



NEWEFIN Project

New Employment Forms and Challenges to Industrial Relations – Reference: VS/2018/0046
Improving expertise in the field of industrial relations



COUNTRY REPORT: The Netherlands

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1. Introduction: new forms of employment in the Dutch labour market

Traditionally, labour law has widely been based on the standard employment relationship, which is defined as a job that is continuous, full-time, with a direct relationship between employer and employee. A job is considered non-standard if its features differ from those of standard employment. Non-standard jobs include temporary employment, part-time and on-call; temporary agency work and other multi-party employment relationships; as well as disguised employment and dependent self-employment. Non-standard employment features prominently in crowd work and the gig economy. The increase in non-standard work in the Netherlands has been driven by a variety of forces, including technological changes and demographic shifts. Globalization and digitisation are making it easier and cheaper to offer work online and online platforms have experienced spectacular growth in recent years. Permanent contracts were the standard for many years, but now around 60% of all workers is entitled to an employment contract for an indefinite period and almost 40% form part of the group of non-standard workers (flexible employment and self-employed).¹

Table 1. Numbers of workers in different forms of employment, 2004 and 2019 (x 1000 and as percentages of the total active working population in the Netherlands)

	2004	2019	2004	2019	Change 2004-2019
	X 1000		%		%
Standard employment contracts	5,659	5,552	72.9	62.0	- 1.9
Flexible employment contracts	1,079	1,923	13.9	21.5	+ 78.22
Self-employment	1,022	1,477	13.2	16.5	+ 44.5
Total working population (active)	7,760	8,952	100	100	+ 15.4

Source: CBS (Statistics Netherlands) (Statline)

¹ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020, p. 31.

Table 1 shows that 38 percent of the active working population in the Netherlands do not have a standard employment contract of indefinite duration. In the period 2004-2019, the proportion of workers with these standard contracts decreased by almost 11 percent, from 73 to 62 percent of the total active working population in the Netherlands. Flexible employment – including fixed term contracts, on-call work, temp agency work and contracts with variable numbers of working hours – grew by almost 80 percent since 2004; from around 14 percent in 2004 to nearly 22 percent of the total active working population in the Netherlands in 2019. Self-employment also increased quite a lot in the Dutch labour market. Nowadays, more than 16 percent of the active working population in the Netherlands is self-employed. Table 2 shows the growth in the different forms of flexible working.

Table 2. Growth of flexi-workers from 2003-2018 (x 1000)

Flexi-workers	2018 (x 1000)	2003 (x 1000)
Self employed without employees (ZZP*)	864	
Self employed manufacturing without employees (ZZP*)	210	
On-call	539	258
Temporary workers, prospects of fixed position	384	200
Agency workers	289	185
Temporary workers, no fixed hours	253	118
Temporary workers < 1 year	190	162
Temporary workers >= 1 year	168	67
Fixed workers, no fixed hours	148	67

* no figures available before 2003

Source: CBS

The Dutch labour market is polarised in terms of income and job security between standard work on the one hand and non-standard work on the other hand.² The level of employment protection for permanent contracts is relatively high, while there is a lack of employment

² Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020, p. 31.

protection in relation to non-standard work. In short, job security for workers with a non-standard employment contract is less than for workers with a permanent employment contract. They have a greater chance of becoming unemployed.³ The same rift is apparent in relation to income security. Workers in non-standard work earn less and run greater risks of poverty.⁴ With this in mind, it is hardly surprising that flexible workers are less satisfied with their own work and would prefer, in most cases (80-90%), to have a fixed contract.⁵

Non-standard work fulfils an important role in the sustainability and resilience of the Dutch economy, because it helps the economy to react and adapt quickly in situations of falling economic growth. The unemployment rates of non-standard workers increase faster than the unemployment rates of the standard workers in a downturn. For the general level of prosperity, that buffer function of non-standard work is useful because the economy can easily adapt to cyclical fluctuations, but from the perspective of these workers it is not an attractive perspective to act as a punch-bag for the Dutch economy, the more so as it seems that workers with non-standard jobs are among the groups of workers with less satisfactory positions in the job market. Those who have had average or poorer educations often end up working on the basis of flexible contracts for those with better educations.⁶ Since job and income security concentrates on groups with a weaker position in the job market, inequality in the job market is threatening to magnify existing social inequality.⁷

Non-standard forms of employment are not new in the Netherlands, but recently they have become more common in occupations and sectors where they didn't exist previously. In addition, the increase of non-standard work is substantial and is now among the highest of all OECD countries. It does not impact all workers equally in general. Women, youngsters and migrants are more likely to work in non-standard arrangements. Using non-standard employment provides firms with flexibility to respond to fluctuations in demand and to replace temporarily absent workers. However, when non-standard employment is used

³ Central Economic Plan 2019, CPB (2019).

⁴ Wage difference between flexible and fixed workers, CBS (2019).

⁵ 'Contract forms and motivations for employers and employees', Ecorys (2013), and '1 in 5 flexi-workers prefer flexible work', CBS (2016).

⁶ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020, p. 33.

⁷ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020, p. 34.

intensively by enterprises, the benefits of these arrangements can be outweighed by long-term negative impacts on productivity and innovation.⁸

According to the latest OECD Economic Survey of the Netherlands, the Dutch economy is performing well, showing excellent resilience since the global financial crisis.⁹ Nonetheless, there are still important challenges to overcome that will lead to sustainable and inclusive growth for the future. The OECD welcomes the new Dutch policy agenda to avoid tax evasion and avoidance, as well as the continuing commitment to being a leader in demonstrating how countries can adapt to a rapidly changing environment, keep markets open and strive to deliver a fairer and more sustainable globalization.

The OECD also points out that the labour market in the Netherlands is rapidly changing due to digitisation, globalization and demographic changes. The OECD emphasises that work contracts are increasingly flexible and are offering lower levels of protection, while the share of non-standard forms of work, including self-employment, is close to 17% of total employment.¹⁰ On top of that, there is a large gender gap in part-time work, which is more common among women.

Wage growth in the Netherlands is much slower than developments in productivity. In other words, the increased productivity has not led to higher real wages to the full extent. One way to close the gap is to lower the tax take from low-income employees. The average tax take in the Netherlands is relatively high. In the Netherlands, the average single worker faced a net average tax rate of 30.5% in 2018, compared with the OECD average of 25.5%.¹¹ Another avenue – and more related to the topic of this research – would, according to the OECD, be to review incentives for non-standard forms of employment, which may cause a downward pressure on wages. In the Netherlands, non-standard work has expanded considerably and temporary contracts and (sham) self-employment have become more prevalent. Figure 1 shows that the growth in self-employment relates mostly to solo self-employed workers without personnel.

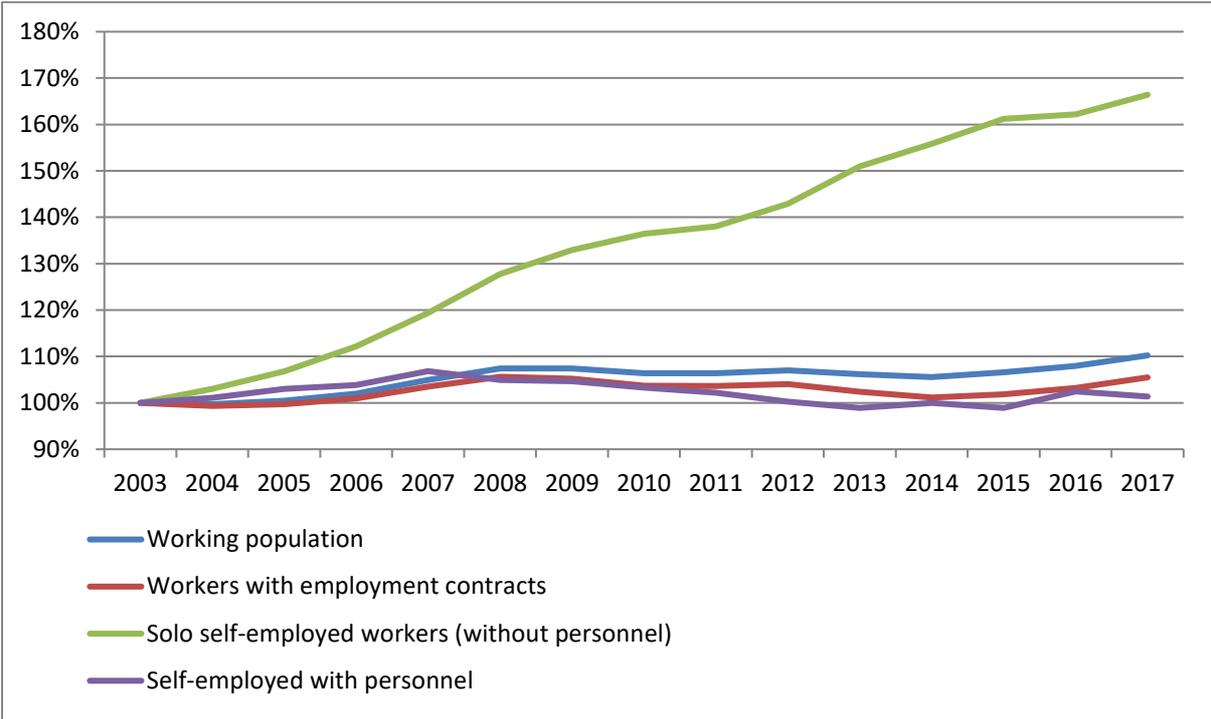
⁸ ILO, The rising tide of non-standard employment, May 2017.

⁹ OECD Economic Surveys Netherlands, July 2018

¹⁰ Idem

¹¹ OECD Taxing Wages 2019.

Figure 1: growth of self employed in the working population, Netherlands, 2003-2017



Source: CBS (Statline)

According to the OECD, the self-employed could bring some benefits to society and this justifies some support from public policies, but not in a way that makes job quality worse. Introducing minimum social security coverage for self-employed workers and gradually reducing tax incentives would shrink the gap in tax treatment between worker types.¹² As well as these measures, the OECD underlines that regulatory reforms cannot be overlooked. The OECD points out that the strictness of employment protection in permanent contracts should be lightened to reduce dualism.

¹² OECD Economic Surveys Netherlands, July 2018, p. 12.

1.1 Problems/ challenges of the growing amount of non-standard work in the Netherlands

The Netherlands is one of the front runners in flexible work in the EU. Table 3 shows the number of flexi-workers (aged between 15-75) in the EU in 2018.

Table 3 Percentage of flex (15 to 75) in the EU, 2018

Country	Temporary worker (%)	Self employed (%)
Poland	19.5	13.8
Spain	22.5	10.6
The Netherlands	17.8	12.2
Greece	7.5	22.2
Portugal	18.5	10.4
Italy	13.2	15.5
Croatia	17.6	5.9
Finland	14.2	9.2
Slovenia	13.5	8.6
France	14.8	7.1
Sweden	14.9	5.9
Czechia	7.4	13.3
Slovakia	7.1	11.8
Belgium	9.3	9.3
Ireland	8.5	9.9
United Kingdom	4.7	12.5
Romania	0.8	16.3
Germany	11.3	5.2
Malta	6.7	9.8
Denmark	10.3	4.5
Austria	8.0	6.2

Source: CBS (Eurostat)

The Netherlands held third place in Europe in 2018, with 30% of flexi-workers. The Netherlands occupies an unusual position in relation to the increase in flexible work. The

Netherlands displays the most rapid growth in the EU in terms of both temporary workers and the self-employed, at 4.7 percentage points in the past 10 years. Table 4 shows the change in the number of flexi-workers (aged between 15-75) in the period from 2008 to 2018.

Table 4. Change in numbers of flexi-workers (aged 15-75) in the EU, 2018 compared to 2008

Country	Change (% points)
The Netherlands	4.7
Slovakia	4.4
Malta	3.6
France	3.2
Belgium	2.7
United Kingdom	2.4
Denmark	2.4
Czechia	2.1
Italy	2.0
Finland	1.8
Greece	1.4
Croatia	0.6
Slovenia	0.5
Ireland	0.4
Sweden	0.0
Austria	-0.1
Spain	-1.7
Poland	-2.2
Germany	-2.4
Romania	-3.2
Portugal	-5.0

Source: CBS (Eurostat)

Many non-standard workers risk precarious work, which is defined by the ILO as low-pay work with little security. Precarious workers have less job security, little control over working conditions and working arrangements and little protection. The growth of non-standard work

can therefore lead to more poverty in the Netherlands. Further growth of flexible work may also lead to greater inequality and reductions in job equality.¹³

Apart from the problem of precariousness for individual workers, there are some major risks for society as a whole. If a smaller percentage of the labour force is not working on basis of an employment contract, some institutions like the pension or social security systems can lose strength. Those institutions are based on employment contracts. The same applies to the system of collective bargaining and worker involvement at the workplace. Almost all individual and collective labour law in the Netherlands is applicable to employees only. In other words, the employment contract is the corner stone of Dutch labour law. This is a challenge not only for labour law, but also for social security law and tax law. The challenge is to combine them into a balanced system.

1.2 Modalities of non-standard work in the Netherlands

Flexible work offers employers flexibility in times of peak demand and also gives them the opportunity to reduce costs. Technology and globalisation make it possible to shape labour in other – more flexible – ways. Some workers (one third in 2017) also state that they prefer flexibility, but the majority indicate that they have no other choice.¹⁴

In this report, we distinguish the following modalities of non-standard work: temporary agency work, contracting & payrolling, on-call work, self-employed and platform workers. Although the use of fixed-term contracts is the most prevalent form of non-standard work in the Netherlands, they fall outside the scope of this research. Workers with a fixed-term contract are – in general – not considered to be precarious workers in the Netherlands. They are – in general - protected well by (regular) labour law, although termination of the contract is easier than the termination of a contract for an indefinite period. The employment contract ends automatically on the expiration date. Dutch employers do not need an objective reason to use and terminate contracts for a definite period, so it is rather easy to use temporary

¹³ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020, p. 33 and 34.

¹⁴ https://longreads.cbs.nl/trends17-eng/labour_and_income/trends/

contracts. To implement Directive 1999/78, the Dutch legislature chose (only) to restrict contracts for a definite period in terms of time (the anti-abuse rule).

The main problem in the Netherlands are (sham) self-employed workers, including platform workers. Self-employed workers are not protected by employment law at all, while they often do the same work as employees. The number of self-employed workers is growing significantly (see introduction) and most policy initiatives refer to the problem of the (sham) self-employed (see below). The group of self-employed is very diverse, from high-skilled professionals to dependent self-employed with a low income. Some self-employed have deliberately chosen to be entrepreneurs, but many others are forced into entrepreneurship, for example by their former employer. Part of the problem is that the Dutch government has always encouraged entrepreneurship. There are tax incentives for the self-employed and people receiving unemployment benefits are encouraged to work in self-employment. Every entrepreneur in the Netherlands is entitled to what is termed the ‘*zelfstandigenaftrek*’, a private business allowance. In addition, every starting entrepreneur receives tax relief for new companies (*startersaftrek*).

Temporary agency work has been a popular modality of non-standard work since the 1960’s. Temporary agency work is regulated sufficiently in the Netherlands by law and collective labour agreements. The problem is not so much the legislation but rather the use of agency concepts for activities for which it is not really intended.¹⁵

Another problem is that alongside temporary agency work, other triangular relationships – like payrolling and contracting – appeared in the Netherlands. The rules on temporary agency work are not applicable to some of the new triangular relationships.¹⁶ Table 5 shows an overview of the most significant forms of contract in the Netherlands and the split among these contract forms.

¹⁵ *De positie van uitzendwerknemers* [The position of agency workers], SEO February 2020, p. 111-115.

¹⁶ *Driehoeksrelaties. De relatie met de Wet Allocatie Arbeidskrachten door Intermediairs (Waadi) en de Wet Flexibiliteit en Zekerheid (Wfz)* [Triangular relationships. The relationship between the Workers (Allocation by Agencies) Act (Waadi) and the Flexibility and Security Act (Wfz)], De Beleidsonderzoekers 12 February 2020, p. 107.

Table 5. Overview of contract forms

Contract classification	Employment contract				Contract for services			
Employed?	Directly employed by employer			Outsourced to a third party (triangular relationship)		Not employed: principal - contractor		
Type	Permanent	Fixed term	On-call		Agency	Payrolling	Self-employed (as professional or business)	Self-employed, not a business or profession
			Zero-hours	Min-max				

Source: Appendix 4, Final report by the Commission on Regulation of Labour: "What sort of country do we want to work in? Towards a new design for the regulation of employment" [in Dutch], 23 January 2020.

1.3 Policy initiatives

Three major legislative changes have been adopted since the 1990s: the *Wet flexibiliteit en zekerheid* (Flexibility and Security Act) in 1999, the *Wet werk en zekerheid* (Work and Security Act) in 2015 and the *Wet arbeidsmarkt in balans* (Balanced Labour Market Act) in 2020. Together they constitute an institutional framework which allows some forms of flexible work and – at the same time – avoids precariousness for workers. All of these law amendments had the same goal: to create balance between flexibility on the one hand and security on the other hand.¹⁷

The purpose of the most recent reform law (*Wet arbeidsmarkt in balans*, hereafter the WAB) is on the one hand to give non-standard workers more income and job security by improving the legal position of some non-standard workers, and to introduce some budgetary incentives for employers to use permanent contracts more often and lower the level of employment protection in standard work on the other hand. The measures combined should reduce the (legal and practical) gap between standard and non-standard work. As a result of these

¹⁷ *Driehoeksrelaties. De relatie met de Wet Allocatie Arbeidskrachten door Intermediairs (Waadi) en de Wet Flexibiliteit en Zekerheid (Wfz)* [Triangular relationships. The relationship between the Workers (Allocation by Agencies) Act (Waadi) and the Flexibility and Security Act (Wfz)], De Beleidsonderzoekers 12 February 2020, Part B.

measures, the buffer function of non-standard workers in general may decrease somewhat, as a result of which the Dutch economy may not function quite so well in the event of a depressed economic climate, but this is offset by an increase in the well-being and equality of non-standard workers.¹⁸

The question is whether the WAB does enough for the security of non-standard workers and will force the major breakthrough in the Dutch labour market. Experts are very doubtful about this. Firstly, the effects of the proposed measures are questioned. From a material point of view, the position of on-call workers is strengthened, but the enforceability of these measures is highly questionable. In addition to the effectiveness of the proposed measures, there is widespread support for the view that the WAB is too limited, because it does not affect self-employed workers. The Dutch Minister for Social Affairs and Employment Koolmees pointed out that the WAB is part of a broader package of measures to improve the balance in the labour market and part of that package is the established Borstlap advisory committee that is to provide advice on fundamental questions about the future of work. The advice by this committee was presented in January 2020.¹⁹ Among other things, the committee advised the government that the principle of labour law should be that every worker is an employee, unless proven otherwise. The committee also advised the government to abolish all fiscal incentives for employees. All triangular relationships should be temporary agency work, according to the committee. The advice of the committee is now being debated in the House of Representatives.

¹⁸ Parliamentary Papers II, 2018/19, 35074, no. 3.

¹⁹ Final report by the Commission on Regulation of Labour: "In wat voor land willen wij werken? Naar een nieuw ontwerp voor de regulering van werk "[*What kind of country do we want to work in? Towards a new design for the regulation of employment, (in Dutch)*], 23 January 2020.

Suggestions by the Borstlap Committee:

1. Continued wage payment on sickness from 1 to 2 years
2. Compensation only if no reasonable ground for dismissal
3. Unilateral adjustment of term of employment (partial redundancy)
4. Shorter chain of contracts for a definite period
5. 'Flexi allowance': extra pay in case of a flexible contract
6. Every worker is an employee, unless proven otherwise
7. Abolish fiscal incentives for the self-employed
8. An insurance for every worker in case of sickness or disability

The biggest challenge at this point is tackling the problem of the sham self-employed. In their coalition agreement 'Confidence in the future', the government parties agreed that self-employed are considered to be employees if the rate is low (125% of the minimum wages) and if the work constitutes normal business activities (see below for more information).²⁰ At the end of 2019, the Minister of Social Affairs presented a plan for new legislation on self-employed work.²¹ Part of this plan is a minimum gross wage of EUR 16.50 for every self-employed worker (a minimum tariff). Self-employed persons who earn more than EUR 75 an hour can use an opt-out. In that case, freelancers and the suppliers of work declare that the relationship is not an employment contract. The self-employed worker has to prove that he earns a gross wage of EUR 75, otherwise the supplier of work will still have to pay premiums. Labour market experts and the self-employed have doubts about the new plans. One of the main points of critics is that the minimum tariff will become a maximum.

In February 2020, social partners reached an agreement on obligatory insurance for self-employed workers in case of sickness or disability.²²

²⁰ Government Accord 2017-2021, *Vertrouwen in de toekomst* [Faith in the Future], VVD, CDA, D66 and ChristenUnie.

²¹ Minimum Remuneration for the Self-employed and Self-employed Statements Bill [*Wetvoorstel minimumbeloning zelfstandigen en zelfstandigenverklaring*].

²² Employment Foundation. *Keuze voor zekerheid: zelfstandigen standaard verzekerd tegen langdurig inkomensverlies door arbeidsongeschiktheid* [Choice for Security: self-employed insured as standard for long-term loss of income due to employment disability], March 2020.

Self-employed plans

Minister of social affairs: Minimum tariff of EUR 16.50 per hour for every self-employed person. Possibility to opt-out for self-employed who earn more than EUR 75 an hour.

Social partners: obligatory insurance for self-employed

2. Legal framework²³

2.1. The employment contract as a cornerstone of labour law

2.1.1 Legal definition

The employment contract is the cornerstone of labour law in the Netherlands. The employment contract is the entrance ticket for all kinds of rights regarding – for example – dismissal law, social security and employee involvement. Employees are entitled to holiday leave, protection against unfair dismissal, anti-discrimination law, employee involvement and the right to strike. Collective labour agreements also apply in general to employment contracts only. Self-employed workers are not entitled to the same level of employment protection. Therefore, there is a big gap between employees on the one side and the self-employed on the other side regarding job and income security, protection and equality. In this context, other forms of flexible work are located between those two extremes.

Therefore, we firstly discuss the ‘normal’ employment contract, before we take a closer look at new and flexible forms of labour relationships.

An agreement will be classified as an employment contract if it meets the following three criteria:

- 1) labour: the employee provides services;
- 2) wage: the employer pays the employee for the work;
- 3) a subordinate relationship.

A written statement is not necessary; an employment contract can be agreed verbally. An employment contract can exist even when parties give the relationship a different name. The court takes all circumstances of the case in relation to each other in account. Since an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties. Not only the intention of the parties is relevant but also the

²³ Annex 1 contains an overview of the most important rights and obligations and modalities for each form of labour and contract.

way the labour relationship is performed. Relevant elements are the way the worker gets paid, whether the worker bears entrepreneurial risks and whether or not the worker is free to decide when and where he provides his services.²⁴

2.1.2 Indefinite period and fixed-term contracts

Employment contracts can be entered for a fixed-term period or for an indefinite period. Employees with a fixed-term contract are entitled to the same level of labour law as employees with an employment contract for an indefinite period, with exception of protection against (unfair) dismissal. A fixed-term contract ends automatically. A permanent contract can only be terminated with the consent of the employee, the approval of the UWV Werkbedrijf (the government) or a decision by a judge. The employer needs a valid reason, like reorganisation, culpable conduct or excessive sickness absence. If an employer terminates the employment contract without valid reasons, the employee may opt either to annul the termination or else for a payment.

As well as having a valid reason, the employer must also observe a notice period. The length of the notice period is defined by law, although that may be varied by an arrangement in the employment contract or a CLA. There is no notice period applicable to fixed-term contracts, but the employer is still obliged to notify the employee, meaning that the employer must notify the employee no later than one month before the end of the contract whether the contract is to be extended and, if so, on what terms. An employer that breaches the obligations to give notice or observe a notice period will be due compensation. A fixed-term employment contract cannot be terminated prematurely unless that option has already been agreed. For employees, a permanent employment contract can be terminated if the appropriate notice period is observed, but with no need for a valid reason. An employee may only terminate a fixed-term employment contract prematurely if that option has already been agreed.

If fixed-term contracts are continually extended, immediately or within 6 months, permanent employment will follow after 2 years or starting from the 4th consecutive contract. All participants stated that employees with a fixed-term contract are adequately protected.

²⁴ SC 14 November 1997, *JAR* 1997/263 (Groen/Schoevers); SC 10 October 2003, *JAR* 2003/263 (Van der Male/Den Hoedt); SC 13 July 2007, ECLI:NL:HR:2007:BA6231 (Thuiszorg Rotterdam); SC 25 March 2011, ECLI:NL:HR:2011:BP3887 (Gouden Kooi).

The employee is entitled to the statutory transitional payment in cases of dismissal or where a fixed-term employment contract is not extended. If the employer has acted with serious culpability, as a result of which the employment contract comes to an end (dismissal or no extension), there is a right to a fair payment on top of the transitional payment. It is up to the court to fix the amount of the fair payment in appropriate cases.²⁵

2.1.2 Part-time work

There is a unique culture of part-time work in the Netherlands. Nowhere else in the world do men and women work so much on a part-time basis and nowhere else in the world is the difference between men and women working part-time as great as it is in the Netherlands. The Dutch work 31 hours a week on average and that is not much from an international perspective.²⁶

The Dutch government has made part-time working easier since the 1980s. Back then, part-time work was regarded as an important solution to the economic crisis. Workers were prepared to have their wages cut in exchange for shorter working hours. From 1983 onwards, increasing numbers of CLAs have included an option for workers to ask for part-time work. Part-time work is now back up for debate in the Netherlands because of the associated inequality between men and women, the lack of economic independence for a group of part-time workers, a lack of supply in the job market and the issue of whether collective provisions are tenable.

Part-time work lets people combine work and their private lives and encourages participation in the jobs market by those who could not otherwise access it. But part-time work also has the disadvantages that are briefly outlined above. For instance, part-time work can be an obstacle to certain groups and may limit career prospects.

For the purposes of this study, it is important that part-time workers have a fully-fledged legal position in the Netherlands.

2.2 Contract for services

²⁵ SC 30 June 2017, ECLI:NL:HR:2017:1187 (New Hairstyle)

²⁶ *De(elt)tijd zal het leren. Van analyse naar beleid over deeltijd* [(Part) time will tell. From analysis to policy on part-time], IBO Deeltijdwerk 29 April 2020.

Self-employed workers do not have employment contracts. They often work on the basis of a contract for services (*opdrachtovereenkomst*, Article 7:400 of the Dutch Civil Code). Labour law is not (or perhaps only partly) extended to dependent workers or pseudo employees. The self-employed do enjoy some protection on health and safety (accidents at the workplace), working time and discrimination. All participants in this study indicated the comprehensive gap between the contract for service and the employment contract. They also recognised that reducing this gap is one of the major challenges of labour law.

Dutch law only contains a limited number of provisions on contracts for services, and it is worth mentioning that parties may deviate from these rules if they wish. The statutory rules are in the nature of supplementary law. The principal may terminate a contract for services at any time (Article 7:408(1), DCC). The contractor may only terminate the contract if the contract has been entered into on an indefinite period basis or if there is a weighty reason (Article 7:408(2), DCC). Breach of the rules on termination results in a liability for damages. The differences between terminating an employment contract on the one hand and terminating a contract for services on the other hand are significant for both the principal/employer and the contractor/employee. Also see section 2.5.

2.3. Temporary agency work and payrolling

2.3.1. Temporary agency work in the Netherlands

In 2017, approximately 850,000 employees worked as temporary agency workers in the Netherlands. The industry grew for a third year in a row.²⁷

All stakeholders indicate that temporary agency work is regulated sufficiently in the Netherlands.²⁸ According to the Dutch law, there is an employment agreement between the agency and the temporary agency worker. The Dutch Civil Code (Article 7:690) defines a temporary agency contract as follows:

²⁷ Uitzendmonitor [Outsourcing monitor] 2018.

²⁸ *De positie van uitzendwerknemers* [The position of agency workers], SEO February 2020.

The temporary employment contract is the employment contract, by means of which one party, the employer, places the other party, the employee, at the disposal of a third party, within the scope of operating the employer's profession or business, to perform work under the third party's supervision and management, pursuant to a contract for professional services, which the third party has concluded with the employer.

This definition is included in the Labour Code by the Flexibility and Security Act of 1996. A temporary agency worker is considered as being equal to a 'normal' employer. There is no definition in law of a temporary agency worker.

In contrast to other countries, regular labour law is – in general – applicable to temporary agency workers, although there are a few exceptions. One of those exceptions is what is termed 'agency clause'. This clause in the temporary agency contract stipulates that the contract between the agency and the employee ends immediately when the hiring (third) party ends the contract for services. The agency clause will also take effect when the employee is incapable of doing his work, for example in case of illness. This same clause can be used during the first 26 weeks when work is actually being done. Another important exception is that the Dutch anti-abuse provision for the use of fixed-term contracts only comes into effect after 26 weeks of work have been done. A CLA can extend the period of 26 weeks for both the anti-abuse provision, and can also state that this anti-abuse provision will not apply, for up to 78 weeks and this is what has been done in the CLAs that apply to agency work. These exceptions mean that agency workers may end up working for up to 5.5 years on the basis of a fixed-term contract.

2.3.2 Collective bargaining and temporary agency work

Social partners

There are two employment associations for temporary agency firms in the Netherlands. The larger of these is the Algemene Bond Uitzendondernemingen (the federation of private employment agencies). The ABU has approximately 580 members, which is about 65% of the total market of temporary agencies. The second association is the NBBU. The members of NBBU are mainly small and medium-sized agencies.

There are no specific unions for temporary agency workers.

Collective labour agreements

There are more collective labour agreements on temporary agency work. The most important agreement is the ABU CLA. This collective labour agreement – concluded between the ABU and several trade unions – has been declared to be universally binding. Negotiations between trade unions and the employer association have led to better conditions for temporary agency workers.

The first collective labour agreement in the temporary agency sector was concluded in 1971. Since then, the position of temporary agency workers has improved. On the basis of both collective labour agreements, temporary agency workers have gradually gained more protection. The collective labour agreement makes provision for what is called a ‘stages system’. The further an agency worker advances through the stages system, the more rights he has.

Example of the ABU CLA

Every temporary agency employee starts in phase A. In this period – which lasts for a maximum of 78 weeks – the agency may conclude an unlimited number of contracts for a definite period. The company can end the contract with immediate effect (for contracts up to 12 weeks), on five days' notice (12-26 weeks), on ten days' notice (26-52 weeks) or on 14 days' notice (52-78 weeks). The agency clause is always concluded in this phase.

In phase B – which lasts for a maximum of 4 years – 6 contracts can be concluded. The agency worker gets a permanent contract when he reaches phase C.

After 26 weeks, a temporary agency worker who is more than 26 years old is entitled to a pension and an education budget.

According to the Allocation of Employees by Intermediaries Act, the agency must ensure equal pay between the temporary agency worker and the regular employees of the hiring party, unless there is an exception in the collective labour agreement. The CLAs that apply to the agency work sector derogate from the Allocation of Employees by Intermediaries Act. One important exception is that the right to equal pay cannot be awarded with retroactive effect if it transpires, after the event, that the agency has not correctly applied the hiring company's remuneration. The obligations to provide information that are imposed on agencies

have now been sharpened up, so that agency workers receive faster and better information about the hiring company's remuneration as it is applied. Research has shown that the Dutch agency regime is complex, which does no favours for the legal position of agency workers.²⁹

Other (sectoral) CLAs

To the disapproval of the employers' organisation, more and more sectoral collective labour agreements are also regulating the position of temporary agency workers in that sector. This development undermines the dominant position of the collective labour agreement as regards temporary agency work. These are not just provisions that limit the use of agency staff but also ones that deviate from the agency CLA as regards the remuneration of agency workers. In particular, provisions that maximise the number of temporary agency workers can count on resistance from temporary agencies and their associations.

2.3.3 Payrolling and contracting

In 1996, the trade unions and employers concluded an agreement about flexibility and security relating to workers' rights. Part of that agreement was the regulation of agency work. In the case of agency work, the employer - the agency - is asked by a third party to make an agency worker available to carry out work under the management and supervision of the third party. In the Netherlands, agency work is seen as a special form of employment contract which requires special regulation at the start of the relationship. This exceptional position is less obvious when the agency work lasts for a longer period of time. That is why a phased system was developed, where, as time passes, the agency worker acquires more rights.

When drawing up the legislation, the idea was that agency work could contribute to a well-functioning labour market. On the one hand, agency work could be an easy solution to a short-term need for temporary labour and, on the other hand, it could provide access to the labour market for groups of people who were distanced from this market. The latter function in particular was important: agency work could function as a stepping stone and thus help people whom were distanced from the labour market to enter the labour market and find work. In the case of agency work, the agency will already have recruited and selected employees and the agency then properly tries to place the recruited employees.

²⁹ *De positie van uitzendwerknemers* [The position of agency workers], SEO February 2020.

It is particularly in relation to that task, the allocation function, that a justification was found for what initially was a more relaxed application of the law governing dismissals. The legislation, which was established at the suggestion of the social partners, provides for the possibility of stipulating in a collective labour agreement that the agency work employment contract will only be governed by the statutory provisions applicable to ordinary employment contracts after a certain amount of time has passed. The trade unions and the employers' association for temporary employment agencies did indeed conclude such a collective labour agreement, which they still maintain to this day. This collective labour agreement provides that all statutory provisions will only apply if the employment between an agency worker and the same employment agency has lasted 5.5 years.

The difference between payrolling services and agency work is that temporary employment agencies recruit and select employees themselves and then try to place them with an employer, while an employer who makes use of payrolling services recruits and selects the employees itself, but then does not employ them itself but has them work via the payroll company. In other words: the agency employer has an allocation function, the payroll company does not. Agency work in the Netherlands is regulated in the Dutch Civil Code. The agency work employment contract is regulated as a special form of employment contract. The requirement of the allocation function is not specifically laid down in the law. Because the law has not sufficiently established the distinction between agency work and payrolling services, the Dutch Supreme Court³⁰ decided in 2016 that the rules for agency work also applied to payrolling services.

2.3.4 Payrolling services in the Netherlands

In 2014, there were almost 200,000 employees working as payroll company employees. That number seems to be dropping again. An important advantage of payrolling for the employer is that the user company does not have to employ the worker and consequently does not have to apply the rules that would apply to it as an employer. In some sectors, employers are subject to onerous provisions, particularly due to collective labour agreements. Various collective labour agreements include provisions relating to payment to industry-wide funds and other

³⁰ Dutch Supreme Court 4 November 2016, ECLI:NL:HR:2016:2356 (Care4Care)

financial obligations. If an employer that is bound by such a collective labour agreement employs the employee, it must make these payments. If it arranges for an employee to work in while employed by a payroll company, that work is subject to the rules that apply to the payroll company. The result is that payroll company employees are often less expensive than employees in the user company's own employ. This was met with more and more objections, because this form of wage competition leads to under-bidding and is an incentive to stop complying with collective labour agreements. What is more, employers often transferred staff to payroll companies without their clear consent. Employees themselves sometimes did not know any longer exactly who their employer was. Nothing in their work changed, and the salary of the employees also often remained the same, but the employer no longer had to pay industry-related contributions, resulting in a considerable drop in wage costs. Courts regularly held that an employee was employed by the user company and not by the payroll company, even though the employment contract was concluded between the payroll company and the employee, because there was a sham structure or because the employee had not intentionally accepted a change of employer³¹.

Such litigation by employees was often based on the dismissal of the employee. The employee sometimes discovered that he was no longer in the employ of his work provider because, if there was a reason for dismissal, he was not dismissed by the work provider but instead was transferred to the payroll company. In the event of a reorganisation, employees who had been transferred to payroll companies were not dismissed on the basis of the 'first-in, first-out principle' of the redundancy regulations, even if, prior to the employment contract with the payroll company, they had worked in the employ of the work provider for years. The payroll company could easily demonstrate that the employee could no longer be placed and that dismissal was therefore unavoidable.

Until a few years ago, the local and regional authorities were among the main users of payroll services. Employers in the public sector are self-insured with regard to the payment of unemployment benefits. This means that they must pay the employee they dismiss benefits from their own resources and that these benefits are not paid from contributions to the public treasury. If a public authority foresaw a need for temporary work or uncertainty about the

³¹ Sub-District Court, Enschede, JAR 2013/95; S-DC. Almelo, JAR 2013/144, para. 2013/196; The Hague District Court, JAR 2013/193, RAR 2013/141; S-DC Amsterdam, JAR 2013/252, RAR 2013/165; Overijssel District Court, JAR 2014/95

duration of the work, that authority often engaged a payroll company to provide employees to do the work. These employees fall under the public unemployment legislation, so that although contributions have to be paid, the benefits are paid from the unemployment funds. In 2014, the Minister of Social Affairs and Employment announced that the national government would stop using payroll services. Local and regional authorities have adopted this policy, so that for this reason alone the use of payroll services has dropped considerably in the last few years.

2.3.5 Legislative changes to discourage use of payroll services

It was agreed in the Social Partners Agreement of 11 April 2013 that the agreements on payroll services must be transparent for the employee. The Work and Security Act was introduced in 2015, partly to implement that agreement. The goal of this Act was to ensure that there would be no misunderstanding about the employee's position. The government also wanted to prevent payroll services from being used as an easy way to circumvent dismissal law. That is why the dismissal rules applying to payroll services were modified as of 1 January 2015. Following this modification, a payroll company employee who works for a user company enjoys the same protection as the user company's own employees.³² These rules were incorporated in the Dismissal Regulations.³³ If a payroll company employer wants to dismiss an employee, that dismissal will be assessed on the basis of the reasons for termination of the temporary hire contract by the actual work provider. If the dismissal is for economic reasons, it will have to be in accordance with the 'last-in, first-out' principle, applied to the de facto work provider. If there are insufficient grounds for dismissal or if the last-in, first-out principle was not observed, the UWV, the Employee Insurance Agency, will not grant permission for dismissal and the employment contract cannot be terminated. The employee will then continue to be employed by the payroll company.

Combatting payroll services if the primary reason for these services is based on the costs of labour is receiving a lot of attention. The opposition parties have submitted an initiative bill³⁴ which seeks to make the costs of a payroll company employee equal to those of an employee who is in the employment of the user company and in the meantime the government has

³² Explanatory Memorandum, Parliamentary Documents II 2013/14, 33818, 3, p. 12

³³ Dutch Government Gazette 2015, 16285.

³⁴ Parliamentary Documents II 2017/18, 34837

proposed the same in the Balanced Labour Market Act³⁵. This Act provides for the introduction of two new articles (Article 7:692 and Article 7:692a of the Dutch Civil Code) to regulate the payroll contract. The bill is before the Dutch Senate at present and is expected to enter into force from 1 January 2020.

The bill provides for a new article (Article 7:692 of the Dutch Civil Code) in the Dutch Civil Code which will read: “The payroll contract is an agency work contract, whereby the contract for services between the employer and the third party was not entered into in the context of bringing together supply and demand in the labour market and whereby the employer is only authorised with the consent of the third party to make the employee available to another party.” This article thus establishes the distinction between payroll services and agency work as being the allocation function, and payroll services are seen as a special form of agency work. It is necessary to define the payroll contract to attach different rights to that contract. It is the government’s intention to prevent an employer from opting for payroll services purely on the basis of costs. What must therefore be prevented is that payroll labour is cheaper than having work carried out by an employee in the employment of the work provider. In order to achieve this, the Balanced Labour Market Bill proposes the introduction of a new article in the Placement of Personnel by Intermediaries Act (WAADI) which reads: “The worker, who has been made available in the context of payroll services, is entitled to at least the same employment conditions as those which apply to employees who work in the same or similar positions at the company where the worker is made available.” The more relaxed employment law regime of Art. 7:691 of the Dutch Civil Code cannot be used for payroll services. Where Section 8 WAADI specifies that the payroll company employee is entitled to the same payment as an employee in the employment of a work provider, Section 8a WAADI then goes on to stipulate that employer taxes and social security contributions must also be the same. This will certainly be achieved, as the same section will stipulate that payroll company employees are entitled to a pension scheme which also applies to a comparable employee in the employment of the work provider or the pension scheme which applies to comparable employees. The aim of the bill is thus to ensure that the payroll company employee is treated, in terms of employment law, as if he were the employee of the work provider.

³⁵ Parliamentary Documents II 2018/19, 34075

The criterion chosen for distinguishing between the payroll contract and the agency employment contract (in short, if there is no allocation function and if the employee only works for the work provider) is not very clear. The Council of State, which advises the government on intended legislation, believed that numerous situations could occur in which the two criteria included in the proposal would be satisfied, even if the placement of the worker was purely geared to avoiding the employment conditions for agency workers. According to the Council of State, the proposal opts for a narrow approach, which will leave ample opportunity for competition in terms of employment conditions, even after the introduction of the bill.³⁶ The Council pointed out that bringing together supply and demand for work (the allocation function) is extremely difficult to monitor in practice. The difference between a situation where an employee is introduced to the employer by a payroll company and the situation where the employer introduces an employee to a payroll company will be difficult to establish in practice. In the first case, there will be an agency employment contract and in the second a payroll contract. That is why the Council of State believed that it would be better to modify the bill and to modify the definition of payroll services. Despite this criticism, the bill was not modified on this point and has in the meantime been adopted by the Dutch House of Representatives. It is expected that the Dutch Senate will also adopt this bill and that it will be introduced with effect from 1 January 2020. Due to the increased costs and the heavier administrative burdens, payroll services will become less interesting and it may be expected that the number of payroll company employees will drop considerably after the introduction of the bill.

2.3.6 Contracting

Contracting is a special form of labour which is not regulated by law. The employee works in the employment of another employer on behalf of the work provider. The work provider actually outsources the work to another employer, a third party, who has the work in question carried out by that third party's own employees. Examples are the bicycle manufacturer Gazelle, which transfers an entire production line of one type of bicycle to a third party, even though the production line is situated in Gazelle's factory, or Post NL, which outsources the entire distribution of packages to a third party, while PostNL has the work in the distribution centres carried out by personnel employed by the third party. The third party undertakes to

³⁶ Council of State, October 11th, No.W12.18.0178/III, p. 12

deliver a result. Due to this structure, the staff are not covered by the collective labour agreement and other arrangements of the work provider but under the arrangements that apply to the third party. Because the employer/third party arranges for supervision and management of the work itself and the work provider is not involved in the supervision and management, this cannot be deemed to be agency work.³⁷ Because the third party does not have an allocation function on the labour market, this does not constitute a payroll services structure either. That is why the rules applying to agency work (like the collective labour agreement for agency workers) and to payroll services do not apply. Depending on the method of transfer of the means of production, there can be a transfer of an undertaking. If this is the case, the structure is usually not abusive. This structure is very similar to temporary agency work, which in the Netherlands is common for various types of work, such as cleaning and catering. The cleaners who clean a university building are subject to the collective labour agreement for the cleaning industry and not the collective labour agreement for universities.

In the Netherlands, contracting is therefore not immediately seen as abuse (avoidance of regulations), but it can be. There will certainly be abuse if the work provider sets up the structure with a third party that was not already engaged in the business activity in question and therefore exercises some degree of supervision and management. If this is the case, both the work provider and the third party are acting contrary to the WAADI (Temporary Agency Work Directive 2008/104/EC). In the Netherlands there has been a lot of commotion about this structure, particularly about its use by Post NL (the former state-owned postal service). On 7 May 2019, the Sub-District Court in Overijssel held that the structure used by Post NL is wrongful and is not in accordance with the WAADI, and that PostNL is liable for payment of the correct wages. The correct wages are those based on the collective labour agreement applicable to PostNL.³⁸

The government has stated that if contracting is used to circumvent legal protection and to compete on wage costs, it will seek to prevent this form of outsourcing of work. The government has committed to conduct further research into how this can be effected.³⁹ To date, nothing is known about that research.

2.4 On-call agreements

³⁷ Court of Appeal of Arnhem-Leeuwarden, 1 November 2016, ECLI:NL:GHARL:8770

³⁸ Cantonal Court of Overijssel 7 May 2019, ECLI:NL:RBOVE:2019:1538

³⁹ Letter to Parliament, 8 November 2018, on contracting.

Approximately 539.000 Dutch workers are working as an on-call employee. In the last 15 years, the number of on-call employees has doubled.⁴⁰ On-call agreements often found in the agricultural and the catering industry (kitchen helpers, bartenders etc.). On-call or zero-hours agreements are (mostly fixed-term) employment contracts with variable hours. An on-call agreement is an employment contract and therefore standard employment law is applicable. There are also some special obligations regarding on-call work. The main obligation of the employee is to be permanently available, regardless of whether they are called upon. If the employee is called upon for work, the employer is obliged to pay at least three hours' wages. According to employers, this obligatory three hours of working time is a significant obstacle to the use of on-call contracts for, for instance, platform work. According to the participants in this research, it is impossible for platforms, such as food delivery companies, to schedule workers for three hours in a row. This is a bigger drawback for them than for example the provisions on sickness leave or dismissal law. The Balanced Labour Act (see below) has not changed this.

Only 35% of on-call employees are economically independent. In on-call contracts, the option is used to derogate from the obligation to continue paying salary if there is no work available (7:268 BW). This period can be extended by the collective labour agreement, which has happened and continues to happen in practice. This means that the on-call employee is only paid from the moment that he actually starts working. If the employee is not called, or if the call is revoked, for example due to weather conditions, then the employee has no right to salary. However, because of the employment contract, when the employer does call, the employee needs to be available to work at all times. This leads to a permanent availability that is deemed undesirable.

On-call contracts have been better protected since the enactment of the WAB. First of all, there is a legal definition of on-call work, which clarifies whether a contract is deemed to be an on-call contract. Since the WAB, the law provides a statutory call notice of 4 days for on-call work. The call needs to be made by written or electronical means. Where the employee is summoned inside 4 days, he does not have to accept the call. Where the employer revokes or changes the call within the 4 day period, the employee still has the right to be paid what was promised in the original call. The government is trying to create a balance between the

⁴⁰ 'Number of flexi-workers up by three quarters in 15 years', CBS 14 February 2019.

uncertainty in working hours for the employee and the employer's need for flexibility.⁴¹ The period of 4 days can be extended through a collective labour agreement but the period should never be shorter than 24 hours.

Another important change is the obligation to offer a fixed contract after 12 months. The fixed contract has to correspond to the number of hours that the on-call employee has worked in the previous 12 months. If the employee accepts the offer, there is no longer an on-call relationship. The employee has a one month reflection period, to decide on whether to accept the offer or not. This offer obligation is sanctioned by a continued wage payment for the average number of hours worked.

For employees working on the basis of on-call contracts, there is also the option to rely on the legal presumption set out in the law. An employee who feels that there is a fixed working pattern can demand fixed working hours on the basis of this presumption. It is then up to the employer to prove the contrary. An employee can only rely upon the legal presumption of the extent of the work if the employment contract has been ongoing for at least 3 months.

During the consultation on the WAB, the unions argued for more far-reaching measures for on-call contracts. The employers' organisations are afraid that the introduction of the WAB will cause less flexibility.

The Balanced Labour Act strengthens the position of on-call employees. The proposed Act – which has been adopted by the Second Chamber of the Parliament – includes the following provisions relating to on-call agreements.

- On call workers no longer need to be permanently available for work. An employee only has to comply with a call if he is called on to work at least four days before the work starts. If the employer (partially) cancels the call for work inside the same four days, the employee is entitled to wages for the cancelled hours. The four day-period can be shortened by collective agreement.
- After 12 months, the employer has to offer the employee a (fixed-term) contract for the hours equal to the average monthly hours worked in that year.

⁴¹ Parliamentary Papers II, 2018/18, 35074, 3, p. 110.

There has generally been a positive reaction to the proposals for amendments of on-call contracts. However, according to employers' organisations, some negative consequences can be expected. In their opinion, the WAB allows less scope for flexible contracts. After twelve months, it is no longer possible to offer a zero-hours contract. Trade unions believe that the WAB will increase job security for flexible employees. Flexible work will become less attractive and more expensive.

2.5 Self-employed

2.5.1 Main challenges

The number of self-employed increased from 630,000 in 2003 to 1.1 million in 2008.⁴² Self-employed workers are regarded as companies in the Netherlands and they are subject to (the prohibitions of) competition law. This means that self-employed workers are not entitled to the same level of protection as employees. For example, they are not protected against unfair dismissal and are not entitled to holiday pay or invalidity insurance. However, in return, they get – in general – higher rewards, do not have to pay social security contributions and are able to claim some entrepreneurial costs and tax benefits. Many self-employed are driven by tax incentives. The most important tax-incentive is the self-employed deduction (in Dutch, *zelfstandigenaftrek*). The self-employed deduction amounts to EUR 7,280 a year. For qualifying start-ups, this amount can be increased by EUR 2,123 for the first three years.

40% of the self-employed do not have any provision or insurance for sickness and disability.⁴³ This proportion of insured self-employed is falling. Self-employed in the building industry are the most often insured.

There are two main challenges for labour law on the subject of the self-employed. In the first place, there is a lack of protection of dependent self-employed (self-employed). These workers are in the grey zone between self-employed and employees. They are often economically dependent on one or just a few contractors. The strict distinction between employees and the self-employed and the major differences in their legal protection mean that a great deal of attention is paid in the Netherlands to the issue of classification as regards dependent self-employed people. The literature argues that many dependent self-employed

⁴² 'Number of flexi-workers up by three quarters in 15 years', CBS 14 February 2019.

⁴³ '4 out of 10 self-employed have no provision for employment disability', CBS, 4 July 2019.

people are in fact employees and should therefore be treated as employees. Legal scholars often refer on this to the European Court of Justice's interpretation of the expression "employee" and they perceive parallels with the problem in the Netherlands. The Dutch approach to the control criterion is argued to be one-dimensional and too much importance is arguably attached to what the parties have agreed in writing. The intention of the parties barely has any part to play in the issue of classification in Europe and greater weight is attached to formal aspects, when considering control, than to whether the principal actually issues instructions. Many dependant self-employed people can be viewed in this regard as sham self-employed and accordingly, in the Dutch approach, as being employees. Another line of argument in the literature argues for the introduction of an intermediate group. This group would include the dependant self-employed person. The literature often then refers to the British "worker", a group affected by a number of rights and obligations under labour law, while exempt from others. The rights that should apply are those rights stemming from European legislation, with a view to safeguarding compatibility with European law. The strategies of many Dutch trade unions are focused on addressing sham self-employment by applying a broad definition of the employment contract, as witness the number of legal actions raised by trade unions in the Netherlands against the likes of PostNL and Deliveroo.⁴⁴

Secondly, low income self-employed can represent a threat to employees and the tenability of social facilities. It is more interesting for employers to hire the self-employed instead of employees because of the reduced costs and fewer risks under labour law. The result of this is that job opportunities and terms of employment for employees end up coming under pressure. All manner of tax measures mean that it is more beneficial for workers to work on a self-employed basis, even if they put money aside for employment disability and pensions. The Dutch government is effectively subsidising the self-employed by means of tax breaks. This is viewed as being undesirable in the literature, certainly if it results in displacement and pressure on the formulation of terms of employment. One associated problem relates to the tenability of social facilities. Many facilities in the Netherlands are financed by employers and employees through a system of premiums. As more people start moving to self-employed work, the premium income declines and pressure rises on the payment of social security benefits. It is correct to say that fewer people can claim for social security because this is

⁴⁴ Amsterdam District Court, 14 January 2016, ECLI:NL:RBAMS:2016:152 and 153; Amsterdam District Court 15 January 2019, ECLI:NL:RBAMS:2019:198.

reserved to employees, but on the other hand many low-risk workers take the step to self-employment and leave the system. The result of this is that the bad risks remain and the system's solidity evaporates. The system's tenability therefore becomes questionable in the longer term.

2.5.2 (*Sham*) self-employment and competition law

Competition law restricts the possibilities for improving the position of the self-employed. For example, an agreement on minimum wages for the self-employed is regarded as fixing purchase or selling prices (a cartel), which is prohibited by the TFEU.⁴⁵ In principle, self-employed workers are 'undertakings' within the meaning of article 101 (1) TFEU, even when they perform the same activities as employees. They offer their services for remuneration in a given market and perform their activities as *independent economic operators in relation to their principal*.⁴⁶ Collective agreements, which regulate the conditions of self-employed, fall within the scope of competition law and are prohibited.

In the Netherlands, some collective labour agreements contain certain provisions on the minimum 'working conditions' for the self-employed. Firstly, the aim of the social partners is to decrease the downward pressure on wages of stark competition caused by less expensive self-employed individuals (preventing a race to the bottom). The second aim of concluding agreements with minimum fees for the self-employed is to improve the position of self-employed workers. EU competition law blocks the path of these (well-intended) initiatives. In 2014, the Court of Justice ruled on the legality of minimum fees in a collective labour agreement.⁴⁷

The case was about self-employed substitutes for whom minimum fees were agreed. If the substitute qualifies as an employee, the provision of the collective labour agreement falls under the Albany exception for collective bargaining. If the substitute qualifies as an undertaking, this exception is not applicable.

⁴⁵ Article 101: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, distortion of competition within the internal market are prohibited as incompatible with the internal market.

⁴⁶ On this, see judgement C-217/05.

⁴⁷ Court of Justice, 4 December 2014, C-413/13. See also the conference paper by Grosheide (2015).

If that is the case, EU competition law prevents national measures from improving the position of economically dependent self-employed persons and from taking measures to prevent the exclusion of employees. The arguments behind the Albany exception can more or less be adopted for this situation.

The ECJ emphasises that a provision in a collective labour agreement, such as that at issue in the main proceedings, insofar as it was concluded by an employees' organisation in the name and on behalf of self-employed service providers who are its members, does not represent the result of a collective negotiation between employers and employees, and cannot, by reason of its nature, be excluded from the scope of Article 101(1) TFEU. This means, in principle, that provisions about 'working conditions' for the self-employed fall within the scope of competition law. Nevertheless, the Court makes an exception for 'sham self-employed'. It decided:

On a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform the same activity as that employer's employed workers for an employer, under a works or service contract, are 'sham self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

It is not clear when a worker is a sham self-employed person. The phenomenon of sham self-employed is not easily compatible with the Dutch binary systems. There are still classification questions. The decision by the Court of Justice, and the lack of clarity about the definition of the sham self-employed are the main reasons why trade unions do not want to negotiate collective labour agreements for the self-employed. They focus on legal procedures in which they claim that the self-employed are in fact employees. Examples of these legal procedures are the Deliveroo cases which we discuss in the next section on platform work.

Despite the decision by the Court of Justice, some initiatives have been developed on minimum rates for the self-employed. This is a long-held ambition of trade unions, policy makers – including the Minister of Social Affairs – and some employers. In January 2019, the

Dutch Consumers and Markets Authority declared that it was willing to research the possibility of agreeing minimum rates in the cultural sector. This declaration is an important first step.

2.5.3 Proposed solutions by policy makers

Many solutions have been proposed. In 2016, the legislature adopted the Deregulation of Labour Relations Assessment Law (*Wet DBA*). The purpose of this Act is to create clarity about the classification of the self-employed worker. However the *Wet DBA* has led to a lot of uncertainty. Because of this uncertainty, the operational date of the *Wet DBA* has been postponed until 1 January 2020. The expectation is that there will be a different law in place by then.

The coalition agreement of the current government stated that the *Wet DBA* will be replaced by a new Act that prevents sham self-employment. According to this proposal, the self-employed with hourly earnings between EUR 12 and 18 are automatically classified as employees. They can only be classified as self-employed if they work for the firm for a short time and do not provide the services that are the core business of the firm. This solution might conflict with European competition law, because it is – in fact – a minimum fee. See below for the relationship between competition law and minimum fees for the self-employed .

Last year, the Minister of Social Affairs appointed experts to form an advisory committee (the Borstlap Committee). The committee advises the Minister on the future of labour market. The Committee will provide advice on sham self-employment. We are waiting for the results.

Until a new law is adopted, the legal position of the sham self-employed is uncertain. If they claim that they have an employment contract, they need to go to court. Based on all of the circumstances, the court can decide whether or not the worker is an employee (see below for an example).

2.6 Platform work

2.6.1 Features

In the platform (or gig) economy, supply and demand are brought together by innovative technology. The platform economy in the Netherlands includes for example passenger

transport, food delivery, child (and animal) care, cleaning and other professional and domestic services. The companies who deliver these services are relatively young. A considerable proportion of the workers are also young and highly educated, but there are big variations. In domestic services, for example, workers are more often less well educated. According to research by SEO and HSI from 2018, platform workers earn on average EUR 787 a month, working 20 hours a week. This is approximately EUR 15 an hour.⁴⁸ Many workers are active on a platform for a short period and for a small amount of time a week.

The current size of the platform economy is rather small; 34.000 people work in the platform economy, which is 0.4% of the total working population.⁴⁹ However, the platform economy is growing fast and some serious questions arise about the labour market position of platform workers.

The way the work is performed differs from standard work. There is no physical work location and the contact between the worker and the platform is almost exclusively via apps, internet and other technology. Many platforms consider themselves as ‘digital pin boards’, where supply and demand of labour come together.

Platform workers are employed under different conditions and legal structures. The most common work arrangement between the platform and the worker is the contract for services. This means the platform worker is (solo) self-employed for labour law purposes and an entrepreneur for tax law purposes. Sometimes the platform worker works on the basis of an employment contract with the platform. And in other cases (for example Helping), there is an employment contract between the client (the private individual) and the platform worker. In that case, the Regulation on Care and Support at Home (*Regeling dienstverlening aan huis*) is applicable.

These are the work arrangement that the parties concluded. The reality can be different because – in the Netherlands – what the contracting parties concluded is not relevant for the classification of the relationship. In one of the Deliveroo cases, which we discuss in paragraph ... the court decided that all Deliveroo riders are – in fact – employees, notwithstanding the fact that they concluded a contract for services with Deliveroo. However, platform companies

⁴⁸ *De opkomst en groei van de kluseconomie in Nederland* [The rise and growth of the gig economy in the Netherlands], SEO March 2018.

⁴⁹ *De opkomst en groei van de kluseconomie in Nederland* [The rise and growth of the gig economy in the Netherlands], SEO March 2018.

shape their activities and work arrangements in a way that there are as many as possible indicators pointing towards self-employed work. For example, they allow workers to choose when and where they want to provide their services, leave the instructions to the customer or allow the workers to wear their own clothes and use their own supplies.⁵⁰

2.6.2 Self-employed platform workers

Self-employed platform workers are not protected by labour law. They are not protected against (unfair) dismissal and are not entitled to wages in case of sickness. They do not fall under the scope of collective labour agreements and they have almost no say at the workplace. A few platforms do have participation schemes. An example is the Riders' Union at Deliveroo. None of them has established a works council. According to a platform we spoke in this research, they do not want that because it is an indicator that the platform is an employer.

Self-employed platform workers are not entitled to social security and (sectoral) pension arrangements. They are often not insured for sickness, disability and unemployment.

The platform we interviewed pointed out that an on-call agreement is not suitable for the way it runs its business. The main problem is the obligation to pay three hours' wages for each call.

3. Approaches of social partners

3.1 Towards temporary agency work, contracting and payrolling

While trade unions made a significant contribution, along with employers, to matters such as the regulation of temporary agency work and other forms of flexible working in the 1990s, they have not been great advocates for the way in which these flexible forms of working should now be used in practice. The allocation involved in temporary agency work was the reason for opening up the market for allocation services. Opening up this market went hand-in-hand with an improvement in the legal position of agency workers because the temporary agency work contract gained the same status as an employment contract. A number of exceptions to labour law were made for agency workers on important topics because they were not readily compatible with the allocated positions of those workers. For instance, the

⁵⁰ See also EU CJ 20 April 2020, ECLI:EU:C:2020:288.

progression option with temporary agency work was not particularly compatible with the law on dismissal and the application of anti-abuse rules. When the agency contract was first introduced, service providers needed a lot of freedom for the allocation side of sour sourcing work. Recent research has confirmed that allocation is undoubtedly still a feature of agency work, but also that many agency workers remain in that type of relationship for a long time without, for example, moving on to a fixed contract, and also that agency workers are often systematically embedded in the work they do. Agency workers are used not only for coping with production peaks or replacing other employees who are off work ill, but for all sorts of reasons. The displacement of fixed personnel and the limited progression to fixed employment meant that trade union strategy focused on limiting the deployment of agency workers by including provisions in CLAs to the effect that only a limited proportion of workers could be temporary agency workers.⁵¹ Many employers are looking at alternative flexible arrangements because agency work in the Netherlands is well-regulated and therefore more expensive. Non-agency workers seem not to be objecting, however, to the CLA provisions that limit the use of agency workers. The temporary agency sector is of course not particularly happy about this and feels that such restrictions are unnecessary. According to this sector, social partners reached an agreement in CLA negotiations that the hiring company's remuneration would apply from day one in order to counteract the displacement of fixed employment and that, in exchange, CLAs would not restrict the number of agency workers. The hiring company's remuneration now applies from the first day of hiring, but some CLAs still contain restrictions on agency work that have therefore been agreed to by the non-agency workers.

Payrolling will have its own statutory definition from 1 December 2020. Trade unions regard payrolling as an undesirable form of agency since, on the one hand, it takes advantage of the labour law benefits of agency but, on the other hand, there is no allocation facility within payrolling, which is what justifies the use of the agency regime. Trade unions regard payrolling as a structure for contracting out of employers' responsibilities. Agency workers regard payrolling as a form of agency and offer payroll services in the context of the service they provide. The new law is expected to mean that payrolling will become less attractive. For outsourced workers, this will mean a shift from payrolling to agency, but will not result in

⁵¹ *'Limiet op aantal flexcontracten bij grondpersoneel KLM'* [Limit on number of flexi-contracts for ground staff at KLM], FNV 1 October 2019.

any significant loss of income. For employers that use payrolling exclusively, the consequences are certainly clear. They will lose market share and there are signs that payroll employers will move over to the temporary agency market.

Contracting is nothing new, but it is a growing phenomenon. Contracting involves the outsourcing of services. This used to be done by companies mainly for specialist jobs or for ancillary activities such as cleaning and security. Nowadays, core activities are being outsourced and the result is sometimes that standard CLAs will not apply and fixed personnel will be displaced. Trade unions are battling the increasing use of contracting, arguing that contracting goes hand-in-glove with pressure on costs and poorer terms of employment. Employers say that contracting is a tool for efficient business operations.⁵² The debate about contracting is concentrated on counteracting undesirable forms of contracting, meaning contracting that is only used from considerations of costs.⁵³

3.2 Towards platform workers

Trade unions reach out to platform workers as members. They support them by offering information and legal support.

The main strategy of trade unions at this moment is to start legal procedures in which they claim the following:

- (i) platform workers are – in fact – employees and not self-employed;
- (ii) platform employers fall under the scope of the collective labour agreement in the industry.

Because of this strategy, the FNV trade union does not want to negotiate with platform employers about a collective labour agreement for platform workers. They consistently maintain their opinion that platform workers are employees who fall under the scope of existing collective labour agreements. In that respect, there is likewise no problem in the protection of platform workers. They are – in the opinion of the trade union – already

⁵² Parliamentary Papers II, 2018/19, 35074, no. 5. Also see *Driehoeksrelaties. De relatie met de Wet Allocatie Arbeidskrachten door Intermediairs (Waadi) en de Wet Flexibiliteit en Zekerheid (Wfz)* [Triangular relationships. The relationship between the Workers (Allocation by Agencies) Act (Waadi) and the Flexibility and Security Act (Wfz)] , De Beleidsonderzoekers 12 February 2020.

⁵³ Letter, Minister of SZW 13 May 2019 (House briefing on contracting and progress on compliance with Waadi)

protected by employment law. Trade unions also point to the fact that, if platform workers have to be considered as solo self-employed, European competition law does not allow them to agree on working conditions by collective labour agreements (see above).

FNV Horecabond chose another approach and did negotiate with the Temper platform . We will discuss that approach later.

3.2.1 Platform workers are – in fact – employees

As said before, trade unions claim that all platform workers are employees, although they are formally self-employed (they all signed a contract for services). The courts have answered the question of classification in three cases.

The first case was brought to court by one of the Deliveroo riders. He claimed to have an employment contract. In 2017, Deliveroo offered all the riders a contract as self-employed. Before then, they all had been working on an employment contract. The reason for the change of contract was more flexibility for the rider and the platform. The rider, who claimed to be an employee, explicitly opted for a contract as a self-employed person. The court did not agree with him. According to the first decision, there was no employment contract between the Deliveroo rider and the platform. Relevant aspects for the judge were that the Deliveroo rider was allowed to reject orders, was free to wear his own clothes (or even the clothes of another meal delivery company) and could have someone stand in for him. The fact that there was an algorithm was not enough to conclude that there was a relationship of authority. The court stated that legislation is the appropriate way to regulate the working relationship between a platform worker and the platform.

In the second case, the Amsterdam District Court (same court, different judge) decided the opposite way. In this case, brought to court by the FNV trade union, the court concluded that the Deliveroo couriers were not self-employed. The court compared work as a freelancer with the former situation of an employment contract and concluded that the work had not changed much since 2018. According to the court, the way the work of the Deliveroo-riders is done still fits within the definition of the employment contract.

Deliveroo appealed against the decision. The rider was indeed allowed to reject an order, but this had consequences for receiving new orders. Hence, there was no real freedom to reject an order and this was an indication of an authority relationship between rider and platform.

The third case⁵⁴ concerned the platform for cleaning services Helpling. Helpling is, in its own words, an online marketplace for cleaning services. Clients can book a cleaner via the website or app. According to Helpling, the cleaners are not employed by the platform but work directly for the client. This is made possible by the ‘*Regeling dienstverlening aan huis*’ (Home Services Regulation), which regulates the employment contract between a private person and a worker in and around the house for less than four days a week. According to this regulation, workers in and around the house do have an employment contract (with the private person’s house where they work), but with lesser rights than employees with a ‘normal’ employment contract.

The FNV trade union claims that Helpling cleaners have an employment contract or – at least – an temporary agency contact with Helpling instead of an employment contract with the private person. In its view, the relationship between the cleaner and Helpling meets the requirements of article 7:610 DCC which sets out the definition of an employment contract. The dispute mainly concerned the question whether or not there was a relationship of authority between Helpling and the cleaners. According to the Amsterdam District Court, the power to give instructions was absent in the relationship between Helpling and the cleaners. The relevant circumstances were:

- the cleaners set the rate for their job themselves;
- instructions about the job were provided by the client (the private person) and not by Helpling;
- the cleaners decided when and where they worked. If they did not accept work, their rate would not be reduced;
- the cleaners only had to comply to the general conditions of services (*algemene voorwaarden*) of Helpling;
- Helpling merely facilitated the performance of the work. The only facilities Helpling offered were the option of managing their diary, dealing with complaints and help with blocking accounts.

⁵⁴ Amsterdam District Court, 1 July 2019, ECLI:NL:RBAMS:2019:4546.

The court concluded that the relationship between Helpling and the cleaner did not fulfill the requirements of an employment contract, because there was no relationship of authority. Because an employment contract between the agency and the worker was also a requirement for a temporary agency contract, article 7:690 BW was also not applicable.

According to the court, Helpling did fulfil the requirements for job placement, because Helpling played an active part in concluding the agreement between the client and the cleaner. This meant that Helpling was not allowed to ask the cleaner for a payment for its services.

An important difference between Deliveroo and Helpling is the way the rates are set. Deliveroo (and also Uber) set the rate for all their drivers. The cleaners set their own rate. If they do not accept work, their rate is not reduced, in contrast to Deliveroo.

(iii) The scope of collective agreements

Initially, trade unions opened up negotiations on a collective labour agreement for platforms. Later, they took the position that sectoral collective labour agreements, like the CLA for the professional transport of goods, was applicable to platforms. Most of the unions concentrated on legal claims regarding the classification as an employment contract and the application of the sectoral CLA. Examples of these legal cases are the three Deliveroo cases.

In the Helpling case, Amsterdam District Court also held that the sectoral collective labour agreement of the cleaning industry (*cao schoonmaak- en glazenwassersbedrijf*) was not applicable to the relationship between Helpling and the cleaner. The scope of this collective labour agreement was limited to people who worked in the cleaning industry on the basis of an employment contract.

If a sectoral CLA is applicable, it is almost impossible for platforms to deviate from the agreement, because that is only possible if another CLA applies to the company and – in general – that is not the case. [The trade unions appear not to be prepared to conclude a CLA with platforms as long as uncertainty persists about the existence of self-employment. The fact is that in this case competition law precludes making any such arrangements.]

The FNV Horecabond (the trade union for the hotel and catering industry) took a different position from the other Unions we spoke to. The Horecabond agreed a pilot with the platform Temper, a platform that brings together freelance workers and hotels, restaurant and bars.⁵⁵ In contrast to other unions, the Horecabond does not solely focus on the classification as an employment agreement. Its main object is to improve the position of platform (self-employed) workers in relation to aspects including (minimum) fees, pensions and disability insurance. In its view, this goal can also be reached by more (collective) protection of the self-employed. This is an exceptional point of view for a trade union. The Horecabond and the platform Temper agreed on improving the position of self-employed workers by changing the general terms and conditions of the platform. One of the improvements is the abolition of the ‘user fee’, the fee the worker has to pay to the platform for the use of its services. This is a first step towards an increase in the payment of platform workers. Temper and the Horecabond are working together to convince policymakers to organise collective insurances and pensions for self-employed platform workers. They are also examining possibilities for supporting freelance workers in self-development and education.

3.3 Approaches of social partners to the solo self-employed

In general, self-employed persons without personnel are weakly organised. They are poorly accommodated by the current system of social dialogue and social partners. Because they are not employees, trade unions do not represent them. However, they do not have personnel either, so that they are also not represented by employers' organisations. Furthermore, the group of solo self-employed people is a highly heterogeneous group of very well and very poorly paid workers with strong as well as precarious positions in the market, which leads to many problems in representation and policy-making. Research in 2009 indicates that only 10-20% of the self-employed are members of a trade union or business/employers' organisation.⁵⁶ This seems to be an adequate estimate even now.

There are at least 18 associations in the Netherlands that organise and represent self-employed workers. Some of these associations organise the ‘entrepreneurs’ in the group of self-employed people, others are more focused on the groups of ‘self-employed workers without

⁵⁵ Temper calls itself a digital notice-board.

⁵⁶ N. Van den Berg, J.W.M. Mevissen, N. Tijsmans (2009). *ZZP'ers en hun marktpositie. Onderzoek naar de mate waarin zzp'ers investeren in en ondersteuning kunnen krijgen bij het behouden en vergroten van hun marktpositie*. Dutch Council for Work and Income.

rights'.⁵⁷ There are also professional associations for self-employed workers, such as for journalists (*NVJ*), for construction workers (*Zelfstandigen-Bouw*) and for healthcare professionals. Apart from their lobbying function vis-à-vis the government and social partners, organisations for the self-employed offer (collective) insurances, pensions and other services for their members.

In response to the increasing numbers of self-employed people in the labour market, the traditional social partners and social dialogue institutions are trying to include some of the associations of self-employed people. Two organisations have since 2002 had a voice in the tripartite Social-Economic Council (SER) at the national level. The trade unions in the SER gave one of their seats to *FNV-Zelfstandigen* and the employers in the SER gave one of their seats to *Platform Zelfstandige Ondernemers*. *FNV Zelfstandigen* is part of the largest trade union FNV and its main goal is to achieve a fair position for the self-employed in the labour market by improving their rates. *FNV Zelfstandigen* is also in favour of regulating pensions and other social security provisions for self-employed workers and sees collective bargaining and collective labour agreements as among the important instruments for better regulations and provisions for self-employed workers. Self-employed people can join a union, but the help the union can offer is limited because of competition rules; trade unions can be charged with cartel building (e.g. FNV Kiem). Another strategy of the trade unions is to claim that the sham self-employed are in fact employees and that the Dutch Tax Authority should enforce the *Wet DBA*. *Platform Zelfstandige Ondernemers* (PZO) organises the 'entrepreneurial' self-employed workers. *PZO* has a coalition with *ZZZP-Nederland* that claims to be the largest organisation for self-employed people. *PZO* and *ZZZP-Nederland* argue in a joint Manifesto⁵⁸ for:

- better representation of self-employed people in social dialogue and political decision-making;
- an independent position and their own legal position as entrepreneurs for self-employed people (and therefore not any regulations for self-employed people in collective labour agreements);
- no obligation for self-employed workers to build up pensions;

⁵⁷ M. Westerveld (2019). *Zzp-arbeid en de verzorgingsstaat* [Self-employment and the welfare state], in W. Been, M. Keune & F. Tros (eds.) *Hoe goed werkt Nederland? [How well is the Netherlands working?]* (pp. 63-91), Alphen aan den Rijn: Vakmedianet.

⁵⁸ https://www.zzp-nederland.nl/onze_lobby/verkiezingen/verkiezingen-2017/manifest-zelfstandigen-hebben-de-toekomst

- a basic insurance for self-employed workers in case of disability, with voluntary, tailor-made opportunities for extra disability insurance for individual self-employed people.

In March 2020, the bipartite Labour Foundation (consisting of the traditional social partners, with the temporary addition of *Platform Zelfstandige Ondernemers* and *FNV Zelfstandigen* for this purpose) agreed on a proposal to the Government for the introduction of a compulsory occupational disability insurance for independent professionals/freelancers (i.e. self-employed persons with no employees).⁵⁹ In view of the diversity of the self-employed population, the proposal offers various options, allowing every self-employed person to decide which insurance cover is appropriate. Every self-employed person will have standard cover insuring them for a benefit equal to 70% of their most recently earned income, capped at approximately EUR 30,000 gross per year or 143% of the Statutory Minimum Wage (SMW). The maximum monthly benefit will be EUR 1,650 gross or 100% of the SMW. The contribution for this standard insurance cover will be approximately 8% of the insured's income and will be tax deductible.

There are other associations for entrepreneurial self-employed people who are excluded from traditional social dialogue and who are more critical of the traditional employers' associations and trade unions. For example, *ONL voor ondernemers* and *Werkvereniging* are against a specific insurance obligation covering disability for the group of self-employed people. Nevertheless, they argue for disability insurance regulation after two years for *all* workers, independent of their labour contract. These associations are against the tradition distinctions between employment contracts and contract for services and are in favour of greater flexibility and autonomy of 'modern workers'. These two organisations have a quite strong lobbying impact on the current, centre-right and liberal cabinet that does not always support the traditional social partners. The problem is however, that these organisations do not represent the self-employed whose position in the labour market is vulnerable.

In sum, the many organisations in the Netherlands that claim to represent self-employed workers in the Netherlands differ widely in the characteristics of their members and in their ideologies. There are remarkably high numbers of associations focussing on the ideology of

⁵⁹ <https://www.stvda.nl/-/media/stvda/downloads/engels/2020/disability-insurance.pdf>

entrepreneurship, autonomy and the ability of people to cope and manage risks of income insecurity for themselves. On the other side of the spectrum are the associations that are linked to the trade unions, which focus on the protection of the lower segments of self-employed in the labour market and try to provide these groups with the security of the 'classical' employment contracts, to combat 'sham self-employment', and to include them in collective solidarity arrangements in the welfare state. In spite of this high contrast in views about the position and interests of self-employed people, there seems to have been some progress in 2019 and 2020 in new social dialogue and the making of new regulations for the growing numbers of self-employed workers in the Netherlands (e.g. about disability insurance and minimum rates for self-employed workers).

4. In conclusion

The Dutch labour market is characterised by a large number of flexi-workers. There is no set definition of flexi-workers and what is often meant by flexi-workers in the Netherlands is workers with a flexible working relationship. These include not just temporary agency workers and on-call workers, but also the self-employed and workers with temporary contracts. This study extends the definition of flexi-workers to all those who are working otherwise than on the basis of a full-time permanent contract. This accordingly includes, as well as those summarised above, part-time workers and those working on the basis of fixed-term contracts. It is not just the large number of flexi-workers that is typical of the Dutch labour market, but also the way these numbers are growing. Only a little more than 60% of all people working in the Netherlands are doing so on the basis of a permanent contract.

The number of flexi-workers is rising on two fronts. First of all, there is a rise in the familiar, older form of flexi-working in sectors and businesses where flexi-working used to be less common, including, for instance, care and education. Secondly, there are new types of flexi-working such as platform working, self-employment and contracting. Research confirms that the reasons behind the use of flexi-working have changed over time. In the 1990s, it was used mainly for 'peaks and illness', while nowadays it is often seen as a way of saving costs and avoiding risks.

Some flexi-working formats – such as agency work, part-time work and fixed-term employment contracts – are fairly well-regulated in the Netherlands. Other flexi-formats are

less well-regulated and their increasing use is on balance leading to a deterioration in the legal position of workers. These formats include self-employment, on-call contracts, payroll workers and workers made available through contracting structures. Recent legislation is aimed at narrowing the gulf between flexi and fixed, partly by making flexible work more expensive and 'unfixing' the fixed contract slightly, and partly by improving the rights of flexi-workers. This new legislation is greeted with mixed feelings in the literature. First of all, it is considered an improvement that the rights of flexi-workers are being enhanced. However, not a great deal is expected from legislation to make flexi-working more expensive and loosen the bonds of fixed employment in order to shrink the fixed-flexi gap. There is an argument that the use of flexi-working has become part of Dutch culture and that more is needed than simple tinkering with legislation and regulations in order to bring about a shift in that culture. Thirdly, the position of the self-employed has been ignored in recent legislation. Experts are worried about a 'water-bed' effect because these workers have not been involved; where one form of flexi-working is dammed up, another one gets inundated. The Borstlap Committee recently argued for the growing number of self-employed to be addressed, partly on the advice of the OECD. This would involve, in broad terms, a more generous application of the definition of the employment contract so that large cohorts of the self-employed – whose self-employed status is to say the least doubtful – would be covered by employment contracts. Another step would be to dismantle tax breaks for the self-employed and compel insurances for certain social risks, so as to make self-employment less attractive.

Social partners have differing views on the use of flexible working. Employers and employees generally agree that flexi-working should not be used to exert pressure on wages. Flexi-working that results in the same work being done in the same place on unequal terms is also comprehensively rejected because of its incompatibility with the principle of a level playing field for all employers and employees. Employers are in favour of flexi-working, however, if this would help to promote efficiencies in business operations and if external factors – such as uncertainties in the supply of work and a highly competitive international market, which demands that an organisation should be able to move quickly with any changes in that market – require the use of flexible contracts. Trade unions generally regard flexi-working as a threat to workers, in terms of displacement and pressure on terms of employment. Flexi-working often goes hand-in-hand with insecurity of work and income and addressing flexi-working would then automatically entail an improvement in the position of workers.