and the minimum holiday allowance. *For the appellate court's judgment in this case, see Court of Appeal 's-Hertogenbosch 28 May 2013, ECLI:NL:GHSHE:2013:CA1457*

2. District Court East-Brabant 8 January 2015, ECLI:NL:RBOBR:2015:18

In this case the Court ruled that Hungarian drivers who carry out their work from a Member State fall within the ambit of the Posted Workers Directive. As the Hungarian drivers in this case carry out their work from the Netherlands, the employer is obligated to pay the drivers the Dutch legal minimum wage, even though the transport itself takes place only for a small part on Dutch territory. *For the appellate court's judgment in this case, see Court of Appeal 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1874*

3. District Court East-Brabant 8 January 2015, ECLI:NL:RBOBR:2015:19

In this case the Court ruled that the Posted Workers Directive applies to Hungarian drivers who carry out their work from a Member State (the Netherlands). As the drivers carry out their work from a Member State, the employer is obligated to pay the drivers the minimum wage with regard to the law of that Member State, even though the transport itself takes place only for a small part on the territory of that Member State. Even if the Posted Workers Directive does not apply, article 6 Rome Convention and article 8 Rome I determine that in this case Dutch law is applicable and that, therefore, the Hungarian drivers are entitled to Dutch wages. *For the appellate court's judgment in this case, see Court of Appeal 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1873*

4. District Court Overijssel 24 August 2015, ECLI:NL:RBOVE:2015:3865

In this case the Court ruled that the dispute claim from the labor union (FNV) to compel the employer to comply with the collective agreements (cao Goederenvervoer en cao Beroepsgoederenvervoer) requires further nuance and, consequently, further actual completion. The labor union is held to complete its claim with regard to which working conditions apply.

5. District Court Leeuwarden 15 November 2016, ECLI:NL:RBNNE:2016:4935

In this case the Court rules that the Bpf 2000 Act and the Compensation Decree are to be regarded as provisions of mandatory law as referred to in Article 9 Rome I. The employer falls within the scope of

the Pension Fund as he employs foreign drivers who are temporary agency workers and for that reason the employer is obligated to pay pension contributions for the foreign drivers.

Court of Appeal

1. Court of Appeal 's-Hertogenbosch 20 November 2012, ECLI:NL:GHSHE:2012:BY4057:

In this case the Court of Appeal ruled that insofar as, and despite the fact that there is no unilateral amendment clause the employers are held to agree with the unilateral change of working conditions, due to the financial and economic conditions in international transport.

2. Court of Appeal 's-Hertogenbosch 28 May 2013, ECLI:NL:GHSHE:2013:CA1457

In this case the Court of Appeal ruled that a Dutch employer acted unlawful towards the labor union by posting drivers through Poland in the Netherlands, whereby parties chose to comply with Polish labor law. As there is no or hardly any relationship with Poland in the case of the actual work carried out under these labor contracts the employer is held to comply with Dutch law, at least for the period that the collective agreement was universally binding.

3. Court of Appeal Arnhem-Leeuwarden 17 May 2016, ECLI:NL:GHARL:2016:3792

In this case the Court of Appeal ruled that the labor union (FNV) has insufficiently asserted that the group of foreign drivers fulfill the terms of the charter provisions of the collective agreements (*cao Goederenvervoer en cao Beroepsgoederenvervoer over de weg en de verhuur van mobiele kranen*). Therefore, the commitment obligation to comply with the working conditions from the collective agreements do not apply to the group of foreign drivers, who are subcontractors.

4. Court of Appeal 's-Hertogenbosch 24 May 2016, ECLI:NL:GHSHE:2016:2011

In this case the Court of Appeal ruled that due to insufficient defense a breach of the charter provision of the collective agreement transpires. The drivers, who are posted in the Netherlands through Poland, should be paid in accordance with the collective agreements. Drivers' statements, contracts and on-board computer reports show that, in practice, the drivers perform their work mainly outside of Poland. Therefore, the employer should comply with the collective agreement.

5. Court of Appeal 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1873

In this case the Court of Appeal ruled that the charter provision in the collective agreement (*cao Goederenvervoer*) does not violate the freedom of movement for services. In this case the applicable collective agreement is not universally binding, however, that is merely the result of the dispensation that has been granted for the applicable collective agreement. In accordance to the case-law of the European Court of Justice an obligation, as in the charter provision, only leads to a violation of the freedom of movement for services if that obligation is concluded in a collective agreement which has not been declared universally binding. Furthermore, the Court of Appeals rules that the term 'territory' as referred to in the Posted Workers Directive should be explained as 'in the territory' not as 'from the territory'.

6. Court of Appeal 's-Hertogenbosch 2 May 2017, ECLI:NL:GHSHE:2017:1874

In this case the Court of Appeal rules that the assignment of assignments does not lead to the applicability of article 8 Rome I or the Terms of Employment Cross-Border Work Act (Waga). To this end, the Court considers that the employees have signed a contract with the Hungary-based transport company and are therefore socially insured and have full tax liability in Hungary. Furthermore, it is determined that the international rides were carried out for only a very limited part in time and kilometers in the Netherlands.

Furthermore, the Court of Appeals rules that the term 'territory' as referred to in the Posted Workers Directive should be explained as 'in the territory' not as 'from the territory'.

