

Profiting from dependency

Working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies



Katrin McGauran, Esther de Haan, Fleur Scheele & Francien Winsemius

Colophon

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investigates multinational corporations
and the consequences of their activities
for people and the environment around
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FairWork and SOMO

**Katrin McGauran, Esther de Haan, Fleur Scheele &
Francien Winsemius**

Amsterdam, June 2016

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Acronyms

ABU	<i>Algemene Bond Uitzendondernemingen</i> (General Association of Recruitment Agencies)
CBS	<i>Centraal Bureau voor de Statistiek</i> (Office for National Statistics)
CEE	Central and Eastern Europe
CIETT	International Confederation of Private Employment Agencies
CLA	Collective Labour Agreement
CNV	<i>Christelijk Nationaal Vakverbond</i> (National Federation of Christian Trade Unions)
FNV	<i>Federatie Nederlandse Vakbeweging</i> (Netherlands Trade Union Confederation)
Inspectorate SZW	<i>Inspectie Sociale Zaken en Werkgelegenheid</i> (SZW) (Inspectorate for Social Affairs and Employment; Dutch labour inspection)
LBV	<i>Landelijke Belangen Vereniging</i> (National Employee Interests Association)
LTO	<i>Land- en Tuinbouw Organisatie Nederland</i> (Organisation for Employers in Agricultural Sectors)
Lura	<i>Lessen uit recente arbeidsmigratie</i> (Lessons from recent labour migration)
NBBU	<i>Nederlandse Bond Van Bemiddelings- en Uitzendondernemingen</i> (Dutch Association of Intermediaries and Recruitment Agencies)
SNCU	<i>Stichting Naleving CAO voor Uitzendkrachten</i> (Foundation for Compliance with the Collective Labour Agreement of the Recruitment Agency Branch)
SNA	<i>Stichting Normering Arbeid</i> (Labour Standards Foundation)
SZW	<i>Ministerie van Sociale Zaken en Werkgelegenheid</i> (Ministry of Social Affairs and Employment)
UWV	<i>Uitvoeringsinstituut werknemersverzekeringen</i> (Employee Insurance Agency)
VNO-NCW	<i>Nederlandse ondernemingsorganisatie</i> (Dutch Business Organisation)
WAADI	<i>Wet Allocatie Arbeidskrachten door Intermediars</i> (Recruitment Agencies Act)

Glossary

Destination country

The host country that receives migrant workers or to which people are trafficked, and the location of their employment or exploitation.

End user

The company that is the end user of recruited or subcontracted labour or products in a supply chain.

Hiring company

The company that is the end user of recruited or subcontracted labour.

Home country / country of origin

The home country of migrant workers or trafficked persons.

Labour intermediary

See recruitment agency.

Posting

An employer sends an employee abroad to perform a job on a temporary basis

Principal

In contract law, a client who awards a contract to a contractor for completion of a job or project in accordance with terms of the contract. In the context of labour law, this is the client of the recruitment agency or subcontractor and ultimate user of the labour.

Private employment agency

See recruitment agency

Recruitment agency

A recruitment agency is a person or company that seeks employment positions for clients, in return for a fee from the applicant (in the Netherlands this is not permitted) or from the prospective employer. They may provide employers with permanent, temporary or contract workers. When an employment agency provides temporary or contract jobs, the person doing the work is either an independent contractor or an employee of the agency, rather than an employee of the company for which the work is performed. Agencies often specialise in certain sectors and nationalities of workers (cross-border recruitment). They can operate in migrant home countries, destination countries or third countries. Depending on legal arrangements in countries and contracts between businesses, recruitment agencies can be responsible for migrant workers' immigration, employment, contracts, wages, treatment and accommodation.

Temporary agency

See recruitment agency

1 Introduction

This report presents the results of interviews carried out by the Centre for Research on Multinational Corporations (SOMO) and FairWork with Polish migrant workers and case studies that were collected between 2012 and 2015. These identify a number of problems experienced by migrant workers, ranging from unpaid wages and sexual intimidation to substandard housing related to certified as well as non-certified recruitment agencies. Workers faced barriers accessing any remedy to their problems including multiple dependencies experienced in the context of recruited migrant labour and, above all, insecurity through temporary and triangular contractual relationships.

In recent years, other reports by the media, trade unions, support organisations and government and research institutions have shown that migrant workers in the Netherlands are subject to bad working conditions and labour exploitation. This can take the form of long working hours, intimidation by employers and recruitment agencies, discrimination, underpayment, unlawful fees or fines and other labour rights violations. In preparation for the end of temporary restrictions for Bulgarian and Romanian citizens entering the Dutch labour market in January 2014, and in reaction to growing public awareness about the exploitation of migrant workers in the Netherlands, a temporary parliamentary commission was set up to draw lessons from recent labour migration from Eastern Europe in 2011.¹ The investigation committee – entitled *Lura (Lessen uit recente arbeidsmigratie)* – published its final report in September 2011.² It put forward a number of recommendations to the government on improving the working and living conditions of Eastern European migrant workers in the Netherlands and regulating recruitment agencies.

Since then, the Dutch government has taken a number of important steps to improve the situation. It introduced chain liability for payment of wages in July 2015, took a number of measures against abusive recruitment agencies and created special intervention teams to detect labour exploitation (see subchapter 2.1). Despite these initiatives, unacceptable working conditions and labour exploitation continue to exist in the Netherlands. Repeated violations of collective agreements and circumvention of regulation have shown, however, that self-regulation of such an important sector is failing when it comes to achieving decent work for migrant workers. However, despite its concerted efforts in a number of policy areas, the government insists on self-regulation of the recruitment sector. This report argues that this exploitation at the bottom end of the labour market can only be effectively tackled through stricter state regulation of recruitment agencies.

1 Tweede Kamer der Staten-Generaal, Parlementair onderzoek Lessen uit recente arbeidsmigratie, 9 March 2011, <https://zoek.officielebekendmakingen.nl/dossier/32680/kst-32680-1?resultIndex=1&sorttype=1&sortorder=8>

2 Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoek.officielebekendmakingen.nl/kst-32680-4.html>

1.1 Methodology

Between 2012 and 2015, SOMO interviewed some 100 Polish migrants working for recruitment agencies in the following sectors: meat and food processing; agriculture (vegetable and fruit); flowers; construction; logistics; and the distribution industry. Interviews were held individually as well as in focus group discussions, based on a questionnaire asking about the conduct of recruitment agencies (contracts and wages, migration and recruitment processes), working and living conditions (working hours, food, accommodation, transport) and disciplinary measures as well as freedom of association. Contact with workers was made through the Netherlands Trade Union Confederation (FNV), Polish translators and municipal information points for Polish migrants, leading to a snowball effect. In addition, researchers made contact with workers at various accommodation sites provided by recruitment agencies.

FairWork receives reports from workers complaining about working and housing conditions. This information is gathered in a database according to a standard format. These interviews and cases, as well as general life stories collected by FairWork over the years, provide the information for Chapter 3.

For Chapters 4, 5 and 6, extensive literature research was conducted, and sources are referred to in footnotes throughout the text. Reports by the former and current Ministers of Social Affairs and Employment were used to assess the government's attempts to reduce labour rights violations in the recruitment industry in the Netherlands.

The report was sent for review to the Inspectorate SZW (Dutch labour inspection), the employers' organisation VNO-NCW and to the SNCU, the organisation that works on the compliance of the Collective Labour Agreement by the recruitment agencies. They all reacted and their reactions have, where relevant, been included in the report.

SOMO decided not to include the names of employers or recruitment agencies in this report. This is because the group of respondents worked in different sectors, for different employers and agencies, making it difficult to gather sufficient evidence by company and agency for comprehensive company profiles.

1.2 Limitations

Thanks to FairWork's unique position as a provider of frontline support, and through trade unions organising workers in different sectors, this report was able to access sufficient interviewees. However, the workers interviewed were mainly Polish, so this report does not deal with the situation of migrant workers as a whole. This is due to the difficulty in accessing migrant workers in low-paid industries. Migrant workers have a precarious legal position and getting into contact and gaining the necessary trust for interviews is challenging. Furthermore, migrant workers have little free time: they work long days and spend a lot of time travelling from their accommodation to various places of work. Because of the nature of agency work, they do not organise by company, making their accommodation sites often the only point of access for researchers.

Furthermore, this report focuses on agency labour, and does not attempt to provide a general picture of flexible labour relations. Important and common employment arrangements, such as cross-border posting (which often involves recruitment agencies), subcontracting and bogus freelance work will be mentioned but are not the primary focus of the report.

1.3 Structure

Chapter 2 reviews the policy context facing migrant workers in the Netherlands. It looks at the initiatives that have been taken by the Dutch government, including an Action Plan to tackle artificial employment arrangements, which has led to a binding law.

As labour mobility in the EU either occurs as posting (an employee sent by the employer to perform a temporary job in another country) or as individual migration, they fall under different but related regulatory frameworks (the free movement of services and the free movement of workers, respectively). The considerable growth in cross-border recruitment obscures employment relationships between workers and employers, which include the circumvention of collective agreements and social security payments.

Recruitment agencies play a role in avoidance practices, by allowing employers to create a distance between themselves and the worker and all liabilities that arise from an employment relationship.

Chapter 3 reviews the current labour situation of Polish migrant workers in the Netherlands, based on media and research reports, and interviews with Polish migrant workers carried out by SOMO and FairWork between 2012 and 2015. Most of the complaints address the recruitment agencies or the companies where the Polish migrant workers are employed. The emphasis is both on the recruitment agencies as well as on the companies where the workers are employed, as both entities have influence on the precarious employment conditions of migrant workers. The issues that the research has identified through interviews and complaints through phone calls to FairWork are clustered into a number of problem areas and illustrated by quotes from workers.

To identify shortfalls and regulatory opportunities to prevent labour rights violations, **Chapter 4** provides a backdrop to agency labour in the Netherlands, describing the liberalisation of the sector and the flexibilisation of labour relations in the Netherlands. Given the importance of EU internal market legislation (freedom of establishment, freedom of movement and the freedom to provide services) in the operation of recruitment agencies, this chapter also explains the functioning of the EU posted Workers Directive (PWD).

Chapter 5 describes the regulatory framework regarding recruited labour in the Netherlands and discusses the problems that the flexibilisation of labour relations and the (lack of) stricter legal regulation poses for the enforcement of agency workers' labour rights. Rather than providing a comprehensive overview of the entire regulatory framework, the chapter focuses on issues that have been highlighted with regard to recruitment agencies and regulatory circumvention – namely, certification, cross-border postings, the evasion of collective agreements and chain liability, as well as problems with enforcement by labour inspections and investigation authorities.

As the case studies in this report highlight, an effective and enforceable chain liability system is a crucial precondition for tackling abuses taking place in the subcontracting chains and thus improving working conditions in economic sectors characterised by the exploitation of workers. The Dutch government has taken some concerted efforts to improve effective supply chain liability and tackle bogus self-employment, a specific avoidance strategy of companies to evade regulation.

Chapter 6 therefore outlines the current EU and Dutch supply chain liability regulations, which form an example for other EU countries to improve EU-wide standards to improve labour conditions in subcontracting and other flexible work arrangements.

Chapter 7 summarises the conclusions of the different chapters and provides a number of recommendations to put an end to labour exploitation and unacceptable working conditions for migrant workers in the Netherlands

2 Context

2.1 Improving the lives of migrant workers in the Netherlands

As mentioned in the Introduction, in March 2011, a special parliamentary commission was set up by the House of Representatives of the Dutch Parliament (Tweede Kamer) to investigate labour migration from Central and Eastern European countries to the Netherlands since 2004. The aim of the research was to draw lessons to inform the government's policy regarding labour migration from the new accession countries, Bulgaria and Romania, which joined the EU in 2007. This was in the wake of the end of the Dutch government's temporary restriction on labour migration from these countries in January 2014. The commission's report, published in September 2011, concluded that many migrant workers from Central and Eastern Europe (CEE) were exploited, underpaid and housed in substandard accommodation. A number of recommendations were made regarding improving housing for recruited migrant workers, and exchanging information on those workers between tax, social security and population registration agencies. Furthermore, recommendations were made to improve the compliance of employers with the law and collective labour agreements.³

In the commission's research, special attention was paid to recruitment agencies involved in labour rights violations. It was estimated that, since 2007, between 5,000 to 6,000 illegal recruitment agencies have been established in the Netherlands that were violating labour standards and masking direct employment relationships through artificial legal arrangements. The commission instructed parliament to make policy proposals to "reduce the number of abusive recruitment agencies to zero within two years".

Since then, the government has taken a number of initiatives, including a 2011 package of stricter regulation of labour immigration from other Eastern European EU countries (*Maatregelen arbeidsmigratie uit Midden- en Oost-Europa*). In 2012 a programme on tackling abusive recruitment agencies (*Aanpak van Malafide Uitzendbureaus, AMU*) was developed. In 2013 an Action Plan was introduced to counter artificial employment arrangements, such as bogus freelance employment masking direct employment relationships, with the aim of undercutting the minimum level of collectively agreed pay and circumventing social contributions (*Actieplan bestrijden van schijnconstructies*).

Notably the Action Plan has led to a number of institutional changes in enforcement, such as joint inspections and better information exchange⁴ and, importantly, to the binding Countering Artificial Arrangements Act (*Wet aanpak schijnconstructies, WAS*), which aims to tackle employers

3 Tweede Kamer, Eindrapport van de Tijdelijke commissie arbeidsmigratie in het kader van het parlementair onderzoek Lessen uit recente arbeidsmigratie, 32680-3, 27 September 2011, <http://www.tweedekamer.nl/kamerstukken/detail?id=2011D46429>

4 In 2012, the government started a multidisciplinary approach to monitoring compliance to core labour norms. This involves exchange of information between the Labour Inspection, SIOD (Social Intelligence and Detection Service, which battles fraud on employment and income), tax services, and the police, in cooperation with the municipalities and the 'relevant organisations on the ground'. On 1 January 2012, the Labour Inspection, the Inspection for Work and Income (*Inspectie voor Werk en Inkomen*), and SIOD were merged to form the Inspection of Social Affairs and Employment (Inspectorate SZW).

circumventing the minimum wage and other collective labour provisions through non-direct and bogus employment arrangements. The Act introduces chain liability for wage payments, whereby employees can hold any actor in a subcontracting chain liable for unpaid wages.

The government is also taking measures to improve the identification of victims of labour exploitation, which is classified as human trafficking since the extension of the definition of human trafficking in the United Nations (UN) Palermo Protocol in 2001. The Dutch Labour Inspection (Inspectorate SZW) has also increased its focus on labour exploitation. Since 2013, it works on the basis of risk analysis regarding identifying future risks and developments, and it focuses on identification of victims. During the European Union (EU) presidency of the Netherlands in the first half of 2016, the government promoted the Decent Work agenda with a two-day multi-stakeholder conference dedicated to improving compliance and enforcement. From another conference of the Dutch government on strengthening multidisciplinary cooperation against trafficking in human beings for labour exploitation a multidisciplinary manual for experts to address trafficking in human beings for labour exploitation was published.⁵

Despite all these initiatives, a central proposal of the commission, namely the serious consideration of a reintroduction of a state-controlled licensing system for recruitment agencies, has been consistently rejected by the government, which believes that self-regulation is the best way to tackle problems in the recruitment sector.

2.2 Cross-border mobility and social dumping in the EU

The context shaping cross-border work within the EU is closely related to the EU's internal market project, which liberalised the movement of workers and businesses. The freedom of establishment and the freedom to provide services guarantee mobility of businesses and professionals within the EU, in principle on the basis of the hosting Member State's labour laws.⁶ However, the Posting of Workers Directive (PWD, 96/17/EC), the Services Directive (2006/123/EC) and the Social Security Regulation (883/2004) allow for the posting of employees who were hired in one Member State to work in another Member State, with the social protection and wages of the sending country, unless specifically regulated by the destination country. Allowing exceptions to the country of employment principle, in a context of regional differences with regard to wages, social security contributions, regulatory (tax and labour) regimes as well as (un)employment, creates a push factor for economic migration and a large pool of cheap labour for employers. In addition, existing economic freedoms – notably the right to establish corporations in any EU jurisdictions with little substance requirements and the principle of freedom to provide services – gives employers ample opportunities to avoid social security, tax and employment laws in countries of operation. Regulatory avoidance is particularly notable in low-wage sectors in which a large portion of operational expenses are

5 See <https://www.government.nl/binaries/government/documents/publications/2016/01/18/manual-for-experts-on-multidisciplinary-cooperation-against-trafficking-in-human-beings-for-labour-exploitation/teamwork-manual-for-experts-on-multidisciplinary-cooperation-against-thb-for-labour-exploitation.pdf>

6 Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the Treaty on the Functioning of the European Union (TFEU).

labour costs, such as the road transport, construction and agricultural sectors, but cases from the manufacturing sector are also known. Internal market measures are therefore, unwittingly or not, directly undermining core labour rights, social protection standards and public revenues in the EU.⁷

Regulatory avoidance can take many different forms (see subchapters 4.4 and 4.5), and can involve cross-border work or not. Recruitment agencies play a role in most of these avoidance practices, however, because they allow employers to create a distance between themselves and the worker and all liabilities that arise from an employment relationship (see subchapter 4.2). This raises the question whether internal market freedoms should apply without restriction to the recruitment sector.

2.3 Polish workers in the Netherlands

This report focuses on Polish migrant workers. Additional problems and more severe forms of labour exploitation can be expected to exist among undocumented migrants. They are more dependent on employers because they face the threat of deportation and they are harder to reach by support organisations. The focus on Polish migrants was chosen due to greater access to interviewees and because Polish workers still form one of the largest migrant groups faced with unacceptable working conditions and labour exploitation in the Netherlands.

In 2007, migrant workers from Central and Eastern European countries that joined the EU in 2004⁸ gained free access to the Dutch labour market. Polish workers formed the largest group of workers who emigrated from these countries to the Netherlands. Bulgarian and Romanian citizens gained access to the Dutch labour market as of January 2014, but the expected growth of Bulgarian and Romanian migrant workers did not materialise and the Polish migrant workers has remained the largest group, according to official statistics.⁹

The exact number of CEE migrant workers living and working in the Netherlands is unknown. In 2014, the number of Polish migrant workers increased from about 20,000 to 145,600, according to the Office for National Statistics (CBS). About 30 per cent of them are officially registered in the Netherlands and 70 per cent work through employment agencies.¹⁰ Research from 2012 showed that two thirds of recruitment agency workers in the horticultural sector come from Poland.¹¹

7 Jan Cremers, "EU Economic Freedoms and Social Dumping," in M. Bernaciak (ed.), *Market Expansion and Social Dumping in Europe* (Routledge, 2015). Aline Robert, "Paris pushes EU-wide minimum wage in crusade against social dumping," *EurActiv*, 2 December 2013, <http://www.euractiv.com/eu-elections-2014/france-advocates-minimum-wage-eu-news-532050>

8 Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

9 CBS, "CBS: Geringe toestroom van Bulgaarse en Roemeense werknemers," *Webmagazine*, 28 January 2015 <http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/artikelen/archief/2015/4259-geringe-toestroom-van-bulgaarse-en-roemeense-werknemerswm.htm>

10 Ibid.

11 Ecorys, "Arbeidsmarktmonitor Tuinbouw 2012," *Productschap Tuinbouw*, 2012, <http://www.tuinbouw.nl/sites/default/files/Arbeidsmarktmonitor%202012%20Tuinbouw%20Basisrapport.pdf>

Official registration is low;¹² in 2010, for instance, it was estimated that 340,000 CEE migrant workers were living in the Netherlands, of whom not even 50 per cent were officially registered.¹³ The largest groups at the time were as follows: Polish (160,000-180,000), followed by Romanian (70,000) and Bulgarian (39,000) nationals.¹⁴ Research since 2011 has consistently shown that Polish, Bulgarian and Romanian migrants are relatively highly educated, with 35 per cent of Romanian and Bulgarian migrants having academic qualifications, for instance. Their position in the Dutch labour market is, however, largely in the low-paid sector; 75 to 80 per cent of Poles living in the Netherlands work in jobs that require low qualifications, although a significant number of CEE workers also work in highly-qualified positions as engineers or IT specialists, for instance.¹⁵

2.4 From bad working conditions to labour exploitation

Bad working conditions are often treated as a matter of civil law that do not require police and inspection authorities to take action in form of public prosecution or supporting workers in achieving better working conditions. Labour exploitation on the other hand requires authorities to take action under criminal law and EU and ratified international human rights law. Migrant workers who are illegal and identified as victims of labour exploitation, for instance, are entitled to a temporary residency permit, basic services and in relation to the temporary residency permit a consideration period in which they can decide whether they want to take legal action against the exploiting party.

Whilst legal definitions are different and lead to different actions by the authorities and stakeholders, the material reality of migrant workers is that a situation often starts off as a bad working environment and ends up as exploitation. Labour exploitation should not be understood

12 CBS, "Bevolking; generatie, geslacht, leeftijd en herkomstgroepering," 16 May 2014, <http://www.cbs.nl/nl-NL/menu/themas/dossiers/allochtonen/cijfers/default.htm>. The registration system used by Dutch municipalities to register residents (the Gemeentelijke Basis Administratie – GBA) is incomplete for a number of reasons. For instance, registration is not required when it is expected that the stay will be less than four months; workers have no incentive to register since registration is linked to tax collection; there are little to no sanctions for failure to register; municipalities will therefore not invest in compliance as it does not lead to income; workers are unaware that they even have to register; employers urge workers to not register as they favour unregulated working conditions and registration is bothersome and complex, see LURA report, 2011, pp. 34-35.

13 Minister of Social Affairs and Employment L.F. Asscher, Kamerbrief EU-arbeidsmigratie, 13 September 2013, 2013-0000127697, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2013/09/13/kamerbrief-over-eu-arbeidsmigratie/kamerbrief-over-eu-arbeidsmigratie.pdf>, p. 2.

14 Heijden, P. van der, M. van der Cruyff en G. van Gils, "Aantallen geregistreerde en nietgeregistreerde burgers uit Moe-landen die in Nederland verblijven. Rapportage schattingen 2009 en 2010," Universiteit van Utrecht, commissioned by the Ministry of Interior 2013, <https://zoek.officielebekendmakingen.nl/blg-202517.pdf>

15 Engbersen et al., "Migratiepatronen in dynamisch perspectief. Een pilotstudie naar veranderende patronen van arbeidsmigratie uit Polen, Bulgarije en Roemenië," Erasmus University of Rotterdam, October 2014, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2014/10/16/migratiepatronen-in-dynamisch-perspectief/migratiepatronen-in-dynamisch-perspectief-1.pdf>, p. 6. These figures are dependent on different research methodologies, for a more in-depth outline of recent research publications and explanations of methodological differences of the same, see *ibid.* p. 5.

as a static relationship between workers and employers.¹⁶ Decent work can be seen on one end of the spectrum and exploitation on the other end, and different “modes of coercion” in the various stages of exploitation.¹⁷ The continuum of exploitation captures “an individual work situation, as it evolves over time”¹⁸ and addresses the shortcomings of strict legal definitions that fail to take into account economic circumstances in defining freedom and is more true to reality in that it exposes the “vulnerability [of a worker] that can be abused to obtain consent”.¹⁹

This analysis also provides guidance for the Labour Inspectorate in identifying bad working conditions that can lead to exploitation, and avoids only looking for signs of victimhood when carrying out inspections to identify labour exploitation. In this report, solutions to labour exploitation are therefore seen to necessarily involve actions to improve the working conditions and legal standing of migrant workers as a whole. This particularly relates to recruited and subcontracted labour.

2.5 The role of private recruitment agencies in social dumping

As mentioned in subchapter 2.2, labour mobility in the EU can occur either as posting – that is, when an employer sends an employee abroad to perform a job – or as individual migration. These different forms occur under different but related regulatory frameworks (the free movement of services and the free movement of workers, respectively) and activate different sets of worker rights and protections. Whether workers come as posted workers, or individual migrants, they are most often recruited through agencies that can encompass anything from family businesses to large corporate groups. Posting of workers also occurs via subcontractors or between subsidiaries of multinational enterprises. The difference between a subcontractor and a recruitment agency is that subcontractors provide their own management and micro-organisation of production, while recruitment agencies perform only recruitment, payroll and human resource functions.²⁰ In reality, however, these forms overlap and can also be used to circumvent regulation.

Since the institution of free movement of services, labour mobility in Europe is increasingly taking the form of the free movement of services, rather than cross-border employment. This has created a considerable growth in cross-border recruitment that obscures employment relationships between workers and employers. This includes the circumvention of collective agreements and social security payments. An increasing phenomenon is the use of letterbox companies, for instance, which employers set up to avoid liabilities, and that go bankrupt when the inspection authorities catch up with them. It has also led to competition not only in relation to wages but also to social protection standards, and a race to the bottom that is seriously endangering social standards in Europe.

16 Beate Andrees/ILO, “Forced labour and trafficking in Europe: how people are trapped in, live through and come out,” 2008, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090548.pdf, p. 22.

17 See Skrivankova, K., “Between Decent Work and Forced Labour: Examining the Continuum of Exploitation,” (Joseph Rowntree Foundation, 2010) <http://www.jrf.org.uk/sites/files/jrf/forced-labour-exploitation-full.pdf>

18 Ibid., p. 19.

19 Ibid.

20 Berntsen, L. and N. Lillie, “Breaking the law? Varieties of social dumping in a pan-European labour market.” In M. Bernaciak, ed., *Market expansion and social dumping in Europe* (London: Routledge, 2015) p. 96. https://www.rug.nl/research/portal/files/17752809/Chapter_4.pdf

Furthermore, businesses that do not deploy these circumvention practices are unable to compete with businesses that do apply these measures. The parliamentary investigation into recruitment agencies bears testimony to legal grey areas that recruitment agencies in the Netherlands operate in and the violations of social and labour standards that are their responsibility.²¹

21 G.P. Walz, B. Frouws and D.H. Grijpstra, "Grenzen Stellen. Omvang van en Maatregelen Tegen Malafide Praktijken in de Uitzendbranche," (ZoeterCEEr: Research voor Beleid, 2010), <http://www.socialevraagstukken.nl/site/wp-content/uploads/2011/07/B3736GrenzenstellenOmvangvanenmaatregelentegenmalafidepraktijkenindeuitzendbranchedef1.pdf>

3 Working and living conditions of Polish workers in the Netherlands

3.1 Introduction

This chapter reviews the current labour situation of Polish migrant workers in the Netherlands, based on media and research reports, and interviews with Polish migrant workers carried out by SOMO and FairWork between 2012 and 2015. In total some 100 workers were interviewed over this time period. Also in 2014 and 2015 FairWork received calls from Polish workers complaining about working conditions and labour rights violations. Most of the calls FairWork received were from Polish migrant workers. Most of the complaints concerned recruitment agencies or the companies where the Polish migrant workers are employed. The emphasis is both on the recruitment agencies as well as on the companies where the workers are employed, as both entities have influence on the precarious employment conditions of migrant workers.

The issues that the research has identified through interviews and complaints through phone calls are clustered into a number of problem areas and illustrated with quotes from workers.

3.2 Sectors and labour rights issues reported

FairWork continues to receive complaints about exploitation from Polish workers, all of which pertain to recruitment agencies and many of which also relate to the hirers or indirect employers. Starting from the recruitment phase, there are many ways in which migrant workers are subject to exploitation and discrimination. Complaints received by FairWork, the trade union FNV²² and numerous media reports have found the following violations of labour standards and basic rights:

- ❑ Wage discrimination (less pay for the same work performed by dutch workers).
- ❑ Lower wages than the agreed wages in the sector (collective labour agreements (clo) violations).
- ❑ Contract fraud, deception (false promises).
- ❑ Keeping workers in permanent temporary contracts.
- ❑ Unjustified fees and obligatory wage deductions by employment agencies for health care, food and accommodation.

22 FNV Bouw, "FNV Bouw vraagt Rutte stopzetten uitbuiting werknemers A2 tunnel," 8 October 2013, http://www.fnvbouw.nl/nieuws/Pages/FNV_Bouw_vraagt_Rutte_stopzetten_uitbuiting_werknemers_A2_tunnel_2872.aspx; FNV Bondgenoten, "Polen overhandigen brandbrief aan VION directie," 25 June 2013, https://www.fnvbondgenoten.nl/nieuws/nieuwsarchief/2013/juni/621180-polen_overhandigen_brandbrief_vion; RTV news, "FNV: Poolse werknemers uitgebuit," 3 February 2011, <http://www.rtvutrecht.nl/nieuws/324814/fnv-poolse-werknemers-uitgebuit>; BNR news, "FNV: CAO-loon voor 800 Polen," 27 August 2012, <http://www.bnr.nl/nieuws/beurs/889140-1208/fnv-cao-loon-voor-800-polen>

- ❑ Intimidation, in particular after workers complain about working conditions.
- ❑ Sexual harassment of female workers.
- ❑ Substandard housing conditions.
- ❑ No access to justice, for instance if an employer fails to pay due wages.

In principle, workers can be exploited in any sector, whether in a regulated labour sector or in informal work. Polish workers are highly represented in low-paid sectors in the Netherlands such as construction, agriculture and horticulture, but also logistics, distribution and meat. Most of the Polish workers find work through the recruitment agencies. Surveys among Polish migrant workers have found that many of them prefer to work in the Netherlands rather than in Poland, given that wage differences between the two countries remain significant.²³

Recruitment agencies, ranging from small enterprises to larger businesses, are known to play a central role in creating and maintaining bad working conditions and in engaging in serious labour rights violations.²⁴ According to estimates by the Dutch agricultural sector from 2010, about 12.5 per cent of the temporary workforce is sought through non-certified recruitment agencies. Certified recruitment agencies, however, can also be exploitative, and the numbers do not include illegal and falsely self-employed workers who are especially prone to abuse.²⁵ Research from 2010 on abusive recruitment agencies has found that:²⁶

- ❑ With regard to the importance of recruitment agencies per sector, 70-80 per cent of workers in the *meat* industry are thought to be contracted on a temporary basis. The use of abusive recruitment agencies is widespread in the sector.
- ❑ The *construction* sector is known to make use of so-called false self-employment. This sector is also known for abusive labour practices, as wages often do not conform to standards set out in collective agreements or even the minimum wage level.
- ❑ The *metal* sector is deemed to be less exploitative, although it is thought that the rate of 10 per cent of temporary workers will increase in coming years.
- ❑ In the *transport* sector, the use of foreign workers is also the standard practice; sometimes these workers are employed through illegal cross-border constructions.
- ❑ In *distribution centres*, foreign workers (often from CEE countries) can represent 50 per cent to 60 per cent of the total workforce. There are indications that this number is still growing.
- ❑ In the *cleaning industry*, the use of temporary workers is reportedly less widespread as the Collective Labour Agreements of the sector stipulate that only a maximum of 7.5 per cent of workers can be employed on a temporary basis.

23 M. Gijssberts & M. Lubbers, "Sociaal en Cultureel Planbureau," July 2013, 'Nieuw in Nederland. Het leven van recent gemigreerde Bulgaren en Polen', <http://www.scp.nl/dsresource?objectid=34857&type=org>

24 K. Strauss, "Unfree Labour and the regulation of temporary agency work in the UK," in J. Fudge, K. Strauss (eds.), *Temporary Work, Agencies and Unfree Labour. Insecurity in the New World of Work* (New York: Routledge, 2015), pp. 165-183.

25 G.P. Walz, B. Frouws and D.H. Grijpstra, "Grenzen Stellen. Omvang van en Maatregelen Tegen Malafide Praktijken in de Uitzendbranche", (ZoeterCEE: Research voor Beleid, 2010), <http://www.socialevraagstukken.nl/site/wp-content/uploads/2011/07/B3736GrenzenstellenOmvangvanenmaatregelentegenmalafidepraktijkenindeuitzendbranchedef1.pdf>, pp. 20-21.

26 Ibid. page 20-21.

Box 1 Four years in the Netherlands: Testimony by a 37-year-old Polish man

“My cousin said there was work for me in the Netherlands, and she knew a place where I could stay. I was having a rough time in Poland, so without hesitation I decided to put my last cents into a trip to the Netherlands. When I finally arrived at the address, I had hardly been able to communicate with my cousin. She had a very busy life herself, but told me that my first month of rent had already been paid. A few days later the landlord came by and demanded that I pay the rent. He knew nothing about any payments by my cousin. I tried to contact her, but I soon realised that I couldn’t even trust my own family any longer. I was left out on the street.

I tried to contact other Polish people. Eventually, someone told me about a job with a Turkish employment agency. That’s how it started. When the jobs dried up there, I was referred to a different Turkish employment agency. The owners were family.

The first two years went reasonably OK. I was lucky, compared to others who were in a tougher spot. But then things started going downhill fast. My experience with the last few employment agencies was very bad. I got phone calls in the middle of the night to work overtime, even though the previous day I’d made very long hours. I was getting paid weekly, partly in cash. I was never given any pay slips. I don’t know exactly what my hourly rate was, about 8,50 before tax? Sometimes I had to wait very long for my money. I said to my boss, I have no money to pay for a roof over my head. He would answer, “Go sleep in the park then.” So together with a few other Poles, we said we’d all go and sleep in his garden. Suddenly we were getting paid. In other words, he kept us on a string.

I worked there for about a year. I noticed new East European migrants were constantly being hired, and then fired again after one or two days. If I opposed to any of this, I’d be threatened on the phone at night. Sure, I had a big mouth, but once they waited with a group at my doorstep, and that was scary. I didn’t even dare to go out for groceries during the day.

These employment agencies were sometimes audited by the Labour Inspectorate, and then it would become clear that it was a big administrative chaos. Once I was ill and I reported with the UWV [Employee Insurance Agency], but my boss thought it was appropriate to say that I wasn’t sick at all; that in fact, I was at work at that very moment. A young cousin of my boss was in fact at work instead of me.

During Christmas I got a text message with a time and address for my next job. We were picked up in the van of a different employment agency. We were dropped off at a remote and unknown spot.

◉ **Box 1 Four years in the Netherlands: Testimony by a 37-year-old Polish man**

There was a large hangar on a terrain fenced with barbed wire. We all had to stand in a row against the wall, hand in our mobile phones and ID, and we were thoroughly searched. I was shocked at how silent everyone was, and at how terrified they were to say a word.

Then we were put to work. The hangar was full of tables where we had to put Christmas decorations together. There was no food, no heating, it was terribly cold and there were only a couple of construction-site mobile toilets. And so we had to work all day and when we finished they tossed a big box onto the table. 'Here, you can take your stuff back!' This went on for a couple of days. Later on I also got fined for supposedly not showing up once. But I had been waiting for the van, and it just never drove by."

FairWork case studies and SOMO's own field research confirm that Polish workers in the Dutch agricultural, meat and distribution sectors face substantial problems with regard to working conditions and labour rights, which are outlined in more detail in box 1.

In summary, the following problems are highlighted:

- ❑ Polish workers report substantial problems with regard to working conditions and labour rights in the Netherlands, especially in the low-paid agricultural, meat and distribution sectors.
- ❑ Most of the Polish workers in the Netherlands find work through recruitment agencies.
- ❑ Examples of violations of labour standards and basic rights Polish workers experience include: wage discrimination, underpayment, contract fraud, permanent employment in temporary contracts, unjustified fees and obligatory wage deductions, intimidation, substandard housing conditions, no access to remedy.
- ❑ Recruitment agencies play a central role in creating and maintaining unacceptable working conditions and in engaging in serious labour rights violations.

3.3 Job insecurity through unconditional flexibility

Flexibility of labour can have significant benefits to hiring companies: labour costs are controlled and production can function optimally when the ideal number of employees can work at any given point in time. The company can react quickly to its clients' demands, can spend its resources efficiently, and can easily dismiss employees who do not perform as well as others.²⁷ Agencies provide hiring companies with this labour flexibility by maintaining a pool of competent workers at no cost to the employers, as most of them are not paid when there is no work, but they are available as soon as the company requires workers.

27 F. Cörvers, J. van Thor, Flexwerk in Nederland, ROA Technical Report ROA –TR-2010/2, < http://www.roa.unimaas.nl/pdf_publications/2010/ROA_TR_2010_2.pdf >, (23 April 2013).

Here are some quotes from recruitment agencies' websites:

Most of E&A's agency workers come from Poland. Big plus point: their employability is very flexible.

Recruitment agency E&A website, 2016²⁸

We build our own pool of workers. We always keep people on call. We are flexible to the extent that we can scale up with twenty to forty people within two hours.

OTTO Workforce, 2011

Quotes like this show that agencies and hiring companies demand unconditional flexibility from workers. For workers who migrate to the Netherlands in order to make a living and send money home, this flexibility can initially be beneficial.²⁹ Even without relevant working experience or education, or Dutch language skills, a newly arrived worker might find employment upon arrival. This generates instant, low-paid employment in the short term, with not much perspective in the long term to gain permanent employment and higher wages.

The workers interviewed for this report stated they are never informed about a lack of work in the Netherlands when they are still in Poland. Most often, they are recruited through employment agencies in Poland that are either local offices of Dutch companies, or Polish agencies that collaborate with Dutch agencies. Even in low employment periods, workers are still encouraged by the offices in Poland to travel to the Netherlands. In the low seasons, workers only learn upon arrival that their chances of obtaining employment are minimal. This leads to unemployment or people only working a few hours per week, increasing competition amongst workers, and migrant workers losing money on travel and accommodation in a foreign country whilst being effectively out of work.

Apart from the individual career prospects and societal impact, this requirement for flexibility dominates workers' private lives to a great extent, as exemplified in *Box 2*.

FairWork reports that Polish migrants were complaining in 2014 and 2015 of being lured into taking a job in the Netherlands with false promises. They sign a contract for a variable number of hours, and subsequently it turns out that there is not enough work, even though new migrants are constantly being recruited. It is also the case that the youngest and cheapest workers get all the work, which leaves the older employees without working hours. Consequently, many of them end up with an income that can only just cover (if at all) their accommodation expenses. They are paid weekly. One week €20 or €30, the next maybe even negative wages. And so they spiral down into a situation that is very hard to get out of.

In all sectors where interviewed workers are active (agriculture, meat packing, distribution, manufacturing, logistics), interviewees know about the 'three months of unemployment benefits' in the Netherlands. Nearly all interviewed workers who have lived in the Netherlands for several years declared that they have been forced into receiving social security benefits at least once. Their stories

28 <http://www.eena.nl/onze-diensten/>, (5 may 2016).

29 Gijssberts, M. & Lubbers, M., Sociaal en Cultureel Planbureau, July 2013, 'Nieuw in Nederland. Het leven van recent gemigreerde Bulgaren en Polen', <http://www.scp.nl/dsresource?objectid=34857&type=org>

Box 2 Worker flexibility: No guaranteed work

“The recruitment agency has been promising me for three weeks that there’ll be work for me, but so far I have hardly worked. They still owe me money from the days that I did work. My own money is running out and I have hardly anything left to live on,” said a female worker in the agricultural sector in Westland, in 2014.

A male colleague who works via a recruitment agency in Poland that is a subsidiary of a recruitment agency in the Netherlands told us: “I’ve been working in Westland, in the Netherlands, for four weeks. But I work far less than the hours that are guaranteed by my contract. To be precise, I worked 13 hours on one day and then I had 3 days off. When I asked what the arrangement was, they said that there was just too little work at the moment because we’re near the end of the season.

Shortly after, I discovered new Polish people had been brought here to work. Now I’m just afraid that after paying for accommodation, insurance, and travel, my earnings will be gone. Nobody in our house has ever seen a pay slip. I don’t have a social security number, which is a problem for salary payments. I no longer have any money for food, I’m kept guessing all the time, and they just say over and over again, ‘sure, next week there’ll be work for you.’ My situation is getting worse all the time.”

Another female worker said: “I signed a contract in Poland. When I travelled to the Netherlands, and I arrived at the employment agency’s hotel, it turned out there wasn’t a place for me to sleep. The turnaround time of workers was very short. It was a big mess. I ended up on the street, and had to return to Poland.”

“Every night at around 9 pm I need to check whether I will be working the next day. This means I can never leave for a night. For me, there is no difference between weekdays and weekends. As I am on the company’s flexible shifts, I need to be available any time. I cannot go and visit my cousin, who lives a few hours away from me; there is never time to spend a weekend at her place. I just need to be checking my schedule every night. My colleagues find themselves in the same situation. As long as they are on flexible shifts, they will always only know the night in advance if they are working the next day.”

“The agency offered me various temporary contracts; phase A, which lasted for three months. After I had worked like that for a year, I was offered a 6 months contract, phase B. After that, I was dismissed. The agency made a declaration for UWV (Employee Insurance Agency) that there was no work, upon which I received social benefits for three months. Subsequently I was hired again, on a phase B contract, for another limited period of time, after which I was fired and re-hired again. This happened to my colleagues, too. It is a very beneficial system for the recruitment coordinator: he keeps getting his broker costs every time somebody is hired.”

are very similar: when a worker has worked for a certain hiring company for a longer period of time, he or she will be fired, to be re-hired three or six months later.

The hiring company's formal reason is always 'shortage of work'. The real reason is that companies avoid the legal obligation to grant workers a more secure labour position. Only weeks before a worker receives the right to a permanent contract or a higher 'phase' in the contract with the recruitment agency, the worker will be forced to stop working.

This phenomenon of employers preventing their employees from obtaining more rights through better contracts by putting them on social benefits for a couple of months has become widespread in the Netherlands. Various workers indicated that hiring companies and recruitment agencies openly discuss the issue of dismissal and plan subsequent re-hiring with their workers.

Research reports published by various organisations indicate that 35 per cent to 50 per cent of Polish workers in the Netherlands only have temporary jobs.³⁰ This, combined with the fact that many workers are employed in sectors that are relatively sensitive to fluctuations and/or to seasonal changes, makes Polish workers vulnerable to unemployment.³¹

Amongst Polish migrant workers who are registered in the municipal administration (Gemeentelijke Basis Administratie, GBA), unemployment is relatively high (13 per cent in 2009, compared to only

Box 3 No job security

"My friends in Zwolle are excusing themselves for the interview. They won't be able to come, as they are returning to Poland. They got fired for a couple of months, because they were nearly moving to Phase B. I have a 52-week contract with a recruitment agency. When that finishes, I will have to take six months off and I'll be on six months' social benefit", according to a worker from a distribution centre.

"I am now on my third one year-contract. My third year is now finishing, and I have to go, otherwise the company would have to hire me permanently. If I really want to stay within the company, I could, but then I'd have to go to another location [of the same company]."
"I was working every day, but I was fired when I got injured and had to recover for a few weeks. They do not want to pay anyone who cannot work. I now receive money from UWV (Employee Insurance Agency)."

30 Ibid, p.76.

31 Ibid.

4 per cent amongst the native Dutch population in that year).³² Dismissal is a significant reason for unemployment amongst the Polish working population.³³

"If you want to get training, well, you don't get any. They just tell you what's left and what's right, and show you a video," according to one Polish respondent who works for an electronics company.

As generally little investment is made in flexible migrant workers in terms of contracts, education, career planning, salary and the accumulation of experience and responsibilities, workers continue to work in flexible jobs without having any prospects for their future careers. This leads to increased employment insecurity and financial instability for workers.

The sporadic courses in basic Dutch language or in fork-lift truck driving that are offered by some agencies could indicate a positive first step towards the inclusion of Polish workers. However, these courses are not enough when no further efforts are made to create a proper career perspective for flexible workers.

In summary, the following problems are highlighted:

- ❑ Agencies and hiring companies demand unconditional flexibility from workers.
- ❑ Employers prevent their employees from obtaining more rights through better contracts.
- ❑ Polish workers often have temporary jobs and are vulnerable to unemployment.
- ❑ Workers have no career prospects.

3.4 Coercion and work pressure

Most of the Polish interviewees reported that their work in the Netherlands was physically demanding, and many reported about ensuing physical ailments, ranging from muscle, back or joint problems (in distribution centres) to skin irritation after exposure to chemicals (in greenhouses).

Many reported that when they need to take time off as result of sickness, they are put under pressure by line managers to return to work or they are sacked. Workers encounter constant demands from line managers to work faster.

In summary, the following problems are highlighted:

- ❑ Polish workers in the Netherlands mostly have physically demanding jobs, and many report about ensuing physical ailments.
- ❑ In case of sickness, they are put under pressure by line managers to return to work or they are sacked.
- ❑ Workers often encounter demands from line managers to work harder or faster.

32 J. Dagevos. (red.), "Poolse migranten. De positie van Polen die vanaf 2004 in Nederland zijn komen wonen," September 2011, p.66.

33 Ibid, p.71.

Box 4 Work pressures

A Polish worker said: “Three years of working in the Netherlands have left me with serious health problems. Not only physical, but also psychological. The work might not seem that tough (putting packages together), if the conditions under which it was carried out were at least normal. But they are far from normal. People faint while they work; women have to pull 150kg trolleys, getting 475 products together every hour, with a heavy trolley that you have to pull behind you. The team leaders were horrible. We sometimes had to work for hours without a break, just because they said so. The coordinators handed out fines for the craziest things. And if there was anything you didn’t agree with, you were invited to resign.”

“I worked through an employment agency. I remember one day we had to start working at 5 am and had to do overtime until 10.30 pm. A few minutes after we arrived back to our hotel after work, we got word that we should be ready again at 3.45 am when we’d be picked up for more work at the same company. And this went on until 3 pm,” said another worker.

Another woman told: “When I was working I overexerted my body, and with hindsight, I can’t see how I managed to keep up with it. We worked seven days a week, an average 14 hours a day. It was also hard work psychologically. When the boss and the coordinator showed up at work, they were constantly screaming and swearing at us. We were forced to work hard for long days, with hardly any breaks or night rest. If anyone said a thing, we heard threats that the boss would be right here, or that you would be fired.

One day we were told to get ready to move to a different place. My friend and I were going to be separated, even though they’d promised us otherwise. It was then that we decided to get away.”

“I am a hard worker and want to work. I like working at the company but now I am thinking about leaving, because the way they treated me when I got ill, and because of the pressure to work faster, even though I already work very hard. I used to have to lift 350 boxes per hour, but now they want us to lift 400. The boxes are 5 to 18 kilos. I think this is why I got the inflammation in my leg. The managers always monitor us and want us to work faster. In the meat section the norm is 500 collies per hour. That’s far too much. Officially everyone has the same collie target, but when you are a good worker and work harder, they expect you to lift more collies per hour than everyone else.”

“Working in the cooling rooms in this distribution centre is hard because there is no daylight and it’s cold all the time. All people working in the cooling rooms are Polish, although in the rest of the distribution centre it’s more of a mix of nationalities. That’s because no one else wants to work in the cooling; we are the only ones who are willing to do that work.

We also have achievement targets that are monitored by the managers. They always tell us to work faster and those of us who have a temporary contract are threatened that they will be sacked if we don’t work fast enough. We have seen people get sacked because they did not perform fast enough, so we know that we need to work fast to keep the job.”

3.5 Wages, compensation and deductions

Many Polish workers report they earn the minimum wage on paper, but they are forced to do unpaid overtime on a daily basis. They end up being underpaid, but this will not show in case of administrative controls of pay slips.

Another wage issue arises from the deductions that appear frequently on workers' pay slips. Frequently, workers testified that deductions on pay slips made by the agencies would vary every month. They often had no idea how these deductions and changes were calculated. Asking the agency about this was, according to workers, most often in vain. Sometimes agencies would admit that certain deductions were not supposed to be made, and gave back some of the deducted money – but only to deduct the same amount again the next month. In addition, some workers reported having to pay substantial fines for spurious reasons.

Another problem is that pay slips are incomprehensible to workers, indicating a failure by recruitment agencies and employers to ensure their workers receive necessary information. Almost none of the interviewed workers were able to explain the calculations on their pay slips. The frequent deductions shown in the pay slips were often not understood, especially not if these were in Dutch, as was most often the case. The complexity of the pay slips is a major barrier for workers in terms of claiming their rights, as they simply do not understand if the pay slips are correct and conform to Dutch law.

Another pressing issue for Eastern European workers is wage discrimination. The Dutch trade union FNV regularly receives complaints and takes employers to court when they do not pay workers according to the agreed wage standards.³⁴

In summary, the following problems are highlighted:

- ❑ Many Polish workers in the Netherlands do earn the minimum wage, but are forced to do unpaid overtime.
- ❑ Unexplained deductions appear frequently on Polish workers' pay slips.
- ❑ Several Polish workers reported having to pay substantial fines.
- ❑ Pay slips are often incomprehensible to workers and form a major barrier when it comes to workers claiming their rights.

34 FNV Bondgenoten, "Polen overhandigen brandbrief aan VION directie," 25 June 2013, https://www.fnvbondgenoten.nl/nieuws/nieuwsarchief/2013/juni/621180-polen_overhandigen_brandbrief_vion; BNR news, "FNV: CAO-loon voor 800 Polen," 27 August 2012, <http://www.bnr.nl/nieuws/beurs/889140-1208/fnv-cao-loon-voor-800-polen>; FNV Bondgenoten, "Celstraf voor uitbuiten Polen," 29 October 2010, https://www.fnvbondgenoten.nl/mijnbranche/branches/agrarisch_groen/nieuws/241975_celstraf_voor_uitbuiten/

Box 5 Wage issues

Group: *"The weekly pay slips are unbelievable. Many of us get pay slips with negative figures. Overtime isn't paid. Deductions for accommodation, health insurance and all sorts of strange fines add up, so that we end up with nothing. The fines are for instance, for not handing in fuel receipts (even though we haven't bought any fuel at all). Or buying special fuel. Damaging the company car. Early leave from work. Failure to bring work shoes. I also got a penalty for speeding, for about €700, even though I know I wasn't even working that day. But nothing I say makes a difference. In all our houses they've hung up a list of all the fines that can be handed out. There are threats of dismissal if anyone doesn't agree with it."*

One man working at an asparagus company told: *"My brother, my sister-in-law and I worked at a Dutch company without a contract. It was seasonal work, collecting asparagus. People who work there are being threatened with not being paid. The wages are always paid at the end of the season. My brother however didn't get paid. In my case, it so happened that my mother was taken to the hospital, and was waiting for an operation. I tried to arrange early termination of the seasonal work with my boss, so I could return to my mother in Poland. I was threatened with no pay if I left. When I said I had contacted the embassy, suddenly they had part of my wages ready for me in cash. The rest would be transferred to my bank account. But he wanted me to hand in my contract. Which I didn't do."*

Another man told: *"My brother and I started to work in 2013 through a recruitment agency. I have since met many people who were also robbed through that same agency for example by deducting payments for pensions that were not accrued."*

3.6 Discrimination, exploitation and sexual harassment

Testimonies from Polish workers about the general situation at the Dutch work place vary greatly. Problems reported by interviewed workers include arbitrariness in allocation of jobs, dirty or menial tasks and preferential treatment, threats of dismissal, discrimination, hazardous work and exhausting work pace.

In larger hiring companies, contact moments between Polish workers and higher management levels are rare, so that problems are reported only with direct supervisors, line managers or team leaders. This may concern arbitrary job allocation or preferential treatment, when supervisors prefer certain workers over others, for instance. Polish workers report that many things are arranged in an informal, arbitrary manner, ending up with the least favoured workers carrying out the least favourite jobs. Power abuse by supervisors is reported at a few large hiring companies, yet power abuse is also reported at smaller companies in the agricultural sector, where it is usually the company owner him- or herself who deals with the workers. One interviewee who works at an electronics company said she was told by one manager that sleeping with him would increase her chances of getting fixed shifts.

Reports from FairWork in 2014 and 2015 indicate that sexual harassment at work seems to be frequent. The employer, owner or foreman promises, for instance, more work in exchange for sexual favours. Some might communicate this explicitly, while others might just hint at it. In the latter case, women start noticing, for instance, that they are suddenly getting less work, or they are fired if they reject someone's advance. There are not many complaints at FairWork about this, but that is partly explained by women's unwillingness or fear to talk about it, even amongst themselves.

In summary, the following problems have been highlighted:

- ❑ Polish workers in the Netherlands report arbitrariness in allocation of jobs.
- ❑ Dirty or menial tasks and preferential treatment.
- ❑ Threats of dismissal.
- ❑ Discrimination.
- ❑ Hazardous and/or exhausting work pace.
- ❑ Sexual intimidation.

Box 6 Pay problems

A worker with various employers in the flower sector told: *"I was employed in the flower sector. I would usually work between 25 and 40 hours per week, yet it did happen that I would work up to 65 hours. Very long days could last from 7 am to 10 pm. I would be sitting on my knees during the entire day. We would get two 30 minute-breaks on such days, and overtime was never paid. For the 40-hour work week, I would receive €260 net."*

A man who worked as a butcher told: *"I get a deduction of €120 from my salary every month. This money is accounted by the agency as 'expenses' on my payslip. When I mentioned this deduction to the company, the €120 did not get deducted the following month after. But it got deducted again the month after."*

Another man who worked as a butcher told: *"I can obtain advance payments from my agency. Each time I wish to do so, I have to send a text message to the agency. They will then transfer the cash advance to my bank account. I can obtain a maximum of €450 each month. For every transfer, the company deducts €15 from my salary. It often happens that I ask for a certain amount but only obtain half of the amount, so that I need to send another text message to the agency. They will then transfer money once again and charge me another €15. Thus, a €400 cash advance cost me €45 last month. Last year, the agency took € 280 in total from my salary to pay for these services."*

3.7 Multiple dependencies leading to exploitation

3.7.1 Dependency on the recruitment agency

Many recruitment agencies in the Netherlands offer various services to their Polish workers, such as transport and housing. Even if the agency intends to merely facilitate the necessary logistical arrangements required for international recruitment, agencies offer a 'package' of services to workers. This is often welcomed by the Polish workers because of the flexible nature of their employment. This flexibility makes it difficult to arrange primary needs like housing and transport individually. Workers become dependent on the agency, not only for work, but also for transportation, medical insurance and housing. This creates opportunities for the abuse of power by the agency and/or the agency's individual representatives and makes agency workers extremely dependent and vulnerable.

A 2011 study found that Polish workers are prone to experiencing unemployment due to temporary contracts, employment in seasonal work and lack of Dutch language skills, qualifications or social networks.³⁵ FairWork case studies and SOMO interviews of Polish workers confirm this and also find that workers' dependency on a recruitment agency for most of their primary needs reduces the workers' freedom to choose employment and to complain about bad working conditions. This in turn increases workers' vulnerability to unemployment, homelessness and social isolation. When workers are no longer offered employment through their recruitment agency due to lack of work or dismissal, the workers will find themselves not only in financial difficulties but also without accommodation and health insurance.

3.7.2 Health and health insurance

Most of the interviewed Polish workers told us they were insured through their recruitment agencies. Basic health insurance is obligatory in the Netherlands; automatic registration through recruitment agencies offers the benefit of workers being insured instantly. However, communication about a workers' insurance is often between insurance company and recruitment agency; the workers are excluded from this communication. As a result, many interviewed Polish workers declare they are insured, because money is deducted from their salaries for health insurance. However, when asked, many workers cannot show any written proof or insurance cards. They merely rely on their agencies that tell them they are insured.

Phone calls from Polish workers to FairWork show repeatedly that sickness is not tolerated. Migrant workers who fall ill are forced to keep working; they get no time off, do not get paid or they are dismissed. Doctors' advice is ignored. When accidents occur at work, the company does not cover the costs, no access to health care is provided; it often turns out workers do not have health insurance, although they had been told otherwise.

35 Sociaal en Cultureel Planbureau, "Poolse migranten. De positie van Polen die vanaf 2004 in Nederland zijn komen wonen". September 2011, p.15. <http://www.scp.nl/content.jsp?objectid=26086>, (23 April 2013).

Box 7 The way Polish workers are treated

"The owner of the greenhouse where I was employed introduced a competition amongst workers. He put a list with the names of all workers on the wall. They were ranked in phases according to their productivity. When someone was in the orange phase for a couple of days he would be fired. The owner would call up the recruitment agency, tell them the name of the workers and the agency would call the workers to tell them there is no work for them anymore. Whenever the agency phones our houses, everybody is immediately on their guard as the agency only calls when there is bad news.

'Sneller, sneller, sneller,' and 'faster, faster, faster,' that is my entire Dutch and English vocabulary."

"I was one of the older employees. At first there was still work for me, but I was soon put on standby. All the time I saw new people were recruited. Many employees were about 17 or 18 years old. They're cheaper workforce, and they worked over 50 hours a week, but for others like me, older than 20, there was no work."

During a group interview with workers from various workplaces, one worker told: *"As workers we cannot complain at work. If you do, you get fired. The conveyor belts always go up in speed, they never slow down. The tempo is extremely high. There is no way that we can complain about this. 'If you can't keep up, you can return to Poland,' is what we are told. And this is not just a threat; colleagues who complain or can't keep pace with the belt receive a phone call that they don't need to come back to work the next morning."*

One man who works as a butcher said: *"The speed of the belt is always the same. It is heavy work, but we are capable to keep up with the speed. Yet it is different when there are not enough people. Then it does get too heavy, and the belt speed doesn't diminish. Unfortunately, most of the time, we do not have enough people."*

A man working in meat packing told: *"When I started working for the company, the owner was rather friendly; but that changed over time. Labour law is not respected there and I felt discriminated by my managers, who were Muslims, and said I smelt like pig. We were not allowed to talk during work. I became very tense at work, as I felt the employer was too strict and I felt intimidated by the discriminatory remarks of my colleagues. [...] I worked there for more than 2 years. Now I no longer work there. I was fired when I was ill, due to back problems. My agency knew I was ill, but didn't inform the hiring company, so the hiring company fired me when I did not pick up the phone."*

Polish workers employed in Dutch agriculture and horticulture sometimes report they are being exposed to chemicals at work. Although some workers testify their employers only spray chemicals in the greenhouses after work hours, at some greenhouses chemicals are sprayed while the employees are working in the greenhouse.

3.7.3 Housing linked to the job: expensive and substandard

Recruitment agencies typically offer accommodation to recruited workers as part of a package deal, and deduct costs for the provided accommodation from the workers' pay. In recent years there has been media attention about mass accommodation for CEE workers in the Netherlands being notoriously bad.³⁶ Large numbers of workers are accommodated in unsafe, cramped, dirty rooms in dilapidated buildings. There have been a number of state initiatives to improve standards and some recruitment agencies have invested in better housing facilities. Recent interviews with CEE workers suggest there have been some improvements in housing. Yet the main problems remain.

Polish workers interviewed who live in mass accommodation give several reasons why they stay rather than looking for independent housing: they do not own their own vehicles, do not have sufficient money to make necessary investments in furniture and deposits. However, the most important reason for not renting an apartment independently from the agency is employment insecurity. From one day to another, people can be out of work. They have no stable contracts to show to real estate owners and have no savings to rely on if employment is low during several months of the year. Even if they did rent housing on the market, they could not take the risk of renting a house that they might not be able to afford. At some recruitment agencies, when workers are temporarily out of work, they are loaned €50 per week from the agency and do not have to pay rent. This accumulated debt has to be paid back, however, once the worker is given a job again.

3.7.4 Violations of privacy

Workers are involuntarily exposed to a security regime. Security guards and cameras are used at housing sites. At some sites, Polish workers cannot ever enter their houses unseen. In some housing estates there have been complaints of unlawful entry of security guards in their rooms. Without permission from workers. Security guards enter bedrooms at any time they please, supposedly to check for cleanliness.

Sometimes agencies include in housing contracts the statement that the agency always has the right to access accommodation. One such housing contracts states: *"These in-house rules are valid for all*

36 "Poolse werknemers Eemshaven wonen erbarmelijk slecht", FNV metal, 05 April 2010, https://www.fnv.nl/sector-en-cao/alle-sectoren/metaal/nieuws/470307-poolse_werknemers_eemshaven_wonen_erbarmelijk_slecht/; "Poolse uitzendkracht betaalt nog steeds te veel voor vervallen chalet", Volkskrant, 31 July 2010, <http://www.volkskrant.nl/economie/poolse-uitzendkracht-betaalt-nog-steeeds-te-veel-voor-vervallen-chalet~a1008693/>; "Liever geen Polen in de achtertuin", Trouw, 24 July 2013, <http://www.trouw.nl/tr/nl/4492/Nederland/article/detail/3480864/2013/07/24/Liever-geen-Polen-in-de-achter-tuin.dhtml>

Box 8 Recruitment agencies abuse power

One woman told us: *“Our accommodation was very far away. The workplace was located somewhere else (about an hour away). We were driven in a van every day. The workdays went from 7 am until late at night. It sometimes happened the van didn’t come to pick us up or they came an hour after closing time. If this happened, I had to sleep in the workplace on one of the wooden trolleys until the van arrived. The chauffeur also drove us once a week to a supermarket for groceries (the nearest supermarket was 5 km away). But he would never tell us beforehand, so sometimes we didn’t even have money with us to do our shopping.”*

A student couple told us: *“Through a recruiting company in the Poland we found work for two months in the Netherlands during the summer. None of what they promised turned out to be true. The trip to the Netherlands was offered for 350 zloty by this bureau, but it later turned out to be more expensive. We eventually decided to arrange our own transport. We had to be at a given address at 7 am where a coordinator would be expecting us. This lady was the first contact for the Polish employees and she took care of the paperwork. We realised very soon that she was not up to the job; she was 19 years old and not at all helpful. The contract was a whole booklet, half in Polish and half in Dutch. At the living quarters a woman came by to show her face to the newcomers; a so-called cleaning lady, so that the agency could charge €35 a week for cleaning services. But nothing was being cleaned, and she disappeared after a while.*

Initially we would stay for three days in a kind of transitional location, and then we’d be moved to a single family dwelling, where we’d stay in groups. For this we were charged €80 a week. The conditions were very bad, and apparently there had been four burglaries that month. The contact people of the recruitment agency were very hard to reach, and their office was also far away.

One day we were suddenly taken away from our house and moved to an even worse facility, a camping trailer. We were later forced to move again, five times in total. I wasn’t happy with the situation, and on top of it, my friend wasn’t getting paid. So I said something about it, and then I realised that they’d put me on the reserve list. Which meant that I had to wait for days until there was work for me. That is, no income, but high living costs. We realised that this was not right, but we didn’t have money to go back home either.”

Another man told: *“One day I dropped by the office to request the salary calculations that I had already asked for three months earlier. The lady there didn’t even want to talk to me and sent me away. I immediately said that I wouldn’t leave until they explained why I had to wait for the money that I have earned. I said I brought documentation with me. So the lady stepped out and came back with a big man who started attacking me physically. I left and called the police immediately, but I was so upset I could hardly speak. Police cars arrived shortly after that; as it turns out, they had called the cops themselves to report me.”*

◉ Box 8 Recruitment agencies abuse power

"I was questioned at the police station and released. The next day I went to work again, and I was told that I was fired on the spot due to aggressive behaviour, and my salary was never paid. Even though I still have a right to three weeks' pay. I kept emailing them but I never got a reply."

Another man said: "Accommodation costs €56 a week. What you get is a dilapidated and mouldy container with leaks. Salaries are hardly ever paid out. I wonder where all that money goes. People who work on the field collecting asparagus are brought in daily in cargo vans, which aren't even meant for people. There aren't any toilets on the work fields; thank God there's a forest."

Box 9 Heart attack at work

One man who works for an asparagus company told: "My friend had a heart attack at work. That afternoon the ambulance picked him up and he got an operation. The employer did nothing at all about it and even forced my friend to say that he wasn't insured and that he had never worked for the company. He had him sign a paper, half-conscious as he was, and now he's not getting any compensation for damages."

accommodations. During your stay at our housing locations one is obliged to respect these rules. [...] One is obliged to allow (...) employees access to both the house as well as the bedroom at all times. It is not allowed to let strangers enter the building without permission from (...)."

3.7.5 Social isolation and lack of knowledge on rights

Mass accommodation is particularly problematic when it is located in remote areas, without public transport and far away from larger cities where workers can build up social networks. One of the Dutch recruitment agencies is using housings just over the German border where hundreds of migrant workers essentially have no contacts in the places where they work because their workplaces change constantly, are at least one hour's drive away, and they have no independent transport but are driven to and from work by the agency. The location is at an old military complex, near an airport and surrounded by agricultural land, and workers have to walk for several kilometres before reaching the nearest village. They essentially live in isolation from the local community in Germany, as well as from the work community in the Netherlands.

Box 10 Hazardous work

"I am unemployed now. Before, I always worked with plants and flowers. I was working on a 0-hour contract which lasted 6 months, without a pension scheme. I was having trouble with the agency, but my relationship with the hiring companies was usually good. Unfortunately, I had to quit this work. In the last greenhouse that I worked at, I got a skin affliction; my hands swelled and my skin showed red spots. It got so bad that I had to stop working. A colleague told me that it was normal that the skin affliction appeared, as double the regular amounts of pesticides were being sprayed in the greenhouse at that time."

"My employer would often spray chemicals during our breaks or after working hours. However, sometimes he would also spray chemicals while we, the Polish employees, were working, never when there were Dutch employees. It wasn't pleasant to inhale the air when chemicals were sprayed."

One woman told: "Illnesses were almost ignored. A colleague of mine had a swollen hand or arm because of an allergy, which looked really bad, and she eventually only got a jab of antibiotics, but she had to return to work the same day."

Box 11 Substandard mass accommodation

"In our barrack, it is a big mess due to the continuous moving of people – newcomers are arriving; others are leaving. The agency does not maintain the building and inhabitants are not cleaning well because nobody stays here anyway. Besides, the cleaning materials are broken or have disappeared, and the agency does not replace them. Drunk people are hanging around in the common rooms."

One man said: "The accommodation conditions were awful and dangerous. There was constant surveillance. I was beaten up by others and a drug addict. When I reported this to our building's security personnel I was just moved to a different room. I also reported that many people were on drugs; the guard just made it clear that I shouldn't say a thing about it, especially not to the cops. The fire alarm was set off almost every day. Once the firemen came because our kitchen had caught fire."

Social isolation is reinforced by the lack of proper internet connections. Due to the isolation of the military barracks in which they are housed, the workers do not have access to internet cafés or free Wifi in public bars or libraries. Workers complain about not having a Wifi signal that is strong enough to use internet in their barracks. Only the three desktop computers provided by the recruitment agency in a leisure centre have a proper internet connection; but three computers between hundreds of people are not nearly enough.

3.7.6 Transport

Employers in the Netherlands are not obliged to reimburse travel costs for their employees, unless this is a duty explicitly stated in a Collective Labour Agreement (CLO) that applies to the company. However, it is very common that employers reimburse travel costs for their employees. Yet this benefit is not available to the Polish employees: interviewees declared that they pay for transport themselves. Often, this money is paid to employment agencies that have transport available for workers. These are often vans, driven by one of the workers. The driver picks up his colleagues in the morning with an agency van, and brings them back home at night. Interviewees in this research all declared that their drivers were not paid for this additional work, even though it is not exceptional that the driver thus works several hours overtime on a daily basis.

At the accommodation just over the German border, many workers are dependent on the agency's vans as a means of transport. Workers are picked up at the barracks to be taken to the hiring companies. After work, they travel back to their barracks. As there is nothing within walking distance of the military complex, workers who do not have their own cars usually do not travel anywhere. On Saturday mornings the agency's van takes workers to a supermarket 4 kilometres away from the military complex.

In summary, the following problems are highlighted: multiple dependencies are leading to exploitation of Polish workers in the Netherlands:

- ❑ Dependency on the recruitment agency.
- ❑ Health and health insurance.
- ❑ Housing linked to the job: expensive and substandard.
- ❑ Violations of privacy.
- ❑ Social isolation and lack of knowledge about rights.
- ❑ Transport.

3.8 No access to grievance mechanisms

At most agencies and hiring companies spoken of by Polish workers who were interviewed for this research, there was no formal complaint procedure. Interviewed workers indicated that they usually talk to agency or company representatives directly when they have complaints, if they feel confident enough to do so.

Box 12 Privacy violations

A worker at a distribution centre told us: *"I lived in a bungalow park of a recruitment agency for a couple of years. Dutch bungalow coordinators would enter any time, and open our fridge and cupboards. They'd tell me to clean, because they found it dirty. But what happened to my friends is worse. My friends, a married couple, were in bed together, when the coordinator came in. My friend got angry and pushed the coordinator against the wall, asking him aggressively what he was doing in there. A week later, my friend was fired."*

Box 13 Barracks in the countryside

"The barracks house around 10 to 15 persons per corridor. Kitchens and bathrooms are shared; bedrooms have space for a closet and a bed. Some bedrooms are shared by two workers. All Polish workers interviewed said they paid at least €320 for their accommodation per month, excluding energy costs. Considering the remote location, the lack of privacy, the lack of internet connections, and the poor state of the buildings, this price is extremely high. In the village that is 5 kilometres from the complex, for example, a four-room apartment of 90 m² can be rented for €450 per month."

One man who worked for 3.5 years in the Netherlands told: *"I wanted to have a bank account here, but I was told I cannot open a bank account, because I am not registered in the Netherlands, but in Germany."*

However, interviewees indicated that they usually will not address any issues with their agencies or hiring companies. Many workers employed in various sectors said that they have often been told that if they are dissatisfied, they should return to Poland. This threat appears to be very effective: the majority of workers indicate that they rarely or never complain about work- or housing-related issues.

One way of complaining about the situation would be to talk with the Labour Inspectorate during an inspection. The Inspectorate should make sure they are trusted by Polish workers and the interviews should take place individually and away from the workplace.

A lot of Polish workers who complain about their situation to FairWork disappear when more information is needed. To change the situation, it is important to stay in touch with Polish workers who file complaints.

Box 14 Paying for transport to work

A horticulture worker told us: "I pay €19.50 per week to the agency for transportation to and from work. One of my colleagues picks me up every morning, with a van which is owned by the agency. He picks up other people, too, and we drive to work together. After work, my colleague brings us back home again. So, apart from his work, the driver thus works two additional hours per day. He is not paid to do that. Instead, he pays the weekly amount of €19.50 as well, and in case he receives a fine in traffic, he has to pay for that himself. New workers are told by the agency that they have to drive; they have no choice but to accept, otherwise they won't be offered a job."

"I was fired a couple of months ago. I drove my own car, had my own apartment and arranged my own health insurance. However, costs for agency-arranged services such as for transport were still deducted from my salary. When I complained about this, I was dismissed."

In summary, the following problems are highlighted:

- ❑ At most agencies and hiring companies, there are no formal complaint procedures.
- ❑ Many Polish workers indicate that they have often been told that if they are dissatisfied, they should return to Poland.
- ❑ As a result, workers do not complain about bad working conditions.

3.9 Conclusions

This chapter presents the results of SOMO and FairWork interviews conducted with Polish workers and case studies collected between 2012 to 2015. These show the consistent and continued existence of labour exploitation, and in particular the central role that recruitment agencies play in this.

Although many Polish workers in the Netherlands perform physically demanding, monotonous and dirty work, most workers do not complain about the work itself. The general attitude among interviewees is that they cannot expect to get better jobs at the moment. In contrast to the minimal complaints workers formulate about their work, workers frequently complain about their working conditions: most often, it is the boundary conditions of the work that provoke dissatisfaction. Complaints about problems with agencies, financial issues and housing are most common.

Most problematic are the workers' high dependency on agencies for housing, transportation, work and medical insurance. Abuse of these highly dependent workers is frequent: contracts and financial arrangements are often not beneficial to employees. Many workers report their agencies make ques-

tionable deductions from their salaries; for accommodation, energy, transport, medical insurance, fees, extra services and various unaccountable costs that workers do not understand.

Workers report violations of labour law and Collective Labour Agreements (CLAs) and explain they have difficulties addressing these violations with their agencies, as the chances of being dismissed for a critical attitude are high. Flexible contracts and working hours, along with low salaries, leave little room for workers to develop their skills and careers. In addition, workers mention discrimination, poor quality housing and insufficient possibilities for education and lack of career prospects as urgent issues.

Hiring companies are just as responsible as the employment agencies. Their demand for highly flexible labour, which has to be available instantly and at minimal expense, generates a culture in which workers are expected to be available for any job at any time. The interchangeability of workers is accompanied by disrespect for the social and economic circumstances of employees.

Interviewed workers propose various improvements:

- ❑ Better protection of labour rights, respect for collective labour agreements.
- ❑ Better treatment of workers.
- ❑ Better communication.
- ❑ Fixed contracts.
- ❑ Elevated and stable salaries, at least equivalent to those of dutch colleagues.

4 Recruited labour in the Netherlands

4.1 Introduction

The previous chapter showed that recruitment agencies play a central role in determining the working conditions of Polish workers in the Netherlands. Indeed, most complaints regarding labour rights violations received by FairWork involve recruitment agencies, and most of the complainants are Polish workers. The Netherlands is viewed internationally as “a forerunner of the regulation of temporary agency work as well as other forms of flexible work that combines flexibility with a high degree of social security”.³⁷ Whilst this high degree of social security might apply to some temporary agency workers, as this report shows, it does not apply to the vulnerable groups such as migrants working through agencies. The regulation of recruitment agencies is a central tool in preventing labour rights violation of low-wage or generally vulnerable workers.

To identify shortfalls and regulatory opportunities to prevent labour rights violations, this chapter provides a backdrop to agency labour in the Netherlands, providing background regarding the liberalisation of the sector and the flexibilisation of labour relations in the Netherlands. Given the importance of EU internal market legislation (freedom of settlement, freedom of movement and the freedom to provide services) in the operation of recruitment agencies, this chapter also explains the functioning of the EU Posted Workers Directive (PWD). The next chapter describes the regulatory framework regarding recruited labour in the Netherlands in more detail, and discusses the problems that the flexibilisation of labour relations and the (lack of) a stricter legal regulation poses for the enforcement of agency workers’ labour rights.

4.2 The triangular employment relationship

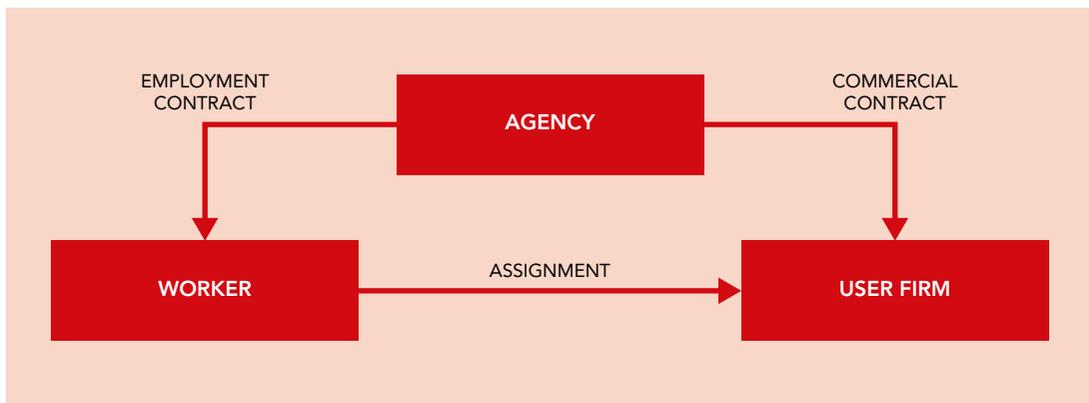
Temporary work and recruitment agencies or labour brokers have long been opposed by trade unions for generating insecure and bad working conditions. They argue that, rather than filling a gap in the labour market or creating new jobs, temporary work is used by employers to avoid hiring permanent staff who have established labour rights. From a labour rights perspective, the central problem of outsourcing labour is the profit-seeking motive for labour recruitment that creates a downward pressure on the quality of labour contracts, wages and working conditions. This is coupled with the triangular employment relationship created by interposing labour intermediaries between an employer and a worker, which makes it more difficult for workers to enforce their

37 Eurociett & UNI Europa, Voss et al., “The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue,” 2013 http://www.ciett.org/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Report/2013.02.08_-_Full_report_on_the_role_of_TAW_and_labour_market_transitions.pdf, p.39. Denmark first termed this combination of enhanced labour market deregulation with social security for workers as ‘flexicurity’, a concept that subsequently gained a high profile at EU level and in particular in the Netherlands.

rights. The triangular character of outsourcing labour also complicates the regulation of recruitment agencies. In the relevant literature, the three aspects of regulation are said to encompass:

1. The regulation of the agencies and the services they provide for user companies by law.
2. The regulation of contracts between agencies and workers.
3. The regulation of assignments between workers and user companies.

Figure 1: Definition and means of regulating recruitment agency work



Source: Eurociett & UNI Europa, Voss et al. (2013).³⁸

The regulation of recruitment agency work therefore has to target different parts of the triangular relationship, and the rights and treatment of workers are shaped by a variety of laws at national level, obscuring liabilities and making access to justice more difficult.

A collection of essays in a recent volume on temporary work and labour rights argues from various national perspectives that the conditions contributing to the rise in precarity and insecurity in work – through the liberalisation of the labour market and rise in recruitment agency work – have also contributed to the rise in forced labour in Europe and beyond. Gendered and racialised cross-border labour recruitment is facilitated and consolidated by recruitment agencies that place workers in specific labour market niches.³⁹ The case studies in this report show how this is the case for agencies specialising in recruiting Polish workers into specific low-paid sectors in the Netherlands.

38 Eurociett & UNI Europa, Voss et al., “The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue,” 2013, http://www.ciett.org/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Report/2013.02.08_-_Full_report_on_the_role_of_TAW_and_labour_market_transitions.pdf

39 J. Fudge & K. Strauss (eds.) “Temporary Work, Agencies and Unfree Labour. Insecurity in the New World of Work,” (New York: Routledge, 2014), pp. 1-25.

4.3 The rise of recruitment agencies

Competition between recruitment agencies to supply workers at the cheapest price, and the central role that end users of labour play in this process, are central to generating exploitative working conditions.⁴⁰ With the rise of flexible labour relations, recruitment agencies (alternately termed labour brokers, private employment or temporary work agencies) have become a standard feature of the European labour market, with established sector lobby associations and an official place in national collective bargaining systems.

The Netherlands was the first country in Europe to institutionalise flexible labour relations and to liberalise the recruitment sector, with low capital requirements and other low barriers to market entry. The first recruitment agencies were set up in the Netherlands in the 1940s (mostly typing bureaus) and became more widespread in the early 1960s, with the first agency licensing system established in 1965.⁴¹ Whilst the early clients of recruitment agencies were mostly women earning supplementary household income in the administrative sector, the industrial sectors started using recruitment agencies from the 1970s onwards, making agency work a structural part of the Dutch labour market. In 2013, Dutch agencies employed some 700,000 workers and had a turnover of €11 billion – around 4 per cent of the global sector turnover.⁴²

With the labour and capital liberalisation wave of the 1980s, agency work became an accepted alternative to regular (full-time, open-ended) employment. The International Labour Organization (ILO) Private Employment Agencies Convention No 181 from 1997 was a landmark in the liberalisation of European labour markets.⁴³ Ten years later, after a decade of political negotiations between Member States on the regulation of flexible labour in the EU, the Directive on Temporary Agency Work (2008/104) was adopted. Although that Directive partially harmonised rules across the EU, generally speaking, regulation in different member states remains highly diverse due to the different historical developments of regulatory frameworks and freedom for member states and partners to decide on the scope and implementation of the Directive. As corporations increasingly outsourced so-called non-core activities, recruitment agencies as well as other enterprises started specialising in certain sectors, such as cleaning, security, marketing, and eventually also in the provision of cheap migrant labour.⁴⁴ In 2011, the European Parliament noted increasingly precarious employment relationships associated with so-called 'atypical' labour contracts in Europe.⁴⁵

40 Verité, *Corruption & Labour Trafficking in Global Supply Chains*, December 2013, <https://www.verite.org/sites/default/files/images/WhitePaperCorruptionLaborTrafficking.pdf>

41 A. Houwing, "A Dutch approach to Flexicurity? Negotiated change in the organization of temporary work," (Universiteit van Amsterdam, 2010), <http://arno.unimaas.nl/show.cgi?fid=21980>, pp. 150-151.

42 CIETT, 2015 Economic Report, http://www.eurociett.eu/fileadmin/templates/ciETT/docs/Stats/Economic_report_2015/CIETT_ER2015.pdf

43 See M. Wynn, "Power Politics and Precariousness. The Regulation of Temporary Agency Work in the European Union" in Fudge, J., Strauss, K. (eds.), *Temporary Work, Agencies and Unfree Labour. Insecurity in the New World of Work*, (New York: Routledge, 2014), pp. 48-69; ILO Convention No181 is published at http://www.ilo.org/dyn/normlex/en/f?p=NOR_MLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326

44 H. Houwing, "A Dutch approach to Flexicurity? Negotiated change in the organization of temporary work," Universiteit van Amsterdam, 2010, <http://arno.unimaas.nl/show.cgi?fid=21980>, pp. 150-151.

According to data of the International Confederation of Private Employment Agencies (CIETT, based on 2013/2014 data), the UK is the largest host to employment agencies in Europe (18,180), followed by Germany (6,500) and Poland (4,548). Whereas the Netherlands was the third-biggest European country in 2009 with some 3,640 agencies. This number dropped to 481 in 2011 and 1,500 in 2013, because only CIETT members (agencies registered with the Dutch industry association ABU) were counted from 2010 onwards.⁴⁶ The number of recruitment agencies rose in Poland on the other hand from 1,086 in 2009 to 4,540 in 2013. Since 2012, CIETT records the number of internal staff per agency, and when comparing these to the number of agencies in the Netherlands and Poland, it appears that Dutch agencies employ on average 70,69 staff per agency in 2012, whilst Polish agencies employ on average 1,03 staff in the same year.

Table 1 No. of recruitment agencies and internal staff in the Netherlands and Poland

Year	Netherlands			Poland		
	No. of agencies	No. internal staff	No. staff per agency	No. of agencies	No. internal staff	No. staff per agency
2009	3,640			1,086		
2010	3,260			2,998		
2011	481*			3,537		
2012	481*	34,000**	70,69	3,971	4,100**	1,03
2013	1,500	20,000	13,33	4,540	4,100**	0,90

* Only ABU members

* Based on 2011 figures

Source: CIETT Economic Reports 2011 to 2016

The data provided in Table 1 is not complete and differences in figures reported between years reflect different or incomplete methods of data collection. However, even when taking into account these data limitations, a striking picture emerges: firstly, the Netherlands has decided to report a lower number of recruitment agencies to CIETT since 2009. The parliamentary investigation committee Lura (see Chapters 1 and 2) mentioned in its final report (September 2011)⁴⁷ that there were an estimated 5,000 to 6,000 abusive employment agencies active in the Netherlands, employing more than 100,000 workers. As mentioned above, in 2011 and 2012, the Netherlands reported only ABU members to CIETT. However in 2013, 1,500 recruitment agencies were reported to CIETT. The actual and reported numbers therefore differ. Furthermore, the increase from 2012 to 2013 cannot be explained by a growing number of ABU members, because the association's membership remained stable at around 500 in 2015.⁴⁸ In any case, this increase in the reporting

45 M. Wynn, "Power Politics and Precariousness. The Regulation of Temporary Agency Work in the European Union" in Fudge, J., Strauss, K. (eds.), *Temporary Work, Agencies and Unfree Labour. Insecurity in the New World of Work* (New York: Routledge, 2014), p. 52.

46 See CIETT Economic Reports 2011 to 2016, "Number of private employment agencies worldwide," <http://www.eurociett.eu/index.php?id=202>

47 Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoek.officielebekendmakingen.nl/kst-32680-4.html>

48 See ABU's website: <https://www.abu.nl/over-de-abu>

Box 15 Recruitment agencies and Eastern European migrant workers

The importance of recruitment agencies in the employment of migrants, in particular Polish workers, in the Netherlands has been illustrated in a number of studies.¹ In 2008, it was estimated that a staggering 66.8 per cent of all CEE workers formally registered in the Netherlands work through recruitment agencies,² long-term as well as temporary employees.

In 2011, research estimated percentages for Polish migrants employed through recruitment agencies vary between 60-70 per cent, in stark contrast to Bulgarians and Romanians, of which only 1 per cent and 5 per cent respectively were employed through a recruitment agency before 2011.³ This is not surprising considering that until 2014, Bulgarians and Romanians had to apply for work permits, which means it was much harder for recruitment agencies to legally employ them. Polish workers gained working rights as of January 2011, which contributes to their higher representation in agency work, and Bulgarian and Romanian workers gained working rights in 2014, so that an increase in their representation in recruitment work over coming years is to be expected. The fact that Bulgarians and Romanians were not registered as recruitment agency workers, however, does not mean that they did not work as temporary workers in the Netherlands. The system of posting workers is used for workers for whom it is more difficult to receive work permits, even if posting is intended for time-limited commissions and contracts.

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- 1 Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoek.officielebekendmakingen.nl/kst-32680-4.html>, p. 31.
 - 2 Ibid., p. 39
 - 3 Engbersen et al., "Arbeidsmigratie in vierden. Bulgaren en Roemenen vergeleken met Polen," 2011, <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/11/18/arbeidsmigratie-in-vieren.html>, p. 38. The report shows that Polish private employment agencies also account for a share of the recruitment. 19 per cent of the Polish workers were recruited through an agency located in Poland, and 31 per cent through one in the Netherlands. 85 per cent of the Polish workers employed through a recruitment agency said their recruitment agency was owned by a Dutch citizen. 61 per cent of the Bulgarian workers interviewed for the research said they found a job through their personal network of friends and family in the Netherlands, as opposed to 25 per cent for the other two nationalities.

explains the drop from around 70 to around 13 internal staff employed per reported recruitment agency in 2012 and 2013.

Secondly, in stark contrast to the reporting of the number of agencies in the Netherlands, the number of reported Polish recruitment agencies has steadily grown from around 1,000 in 2009 to 4,500 in 2013. More striking still are Poland's internal staff numbers, which show that each agency employs around one staff member. This points not only to a large number of one-person businesses in the Polish recruitment sector, but – given that at least some agencies must have more than

one staff member – to the existence of no-staff businesses in the sector, which implies mailbox companies acting as recruitment agencies. Trade unions are increasingly reporting social dumping by means of artificial cross-border posting arrangements using letterbox companies located largely in Eastern Europe. Therefore, it is likely that these figures indicate Poland is being used as a conduit country for employment contracts. This provides employers with lower wage and social security costs and the circumvention of collective agreements.⁴⁹

4.4 Cross-border postings in the EU

The EU applies the so-called *lex loci laboris* principle in cross-border work, under which pay and conditions of employment of cross-border workers falls under the jurisdiction of the country of employment. Similarly, workers are subject to only one social security scheme, notably the one of their country of employment.⁵⁰ However, Posting of Workers Directive (Directive 96/71/EC) and related Enforcement Directive (PWD) as well as the Social Security Regulation 883/2004 and its Implementation Regulation 987/2009⁵¹ regulate exceptions to this principle. On the one hand, the PWD aims to avoid social dumping (framed as ensuring fair competition within the EU) and lays down minimum criteria for social protection for posted workers. On the other hand, the PWD facilitates the freedom to provide services on the European market that involve cross-border postings of workers.

The PWD defines three forms of temporary posting to another member state, namely:

a) as part of commissioned (sub)contracting work; b) cross-border postings within the same corporate group in the EU; and c) postings to another member state as a recruitment agency worker.

Since the PWD was agreed in the late 1990s, the nature of subcontracting and of incorporations has changed considerably, partly as a result of employers using loopholes in EU regulations facilitating the free market (freedom to provide services and freedom of establishment) to avoid regulation. Whilst the PWD is sometimes seen as having the potential to provide posted workers with minimum labour standards, trade union reports have shown that it continues to be used for social dumping and wage competition, even after the Enforcement Directive came into force.

The PWD was transposed in the Netherlands with the Employment Conditions Cross-border Work Act (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid*, WAGA). This lays down that posted workers have the same rights as resident workers with regard to the applicable collective

49 See CIETT Economic Reports 2011 to 2016, “Number of private employment agencies worldwide,” <http://www.eurociett.eu/index.php?id=202>

50 This subchapter draws heavily on Mijke Houwerzijl’s discussion of how the PWD stimulates competition between member states. See Houwerzijl, “Concurreren met behulp van detachingsarbeid,” in Cremers et al (eds), *Vorbij de retoriek. Sociaal Europa vanuit twaalf invalshoeken* (Amsterdam: Van Gennep, 2014).

51 Jan Cremers, ETUI Policy Brief, 5/2014, European Economic, Employment and Social Policy. “Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping,” 2014, <https://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Letter-box-companies-and-abuse-of-the-posting-rules-how-the-primacy-of-economic-freedoms-and-weak-enforcement-give-rise-to-social-dumping>

agreements and rest periods, working hours, holiday pay, and occupational health and safety. Employers should not discriminate against them *vis à vis* domestic workers and should adhere to the Temporary Employment Agencies Act (*Wet Allocatie Arbeidskrachten door Intermediars*, WAADI).

4.5 Other types of flexible employment

It should be noted that recruitment labour is only one form of a growing number of different types of employment relations. Whilst different forms of labour contracts might serve different types of work, in low-paid sectors, it is often found that employers change employment contracts when the regulation of a commonly used form of employment relationship increases, i.e. the type of relationship that offers employers the greatest flexibility and thus puts workers in a weaker position *vis à vis* their employer is being sought. In the German meat sector, for instance, when the minimum wage was introduced for recruitment labour, meat producers changed their employment practices to subcontracting. Under this arrangement, the slaughter houses no longer employ workers through contracts with recruitment agencies providing workers, but subcontracts the work itself out to labour providers. This created a bigger distance between the end users of the labour and the workers, and the minimum wage was undercut by the subcontractors through a number of deductions off the workers' wages.⁵²

In the Netherlands, the circumvention of labour rights often takes the form of bogus self-employment (*schijnzelfstandigheid*). This means that employers pressurise their workers to become freelancers, even though the nature of the job has not changed and the workers work for only one employer. In a recent study into the construction, transport, care and professional services sector, bogus self-employment was found in these sectors to take place in between 2-17 per cent of cases. Some 800,000 fulltime freelancers are registered in the Netherlands, and another 600,000 have a part-time freelance status.⁵³

Different types of flexible types of employment identified in the Netherlands include:⁵⁴

- ▣ **Contracting:** A contractor takes on a specific job for a set price, works with his or her own people and tools, and organises and supervises the work. It is a growing phenomenon in

52 See the NGG brochure "Wenig Rechte, Wenig Lohn. Wie Unternehmen Werkverträge (aus)nutzen" [Few rights, low wages. How companies (ab)use subcontracting], September 2012, <http://sh-nordwest.dgb.de/themen/+co++d6c350ae-fdd9-11e2-8c78-00188b4dc422?t=1>; numerous TV investigations are published at <https://www.youtube.com/watch?v=JgSpUN0KSMw>; the *Südwestrundfunk* (SWR), a regional public broadcasting corporation serving the southwest of Germany has a dedicated dossier on exploitation in the German meat industry: <http://www.swr.de/report/dossiers/fleischdossier/-/id=8246696/did=8480926/nid=8246696/uiik83w/index.html>; for a recent article on the link between this type of exploitation and EU regulation of labour migration in English, see Hassel & Wagner, op. cit.

53 Government of the Netherlands interdepartmental research service, IBO (Interdepartementaal Beleidsonderzoek) Zelfstandigen zonder personeel, April 2015, <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2015/10/02/eindrapport-ibo-zelfstandigen-zonder-personeel/eindrapport-ibo-zelfstandigen-zonder-personeel.pdf>

54 Gijsbert van Liemt, "Private employment agencies in the Netherlands, Spain and Sweden, Sectoral Activities Department," Sector Working Paper No. 290, 2013, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_231420.pdf

agriculture and logistics. Often workers are Polish (temporary) migrants who receive no more than the minimum wage.

- ❑ **On-call jobs:** Workers are available for work but the number of working hours are not specified and this can lead to great fluctuations in weekly or monthly income. On-call jobs can be useful in specific cases (e.g. undertaker) and other sectors where demand for labour is irregular and may increase suddenly (such as cafés, restaurants or healthcare).
- ❑ **Payrolling:** The user company recruits, selects and supervises the workers but for the law these are employed by the payroll organisation. The latter handles the administrative and other obligations typical of employers and so enables user companies to avoid the costs related to administration, dismissal and illness. 37 per cent of all workers are over 45. They work mainly in cafés and restaurants, retail and wholesale trade and in education.
- ❑ **Fixed-term contracts:** These are used for work on a project basis and as a replacement contract to cover illness or pregnancy. They are also often used as prolonged probationary period. Over 65 per cent of workers on these contracts are younger than 35. They are mainly active in commerce, 'other services' and health care.
- ❑ **Recruitment agency work:** Provides temporary or contract jobs, the person doing the work is either an independent contractor or an employee of the agency, rather than an employee of the company for which the work is performed.
- ❑ **Own-account (self-employed or freelance) workers without employees** are not employed, not covered by a CLA and are not automatically insured against illness and unemployment. An unknown number of freelancers are *de facto* employees and are independent in name only.

The majority of Polish and other Eastern European workers are employed in recruitment agency work in the Netherlands, and to a lesser extent contract work and (posted from abroad to the Netherlands) to carry out freelance work. The latter is referred to as ZZP (*zelfstandigen zonder personeel*) in the Netherlands. These types of employment are not mutually exclusive. Recruitment agencies – especially in construction and agriculture, for instance, but also, as mentioned above, in the meat industry – can employ foreign workers as posted workers, which are comparable to contract arrangements. Furthermore, employers are known to change contracts from direct to freelance contracts to save costs.

In Dutch law, there are two forms of subcontracting. The first concerns *outsourcing of work*, from a main contractor to a subcontractor. The second concerns *outsourcing of labour* from a main employer (hirer) to a recruitment agency (broker). This includes the risk that the revenue authority views an outsourced or freelance employee as the company's regular staff, making it liable for the ensuing social, insurance and tax responsibilities.⁵⁵

55 WKCheck, <http://www.wkcheck.nl/>

Box 16 NEN 4400 certification

Recruitment agencies and other contractors of work can certify themselves according to standard NEN 4400-1 or NEN 4400-2 and can be included in the Labour Standards Register (Register Normering Arbeid) of the Labour Standards Foundation (Stichting Normering Arbeid, SNA). Because the law until recently laid down that the hirer is not liable for non-payment of the minimum wage and holiday pay if using a certified agency, this offered end users of labour greater protection against fraud and illegality.

NEN 4400-1 is a national standard that set requirements for temporary work businesses and contractors of work, including subcontractors, that have their registered office in the Netherlands with respect to the payment of taxes and social insurance contributions and the legitimacy of employment in the Netherlands. The aim of the standard is to limit the risk for clients of recruitment agencies (the ultimate employers in a sub-contracting chain) of recovery and penalties from the Dutch Tax and Customs Administration.

NEN 4400-2 has been developed for companies that have their registered office outside the Netherlands. This standard includes requirements for checking and assessing any company with a registered office outside the Netherlands that provides workers for the purpose of working under the supervision or direction of a third party and for testing and assessing any contractor or subcontractor having its registered office outside the Netherlands. This is in order to determine that they are organised in such a way that it may be safely assumed that obligations from employment are complied with.

In both cases, liability of the employer is laid down in the Tax Compliance Act (*Invoering-swet*). Article 35 on the outsourcing of work is referred to as the Supply Chain Act (*Wet Keten Aansprakelijkheid, WKA*)⁵⁶. It lays down that, if a subcontractor fails to pay an employees' payroll taxes, national or employee insurance premiums, the main contractor can be made responsible for these payments. This also applies in case of several layers of subcontracting.

Article 34 in the same law, referred to as Hirer Liability (*Inlenersaansprakelijkheid*), lays down liability for using external personnel, i.e. not to the outsourcing of work but the hiring of staff through recruitment agencies, subcontractors or payroll companies.⁵⁷ Thus there is a legal liability of employers (hirer) for the failure of a recruitment agency (broker) to pay tax and social premiums. In 2010, this law was extended to create liability for the non-payment of the legal minimum wage. A recruitment agency worker who does not receive the minimum wage is thus entitled to demand

56 Uitvoeringsregeling inleners-, keten- en opdrachtgeversaansprakelijkheid 2004, http://wetten.overheid.nl/BWBR0016131/geldigheidsdatum_07-04-2014; Tax Compliance Act, http://wetten.overheid.nl/BWBR0004770/geldigheidsdatum_28-11-2014#HoofdstukVI

57 See WKAcheck website <http://www.wkacheck.nl/index.php/wet-keten-aansprakelijkheid> or Revenue Authority information folder.

the unpaid wages from the ultimate hirer. However, until June 2015, the law laid down that the hirer is not liable for non-payment of minimum wage and holiday pay if using a NEN 4400 certified recruitment agency.⁵⁸

With the introduction of chain liability, non-liability is not automatic when using certified agencies. The Dutch Inspectorate SZW however, still focuses enforcement actions largely on abusive agencies, assuming that circumvention of social standards, applicable taxes and labour rights are concentrated in the non-certified industry. In a reaction to this report the Inspectorate SZW⁵⁹ mentions that they base their actions on a risk analysis and will look at both certified and non-certified recruitment agencies, even though the employer associations would rather have them focus on non-certified agencies.

This exemption creates a potential loophole in the protection of labour rights, because certified brokers have been found to engage in the same types of labour rights abuses as non-certified recruitment agencies. Or the agency itself might use a non-certified (sometimes foreign) subsidiary to source workers, who might consequently be exploited and contracted under foreign labour law. The use of mailbox companies for this type of circumvention of regulation is widely documented.⁶⁰

4.6 Trade union organisation

Since the legalisation and liberalisation of recruitment work, most trade unions have concentrated on bargaining for equal rights and payments for recruitment agency workers, to improve working conditions for those workers and prevent temporary work from becoming a cheaper alternative to permanent staff. Although trade unions in Europe have often dropped their earlier opposition to recruitment agency work, there have been recent signs of renewed opposition to the existence of work agencies blurring employment relationships and related liability for wages and collective agreements.⁶¹

In all European countries, agency workers are normally free to join the relevant union for the sector, occupation or workplace in which they are placed. Even though no specific union structure exists, trade union organisations at cross-sectoral as well as sectoral level have established their own departments and branches for recruitment agency workers in response to the growing role of this type of work amongst their members. Examples here include *FNV Bondgenoten* in the Netherlands that has established the *FNV Flex* branch.

58 Walz et al., op. cit., pp. 34-35.

59 L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file

60 See, for instance, J. Cremers, "Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping," ETUI, 2014, <https://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Letter-box-companies-and-abuse-of-the-posting-rules-how-the-primacy-of-economic-freedoms-and-weak-enforcement-give-rise-to-social-dumping>

61 Gijsbert van Liemt, "Private employment agencies in the Netherlands, Spain and Sweden, Sectoral Activities Department, Sector Working Paper No. 290," 2013, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_231420.pdf

In most EU member states, the unionisation level in the recruitment agency sector is very low and in most countries there is a significant gap between union membership rates of recruitment agency workers and those of permanent workers. Higher membership rates of more than 30 per cent are only reported from Belgium (67 per cent according to the bipartite fund), Denmark, Finland and Sweden (thus, countries characterised by high union membership rates for permanent workers). Countries such as Austria, Germany, Italy, Luxembourg, the Netherlands and the UK report membership rates of 5-10 per cent and in the rest of Europe union membership is likely to be only around 1 per cent.⁶² These low levels of organisation mean workers with flexible contracts are in a weak bargaining positions and are less able to claim their labour rights.

4.7 Conclusion

This chapter provided a general background to the increase in agency labour and the liberalisation of the sector. The ILO's Private Employment Agencies Convention from 1997 was a landmark in the liberalisation of labour markets. The EU Directive on Temporary Agency Work was adopted in 2008, setting the legal basis for flexible employment in Europe. Other frameworks facilitating the use of foreign recruitment agencies is the EU Posting of Workers Directive and the EU Services Directive. This liberalisation, and the subsequent increase in recruitment labour, has created triangular employment relationships and so-called atypical forms of employment, which in turn complicate legal liabilities.

In the many different types of employment, often overlapping in practice, recruitment agencies play a central role. They are known to help in setting up cross-border and domestic legal arrangements for social dumping purposes (avoiding collective agreements provisions or social security contributions in countries with higher labour and social protection standards). They can take on subcontracting work, for instance, employing essentially recruitment agency staff, which allows for the circumvention of collective agreements. Minimum wages can be undercut by deducting costs or illegal fines from workers' wages. Agencies also force workers to take a break between contracts so that they do not move from Phase A in the collective agreement to Phase B or C, which grants more job security (see also subchapter 5.3.1).

A notable development is the rise in Polish recruitment agencies since 2009, which employ very low numbers or no internal staff. Together with evidence that exists with regard to letterbox companies being used for social dumping purposes, this points to the use of letterbox recruitment agencies in Poland, although further research is needed to confirm this picture.

Finally, the level of trade union organisation in the recruitment sector is very low across Europe, further weakening the bargaining position of workers. In summary, the rise of agency work is posing a threat to decent work in Europe.

62 Eurociett & UNI Europa, Voss et al. "The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue," 2013, http://www.ciett.org/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Report/2013.02.08_-_Full_report_on_the_role_of_TAW_and_labour_market_transitions.pdf, p. 56.

5 The regulation of private recruitment agencies

5.1 Introduction

This chapter describes the regulatory framework regarding recruited labour in the Netherlands. As described in the previous chapter, the regulation of recruitment agency work has to target different parts of the triangular relationship, and the rights and treatment of workers are shaped by a variety of laws at the national level, taking into consideration:⁶³

- ❑ The legal status of recruitment agency work.
- ❑ Specific requirements for the operation of recruitment agencies (licensing, monitoring etc.).
- ❑ The regulation of assignments of workers to user companies (requirements and restrictions).
- ❑ Equal treatment of agency workers vis à vis non-agency staff.
- ❑ The role of social dialogue and collective bargaining.
- ❑ Self-regulation of the sector in general.

This chapter does not provide a comprehensive overview of the entire regulatory framework but focuses on issues that have been highlighted with regard to recruitment agencies and regulatory circumvention. Namely, this involves certification, cross-border postings, the evasion of collective agreements and chain liability as well as problems with enforcement by labour inspections and investigation authorities.

5.2 Liberalisation and certification

In 1990 the Dutch government passed a comprehensive Law on the Provision of Labour (*Arbeidsvoorzieningswet*). This combined fragmented regulations and legalised labour intermediation for profit, which had previously been unlawful. It also turned the state government service agency into a private body under public law, still financed largely by the Ministry of Social Affairs and Employment. During the 1980s and 1990s, agency work became an accepted alternative to regular (full-time, open-ended) employment. As corporations increasingly outsourced so-called non-core activities, recruitment agencies, as well as other enterprises, started specialising in sectoral staff recruitment, such as in cleaning, security, marketing, and eventually also in the provision of cheap migrant labour.⁶⁴

63 Eurociett & UNI Europa, Voss et al. "The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue," 2013, http://www.ciett.org/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Report/2013.02.08_-_Full_report_on_the_role_of_TAW_and_labour_market_transitions.pdf, In the Annex, Fout! Verwijzingsbron niet gevonden. outlines the legal framework regulating recruitment agencies or intermediaries in the Netherlands, determining the rights of temporary workers, the obligations of recruitment agencies and in some the cases the obligations of end user firms that subcontract the recruitment agency.

64 H. Houwing, "A Dutch approach to Flexicurity? Negotiated change in the organization of temporary work," (Universiteit van Amsterdam, 2012) <http://arno.unimaas.nl/show.cgi?fid=21980>, p. 150-151

A number of legal changes are noteworthy with regard to the liberalisation of the recruitment industry in the Netherlands. After concerted lobbying efforts of the employers' association for recruitment agencies (*Algemene Bond Uitzendondernemingen*, ABU), set up in 1961, the Dutch government liberalised the sector in 1998 with Temporary Employment Agencies Act (*Wet Allocatie Arbeidskrachten door Intermediars*, WAADI). The law allowed the industry to offer not only short-term, but also long-term postings and abolished the government's licence system, thereby establishing the principle of 'self-regulation' of the industry. The Netherlands is therefore one of a few EU member states that currently do not have licensing schemes (as well as Sweden and Finland).⁶⁵

As well as the WAADI, temporary work is regulated by the Flexibility and Security Act that came into force in 1999 and amended a number of existing labour and civil laws codes. This 'Flexicurity Act' stipulates that recruitment agency workers are entitled to a permanent contract after three years or after three consecutive fixed-term contracts. For the first time, it defined a workers' contract with a recruitment agency as a regular employment contract, with the exception of the first 26 weeks of employment, when the so-called "agency clause" applies.⁶⁶ The Annex to this report provides an overview of the applicable laws described above.

One central problem of liberalisation and privatisation of the intermediation of labour in the Netherlands has been the abolition of this licence system, which possible contributed to the establishment of exploitative recruitment agencies. The ABU used this governance gap to create a compliance mechanism in 2004 and certification scheme in 2007 (see section 5.4 below). In a reaction to this report the Inspectorate SZW⁶⁷ mentions that in 2004 SZW and the Ministry of Finance have proposed a licence system, which did not get sufficient support. They mention in their reaction that also a licence system will not directly impact malafide recruitment agencies and causes at the same time an administrative burden.

Following the public debate on widespread abuse in the sector, a minimal level of government regulation was reintroduced in July 2012, with the obligation for recruitment agencies to register with the Dutch Chamber of Commerce. Fines of up to €12,000 were issued for every employee working without registering the recruitment agency. This fine increased to €24,000 and to €36,000 every second and third time the agency is found to have failed to register while seeking employment for clients.⁶⁸ Also the employers that use unregistered employment agencies can be fined. Calls have

65 Gijsbert van Liemt, "Private employment agencies in the Netherlands, Spain and Sweden," Sectoral Activities Department, Sector Working Paper No. 290, 2013, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_231420.pdf

66 For a more detailed outline of key Dutch legislation on temporary work agencies, see Gijsbert van Liemt, "Private employment agencies in the Netherlands, Spain and Sweden," Sectoral Activities Department, Sector Working Paper No. 290, 2013, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_231420.pdf, pp. 11-13.

67 L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file

68 See <http://www.flexnieuws.nl/2012/07/09/registratieplicht-uitzendbureau-per-1-juli-in-werking/>

been made to (re)introduce a government permit system and go beyond mere registration,⁶⁹ but the government continues to resist regulation and promotes self-regulation of the sector instead.⁷⁰

5.3 Collective Labour Agreements in the recruitment sector

Collective Labour Agreements (CLAs, hereafter also termed collective agreement) are a central feature of Dutch labour relations. The Flexibility and Security Act from 1999, although providing a baseline for the sector, also provides substantial room for trade unions and employers to deviate from the law and negotiate alternative arrangements in collective agreement for recruitment agency workers.⁷¹ Rather than falling under an agreement of the industry they work in, workers employed through recruitment agencies fall under the recruitment agency sector, even if they have a long-term position.

The sector currently has two collective agreements, one for each of the two largest sectoral employers' organisations, the ABU (*Algemene Bond Uitzendondernemingen*) and NBBU (*Nederlandse Bond Van Bemiddelings- en Uitzendondernemingen*). The ABU collective agreement, signed by the trade unions FNV Bondgenoten, de Unie, CNV Dienstenbond and LBV, was declared generally applicable for the entire sector in 2009.

5.3.1 Labour rights in phases

Both the ABU and NBBU collective agreements lay down a phase system whereby each successive phase grants the worker more protection. The ABU is the bigger organisation of the two, and its collective agreement⁷² covers the entire sector (except NBBU members). It has three phases (A, B and C). The NBBU has four phases (1-4). The different rights built up range from the right not to be sacked if you fall ill to the right to a permanent contract; different phases also provide different rights regarding notice periods, wages, paid holidays, job training and pension rights. Both CLAs stipulate that, if a worker does not work for the agency for 26 weeks or more, the worker's build up weeks will be ruled invalid, and s/he has to start in the first phase again.⁷³

69 RTLZ, 7 February 2012, Wellicht Vergunningsplicht Uitzendbureaus, <http://www.rtl.nl/components/financien/rtlz/nieuws/2012/06/wellicht-vergunningplicht-uitzendbureaus.xml>

70 Kamp, 7 February 2012; L. Asscher, Kamerbrief Stand van zaken uitzendsector, 2015, <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/07/08/kamerbrief-stand-van-zaken-uitzendsector/kamerbrief-stand-van-zaken-uitzendsector.pdf>

71 Eurociett & UNI Europa, Voss et al. "The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue," 2013, http://www.ciett.org/fileadmin/templates/eurociett/docs/Social_dialogue/Transitions_project/Report/2013.02.08_-_Full_report_on_the_role_of_TAW_and_labour_market_transitions.pdf, p.36.

72 ABU, Samenvatting CAO voor Uitzendkrachten 2009-2014 (2009). 3-4.; NBBU, Collective Agreement for Temporary Workers. 30 March 2009 to 31 December 2013 (Amersfoort: NBBU, 2009). article 13.

73 The collective agreements are published at https://www.abu.nl/yourpassage/collective_labour_agreement_temporary_agency_workers_2012-2017-summary/index.html#5/z and https://www.fnv.nl/site/alle-sectoren/caos/caos/42899/ABU_cao_Engels_versie_2014.pdf

Recruitment agency workers in principle work in phase A for the first 18 months (78 weeks) of their employment. During this phase, the worker's contract with the recruitment agency ends as soon as the client's commission with the agency has ended. The agency only owes wages for the hours the worker has actually worked.

In phases B and C, the worker has an employment contract with the recruitment agency and the right to receive payment, even if there is no work for them. Workers reach phase B if the employment relationship continues within a period of six months after conclusion of phase A. Phase B lasts four years. The contract takes the form of a secondment agreement for a definite period, of which a maximum of six (fixed term) may be concluded. The duration per secondment agreement can vary. If a seventh agreement is reached, or if the worker has been in phase B for more than four years, she or he automatically advances to phase C.

A worker is in phase C if the employment relationship continues within a period of six months after completion of phase B. In phase C, the worker has a secondment agreement for an indefinite period.

As other research reports and the research for this report show, this rarely happens because of strategies of recruitment agencies to keep workers in phase A. This means that workers do not build up decent rights with regard to pensions and job security, but they also remain in a position of dependency *vis à vis* the agency, as they can be sacked at any time. This results in a docile labour force that does not complain about bad working conditions, and creates a breeding ground for labour exploitation.

5.3.2 Accommodation standards in the collective agreement

The collective agreement stipulates minimum requirements for housing for recruitment agency workers who do not live in the Netherlands permanently, if the agency makes a deduction from or a set-off against the wage of the temporary agency worker for the purpose of the accommodation of the temporary agency worker, or if an agreement has been concluded with the agency worker on the use or the renting of the accommodation. For instance, agencies have to ensure that the accommodation is not more expensive than the material costs, offers basic amenities, is at least 10m² per person and adheres to fire regulations. The agency is also responsible for providing information to its workers about health insurance, health and safety rules and the applicable collective agreements. Any fees deducted from the salary have to be discussed beforehand with the workers. .

In April 2016 the Minister of Social Affairs and Employment Lodewijk Asscher announced⁷⁴ that an earlier agreement to allow no deductions of the minimum wage was postponed to the 1st of January 2017. In the letter to the Parliament Minister Asscher announced, changes to the agreement; deductions will be possible for costs such as social insurances and housing.

74 Asscher, Kamerbrief Herziening Wet inkomloon en minimumvakantiebijslag, 21 April 2016, <https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-en-werkgelegenheid/documenten/kamerstukken/2016/04/21/kamerbrief-herziening-wet-minimumloon-en-minimumvakantiebijslag>

Despite improvements in the CLA with regard to setting minimum housing standards, accommodation is still a recurring complaint by migrant workers, as illustrated in Chapter 3. One of the problems that remains is the dependency of the workers on recruitment agencies as a result of the housing being dependent on the employment contract.

5.3.3 Chain liability in the collective agreement

The ABU collective agreement does not lay down chain responsibility provisions with regard to the hiring firm. Workers who work for longer than 52 weeks, however, have the right to the wage levels and supplementary remunerations granted by the user firm, except for workers who are unqualified, are undergoing training, or who qualify as ‘young people with disabilities’, in which case the maximum period is 104 weeks.

Hiring firms remain responsible for the payment of tax, national insurance contributions, the income-related contribution towards the healthcare insurance scheme and employee insurance contributions from the wages of the employees concerned under the Chain Liability Act. Recently, the law has been extended to introduce chain liability for wages. Although there is no general exemption from the Chain Liability Act laid down in the CLAs, a number of liability exemptions exist for hiring firms when they use NEN 4400 certified recruitment agencies (i.e. those with a Labour Standards Foundation or SNA certificate, see Box below), which a judge will rule on when a complaint is made. Chapter 6 discusses chain liability in more detail.

5.4 Self-regulation and compliance with CLA norms

Since the regulatory rollback in the recruitment sector, the industry has lobbied for voluntary and self-regulatory measures to curb labour rights violations in the recruitment sector and has actively lobbied against binding regulation. The recruitment agency employers’ organisations ABU (*Algemene Bond Uitzendondernemingen*), for instance, criticised the introduction of chain liability concerning wages. They argued that the law would create bureaucratic obstacles to outsourcing whilst the problem of labour rights abuse – which in their eyes only applies to a number of small, uncertified agencies – would not be tackled.⁷⁵ In previous years, the sector also successfully lobbied for voluntary certification, which also grants liability exemptions for the sector’s clients.⁷⁶

The parliamentary investigation committee Lura (*Lessen uit recente arbeidsmigratie*) put forward a number of recommendations to the government in its 2011 final report⁷⁷ to help improve the working and living conditions of Eastern European migrant workers in the Netherlands and regulate recruitment agencies. It recommended the establishment of a state licensing system and government

75 ABU, “Aanpak schijnconstructies verder opgevoerd,” 18 February 2014, <http://www.abu.nl/website/publicaties/uitzendwerk-1-2014/aanpak-schijnconstructies-verder-opgevoerd>

76 Walz et al., op. cit., pp. 34-35.

77 Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoek.officielebekendmakingen.nl/kst-32680-4.html>

Box 17 Agencies monitoring CLA compliance in the recruitment sector

Foundation for the Compliance with the Recruitment Sector CLA (Stichting Naleving CAO voor Uitzendkrachten, SNCU)

The SNCU was established in February 2004 on the initiative of the social partners in the industry namely, the sector association ABU, and the trade unions FNV, CNV Services and De Unie. In 2008, the second association representing small and medium-sized agencies and the trade union LBV joined the board. Dutch regulations on CLAs lay down that employers' and workers' organisations who sign a Collective Labour Agreement can sue for damages if the CLA is not respected. The CLAs monitored by the SNCU are those of the sector associations ABU and NBBU and the CLA of the sectors Social Fund, CAO Sociaal Fonds Uitzendbranche (SFU). Compensation can be demanded on grounds of the loss of reputation of and attractiveness to join the signing parties, and on grounds of financial damages suffered, for instance, for wages paid below the CLA-agreed level. The powers as laid down in the temporary work CLA have been transferred to the SNCU, regulated by the sector's Social Fund. The SNCU primarily serves as a contact point for reporting wrongful practices within the sector. The SNCU also collects evidence using information provided by employees and other parties and organises on-site inspections following complaints. In the first instance, the SNCU encourages organisations that are found to be at fault to comply with the collective agreement concerned. Agencies that fall within the scope of the collective agreement are obliged to cooperate. If necessary, the SNCU can enforce cooperation and compliance by recourse to the courts.

Dutch Institute for Labour Standards (Stichting Normering Arbeid, SNA)

In addition to the registration obligation that was re-introduced in 2012 to combat fraudulent recruitment practices, recruitment agencies are encouraged to be certified with the SNA quality mark of the Dutch Labour Standards Foundation. ABU-affiliated companies must be SNA-certified. Upon joining, NBBU-affiliated agencies are given six months to become SNA-certified. The SNA mark indicates that the recruitment agency pays tax and at least the minimum wage. The quality mark is based on the NEN 4400 standard and was instituted by the recruitment agency industry and the social partners to protect user companies and subcontractors against costly claims. Recruitment agency workers can claim their back wages and holiday allowances from the user company in case their recruitment agency employer is incapable or unwilling of paying these. However, user companies who only make use of agencies certified with the SNA quality mark and follow the conditions of the Internal Revenue Services cannot be held liable for the payment of outstanding wage taxes and VAT of the company that supplied the staff.

◉ **Box 17 Agencies monitoring CLA compliance in the recruitment sector**

Inspection for Social Affairs and Employment (Inspectie Sociale Zaken en Werkgelegenheid, SZW)

The Inspectorate SZW monitors compliance with labour laws. Which covers the law on minimum wages and holiday pay (Wet minimumloon en minimumvakantiebijslag, WML) and on the employment of foreign workers (Wet arbeid vreemdelingen, WAV). Among the tasks of the Inspectorate SZW are:

- ❑ Supervise compliance with labour law and the prevention of major hazards involving dangerous substances.
- ❑ Monitor compliance with minimum wage legislation and irregular employment.
- ❑ Conduct research on the effectiveness of social security legislation.
- ❑ Tackle fraud, exploitation and organised crime in the labour market.
- ❑ Explore and highlight developments and risks in the area of social affairs and employment and notify ministers and policy-makers, the sncu and the sna, with whom the inspectorate szw also shares information.¹

1 See <http://www.inspectieszw.nl/english/index.aspx>

rather than a compliance mechanism with regard to collective agreements.⁷⁸ The government, however, rejected this recommendation and continues to promote regulation of CLA compliance by the social partner, arguing the state is not considered a party in the collective agreements.⁷⁹

The recruitment industry set up a special body in 2004 to monitor compliance of the sector's collective labour agreements and to tackle abuse in the sector. The body, entitled Foundation for Compliance with the Collective Labour Agreement of the Recruitment Agency Branch (*Stichting Naleving CAO voor Uitzendkrachten*, SNCU) is a self-regulatory body to which workers and other parties can report abuses of the CLA. The SNCU then gathers evidence and works together with other agencies involved in monitoring compliance. These are the industry's Labour Standards Association (*Stichting Normering Arbeid*, SNA), the Dutch immigration authorities, municipalities, the revenue authorities and the Dutch labour inspection (Inspectorate SZW).

The SNCU can carry out inspections and will in the first instance encourage the employer to adhere to the CLA if it finds violations by laying out due wages, for instance. The SNCU publishes all court rulings resulting from its actions.⁸⁰ If necessary, the SNCU lodges complaints in a court of law,

78 Tweede Kamer der Staten-Generaal, Arbeidsmigratie uit EU-landen, Bilage, 18 November 2011, p. 8. The latter says "Het kabinet verkent in hoeverre een vergunningplicht voor uitzendbureaus, zoals de commissie-Lura aanbeveelt, bijdraagt aan een effectieve aanpak van fraude en illegaliteit in de uitzendbranche.", p. 5.

79 This has been repeated in several updates to parliament, such as Tweede Kamer der Staten-Generaal, Maatregelen arbeidsmigratie uit Midden- en Oost-Europa, 15 April 2011

80 See SNCU website: <http://www.sncu.nl/nl/resultaten/vonnissen-en-arresten>

which can lead to fines for the recruitment agency. The fines do not automatically lead to unpaid wages being paid out. Workers have to start their own civil procedure. The chance of winning such a procedure is higher, however, if a court has found the agency to be in violation of the collective agreement.

Since 2007, the industry's own labour standards foundation SNA certifies recruitment agencies for compliance to CLA standards, such as payment of the minimum wage, payroll and turnover tax. In 2015, 4,000 recruitment agencies held the SNA certificate.⁸¹

The two largest Dutch trade unions, FNV and CNV, withdrew their support for the certification in February 2016. They argue that in the past two years an increasing number of agencies have been using artificial legal constructions to avoid CLA requirements and still received certification from the SNA. Practices of newly certified agencies included the use of subcontracting and freelancing arrangements to mask actual employment by these agencies, thus circumventing the applicable collective agreement.⁸²

5.5 The problem with 'abusive' and 'certified' agency categories

The above-mentioned final report of the parliamentary Lura commission classifies recruitment agencies into three groups,⁸³ namely:

1. Those that operate within the law and aim to employ workers under reasonable conditions
2. Those that operate in legal grey zones (whilst they might adhere to CLAs, they might charge high fees for housing and travel costs and are quick to charge high fines for alleged breaches of contract).
3. Those that are criminal, in that they mislead prospective migrant workers about wages, working conditions and even the nature of their job. If several criteria apply, the latter might amount to human trafficking.

As mentioned in Chapter 4.2, in 2011 it was estimated that around 5,000-6,000 abusive recruitment agencies are active in the Netherlands, indicating a high number of unlawful recruitment practices. In a large number of cases identified at the time, a considerable portion of the salary was also retained by agencies for housing, transport, insurance and penalties, indicating many agencies operate in grey zones. Also, the SNCU itself signalled a downward trend at the time,⁸⁴ indicating that decent work standards are deteriorating and recruitment agency workers are increasingly subjected to unacceptable working conditions.

81 SNA-monitor 2015, 3 January 2016, <http://www.normeringarbeid.nl/lists/nieuws/artikel.aspx?ID=57&Source=/default.aspx>

82 FNV, Keurmerk uitzendbranche te vaak ten onrechte toegekend, 15 February 2016, https://www.fnv.nl/over-fnv/nieuws/nieuwsarchief/2016/februari/1170389-keurmerk_uitzendbranche_te_vaak_ten_onrechte_toegekend/

83 Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoe.k.officielebekendmakingen.nl/kst-32680-4.html>, p. 52.

84 Ibid

There are a number of problems with the classification of the recruitment sector into certified and abusive agencies.

Firstly, an SNA certification is no guarantee that the collective agreement and other labour standards are respected. This is because the certificate in the first instance only checks that the agency's administration fulfils certain standards, although there are, according to Inspectorate SZW⁸⁵ random checks if these standards are actually implemented in practice. There are agencies that pay the minimum wage on paper, but have oral agreements with employees to work more hours than stipulated on the pay slip, for instance. Research has shown that the Inspectorate SZW identifies only a small number of violations, given the low number of investigations and large number of estimated abusive agencies.⁸⁶

Research from 2010 and 2013 commissioned by the Ministry of Social Affairs and Employment has found that recruitment agencies with a certificate breach labour law almost as often as non-certified agencies.⁸⁷ This picture is confirmed by FairWork, which receives dozens of complaints about violations at certified recruitment agencies every year as well.

Furthermore, certifications and participation in government-led initiatives such as municipal accommodation projects, used in combination with media campaigns and high-profile media events can be used to create the image of an agency as a good employer, whilst in practice they still violate workers' rights. The recruitment agency OTTO, for instance, sponsors a number of municipal initiatives, which amounts to a conflict of interest, given that same municipality is responsible for enforcing housing standards and disciplining the agency in case violations are found. Certifications and membership of an industry association therefore do not necessarily imply good conduct. It is evident that better enforcement efforts from the industry are needed as well as control and thorough inspections from the Inspectorate SZW to improve the conduct of both certified and non-certified agencies.

85 L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file

86 Walz, op. cit.

87 *"Uit de resultaten van het inspectieproject Uitzendbureaus 2010, dat als bijlage is bijgevoegd, blijkt dat het certificaat dat de branche zelf heeft ingesteld om fraude en illegaliteit tegen te gaan nog niet goed werkt. Bij 21% van de inspecties bij uitzendbureaus met certificaat is een overtreding geconstateerd. Dit is maar een fractie lager dan het percentage overtredingen bij uitzendbureaus zonder certificaat (23%)."* Tweede Kamer der Staten-Generaal, Arbeidsmigratie uit EU-landen, Bilage, 18 November 2011, pp. 5-6, based on A. Wilms & A. Houtkoop, Ministry of Social Affairs and Employment, Buitenlandse Werknemers en Gecertificeerde Uitzendbureaus 2010. Een onderzoek naar CAO-afspraken over buitenlandse werknemers en gecertificeerde uitzendbureaus, June 2011, http://cao.minszw.nl/pdf/174/2011/174_2011_13_8456.pdf.
"In 2013 blijkt 17 procent van de gecontroleerde, gecertificeerde uitzendbureaus de Wet arbeid vreemdelingen (Wav) of de Wet minimumloon (Wml) te overtreden, tegenover 20 procent van de niet-gecertificeerde uitzendbureaus." Zelfregulering in de uitzendbranche. Het onderscheidend vermogen van het SNA-keurmerk, Regioplan, June 2015, <https://www.rijksverheid.nl/binaries/rijksverheid/documenten/rapporten/2015/07/08/eindrapport-zelfregulering-in-de-uitzendbranche/eindrapport-zelfregulering-in-de-uitzendbranche.pdf>

5.6 Problems with enforcement

The parliamentary Lura commission concluded in 2011 that administrative controls are insufficient for detecting labour rights violations and that thorough workplace controls are necessary to enforce existing labour laws and collective agreements.⁸⁸ Thorough workplace inspections, it is increasingly recognised, must involve interviews with workers. Workers who have experienced labour exploitation or bad working conditions have reported to FairWork that when labour inspections take place, the inspectorate does not always talk to them. Often interviews are held with line managers, for instance, who take part in the abuse. Workers are also intimidated, so that they do not report problems openly to the inspectorate. This creates considerable problems for the labour inspectorate, which it needs to overcome.

A number of positive steps have been made to improve enforcement. The Ministry of Social Affairs and Employment has started using intervention teams to tackle exploitation of Eastern European migrant workers. In 2014, a special Intervention Team including Inspectorate SZW was created, which focuses on sectors known to employ Eastern European migrants and in which problems have been reported, such as the mushroom sector. The Countering Artificial Arrangements Act (*Wet aanpak schijnconstructies*, WAS) also introduced transparency about offending employers identified during inspections in an effort to achieve improvements in compliance by naming and shaming. The labour inspection has also introduced risk analyses to guide their efforts in tackling human trafficking, in an attempt to not only react to reports but also anticipate future risk areas.

5.6.1 Tackling labour exploitation cannot involve crime-fighting

However, the focus of intervention teams is not only detection of abuse, but also detection of illegal employment. The labour inspection not only monitors compliance with the law on minimum wages and holiday pay (*Wet minimumloon en minimumvakantiebijslag*, WML) but also on the employment of foreign workers (*Wet arbeid vreemdelingen*, WAV). As outlined in Box 17, the legally stipulated tasks of the Inspectorate SZW encompass safety at the workplace, labour exploitation and social security and labour market fraud. These different aims could lead to fear among workers to report issues and this forms a barrier to identifying unacceptable working conditions and victims of labour exploitation.⁸⁹

In 2012, the government institutionalised a multidisciplinary approach,⁹⁰ involving the exchange of information between the Inspectorate SZW, tax services and the police, in cooperation with the

88 “Voor de handhaving van Wav en Waga zijn administratieve controles ontoereikend en zijn diepgaande controles op de werkplek noodzakelijk”, Tweede Kamer der Staten-Generaal, Commissie Lessen Uit Recente Arbeidsmigratie. Eindrapport: Arbeidsmigratie in Goede Banen, 29 November 2011, <https://zoek.officielebekendmakingen.nl/kst-32680-4.html>, p. 56.

89 In a reaction to the report the Inspectorate SZW mentions that all staff gets training during inspections to recognize signals from labour exploitation and these signals are being communicated within the Inspectorate SZW. L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file

90 On 1 January 2012, the Inspectorate SZW, the Inspection for Work and Income (*Inspectie voor Werk en Inkomen*) and SIOD were merged to form the Inspection of Social Affairs and Employment (Inspectorate SZW).

municipalities and the 'relevant organisations on the ground'. In practice, this means that the Inspectorate SZW teams up with the immigration authorities to detect undocumented work and fraud:

"SZW monitors compliance of the Employment of Foreign Workers Act. Our aim is to tackle illegal employment in the Netherlands. If one of our 200 labour inspectors detects foreigners in a company, he checks with the immigration authority or the foreigner's police whether that person stays here illegally. They are, so to speak, the eyes and ears for the immigration authorities at the workplace. In addition, our special investigation team conducts criminal investigations into, amongst others, labour exploitation and fraud."

Former Director of Detection Labour Market Fraud, Inspectorate SZW, 2014⁹¹

A recent study, comparing the role of labour inspectorates in the identification of labour exploitation in the UK, the Netherlands and Romania, has found that confusion between immigration policing aspects and labour rights aspects of inspections is one of the biggest barriers to identifying abuse.⁹² Victims of abuse are reluctant to come forward as victims and inspectors may not recognise the signs of abuse. Often, the Inspectorate SZW conducts common actions with the foreigner police (*Vreemdelingenpolitie*, AVIM). A professional interviewed for the report confirmed that *"The police and Inspectorate SZW have a role in protecting victims, but they leave it to the Foreigners Police"*⁹³.

FairWork has found that often workers do not even know which authority is which, and who they have been interviewed by. For non-EU citizens without work permits this means that detection will most probably lead to deportation. Some cases reported to FairWork also show that evidence of irregular situations might not be detected as such by inspection staff. One victim reported: *"They asked me whether I worked there, and I said 'no, I am only looking around', because if the employer gets a fine I am not allowed to work there anymore. If he does not get a fine, then workers only have to stay in foreigner detention for a while and can come back when they get out. The employer receives a report detailing what we all said."*⁹⁴ Another worker reported: *"The boss shouldn't find out that you talked to the police. He will interrogate you then. I don't know what would happen with those crazy people."*

91 The institutional merging of labour inspection with migration control and fighting crime is exemplified in this interview with members of, respectively, the labour inspectorate and Foreign Affairs Department: Dubbelinterview met Ruth Clabbers en Willem van Ee, Versterking Vreemdelingentoezicht en Handhaving, Rijksoverheid Newsletter 1(3), 13 October 2014, <https://abonneren.rijksoverheid.nl/nieuwsbrieven/archief/artikel/54/4bfb2d2-afa7-40a4-9510-41ba08c95925/c991a70c-5cbf-4b8c-b094-0e159d37ec9b>. The term *Vreemdelingenketen* is freely translated in this quote as immigration authorities. The government refers to the *Vreemdelingenketen* as the 'immigration process' involving partnerships between the IND and other authorities who have responsibilities in Dutch aliens policy.

92 FLEX, Fair Work & Adpare, Pro-Act Working Paper: Pilot Strategies for Pro-Active Identification and Support to Victims of Trafficking for Labour Exploitation, July 2015, <http://www.labourexploitation.org/publications/pro-act-working-paper-pilot-strategies-pro-active-identification-and-support-victims>

93 In a reaction to this report the Inspectorate SZW mentions that the foreigners police is only involved to offer a B8 (human trafficking) procedure as the Inspectorate has no authority in this. L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file.

94 FairWork, Zien en gezien worden. Proactief herkennen, erkennen en ondersteunen van slachtoffers van arbeidsuitbuiting, 2016, http://www.fairwork.nu/assets/structured-files/Actueel/Rapport_Zien_en_Gezien_Worden.pdf

The risk of punishment is (perceived as) very high, and workers also worry that they do not have sufficient evidence or will not be believed. In general workers are not sure whether the authorities can offer them help, and if so, what precisely that entails. This does not only apply to workers who are undocumented, but also to those who are generally dependent on the employer for work and housing.

5.6.2 Corporate impunity should be tackled with stricter substance rules and certification

One of the barriers to enforcing compliance of recruitment agencies with labour standards is the ease with which agencies can set up and dissolve legal entities that qualify as recruitment agencies. The Labour Inspectorate can fine agencies that have repeatedly violated collective agreements of administrative requirements. However, in practice these agencies often declare themselves bankrupt and start up under another name. This is not only a Dutch, but a European-wide problem, as cross-border postings using Eastern European letterbox companies is becoming increasingly common.

The government is taking a number of actions to tackle this problem. In 2012, an intervention team was entitled 'Tackling Abusive Recruitment Agencies' (*Aanpak Malafide Uitzendbureaus*). From 2012 to 2013, the team started 55 civil procedures, involving 84 recruitment agencies and 174 clients of these agencies. By August 2013, a total of €3.3 million in fines and recoveries of tax and social premiums had been imposed.⁹⁵

Furthermore, recruitment agencies have to register themselves with the Chamber of Commerce under one category (*uitzendingonderneming*) and information is now exchanged between the Chamber of Commerce and tax authorities to increase compliance with employee taxes and social security contributions. The Ministry of Economic Affairs is currently drafting a reform package to strengthen the role of the Chamber of Commerce to tackle abusive recruitment agencies by amending the Chamber of Commerce Act of 2007 (*Handelsregisterwet 2007*) and the Dutch Civil Code (*Burgerlijk Wetboek*). The aim is to enable the Chamber to actively highlight irregularities to prosecution and compliance authorities, as well as accessing data on people who have been banned from board functions in civil and criminal procedures, on the basis of which the Chamber can refuse a registration. Its powers to deregister legal entities will also be increased.⁹⁶ The Chamber of Commerce already carries out control functions with regard to legal entities acting as shell companies, and has deregistered around 4,000 companies in 2012 as well as in 2013.⁹⁷

A more active role of the Chamber of Commerce in terms of highlighting the abuse of legal entities for unlawful activities is a necessary step in the right direction. However, given the scale

95 Rijksoverheid News, Aanpak malafide uitzendsector verloopt succesvol, 20 August 2013, <https://www.rijksoverheid.nl/actueel/nieuws/2013/08/20/aanpak-malafide-uitzendsector-verloopt-succesvol>

96 Tweede Kamer der Staten-Generaal, Rapportage uitzendbranche, Bijlage Kamerbrief Stand van zaken uitzendsector, 8 July 2015, <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/07/08/kamerbrief-stand-van-zaken-uitzendsector>

97 Tweede Kamer der Staten-Generaal, Misbruik en oneigenlijk gebruik op het gebied van belastingen, sociale zekerheid en subsidies, 12 May 2014.

of the problem as well as continued reports of violations in the sector, the question arises why the government does not reintroduce a licensing system for recruitment agencies that involves a thorough substance and identity check by a state agency of people attempting to set up a recruitment business. The Chamber of Commerce, after all, is merely an administrative authority for the registration of any legal entity active in the Netherlands, and is not specialised in assessing substance relating to recruitment activities. Nor does it have the capacity or powers to identify the ultimate beneficial owner of a business, which is necessary to stop the use of proxy ownerships and a web of letterbox companies belonging to the same person or company. Whilst the identification of substance and ownership will not prevent companies from violating the law or collective agreements once a licence has been granted, it greatly reduces employer impunity through the use of shell companies, or so-called letterbox companies.

5.7 Conclusion

This chapter outlined the regulatory framework regarding recruited labour in the Netherlands, encompassing national laws and self-regulation by the industry, such as industry-led compliance bodies and certification schemes. The classification of agency workers' labour rights into phases in the applicable collective agreements, with low protection standards at the beginning of an employment relationship, is identified as problematic, given the strategies applied by recruitment agencies to avoid giving workers phase B and C contracts.

Furthermore, the chapter discussed the false dichotomy that is made through certification, between certified recruitment agencies as *bona fide* and non-certified recruitment agencies as abusive employers. This dichotomy ignores the fact that exploitation and bad working conditions are regularly found among certified agencies as well, even after successive attempts to improve self-regulation and strengthen the SNA certificate.

Research in recent years commissioned by the Ministry of Social Affairs and Employment has found that recruitment agencies with a certificate breach labour law almost as often as non-certificated agencies. Finally, this chapter highlighted two barriers to enforcement and identification of labour exploitation. Firstly, the merging of immigration control and identification of workers whose rights are being violated. Research has shown that these two functions form a barrier to identification inspections. Secondly, recruitment agencies and employers set up shell companies that go bankrupt when authorities impose fines for misconduct.

Although measures have been taken to introduce checks at the level of registration of legal entities at the Chamber of Commerce and identification of fraudulent bankruptcies, the effectiveness of these administrative measures can be called into question, given the number of abusive agencies that operate in the Netherlands. The government should therefore consider reintroducing a state-controlled licensing system based on substantive criteria as Government oversight of recruitment and outsourcing practices are preconditions for ensuring decent work.

In summary, it could be said that the liberalisation drive in the recruitment sector has led to an overall weakening of labour standards in the sector. Self-regulation can both complement as well as undermine the law, or rather compliance to the law, depending on numerous external factors.⁹⁸ In the Netherlands, the persistence of bad working conditions, specifically for vulnerable groups such as migrant workers, is evidence that only self-regulation in the sector is failing to protect these groups.

98 For a debate on the tension between voluntary and binding regulatory measures for corporate misconduct, see SOMO & La Strada International, “Engaging the Private Sector to End Human Trafficking. A Resource Guide for NGOs,” 2014, http://www.somo.nl/publications-en/Publication_4239

6 Chain liability in outsourced work

6.1 Introduction

As the case studies in this report highlight, an effective and enforceable chain liability system is a crucial precondition for tackling the abuses that are taking place in the subcontracting chains and therefore for improving working conditions in economic sectors characterised by the exploitation of workers.⁹⁹ The Dutch government has made some concerted efforts to improve effective supply chain liability and tackle bogus self-employment, a specific strategy used by companies to evade regulation. This chapter outlines the current legislation regarding EU and Dutch supply chain liability regulations, which form an example for other EU countries to strengthen EU-wide standards to improve labour conditions in subcontracting and other flexible work arrangements.

6.2 Chain liability in outsourced work in Europe

There is currently no European mechanism of joint and several liability with regard to subcontracting. A study from 2012¹⁰⁰ has found that only seven EU member states and Norway have implemented a system of general joint and several liability for certain aspects related to wages and/or labour conditions in their legal system. General joint and several liability systems are thus not widespread in the European Union. Although there is no comprehensive legislation to regulate liability in subcontracting processes in Europe, some EU Directives¹⁰¹ lay down certain rules to protect subcontracted or recruited workers in certain sectors. Most of these Directives were not created with the purpose of explicitly protecting subcontracted workers but rather to protect workers in general, in a certain sector (the construction and the sector of the recruitment agency), or to coordinate procurement procedures. Two Directives, however, introduced joint and several liability in EU law for the first time, namely:

99 This has also been recognised by the European Parliament Resolution of 26 March 2009 on the social responsibility of subcontracting undertakings in production chains (2008/2249(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0190+0+DOC+XML+V0//EN> and Y. Jorens, S. Peters, M. Houwerzijl, "Study on the protection of workers' rights in subcontracting processes in the European Union," June 2012, Final Study, Ghent University, European Commission, <http://ec.europa.eu/social/BlobServlet?docId=7921&langId=en>, pp. 144.

100 Y. Jorens, S. Peters, M. Houwerzijl, "Study on the protection of workers' rights in subcontracting processes in the European Union," June 2012, Final Study, Ghent University, European Commission, <http://ec.europa.eu/social/BlobServlet?docId=7921&langId=en>

101 See Y. Jorens, S. Peters, M. Houwerzijl, "Study on the protection of workers' rights in subcontracting processes in the European Union," June 2012, Final Study, Ghent University, European Commission, <http://ec.europa.eu/social/BlobServlet?docId=7921&langId=en>, pp. 13-14.

Directive 2009/52¹⁰² (which places sanctions on employment of illegally staying third-country national workers, including as an option joint and several liability) establishes minimum standards across the EU on sanctions and measures against employers of irregular migrant workers, and recognises some fundamental rights of irregular migrants, such as the right to pursue unpaid wages. Article 8 of Directive 2009/52 contains both a direct and chain liability.

Directive 2014/67 (enforcing the Posting of Workers Directive 96/71) clarifies legal terms used in the PWD and makes direct contractors liable, although only for non-payment of (minimum) salary and only in the construction sector. The Enforcement Directive came into force in June 2014 with a deadline for transposition in member states by June 2016. Article 12 contains not only a mandatory direct liability but also the option for member states to implement a (more extensive) chain liability.

A good legal framework ensuring employers liability with regard to pay and collective agreements in subcontracting, freelancing, posting or other outsourcing arrangements is clearly lacking at the EU level. The Netherlands has taken an important step in going further than most countries in the EU in establishing chain liability that, if coupled with enforcement action, might improve the position of workers who are not directly employed.

6.3 Chain liability in the Netherlands

Until recently, binding legislation on supply chain responsibility in the Netherlands largely related to making companies responsible for tax or wage liabilities for outsourcing agencies in an attempt to fight social premium and payroll tax fraud by way of subcontracting work or staff.¹⁰³ As outlined in Chapter 1, chain liability for wage payments was introduced in 2015 with the Countering Artificial Arrangements Act (*Wet aanpak schijnconstructies*, WAS),¹⁰⁴ which comes into force in three phases: July 2015, January 2016 and July 2016. The Act aims to prevent unfair competition between companies by preventing underpayment of (foreign) employees and strengthening the legal status of employees.

Measures introduced in the WAS aim to stop employers from avoiding legal minimum and sector-agreed wage and holiday pay and social premiums through the artificial or bogus freelance status staff who are actually directly employed. They include:

- ❑ A limitation on cash wage payments and obligation to pay at least the statutory minimum wage by bank transfer. In first instance a ban as of July 2016 on withholding certain costs (such as housing, health insurance payments and fines) from minimum wage payments (except pension

102 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0052>

103 The provisions of which are laid down in the Tax Compliance Act of 1990 (*Invorderingswet*).

104 For an overview of legislative texts and ministerial notes, see the government's website <https://www.rijksoverheid.nl/onderwerpen/aanpak-schijnconstructies/documenten>

contributions or savings premiums) was announced. In a later letter¹⁰⁵ of the Minister of Social Affairs and Employment Lodewijk Asscher in April 2016 however a decision was postponed to the 1st of January 2017 with the intention that for costs such as social insurances and housing there will be possibilities for deductions.

- ❑ The obligation to itemise on the payslip holiday allowance and expense allowance paid, as well as any amounts withheld from the wage. The publication by the Inspection of Social Affairs and Employment (Inspectorate SZW) of names of employers who have been fined on the basis of the law on minimum wages and holiday pay (WML), on the employment of foreign workers (WAV) or the Placement of Personnel by Intermediaries Act (*Wet Allocatie Arbeidskrachten door Intermediars, WAADI*).
- ❑ International cooperation to tackle bogus cross-border employment arrangements more effectively are also being improved through a number of procedural measures.

Importantly, the Act extends chain liability for wage payments to all economic sectors and actors in the subcontracting chain. Since July 2015, recruitment agency or subcontractors and their clients (called principals in contract law; the end users of the labour) are jointly and severally liable for wages according to the law, applicable collective agreement or an employment contract. This means workers who have not been paid or have been underpaid can hold them both to account and decide from which of them to claim back unpaid wages. If workers cannot file a claim against their employer or the employer's direct principal because it cannot be traced or is insolvent, the employee can directly bring his action to recover back wages against the next higher link in the chain.¹⁰⁶ The Inspectorate SWZ can only impose a fine in case of non-payment on the direct employer.¹⁰⁷ Some procedural measures also make it easier to lodge complaints.

The explicit aim of the new legislation, according to the Minister of Social Affairs and Employment Lodewijk Asscher, is to form "an important weapon against exploitation and unfair competition on the labour market". Although focusing on labour migrants from Eastern Europe, the increased avenues to enforce labour rights are therefore also aimed at improving working conditions for national workers by ending wage dumping in low-paid sectors.

However, there are two important limitations regarding the new chain liability law, one related to the substantive law and another related to barriers that exist in practice, namely multiple dependencies on employers of migrant workers. The substantive shortcoming is described below; barriers that exist regarding workers claiming their rights in practice are described in the next sub-chapter.

105 Asscher, Kamerbrief Herziening Wet inkomloon en minimumvakantiebijslag, 21 April 2016, <https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-en-werkgelegenheid/documenten/kamerstukken/2016/04/21/kamerbrief-herziening-wet-minimumloon-en-minimumvakantiebijslag>

106 E. Nunes. & S. Kuit / Boekel, Dutch Employment Law Newsletter: Chain Liability for Wage Payments, 17 February 2016, <http://www.employmentlawalliance.com/firms/boekeldeneree/articles/dutch-employment-law-newsletter-chain-liability-for-wage-payments>

107 L. Bastiaansen of the Directie Arbeidsverhoudingen and S. De Geus of the Inspectorate SZW in a reaction to the report, 17 may 2016, email on file

Since 2010, user firms (principals) are exempt from chain liability with regard to the non-payment of the minimum wage and minimum holiday pay when using NEN 4400 certified recruitment agencies, i.e. agencies that are certified by the industry's own SNA certificate.¹⁰⁸ Under the new Act, the court ultimately decides to what extent the principal is to be held liable when a claim is made. However, liability can be greatly reduced if not prevented by "sufficiently demonstrating that it is not to blame for the failure to pay the wages due", similar to the due diligence provision in Article 12 of the Posted Workers Enforcement Directive. This can be achieved, for instance, "by including specific provisions in the contract for services, by introducing a sector quality mark or certificate, and by higher links in the chain taking adequate action when misconduct is established."¹⁰⁹

This exemption from liability is based on the idea, put forward by the industry itself, that there is a clear distinction between law-abiding and abusive agencies. The main employers' association for recruitment agencies (ABU), for instance, has explicitly criticised chain liability for wages with the argument that it will not tackle the problem because only a number of small, uncertified agencies are guilty of labour rights abuses.¹¹⁰ FairWork, however, has found that rights abuses take place at SNA certified recruitment agencies as well. As mentioned above in subchapter 5.4, the two largest Dutch trade union associations (FNV and CNV) have recently stepped out of the SNA certification scheme because the quality mark is given to recruitment agencies that are using employment arrangements to avoid the CLA such as contracting and bogus self-employed workers.¹¹¹ This means an exemption from liability based on the use of certified agencies leaves an open door for the continuation of the current situation, whereby artificial employment schemes are used to circumvent decent wages and working conditions.

6.4 Claiming and enforcing labour rights

Another limitation to the implementation of chain liability in the Netherlands is the reality of enforcing rights on the ground. As shown in Chapter 3, workers live in a position of dependency *vis à vis* the recruitment agency and employer, ranging from lack of information in their own language and housing provided by the employer to short-term contracts and social isolation. Often, workers only pluck up the courage to lodge a complaint or claim when they have a new job. It can therefore take months or even years after violations before rights are claimed, with the related difficulties regarding evidence gathering for judicial proceedings.

Lack of information and knowledge is another barrier to claiming rights, in particular in low-paid work. The cultural and psychological context can also form a barrier. Employers create an atmosphere of fear and flexibility (workers are sacked if they complain) and divide and rule (workers receive better jobs the higher up in the legal rights situation they are). Polish migrants in particular

108 Walz et al., op. cit., pp. 34-35.

109 Nunes & Kuit, op. cit.

110 ABU, 18 February 2014, Aanpak schijnconstructies verder opgevoerd, <http://www.abu.nl/website/publicaties/uitzendwerk-1-2014/aanpak-schijnconstructies-verder-opgevoerd>

111 FNV, Keurmerk uitzendbranche te vaak ten onrechte toegekend, 15 February 2016, https://www.fnv.nl/over-fnv/nieuws/nieuwsarchief/2016/februari/1170389-keurmerk_uitzendbranche_te_vaak_ten_onrechte_toegekend/

also pride themselves on being hard workers who do not complain easily about tough working conditions. An effective approach to fighting artificial and abusive employment relations frames the problem and possible solutions to it from the perspective of the worker. Workers need to be better informed about their rights and have better access to legal proceedings and official information points at local authorities. Support services need to be easily accessible.

Another central issue is providing migrant workers who are suffering bad to exploitative working conditions with the possibility of finding new work. Most labour migrants are concerned more about losing their income than addressing injustices.

Finally, making it easier to claim unpaid wages, in particular unpaid overtime and holiday pay, in a civil procedure as well as compensation – and making it easier to receive those within a reasonable period from the moment the complaint is made – is crucial for workers.

Not only the existence of legal liability in the law, but in particular the procedural and enforcement side of compliance need to be improved. After all, before chain liability for wage payments came into force, workers in the Netherlands already had a right to holiday pay, to breaks and safe working environments. However, workers who have been recruited subcontracted have rarely claimed these rights, in spite of their existence.

6.5 Conclusion

This chapter has shown that there is gap in the EU regulatory framework with regard to employer liability for wages and working conditions in outsourcing arrangements. Internal market freedoms are therefore not adequate to protect social and labour standards in Europe. Current legislative changes in the Netherlands to introduce such a liability can serve as an example to other EU states and the EU Commission in addressing problems with regulatory evasion and avoidance regarding labour rights in the Netherlands and improving the labour protection framework. However, as other chapters in this report show, they will fail unless additional measures are taken that reflect the position that subcontracted and recruited migrant workers find themselves in when trying to claim these rights.

7 Conclusions and recommendations

Many migrant workers in the Netherlands are exploited, underpaid and housed in substandard accommodation. This particularly concerns Polish and other Eastern European migrant workers, who are dominant workers in a number of sectors of the Dutch economy, such as agriculture and transport. This picture is mirrored across Europe, where internal market freedoms of establishment of businesses and provision of services have fundamentally changed the nature of the EU labour market, and created a race to the bottom with regard to pay, working conditions and social contributions.

A parliamentary commission in the Netherlands investigating labour migration from Eastern Europe, in its final report from 2011, made a number of recommendations to improve the housing of recruited migrant workers, and the exchange of information on those workers between tax, social security and population registration agencies. Furthermore, recommendations have been made to improve compliance of employers with the law and collective labour agreements. Special attention was given to recruitment agencies involved in labour rights violations. The commission instructed parliament to make policy proposals to “reduce the number of abusive recruitment agencies to zero within two years”. The government has taken a number of important steps to improve the situation. However, notably in the area of the regulation of recruitment agencies, it has relied on self-regulation of the recruitment sector, which has not been effective in curbing abuse.

Evidence from interviews carried out by SOMO and FairWork and case studies collected between 2012 and 2015, however, show the consistent and continued existence of labour exploitation, and in particular the central role that recruitment agencies play. Many Polish workers in the Netherlands perform physically demanding, monotonous, and dirty work. However, they do not complain about this, but about unfair treatment *vis à vis* Dutch workers, overtime, the lack of secure contracts and bad housing.

Particularly problematic is the high dependency on agencies for housing, transportation, work and medical insurance. The abuse of these highly dependent workers is frequent: contracts and financial arrangements are often not beneficial to employees. Many workers report their agencies make questionable deductions from their salaries; for accommodation, energy, transport, medical insurance, fees, extra services, and various unaccountable costs that workers do not understand. They are also fined for not adhering to rules imposed by recruitment agencies in accommodation facilities, for instance.

Workers report violations of labour law and collective labour agreements and explain they have difficulties addressing these violations with their agencies. Almost all interviewees gave examples of colleagues having been dismissed for complaining, and being told they will be dismissed if they complain. Female workers are frequently sexually intimidated or asked for sexual favours in exchange for receiving work or better working conditions. Flexible contracts and working hours, along with low salaries, leave little room for workers to develop their skills and careers. In addition, workers mention

discrimination, poor quality housing, and insufficient possibilities for education and lack of career prospects as urgent issues.

Hiring companies are just as responsible as the employment agencies. Their demand for highly flexible labour that has to be available instantly and at minimal expenses generates a culture in which workers are expected to be available for any job, at any time. Interviewed workers propose various improvements, such as fixed contracts, respect for collective labour agreements, non-discrimination, and equal treatment in the work place, including equal pay for the same work.

With a view to formulating recommendations, in particular towards regulating and licensing the recruitment sector in the Netherlands, this report contextualises the research findings in Chapters 4, 5 and 6.

Chapter 4 provides a general background to the increase in agency labour and the liberalisation of the sector. The gradual liberalisation of the recruitment sector, and the subsequent rise in recruitment labour, has created triangular employment relationships and so-called atypical forms of employment, which in turn complicate legal liabilities. In the many different types of employment, often overlapping in practice, recruitment agencies play a central role. They are known to help with setting up cross-border and domestic legal arrangements for social dumping purposes (avoiding collective agreements provisions or social security contributions in countries with higher labour and social protection standards). They can take on subcontracting work, for instance, employing essentially recruitment agency staff, which allows for the circumvention of collective agreements. Minimum wages can be undercut by deducting costs or illegal fines of workers' wages. Agencies also force workers to take leave in between contracts so that they do not move from phase A in the collective agreement to phase B or C, which grants more job security (see also subchapter 5.3.1). A notable development is the rise in Polish recruitment agencies since 2009, which employ very low numbers or no internal staff. Together with evidence that exists with regard to letterbox companies being used for social dumping purposes, this points to the use of letterbox recruitment agencies in Poland, although further research is needed to confirm this picture. Finally, the level of trade union organisation in the recruitment sector is very low across Europe, further weakening the bargaining positions of workers. In summary, the rise of agency work is posing a threat to decent work in Europe.

Chapter 5 outlined the regulatory framework regarding recruited labour in the Netherlands, encompassing national laws and self-regulation by the industry, such as industry-led compliance bodies and certification schemes. The classification of agency workers' labour rights into phases in the applicable collective agreements, with low protection standards at the beginning of an employment relationship, is identified as problematic, given the strategies applied by recruitment agencies to avoid giving workers phase B and C contracts. Furthermore, the chapter discussed the false dichotomy that is made through certification between certified recruitment agencies as *bona fide* and non-certified recruitment agencies as abusive employers. This dichotomy ignores the fact that exploitation and bad working conditions are regularly found among certified agencies as well, even after successive attempts to improve self-regulation and strengthen the SNA certificate. Finally, this chapter highlighted two barriers to enforcement and identification of labour exploitation. Firstly, the merging of immigration control and identification of workers whose rights are being violated.

Research has shown that these two functions form a barrier to identification, and the Inspectorate SZW should therefore focus only on labour rights monitoring during inspections.¹¹² Secondly, recruitment agencies and employers set up shell companies that go bankrupt when authorities impose fines for misconduct. Although measures taken to introduce checks at the level of registration of legal entities at the Chamber of Commerce and identification of fraudulent bankruptcies, the effectiveness of these administrative measures can be questioned, given the number of abusive agencies that operate in the Netherlands. The government should therefore consider reintroducing a state-controlled licensing system based on substantive criteria. This should be accompanied by a robust system of inspections. The Inspectorate SZW commented on this report that an earlier licencing system did not sufficiently control abusive recruitment agencies. Reintroducing such a system should therefore take into account the learnings, from this earlier licencing system, from self-regulation, as well as recommendations from organisations such as FairWork. In summary, it can be said that the liberalisation drive in the recruitment sector has led to an overall weakening of labour standards in the sector. Self-regulation can both complement as well as undermine the law or rather compliance to it, depending on numerous external factors.¹¹³ In the Netherlands, the persistence of bad working conditions for vulnerable groups such as migrant workers is evidence that self-regulation in that sector is failing to protect these groups.

Chapter 6 showed that there is a gap in the EU regulatory framework with regard to employer liability for wages and working condition in outsourcing arrangements. Internal market freedoms are therefore not adequate to protect social and labour standards in Europe. Current legislative changes in the Netherlands to introduce such a liability can serve as an example to other EU states and the EU Commission in addressing problems with regulatory evasion and avoidance regarding labour rights in the Netherlands and improving the labour protection framework. However, as other chapters in this report show, they will fail unless additional measures are taken that reflect the position subcontracted and recruited migrant workers find themselves in when trying to claim these rights.

7.1 Recommendations

Four main conclusions that can be drawn from this report and these are outlined below, followed by more specific recommendations towards the government.

- 1. Recruitment agencies need to be better controlled**, and self-regulation of the industry is failing. The government should reintroduce a licensing system and robust inspections, and restrict certain internal market freedoms for this sector to uphold European and Dutch social and labour standards. This concerns in particular the freedom to set up recruitment agency

112 In a reaction to this report SZW mentions that during migration and fraud controls also certain relevant signals will be detected and be shared within the department and that training is key.

113 For a debate on the tension between voluntary and binding regulatory measures for corporate misconduct, see SOMO & La Strada International, "Engaging the Private Sector to End Human Trafficking. A Resource Guide for NGOs," 2014, http://www.somo.nl/publications-en/Publication_4239

businesses without substance requirements and other criteria that should be developed specifically for the economic activity of labour intermediary services.

2. **Direct employment needs to return as the main form of employment.** Even in the context of flexible production processes, direct employment should return as the standard of decent work in Europe. The proliferation of flexible labour relations has shown that triangular working relationships offer too many opportunities for abuse that cannot be fixed by patch work policies. The government should aim for direct employment as the gold standard and should be a frontrunner at the EU level, promoting direct employment in the same way as it is currently doing with promoting chain liability in Europe by improving the Posted Workers Directive and its related Enforcement Directive.
3. **Labour inspections need to be improved.** Labour inspections should be de-linked from migration and fraud controls, because this creates a barrier to identifying abuse in the workplace. Workers need to be interviewed in confidence, away from the workplace and individually, to allow for a situation in which grievances can be made without repercussions from employers.
4. **Finally, making it easier to claim unpaid wages,** in particular unpaid overtime and holiday pay, in a civil procedure as well as compensation – and receive those within a reasonable period from the moment the complaint is made – is crucial for workers.

Investigating authorities

- ❑ Ensure investigating authorities are proactive and adequately resourced to encompass all sectors where labour exploitation is prevalent. Monitoring of working conditions at companies in risk sectors should be expanded. Continue pursuing unpaid wages and compensation in prosecution cases.
- ❑ Ensure understanding of forced and trafficked labour indicators amongst investigating authorities. If necessary arrange additional training.
- ❑ React swiftly to complaints and ensure action is taken before the workers in question leave the Netherlands. This should include recording personal contact details of close relatives in the home country, offering clear advice on the process of claiming unpaid wages, compensation or damages in the workers' mother tongue, and keeping workers informed about the progress in reports they make to the authorities.

Labour Inspection

- ❑ Maintain the distinction between labour inspection, immigration control and law enforcement: the Inspectorate SZW controls both employer, employee and workplace. This three-pronged cap can result in contradictory situations and thus hamper the recognition of signs of labour exploitation.
- ❑ Investigating authorities should improve their controls and raids in workplaces, in order to increase the confidence of potential victims. In a recent FairWork report¹¹⁴ victims of labour exploitation offered some tips for investigating authorities to boost confidence:
 - To speak with potential victims it is best to remove workers from the workplace. This would reduce the pressure exerted by the employer.
 - Victims would be more willing to speak out about exploitation if investigating authorities would provide information on employment rights and rights for undocumented migrants.
 - Trust can be created by providing business cards and the offer to call if there are problems, and bringing a lawyer during an audit or raid.
 - Carry out checks more often, especially unannounced. Unannounced checks should also be carried out regularly at workplaces that are part of multi-stakeholder sector initiatives, such as FairProduce.
- ❑ To find potential victims proactively and at the earliest possible stage, the Inspectorate SZW may seek cooperation with civil society organisations. They have easier access to potential victims and potential victims trust them.
- ❑ Recognition of victims can be promoted by providing information on the rights of victims and possible ways to enjoy these rights. This information should also be accessible to victims who are kept hidden, and those who keep themselves hidden. The information could be disseminated to potential victims by authorities with a signalling task, by authorities that may play a role in signalling, and others, such as detention, lawyers, health organisations, migrant organisations, churches, neighbourhood teams, homeless centres and unions, and also via the Internet.
- ❑ Inspectorate SZW should pursue unpaid wages and compensation in prosecution cases.

Housing

- ❑ Housing of (temporary) migrant workers must be improved. An important step would be the decoupling of work and housing, so that the dependence on the employer or employment agency is greatly reduced and employees are less vulnerable to exploitation. This would entail housing being offered by an independent third party. Furthermore, if workers' contracts end, they need to have a longer transitions period than three days to find either new work or alternative accommodation.

114 X. Commandeur, "Zien en gezien worden: Proactief herkennen, erkennen en ondersteunen van slachtoffers van arbeidsuitbuiting," maart 2015, Stichting Fairwork, 2016, http://www.fairwork.nu/assets/structured-files/Actueel/Rapport_Zien_en_Gezien_Worden.pdf

Flexibility

- ❑ The legal position of migrant workers must be improved. If dependency and flexibility continues, legal liability on paper will not be enough to enforce workers' rights and address severe forms of violations. Migrant workers complain of unfair dismissal, poor working conditions and 'flexible' contracts. Flexibility now means workers have few rights, also in Collective Labour Agreements for temporary workers.

Worker-driven social responsibility

- ❑ Introduction of a new model of supervision based on reports by the workers themselves: "Worker-driven social responsibility puts workers first when addressing human rights in corporate supply chains" inspired by the Immokalee workers in Florida (<http://ciw-online.org/blog/2014/06/wsr/>).

Direct employment

- ❑ Workers should be directly employed by the companies where they work, to avoid: abuse in flexible employment relations; the circumvention of social standards and collective labour agreements; multiple dependencies that can be exploited and avoid different employment standards for similar work.

Annex 1

Legal framework regulating recruitment agencies, the hiring companies and the agency workers in the Netherlands

Legal framework regulating recruitment agencies in the Netherlands¹¹⁵

Law / Regulation	Recruitment agency	Hiring firm	Agency worker
1 Minimum Wages and Holiday Pay Act <i>Wet minimumloon en minimumvakantiebijslag, WML</i> Determines the minimum weekly pay that employers, including recruitment agencies, have to pay to their employees.	X	X	
2 Employment of Foreign Workers Act <i>Wet arbeid vreemdelingen, WAV</i> Regulates the conditions under which foreigners are allowed to work in the Netherlands.	X	X	X
3 Recruitment Agencies Act <i>Wet Allocatie Arbeidskrachten door Intermediars, WAADI</i> Lays down the conditions for hiring out workers, in particular on provision of workers by recruitment agencies. This states that a contract for temporary work is an employment contract and lays down that recruitment agency workers should receive the same pay as regular sector workers. The law also places an obligation on employers to give temporary workers full details about the necessary vocational qualifications and working conditions before the temporary work starts, lays down that the intermediary cannot charge the workers for intermediary service itself.	X	X	
4 Flexicurity Act <i>Wet flexibiliteit en zekerheid</i> Amends a number of existing labour and civil laws codes and stipulates that recruitment agency workers are entitled to a permanent contract after three years or after three consecutive fixed-term contracts, and defined for the first time a workers' contract with a recruitment agency as a regular employment contract, with the exception of the first 26 weeks of employment, when the so-called 'agency clause' applies.	X	X	X
5 Working Hours Act <i>Arbeidstijdenwet, ATW</i> Lays down maximum number of working hours per week (45 hours excluding and 48 hours including overtime). Without overtime, measured over a 4-week period the average number of hours is set at 40 hours per week. The limit is 60 hours a week, but, measured over a 13-week period, the average number of hours may not exceed 48 hours.	X		
6 Employment Conditions Cross-border Work Act <i>Wet arbeidsvoorwaarden grensoverschrijdende arbeid, WAGA</i> Transposes the EU Posting of Workers Directive from 1996 (96/71/EC) and lays down that employers have to pay workers according to the applicable Dutch CLA agreements, adhere to the legal requirements concerning rest periods and holidays and follow the stipulations of the Recruitment Agencies Act in these cases.	X		

115 The table and classification is taken from Walz et al., op. cit., p. 33, and amended by adding the Flexicurity Act to the table.

Law / Regulation	Recruitment agency	Hiring firm	Agency worker
7 Chain Liability Act Wet Ketenaansprakelijkheid, WKA Creates liability of end user firms of hired labour with regard to wage tax, national insurance contributions, the income-related contribution towards the healthcare insurance scheme and employee insurance contributions from the wages of the employees concerned. ¹¹⁶ Recently, the law has been extended to introduce chain liability for wages. When recruitment agencies declare bankruptcy and still owe unpaid wages to the workers, the end user is thus financially responsible, to compensate the workers for the minimum wage and if applicable the agreed sector pay.		X	
Collective Labour Agreements (CLA) A number of CLAs protect recruitment agency workers in specific sectors, such as the agriculture, meat, construction, metal, and restaurant industries. CLAs for the recruitment sector as a whole are detailed further below. With regard to chain liability in sectoral CLAs, the generally applicable CLA for the construction industry provides that "The employer is obliged to monitor the compliance of the provisions of this collective bargaining agreement in all individual employment contracts covered by the agreement. When dealing with independent entrepreneurs, the employer should agree on this in the subcontracting arrangement." In some other CLAs, similar kinds of obligations can be found for end users of the hired labour (principal contractors). ¹¹⁸	X	X	
8 CLA of the Federation of Recruitment Agencies (ABU) (generally binding to all firms in the sector)	X		X
Sectoral CLAs	X	X	X

116 M. Houwezijl & S. Peters, "Liability in subcontracting processes in the European construction sector" (Netherlands: European Foundation for the Improvement of Living and Working Conditions, 2008), http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0887en7.pdf

117 Ibid., p. 1. The citation of the CLA is an unofficial translation of Article 96 of the above-named authors.

Annex 2

ABU salary table

ABU salary table (collective agreement 2012-2017)

Job grade	1 Starting salary Allocation group	2 Starting salary Indefinite term in phase C Transition group Group non-gradable	3 Final salary	4 Period-linked salary increase by job grade
1	€8,67*	€9,27	€11,35	2,1%
2	€8,67*	€9,69	€12,23	2,2%
3	€8,67*	€10,23	€13,29	2,3%
4	€10,64	€10,75	€14,12	2,4%
5	€11,16	€11,22	€15,40	2,5%
6		€12,12	€17,00	2,6%
7		€12,93	€18,95	2,7%
8		€14,17	€21,33	2,8%
9		€15,63	€24,06	2,9%
10		€16,51	€26,85	3%

* The minimum actual hourly wage for job grades 1, 2 and 3 is determined on the basis of the current statutory minimum wage and the normal working applying for this CLA.

Profiting from dependency

Working conditions of Polish migrant workers in the Netherlands and the role of recruitment agencies

This report presents the results of interviews carried out by the Centre for Research on Multinational Corporations (SOMO) and FairWork with Polish migrant workers and case studies that were collected between 2012 and 2015. The results identify a number of problems experienced by migrant workers, ranging from unpaid wages and sexual intimidation to substandard housing.

The report looks at the role of recruitment agencies, but also at the steps the Dutch government has taken to deal with labour exploitation of migrant workers in the Netherlands.

