The Dutch understanding of posting of workers in the context of free services provision and enlargement: A neutral approach?

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FORMULA Working Paper
No. 23 (2010)
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I. Introduction

This paper consists of an overview and analysis of the Dutch legal and practical approach towards posting of workers in the framework of the free provision of services within the European Union. As a point of departure, the ‘state of the art’ before the adoption of the Posting of Workers Directive (hereinafter PWD) is sketched (section II). This is indispensable for putting the Dutch approach towards the implementation, application and enforcement of the PWD in the right perspective. Next, an account of the Dutch implementation process of the PWD is given, including measures aimed at the effectiveness of the PWD in practice (on compliance, the provision and cooperation on information) (section III). The main legal and practical changes in (the context of) this implementation Act, resulting from the political debates on the consequences of the enlargement of the EU and on the draft services directive, are the subject of section IV. Finally, the Dutch reception of the ECJ case law often referred to as the ‘Laval-quartet’, is described (section V). Since this paper is meant for comparative purposes, it is less interesting to describe in full detail the actual Dutch legal rules on posting of workers, than to examine the choices and changes in (the application of) Dutch law. Nevertheless, a certain amount of details is unavoidable in the exercise to provide an accurate picture of the Dutch system. Section VI contains some concluding remarks.

II. Posting of workers in the Netherlands prior to the adoption and implementation of the PWD

2.1 Awareness of the posting ‘phenomenon’

As we may gather from early ECJ-judgments in the cases Manpower (35/70) and Van der Vecht (19/67), posting was in the Netherlands already a phenomenon in the 1960s and 1970s. Practices to hire a (temporary agency) worker from a country with a

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‘cheaper’ social security scheme only with the purpose of posting him to a Member State with a more expensive social security regime, were at that time labelled as abusive and as ‘social dumping’. The Dutch authorities responsible for the application and enforcement of social security developed policy rules against these kind of practices and were very keen on acquiring political support for strict rules on monitoring and compliance in the context of Regulation 1408/71 (now Regulation 883/2004) and especially the so-called E-101 declarations. Until the beginning of the 1990s, the sparse Dutch academic literature on posting of workers was purely focused on the social security aspects of posting of workers.

Around 1990, Jacobs was the first author in the Netherlands who drew attention to labour law aspects of the ‘completion of the single market’ in 1992. Among other things he pointed to the upcoming phenomenon of posting of workers in the European construction sector as a result of the gradual liberalisation of the EU public procurement market from the mid 1980s on. In the slipstream of this development, isles of foreign labour law were observed at big construction sites as a consequence of chains of cross-border subcontracting. The proposal for a Posting of Workers Directive and the underlying question to what extent Member States must be allowed (as a consequence of the Rome Convention 1980, together with the VanderElst and Rush Portuguesa judgments of the ECJ) or should be required to apply their mandatory wages and other working conditions to workers posted on their territory, didn’t lead to fierce debates in the Netherlands at the time, not in academic literature, nor in circles of policy makers.

This was only slightly different in the construction sector, where the Dutch trade union ‘FNV Bouw & Hout bond’ tried to raise some awareness to the social dumping problems surrounding big building projects in a cross-border context. At that time, the general secretary of the European Federation of Building and Woodworkers (EFBWW) originated from this Dutch trade union. On behalf of the EFBWW he pleaded for a solution in community law analogous to the ILO Convention 94 on social clauses in public procurement contracts. In this respect the American Davis-Bacon Act was a source of inspiration as well. During the adoption process of the PWD, the EFBWW pleaded for an application of host state labour standards without a threshold (so from day 1 of the posting). Although the Dutch FNV Bouw & Hout supported this stance, it did not put it on the domestic agenda as a very pressing issue because in practice social dumping was not much of a problem, even in the Dutch construction industry. This may be attributed to the closed structure of this branch until 2001, thanks to the predominant cooperation of Dutch building companies in

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3 Until 1992 less than 5 % of building activities in the EU took was carried out across borders.

4 Indeed in the action programme linked to the Community Charter of Fundamental Social Rights for Workers signed on 9 December 1989, next to the proposal which led to the PWD another proposal was launched to combat social dumping, in particular in the construction industry. This was a: “Proposal for a Community instrument on the introduction of a labour clause into public contracts”, with a reference to Communication COM 89/400.”

cartels. Trade Unions indirectly profited from this cartel-mentality as well, because it (almost) eliminated labour cost competition and benefited the level of compliance to the CLA for the construction industry.

2.2 The PIL approach to cross-border mobility of workers

Right from the beginning of the rather modest debate in the Netherlands, the quest for the right mix of labour standards applicable to posted workers was understood as a problem regarding the interface between private international law (hereinafter PIL or conflicts of law) and national labour law.

Prior to the adoptation and implementation of the PWD the law applicable to the individual employment contract of posted workers (to and from the Netherlands) was exclusively governed by national PIL and later on by the Rome Convention of 1980 (entered into force in the Netherlands in 1991). With the help of these Law of Conflict rules the law applicable to the individual employment contract of the (posted) worker has to be determined. Since in the Netherlands CLA-provisions are a source of law for most individual employment contracts, they also fall (through this linkage) into the scope of the law of conflict rules.

Most provisions of the Rome Convention embody the principle of (individual) party autonomy and the principle of legal certainty. The rules applicable to contractual obligations are in principle neutral to the sort of social-economic interests furthered by (labour) law, since they are based on the assumption that national legal systems are interchangeable. However, for obligations deriving from the employment (and consumer) relationship the rules of conflict have partly broken with the presumptions of free choice of law and neutrality in order to protect the, from a social-economic point of view, weaker party in the contractual relationship. The rule is that parties are free to chose the law applicable to their employment contract, only insofar as it is more favourable to the employee than the mandatory standards of the law which would objectively apply to the contract in absence of a choice by the parties. In this respect, Art. 6(2a) of the Rome Convention (and now, Art. 8(2) of the Rome I Convention) refers to the law of the country where this means that:

6 Still in 1995 more than 80 % of public procurement was awarded in closed tender procedures, whereas in Belgium this was approximately 50%. Nevertheless, Belgian building companies quintupled their turnover on the Dutch construction market between 1983 and 1996. See also B. Bercusson, European Labour Law 1996, p. 500 on the increasing turnover of big British construction firms on ‘the Continent’, while their share in the homemarket diminished. See Houwerzijl, dissertation 2005, p. 280-284 for more details on the Dutch construction sector. Also D. Corbey, Samenwerking met buitenland noodzakelijk, Stuwing nr. 3, B&Hbond FNV 1997, p. 6.


8 We refrain here from the other connecting factors stated in Art. 6(2), namely ‘the law of the country in which the company that employed the worker has its place of business’ or ‘the law of the country with which the employment contract is most closely associated’.

9 in Art. 8(2) of the Rome I Convention: the words ‘or failing that, from which the employee habitually carries out his work in performance of the contract’ are added.

‘The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law. It follows from this text that if the law of the country designated by Article 6 (2) makes the collective employment agreements binding for the employer, the employee will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.’

This explanation suits the traditional Dutch PIL- approach in cases concerning employment contracts, since in Dutch labour law the individual autonomy of the parties is limited by the mandatory character of much labour law among which extended CLA-provisions. Dutch labour law has often been characterized as being of a corporatist nature, due to the fact that social partners in interplay with the state play an important role in regulating the Dutch industrial relations. Within domestic labour law, the party autonomy can not only be restricted in order to protect employees, but it can also be set aside in order to steer the labour market for social-political purposes.¹¹

The application of Art. 6(2)(a) of the Rome Convention leads to territorial application of labour law in the archetypal case of workers mobility, namely when a worker moves to another country and concludes and performs an employment contract overthere. It may lead to a gap in protection however, in more complex forms of workers mobility, for instance in the case of posting. In that situation a worker has concluded his employment contract in the country where he (is supposed to) work(s) habitually, but temporarily performs his duties in another country. Then the law of the habitual place of work prevails, irrespective of mandatory labour standards in the law of the host country that would protect the worker better.

However, Article 7 (now Art. 9 Rome I Convention) defines rules of a special mandatory character; these rules may apply even if a worker is only temporarily working in a country. The text of this provision was in particular inspired by the 1966 judgment of the Netherlands Supreme Court in the so-called Alnati case, in which the Court said that, ‘although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, "it may be that, for a foreign State, the observance of certain of its rules, (..) is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract".’¹²

In the Netherlands a clear distinction exists between public law rules on labour protection ((representing supra-individual interests, such as the regulation of the domestic labour market, and/or the protection of workers e.g. in the area of safety and

health) and the private law rules (representing the legitimate expectations of the contractual parties) on the employment contract. Thus, if an employment contract is governed by foreign law, Dutch mandatory provisions will only apply to the contract if these provisions can be classified as overriding mandatory provisions in the meaning of Article 7 Rome Convention/Art. 9 of the Rome I Regulation. Most labour protection rules of a public nature will have this character, most contractual rules will not. Of the private law category, only specific rules will be overriding mandatory provisions because they are deemed to protect a public or supra-individual interest. Since Dutch CLA-provisions are a source of law for most individual employment contracts, they fall into the scope of the law of conflict rules. Extended provisions of CLAs may also be labelled as such, but according to academic literature and to a report of the Social Economic Council in 1992 on the implications of the coming into effect of the Rome I Convention this must be assessed for each provision, depending on the nature and purposes of it. Thus, in contrast with traditions in France, Belgium and Luxembourg, not all but only some provisions of extended CLAs may be classified as rules of an overriding mandatory nature.

Although the Rome Convention provided for fairly uniform law of conflict rules in the Member States, until 2004 the Convention could only be interpreted exclusively by national courts. The European Court of Justice did not have any jurisdiction with respect to the Rome Convention. Therefore, in the Netherlands and in other Member States national PIL-traditions still give their flavour to the application of the Convention in the Member States. This was furthered by the fact that the Convention does not define the term ‘mandatory rule’ clearly. The margin for a national appreciation of what should be treated as a mandatory rule and what not, was used by the MS to continue their different traditions in particular with regard to the extent to which and the reason why the applicable employment law is set aside by overriding mandatory rules and rules of public policy.

2.3 The overall picture prior to the PWD

As explained above, the traditional Dutch PIL-approach to what constitutes a rule of an overriding mandatory character steers a middle-course. For a posted worker on the territory of the Netherlands before the implementation of the PWD, this meant that not all, but only some provisions of extended CLAs could be applied to him, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character. However, this was only a possibility and not a duty and therefore it was left to the social partners to decide on this matter for

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14 Since 17 December 2009 replaced by the Rome I Regulation (593/2008) for newly concluded (employment) contracts.
15 Not fully, since some MS made a reservation to art. 7(1) of the Rome Convention, which means that MS may give different effect to internationally mandatory rules not belonging to the law of the judge (lex fori).
16 First judgment of the ECJ on a (non-labour law) Rome Convention case was in 2009 (Intercontainer Interfrigo (C-133/08).
themselves. Like many other extended Dutch CLAs do until today, until 1995 the Dutch CLA for the construction sector excluded posted workers from its personal scope. Although already on the bargaining agenda of the union side from 1990 on, as a consequence of the Rush Portuguesa judgment, this was only altered five years later following the example of Belgium. In fact, this is all that can be said about the reception of the Rush Portuguesa judgment in Dutch labour law with regard to the application of host state labour law. The Dutch academic literature didn’t pay any attention to it, apart from an interesting annotation of the Belgian author Verschueren in a Dutch migration law journal. Verschueren noticed the broad interpretation that the ECJ gave, albeit implicitly, in point 18 of this judgment to Art. 7 of the Rome I Convention. In sharp contrast to other ‘high wage’ countries such as Belgium, Germany, Austria, Finland and Denmark, in the Netherlands no need was felt to require that all or a part of its employment regulations and (extended) collective agreements would be applicable to posted workers on its territory.

III. 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.’ In hindsight, it seems that the Dutch government advocated the implementation of the PWD as ‘a maximum Directive’. Since the ‘ECJ judgments in the Laval-quartet’, we may appreciate this as an anticipatory plan.

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

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18 In my opinion this runs contrary to the Dutch implementation of Art. 3(1) of the PWD which states that the Member States should ensure the core protection of the posted workers. Although the PWD limited this for extended CLA-provisions to the construction industry, since 2005 the Dutch implementation Act has broadened this to extended CLA-provisions in all branches.

19 See Jacobs/Van Rooij, BR 1992/2, p. 133 and Houwerzijl, Detacheringsrichtlijn, p. 281.

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)\(^{21}\) in which social partners are predominantly represented but also, for one-third, a delegation of ‘independent experts’.\(^{22}\) Thus, the Bill was passed on. Meanwhile, the SER delegated the request to another board of advice, named STAR,\(^{23}\) 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.\(^{24}\) 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.

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)).\(^{25}\) 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.

### 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 the PWD.

#### 3.2.1 Definition of posting

Hence, the three types of posting that are distinguished in Art. 1(3) of the PWD 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.\(^{26}\) 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.\(^{27}\)

\(^{21}\) Sociaal-Economische Raad.


\(^{23}\) Stichting van de Arbeid.

\(^{24}\) See STAR, Advies inzake de uitvoering van richtlijn 96/71/EG, 4 oktober 2000, no. 11/00.


\(^{26}\) See ‘Kamerstukken II, 1998-1999, 26 524, nr. 5, p. 3 and nr. 6, p. 3’.

\(^{27}\) A judgment of kantonrechter Heerlen, 24 sept. 2003 (JAR 268/2003) shows that this confusion has in fact occurred in practice. See annotation M.S. Houwerzijl, AI 2004/2, p. 39-41.
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.29

In contrast, it can be deduced from a jointly-published leaflet of 2003 in the construction industry that social partners, while not mentioning the three types either, 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’.30 Since 2003, a provision in the extended collective agreement for the Construction sector31 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 usually works in another Member State, not being the Netherlands. Thus, the 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. This seems to imply that the linkage between posting of workers and cross-border service provision was overlooked by the implementing actors.

3.2.2 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.32 In this respect

28 Since no consciousness of the difference with the PWD definition is shown in the parliamentary documents.
30 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. In an update of 2008 however, this text was deleted but instead the different types of posting were described.
31 See Article 92 of the extended version of the collective agreement for the construction (Bouwcao 2007-2009).
32 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
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. 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. 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 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. Furthermore, the employer is obliged to treat and pay the foreign worker in conformity with all Dutch current working and employment conditions.

On the level of the extended provisions of the CLA for the Dutch construction industry, this full equal treatment of posted workers from third countries used to be stipulated as well. Until 2007, it was stated in Art. 1a (b) of the CLA that all its 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 are directly deployed through Dutch temporary employment agencies. In that this also applies to posted temporary workers from abroad. See Kamerstukken II, 1998-99, 26 524, nr. 3, p. 3.

33 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. Especially in the construction sector. 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.

34 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 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.

35 ‘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).
that case all Dutch labour law is applicable to them as well. But as a posted worker from an EU Member State, they are entitled to the hard core only.

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 rather logical: In the PWD 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 at all. Nevertheless, in the CLA for the Dutch construction industry the traditional approach can still be traced in provisions on the posting of workers from the Netherlands to other Member States (usually neighbouring countries Germany and Belgium). Here it is stated that the performance of the contract in the other Member State is regarded as posting, for as long as Dutch social security legislation applies to the employment contract (this is possible for a maximum of 2 years, according to art. 12 Reg 883/2004).

3.3 Terms and conditions of employment in law

3.3.1 Statutory terms and conditions for posted workers

Interestingly, applicable national rules corresponding to the subject matter covered by Art. 3(1) of the PWD are only 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 law 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 public (administrative) law are applicable to posted workers as well. All special mandatory law with a ‘public order’ character is deemed 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 Health and Safety Act, the Temporary Employment Agencies Act and the Equal Treatment Act.

The Dutch implementation of Article 3 of the PWD may be interpreted as a continuation of the traditional Dutch PIL-tradition, as explained above in section II: As was explained in parliamentary documents, the Acts and legislative provisions that were already undisputedly deemed applicable under Art. 7 of the Rome I Convention, such as the safety and health act and the working time act, didn’t have to be mentioned in the Dutch implementation Act. Indeed, according to the Preamble of the PWD (Recital 7-11), the Directive makes the optional character of Article 7 Rome I Convention obligatory, and defines what subjects of employment law must be seen as ‘special mandatory’.
Thus, in the set of applicable mandatory national rules (as a minimum) corresponding with the subject matters in Art. 3 (1) of the PWD, a mixture of public law and private law with an overriding mandatory character is visible:

a. With regard to maximum work periods and minimum rest periods, only the public Working Time Act (ATW) applies, is.

b. But minimum paid annual holidays are laid down in Art. 634 t/m 642, 645 of Book 7 of the Civil Code (BW). The minimal payment of holiday allowance (which exists next to the right to continued payment of wages during holidays) is laid down in art. 15 of the public Minimum Wages Act (WMM).

c. Likewise minimum rates of pay, including overtime rates, are also covered by the Minimum Wages Act (WMM), which stipulates a flat Minimum wage rate based on a fulltime working week. 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) of the PWD 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 public Temporary Agencies Act (WAADI). Also applicable however is art. 7:690 of the Dutch Civil Code. 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 public Working Conditions Act (Arbowet 1998) and, specifically for employment related diseases and accidents, in Art. 7:658 of the Civil Code (BW).

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 following public laws: Working Time Act (ATW), Working Conditions Act (Arbowet 1998) and the Minimum Wages Act (WMM). For pregnant posted workers also Art. 7: 670(2) of the Civil Code (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 public Equal Treatment Act (AWGB) and in Art. 646, 647, 648 book 7 of the Civil Code (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.

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

37 Although only mentioned in the Ex. Mem., see above noot 15.
3.4.1. System of extension of CLA’s

And what Dutch CLA-provisions may be applied to posted workers? As explained in section II above, Dutch legal doctrine classifies CLA-provisions as a source of law for the individual employment relationship. This is (1) the case when the employer is a party to the CLA or is a member of an employers association which is party to the CLA. Next to this (2) the CLA may be incorporated in the individual employment contract either implicitly or explicitly, by way of a contractual clause. Finally (3), the CLA-provisions must be applied by individual parties when they are declared generally binding. The Dutch method of extension of collective agreements came into force in 1937 and results in an ‘erga omnes’ scope during the period of extension. Therefore the system fits into the definition in the first subparagraph of Art. 3 (8) of the 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.

In the Netherlands, CLA 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 CLA 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. The method of extension of CLA’s results in an ‘erga omnes’ scope during the period of extension. During that period the CLA is ‘universally applicable’ which means that it must be observed by all undertakings in the industry concerned. In fact, it is not the CLA as a whole that is declared generally binding, but only 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. Derogations from generally binding CLA-provisions by clauses in individual employment contracts are automatically null and void.

The Minister of Social Affairs and Employment has the competence to declare provisions of CLA’s generally binding. 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. Before CLA-provisions may be extended, two conditions must be fulfilled. In the first place there must be a request of 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 those working in the concerned branch of industry. According to the law, it must be ‘an important majority in the opinion of the Minister’. For a long time it was unclear what should be regarded as an ‘important majority’, but this was never considered to be a problem until neoliberal economists started to challenge the system of extension before in the early 1990s. They reasoned that it constituted an unreasonable restriction to free competition. Since 1998 the Minister applies his competence to extend CLA-provisions according to published policy rules. In these rules it is stated that a

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38 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.
majority of 60% is always ‘important’ and a majority of 55% or (or even less) may be considered important enough under certain conditions. A majority does not consist of the number of unionised employees (union density in the Netherlands is only around 25 %), but of the number of workers in the service of organised employers. Since the employer, bound by a collective agreement, must apply its employment conditions to all of his employees, irrespective of union or non-union membership, a majority is easily reached when enough (large) employers are bound by the collective agreement. This system, which depends on the density of organised employers instead of employees, makes nearly 85% of the employees in the Netherlands covered by CLA’s. According to research in the 1990s, this would still be over 75% without extension, due to the fact that so many large enterprises are organised.

3.4.2 Extended CLA-provisions and posted workers
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) of the PWD. Subsequently, Art. 2(7) limited the scope of Art. 2(6) to the branches of industry, mentioned in the Appendix of the PWD. Although in the PWD the construction industry is defined broader than usual in the Netherlands, the Dutch Government did not try to identify all the corresponding Dutch collective agreements. 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. 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.

As part of the collective bargaining process Dutch social partners in the construction sector began with classifying the applicable provisions in subsequent CLAs for the construction industry from 1998 on. Between 1998 and 2002 they had explored the possibilities and limitations of the four main CLAs in the construction sector. These collective agreements cover most but not all occupations and companies in the Dutch construction sector. Still not all sub-industries and professions were 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 CLAs. Only in 2003, the scope of the CLA for painters-firms (and related companies) was for the first time expanded to posted workers (Art. 2a). A supplement stipulates exactly

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40 Article 14 of the Act on collective agreements. The parties to the collective agreement may deviate from this statutory provision.
41 See Schmale & Siebenga, SMA, However, many authors have observed that the coverage of CLAs would probably drop considerably if the extension mechanism were to be abolished, because this would expose the organised employers to wage competition from their unorganised competitors. See E. Franssen and A.T.J.M. Jacobs, o.c. 2001 and Van Peijpe in M. Ronnar< Kluwer Law International, 2008.
42 Until the law was altered in 2005.
which provisions are belonging to the hard core of the PWD and therefore applicable to posted workers.\textsuperscript{45} From the slow progress that has been made in this field, it may be deduced that it has been quite difficult to motivate the bargaining social partners engaged in the other related construction CLAs \textsuperscript{46} 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 and that possibilities to undercut wages of domestic employees are taken for granted. 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\textsuperscript{47}, the posted plasterer has to go to Court with this claim.

So, which applicable collective agreement provisions are identified in the Dutch CLAs of the construction industry? From the seven categories mentioned in art.3 (1) of the PWD, the CLAs 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. Such highly detailed wage systems are customary in Dutch CLAs. Altogether, in the construction sector, only about half of the total extended agreement provisions applicable to domestic employees, apply to posted workers. 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 workers with an infinite employment contract (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.\textsuperscript{48}

As soon as Art. 2(6) of the Act of Extension of Provisions of Collective Agreements was made applicable in all sectors by the end of 2005 (for the reasons behind this decision see section IV), social partners in the Temporary Work Agency sector have also started labelling and making accessible which CLA provisions correspond to the hard core of labour law in the PWD. To my knowledge, in other sectors this work has not been done yet, probably because social partners do not think the result is worth the

\textsuperscript{46} 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).
\textsuperscript{47} Because everyone knows that posted workers will not easily resort to Court and probably are not aware of all their rights as well.
\textsuperscript{48} This estimation was made by one of the interviewed union representatives for the CLR Study. See Cremers/Donders, o.c., 2005.
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 Art. 2 (6) of the Act of Extension of Provisions of Collective Agreements. Since 2005 the hard core conditions of extended CLAs in all industries must be applied to posted workers. In this respect, it is interesting to note that the implementation of the PWD has limited the policy space for self-regulation of the social partners. They used to be free in the demarcation of the personal scope of their CLA, but in case they want to request for extension, Art. 2(6) of the Act of Extension of Provisions of Collective Agreements now limits this policy freedom with regard to posted workers.49

3.4.3 Exemption from or expiry of extended CLA provisions

In practice, the application of (the mandatory hard core of) host state CLA-provisions depends on their extension. Just like (onorganised) domestic employers, foreign service providers have the possibility to submit a request for an exemption of the extended CLA, either to the Minister (see section 5.1 below) of Social Affairs, or to the CLA-parties. To my knowledge, the latter situation has once occurred in practice:

In the (extended) CLA for construction 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 CLA 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 CLA Construction Industry 2001 social partners decided to grant an exemption to the Irish construction company ICDS. This was not based on a comparison of labour standards but on practical arguments, because ICDS delayed the extension of the CLA with objections against this extension that had to be dealt with by the Minister of Social Affairs. Since the subsequent CLA 2003-2004 this exemption was not granted again. The objections that ICDS brought in against extension were at that time all overruled.50 Moreover, the CLA 2003-2004 and its successors were improved with regard to their accessibility and clarity for foreign service providers and their employees.

Apart from the exemption possibility, the hard core of Dutch CLA provisions does not have to be applied either if the period of extension is expired before the renewal of the CLA. In practice, such periods without extension occur quite often in the Netherlands. After the renewal of an expired CLA 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 CLA, are free to apply other employment conditions to their workers until a new extension applies.

3.5. Optional derogations from host labour law terms and conditions

In the Netherlands no use is made of the optional derogations contained in Articles 3(3) and 3(5) of the PWD. Up till now this does not seem to raise any particular problems in practice. The compulsory derogation for initial assembly and/or first

49 Sofar, stakeholders did not perceive of this restriction of their own competence as a problem and the Minister doesn’t seem to examine the personal scope during the extension procedure.

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 Implementation Bill that the Dutch government intended to let social partners free to make use of Art. 3 (4) Directive. But no transposition of this provision can be found in the Implementation Act, so one can question whether Art. 3 (4) is sufficiently and recognizably implemented in the Netherlands. Probably not, since the evaluation of the European Commission showed that no Member States had implemented this provision. The attitude of the Dutch government is explicable in the light of the CLA for the Construction Industry which was in force at the time the Implementation Bill was drafted and enacted. From 1995 till 2001 this CLA stipulated that the rules for posted workers only applied for postings longer than a month (analogous to Dir. 91/533). Perhaps the Dutch government didn’t want to force social partners in construction to alter this into an 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 CLA-provisions for posted workers apply from the first day that a posted worker starts working in the Dutch construction sector.

3.6. The favour principle and the method of comparison

Art. 3(7) of the PWD 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 Netherlands Art. 3(7) was read right from the beginning in the way the ECJ did in its rulings on these cases.

During the adoption process of the implementation act, 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

51 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.

52 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.
mandatory character of provisions does not allow the exchange of one provision for another, depending on the arbitrary preference of an individual worker.53

In this regard, the Minister also mentioned the existing 1997 agreement between the Dutch and Belgian social partners in construction to acknowledge each other’s collective agreements as equivalent. The social partners took this bilateral initiative as a way of ‘repairing’ the in their eyes unsatisfactory consequences of the ECJ judgment in the case Guiot (Climatec) of 1996. In this case, a service provider protested against double charges in both the host state (Belgium) and the state of origin (Luxembourg) for contributions to so called social funds in the construction sector. Construction workers often work under short term contracts. In these circumstances, statutory labour law and social security law do not necessarily provide these workers with adequate social protection. Holiday rights, for example, are hard to realise for a worker who works for many different employers in the same calendar year. To solve this problem, social partners have often concluded collective agreements to create special funds for additional workers’ rights like holiday pay and bad weather payments. If these collective agreements are declared universally applicable, all employers in a particular country or region have to contribute to this fund, including foreign service providers with workers posted in the construction sector. In Guiot however, the ECJ ruled that the service provider only had to pay contributions in his own country of origin. Social partners in the construction sector criticised this judgment because the ECJ had only considered the type of social funds, not the level of payment which workers could derive from the funds and thus not the equivalence of the schemes. Therefore, the Belgian and Dutch social partners made a comparison of their CLAs, which led them to the conclusion that workers in both countries were provided protection at an equivalent level. This led to an agreement on the suspension of the application of the CLA of the host state. As a result, Belgian and Dutch service providers only had to apply their own CLA and to contribute to the holidays funds in their own countries and were no longer confronted with unjustified double charges. The German ULAK copied this initiative but limited it to the holidays funds, and has concluded multiple bilateral agreements with, e.g., French, Dutch, Belgian and Austrian holiday funds.54

As a result of the Belgian-Dutch agreement, the Belgian CLA applies to a posted worker that habitually works in Belgium during his period of posting in the Netherlands and vice versa. According to the Minister this agreement could be prolonged. But he added that if a posted worker from Belgium appeals to more favourable extended Dutch CLA-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.55 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

53 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.
individual appeals for deviance have to be expected, this may not be considered a problem.

**3.7 Cooperation on information**

To ensure the practical effectiveness of the PWD, Article 4 of the PWD provides for cooperation on information between the Member States. Liaison offices and authorities are designated to monitor the terms and conditions of employment and to serve as correspondents and contact points for authorities in other Member States, for undertakings posting workers and for the posted workers themselves. Article 4 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.\(^{56}\) 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 CLA related questions would be referred to social partners, no regular contacts about the Implementation Act and/or the application of the CLA provisions were 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,\(^{57}\) 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 future.

In what way is the information on the terms and conditions of employment referred to in Article 3(1) of the PWD made generally available for workers and employers from other Member States (as required in Article 4(3) of the PWD)? 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.\(^{58}\) 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

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56 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.
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.\(^59\) In 2005 the TWA-sector was the first to start with publishing leaflets and making information available through its website, even in the Polish language.

3.8 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 transposed PWD in the Implementation Act 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 the PWD. 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. Thus, 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 Dutch Civil Code. As far as extended CLA provisions are concerned, Article 3 of the Act of Extension of Provisions of Collective Agreements entitles unions and employers’ organisations to institute proceedings in their capacity as parties to the collective labour agreement.

In Parliamentary Debate the Minister was asked in what way the government interprets its task to ensure the effective enforcement of the PWD 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 were at that time mainly sanctioned by

\(^{59}\) See CLR-Country report the Netherlands 2005
private law mechanisms. And the enforcement of CLA-provisions belongs substantially to the competence of the social partners themselves. Some help is provided for in public Acts, where it is laid down that social partners or individual workers can ask the Labour Inspectorate for example to check working conditions in specific companies. However, insiders generally agree that these possibilities do not mean very much in practice 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 state is that the costs are limited. But also in purely domestic 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. In the Parliamentary Debate a Member of Parliament 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).

Nothing was done with this idea.

3.9 Observations

In this section the Dutch legislative (and partly practical) process of implementing the PWD was examined. In all matters that were examined above, the ‘neutral’ motto of the government in its implementation Bill, namely ‘to transpose not more or less than necessary’, was consistently and successfully upheld. According to the Minister this neutral stance was guided by the general government guidelines on the implementation of EU-Directives, which is based on avoiding unnecessary ‘national supplements’ to European legislation. Therefore, all options in the PWD to do less or more than strictly necessary were left out of the Bill. Politically, this attitude was fully in line with the deregulation and free-market philosophy which was at its heyday during the second government of secular liberal and social democrat political parties (so-called purple governments). To apply a neutral attitude (disregarding as much as possible the domestic interests) to such a politically sensitive

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61 See Art. 18a WMM, Art. 21 WGB m/v, Art. 10 Wet AVV. Often this help from the Labour Inspectorate can only be asked for in case of a lawsuit or when legal proceedings are at least prepared.
65 See Aanwijzingen voor de regelgeving, nr. 337, and more extensively Houwerzijl, Diss. 2005, p. 291.
66 Its rise and fall in popularity may be situated between 1996 and 2009, marked by the embrace of the so-called ‘Third way’ by the leader of the social-democrat-party Wim Kok, in a key-note lecture on 11 December 1995 (Den Uyl lezing) and the departure from it by his successor Wouter Bos in a key-note lecture of 25 January 2010 (Den Uyl lezing).
subject matter as posting of workers led however to a (too)\textsuperscript{67} minimalistic and sometimes rather indifferent implementation of the PWD. This is in particular true regarding the (1) practical effectiveness of the PWD, (2) the personal scope of the PWD and (3) the limiting of the substantive scope to only extended CLA-provisions mentioned in the Appendix of the PWD (the construction industry).

With regard to the latter issue, it seems as if the government deliberately disregarded its own system of extension of CLA-provisions which aims at furthering collective bargaining on a sectoral level by temporarily eliminating the possibility of labour cost competition among firms during the duration of the extension. Since 1937 this system has been widely used and supported, but it became controversial in the 1990s. Nevertheless, the system survived the attacks from neo-liberal academics and policymakers but this came at a price: from 1997 till 2007 a very liberal exemption-policy was implemented (elaborated upon below in section IV).\textsuperscript{68} During the implementation process of the PWD the possibility that foreign service providers would undercut Dutch labour standards was consistently ignored or trifled. In contrast, the Minister underlined the problems experienced by Dutch companies posting workers to Germany in its defence to apply as less host state labour law as possible to posted workers and he advised the Parliament to first wait and see how other countries implemented the PWD at this point. Although the Parliament remained very critical and a majority favoured a broadening of the substantive scope to all industries in order to create a level-playing field of fair competition between domestic and foreign companies, it didn’t make it a breaking point when the government persisted in its refusal to use the option laid down in Art. 3(10), second indent of the PWD and it adopted the Bill in full.

With regard to the ‘neutral’ but insufficient implementation of the PWD regarding its practical effectiveness and its personal scope, it seems that the government was more concerned with preserving national autonomy than with loyalty to the EU-integration process. This factor is explicitly visible in the defence of the Minister of ‘our private-law based enforcement system of labour law’. Not sticking to the traditional passive enforcement tradition of the state in labour law would simply cost too much money. Reluctance to re-examine the adequacy of the national system may also have guided the inaccurate implementation of the personal scope, because the definition and the three situations of posting in the PWD didn’t fit into the domestic definition of this phenomenon. As a result nowhere in the Dutch Implementation Act it is made clear that posting of workers takes place in the framework of service provision and that these workers are supposed to habitually work in another Member State. Lacking knowledge or awareness of the role of EU-free movement law in this subject matter may have played a role in overlooking or ignoring this aspect of the PWD. Moreover, the dominant PIL-perspective (see section II) on the legal position of posted workers may have strengthened the misunderstanding of the personal scope of the PWD by the Dutch legislators. In this context it is remarkable that the CLA for the Construction Industry has implemented a more accurate definition of a posted worker.

\textsuperscript{67} The Netherlands forgot to implement Art. 3(2) of the PWD which consists of an obligatory exemption from the hard core for very short postings for first installation of a newly purchased machine for example).

Thus, the initial implementation of the PWD was guided by a ‘neutral’ approach with
blind spots for the ‘prevention of unfair competition’ and the ‘furthering of effective
employment protection of posted workers’ aims of the Directive. However, as far as
the Dutch ‘neutral’ implementation was meant to further the third goal behind the
PWD of ‘enhancing the free movement of services within the EU’, this must purely
be understood in the legal, PIL-interpretation of this aim (see the recitals of the PWD)
to further transparency and legal certainty: during the parliamentary adoption process
the undesirability of the applicability of more than one legal system on the
employment contract of posted workers was emphasised several times. At first
instance the Minister even send a Bill to the Parliament in which also the application
of the hard core labour standards in statutory law was limited to the construction
industry. This omission was quickly repaired after discovery. Hence, furthering legal
certainty and simplicity (fitting into the deregulation-hype) may have been the main
drive behind the Dutch implementation of the PWD.

IV The Enlargement and the debate on the Services Directive – influence on the
(enforcement of) rules concerning posting of workers in the Netherlands

4.1 The Dutch transitional regime for the free movement of workers

From 1 May 2004 on nationals from 8 of the 10 new Member States (hereinafter EU8
nationals) were denied full access to the Community law right to freely move to and
reside in the Netherlands for the purposes of work (old art. 39 EC, now art 45 TFEU);
instead, national migration law initially governed EU8 nationals’ labour market
access, which meant they were still treated as third country nationals for whom a
work permit was required to gain access to the Dutch labour market. The possibility
to impose these temporary restrictions on the right to free movement is enshrined in
the Accession Treaty between the new and the old (hereinafter EU15) Member States.
The Accession Treaty allows the EU15 Member States to derogate from elements of
the free movement of workers acquis until ultimately 1 May 2011.

Until November 2003, when the Ministers of Finance (against) and of Economic
Affairs (in favour) came into conflict about this subject, the government had favoured
the immediate opening up of the Dutch labour market after accession of the EU8
countries. In the following months running up to the enlargement, all the arguments
pro and con passed by in heated debates in parliament and in the public press. The
combination of concern about rising unemployment and more importantly, the
perceived increasing chance on unmanageable influxes of EU8 workers on the labour
market now that more and more other EU15 states had already made policy U-turns
and announced that transitional measures would be implemented, were the official
reasons to adopt a transitional regimen in Spring 2004. However, the concerns about
negative public reaction to the immediate extension of mobility rights to EU8
nationals seems to have been an important hidden factor motivating transitional
restrictions rather than any convincing evidence of probable labour market

69 Which in hindsight proved only to be a small interruption in a booming economy until mid 2008.
disruption. In this context, the rising popularity of populist political parties from 2001 on, seems to be of crucial importance.

Whatever the general public might have expected, in reality, the transitional arrangements were not meant as a measure to stop immigration. On the contrary, immediately from 1 May 2004 on thousands of EU8 migrants got work permits every month to help alleviate labour shortage in specific sectors of the labour markets, like transport and agriculture. The flexible design of the transitional measures made it possible to adapt the rules every three months to changings labour market needs. Only three years after the enlargement, in May 2007, the Netherlands lifted the last restrictions on the free movement of workers from the EU8 (for the EU2 countries Bulgaria and Rumania a transitional regime was enacted from 1 January 2007 on which still exists).

4.2 Policy change nr. 1 and the factors behind it.

4.2.1 Expanding the substantive scope of the Implementation Act

In the slipstream of the dispute on the transitional arrangement in the Autumn of 2003, the debate on broadening the scope of the Dutch implementation Act in order to create a level playing field for domestic and foreign companies and workers was opened again. Left-wing politicians and also the trade-union were in favour of opening the borders to the EU8 workers from day 1 but linked this to the need to prevent social dumping. At first, the government kept defending its ‘neutral’ position and the majority of the Parliament still accepted this, despite continuing attempts by supporters of ‘expanding the scope’ to put the item on the legislative agenda again. It was only after enlargement, in the Summer of 2004, that the Government (now used to U turns) made a U-turn, officially because Dutch employers had complained about unfair competition related to the influx of cheap (posted) workers. Thus, 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 and enacted from 14 December 2005 on. Apart from the official reason behind the U-turn, two important other developments in the context of cross-border mobility of workers and the opening up of services market in the Autumn of 2004 seem to have informed this decision. First of all, the discussion on the draft Services Directive (see below 4.2.2) and secondly the acknowledgment that posting of workers in the framework of service provision could not be restricted by the transitional regime (4.2.3).

4.2.2 The evolving debate about the ‘Bolkestein Directive’

The slowly evolving Dutch debate about the proposal for a Services Directive, launched by the Dutch Internal Market Commissioner Bolkestein in January 2004, became serious in the Autumn of 2004. Public press reported that the government was divided on this proposal. The Minister of Economic Affairs was positive, the Minister

70 See for a general overview of the decisionmaking process on transitional regimes, Tamas/Munz 2006*
71 In May 2002, the charismatic leader Pim Fortuyn was killed shortly before a landslide victory in the Parliament elections (lower house), which marked the end of 8 years of coalition government between the (secular) parties of social-democrats and liberals.
of Justice hesitated, because the legal implications of this draft were far from clear. The part of the draft legislation that caused most discussion was the ‘country of origin’ principle. Former opponents of expanding the scope of the Terms of Employment (Cross-Border Worker) Act to all universally applicable collective agreements suddenly saw it as an argument to take away the public fear that companies setting up services in the Netherlands could do so according to the labour standards in their own country. In December 2004 the government, also at the request of the parliament, asked the SER (Social and Economic Council) to issue advice regarding the draft Services Directive. In its advice of May 2005, the influential Social Economic Council (SER) stated that it assumed that the parliament would adopt the expansion of the Terms of Employment (Cross-Border Worker) Act, since ‘This legislative proposal guarantees that it will be possible to properly manage the increase in cross-border service transactions and therefore the increase in posted workers’.

Next, the SER-Advice states that the exclusion of only those aspects of the country of origin principle that are regulated by the PWD is not sufficient to guarantee the desired neutrality of the Services Directive in respect of existing European employment law in cross-border situations, as there are cross-border situations in which the PWD does not or no longer apply. In these situations the Rome Convention is relevant. Those aspects of employment contracts that are regulated by the Rome Convention were not excluded from the country of origin principle. The SER therefore advised amending the draft Services Directive in order to ensure that the Rome Convention will continue to apply in respect of employment contracts, ‘of course with due observance of the specific stipulations regarding posting in the PWD’.

Furthermore, whilst supportive of the aim to establish a better balance between enforcement of employment law on the one hand and market opening on the other hand, the SER rejected the proposed provisions (in Art. 24 and 25) to limit the competence of the host state concerning the abolishment of certain disproportionate national authorisation schemes and the improvement of controls in respect of the compatibility between the employment terms and conditions and the PWD. In its final assessment the SER emphasised that ‘Confidence in efficient collaboration between the Member States and in strict enforcement is a basic condition for the proper functioning of the country of origin principle: after all, the Member States must be able to rely on the fact that public interests are sufficiently guaranteed in the Member State of establishment.’

Since the final version of the Services Directive turned out more ‘limited’ than the SER had advised in its report of 2005, it didn’t stir any noticeable commotion among Dutch social partners and the major political parties. It is worth noticing that the central-left-wing politicians in the Netherlands were more supportive of the draft Services Directive than central-right-wing parties in neighbouring parties such as

75 See SER-Advice 2005 on the draft Services Directive.
76 For example: The SER had advised to stick to the Country of Origin Principle and to keep the temporary agency branch within the scope of the proposed Directive.
Belgium. In my view, this perfectly illustrates the predominantly EU-loyal free market mindset of the Dutch political and industrial establishment, although these views are most of the time carefully mitigated with concerns for preservation of the ‘social model’. Illustrative for the blind eye this establishment (often) seems to turn to the feelings of resentment of ‘the ordinary people’ is the remark of the chairman of the largest employers association VNO-NCW on the day of the release of the SER-advice on the draft Services Directive: He was proud of the civilized and sensible tone of the Dutch debate on the Services Directive in our country, unlike a country such as France where one speaks ‘cheap and populistic’ about a Frankenstein-Directive. Eleven days later, almost 62 % of the Dutch voters rejected the Constitutional Treaty.

4.2.3 Partial lifting of transitional regime for posting of EU8 workers
The second factor that facilitated the expansion of the Terms of Employment (Cross-Border Worker) Act, was the acknowledgement of the Dutch Government, as a consequence of the judgment of the ECJ in Case C-445/03 (Commission v Luxembourg) of 21 October 2004, that the transitional regime for the free movement of workers, does not include workers posted by EU8 companies making use of their (unrestricted) freedom to provide services in the Netherlands. Therefore, Dutch government announced that ‘in the near future’ no work permit would be required anymore for this group. In December 2005, the transitional regime for the free movement of EU8 workers was changed as follows:

‘Foreign service providers for whom the free movement of services applies, who want to offer a service in the Netherlands using their own employees (i.e. posting of workers as mentioned in article 1, sub 3 (a) of the Directive) for whom the free movement of workers within the Netherlands does not pertain, are exempted from applying for work permits for their employees under the following conditions:

• The service provider is established outside the Netherlands in a country, where the rules for the free movement of services apply and is not only a post office box business;
• The services provided do not involve the posting of workers or an undertaking engaged in making labour available;
• The services are reported to the Centre for Work and Income (CWI) before their commencement.

Posted employees as mentioned in article 1, sub 3 (b) (i.e. posting of workers to an establishment or to an undertaking owned by the group in the territory of a member state) and sub 3 (c) of the Directive (i.e. hiring out of workers to a user by a temporary undertaking or placement agency) are exempted from the notification system and need to apply for work permits.’

77 The enthusiasm for ‘flexicurity’ and the Lisbon Strategy also fit into this picture. One of the assumed reasons behind the rise of populist parties seems to be the absence of disagreement about these socio-economic issues between the (traditionally) major political parties on the central, left- and right wing. See: SER unaniem over dienstenrichtlijn, press release 20 May 2005.
78 Two days earlier, on 29 May 2005, in France, ‘only’ 55 % voted no. Although some voted no because they wanted a more social Europe, there seem to have been a lot of different reasons for the no-votes. From the interviews with no-voters however the picture rose that their vote was often not based on informed political arguments, but foremost on a dislike of the ‘arrogance’ of the elite: ‘People are unhappy with the fact that Europe is a project of the elite, not the ordinary people’. See, ‘Varied reasons behind Dutch No, BBC 1 June 2005, http://news.bbc.co.uk/2/hi/europe/4601731.stm.
79 See also under section 3.2.3 for the implementation of the PWD on posting from third countries.
80 docs.minszw.nl/pdf/135/2006/135_2006_1_14765.pdf
cceuropa.eu/social/ajax/BlobServlet?docId=2367&langId=en
So, the recognition that posting of workers by EU8 companies could not be restricted by the transitional regime, was limited to what the Dutch Government understood as ‘real’ posting situations. For these archetype ‘Rush Portuguesa’ type of posting situations (as codified in Art. 1(3)(c) of the PWD service providers from the EU8 did not need a work permit anymore, but they remained obliged to notify postings to the authorities. According to the new rules from December 2005 on, (some of the) situations of posting defined in Art. 1(3)(b) and all situations defined in Art. 1(3)(c) of the PWD are no situations of ‘genuine’ posting, since these worker from the new Member States enter the Dutch labour market. The obligation to obtain a work permit is therefore deemed necessary in these situations to monitor and prevent abuse of the freedom to provide services in the EU (with reference to Commission/Luxembourg (C-445/03) and Commission/Germany (C-244/04). In relation to the ‘non-genuine situations of posting cases’ were brought before the administrative judge against fines imposed by the Labour Inspection because of the alleged non-compliance to the transitional regime. On 29 july 2009 the judicial department of the Council of State postponed several of these cases and posed preliminary questions to the EUCJ (Cases C-307-09/09). 82

4.3 Policy change nr. 2: More stringent monitoring and enforcement of Dutch labour law

4.3.1 Background

Apart from expanding the scope of the Terms of Conditions (Cross-border worker) Act, the partial denouncement of the transitional regime on posting of workers by EU8-service providers in 2005 stirred the Dutch government also to intensified action with regard to the enforcement of labour law, now that they couldn’t use migrant law tools anymore to monitor the entrance and labour standards of posted EU8 workers. The emphasis in the SER-advice (see above section 4.2.1) on the need of proper enforcement as a basis for opening up national services markets also marked the shift in thinking about enforcement issues.

Since the beginning of the new century, the increasing presence of Eastern European workers on the Dutch labour market who appeared to be more prone to abstain from their rights, had led to an increase of exploitative or abusive employment relationships on the Dutch labour market. Moreover, locking ‘the front door’ to the Dutch labour market after the enlargement in 2004, stimulated an increasing use of ‘the backdoor’, most notably through reliance on temporary employment agencies and employer-organised schemes. These methods may be legal or illegal and consequently offer less or no labour law protection compared to more regular forms of employment. As numerous research studies have confirmed, the EU8 migrants were mostly hired as cheap workers, unaware of their rights and/or not interested in them either (because they were still in a better position than in their own country). As a result of the

82 Must Articles 49 EC and 50 EC be interpreted as precluding a national arrangement, under which a work permit is required for the hiring-out of workers? On the basis of what criteria should it be determined whether workers have been hired out within the meaning of Article 1(3c) of the PWD?

83 For example: 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 were a number of Polish citizens with German passports. There were also 834 other foreign workers and 300 Polish painters working on temporary employment contracts.
increased demand for and supply of ‘cheap labour’, Dutch sectors such as the road transport, the construction industry, agriculture, the fish and meat processing industries, the hospitality business, and the temporary employment agencies sector, competition were disturbed by the (legal, grey and black) supply of EU8 (posted) employees and (bogus) self-employed workers. Apart from the legal and illegal possibilities to circumvent the transitional restrictions on the free movement of workers, for some 100,000 EU8 nationals work permits have been issued out in the three years that the transitional regime lasted. Next to abusive labour relationships, unsafe and illegal housing situations, broadly exposed in the press, became a growing problem for municipalities with a lot of (in majority Polish) workers.

The attitude of the Dutch press has varied since the EU8 workers made their entrance on the Dutch labour market. Initially, the Dutch government was heavily criticised by the left-wing and liberal (in general EU-loyal) spectrum of the press after making the decision to impose a transitional regime on the entrance of EU8 workers to the Dutch labour market. The right-wing (populistic) media however applauded this step. After enlargement gradually more stories were released in both spectrums of the press (although differing in tone) on abusive situations and/or of perceived social dumping. Often this led to questions in the Lower House of Parliament. In August 2005 for instance, 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, the Minister did not rule out increasing competition in construction and a subsequent loss of employment.

Although less frequent than negative stories there has, though, in the press also been recognition of an apparent good work ethic demonstrated by Polish migrant workers and they were even celebrated as a role model for unwilling Dutch unemployed since they were working in occupations not (easily) filled by domestic workers.

4.3.2 Supportive measures to enhance enforcement as precondition for lifting the transitional regime

In May 2007, the government could lift the last restrictions on the free movement of workers from the EU8 only in cooperation with the representatives from both sides of industry in the Foundation of Labour. In a framework agreement between those parties and the Minister of Social Affairs special supporting measures were proposed to enhance the enforcement of applicable employment conditions in order to prevent social dumping. The Labour Inspectorate was to play a more active role in controlling

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84 Ecorys-report 2006.
85 In the Netherlands, a liberal politician must be understood as someone who predominantly supports ‘enlightened’ (secular) tolerant point of views on immaterial issues such as abortus, euthanasia, freedom of opinion, open migration policies etc., traditionally associated with left-wing parties, but on socio-economic issues fancies the free market philosophy.
86 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.
and 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.

The introduction of an administrative fine was a remarkable step since it added public enforcement to (underused) private enforcement of the Law on minimum wages. The measure was adopted by Parliament and enacted in 2007.

However, this agreement with the social partners didn’t come overnight. Several times before, the government had tried in vain to find a majority in Parliament for lifting the restrictions. By the end of March 2006, the government had already announced that from January 1st 2007 onwards, the Netherlands would allow free movement for EU8 workers. According to the government, freedom of movement for workers was 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 of illegal practices. To show its concern for a proper enforcement of labour law to this new group of workers on the Dutch labour market, the government announced to implement a number of measures, first in order to prevent unfair competition. Most of these were practical measures on information and cooperation.

For instance, the Tax Department and the Labour Inspectorate would cooperate more closely to counter illegal labour, undeclared employment and migrant workers posing as bogus self employed (1). The Labour Inspectorate would also start notifying workers and trade unions of cases of infringement of the Law on minimum wages, with the aim to facilitate taking matters to court to demand back payment. By passing on information trade unions could better enforce observance of CLAs (2). Next, cross-border cooperation agreements would be made with competent authorities on tax on wages and social security contributions (3) and the government would support information campaigns initiated by employers’ organizations and trade unions, to raise awareness among EU8 workers on the Dutch (hard core of) labour standards they are entitled to (4).

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 government had to postpone a final decision on the opening of the labour market until the end of 2006. First, another report had to be submitted to the parliament on planned measures to prevent abuse of labour market rules. In the meantime, the government reported to the European Commission that it would stick to its current restrictions.88

4.3.3 The better enforcement approach
It must be noted that the supportive measures to lift the transitional regime for EU8 migrants, have been taken in a general political environment focused on repressing illegal migration. Thus, the focus in issues of compliance seems to have been shifted

from regulation to suppression through increased controls and fines. This is accompanied by stricter policies (and policy proposals) towards people staying illegally and towards asylum-seekers. 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.

In the last decade, the trend therefore is better enforcement of existing laws and regulations and the improvement of control and sanctions. Not only the authorities, also social partners have made efforts to better compliance in their branches of industry. The majority of (in majority) Polish workers in the Netherlands workers are engaged through temporary employment agencies or intermediaries based in Poland, Germany or the Netherlands. 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 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. Therefore, many measures aiming at better enforcement are targeted at the Temporary Work Agencies branch, as an exploratory – and thus incomplete - overview of initiatives below will show. Although there are successes in the short-run, nevertheless there is no (convincing) evidence that the problems with non-compliance are diminishing in the longer run, probably due to the fact that the demand for ever cheaper labour is simply too high. At best, the authorities may keep pace with the increase of the phenomenon (or they may be helped by a long economic downturn).

a) Cooperation of authorities in Intervention Teams.
In sectors with much abuse, such as agriculture and horticulture, the temporary agency sector, construction, transport, cleaning and retail, the competent authorities work together in so-called intervention teams. The activities of such an Intervention Team (IT) are announced in public press some weeks or months before the operation starts, but individual employers are not informed beforehand when and where inspections will take place. The Press releases by the Ministry of Social Affairs and Employment have a presumed precautionary effect.

The IT controls all possible forms of undeclared labour: illegal foreign employment (a task of the Labour Inspectorate), evasion of taxes and social security contributions (a task of the tax authorities), bogus self-employment, and benefit-fraud (a task of the UWV). The inspectors of the IT also envisage illegal housing, which is one of the

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89 Robbert van het Kaar, HSI, EIRO 2004.
92 Information from union spokesmen, see also ‘Grievance copybook’ Jij, Jerzy, FNV Bondgenoten, 2006.
93 Based on a (slightly updated) survey in Bosse/Houwerzijl, CLR-report Undeclared work in the Netherlands, 2006.
side-effects of the illegal employment of foreign workers, and the observance of safety regulations. Dangerous situations are reported by the Labour Inspectorate and will be sanctioned later. Other institutions involved are the Foreign Nationals Registration Office, de SVB, the SIOD and the local government. Sometimes more than 70 inspectors operate together.

During the operations, workers who are not able to identify themselves will be booked. Their employer will receive an administrative fine of 8,000 € a head per day. Foreign workers who are not allowed to stay will be expelled by the Foreign Nationals Registration Office. The sanctions of the tax authorities are severe: a refund of income taxes and contributions together with a fine.

b) More manpower for more labour inspections.
The number of inspections was gradually increased from 3,900 in 2003 to 10,500 in the year 2006. The number of labour inspectors has doubled from 80 to more than 160.

c) Notification of new employees from the first day of work.
In an effort to tackle unreliable temporary work agencies (but also undeclared work in general) employers became obliged to notify a new employee on the first day of work to the relevant tax and social security organisations on 1 July 2006. However, on 1 January 2009, this measure was abolished again because it was deemed disproportionate and not very effective.94 Now, the Tax Inspector may only oblige certain risk groups of employers to notify each employee on the first day of work.

e) Complaint desks:
Several Trade Unions installed permanent or temporary complaints desks for their members to report unfair competition by foreign workers not respecting the CLA. The results have once been used for a naming- and shaming report, which caused a lot of troubles with the employers side of the branche (road transport).95

f) Self regulation through quality labels and compliance offices
The Temporary Work Agency (TWA) witnessed a sharp increase in the number of unreliable temp agencies since the abolishment of the permit system in 1998. To combat fraud and other abuses, the employers association ABU (also with an eye to prevent the reintroduction of a permit system) has developed a quality label. This is meant to distinguish trustworthy agencies from their unreliable colleagues. It enables user companies to choose a qualified agency that adheres to the rules. Since 1 January 2007, temporary work agencies established in the Netherlands can acquire this quality label – known as NEN-norm 4400 Part 1 – from the National Standardisation Institute (Nederlands centrum van normalisatie, NEN) when they have been shown to fulfil requirements concerning the payment of statutory minimum wages, taxes and social insurance and the legitimacy of employment in the Netherlands. The assessment is made by private certifying companies. After certification, the temporary work agency

94 See http://www.antwoordvoorbedrijven.nl/product/nieuwe-wet--en-regelgeving/fin/FIN---Afschaffing-eerstedagsmelding?branch=62. In this informational webside the government emphasised that the first-day notice obligation caused annoyance among employers.
95 See http://www.fnvbouw/for,/meldpunt/illegalebouw.html; see also FNV black book ‘Jij, Jerzy’, 200, the result of a temporary complaint desk for the duration of a couple of months in the road transport sector.
will be registered by the Foundation for Employment Standards (Stichting Normering Arbeid, SNA). Regular monitoring of the registered agencies on compliance with the applicable law and regulations and on their payment record must ensure that the agencies stay on the right track. Otherwise, a non-compliant agency will be removed from the register. Next to this, social partners in TWA have established an independent Compliance office, incorporated in the extended CLAs from 2004 on, which has been given the task to monitor compliance to the CLA provisions. Recently, more and more (extended) CLAs of other industries have introduced a clause obliging the employer to contract a qualified temporary work agency in order to promote certification of agencies.

With regard to the enforcement of CLA-provisions most social partners do not yet have a very active tradition. In general there was no urgency for a very active approach until some seven years ago. However, following the example of active engagement of the social partners in the TWA branche to combat illegal practices, the social partners in the Construction industry agreed in 2006 on a so-called Compliance Office that would combat illegal employment and unfair competition by migrant workers. The aim was to actively monitor compliance of the rules by foreign companies and (their) workers. The Compliance Office was to become a central point of contact and registration for firms and employees. Moreover, the Office would 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. However, in 2009 the Compliance Office was closed down because it had not able to achieve its goals. Part of the duties are now shifted to another joint office.

g) Information on applicable labour law for posted workers:
In recent years considerable progress has been made in making available the required information on host labour standards for posted workers and their employers. For instance, the Minister of Social Affairs has launched a whole website in the Polish language, and social partners in TWA and Construction have updated their information leaflets on the applicable hard core of CLA-provisions, digitalised them and translated them in four to six languages.

h) Media campaigns and informational events
The Labour Inspectorate has informed the public on the risk and impact of undeclared labour by radio emissions and newspaper articles in a media campaign in 2006. Regular press releases of planned actions are meant to inform the public about the topic and the task of the Labour Inspectorate. In the same year FNV unions initiated a promotion campaign and demonstration (April 2006) for ‘equal work, equal wages’ in the first quarter of 2006. In the construction industry the employers association organised several informational events in the region to inform employers on their obligations and to explain the benefits of declared work.

i) Liability in subcontracting and temporary agency work

From 1 January 2010, liability exists for the wages of temporary agency workers in user companies which make use of non-certified temporary work agencies. The liability is limited to the statutory minimum wage level. This new legislative measure is laid down in Art. 7: 692 BW and means to encourage the use of NEN-certified temporary work agencies. It is also applicable to users of foreign temporary work agencies and is thus also meant to serve as a tool to enhance compliance to the host labour standards by foreign service providers. The German example played a role in the parliamentary process where a reference to the Wolff/Mueller judgment of the ECJ in 2004 was made in an analysis of the compatibility of this measure with the obligations under EU law. Liability for wages is a new tool of enforcement of labour law in the Netherlands. It fits in the trend to further compliance without (too much) administrative ado. Nevertheless, liability as such is not new.

With regard to labour law, Art. 7:658 (4) Civil Code provides for a liability of the user undertaking in the event of industrial accidents or work related diseases. And already since 1982 the Wages and Salaries Tax and Social Security Contributions Act (Liability of Subcontractors - Wet Ketenaansprakelijkheid) provides that the main contractor or user company is liable for social security contributions and income tax. The first goal of this Act is to fight unreliable subcontractors and temporary work agencies. The main contractor/user company is not only liable for the first subcontractor but for the whole chain of subcontractors who follow in line and work on the same project. The second goal is to combat unfair competition. However, in cross-border situations the Act is not always applicable: when foreign subcontractors are at work with posted workers, no social security contributions and income taxes are due for respectively the first two years and the first 183 days of labour. Foreign temporary work agencies however are covered by the Dutch law on wage tax from the first day of labour.

4.4 Observations

Since 2005, the initial reluctance of the government to implement measures aimed at the practical effectiveness of the PWD, has vanished. The most important policy change was the expansion of the substantive scope of the Terms of employment (cross border worker) Act. Two important reasons behind this policy shift were the debate on the draft services directive in Autumn 2004 and coincidently the necessicity to lift the transitional regime for (genuine) posting of workers due to case-law of the ECJ. With regard to the latter, the replacement of a migrant law tool of enforcement by a labour law enforcement tool is noteworthy.

However, if it would only have been for the effectiveness of the Terms of Conditions (Cross-border worker) Act, most other measures to stir the practical effectiveness of the PWD would probably not have been taken. Therefore, in section 4.3 the favourable climate for more stringent enforcement tools (policy change nr. 2) was sketched and a survey was given of implemented measures in the last five years. The main focus of all these tools and measures is on:

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98 See Houwerzijl/Peters, TRA 2010 forth coming
better enforcement of existing laws and conventions and improvement of control and sanctions
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
methods linked to the liability in the chain (main contractor and/or client oriented)
improvement of the cooperation between actors concerned
transparent and accessible information on the applicable rules
promotional measures demonstrating the benefits of abiding by the rules for employers and employees.

Most of these measures are targeted (and have to be, if only because of equal treatment obligations) on diminishing all kinds of bogus or illegal labour relationships and abusive or exploitative working conditions. Since there is no registration system for posted workers (apart from the duty to notify ‘genuine’ postings in relation to the transitional regime), the seize of the phenomenon in the Netherlands is unknown. However, many empirical research reports point to the sharp rise of (bogus) self-employed as a much larger trend. Often there is both a domestic interest next to the cross-border interest. As much intertwined are the interests with regard to their content: protecting the own labour market may come first but the measures also (genuinely) mean to protect the (posted) workers concerned. The combination of both aims is logical since one of the more effective measures to protect the labour standards of workers is to eliminate or diminish space for labour cost competition.

Summarising, the Netherlands witnessed a policy shift from targeted control on the entrance of posted workers through migration law tools to control measures with a general personal scope in labour law. Notably, these were not only of a private law but also of a public law character, such as the introduction of administrative fines in the Minimum wages law. The introduction of a user company liability for the Minimum wage in January 2010 was another remarkable step, in the perspective of the former, passive tradition with regard to enforcement in Dutch labour law. This policy shift was facilitated by a political climate fancying better enforcement of rules and combating illegal practices in general.

V. Reactions to the ‘Laval-quartet’

In comparison with the impact of the draft Services Directive and the enlargement, the ECJ judgments in the so-called ‘Laval-quartet’ didn’t cause much arousal. Of course they were (critically) scrutinized in academic literature and in the field of public policy, but with regard to the impact of this case-law the shared conclusion was that Dutch strike law, public procurement law, PIL-law and the implementation of the PWD, were more or less in line with the four judgments. Nevertheless, some, in comparison with other countries rather minor, comments can be made with regard to the impact of the four judgments in the Dutch context. These (and not the judgments themselves) will be dealt with below in chronological order.

5.1 Impact of the Viking/Laval judgments
5.1.1 Impact on Dutch strike law or practice?
With regard to the kind of strikes that were at stake in the Viking and Laval cases, it must be noted that the judgments will not have any consequences, since it is highly unusual that Dutch unions would resort to collective action in order to compel outsiders to adhere to a collective agreement. Nevertheless, there may occur a more indirect effect of Viking/Laval, namely on the willingness of Dutch trade unions to strike in certain cross-border situations. In one case, this may have played a role. The case was as follows:

In 2008, a posting of workers case attracted attention in the press: A German cleaning company was subcontracted by a Dutch company to carry out cleaning activities in its holiday parcs located in the Netherlands and in Germany. This caught the interest of the media, when trade union FNV initiated actions against the subcontractor because of complaints about bad working conditions. Especially the difference in payment between German workers and their Dutch colleagues was felt as unfair. Questions about this case were posed in Dutch Parliament. In media stories the difference in payment was related to the fact that German workers were covered by a less favourable German CLA, whereas to Dutch workers the Dutch CLA was applied. The company insisted that it adhered to the law and if one takes the PWD into consideration this may have been the case if a non extended Dutch CLA applied in that period. The FNV chose in this case to try to pursue the company to reward the Dutch and German workers equally for their identical work, even if on pure legal grounds they may not have been obliged to do so. According to a representative of the union, if it would not have been for the judgments in the Viking and Laval cases, FNV might have considered a (call for a) solidarity strike, but now its strategy is to avoid litigation as much as possible in intra-EU cross-border cases.

5.1.2 Impact on Dutch exemption policy rules?
Also with regard to the application of the Dutch system of extension of CLA on foreign service providers, there may have been an indirect influence of the (pending) Laval-case. In his contribution to a book edited by Rönmar, Van Peijpe described the hypothetical situation of a Laval case in the Netherlands. He examined four possible Laval-like scenario’s. The most realistic one was the scenario that ‘Laval’ would have tried to evade the applicability of Dutch extended CLA-provisions by submitting a request for exemption to the Minister of Social Affairs (see also section 3.4.3 above). In a scenario where the Minister would refuse this request for exemption, Laval could go to Court and, according to Van Peijpe:

‘Lavals’ action in Court could be successful if he could prove that a Dutch employer under similar circumstances would have received an exemption. Perhaps ‘Laval’ could use as an argument for exemption that the special conditions of his enterprise, being established on a distant location (travel- and housing costs for the workers) require an exemption. Such an argument may be successful if ‘Laval’ can find a precedent where similar conditions have been accepted as a ground for exemption.

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100 Menke Kamervragen 34 2008 12250 8 september 2008
102 Information based an interview with a representative of FNV, who also referred to the BALPA in this respect.
103 T. van Peijpe, If Vaxholm were in Holland, in: Mia Rönmar (ed), EU vs national industrial relations, Kluwer 2008.
for Dutch employers. Furthermore, ‘Laval’ could put forward that he is discriminated against since it is difficult for a foreign service provider to meet the procedural requirements for exemption in the Netherlands.\textsuperscript{104}

That a refusal of an exemption from extension to a foreign service provider must be deemed discriminatory in a situation where a domestic employer would have received it, followed already from the judgment of the ECJ in 2002 in the case Portugaia Construçõess.\textsuperscript{105} Here, the ECJ ruled that the fact that German employers could be exempted from the obligation to pay minimum wages by concluding their own CLA whereas foreign service providers did not have this opportunity, constituted discrimination and a violation of Article 49 EC (now Art. 56 TFEU). Apparently, at that time, the Dutch Minister of Social Affairs didn’t realise that its own exemption policy provided an equivalent loophole as the German one.\textsuperscript{106}

In the Netherlands, exemption from (extended) CLA-provisions by the Minister of Social Affairs is possible under certain conditions. According to the published policy rules in force until 1 January 2007,\textsuperscript{107} first of all, the employer has to conclude a, according to Dutch norms, legally valid CLA on enterprise/company level. Secondly, a request for exemption should be directed to the Minister of Social Affairs, who would then assess it by virtue of the policy rules. According to these rules, a request for an exemption used to be granted ‘in principle’ if the employer was already bound by another CLA. In practice, this turned out to be a loophole for competition on labour costs because the rules made it possible for an employer to pay lower wages if he concluded a CLA on enterprise/company level.\textsuperscript{108}

The Ministry of Social Affairs did not investigate how many of the granted exemptions were given on the basis of company CLAs with a lower level than the industrial CLA. However, from 2002 on attempts of employers to evade extension were reported ever more frequently in literature. These employers asked for an exemption after the conclusion of a very meagre company CLA with an employer-friendly (‘yellow’), not really independent, union. Not surprisingly, the experience with lower level company CLAs grew in particular in several branches with fierce labour-cost-competition.\textsuperscript{109} Hence, criticism increased, in line with the frequency of use of this loophole in the branches that employ the most vulnerable (often migrant) employees. Moreover, in literature it was pointed out that foreign service providers had to be given equal access\textsuperscript{110} to this loophole, once they would discover it. In this

\textsuperscript{104} Van Peijpe, 2008, for this last argument referring to A.A.H. van Hoek and M.S. Houwerzijl, ‘De Europese werknemer en het Nederlandse arbeidsrecht’, SMA oktober 2006, jg 61, nr 10, pp. 432-453.

\textsuperscript{105} ECJ in Case C-164/99, decided in 2002.


\textsuperscript{107} See Toetsingskader algemeen verbindend verklaring CAO-bepalingen. First time of publishing was 1998.

\textsuperscript{108} 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.


\textsuperscript{110} 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
respect a reference was made to the than pending Laval-case before the ECJ, but also to the older Portugaia judgment.  

Apparently the time was ready for a change, because some additional policy rules for exemptions entered into force on 1 January 2007. From than on, an employer (or employers’ organization) 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 CLA provisions in his (their) enterprise. Moreover, it must be made clear that the union party to the CLA is truly independent. The new rules seem to be rather effective (some would say too effective). In June 2007, immediately three exemptions 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.

5.2 Impact of the Rüffert judgment regarding social clauses

In theory, the Rüffert judgment should have had the most serious implications for Dutch legal practice, since the Netherlands did, in 1952, ratify Convention 94 of the ILO on social clauses in public procurement contracts. Article 2 of this 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. Thus, when tendering, the Dutch authorities have committed themselves to contract only on the condition that the prevailing Dutch labour standards are respected by (sub) contractors. Nevertheless, it is not customary for the authorities to put a social clause in public procurement contracts, as became clear after a request from the ILO on the practical application of the Convention in the Netherlands. Thus, the Rüffert judgment didn’t have any repercussions for public procurement practice. Ironically, the FNV seized the opportunity to plead for a more stringent application of the ratified Convention 94 as a follow-up of the Rüffert judgment. So far, the government didn’t consider this request.

5.3 Impact of the Commission /Luxembourg judgment

Last but not least, the Commission-Luxembourg judgment didn’t have any impact on the Dutch posting of workers law either, since the Netherlands did not make use of the collective agreement can be a ground for exemption only if this separate collective agreement has been registered with the Minister of Social Affairs. See Art. 4 Wage Determination Act.

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111 See VanHoek/Houwerzijl, De Europese werknemer en het Nederlandse arbeidsrecht, SMA 2006.
115 On 12 March 2008, the ILO issued a report on the application of Convention No. 94 in which this was confirmed (ILO, 2008).
possibility laid down in Art. 3(10) (first indent) of the PWD to impose more mandatory rules than the ‘hard core’. Therefore, this judgment didn’t stir much political arousal either.

Nevertheless, despite the fact that the government chose to implement the PWD in 1999 as if it were the ‘maximum’ directive that it seems to be from 2008 on, it cannot be ruled out that other mandatory rules than the hard core would be applicable according to Dutch legal doctrine. As observed by the SER in its advice on the draft Services Directive, ‘The Rome Convention also remains relevant in situations that do come under the posting situations. The Posting of Workers Directive only stipulates that the mandatory law of the host country applies to the hard core of employment terms and working conditions. With regard to employment terms that fall outside or go beyond this hard core the country of origin principle could, potentially, interfere with the Rome Convention.’

Thus, it remains to be seen whether in a future case an appeal to Art. 7 Rome Convention/Art. 9 Rome I Regulation would be honoured, although the margin of appreciation is certainly diminished by the ECJ judgment in Commission/Luxembourg.

5.4 Conclusion

With regard to the impact of the Laval-quartet in the Netherlands, we can be very brief: The Viking and Laval-judgments may have a discouraging effect on the readiness of trade-unions to call for (solidarity) strikes in cross-border situations, but so far this is only based on an observation, not on any real evidence (which may be hard to obtain). Likewise, it may be speculated, that in 2006 the then pending Laval-case has had some influence in the decision of the government to close a loophole in its exemption policy for extended CLA which heavily undermined the aim of the Extension of Collective Agreements provisions Act in certain labour-intensive sectors (often with a lot of migrant labour). Nevertheless, the policy shift predominantly aims to shield organised labour from domestic ‘social dumping’, since no service provider from another Member State had ever used the loophole in practice. Ironically, the Rüffert judgment didn’t have any impact in the Netherlands because in practice the ratified ILO Convention 94 on social clauses in public procurement contracts is not applied. As for the Commission/Luxembourg judgment, this judgment didn’t leave traces in the Netherlands because the PWD was implemented as if it a ‘maximum’ directive right from the beginning.

VI. Conclusive remarks

In a comparative perspective, the implementation, application and enforcement of the PWD in the Netherlands didn’t involve major difficulties or political turmoils. Nevertheless, we may conclude from the above (see for a summary of the contents of this paper first and foremost sections 2.3, 3.9, 4.4 and 5.4), that the Dutch ‘neutral’ transposal of the PWD into Dutch law and legal practice, was too minimalistic with regard to (1) ensuring its practical effectiveness, (2) its personal scope and (3) the substantive scope, by excluding extended CLA-provisions from all sectors but the construction industry. With regard to issue 2 nothing has been done yet (and there seems to be no need for in legal practice), but with regard to issues 1 and 3 two major

changes in policy were established (see sections 4.1 and 4.3 above). The most important legislative change was the expansion of the substantive scope of the Terms of employment (cross border worker) Act in 2005 to extended hard core CLA-provisions in all industries. From then on, the government and social partners also began to work more actively than before towards improving the practical effectiveness of the PWD, in particular with regard to monitoring and enforcing compliance to the rules.

Two important reasons behind these policy shifts were the debate on the draft services directive in Autumn 2004 and coincidentally the necessity for the Dutch government to lift the transitional free movement of EU8 workers regime for (genuine) posting of workers due to case-law of the ECJ. With regard to the latter reason, the fact that a migrant law tool of enforcement was replaced by labour law enforcement tools, including some of a public law nature, is noteworthy. Another interesting aspect of the need to adapt the transitional rules on posted workers to the case law of the ECJ, is that it revealed the long-standing misunderstanding of the Rush Portuguesa judgment with respect to the non-entrance of posted workers on the labour market of the host state. Until today, the Dutch government sticks however to the leeway the Rush Portuguesa judgment gave for the interpretation that workers posted by foreign intermediaries do enter the Dutch labour market and therefore do not constitute ‘genuine’ postings. A case on this aspect of the Dutch transitional regime for the free movement of workers is now pending before the ECJ.

On the contrary, in the beginning of the 1990s, when the Rush Portuguesa judgment was released, the Dutch approach was remarkably passive with regard to the possibility the ECJ gave to host member states to impose their mandatory labour standards in legislation and (extended) CLAs upon foreign service providers. One of the reasons behind this must have been that social dumping was not felt as a problem in the Netherlands. An exception was the construction industry. Here, the extended CLA was made applicable to posted workers from 1995 on, following the example of Belgium. Another, more legally informed reason for the ‘non-use’ of the Rush Portuguesa judgment in this respect, may be found in the Dutch Private International Law-tradition. The traditional Dutch PIL-approach to what constitutes a rule of an overriding mandatory character steers a middle-course. For a posted worker on the territory of the Netherlands before the implementation of the PWD, this meant that not all, but only some provisions of extended CLAs could be applied to him, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character.

Coming from this tradition, it was only logical to implement the PWD in a ‘neutral’ way, furthering legal certainty as much as possible. This led to an implementation Act that suited the goal of ‘enhancing the free movement of services within the EU’ above the other goals of the PWD. So, in this Dutch context, the word ‘neutral’ may be coined as a synonym for ‘internal market friendly’. Together with the balanced Dutch PIL-tradition regarding employment contracts, which in fact stood model for Art. 7 of the Rome Convention, this seems to explain why the Netherlands experienced no aftermath of the so-called ‘Laval-quartet’, but instead proved to be a trendsetter with its limited interpretation of the substantive scope of the PWD.