Implementation of the Posting of
Workers Directive in the Netherlands

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1. Introduction

This paper contains an overview and analysis of the Dutch implementation of the Posting of Workers Directive (hereinafter PWD), together with a description and assessment of the way the Implementation Act is practically applied and complied with in the Netherlands. But as a starting point some observations about the pre-PWD period are made. These are necessary to put the later developments in the right perspective.

2. Pre-PWD Legal framework for posting of workers in the Netherlands

PM (Ratification and enactment of Rome I Convention; Rush Portuguesa case; first CLA provisions in the construction sector in 1995; agreement B – NL and NL-ULAK; link with social security coordination)

3. Implementation of the PWD

3.1 Parliamentary history

The Posting of Workers Directive was officially implemented by means of the Wet arbeidsvoorwaarden grensoverschrijdende arbeid (Terms of Employment (Cross-Border Work) Act). The Act entered into force on 24 December 1999. The parliamentary history of the Act perfectly illustrates the ‘neutral’ attitude of the Dutch government vis-à-vis the Posting of Workers Directive (hereinafter PWD). In brief: the Bill was sent to the House of Representatives in Spring 1999. In the parliamentary debate, the central motto of the Government became clear: ‘We do not want to transpose more or less than necessary.’

The main consequence of this motto was that none of the optional provisions in article 3 (i.e. Art. 3(3-5), Art. 3(10) in the PWD were considered in the Bill. This neutral

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attitude corresponds with the general Dutch conduct concerning the implementation of EU-Directives. Nevertheless, the majority of the House of Representatives did not agree with this strategy. These politicians objected in particular to the limitation of the collective agreement part of the Directive to the construction sector. They stated that companies in other sectors would also want equal treatment at this point. The system of universally applicable (generally binding) collective agreements is widely spread in the Netherlands. Thus, not broadening the scope of the Bill through Article 3(10) of the Directive would mean that Dutch companies and workers outside the construction sector would not be able to compete with their foreign colleagues on an equal footing. This discussion dominated the parliamentary debate about the Bill, but did not lead to its amendment. Finally, the Second Chamber of the Dutch Parliament agreed with the Bill, under the condition that the Government would seek advice of the national board for socio-economic affairs (SER)\(^2\) in which social partners are predominantly represented but also, for one-third, a delegation of ‘independent experts’.\(^3\) Thus, the Bill was passed on. Meanwhile, the SER delegated the request to another board of advice, named \(\text{STAR}\),\(^4\) which only exists of representatives from employers associations and unions. This board advised divided about the desirability of scope broadening to other sectors: Union representatives were in favour of it, whereas representatives on the employer side spoke out against it.\(^5\) In January 2001 the Government concluded that the Advise did not give cause to adjust its policy. This conclusion was accepted by Parliament and the discussion seemed to be closed.

However, in the autumn of 2003, the topic was raised again. This time it was related to a debate about a transitional arrangement for the free movement of workers from Eastern European countries after their accession to the EU on the first of May 2004. At first, the government kept defending its ‘neutral’ position and the majority of the House of Representatives still accepted this, despite continuing attempts by supporters of ‘broadening the scope’ to put the item on the legislative agenda again. In the summer of 2004, however, the Government has made a U turn, because Dutch employers had complained about unfair competition related to the influx of cheap posted workers. In the autumn of 2004, a Bill was sent to the House of Representatives with the proposal to broaden the scope of the Terms of Employment (Cross-Border Worker) Act to all universally applicable collective agreements. This Bill was adopted by the end of 2005.\(^6\)

Obviously, other items were raised during the parliamentary debate about the Terms of Employment (Cross-Border Worker) Act. Questions were posed about the definition of ‘posting’, about the mode of compliance and enforcement of the applicable employment conditions for posted workers (Art. 4, 5, 6), about the non-use of the derogation option for postings not exceeding one month (Art. 3 (3 and 4), or 'non-significant' postings (Art. 3 (5) and about the application of the ‘favour-principle’ (Art. 3(7).\(^7\) However, none of these questions led to broad discussions or to any adjustment of the Bill. As far as the answers to these questions are still of relevance, they are dealt with in the sections underneath.

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\(^2\) Sociaal-Economische Raad.


\(^4\) Stichting van de Arbeid.

\(^5\) See STAR, Advies inzake de uitvoering van richtlijn 96/71/EG, 4 oktober 2000, no. 11/00.


3.2 Definition of posting, worker and period of work

In the Terms of Employment (Cross-Border Worker) Act (Art. 1) the posted worker is defined as someone who works temporarily in the Netherlands and on whose employment contract foreign law is applicable. No other words are used to implement Article 1 and Article 2 of Directive 96/71.

3.2.1 Definition of posting

So, the three types of posting that are distinguished in Art. 1(3) of Directive 96/71 do not occur in the Terms of Employment (Cross-Border Worker) Act. Still, as the responsible Minister assured members of Parliament, the Act is meant to apply for all three types of posting. Explicit implementation in the Act was not deemed necessary. Problem in practice with this ‘implicit’ method of implementation is that the posting definition of Art. 1(3) does not correspond to the Dutch internal definition of posting. In Dutch (legal) usage only posting types b (intra-corporate posting in multinational companies) and c (posting through temporary work agencies) are understood as posting, while type a (temporary cross-border working in the framework of the employer’s subcontract) is normally seen as something different. Moreover, the definition in the Terms of Employment (Cross-Border Worker) Act may be confusing because it includes (probably unintentionally) more workers than only temporary service workers who usually work in another Member State: It also includes workers who carry out their work in other Member States permanently on a temporary basis. In such a situation no Member State can be seen as the habitual work place of a worker. Examples are international truck drivers and tour guides. Because art. 1(1) Directive 96/71 is not explicitly transposed, the Terms of Employment (Cross-Border Worker) Act is not limited to companies that post workers in the framework of a provision of services. This means, at least in theory, that it would be possible to bring under the scope of the WAGA someone who has a temporary job in the Netherlands under an employment contract in which parties have explicitly chosen to apply foreign law (art. 8 Rome I Regulation). Because art. 1(1) Directive 96/71 is not explicitly transposed; the WAGA is not limited to companies that post workers in the framework of a provision of services.

In contrast, it can be deduced from a jointly-published leaflet in the construction industry that social partners, while not mentioning the three types either, have at least limited the scope of the applicable provisions of their collective agreements to workers who ‘normally work for their employer in another country of the EU’. Since 2003, a provision in the extended collective agreement for the Construction

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8 See ‘Kamerstukken II, 1998-1999, 26 524, nr. 5, p. 3 and nr. 6, p. 3’.
10 Since no consciousness of the difference with the PWD definition is shown in the parliamentary documents.
12 See Brochure ‘Posting to the Dutch construction sector. Collective labour agreement for the Construction Sector, Collective labour agreement for Site Management, Technical and Administrative personnel in construction companies,’ September 2003, published on behalf of the parties to these collective agreements, especially p. 2/3.
sector\textsuperscript{13} repeats the definition of the Terms of Employment (Cross-Border Worker) Act, but in addition stresses that a ‘posted worker’ means in this respect every worker who \textit{usually} works in another Member State, not being the Netherlands. This provision of the social partners is more accurate than the definition in the Terms of Employment (Cross-Border Worker) Act, although here the necessity of posting in the framework of a cross-border provision of services (as mentioned in Art. 1 of the Posting Directive) is absent as well.

3.2.2 \textit{Status of a worker}

Art. 1 of the Terms of Employment (Cross-Border Worker) Act makes no explicit distinction 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.\textsuperscript{14} In this respect no problems have arisen like the ones that led to ECJ judgments in cases like Barry Banks / Fitzwilliams in the framework of Vo. 1408/71.\textsuperscript{15} 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 recognise a posted worker and as a result apply the Terms of Employment (Cross-Border Worker) Act? First of all these workers are difficult to find because they often work quite insulated from the Dutch workers.\textsuperscript{16} 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.

3.2.3 \textit{Posted workers from third countries}

The scope of the Terms of Employment (Cross-Border Worker) Act is not limited to workers originating from one of the EU Member States. This means that posted workers from a ‘third country’ are entitled (at least) to the same protection and their employers are obliged (at least) to comply with the same conditions as workers and employers from within the EU. Migrant law however, shows that posting by an undertaking established in a third country is regulated differently: The Foreign Nationals Employment Act requires not only a residence permit for workers from a third country but also requires employers to obtain a work permit.\textsuperscript{17} Furthermore, the

\textsuperscript{13} See Article 92 of the extended version of the collective agreement for the construction (\textit{Bouwcao 2007-2009}).

\textsuperscript{14} See Art. 1:1 Arbeidstijdenwet, art. 1 Arbeidsomstandighedenwet 1998 and art. 4 jo. art. 2 WMM for a definition of an employee under Dutch law. It would have been more clear if art. 610, 610 a and b BW and also 690 of book 7 BW had been mentioned in art 1 of the Terms of Employment (Cross-Border Worker) Act. About the last mentioned provision the Explanatory Memorandum makes clear that this also applies to posted temporary workers from abroad. See Kamerstukken II, 1998-99, 26 524, nr. 3, p. 3.

\textsuperscript{15} See ECJ judgments in cases nr. C 178/97 from 30 March 2000 (Banks) and nr. C-202/97 from February 2000 (Fitzwilliam). Problem for host countries is that Reg 1408/71 and its successor Reg 883/2004 refer to the law of the country of origin (sending country) to define the status of the worker.

\textsuperscript{16} A practical reason for this ‘insulation’ is that working together in a team with different nationalities would lead to much more communication problems for the managers of the teams on a building site.

\textsuperscript{17} Until December 2005, no difference in treatment was made between third country workers legally resident in one of the Member States and posted by an ‘EU-employer’, and third country workers who live outside the EU and who are posted by an employer, established in a third country. As a
employer is obliged to treat and pay the foreign worker in conformity with all Dutch current working and employment conditions.\(^\text{18}\)

On the level of the extended provisions of collective agreements, this full equal treatment of posted workers from third countries is stipulated as well. Until 2007\(^*\ast\ast\ast\), Art. 1a (b) of the collective agreement in the construction sector stated as well that all extended provisions are applicable to posted workers from third countries. In the last decade a growing number of undertakings especially from (former candidate-) Member States like Poland is active in the Dutch construction sector (and in some other industries like horticulture and cleaning). In practice a lot of workers from these countries work directly via Dutch temporary employment agencies. In that case all Dutch labour law is applicable to them.

3.2.4 What is temporary?

Finally, in the Terms of Employment (Cross-Border Worker) Act the ‘allowed’ length of posting is not determined. This vagueness about the period of posting is quite logical: In the Directive it was not specified either. It would have been a breach of the ‘neutral implementation attitude’ to develop a Dutch policy on this point, even if we refrain from the question whether the Directive would permit a national determination of the period of posting.

3.3 Terms and conditions of employment in law

3.3.1 Statutory terms and conditions for posted workers

Applicable national rules corresponding to the subject matter covered by Art. 3(1) of the PWD are partly identified by the Terms of Employment (Cross-Border Worker) Act. Art. 1 of the Act makes sure that a couple of provisions in Book 7 (about employment contracts) of the Civil Code are applicable to posted workers in the Netherlands. Herewith (all) mandatory civil provisions about minimum paid annual holidays, equal treatment of men and women and other provisions on non-discrimination, health and safety at work (employers’ liability in case of work related accidents or diseases) and one of the protective measures for pregnant women (prohibition to dismiss someone because of pregnancy) are implemented.

Although not clear when one only reads the text of the Terms of Employment (Cross-Border Worker) Act, several provisions of Dutch administrative law are applicable to posted workers as well. All special mandatory law with a ‘public order’ character is applicable under art. 7 of the Rome I Convention (art. 9 of the Rome I regulation). This concerns provisions of the Minimum Wages Act, the Working Time Act, the consequence of the judgment of the ECJ in Case C-445/03 (Commission v Luxembourg) of 21 October 2004, the Dutch government announced that in the near future no work permit will be required anymore for the first group.

\(^{18}\) In conformity with Dutch current working conditions’ (marktconform) means that not only statutory provisions but also working conditions in current collective agreements (extended and not extended ones) have to be applied or even more favourable company-related working conditions. Only in situations when the foreign TCN worker is hired for a very short period (a couple of days or at least less than a month), it might in some cases be allowed that the worker is paid according to the statutory minimum wage level (Art. 8 (d) WAV).
Health and Safety Act, the Temporary Employment Agencies Act and the Equal Treatment Act.

So, which applicable mandatory national rules (as a minimum) correspond with the subject matter covered by Art.3 (1) of Directive 96/71?

a) Maximum work periods and minimum rest periods are laid down in the Working Time Act (ATW). The maximum number of work hours per week is fixed on 45 hours, excluding overtime, and 48 hours including overtime. Without overtime, measured over a 4 weeks period, the average number of hours is fixed on 40 hours per week. The limit is 60 hours a week, but, measured over a 13 weeks period, the average number of hours may not exceed 48 hours.

b) Minimum paid annual holidays are laid down in Art.634 t/m 642, 645 Book 7 Civil Code (BW). The minimum entitlement to holidays is four times the amount of working hours a week (so, for a fulltime job 20 days on annual basis). This minimal period of days cannot be paid out (art. 7:640 BW). The minimal payment of holiday allowance (which exists next to the right to payment of wages during holidays) is laid down in art.15 Minimum Wages Act (WMM).

c) Minimum rates of pay, including overtime rates are covered by the Minimum Wages Act (WMM). At the moment the Minimum wage rate on a fulltime basis is € 1264,80 per month, € 291,90 per week and € 58,38 per day for an adult worker. Lower rates of Minimum Wage are laid down for young workers (from the age of 15 - 22 years: Besluit Minimumjeugdloonregeling). According to the second sentence of Art. 3 (7) Directive 96/71 it is possible to consider allowances specific to the posting to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging. The same rule is laid down in Art. 6 lid 1 (sub f) Minimum Wage Act (WMM).

d) Conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, are laid down in the Temporary Agencies Act (WAADI). Also applicable19 is art. 7:690 BW. This provision states that a contract for temporary work is an employment contract. Most important provision of the WAADI is Art. 8: Unless a (universally applicable) collective agreement provides other rules, 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 (loonverhoudingsnorm). Furthermore, Art. 11 WAADI obliges the employer to give temporary workers all information about necessary vocational qualifications and working conditions, before the temporary work takes off.

e) Rules about health, safety and hygiene at work can be found in the Working Conditions Act (Arbo-wet 1998) and, specifically for employment related diseases and accidents, in Art. 7:658 Civil Code (BW). Art. 5 (6) Arbo-wet 1998 obliges the user undertaking to give the posting employer on time a survey and evaluation of the risks of the job that the temporary worker is hired for. Subsequently, the posting

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19 Although only mentioned in the Ex. Mem., see above noot 15.
employer of the temporary worker has to hand out this document to his worker before he starts working on the job.

f) Protective measures with regard to the terms and conditions of employment of pregnant women, women who have recently given birth, children and young people are found in the Working Time Act (\textit{ATW}), Working Conditions Act (\textit{Arbowet 1998}) and the Minimum Wages Act (\textit{WMM}). For pregnant posted workers also Art. 7: 670(2) Civil Code (\textit{BW}) applies. But the usual sanction that accompanies this provision for workers under Dutch law is not applicable. Therefore it is unclear for the posted pregnant worker how she can actually enforce her right to protection against unlawful dismissal.

g) Equal treatment of men and women and other provisions on non-discrimination are laid down in the Equal Treatment Act (\textit{AWGB}) and in Art. 646, 647, 648 book 7 of the Civil Code (\textit{BW}). Important is that posted workers are not treated unequal on grounds of nationality. Unequal treatment is only allowed when related to the specific employment situation that goes along with cross-border posting. Directive 96/71 and for the Netherlands the WAGA contain rules about such a specific situation, namely temporary employment in another Member State.

3.4. Terms and conditions of employment in (extended) collective agreements

Which collective agreements may be applied to posted workers? Since the change in the law by the end of 2005, extended collective labour agreements in all branches of industry are applicable. The Dutch method of extension of collective agreements results in an ‘\textit{erga omnes}’ scope during the period of extension. Therefore the system fits to the definition in the first subparagraph of Art. 3(8) PWD: ‘Collective agreements which have been declared universally applicable’ means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

The 1937 Act of Extension of Provisions of Collective Agreements\textsuperscript{20} gives the Minister of Social Affairs the competence to declare provisions of collective agreements generally binding. All employers in the concerned branch of industry then must apply the employment conditions to their employees for work falling within the scope of those provisions. Derogations from those provisions by clauses in individual employment contracts are automatically null and void.

Two conditions must be fulfilled before the Minister may declare a collective agreement\textsuperscript{21} generally binding. In the first place there must be a request from at least one of the parties to the collective agreement. The second condition is that the collective agreement must already be applicable to a majority of employees working\textsuperscript{22} in the concerned branch of industry. The law says that it must be ‘an important


\textsuperscript{21}In fact it is not the collective agreement as such that is declared generally binding, but separate provisions of the agreement. The Act excludes certain provisions form the possibility of extension, for example provisions which have the purpose to compel employers or workers to join an organization.

\textsuperscript{22}Including the employers themselves; this may have some significance in industries with many very small enterprises.
majority in the opinion of the Minister’. For many years it has remained unclear what should be regarded as an ‘important majority’, but this was never considered to be a problem. Things changed when in the nineties of the past century liberal economists started to challenge the system of extension, reasoning that it constituted an unreasonable restriction on free competition. Since 1998 the Minister adheres to published policy rules on the application of his power to extend collective agreements. According to the policy rules, a majority of 60% is always ‘important’ and a majority of 55% or (or even less) may be considered important enough under certain conditions. It might seem that such a majority would be exceptional in The Netherlands, where union density averages around 25%. However it is not the union density which counts, but it is the number of workers in the service of organised employers. Where the law demands that the agreement is ‘applicable’ to a majority, this means that a majority of the workers is in the service of an employer who applies the collective agreement. Since the employer, bound by a collective agreement, must apply its employment conditions to all of his employees\(^\text{23}\), regardless of their being union members or not, a majority is easily reached when the large enterprises in the concerned industry are bound by the collective agreement. In practice, the employment conditions of nearly 85% of the workers in the Netherlands are regulated by collective agreements. Without extension, this would still be over 75%, thanks to the fact that so many large enterprises are bound by collective agreements.\(^\text{24}\) The Minister must publish the proposed extension, so that employers and workers and their organizations have an opportunity to submit objections before a decision is taken. In the Dutch system a requirement of public interest for the positive decision to extend provisions of a collective agreement doesn’t exist. Nevertheless (Dutch) 'general interest' may be a ground for refusal of extension.

Art. 2(6) of the Act of Extension of Provisions of Collective Agreements transposes the hard core of labour standards, specified in art. 3(1) PWD. Until the end of 2005, Art. 2(7) limited the scope of Art. 2(6) to the obligatory part of the PWD as defined in the Appendix. The Appendix to the PWD defines the construction industry broader than usual in the Netherlands,\(^\text{25}\) but the Dutch Government did not try to identify all the corresponding Dutch collective labour agreements (CLA’s). Some Members of Parliament insisted that the government should do so because it would further the accessibility of the Dutch collective agreements to foreign employers and employees and it would prevent misunderstandings as well. The responsible Minister objected, saying that such an exercise would lead to more bureaucracy and moreover, that it belonged to the competence of the social partners to decide on this issue.\(^\text{26}\) The same answer was given about the related issue of who has the competence to decide which provisions of the collective agreement correspond to the subject matter covered by the PWD.

\(^{23}\) Article 14 of the Act on collective agreements. The parties to the collective agreement may deviate from this statutory provision.

\(^{24}\) It is likely that the coverage of collective agreements would sink considerably if the extension mechanism were to be abolished, because this would expose the organised employers (bound to collective agreements) to wage competition from their unorganised competitors.


In the Netherlands, collective bargaining provisions can only be made when statutory provisions leave room for derogation. In most cases derogation from a legal provision is only possible for social partners. If a bargaining provision proves to be inconsistent with (mandatory) legal provisions, this bargaining provision must be considered as null and void. For workers who are employed by a non-organised employer in the industry, only extended collective agreements are applicable.\textsuperscript{27} The method of extension of collective agreements results in an ‘erga omnes’ scope during the period of extension. During that period the collective agreement is ‘universally applicable’ which means that it must be observed by all undertakings in the geographical area (the Netherlands) and in the profession or industry concerned (the construction sector).

The Dutch Transnational Employment Act of 1999, implementing the Posting directive declares those articles of the Dutch Civil Code applicable which correspond with the hard core items on the list. With regard to extended collective agreements the situation is as follows. As explained above, the Act on Extension of Collective Agreements allows for an extension of collective agreements to ‘all’ employers and workers in the industry. However, pursuant to article 6, section 2 of the Rome Convention, the extended provisions of a Dutch collective agreement are not applicable to a posted worker who habitually carries out his work in another country. The Dutch Transnational Employment Act of 1999 makes the ‘hard core’ provisions (corresponding to the list in the Directive) of extended agreements also binding for employers established in another MS when posting their employees to works in the construction industry in The Netherlands. Since 2005 the ‘hard core’ conditions of extended collective agreements in all industries must be applied to posted workers. The conditions of mandatory labour legislation concerning health and safety, working time and minimum wages were already considered to be applicable to posted workers, pursuant to the Rome Convention. Hence, the effect of extension is for posted workers limited to the hard core conditions. However, according to the Arblade judgment, the applicable CLA-provisions must be transparent and accessible for foreign service providers and their employees, so that they are able to know what they are obliged respectively entitled to.

As part of the collective bargaining process Dutch social partners in the construction sector have begun classifying the applicable provisions in subsequent collective agreements voor de Bouwnijverheid from 1998 on. Between 1998 and the negotiations for the period 2002-2004 they have explored the possibilities and limitations of four collective agreements in the construction sector. These collective agreements cover most but not all occupations and companies in the Dutch construction sector. The main collective agreement in construction is the Collective Bargaining Agreement for the Construction Industry 2004-2007, covering some 190.000 workers (including managerial, technical and administrative staff) in house, office and industrial building and civil, road and maritime construction engineering. Still not all sub-industries and professions are included that are part of the prescribed activities in the Appendix to the PWD. Professions such as painter, plasterer, installation engineer and electrician are subject to other collective agreements. These other major collective bargaining agreements are the Collective Bargaining

\textsuperscript{27} This is regulated in the Act of extension of provisions of collective agreements (Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten), Act of 25 May 1937, Government Gazette 801.
Agreement for Painters, covering some 35,000 workers, and the Collective Bargaining Agreement for Plasters, covering some 17,000 workers.  

Only in 2003, the scope of the collective agreement for painters-firms (and related companies) (**CAO voor Schilders-, Afwerkings- en Glaszetbedrijf 2003-2005**) was for the first time expanded to posted workers (Art. 2a). A supplement (**Bijlage 6E**) stipulates exactly which provisions are applicable.  

From the slow progress that has been made in this field, it may be deduced that it is quite difficult to motivate the bargaining social partners engaged in the other related construction CLAs  to make the inclusion of posted workers a part of the scope of their CLA. The consequence of this situation is that posted workers that should be covered by CLA’s where no reference is made to this, are left to take action themselves. Naturally, the chance that they are aware of the fact that for instance the **CAO** for plasterers is not applied to them although falling under the scope of the Appendix of the Directive, is very small. In this rather theoretical situation\(^{31}\), the posted plasterer has to go to Court with this claim.  

So, which applicable collective agreement provisions are identified? From the seven categories mentioned in art.3 (1) of the PWD, the collective agreements contain rules in six of them: work and rest time (a), holiday (b), rates of pay (c), workers for a temporary employment agency (d), health and safety (e), protective measures (only with regard to the terms and conditions of employment for young people) (f). In the remaining field (equal treatment (g) only the legal rules apply (minimally) to posted workers. A special appendix stipulates which parts of the applicable provisions are meant for posted workers. Sometimes, the text of the applicable parts of the provisions is rewritten to adjust it to the situation of posted workers (references to Dutch provisions and situations have been deleted). In addition, a special explanation is given about the job-related pay system and guaranteed gross wages. Special attention is paid to posted temporary agency workers.  

Altogether, in the construction sector, only half of the total extended agreement provisions applicable to domestic employees, apply to posted workers (25 provisions out of a total of 53). Still, practically all basic working and employment conditions are included. According to a spokesman from the construction union, the exclusion of fringe benefits and other provisions meant for ‘permanent workers’ (such as vocational training and stipulations about the end of an employment contract), makes posted workers around 25% cheaper in labour costs than domestic workers.  

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\(^{28}\) Figures provided by Regioplan 2004, p. 75.  
\(^{30}\) Like the CAO for plasterers and related companies (stukadoors, -afbouw, -vloerenleggersbedrijf (afbouw-cao) and may be the CAO for roofers (cao voor bitumineuze en kunststofdakdekkers (dakdekkers-cao), and even (partly) the CAO for mortar (cao voor mortel- en morteltransportondernemingen (mortel-cao), the CAO for carpenters-firms (cao timmerfabrieken (timmer-cao), the CAO for furnishing companies/industry (cao voor de meubelindustrie en meubleringsbedrijven) and the CAO for residence services (cao woondiensten).  
\(^{31}\) Because everyone knows that posted workers will not easily resort to Court and probably are not aware of all their rights as well.  
\(^{32}\) This estimation was made by one of the interviewed union representatives for the CLR Study. See Cremers/Donders, o.c., 2005.
Now that Art. 2(6) of the Act of Extension of Provisions of Collective Agreements is applicable in all sectors, social partners in the Temporary Work Agency sector have also started classifying and making accessible which CLA provisions correspond to the hard core of labour law in the PWD. So far**, in other sectors this work has not been done yet, probably because social partners do not think the result is worth the effort (national topics are much more important in the bargaining process). Moreover, in some sectors, like in transport, the CLA’s contain provisions which exclude posted workers from the scope of the CLA. This is in breach with the PWD.

3.5. Optional derogations from terms and conditions for posted workers

In the Netherlands no use is made of the optional derogations contained in Articles 3(3) and 3(5) of the Directive. Up till now this does not seem to raise any particular problems in practice. The compulsory derogation for initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking, if the period of posting does not exceed eight days (Art. 3(2), is not implemented either. For the construction sector this is not important because it is exempted from this obligation.

It can be gathered from the documents of Parliament about the *WAGA* Bill that the Dutch government intended to let social partners free to make use of Art.3 (4) Directive.33 But no transposition of this provision can be found in the *WAGA*, so one can question whether Art.3 (4) is sufficiently and recognizably implemented in the Netherlands. According to the evaluation of the European Commission no Member States had implemented this provision.34 The attitude of the Dutch government is explicable in the light of the Construction CAO that was in force at the time the *WAGA* was drafted and enacted. From 1995 till 2001 this CAO stipulated that the rules for posted workers only applied to postings longer than a month (see above in section 2**). May be, the Dutch government didn’t want to force social partners in construction to alter this in application from the first day of posting. Nevertheless, as a result of collective bargaining social partners have altered this stipulation (Art. 1a) from 2001 on. From that time on, extended CAO provisions for posted workers apply from the first day that a posted worker starts working in the Dutch construction sector.

3.6. Equality of treatment (article 3(8))

3.6.1 Dutch exemption possibilities

As stated above, the Dutch system of extension of collective agreements fits to the definition in the first subparagraph of Art. 3(8) PWD. In the Netherlands, exemption (*dispensatie*) from (extended) collective agreement provisions is possible. First of all

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33 See Kamerstukken II, 1998-99, 26 524, nr. 3, p. 4 and nr. 6, p. 5: The government deemed deviation from the legislative minimum wage and minimum paid holiday level undesirable and inconsistent with the Dutch system. For additional entitlements in collective agreements a more flexible attitude was argued.

34 See COM (2003) 458 of 25 July 2003. STAR-Advice about Directive 96/71, nr. 11/00, o.c. 2000, p. 15 demonstrates that social partners on the national level also concluded that the optional derogation in Art. 3(4) was not implemented in the Netherlands. See also Van Hoek, Internationale mobiliteit van werknemers, SDU: Den Haag 2000, p. 516. She observes that implementation of Art. 3(4) Directive is in contradiction with the terms in Art. 2(6) AVV, that give no room for own policy to social partners.
a request for exemption can be directed to the Minister of Social Affairs under the condition that the employer has concluded a, according to Dutch norms, legally valid collective agreement on enterprise/company level. Although it was not stated explicitly in legislation, interpretation of policy guidelines in force until 2007\textsuperscript{35} made clear that, to a certain extent, it had to be considered as possible for an employer to pay lower wages if he concluded a collective agreement on enterprise/company level.\textsuperscript{36} According to the policy rules for extension as they were applied, a request for an exemption used to be granted ‘in principle’ if the employer was already bound by another collective agreement. The Ministry of Social Affairs did not investigate how many of the granted exemptions were given on the basis of company collective agreements with a lower level than the industrial collective agreement. However, from 2002 on in literature more and more attempts were reported of employers trying to evade extension by asking for an exemption after concluding their own collective agreement with an employer-friendly (‘yellow’) union. In practice the experience with lower level company agreements grew in several branches sensitive for labour-cost-competition. This development revealed that the Dutch system of collective agreements is rather vulnerable to undermining by yellow unions. In the Dutch system no legal requirements exist on the independence and the power of a union which wants to conclude a collective agreement. This made it easy for an employer to evade the system by obtaining an exemption from an extended agreement in order to apply a ‘cheap’ agreement concluded with a not really independent company union. In the beginning of 2007 new policy rules for exemptions were introduced. To obtain an exemption an employer (or employers’ organisation) now must prove that there are ‘serious reasons’ (for example the particular character of his enterprise as distinguished from other enterprises in the same industry) which would make it unreasonable to apply the extended provisions in his (their) enterprise. Moreover it must be made clear that the union with which he has reached an agreement is truly independent. In June 2007 three requests for exemption were refused under the application of the new policy rules, because the employers (temporary works agencies) could not provide sufficient proof of serious reasons for an exemption.\textsuperscript{37}

Next to the exemption possibility granted by the Minister of Social Affairs, the social partners that have agreed on a CAO can also provide a possibility for exemption from their collective agreement. They are not obliged to use certain criteria (like the existence of a company CAO) in their exemption clause (vormvrij). In the CLA for construction (Bouwcao) it is stated that an employer may send a request for exemption to a committee of social partner representatives. Although not mentioned in the text of the provision, the usual policy of this committee is to give only exemption when there is a collective agreement on company level that has on average the same level of wage and other conditions as the agreement on industry level. Sometimes however, exemption rests on other considerations: In case of the extended Bouwcao 2001 social partners decided to grant an exemption to the Irish construction

\textsuperscript{35} See Toetsingskader algemeen verbindend verklaring CAO-bepalingen. First time of publishing was 1998.

\textsuperscript{36} From documents before 1998 it can be traced that in the beginning of the 1990s the Minister of Social Affairs deemed exemption for a Company CAO with lower wages than the extended CAO on industry level inconsistent with the intention of the Act on extension of collective agreements (Wet AVV). Since 1998, the policy has apparently changed in a more liberal direction.

company ICDS. This was not based on a comparison of labour standards but on practical arguments, because ICDS delayed the extension of the Bouwcao with objections against this extension that had to be dealt with by the Minister of Social Affairs. Since the Bouwcao 2003-2004 this exemption was not granted again. The objections that ICDS brought in against extension were all overruled.\(^{38}\) Moreover, the Bouwcao 2003-2004 and its follow-ups were improved qua accessibility and clarity for foreign service providers and their employees.

3.6.2. Equal exemption possibilities for employers from other Member States?
At least in theory, there are no elements in legislation or at CAO level that would obstruct the same exemption possibilities for foreign employers with a company agreement on which Dutch law is applicable and in which Dutch unions are represented. Still, it depends on the circumstances of the made request how a company CAO will be judged if this is agreed upon with foreign unions and by the rules of a foreign legal system. In that case a comparison between the legal systems might be necessary to ascertain that the foreign company CAO is equivalent with a (legally valid) Dutch one. Moreover, in order to obtain an exemption certain procedural requirements must be fulfilled, which may cause an obstacle for employers from other MS. A request for exemption must be made within a short period (usually three weeks) after the publication of a proposed extension. The existence of a separate collective agreement can be a ground for exemption only if this separate collective agreement has been registered with the Minister of Social Affairs.\(^{39}\)

In the Netherlands, a situation similar to the Laval case may lead to problems in the context of the policy for exemptions.\(^{40}\) The refusal of an exemption from extension to an employer from another MS must be deemed discriminatory in a situation where a Dutch employer would have received it.\(^{41}\) Furthermore, a foreign service provider such as Laval may profit from situations where no extended collective agreement applies. This could occur if the requirements for extension are not met, or if the period of extension would have expired before the renewal of the collective agreement. Such periods without extension occur quite often in The Netherlands. After the renewal of an expired collective agreements it usually takes several months before the new provisions are extended. In the meantime no extension is applicable. The employers who are not bound themselves by the collective agreement are free to apply other employment conditions to their workers until the new extension applies.

3.6.3. Mixed Businesses
With regard to mixed businesses in for example the construction sector, it belongs to the competence of social partners to define a policy about this. To determine which collective agreement is applicable in case of mixed businesses which partly consist of construction activities, The provision of the CLA in construction about the scope of the collective agreement provides a clue: In case of a separate department where the

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\(^{39}\) Article 4 of the Dutch Wage Determination Act.

\(^{40}\) *** Van Peijpe described the hypothetical situation of a Laval case in the Netherlands (before the judgment). See T. van Peijpe, If Vaxholm were in Holland in M Roenmar, ** 2007

\(^{41}\) The situation is comparable with the case Portugaia Construções C-164/99 [2002] ECR I-787, where the ECJ concluded that the fact that German employers could be exempted from the obligation to pay minimum wages by concluding their own collective agreement whereas service providers established in another MS did not have this opportunity, constituted discrimination and a violation of Article 49 EC.
construction activities are carried out, the Bouwcao applies to all the workers in this department (or section) of the company. When no such distinction can be made, wage costs (verloonde bedragen) have to point to a predominant activity in the construction sector to make the Bouwcao applicable. Although no experience has been acquired yet, social partners have no intention to apply different rules to foreign undertakings with mixed businesses, which post workers to the Netherlands. When a mixed business (rightfully) objects against the application of the Bouwcao for this reason, the Minister of Social Affairs has the policy to postpone the decision to extend the CAO until social partners have found a way to solve this problem with the company in question.

In many cases problems about coincidence of collective agreements are not solved in advance. When a worker goes to court with the claim that a certain collective agreement must be applied to his employment contract whereas the employer applies a different CLA, case law shows that no general standards exist to decide which agreement has priority. Sometimes judges chose to look at the (predominant) kind of labour of the worker and not of the undertaking as a whole, in other occasions the most favourable collective agreement from the workers point of view is given priority to. But another way of solving the dispute is pursued by judges who look at the legal hierarchy of the coinciding CAOs (an extended CAO provision is higher in range than a not extended one; when two extended CAOs coincide the most favourable for the worker is given priority).42

3.7. The favour principle and the method of comparison

Art. 3 (7) of the Posting Directive is not implemented explicitly in the Terms of Employment (Cross-Border Work) Act. Since the interpretation of this provision was at stake in the cases Laval and Rüffert, it is important to emphasise that in the Dutch context this article was red right from the beginning in the way the ECJ did in its rulings on these case.

During the adoption process of the Dutch implementation bill, some Members of Parliament asked in vain for codification of the favour principle, especially because in Dutch law no legal base exists for the favour principle. Moreover, Members of Parliament asked the Minister what method has to be followed in the Netherlands to compare the applicable labour conditions of the host country and the country of origin. Art. 3(7) gives posted workers a right to the most favourable terms and conditions of employment, but no method of comparison to determine this is prescribed. Is a comparison preferable on the level of each provision, or between units of provisions covering the same subject, or is a comparison of the whole package of working and employment conditions the right point of departure? According to the Minister, the Dutch legal system prescribes a comparison on the level of each provision because, in the case of posted workers only (a minimum level of) mandatory law is at stake. The mandatory character of provisions does not allow the exchange of one provision for another, depending on the arbitrary preference of an individual worker.43

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42 See Van Hoek, o.c. 2000, p. 56.
43 See ‘Handelingen II, 1998-99, nr. 104, p. 5980, 5987’. This statement is confirmed in a judgment of the Hoge Raad (Supreme Court), JAR 2000/43.
In this regard, the Minister also mentioned the existing agreement between the Dutch and Belgian social partners in construction to acknowledge each other’s collective agreements as equivalent. As a result of this agreement, the Belgian collective agreement applies to a posted worker that usually works in Belgium during the period of posting in the Netherlands and vice versa. According to the Minister this agreement can be prolonged. But if a posted worker from Belgium appeals to more favourable extended Dutch provisions, the Belgium provisions have to yield as far as minimum entitlements are concerned. As long as posted workers are satisfied with the agreement, no objections against a prolongation exist. This pragmatic attitude leaves enough room for collective bargaining to make the favour principle more workable in practice. The only reverse side of the coin is that it does not guarantee 100% legal certainty for employers. But when only very few or even no individual appeals for deviance have to be expected, this may not be considered a problem.

4. Administrative cooperation and measures aimed at compliance

4.1 Cooperation on information

Article 4 of Directive 96/71 obliges the Member States to appoint one or more liaison offices or one or more competent national bodies. In the Netherlands, the Labour Inspectorate is mentioned as the chief responsible organisation in this respect. Until 2005, the Labour Inspectorate did not report any difficulties when applying the provisions of the Directive. But, as we shall see further on when the Dutch enforcement system is explained, this is not per se a good sign because the Labour Inspectorate was hardly engaged in this task.

One of the tasks stipulated in Art. 4(2) PWD is to reply to reasoned requests from equivalent authorities in the other Member States for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities. Until 2005, from France there has been two times a request (in 2001) for information about Dutch companies that posted their workers to France. The request consisted in a check of the correctness of the given information to the French authorities by the companies. Also, a German agency of the social partners in construction has once approached the Dutch Ministry of Social Affairs with a question. This request was delegated to the Dutch social partners. Apart from the established practise that CAO related questions would be referred to social partners, no regular contacts about the WAGA and/or the application of the collective agreement provisions are reported between the Ministry and the social partners. The Dutch Labour Inspectorate didn’t make any requests to liaison offices in other Member States. In the group of Experts, installed by the Commission as proposed in their Evaluation, the improvement of the mutual administrative cooperation was taken up. Data of the persons to contact at the Ministries and liaison offices were exchanged and the intention was spoken out to keep this information up-to-date in the

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44 See ‘Handelingen II, 1998-99, nr. 104, p. 5980, 5987’ and ‘Kamerstukken II, 1998-99, 26 524, nr. 6, p. 4-5.’ See also Sengers and Donders, SR 2001/5, p. 143. They speak of ‘gentlemen’s agreements’.

45 The Labour Inspectorate nor any other organisation is mentioned in the WAGA. Only the Parliamentary documents make clear that the Labour Inspectorate is to function as liaison office. Also the ‘Rijksverkeer inspectie’ is mentioned in the Documents but this organisation has only minor tasks in the enforcement of Dutch labour law. See Kamerstukken II, 1998-99, 26 524, nr. 6, p. 5.

future. May be for reason of the small scale on which mutual administrative assistance appears involving the Netherlands, no official figures are available yet. The same is true for general requests from the public for information about the WAGA or the application of the Directive in the Netherlands.

In what way is the information on the terms and conditions of employment referred to in Article 3(1) of the Posting Directive made generally available for workers and employers from other Member States (as required in Article 4(3) of the Posting Directive)? It took quite a while before the text could be found rather easily on the website of the Ministry of Social Affairs. At first instance, there were no plans to improve the accessibility of the information to the general public in spite of the strong recommendation to do so in the Evaluation of the EC Commission. However, this attitude changed after enlargement. The site of the Ministry (www.szw.nl) also refers to a free phone number (+31 800 9051) that can be dialled by individuals and companies to obtain information. Furthermore, it provides the possibility of submitting questions by e-mail. From September 2003 on social partners in the construction sector publish a special leaflet in the English language, aimed at posted workers and their employers. This leaflet gives rather detailed and comprehensive information about the provisions applicable to posted workers. At the back of the leaflet the public information phone number of the Ministry of Social Affairs is referred to for more information about Dutch statutory regulations. On social partners level until recently no website information was available. On plans to translate the brochure in at least the German language no agreement could be reached between the social partners. According to union representatives, insufficient financial budgets played a role. The TWA-sector has also published leaflets and makes information available through its website, even in the Polish language.

4.2 Measures aimed at compliance

Article 5 PWD states that Member States shall take appropriate measures in the event of failure to comply with the Directive. So, the Government is held responsible for (the supervision of) compliance with the WAGA and the other applicable statutory (and extended collective agreement) provisions. Therefore, the government has to ensure in particular that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. But because the Dutch enforcement system is mainly based on private law, the Dutch government did not have any special control mechanisms to prevent fraud and to assure the correct application of the Directive, at first instance it was fully left to the posted workers and the social partners involved, to ensure the Directive’s correct application and, if possible, to prevent fraud.

In this respect, Article 4 of the Terms of Employment (Cross-Border Worker) Act transposes Article 6 of the Posting Directive (on jurisdiction) in the Code of Civil Procedures. Thus, it is safeguarded that the Dutch judge has jurisdiction to decide in judicial proceedings started by a posted worker. Moreover, unions are entitled to start judicial proceedings on behalf of posted workers or on the basis of their own interest in enforcement of the Directive. This is laid down in Articles 3:305a and 305b of the

48 See CLR-Country report the Netherlands 2005
Dutch Civil Code. Especially for the statutory provisions of the Terms of Employment (Cross-Border Worker) Act and of the other legislation applicable, this may be helpful. Where collective agreement provisions are concerned, Article 3 of the Collective Labour Agreements (Declaration of Universally Binding and Non-Binding Status) Act entitles unions and employers’ organisations to institute proceedings in their capacity as parties to the collective labour agreement.

In Parliamentary Debates the Minister was asked in what way the government interprets its task to ensure the effective enforcement of the Directive in the Netherlands. According to the Minister, the Labour Inspectorate and to some extent the ‘Rijksverkeer inspectie’ have the supervision on the enforcement of for example working conditions and working times. This occurs when a provision in the Acts concerned is sanctioned with a penalty or fine (according to criminal or administrative law). In this respect no difference is made between Dutch and foreign companies. But most of the applicable legal provisions on posted workers are of a private law character. Not only provisions in the Civil Code but also provisions with a public law character like the Act on Minimum Wages are mainly sanctioned by private law mechanisms.\(^{49}\) And the enforcement of CAO provisions belongs substantially to the competence of the social partners themselves.\(^{50}\) Some help is provided for in public Acts, where is laid down that social partners or individual workers can ask the Labour Inspectorate for example to check working conditions in specific companies.\(^{51}\) However, insiders generally agree that these possibilities do not mean very much in practise because the Labour inspectorate has a huge workload and is not able or prepared very often to give priority to these requests.

The Minister defended this system of enforcement, which is quite atypical compared to other Member States, like for instance our direct neighbours Belgium and Germany. Main advantage for the government is that the costs are limited.\(^{52}\) But also in purely internal situations critics have warned that the trust in this system might be too high where the ability of workers to lay down their claim in court is concerned.\(^{53}\) In the Parliamentary Debate a Member proposed to oblige employers to announce in their specifications of public work contracts whether they work with posted workers. But the Dutch Government had complained by German authorities about such a duty for the sake of Dutch employers who post workers to German construction sites. So imposing such a duty on the Dutch sites would not be very consequent in that respect. Another suggestion of this Member of Parliament was to make use of the E-101 documents as a control mechanism because employers need to obtain these forms anyway to let their posted workers stay insured under the social security system of their Home State (see Regulation 1408/71).\(^{54}\) Nothing was done with this idea.

It depends on the provisions applicable to posted workers of Dutch labour and employment law whether for instance the ‘user undertaking’ of posted temporary

\(^{49}\) See the former Art. 18a WMM, Art. 21 WGB m/v, Art. 10 Wet AVV. In 2007 an administrative fine was introduced in a new Art. 18 WMM.


\(^{51}\) Often this help from the Labour Inspectorate can only be asked for in case of a lawsuit or when legal proceedings are at least being prepared.


agency workers can be held liable when the agency does not fulfil its duties to pay wages etc. to the posted worker. Article 7:658 (4) of the Civil Code provides for such a liability of the user undertaking, namely in cases of industrial accidents or work-related disease. Very recently, in January 2010, a new Art. 7: 692 was added to the Civil Code in which user liability for the non-paylent of mandatory statutory minimum wages by the TWA is introduced. Until then, the user undertaking was not liable for the compliance of other statutory employment conditions, like minimum wages and paid holidays. In some situations, however, the user undertaking might be held liable through tort law (Art. 6:162 of the Civil Code). In the construction sector a kind of user undertaking liability is laid down in the collective agreement. The Collective Bargaining Agreement for the Construction Industry provides that: ‘The employer is obliged to monitor the compliance of the provisions of this collective bargaining agreement in all individual employment contracts covered by the agreement. When dealing with independent entrepreneurs, the employer should agree on this in the subcontracting arrangement.’ (Art. 94).

4.3 Enforcement of the PWD in practice
Government intervention with regard to the Posting Directive may only come from the Labour Inspectorate, in its capacity of liaison office. The Inspectorate is allowed to check the pay slip of a posted worker. In practice this probably only happens in the course of an investigation that is targeted at illegal workers.

Construction sector
However, in its policy the Labour Inspection pays special attention some so-called risk-sectors of which the construction industry is one. Within the Labour Inspectorate a special team exists (since 2002): BouwInterventieTeam (BIT). This team inspects on construction sites to check if illegal employment, moonlighting and other forms of fraud are taking place. In construction the Labour Inspectorate (department Arbeidsmarktfraude) runs a nationwide inspection program against labour market fraud, aimed at compliance of the Foreign Nationals (Employment) Act. In 2004, the number of inspectors was raised from 100 to 180. Controls are focused on temporary agencies, agriculture, construction, hotels and catering, and meat- and fish-processing. Moreover, control of private individuals performing illegal (undeclared) work in areas such as the renovation or painting of private houses was intensified. In 2003, the Labour Inspectorate issued 731 fines to employers with illegal employees, 11% more than in 2002, mainly due to more intensive operations in the agricultural sector. Since 2002, the Labour Inspectorate closely cooperates with other authorities in so-called Building Intervention Teams. These teams visit construction sites to check if illegal employment, moonlighting, bogus-self-employment and other forms of fraud are taking place. The intervention teams are an example of the policy focus in the most recent years: the new emphasis in tackling illegal (undeclared) work has been not so much on new legislation, but on the enforcement of existing law.

An interesting observation in the CLR-report from 2004, confirmed again in 2006, was about the influence on compliance to labour conditions of the dismantling of cartels in the Dutch construction sector. Although EU-rules and case-law of the ECJ

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55 Information provided by EIRO 2004 -.
56 See for more details on the work of the Building Intervention Teams, paragraph 6 below.
from 1992 already prohibited cartels in construction, they existed till far in the 1990s in the whole sector, providing a very obedient attitude of employers where compliance with the collective agreement was concerned. Now that these cartels were dismantled after the big Construction Fraud affair from 2001-2004, competition on labour costs became ever fiercer (and therefore the enforcement and the level of entitlements of the agreement came under more pressure). In the eastern part of the Netherlands the dismantling of cartels has especially led to more market penetration of German building contractors in small housing projects.

During a strike in 2002, unions came for the first time in closer contact with migrant workers who told about their sometimes deplorable working conditions. Only in April 2006 the construction union FNV Bouw has decided to more actively pursue the aim to organize migrant workers. But, this proved to be difficult because migrant workers are very mobile: (illegal) migrant workers frequently disappear from one day to another. In fact information from the employer’s side confirms this view when they give the example of the practical impossibility for the main contractor to be sure that subcontractors will, during the whole period of the project, send the same (posted) workers to a site. On the first day the identity of workers has to be checked. But if next morning some other people are arriving with the bus, the supervisor does not (always) notice. An everyday check would be much too expensive and time consuming.57 Too much paperwork does not fit in the mentality of building contractors, who as a spokeswoman of the Employers’ association puts it: ‘..like to start working in the morning, instead of doing paperwork’.58

With regard to the enforcement of collective agreement provisions social partners have not a very active tradition. In general there was no urgency for a very active approach until some eight years ago. Since then undeclared work, especially by illegal migrants, is on the rise and the sense of urgency to tackle this phenomenon is growing. Following the example of active engagement of the social partners in the temporary agency sector to combat illegal practices, the social partners in construction have also agreed on a joint initiative in this field. From 1 July 2006 on a so-called Compliance Office (Bureau Naleving Bouwnijverheid) is to combat illegal employment and unfair competition by migrant workers. The aim is to actively monitor compliance of the rules by foreign companies and (their) workers. The Compliance Office should become a central point of contact and registration for firms and employees. Moreover, the Office will actively search cooperation with the Labour Inspectorate and other enforcement authorities and with the social partners in the temporary agency sector to join forces against concrete illegal practices.59

Apart from its role to enforce the law, in the construction sector the national and local government is the main provider of employment. In this role the government could be exemplary in the compliance of Dutch labour standards. When tendering, the government should contract only on the condition that Dutch legal provisions of employment, of social security and fiscal character are respected by (sub) contractors. In fact, the ratified ILO-Convention no. 94 obliges the Dutch Government to do so since 1951. With regard to public procurement, the Netherlands has signed the Labour

58 See country report The Netherlands, CLR-study undeclared work, Claire Bosse and Mijke Houwerzijl**
Contracts (Public Clauses) Convention, 1949 of the International Labour Organisation. Article 2 of the Convention provides that contracts for construction etc. awarded by a public authority shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried. In practice however, social clauses are not a common feature of public procurement contracts in the Netherlands. As a reply to the regular report of the Netherlands about this Convention in 2001 the “Committee notes that for many years the Government has been indicating that there are no major developments to be reported and consequently has not provided any information on the practical application of the Convention. (...) The Committee would therefore be grateful if the Government would provide in its next report detailed and up-to-date information on the practical application of the Convention, including copies of public contracts, the model text of the labour clause currently in use, information from inspection services on the supervision and enforcement of national legislation and any other particulars bearing on the application of the Convention.” This report was handed out in 2007 and revealed the meagre practical application of the Convention.

Temporary agency work sector
In 1998 the legislation on temporary work agencies was altered in the Netherlands, abolishing the system of permits for agencies and the maximum tenure of the agency worker with the user firm. Next to this, the authorization procedure and most sector restrictions for agency work were abolished. This was laid down in the Allocation of Employees by Intermediaries Act, 1998 (WAADI). The WAADI regulates the position of intermediaries, including employment agencies. In practice this means that there are very few requirements for temporary employment agencies. As a dubious side effect, since 1998, the number of dubious temporary employment agencies has risen sharply. Apart from the abolishment of the permit system, other reasons behind the considerable increase in agencies using illegal employees and/or evading the payment of taxes and premiums, are the more stringent legislation to combat illegal residence and the thriving economy of a few years ago. According to an investigation of Dutch association of temporary work agencies (Algemene Bond Uitzendondernemingen; ABU), in 2004 the number of organised branches (companies) was 3,000, whereas the number of malafide branches was 6,600. The number of temporary workers through bona fide placement was 650,000, whereas from an estimated number of 210,000 illegal workers in the total Dutch workforce, 100,000 of them were temporary workers through malafide placement.

64 For more information on temporary agency work regulation, see “Temporary agency work in an enlarged European Union - The case of the Netherlands”, EIRO thematic feature 2006.
65 The ABU investigation, Illegal practices in the temporary work agency industry, is available in English at: http://www.abu.nl/abu/pagina.asp?pagkey=37892&mode=read
Both the government and the sector itself have taken measures to fight the illegal activities. In 2004, the Dutch government intended to re-introduce a licensing system to combat illegal practices in the temporary agency sector. The proposal of the Dutch Government contained an exploitation license connected to a deposit of 75,000 Euro. This proposal was successfully opposed by the employer organisations in the temporary agency sector. The Lower House of Parliament dismissed it in May 2005. According to the employer organisations the license approach would not be effective, as it would give malafide temporary agencies a great chance to buy a bonafide status by paying the deposit. Moreover, they were afraid that the proposal would lead to more administrative expenses. The employer organisations considered enlargement of enforcement capacities (by strengthening the Labour Inspectorate and by giving their own joint enforcement institute more power) as more effective. In addition, the sector has introduced a quality label (NEN-4400) that is applied not only to members of the biggest employer organisation ABU but to the entire industry. The ABU Federation has developed already an alternative to the blocked account system that all agencies can use. In this system a Foundation of Financial Checking monitors the payment record of the temporary agencies every year. Furthermore, the Association of Registration Enterprises monitors the ABU members whether the agencies comply with the law and regulations.66 Moreover, according to the extended collective agreement of ABU for 2004-2009, an independent Compliance Office has been given the task to monitor compliance to the collective agreement provisions.

5. The evolving debate on ‘foreign employment’

The (non-)compliance with rules applicable to posted workers was never debated in the Netherlands as an isolated issue, but rather in the slipstream of two prominent topics: (1) Illegal foreign employment in general and (2) free movement for workers from the new Eastern-European Member States.

5.1 The debate on illegal foreign employment

Since 2003, illegal foreign employment has become a hot topic in Dutch media. Illegal foreign workers would not only compete unfairly with registered companies; they would also constitute a threat for Dutch workers engaged in some form of undeclared work. They were committing, so to speak, a double offence: not only do illegal foreign workers evade taxes and social security contributions; they also work below the price of national undeclared workers, preventing them from gaining an extra income next to their formal job or social security benefit.67 Following ongoing rumours, the Labour Inspection visited construction sites and private households to check the employment of foreigners without necessary work permit. The inspections were held between 1 March and 15 December 2004 and lead up to the following figures: in almost half of the building activities by private households, illegal employment was involved. Approximately 20 % of the inspected building companies were not in rule with the Foreign Nationals (Employment) Act.68 The Labour Inspectorate received 136 hints of suspected illegal employment: 123 from outside, 12 from the social security authority UWV and 1 from the Tax Authorities. In 2002, the

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66 See Temporary agency work in an enlarged European Union - The case of the Netherlands EIRO thematic feature 2006, par. 8.
Labour Inspectorate visited 99 building sites and found illegal employees on 45 of them. About half of the 129 workers concerned came from Poland.

Offences of the Foreign Nationals (Employment) Act often go together with other offences: working hours, working conditions, illegal housing. During their projects, (illegal) migrant workers sometimes live in the houses they are to paint and/or to renovate. Especially when the work is organized by shady intermediaries, migrants live often in unsafe, crowded and illegal lodgings. An example from a union spokesman was that 12 to 14 Polish workers were lodged in a row house (meant for an average household of four or five persons). Each worker had to pay € 5,- per day. This means the lessor earns €1800,- till €2100,- per month, whereas normal rents are around € 1000, - (all inclusive) per month.

In a study on compliance with the Foreign Nationals (Employment) Act, published in February 2005, Regioplan points out that 28% of the employers in construction engaged illegal workers, compared to 19% of the employers in general. Employers entered into 267,000 employment relations with foreigners, without possessing a valid work permit. These relations involved 66,750 to 98,000 foreigners, who worked 44,500 to 66,750 work years. This is between 0.8 percent and 1.2 percent of the legal work volume. This volume excludes the illegal employment with private persons as employers (they were excluded from this study). An estimated 40 percent of the illegal employees come from the 8 middle and eastern European countries (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary and Slovenia). Most of them are Polish employees.

The researchers observed a trend concerning the nature and duration of the undeclared activities: ‘The illegal employment relations are generally of a short duration and they become increasingly shorter. This includes a development from ‘directly employed by the employer’ to ‘indirectly employed through a temporary work agency’. As a result, an increasing share of the illegally employed has several temporary jobs per year. These jobs have various appearances: illegally employed seasonal workers that travel to the Netherlands in order to earn a lot of money in a short period of time, illegally employed temporary employees who reside in the Netherlands for a substantial period of time and who work for several employers through the agency of malicious intermediaries, and illegal direct employees who work for their employer directly and over a longer period of time.’ According to Regioplan, 52% of the building contractors admit that they do not always check the identity papers of workers engaged through private employment agencies, service supply agencies or subcontractors.

In a study called ‘Foreign workers and self-employed persons on building sites’ (Buitenlandse werknemers en zelfstandigen op de bouwplaats) commissioned by the union FNV Bouw, BMT Consultants concluded that labour relations at construction sites have changed over the last couple of years. There appears to be an increase in the number of self-employed, posted workers and temporary workers from abroad. This could explain the fact that both in 2004 and in 2005, an increase in production was

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69 Regioplan 2005.
70 For more examples of deplorable housing conditions and fines that have to be paid when the window is left open, see FNV, ‘Copy book of grievance’ 2006.
71 See also FNV Bouw, Meldpunt Illegale arbeid in de bouw, 22 juli 2005.
accompanied by a slowdown in employment. In general, the development of employment follows the development of production (albeit at a slower speed). In 2004, production in the sector increased by 1.2%, while employment decreased by 5.2%. In 2005, production increased by 2.5%, while employment for workers decreased by 3% and employment for self-employed persons increased by 1%. The year 2005 was especially bad for employment in installation, finishing and in maintenance: a decrease by more than 4%. The figures for civil and non-residential building engineering (B&U) and civil engineering (GWW) were a little better. Labour analysts from the Economic Institute for the Construction Industry came up with three possible explanations: (1) an increase in labour productivity; (2) unreliable statistics; (3) an increase in the amount of undeclared labour, resulting in 5 to 10 undeclared workers for every 100 workers in the industry. According to the EIB, this is very unlikely because of the high degree of control. The first explanation is more likely. Companies have been careful in hiring personnel and try to cover up shortages by employing temporary workers.

Figures from ABU (Dutch association of temporary work agencies) and the Chamber of Commerce show that, in 2004 and 2005, the construction market experienced a ‘flexibility-boom’. The number of temporary workers, self-employed persons, foreign workers and foreign subcontractors rose considerably. Part of this development can be explained by the ageing of the population combined with the fact that young people are not interested in working in construction. The number of starters decreases constantly. In 2000 some 16,000 construction workers started to work in the industry, while in 2004 this was only 8,500, a decrease of 40%. At the same time, the number of unemployment beneficiaries decreases, which is a positive trend to mention. Big companies concentrate more and more on management and organisation of building projects, which means that they employ more staff members and less construction workers (executive personnel). For every project, workers are hired from specialised subcontractors on the basis of temporary contracts. The subcontractors work with other subcontractors, but also with Dutch or Polish self-employed persons.

Almost all Polish construction workers are engaged through temporary employment agencies or intermediaries based in Poland, Germany or the Netherlands. Most Polish self-employed persons offer their services to private households (small jobs in and around private houses) without intermediary, building up their own network of clientele. However, a growing number of intermediaries and temp agencies tried to penetrate the market for private renovation and maintenance jobs, some of them in bad faith. Often constructions are semi-legal: a migrant worker is on the pay roll for the statutory minimum wage per month, which is based on a 40-hour working week. In practice the migrant worker makes more than 60 hours per week, which decreases his wage per hour substantially. Another popular practice is to pay on a regular wage

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72 The fixed joinery in a building; also the plaster, paint, or other details to the walls, doors, etc.
level, but to deduct costs for tools, working clothes etc. from the wage, because everything that is needed to get the work done has to be hired via the intermediary.\textsuperscript{76}

The number of self-employed persons has risen sharply since the nineties. At the same time, there was a strong demand for more flexibility. An important measure in this respect is the lifting of the ban on temporary work in construction. Self-employment became even more popular when labour brokers left the scene and entrepreneurship was promoted by the Dutch government. On the first of January 2004, 1,262 Polish companies were registered in the Netherlands.\textsuperscript{77} Apart from this, there are also Polish registered companies and self-employed persons active in the Netherlands on a temporary base. These self-employed persons or companies are not subject to Dutch taxation, if they stay less than 183 days. So, there is an unknown number of entrepreneurs not registered and thus not included in national statistics.

In an inquiry called ‘Ethnic minorities and foreigners in construction’, EIB concludes in 2004 that approximately 1,450 Germans are employed by Dutch building companies, posted, working on temporary contracts or as self-employed persons. Among these Germans, there are a number of Polish citizens with German passports. There are also 834 other foreign workers and 300 Polish painters working on temporary employment contracts.

5.2 
Debate on the free movement of workers from new EU member states

The construction sector also played a key role in the ongoing discussion on the influx of Eastern-European workers and its effects on domestic employment. In August 2005, the Minister of Social Affairs and Employment was asked in Parliament if rumours were true that thousands of construction workers lost their jobs because of the lower labour costs of Polish employees. The Minister responded that there were no signs of substantial loss of employment by Dutch construction workers. Although the number of job-seekers increased slightly between July 2004 and July 2005, the number of construction workers looking for employment decreased by 3.8%. Nevertheless, he did not rule out increasing competition in construction and a subsequent loss of employment.

By the end of March 2006, government announced that from January 1\textsuperscript{st} 2007 onwards, the Netherlands would allow free movement for workers from Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia, Slovakia and the Czech Republic.\textsuperscript{78} These workers with the nationality of the new EU-Member States would be given unrestricted access to the labour market and they would be entitled to the same treatment as Dutch workers. According to the cabinet, freedom of movement for workers is inevitable and further postponement would lead to an increase in the number of self-employed from the new EU-countries and an increase of the number

\textsuperscript{76} Information from union spokesmen, see also ‘Grievance copybook’ Jij, Jerzy, FNV Bondgenoten, 2006.
\textsuperscript{78} Government information service, 31 March 2006. See the International Site of the Ministry of Social Affairs and Employment at \url{http://internationalezaken.swz.nl/index.cfm?fuseaction=dsp_document&link_id=91120}, and o Press Release SZW 06/005.
of illegal practices. The government announced to implement a number of measures first to prevent unfair competition:

- The Labour Inspectorate would be authorised to impose direct administrative fines on employers who fail to pay statutory minimum wages. The introduction of an administrative fine made it necessary to amend the Law on minimum wages before January 1st 2007.
- In the future, the Labour Inspectorate would also notify workers and trade unions of cases of infringement of the Law on minimum wages, in order to facilitate taking matters to court to demand back payment. By passing on information trade unions can better enforce observance of Collective Labour Agreements.
- The Tax Department and the Labour Inspectorate would cooperate more closely to counter illegal labour, undeclared employment and migrant workers posing as self employed workers without personnel to evade statutory minimum wages.
- To combat fraud in tax on wages and social security contributions, agreements would be made about the proper exchange of information between the competent bodies in the Netherlands and other EU-countries.
- Government would support information campaigns initiated by employers’ organizations and trade unions, to raise awareness among workers from the new EU-countries on Collective Labour Agreements and minimum legal conditions of employment.
- The cabinet would also support certain municipalities in combating unsafe and illegal housing situations.

Parliamentary debates on the issue in April 2006, however, revealed broad opposition to the plan. The Christian Democrats party and the Labour party, demanded further guarantees that an expected influx – primarily of Poles - would not lead to unfair competition for Dutch workers. This was in line with the opinion of the largest trade union of the country, FNV. The cabinet therefore had to postpone the final decision on the opening of the labour market until the end of 2006 and had to report to the European Commission that it would stick to its restrictions.79

In May 2007, the Netherlands has finally lifted the last restrictions on the free movement of workers from the recently acceded Member States (except Bulgaria and Rumania). The representatives from both sides of industry in the Foundation of Labour80 have welcomed this step. In a framework agreement between those parties and the Minister of Social affairs special measures have been announced to enhance the enforcement of applicable employment conditions in order to prevent social dumping. The Labour Inspectorate is to play a more active role in controlling. In addition, a penal provision has been added to the Minimum Wages Act. An employer offending this Act may forfeit a fine up to € 6700,- per worker.

5.3 Enforcement approach


80 The Foundation of Labour (Stichting van de Arbeid) is a joint body of the national employers- and trade union federations. The Foundation plays an important role in the negotiations on employment conditions and advises the government on social policy measures.
As a result of public pressure and scandals, in the last eight years, the focus in the Dutch compliance approach seems to have shifted from regulation to suppression through increased controls and fines. For example, the number of inspections of the Labour Inspectorate have been increased from 3,900 in 2003 to 10,500 in the year 2006. New inspectors are trained to monitor the observance of the Foreign Nationals (Employment) Act. These inspections should not be confused with the activities of the Labour Inspectorate in Building Inspection Teams. The Secretary of State expects that harder actions against illegal employment will diminish the number of offences.81 This is accompanied by stricter policies (and policy proposals) towards people staying illegally and towards asylum-seekers.82 In March 2005 for example, the Christian Democratic Party (CDA) insisted on higher sanctions to combat illegal employment of foreign workers. They asked the fine for illegal employment to be raised from 8,000 to 10,000 € a head. Since, the issue has been prominently on the political agenda. One of the parliamentarians stressed that illegal employment is a widespread phenomenon and that sanctions are apparently not severe enough to have a real impact.83

The dominant approach therefore is better enforcement of existing laws and regulations and the improvement of control and sanctions. The main focus is on:
• better enforcement of existing laws and conventions and improvement of control,
• more staff and resources for the labour inspectorate and other authorities or institutions involved,
• higher efficiency in the penal or administrative procedures, sanctioning of all actors involved,
• blacklisting of contractors and/or customers,
• internal discipline (including ban) in the social partner organisations,
• job cards or other employee registration methods,
• deduction of tax and social security contributions,
• other methods linked to the liability in the chain (main contractor and/or client oriented)
• improvement of the cooperation between actors concerned.

In the Netherlands, nearly all these measures have been taken and/or proposed over the last six years.

6. Conclusion

From the above we may conclude that the Dutch implementation legislation and the Dutch application and enforcement practice of the PWD (looked at in the broader context of foreign – and often illegal – employment) are not without problems. At the same time, in a comparative perspective, the implementation and application of the PWD does not seem to have caused major difficulties. Especially when it comes to monitoring and enforcing compliance to the rules the government and social partners have been working actively towards improving the Dutch situation. ***(to be extended)

81 Press release SZW, 20 January 2005, Nr. 06/008.
82 Robbert van het Kaar, HSI, EIRO 2004.