Decent Flexibility

Studies in Employment and Social Policy

Volume 49

Series Editors:

Prof. Alan C. Neal
Prof. Dr Manfred Weiss
Prof. Birgitta Nyström

Launched in 1997, the Studies in Employment and Social Policy series now boasts over forty titles, addressing key policy and development issues in the fields of Industrial Relations, Labour Law, Social Security, and International Labour Regulation.

Under the direction of its General Editors, Professor Alan Neal (Founding Editor of the International Journal of Labour Law and Industrial Relations, and Convenor of the European Association of Labour Law Judges), Professor Manfred Weiss (past-President of the International Industrial Relations Association) and Professor Birgitta Nyström (Professor of Private Law at the Law Faculty, University of Lund, Sweden), Studies in Employment and Social Policy seeks to provide a forum for highlighting international and comparative research on contemporary areas of significance for evaluation and regulation of the world of work.

With contributors from leading figures in the field, Studies in Employment and Social Policy brings together key policy-makers, academics, and regulators, providing a unique context in which to analyse and evaluate the rapid and dramatic work and social policy developments taking place across the globe.

Decent Flexibility

The Impact of ILO Convention 181 and the Regulation on Temporary Agency Work

Dr Fred C. A. van Haasteren

Wolters Kluwer

Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:
Quadrant
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN: 978-90-411-9236-3

e-Book: ISBN 978-90-411-9271-4
web-PDF: ISBN 978-90-411-9304-9

Originally published in Dutch by Sdu Publishers, The Hague, 2016 as *Fatsoenlijke flexibiliteit: De invloed van ILO-conventie 181 en de regelgeving omtrent uitzendarbeid*.

This English version has been made possible by the Goldschmeding Foundation, Adecco, Randstad and the Dutch Labour Standards Foundation.

Printed in the United Kingdom.

Foreword

During the past fifteen years, the labour market has undergone major changes. The rise of flexible labour has proven unstoppable. The permanent employment contract as the standard option for work has been overtaken by a wide range of contract forms, which sometimes fit in with classic labour law and sometimes do not. Quite a lot of part-time work, a great deal of temporary agency work, many secondments and payroll workers, a vast number of self-employed workers – some with real, other with false self-employment status – have entered the labour market. The proportion of people in the Dutch labour market that have permanent employment contracts has been reduced to approximately 60% and is still declining. About 25 years ago, that proportion still amounted to 85%.

This trend is certainly not unique to the Netherlands. It is equally evident in other European countries, and in other parts of the world. 'The non-standard has become standard.' It was in this way that the Director-General van de ILO summarised the trend some years ago. By then, the ILO had several studies carried out on the phenomenon of the flexibilisation of the labour market.

Fred van Haasteren's study relates to those studies. He focuses on Convention 181, which the ILO established in 1997 with respect to temporary agency work. This convention was not plucked out of a hat. It had a long and intensive history, which has been described graphically in this book. As a subject of negotiations with trade unions, temporary agency work has long been 'tainted'. They felt that labour is not a commodity and that no one should make a living out of facilitating the labour market. Only the government should be allowed to act there, they believed.

This point of view was untenable in a period of deregulation, privatisation, decollectivisation, individualisation and, particularly, globalisation. And thus, a convention was realised after all, supported by the trade unions.

This study, which was defended successfully at Leiden University as a doctoral PhD thesis, reviews the impact of this convention during the past two decades. Has the convention had an effect, and was this the effect that had been intended?

However, the book also extends its scope in other directions, posing several highly relevant questions relating to the future of the labour market and its regulation in the Netherlands, in Europe and globally.

In various regions of the world, the labour market has long been at the top of the political priority lists. Likewise, it has ranked high on the ILO's priority list. Since this organisation is strongly committed to Decent Work, and since this concept now forms part of the UN's Sustainable Development Goals 2030, there is a great deal of work to be done in the international context.

Fred van Haasteren's study can play an important role in the further development of thinking about and policy-making on Decent Work in connection with flexible labour and its regulation, both internationally and nationally. That is why it is important that this study is not only available in Dutch, but also in English, so that many interested parties and stakeholders can consult it.

Paul F. van der Heijden
Professor International Labour Law Leiden University

June 2017

Preface

In 1973, I received my law degree from Leiden University. As I had written my Master's dissertation about private employment agencies, I was presented with the opportunity to participate in the *Arbeid à la carte*[1] study, which I conducted together with my colleague Martin van Overeem at the Stichting Maatschappij en Onderneming (SMO, Society and Enterprise Foundation). This publication turned out to be an important stepping-stone towards a lengthy career in the private employment sector.

During my student years, I had already worked at a private employment agency as what is now called an 'intermediary'. Thanks to my dissertation and the *Arbeid à la carte* study, I embarked on a fascinating and long career, the main part of which I spent working at Randstad. When I started there in 1982, Randstad had approximately 300 staff and employed 4,000 temporary workers daily. Before long, Randstad had expanded across the globe. In 2012 it had branches in over forty countries. By the time I retired in 2012, numbers had increased to approximately 30,000 permanent staff and exceeded more than 600,000 temporary workers per day. At Randstad, my main occupation was to give shape and substance to social policy, with regard to both temporary workers and our 'own' staff members.

Many years later, the need arose to make a scientific inventorisation on the development of the social domain with respect to temporary agency work. I regard the creation of Convention 181 as ILO's main international achievement. This study mainly focuses on the history and subsequent evaluation of the convention. From *Arbeid à la carte* to *Decent Flexibility* is a road paved with questions and challenges but ultimately, with definite solutions. It will become clear that this study bears the mark of my excessive involvement with temporary work agencies. Nevertheless, I hope that my scientific detachment has managed to bring about sufficient neutrality and objectivity.

Firstly, I would like to thank colleagues Frits Goldschmeding and Frits Drost for deciding to hire me as Chief Personnel Officer in 1982. This decision resulted in an interesting and multifaceted career with many challenges. Likewise, I wish to thank Sieto de Leeuw and Annemarie Muntz as well as other colleagues, including Ben Noteboom and Fred Farber, who in many ways assisted in developing the regulatory framework with regard to temporary agency work.

1 Van Haasteren & Van Overeem (1976). The title translates as 'Tailor-made labour'.

I am deeply indebted to all staff at VNO-NCW, viz. Niek-Jan van Kesteren, Ton Huntjes, Chiel Renique and Loes van Embden-Andres, for including me in employers' delegations at annual ILO conferences on numerous occasions. This proved an invaluable source of inspiration for the creation of this thesis.

Of course, I thank my scientific mentor Paul van der Heijden, who constantly encouraged me and helped me stay on course by periodically supervising my progress and for providing the required scientific support. I thank the members of the thesis committee, viz. Guus Heerma van Voss, Nico Schrijver, Klara Boonstra and Ferd Grapperhaus, who allowed me to defend my thesis so soon after its completion, following a thorough examination of the final version. I also thank Gijs van Wezenbeek, who was of tremendous assistance to me when I wrote the chapter about IFAS.

Last but most certainly not least, I would like to thank my wife Fia who turned everything I wrote into a readable typewritten document, which Frits Fritschy, to whom I also owe my thanks, could then convert into a printer's proof. If I mention that there were ten consecutive versions before the final manuscript could be produced, you will appreciate the full extent of my gratitude.

Our national football hero-turned-philosopher Johan Cruyff once postulated that 'when you've been married for so many years, your back is covered'. I was often reminded of this quotation when I saw everything that Fia did on my behalf. Her support has been invaluable.

Fred van Haasteren, July 2016

This study was originally written in Dutch. The proposal to have it translated into English came from within the circle of the supervisory committee. Guus Heerma van Voss in particular considered it important that the study would become widely accessible through an English-language version. My supervisor, Paul van der Heijden, rightly argues in his foreword that this study can play an important role in the further development of thinking about and policy making on Decent Work in connection with flexible work and its regulation, both internationally and nationally.

Thanks to funding by the Goldschmeding Foundation, Adecco, Randstad and the Dutch Labour Standards Foundation, SNA, this has become financially feasible, for which I am immensely grateful. I also want to express my thanks and appreciation to Josee Koning for her translation, and Frits Fritschy, acting as the unsurpassed editor-in-chief, who in the time available have buried themselves in the subject matter to such an extent that a sound translation could be produced. Finally, I would like to thank Kluwer Law International for their willingness to publish this study internationally, and their publisher Suzanne Leppen for all her efforts.

Fred van Haasteren, July 2017

About the Author

Fred van Haasteren was born in 1949. Following his high school education at St. Bonaventura Lyceum in Leiden, he read law at Leiden University (1968–1973).

He started his career as a scientific associate at the Society and Enterprise Foundation (SMO) in The Hague. In 1978, he became the commercial director at a medium-large temporary employment organisation, following which he joined the Randstad Nederland Board in 1982 as the Chief Personnel Officer. From 1990 to late 2011, he was the Executive Vice-President Social and General affairs at Randstad Holding, helping give shape and substance to its internationalisation.

From 1990 to 2005, he also acted as President of Euro-Ciett, the platform of European temporary agency employers in Brussels. From 2008 onward he was Vice-President, and from 2011 to 2014 he was President of the global temporary agency umbrella organisation CIETT.

He also was a long-term member of the General and Executive Board of the confederation of Netherlands industry and employers VNO-NCW. Since 2015 he has been a board member at the Dutch Labour Standards Foundation SNA, which, among other things, supervises the temporary agency sector by means of a certification scheme.

As of mid 2016, Dutch Minister Ploumen of Foreign Trade and Development Cooperation appointed him as independent member of the NCP OECD, the Dutch guardian of the OECD Guidelines for Multinational Enterprises.

Contents

Abbreviations

ABU	Algemene Bond Uitzendondernemingen ('federation of private employment agencies') (Netherlands)
ABVV/FGTB	Algemene Centrale der Liberale Vakverbonden van België /Fédération Générale du Travail de Belgique ('general federation of Belgian labour')
ACLVB/CGSLB	Algemeen Christelijk Vakverbond/Centrale Générale des Syndicats Libéraux de Belgique ('general federation of liberal trade unions') (Belgium)
ACTRAV	Bureau des Activités pour les Travailleurs/ Bureau of Workers' Activities
ACV/CSC	Algemeen Christelijk Vakverbond/Confédération des Syndicats Chrétiens ('confederation of christian trade unions') (Belgium)
AETT	Asociación Estatal de Trabajo Temporal
AGETT	Asociación de Grandes Empresas de Trabajo Temporal
AIWU	Aviation Industry Workers' Union
AKT	Auto- ja Kuljetusalan Työntekijäliitto (Transport Workers' Union, Finland)
AMU	Aanpak Malafide Uitzendbureaus ('fraudulent employment agencies reporting centre') (Netherlands)
AOW	Algemene Ouderdomswet ('general old age pensions act') (Netherlands)
Arbowet	Arbeidsomstandighedenwet ('working conditions act') (Netherlands)
ATW	Arbeidstijdenwet('working hours act') (Netherlands)
AVV	Wet tot het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten ('act governing the universal applicability or inapplicability of collective agreements') (Netherlands
AWB	Algemene wet bestuursrecht ('general administrative law act') (Netherlands)
AWD	Agency Work Directive
AWGB	Algemene wet gelijke behandeling ('equal treatment act') (Netherlands)
AWVN	Algemene Werkgeversvereniging Nederland ('general employers' association') (Netherlands)
BAP	Bundesarbeitgeberverband der Personaldienstleister
BCG	Boston Consulting Group
BDA	Bundesvereinigung der Deutschen Arbeitgeberverbände
BGL	Wet invoering Beschikking geen loonheffing ('payroll tax withholding (implementation) act') (Netherlands)
BIAC	Business and Industry Advisory Committee
BW	Burgerlijk Wetboek ('civil code') (Netherlands)
BWI	Building and Woodworkers International
CBA	Centraal Bureau voor de Arbeidsvoorziening ('central employment services authority') (Netherlands)
CBI	Confederation of British Industry

CBS	Centraal Bureau voor de Statistiek ('Statistics Netherlands')
CCvD	Centraal College van Deskundigen ('central college of experts') (Netherlands)
CCOO	Comisiones Obreras
CDA	Christen Democratisch Appel ('christian democratic appeal, Dutch political party)
CEACR	Committee of Experts in the Application of Conventions and Recommendations
CEDAW	Convention of the Elimination of all forms of Discrimination Against Women
CEEP	Centre of Employers and Enterprises providing Public services
CFA	Committee on Freedom of Association
CFTC	Confédération Française des Travailleurs Chrétiens
CGT	Confédération Générale du Travail
CGU	Council of Global Unions
CIETT	Confédération Internationale des Enterprises de Travail Temporale (name changed to World Employment Confederation
CLA	Collective Labour Agreement
CLL	Comprehensive Lifelong Learning
CNV	Christelijk Nationaal Vakverbond ('national federation of christian trade unions') (Netherlands)
CPI	Consumer Price Index
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSN	Confédération des Syndicats Nationaux
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DBA	Wet deregulering beoordeling arbeidsrelaties ('assessment of employment relationships deregulation act') (Netherlands, pending)
DGA	directeur-grootaandeelhouder ('director and major shareholder') (Netherlands)
DGB	Deutschen Gewerkschaftsbund
DWI	Decent Work Index
EC	European Community
ECLI	European Case Law Identifier
ECS	European Company Survey
ECSR	European Committee of Social Rights
EDM	eerstedagmelding ('first-day notification') (Netherlands)
EEC	European Economic Community
EFA	European Framework Agreement
EC	European Community
ECSC	European Coal and Steel Community
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
EFTA	European Free Trade Association
EI	Education International
EK	Eerste kamer ('upper house of the parliament of the Netherlands')

ELFS	Enterprise Labour Flexibility and Security Surveys
ELMP	Effective Labour Market Policies
EMF	European Metalworkers' Federation
EMS	European Monetary System
EPL	Employment Protection Legislation
ESF	European Social Fund
ESC	European Social Charter
ETUC	European Trade Union Confederation
EU	European Union
EU LFS	European Union Labour Force Survey
Euro-FIET	International Federation of Commercial, Clerical, Professional and Technical Employees (Organisation Régionale Européenne de la Fédération Internationale des Employés, Techniciens et Cadres)
EWCS	European Workers Conditions Survey
FEDETT	Federación Española de Empresas de Trabajo Temporal
FNV	Federatie Nederlandse Vakbeweging ('federation of trade unions in the Netherlands')
FO	Forces Ouvrières
FSU	Finnish Seaman's Union
GA	General Assembly (United Nations)
GATT	General Agreement on Tariffs and Trade
GDF	Global Dialogue Forum
GDFPSS	Global Dialogue Forum Private Services Sectors
GDP	Gross Domestic Product
GNP	Gross National Product
GRI	Global Reporting Initiative
GUF	Global Union Federation
GW	Grondwet ('constitution of the kingdom of the Netherlands')
HR	1. Human Resource
	2. Supreme Court of the Netherlands
IAMAW	International Association of Machinists & Aerospace Workers
IB	Inkomstenbelasting ('income tax') (Netherlands)
IBO	Interdepartementaal Beleidsonderzoek ('interministerial policy research') (Netherlands)
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICEM	International Federation of Chemical, Energy, Mine and General Workers' Unions
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICLS	International Conference of Labour Statisticians
ICRMW	International Convention on the Rights of Migrant Workers and their families

ICS	International Chamber of Shipping
IFA	International Framework Agreement
IFCTU	International Federation of Christian Trade Unions
IFJ	International Federation of Journalists
IFTU	International Federation of Trade Unions
IGZ	Interessengemeinschaft Zeitarbeit
ILC	International Labour Conference
ILO	International Labour Organization
IMEC	International Maritime Employers Committee
IMF	1. International Monetary Fund
	2. International Metalworkers' Federation
INEM	Instituto Nacional de Empleo
IOE	International Organisation of Employers
ISCO88	International Standard Classification of Occupations 1988
ISF	Indian Staffing Federation
ISIC	International Standard Industrial Classification
ISNTUC	International Secretariat of National Trade Union Centers
ISO	International Organization for Standardization
IT AMU	Interventieteam Aanpak Malafide Uitzendbureaus ('intervention team addressing employment agency fraud') (Netherlands)
ITF	International Transport Workers' Federation
ITS	International Trade Secretariat
ITGLWF	International Textiles Garment and Leather Workers' Federation
ITUC	International Trade Union Confederation
IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations
IWMA	International Workmen's Association
JAR	Jurisprudentie Arbeidsrecht ('employment case law') (Netherlands)
JASSA	Japan Staffing Services Association
LBV	Landelijke Belangenvereniging ('national association' (an independent Dutch trade union))
LFPR	Labor Force Participation Rate
LLL	Lifelong Learning
LTO	Land- en Tuinbouworganisatie ('agriculture and horticulture organisation') (Netherlands)
MCCG	Monitoring Commissie Corporate Governance ('corporate governance code monitoring committee') (Netherlands)
MHP	vakcentrale voor Middengroepen en Hoger Personeel ('trade union federation for intermediate and higher employees') (Netherlands)
MNE	Multinational Enterprise
MS	Member State(s)
NAP	National Action Programme

NBBU	Nederlandse Bond van Bemiddelings- en Uitzendondernemingen ('Dutch association of intermediary organizations and temporary employment agencies') (Netherlands)
NCP	National Contact Point for the OECD guidelines for multinational enterprises
NEI	Nederlands Economisch Instituut ('Dutch Economical Institute')
NEN	NEderlandse Norm ('Dutch standard')
NGO	Non-Governmental Organisation
NJ	Nederlandse Jurisprudentie ('Dutch case law')
NLRB	National Labor Relations Board
NRP	National Reform Programme
NSFE	Non-Standard Forms of Employment
NUMSA	National Union of Metal Workers of South Africa
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal of the European Union
OMC	Open Method of Coordination
OR	Onderrnemingsraad ('works council') (Netherlands)
OSH	Occupational Safety and Health
PPP	Purchasing Power Parity
PrEA	Private Employment Agencies
PSI	Public Services International
PvdA	Partij van de Arbeid ('labour party') (Netherlands)
RBDHA	Rechtbank Den Haag ('district court of The Hague') (Netherlands)
REA	Wet op de (Re)integratie Arbeidsgehandicapten ('disability (reintegration) act') (Netherlands)
REC	Recruitment and Employment Confederation
RILU	Red International of Labour Unions
RMG	Ready-Made Garments
RPO	Recruitment Process Outsourcing
RvA	Raad voor Accreditatie ('Dutch accreditation council') (Netherlands)
SATAWU	South African Transport and Allied Workers Union
SEO	Stichting voor Economisch Onderzoek ('SEO Amsterdam economics') (Netherlands)
SER	1. Sociaaleconomische Raad ('social and economic council of the Netherlands') 2. Standard Employment Relation
SFT	Stichting Financiële Toetsing ('financial safeguard foundation') (Netherlands)
SMES	Small and Medium-sized Enterprises
SMU	Stichting Meldingsbureau Uitzendbranche ('temporary employment agencies notification office') (Netherlands)
SNA	Stichting Normering Arbeid ('Dutch Labour Standards Foundation') (Netherlands)

SNCU	Stichting Naleving CAO voor Uitzendkrachten ('foundation for compliance with the collective labour agreement (CLA) for temporary agency workers') (Netherlands)
SP	1. Social Partners
	2. Socialistische Partij ('socialist party') (Netherlands)
SSR	Soviet Socialist Republic
STAR/StvdA	Stichting van de Arbeid ('Dutch labour foundation') (Netherlands)
Stb.	Staatsblad ('bulletin of acts & decrees') (Netherlands)
SVr	Sociale Verzekeringsraad ('social insurance council') (Netherlands)
SWD	Staff Working Document (European Commission)
SZW	Sociale Zaken en Werkgelegenheid ('ministry of social affairs and employment') (Netherlands)
TAW	Temporary Agency Work
TBL	Triple Bottom Line
TCA	Transnational Company Agreement
TCB	Transnational Collective Bargaining
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TK	Tweede Kamer ('lower house of the parliament of the Netherlands')
TNO	Nederlandse Organisatie voor toegepast natuurwetenschappelijk onderzoek ('Netherlands organization for applied scientific research')
TUC	Trades Union Congress
Tümtis	Türkiye Motorlu Tasit Iscileri (Turkish trade union)
TWA	Temporal Work Agency
UCM	Union des Classes Moyennes
UDHR	Universal Declaration of Human Rights
UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Enterprises ('European association of craft, small and medium-sized enterprises')
UGT	Unión General de Trabajadores
UI	Unemployment Insurance
UN	United Nations
UNCAT	United Nations Convention Against Torture and other forms of cruel, inhuman and degrading treatment
UNCHR	United Nations Commission on Human Rights
UNGC	United Nations Global Compact
UNICE	Union of Industrial and Employers' Confederations of Europe
Unie BLHP	Unie van Beambten, Leidinggevend en Hoger Personeel ('union of civil servants, managing and higher staff') (Netherlands)
UNI-Europe	Union Network International Europe
UNIZO	Unie van Zelfstandige Ondernemers ('organisation for self-employed entrepreneurs') (Brussels and Flanders)
UWV	Uitvoeringsinstituut Werknemersverzekeringen ('Dutch institute for employee benefit schemes')
VAR/WUO	Verklaring Arbeidsrelatie Winst Uit Onderneming ('declaration of independent contractor status') (Netherlands)

VAT	Value-Added Tax
VBO/FEB	Verbond van Belgische Ondernemingen/Fédération des Entreprises de Belgique ('federation of entreprises in Belgium')
VNO/NCW	Verbond van Nederlandse Ondernemingen/Nederlands Christelijk Werkgeversverbond ('confederation of Netherlands industry and employers')
VOC	Verenigde Oost-Indische Compagnie ('Dutch East India Company')
VVD	Volkspartij voor Vrijheid en Democratie ('people's party for freedom and democracy') (Netherlands)
Waadi Act	Wet arbeidsallocatie door intermediairs ('posting of workers by intermediaries act') (Netherlands)
WAGA Act	Wet arbeidsvoorwaarden grensoverschrijdende arbeid ('terms of employment (cross-border work) act') (Netherlands)
WagwEU	Wet Arbeidsvoorwaarden gedetacheerde werknemers in de EU ('terms of employment posted workers in the EU act') (Netherlands)
WAO	Wet op de arbeidsongeschiktheidsverzekering ('disablement benefits act') (Netherlands)
WAV	Wet arbeid vreemdelingen ('labour act for aliens') (Netherlands)
WAZ	Wet arbeidsongeschiktheidsverzekering zelfstandigen ('invalidity insurance (self-employed persons) act') (Netherlands)
WBP	Wet bescherming persoonsgegevens ('personal data protection act') (Netherlands)
WCL	World Conference of Labour
WEC	World Employment Confederation (formerly known as CIETT)
Wet AVV	Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten ('collective agreements (declaration of universally applicable and non-applicable status) act') (Netherlands)
Wet BIBOB	Wet Bevordering Integriteitsbeoordelingen door het Openbaar Bestuur ('public administration probity screening act' (BIBOB Act) (Netherlands)
Wet LB	Wet op de loonbelasting (wages tax act') (Netherlands)
Wet REA	Wet op de (re)integratie arbeidsgehandicapten ('disability (reintegration) act') (Netherlands)
WFTU	World Federation of Trade Unions
WIA	Wet werk en inkomen naar arbeidsvermogen ('law on work and income in accordance with capacity for work') (Netherlands)
WML	Wet minimumloon en minimumvakantiebijslag ('minimum wage and minimum holiday allowance act') (Netherlands)
WOR	Wet op de ondernemingsraden ('works councils act') (Netherlands)
WPEAC	Workshop to promote ratification of the Private Employment Agencies Convention
WPNR	Wage Penalty For Non-Regular Workers
WPR	Wage Premium For Regular Workers
WRR	Wetenschappelijke Raad voor het Regeringsbeleid ('Netherlands scientific council for government policy')
WTO	World Trade Organization
WW	Werkloosheidswet ('unemployment benefits act') (Netherlands)
ZW	Ziektewet ('sickness benefits act') (Netherlands)
ZZP	zelfstandige zonder personeel ('self-employed person') (Netherlands)

CHAPTER 1

Introduction

1.1 SUPPLY AND DEMAND

This study focuses on the development and adherent complications regarding the regulatory framework for temporary agency work. Specific attention is due to the role that ILO convention 181 plays in this respect. In 1997, this convention caused a major turnabout in the global attitude towards temporary agency work. Two decades later, it is important to examine how much store we should set by this prominent convention.

Temporary agency work is characterised by a tripartite relationship. Usually, the jobseeker registers at a temporary employment agency, which then sets out to find him or her a job. As soon as an assignment has been found, the private employment agency hires the jobseeker and assigns him or her to a commissioning client, also known as a user company. Thus, the temporary employment agency plays an intermediary role in the process of matching supply and demand in the labour market.

There are various ways to align supply and demand.[1] This ranges from tapping private contacts for assignments and candidates, to involving anonymous intermediaries who bridge the gap between supply and demand. Historically, several approaches can be distinguished.

Without claiming to be exhaustive, we might refer to Molenaar.[2] He states that, according to records dating back to the time of Hammurabi (± 1700 BC), the First Babylonian Dynasty both hired labourers on the basis of *agarum* agreements and, for harvesting, worked with so-called service provision agreements, on the basis of a *šubanti* form: harvest workers would join an organisation in which the overseer assigned his subordinates to sites according to existing needs. This made the overseer

1 Lucassen (2000), p. 43 ff

2 Molenaar (1953), p. 8.

a distant precursor of the labour subcontractor. Thus, Babylonian employment relations could be bipartite, using the *agarum* agreement, or tripartite, using the *šubanti* form. This brings to mind the tripartite relationship of the temporary employment agency in current labour law.

In 13th-century France, private forms of labour intermediation occurred in the 'Rue des commandaresses', where women (recommandaresses) 'placed' girls as domestic servants.[3]

In 17th-century Paris, both private individuals and institutions engaged in labour market allocation in the form of the 'bureaux d'adresses'. The focus was on professions outside the guild system, for instance in domestic services, trade and hospitality.[4] The *Livre commande des adresses the Paris pour 1692* lists, among others, mediation bureaus and labour exchanges for the hiring-in and hiring-out of workers.

Van Bekkum points out the rich diversity of intermediaries organising the labour allocation to match the specific needs of the various labour market segments. Thus, the Dutch East India Company employed sailors who were signed on by so-called 'crimps'. He also points out the role of innkeepers and landlords who supplied labour mediation services as a sideline. In project labour, an intermediary matched the supply and demand of seasonal and peak labour in agriculture, land development and shipbuilding, setting and paying wages. Apart from that, he also organised supervision by labour contractors, pit bosses, seasonal work overseers, foremen, et cetera.

Historically, the guilds[5] had professionally engaged not only in training and educating young talents, but also in matching supply and demand. Following the ban on guilds in nineteenth-century France, a so-called compagnonnage system (apprenticeships) took over this role.[6] Similar systems existed in Germany, organised by the 'Innungen',[7] that had succeeded the German guilds. Before World War One, they represented approximately 25% of German manual workers.

Likewise, employers and workers' organisations have professionally matched supply and demand.[8] In early nineteenth-century England, for instance, employers' clubs played an intermediary role on a private, not-for-profit basis. By the end of the nineteenth century, Paris hosted a 'labour exchange' that was funded by the city, but run by the trade unions.

3 Van Bekkum (1996), p. 42.
4 Van Bekkum (1996), p. 42.
5 Lucassen (2000), p. 46.
6 Lucassen (2000), p. 49.
7 Lucassen (2000), p. 49.
8 Lucassen (2000), p. 50.

It is hard to determine when temporary agency work first came into being. Most probably, this type of services originated in the Anglo-American world.[9] Manpower claims it pioneered temporary agency work as we now know it. Two lawyers from Milwaukee, Elmer Winter and Aaron Scheinfeld, laid the foundation by starting a temporary employment agency in 1948. Samuel L. Workman also played an important role in the development of American labour relations. By 1920, he had founded the 'Temporary Help Service', hiring workers whom he then temporarily posted elsewhere. From 1920 he did this as a sideline next to his job at a calculator factory, but by 1930 it had become his main occupation.[10]

By the 1960s, the temporary agency model had crossed from the United States to Europe. Henri-Ferdinand Lavanchy in Switzerland (Adia), Philippe Foriel-Destezet in France (Ecco) and Frits Goldschmeding in the Netherlands (Randstad) pioneered temporary agency work in Europe.

1.2 FIGURES

For some years, CIETT (Confédération Internationale des Entreprises de Travail Temporale)[11] has published an annual economic report,[12] based on data largely supplied by its members. These reports were often estimates.

Early in 2016, the data for 2014 was published. It revealed that an average of 70 million people had worked through HR services provided by temporary employment agencies, 67 million of whom as temporary agency workers. India, the United States and China were the main markets, with 27.8, 14.6 and 8.1 million workers respectively. Europe represented 11.3 million workers.[13] From 2013 to 2014, the market increased by 3% worldwide. The United Kingdom (4,189,000), France (2,051,000), Poland (920,000), Germany (839,000) and the Netherlands (701,000) constituted the main markets in Europe (see figure 1).[14]

9 Van Haasteren & Van Overeem (1976), p. 10.

10 Van Haasteren & Van Overeem (1976), p. 10.

11 As from 21 September 2016, CIETT has been renamed World Employment Confederation (WEC).

12 CIETT (2015).

13 CIETT (2016), p. 8.

14 CIETT (2016), p. 9.

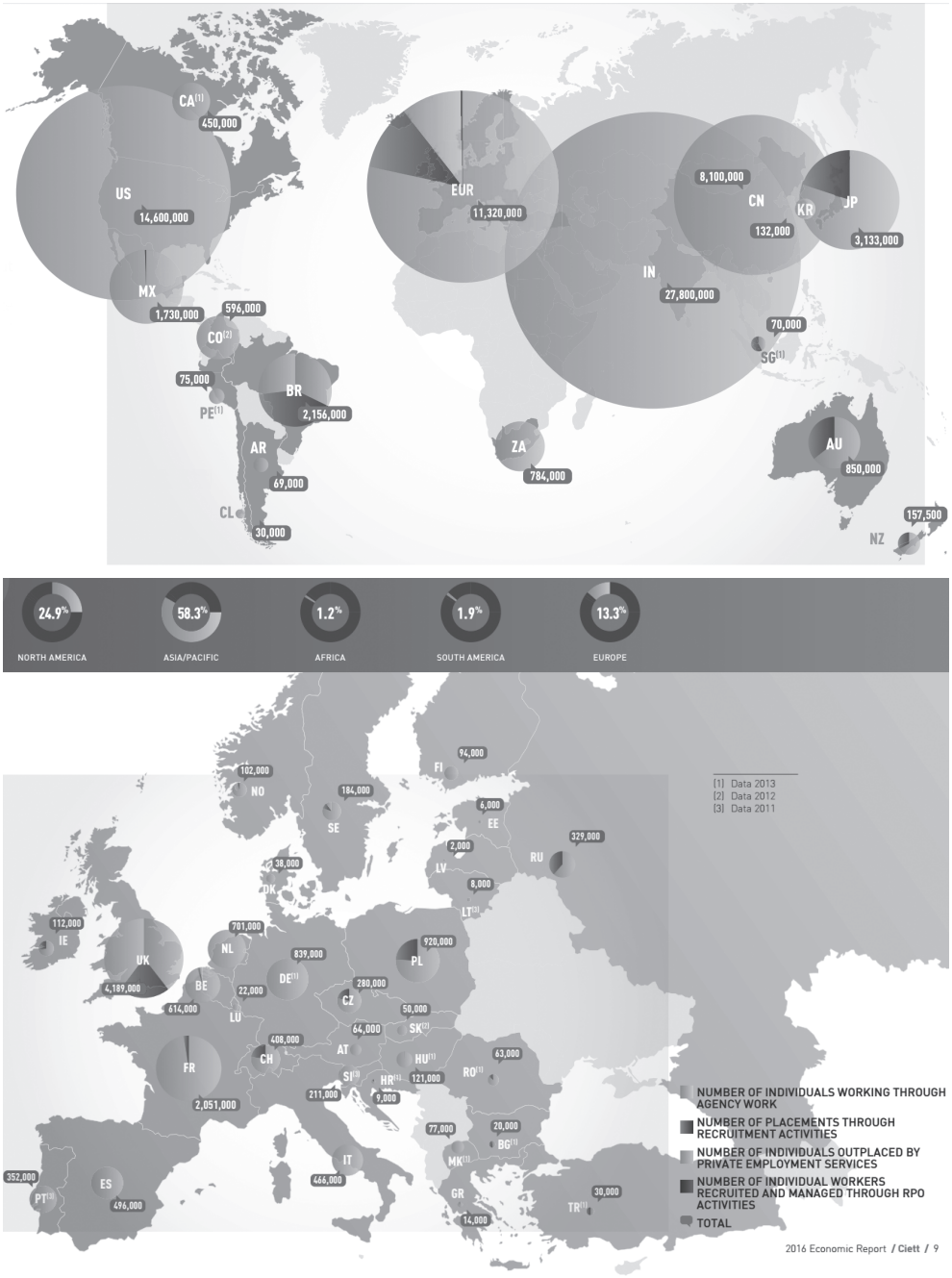


Figure 1 Total number of individuals working through HR services CIETT (2016)

1 2013 data
2 2012 data
3 2011 data

In terms of turnover, the largest temporary employment agencies are Adecco (19.5 billion euro), Randstad (16.6 billion euros) and Manpower (15 billion euros). This top three represents 16% of the worldwide private employment turnover. Together, the following seven temporary employment agencies from the top 10 represent 9% of turnover: Allegis Group 7.9 billion; Recruit 4.6 billion; Hays PLC 4.3 billion; Kelly Services 4.1 billion; Robert Half 2.8 billion; USG People 2.3 billion and Tempstaff 2 billion euros.[15]

Worldwide, temporary agency work has a 1.6% penetration rate. This percentage indicates the number of temporary agency workers in proportion to the total active population (see figure 2). Following a lapse caused by the worldwide recession since 2007, the market is recovering to pre-financial crisis levels (see figure 3). Thus, the United States has achieved a 2.2% penetration rate, Japan 2% and Europe 1.8%.[16] Otherwise penetration rates paint a variegated picture. The United Kingdom (3.9%), Australia (3.7) and the Netherlands (2.7%) score highest, whereas Brazil (0.1%), Greece (0.2%) and Lithuania (0.2%) score lowest.[17]

In 2014, HR services – including temporary employment services, recruitment and selection, RPO (Recruitment Process Outsourcing) and outplacement – generated a total turnover of 450 billion euro, an increase of 1.5% in comparison with 2013. Temporary employment accounted for 316.6 billion euro.

Temporary agency workers tend to be young people. Worldwide, 40% are under 25 and 65% are under the age of 30. Out of the temporary agency workers, 26% had higher education, 54% finished secondary school and 20% had dropped out.[18]

Larger companies make more use of temporary agency workers than smaller-sized enterprises (34% of the user companies have more than 500 employees; 32% have 100–499 employees). The smaller the company, the fewer temporary agency workers it hires (22%: 50–99 employees; 17%: 10–49 employees; 9%: 1–9 employees).[19] The main reasons for using temporary agency workers are the need for flexibility, the need for sudden adjustments, dealing with peak cycles of productivity, the need for additional staff and creating an opportunity to 'try before you buy'.[20] Hiring temporary agency workers is not the only way for companies to create flexibility within their workforce. Companies can also enter into fixed-term contracts directly or hire self-employed workers.

15 CIETT (2015), p. 17.
16 CIETT (2016), p. 10.
17 CIETT (2016), p. 11.
18 CIETT (2015), p. 58, 59, 60.
19 CIETT (2015), p. 64.
20 CIETT (2015), p. 65.

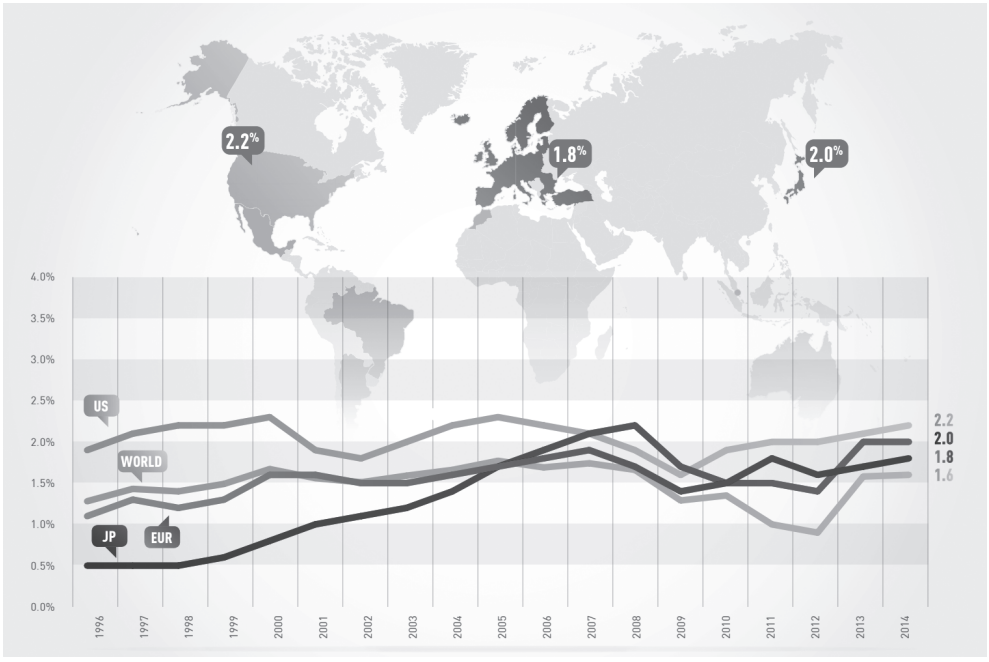


Figure 2 Evolution in key markets 1996–2014 CIETT (2016)

Figure 3 Temporary employment penetration rates CIETT (2016)
(1) 2013 data (2) 2012 data

Canada, Japan and most European countries have a flexible workforce amounting to 20–30% of the total personnel. Flex work is popular in the Mediterranean countries (more than 30%), in Poland (46%) and the Netherlands (37%). The United States have the smallest share worldwide (10%), followed by Australia (16%) and the United Kingdom (20%)[21] (see figure 4).

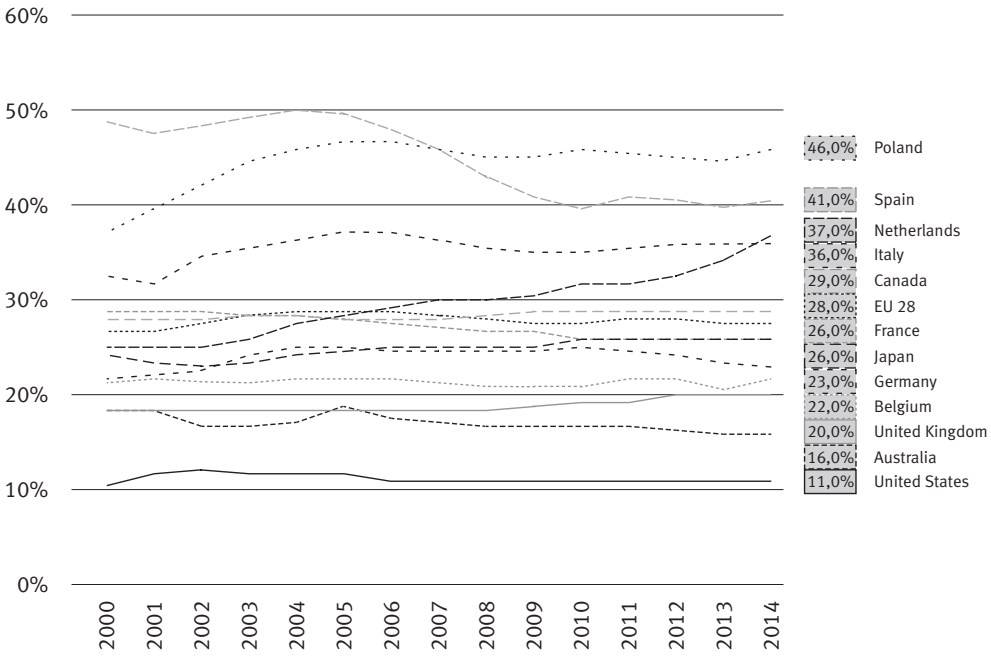


Figure 4 Flexible employment relations, 2000–2014 (in %) Blanchflower (2015)

1.3 REGULATION

According to Randstad, the need for flex work and outsourcing are factors that drive the growth of temporary agency work. Similarly, demographic development, causing both deficiencies and surpluses, require intermediary facilities to bridge the gap. Another growth factor appears to be the need for a total HR support package. Finally, regulation is often a deciding growth factor.[22]

This pertains to the domain of social law. Van Esveld[23] distinguishes three phases in the development of social law: repressing the worst kinds of malpractice; repairing contractual balance (the protection from potential malpractice) and, lastly, with

21 Blanchflower (2015), p. 170.

22 Presentation by J. van den Broek, CEO Randstad; Capital Markers Day, London, 17-11-2015, slide 11.

23 Van Esveld (1968).

regard to welfare – the development of the individual worker. Van Esveld refers to Thorbecke, who states:

> If we want to regulate, we must have and keep in mind a principle. With respect to labour law, that principle should be the protection of the socially weaker according to the standards of social justice, enhancing their power and developing their personality.[24]

In this respect, Heerma van Voss and Barentsen, as well as many others, refer to the notion of inequality compensation. This is a key concept, meaning that social law should attempt to compensate for economic inequality.[25]

Van der Heijden and Noordam observe seventeen '-ations' that influence the formation of social law.[26] They are:

- individualisation,
- flexibilisation,
- decentralisation,
- horizontalisation and informalisation,
- informatisation and computerisation,
- internationalisation, Europeanisation and globalisation,
- privatisation and decollectivisation,
- work-life integration,
- economisation and activation,
- deregulation,
- intensification.

All of these '-ations' also play an important role in the creation of the regulatory framework for temporary agency work. In particular, individualisation, flexibilisation, informatisation and computerisation, internationalisation, Europeanisation and globalisation, economisation and activation, and deregulation are influential.

Van der Heijden and Noordam discuss various rationalities. They observe that value, legal, economic and political rationalities all play individual roles in the background to the creation of social law.[27] This is reminiscent of the 'suite of fifteen aspects' that Dooyeweerd developed in his *A New Critique of Theoretical Thought*.[28]

24 Van Esveld (1968), p. 303.
25 Heerma van Voss & Barentsen (2015), p. 22; see also Betten (1997).
26 Van der Heijden & Noordam (2001), p. 7 ff.
27 Van der Heijden & Noordam (2001), p. 69.
28 Dooyeweerd (1935), p. 46; see also Rupert et al. (2015).

In creating social law, Van der Heijden and Noordam rank responsibility, socio-economic security, protection, solidarity, non-discrimination and participation as some of the basic values that must be taken into account.[29]

All of these elements should be covered. Van der Heijden and Noordam look upon the circle of those protected, the level of protection, the protected risks and reciprocity as variables entailing choices.

Lastly, there is the toolbox of social law creation that both facilitates and requires making choices regarding a public and/or private approach, through imperative law, semi-imperative law and regulatory law, through a form of central standardisation, adaptive labour law, vague norms and the option of validation.

1.4 FORMULATING THE PROBLEM

Temporary agency work as an object of international social law creation has an unruly history. In the ILO, temporary agency work was always closely linked to the issue of private commercial placement, and this has hardly been off the agenda since it was established. The phenomenon of temporary agency work developed against the current of international regulation. National governments attempted to formulate an adequate regulatory answer.

I have always wondered why it took so long before temporary agency work was granted a fully-fledged and regulatory framework.

The underlying reason lies in the fact that throughout history, social law has mainly focused on the 'bipartite employment relations' existing between employer and employee. When we discuss 'protecting the socially weak according to the standards of social justice, enhancing their strength and developing their personality', our primary concern is the relationship between employers and employees. Van der Heijden and Noordam's basic values were also focused on this relationship. In due course, an impressive social structure has been erected, which pivots on this bipartite employment relationship. The interior was designed and the garden around it landscaped. At such a point in time, it is difficult to suddenly accept a third party who makes havoc of the design and raises various questions, to which the answers previously seemed so clear. Thinking from the perspective of tripartite employment relations demands an adjustment to the state of mind and some renovation of the social structure. It demands the distribution and clarification of responsibilities.

Both internationally and nationally, the discussion pivoted on the question as to whether it was even possible to distinguish the temporary employment agency as the formal employer from the commissioning client, or user company, as the material

29 Van der Heijden & Noordam (2001), p. 76 ff.

employer.[30] The real issue was including the temporary agency model into labour law as an accepted business model.

The underlying reason is that temporary agency services were seen as job mediation for profit. The fact that money was made on it disrupted one of the main ILO principles – 'labour is not a commodity'. Over the years, this underlying reason retreated into the background. In 1972, Albeda[31] stated that it was hard to defend this attitude as long as the system of corporate production continued to be accepted.

Nowadays, economists tend to refer to 'disruptive innovation'. This takes place when 'you change something that is mainstream and create a new mainstream'.[32] Clayton Christensen referred to this idea in his book *The Innovator's Dilemma*[33] to describe innovations that create new markets and serve new clients.

Once it came into existence, the temporary employment agency was one of those disruptive innovations, and by all appearances it is still going strong. Technology, i.e. informatisation and computerisation, plays a leading role. Interestingly, these technologies in turn create new ways to match supply and demand. Jobs can be outsourced by means of an app, and flowers, taxi drivers and doctors can be called upon when needed. The so-called 'demand economy' is making huge strides.[34] It is also known as the 'gig economy', including crowd work and work on demand through apps.[35] Regulation will contribute to its chance of success, its continued existence, as well as an effective labour protection.

After many years' discussion, the ILO has finally regulated temporary agency work as a manifestation of disruptive innovation within Convention 181.

Among other things, Convention 181 states in its preamble: 'Recognizing the role which private employment agencies may play in a well-functioning labour market' and 'Recalling the need to protect workers against abuses' and aims: 'to allow the operation of private employment agencies as well as the protection of the workers using their services, within the framework of its provisions'.

The convention has become the foundation for a flourishing industry that has continued to grow in both size and professionalism. Nevertheless, we should not be oblivious to questions that demand further analysis. Therefore, it is necessary to

30 Van Haasteren & Van Overeem (1976), p. 101
31 Albeda e.a. (1972), p. 53.
32 Sprengers (2013).
33 Christensen (2011).
34 Van Noort (2015). see also: *The Economist* (2015).
35 De Stefano (2016).

assess the value of Convention 181. Nearly twenty years after its creation, a further analysis is appropriate to be able to answer the following question:

> *Viewed from the perspective of more recent international developments in social law as well as from a Dutch context, is Convention 181 (still) an effective instrument for the international regulation of temporary agency work?*

First, I shall indicate in part I how the development and the corresponding complications of a regulatory framework for temporary agency work have taken place within the ILO. In part II, I shall work out which major developments have occurred in international social law and what these mean for Convention 181. Part III will be wholly dedicated to a Dutch perspective on Convention 181. In eight chapters spread over these three parts, I shall go into a number of related sub-questions.

In **part I, chapter 2** I shall present the question:

> *How has the ILO regulation for temporary agency work developed over the years?*

In **part I, chapter 3**, this is followed by:

> *Which complications can be observed in relation to this framework?*

In part II, I shall dedicate four chapters to a series of developments in international social law and their effects on Convention 181. Since this convention was created, international social law has evolved with respect to the following '-ations', as Van der Heijden put it:

1. *decent-isation:* the introduction of the concept of decent work in international social law (chapter 3);
2. *human right-ification:* the increasing importance of the theme of human rights in international social law (chapter 4);
3. *IFA-isation:* the creation of worldwide agreements in the area of international social law, the so-called IFAs (chapter 5);
4. *European-isation:* the consequences of European cooperation for international social law (chapter 6).

More specifically, the question in part II is how these so-called '-ations' have had influence on Convention 181. Does this convention still have any value and is it still adequate if we compare these '-ations' to its contents?

ad 1. Decent Work has become a catch-all phrase that tries to give substance to the improvement of working conditions in general. Many discussions both within and beyond the ILO are modified by this notion.

The opposite of decent work is the precarisation of work. Temporary agency work is often classed as precarious work. As a result of the complication in respect of the ILO framework for temporary agency work, the following **sub-question for part II, chapter 4** appears indispensible:

> *What do we mean by 'decent work' and how can this be contrasted with temporary agency work under ILO convention 181?*

ad 2. Human rights increasingly influence the behaviour of (multinational) companies. By way of the OECD guidelines, which now include the Ruggie framework 'protect, respect and remedy', the Bill of Rights has become a guideline that enterprises increasingly must take to heart. This begs the question as to whether Convention 181 can still be considered a valuable instrument now that companies are also subject to the desired regulation due to the obligation to observe human rights. Therefore the **sub-question presented in part II, chapter 5** reads:

> *Which developments with respect to human rights have occurred specifically for companies and how can their results be valued in relation to the achievements of ILO convention 181?*

ad 3. Subsequently, more and more multinational companies enter into IFAs (International Framework Agreements) together with various international trade unions. These agreements cover a wide range of subjects within social policy. **Sub-question in part II, chapter 6**, then, reads:

> *How has the Global Social Dialogue developed and how does this development relate to ILO convention 181? Are the corresponding IFAs substitutes for and/or additions to ILO convention 181?*

ad 4. International social law has attained an essential European dimension that has had, and still has, a vast influence on the creation of social law. Apart from the ILO, Europe has exhaustively discussed temporary agency work. The exact relationship between European labour law and ILO convention 181 requires further analysis. This should focus specifically on the question as to whether Convention 181 still has value, knowing that much European legislation has been drawn up with respect to temporary agency work. Hence, the sub-question that must be dealt with **in part II chapter 7** reads:

In which direction does the creation of social law with respect to temporary employment develop at European level and what does that mean for the value and scope of ILO convention 181?

Following these discussions on international social law, in part III I aim to dwell on the Dutch social law context with regard to temporary agency work. ILO Director-General Guy Ryder recently stated that: 'No country has as many self-employed people, temporary agency workers and part-time workers as the Netherlands.' He considers the rapidly expanding flexibilisation in the Netherlands as a forerunner of what awaits other European countries. 'You cannot reverse this trend, merely streamline it in an acceptable way.'

According to Ryder, the future labour market will be dominated by casual, temporary employment arrangements. The employee with a permanent contract belongs to a shrinking minority. Ryder argues that this has huge repercussions for social security, but also for the consultation model of employers and employees. In this respect, the Netherlands can be a testing ground. Is it possible to link those flex types to protection and legislation in such a way that they become high-quality alternatives for a permanent position? That question has yet to be answered. I will not deny that this is extremely complicated, however, you cannot reverse flexibilisation either.[36]

Thus, the Netherlands serves as a forerunner for developments elsewhere and subsequently as a testing ground. Against the background of these remarks, I intend to discuss the following **sub-question with regard to the Netherlands in part III, chapters 8/9.**

How has the temporary agency legislation developed in the Netherlands; which complications have presented themselves and how can they be evaluated in relation to ILO convention 181?

Lastly, I intend to synthesise my observations and answer the question as to whether, in the light of my observations, ILO convention 181 still has value and is an adequate foundation for the international temporary agency sector. The subject is highly dynamic and developments take place in rapid succession. It should therefore be noted that the final version of this manuscript is entirely up to date until the end of June 2016.

36 Leupen (2015), interviewing Ryder for *Het Financieele Dagblad, a* daily Dutch newspaper that focuses on business and financial topics.

PART I

AN ILO FRAMEWORK FOR TEMPORARY AGENCY WORK: DEVELOPMENT AND COMPLICATION

CHAPTER 2

Development

How has the ILO framework for temporary agency work developed over the years? This chapter takes stock of discussions held within the ILO. Private employment agencies, particularly those run on a for-profit basis, have been under debate within the ILO since its earliest days. Initially, temporary agency work as such was not the issue, but the corresponding phenomenon of placement was. In due course this changed, resulting in ILO convention 181 in 1997.

This chapter will pay attention to the development and impact of the convention and to how social partners and governments appreciated ILO convention 181. Subsequently, chapter 3 will present questions with regard to the convention that have since arisen.

2.1 PROGRESSING FROM CONVENTION 2 TO CONVENTION 181

2.1.1 The fundamental principles of the ILO[37]

The ILO was established at the Paris Peace Conference in 1919 as a means to promote social progress, i.e. by resolving social and economic conflicts through dialogue and cooperation. Its founders opted for a worldwide consultation model, as opposed to the conflict model that prevailed at that time. They sought common rules, policies and implementation in the interest of employers, employees and governments. Peace and justice go hand in hand; war – they found – does not always result from injustice. Conversely social justice is emphatically essential to universal and lasting peace.

In the 1944 Declaration of Philadelphia, the fundamental principles of the ILO, as adopted in the ILO constitution, were further developed. These principles are:

- Lasting peace cannot be achieved unless it is based on social justice, grounded in freedom, dignity, economic security and equal opportunity.
- Labour should not be regarded merely as a commodity or an article of commerce.

37 Rodgers et al.(2009), p. 6 and 7.

– There should be freedom of association, for both workers and employers, along with freedom of expression, and the right to collective bargaining.

These principles are fully applicable to all human beings, irrespective of race, creed or sex. Poverty anywhere constitutes a danger to prosperity everywhere, and must be addressed through both national and international action.

2.1.2 The ILO policy concerns [38]

The fundamental principles listed above need to be implemented in several fields. The ILO constitution stresses seven central policy concerns:

– the promotion of full employment and rising standards of living, in occupations in which workers can apply their capabilities and contribute to the common well-being – along with equal opportunity for men and women in achieving this end, and facilities for training and for migration;
– the provision of an adequate living wage for all those employed, calculated to ensure a just share of the fruits of progress to all;
– the regulation of hours of work, including the establishment of a maximum working day and week, and of weekly rest;
– the protection of children, young persons and women, including the abolition of child labour, limitations on the labour of young persons and the provision for child welfare and maternity protection;
– protection of the economic and social interests of those workers who are employed away from the country of birth;
– the adequate protection of all workers against sickness, death and injury arising out of employment;
– the extension of social security measures to provide for old age and ill health, a basic income to all those in need of protection, and comprehensive medical care.

2.1.3 Four means of governance [39]

The ILO realises its goals by means of four governance instruments:

– tripartism: the representatives of workers and employers, enjoying equal status with that of governments, join with them in free discussion and democratic decision on social and economic measures, and collaborate in increasing productive efficiency;

38 Rodgers et al.(2009), p. 8.
39 Rodgers et al.(2009), p. 9.

– the adoption of international conventions and recommendations to be submitted to national authorities for ratification or other actions;
– a system of supervision to ensure enforcement of the laws and regulations concerned;
– cooperation among international bodies to ensure that all economic and financial policies contribute to social progress and well-being.

2.1.4 1919, discussing placement of workers: preference for public and aversion to private placement [40]

Ever since the ILO was established, there has been much debate about placement. Ever since the first ILO conference, which took place in Washington in 1919, the participants have discussed placement of workers as part of the dialogue about instruments to tackle unemployment. With regard to the role of public employment services instituted in various countries, one speaker underlined their vast importance and stated that they should be strongly promoted. Thus, a convention on unemployment should pay much attention to instituting public employment services in ratifying countries – where these were not already in place. In view of public employment services the existence of private employment agencies were of particular concern. The speaker argued that this kind of worker exploitation occurred mainly in Europe, and that action must be taken to stop it. In any case, a licensing regime should be in place. Where some participants criticised placement carried out for profit, others applauded it. For instance, the Brazil delegate failed to understand why fee-charging employment agencies should be forbidden if this activity was being undertaken fairly and according to regulations, the more so since the freedom of enterprise had been included in the Brazilian constitution.

Eventually, the conference proposed the following convention text with respect to employment agencies:

> (Draft Convention no. 2)
> The states ratifying the present convention or acceding thereto shall establish in their respective countries a system of free public employment agencies under the control of a central authority. Committees, which shall include representatives of employers and representatives of the workers, shall be appointed to advise on matters concerning the carrying on of the work of such agencies. In States where both public and private free employment agencies engage in the work of finding employment for the unemployed, such States shall take measures to coordinate the operations of any or all of such agencies on a national scale. The operations of the

40 ILC (1919), p. 132, 144, 145, 192.

> several national systems shall be coordinated by the International Labour Office in agreement with the States concerned.[41]

Subsequently, a recommendation proposed the following text:

> (Draft Recommendation no. 1)
> The General Conference recommends that each Member of the International Labour Organisation take measures to prohibit the establishment of employment agencies which charge fees or which carry on the business of an employment agency for profit.
> As regards the States in which agencies of this nature already exist, the conference recommends:
> That these agencies shall operate only under licenses granted by the State, and that all practicable measures shall be taken to abolish such agencies as soon as possible.[42]

Ultimately, both texts were included in Convention 2 and Recommendation 1. Overall, in 1919 there was a clear preference for public placement; if private agencies were in place, it was recommended that their activities should be subject to licensing and that Member States should do their best to ensure that private agencies disappear as soon as possible.

2.1.5 1920, abolition of private placement in the Maritime Convention[43]

During its second session in Genoa in 1920, the ILO went a step further. Maritime matters were under discussion, and the principle of abolishing fee-charging agencies was included in full in the convention issued on this subject. The convention stipulated that:

> […] the business of finding employment for seamen shall not be carried on by a person, company or other agencies as a commercial enterprise for pecuniary gain [...] Notwithstanding [these] provisions [...] any person, company or agency, which has been carrying on the work in finding employment for seamen as a commercial enterprise for pecuniary gain, may be permitted to continue temporarily under Government licence, provided that such work is carried on under Government inspection and supervision so as to safeguard the rights of all concerned.

41 ILC (1919), Appendix, chapter II, p. 235.
42 ILC (1919), Appendix, chapter II, p. 235.
43 ILC (1932a), p. 1.

> Each member which ratifies this convention agrees to take all practicable measures to abolish the practice of finding employment for seamen as a commercial enterprise for pecuniary gain as soon as possible.

And thus, the prohibition of fee-charging employment agencies was set down in an ILO convention for the first time.

Ten years later, during the 48th session of the Governing Body, the German government again drew attention to the fact that the Washington convention had not prescribed abolition of fee-charging agencies and that this did not tally with German national legislation, which was to abolish them as per 1 January 1931.[44] It was proposed to review the 1919 unemployment convention, or develop a new one. The German government was willing to waive a review if the Governing Body were prepared to enter the subject on the agenda for one of the following conferences. In 1930 the Governing Body finally decided to enter the subject on the agenda for the 1932 conference.

2.1.6 Widespread abuses in private placement

It was clear that fraud, abuses and immorality in connection with fee-charging employment agencies were rife, and this soon necessitated national 'prohibition' legislation.[45]

Instances of abuse that were noted were: demanding exorbitant fees, demanding fees without actually rendering services, misrepresenting working conditions, failing to place truthful adverts, unfair treatment of candidates, iterating placement by sharing fees with employers and foremen, placing applicants in non-existing or immoral jobs, violence, trafficking in women, placement to replace striking workers, bias and discriminating between organised and unorganised workers, granting credits under bad conditions, keeping back wages and identity papers, provision of housing and lodging facilities to applicants by people with whom the placing agency has deals, forced purchase of shoes and other articles.[46]

All these abuses inspired the idea that national governments were best suited to organise the labour market by means of freely accessible employment facilities.[47] The 1919 Washington convention had already laid this down, and it had by then been implemented far and wide. Exceptions remained in place for specific occupations, which the government had not dealt with at the time.

44 ILC (1932a), p. 2.
45 ILC (1932a), p. 8.
46 ILC (1932a), p. 9; see also p. 111.
47 ILC (1932a), p. 11.

Initially, national legislation provided guarantees against abuses, but later the focus shifted to banning fee-charging employment agencies, since that was the most effective way to end the abuses. Their operating activities were considered to be inconsistent with human dignity and in breach of social justice, as well as hampering the efficient organisation of the labour market and the principle of freely accessible placement.[48]

2.1.7 Questionnaire about approach

The decision to put the issue on the agenda for the 1932 ILC resulted in national governments being sent a questionnaire that included the following questions:

- Should there be a convention or a recommendation?
- What definition should or should not be included for fee-charging and non-fee-charging employment agencies?
- Should the scope be defined by means of specifying the occupations concerned?
- What exceptions are there?
- At what time will the ban on fee-charging employment agencies come into force?
- What transitional measures and penalties are necessary?[49]

At the time, the committee had unanimously supported the decision to put the issue on the agenda for the 1932 ILC. However, not all committee members were negative about fee-charging employment agencies. A Belgian employers' delegate wondered whether the abuses should be tackled or rather the fee-charging employment agencies themselves.[50]

There were also other points of view regarding the fee-charging agencies. Some of them rendered valuable services and could not be accused of abusing their position. Implementing a licensing system was also a way of preventing abuses. The ILO Office report had also provided examples of licensing. Thus, in view of increasing unemployment, the question arose as to whether abolishing private employment agencies that did not imply any dangers and provided a good service was actually prudent.

It was said to be remarkable that these fee-charging agencies existed alongside – and therefore could successfully compete with – the public employment services, even though the former charged fees while the latter was free. Thus, the governments must also answer the question as to whether they thought these operating activities should be allowed. Although this vision was contested at some point during the delibera-

48 ILC (1932a), p. 12.
49 ILC (1932a), p. 129–130.
50 ILC (1932b), p. 287.

tions, the questionnaire still left room for a decision to be made about private employment agencies, both those operating for profit and those not operating for profit.

The questionnaire was despatched to the governments in May 1932. The idea was to take the results of the questionnaire into consideration during the 1933 deliberations. In the end, 29 Member States filled in the questionnaire, i.e. Australia (the states New South Wales and Victoria), Austria, Belgium, Bulgaria, Canada, Chile, Cuba, Denmark, Estonia, Finland, France, Germany, Great Britain, Hungary, India, Italy, Japan, Latvia, the Netherlands, New Zealand, Nicaragua, Norway, Poland, Romania, South Africa, Spain, Sweden, Switzerland and Yugoslavia. Seven of these Member States (Australia, Austria, Great Britain, Japan, New Zealand, South Africa and Switzerland) were ultimately against an 'abolition convention', or at least had certain objections to abolition. The vast majority of 22 Member States were in favour of such a convention.[51]

Even though the Member States proved to have a marked preference for abolishing private employment agencies, total abolishment did not obtain a majority. It was suggested to restrict abolishment to private 'for-profit' agencies carried out for profit and to allow the not-for-profit agencies to continue under certain conditions. A number of governments saw this type of services as a useful addition to public employment services.

2.1.8 1933, Convention 34 on 'fee-charging employment agencies'[52]

The eventual convention distinguished fee-charging employment agencies carried out for profit from the non-profit-making type. The first type was to be abolished and the second to be put under supervision. Fee-charging employment agencies carried out for profit were described as: 'any person, company, institution, agency or other organization which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving directly or indirectly any pecuniary or other material advantage from either employer or worker', on the understanding that newspapers were exempt, unless they could be seen as intermediaries.

By fee-charging, not-for-profit employment agencies were meant: 'the placing services of any company, institution, agency or other organization which, though not conducted with a view to deriving any pecuniary or other material advantage, levies from either employer or worker for the above service an entrance fee, a periodical contribution or any other charge.[53]

51 ILC (1933a), p. VI, 81.

52 C034 (1933).

53 ILO (1951), p. 179.

The key provision in the Convention is article 2, stating that: 'Fee-charging employment agencies should be abolished within three years from the date on which the Convention comes into force for the Member concerned'. During this three-year-period, no new fee-charging employment agencies must be established and any existing agencies were subject to government supervision and a government-approved fee structure.

Article 3 lists exceptions to the key provision of abolishment after three years with regard to special worker categories defined by national laws or regulations. However, no new placement activities must be established after three years. The exceptions were subject to supervision and must apply annually for a new licence for a maximum period of ten years, must adhere to a government-approved fee structure, and could only undertake cross-border activities if they were licensed to do so, and if a bilateral agreement to that effect was in place.

Article 4 refers to fee-charging but not-for-profit private employment agencies, which continued to be allowed, albeit subject to government supervision and a government-approved fee structure.

In article 5, an obligation to report is introduced for all employment agencies.

The recommendation accompanying this convention (no. 42), includes measures[54] 'to adapt the free public employment offices to the needs of the occupations in which recourse is often had to the services of fee-charging employment agencies', for instance farm workers, domestic workers, salaried employees, professional workers, artists, musicians and nurses. Persons engaging in prostitution, the hotel industry, activities with regard to selling second-hand goods or credit facilities must not engage in placement.

The committee's rapporteur, Mrs Letelier, stated that the adoption of the convention would put a stop to a large part of the abuses reported early on in the deliberations. The convention was to complete the work started by the 1919 Washington convention, deciding for public employment services and logically abolishing fee-charging employment agencies, as had been included in the recommendation at that time.

2.1.9 1944, a more comprehensive labour market approach is called for[55]

The way of thinking about how placement could play an optimum role in the labour market did not stand still. The war situation had produced huge shifts in the labour market, and within the ILO the outlook had taken root that a post-war policy must

54 ILC (1933b), p. 139–140.

55 ILC (1944).

be formulated to normalise the labour market relations. This went far beyond merely underlining the need for a labour market institution, resulting in a complete labour market programme consisting of 11 chapters and 45 agenda items. The programme went down in history as *Recommendation (no. 71) concerning Employment Organisations in the Transition from War to Peace*.

Its starting point was 'the promotion of full employment with a view to satisfying the vital needs of the population and raising the standards of living throughout the world'. Thus, matching supply and demand in the labour market should be organised effectively.[56]

The widest possible use of employment service facilities was crucial,[57] as was providing training facilities and industrial policies, and paying specific attention to young people, women and disabled workers.

The ILO encouraged national governments to collect the necessary information regarding supply and demand in the labour market; moreover, it strived for a systematic approach to demobilising the armed forces while converting a wartime economy into a normal economy.

As this comprehensive labour market approach required efficient employment services to have good infrastructure, a separate recommendation – *Recommendation (no. 72) concerning the Employment Service* – focused on this. The essential responsibilities of the employment services were listed as follows:[58]

- collecting and making available information concerning labour supply, employment opportunities, the skills required to do particular jobs, changes in skill requirements within the different industries, employment and unemployment trends, the regularisation of employment and the causes of unemployment, and other information of value in promoting full employment;
- assisting workers to find suitable employment and employers to find suitable workers;
- assisting in developing and in determining the content of training and retraining courses;
- developing methods of facilitating the transference, where necessary, of workers from one occupation or area to another;
- helping to achieve the best possible distribution of manpower within each industry and area;
- co-operating as may be required in the administration of unemployment insurance and assistance;

56 ILC (1944).
57 ILC (1944).
58 ILC (1944).

– assisting other public and private bodies in planning the location of industry, public works, housing projects, social amenities, and other social and economic measures.

It is remarkable that neither recommendation pursued the distinction between public employment services and private agencies. This was expressed particularly well in paragraph IV of Recommendation 71:

> In the organisation of full employment in the transition period and thereafter the widest possible use of employment service facilities by employers seeking workers and by workers seeking employers should be encouraged by the competent authorities and by employers and workers organizations.[59]

In effect, a convention now existed alongside two recommendations that pivoted on the role of public employment services. Whereas the promotion of public employment agencies was set down in the 1919 convention, both 1944 recommendations further specified the agenda of a more comprehensive labour market policy, including a steering role for the public employment agencies.

At the time, the 1919 Washington convention was ratified by 31 countries and was widely emulated in the years after. In 1947, the Governing Body entered the employment service organisation on the ILC agenda, aiming to have a convention adopted about this subject.

The war situation had certainly not boosted public placement[60] and moreover Nazi Germany had 'benefited' from the existing infrastructure of public employment services. A Czechoslovakian delegate had stated that the employment services had become one of the most hated symbols of the German occupation, and thus it was not easy to invest these employment services with a new spirit and secure a positive public perception.

Nevertheless, the need that arose by 1946 to tackle the labour market problems resulted in remarkable efforts that boosted the employment service in ways intended in the 1944 Recommendations 71 and 72. Earlier, President Roosevelt had aptly expressed this by stating that the employment services should operate like a corner shop greengrocer,[61] the specialist in labour market affairs, in order to play a vital and urgent role in full employment planning.

59 ILC (1944).
60 ILC (1946), p. 12.
61 ILC (1946), p. 13.

2.1.10 Employment services survey[62]

In 1947, the ILO conducted an extensive employment services survey among the national governments, the results of which were to inform the deliberations during the 1948 ILC. A questionnaire inquired whether a convention possibly accompanied by recommendations was desirable. Also the questionnaire asked about matters such as: aim of labour market policies, desired organisational structure, involvement of employers' and employees' organisations, specialisation by occupations, collection of information with regard to promoting labour mobility (including geographical mobility), cooperation on unemployment insurance, commitment to employment policy, ways of involving jobseekers and employers, international cooperation and the role of private employment agencies.

This last topic was included in the questionnaire[63] at the request of the Swedish government, which had had issues with the international placement of musicians and artists. The 1933 convention (no. 34), which Sweden had ratified, laid down that exempted private for-profit employment agencies were only allowed to conduct cross-border mediation if their government had licensed them to do so and entered into bilateral agreements with the countries concerned. Sweden's attempts to make such agreements with (neighbouring) countries had not been successful. As a result, the government feared that the placement of musicians and artists from Sweden would shift to other countries that had an advantage over Sweden by not ratifying the convention. The ILC complied with Sweden's request, so that this part – the revision of the 1933 Fee-Charging Employment Agencies Convention – was also put on the agenda at the 1948 ILC deliberations on the employment service in general.

2.1.11 1948, Convention 88 and Recommendation 83[64]

The 1948 ILC eventually proposed a convention and a recommendation concerning the employment services organisation. The convention obligated ratifying Member States to institute a public employment service and, in cooperation with other private and public parties to organise matters in such a manner as to achieve the aim of full employment. They should, among other things, have a local network, seek advice from employers' and workers' organisations, develop labour market policies, conduct placement activities, organise occupational and geographical labour mobility, collect labour market data, enable specialisation with regard to occupations and industries, hire staff and guarantee cooperation with private not-for-profit employment agencies.

62 ILC (1946), p. 13.

63 ILC (1946), p. 220–233.

64 ILC (1947a, b).

The ILC recommended that national governments establish a head office and local offices, formulate a policy for young and disabled workers, collect labour market information, arrange funding, maintain neutrality in the event of strikes and facilitate mobility.

It was also suggested that the 1933 Fee-Charging Agencies Convention (no. 34) be amended, replacing the three-year period after which the for-profit employments agencies were to be abolished with a provision that left the decision for the time frame for the abolition to the national governments.

Furthermore, new agencies might establish themselves provided they specialise in worker categories that the public employment services could not place. International placement should be allowed to proceed under conditions provided by national law.

The proposed convention was adopted in 1948 and went down in history as Convention 88; the recommendation was also adopted, as Recommendation 83.

2.1.12 Revising Convention 34[65]

At the request of employers, the relevant committee accepted the revision of the 1933 Fee-Charging Employment Agencies Convention (no. 34) with 26 in favour and 24 against,[66] following a discussion among the committee that strained mutual relations. During the 1948 revision discussion, the English employers had submitted a far-reaching amendment; rather than abolishing the private for-profit employment agencies over the course of time, they wanted to facilitate them subject to government supervision, licensing and a government-approved fee structure. All the employers sided with this proposition. They were convinced that the fee-charging agencies played a useful role in the labour market. Furthermore, they stressed that only six countries had ratified Convention 34. The governments of New Zealand, India and South Africa endorsed the amendment.

The employees stated that here were widespread abuses and that the private for-profit employment agencies were responsible for exploiting workers. The Belgian, French, Polish and Turkish government representatives endorsed this point of view. The United States government abstained from voting; it had always been against an 'abolition convention', but did not think it would do the ILO's work any good if a convention be revised so soon afterwards. The United Kingdom government endorsed this point of view.

Eventually, the 1948 ILC was to reject the revision of the 1933 Fee-Charging Employment Agencies Convention (no. 34) by a small margin of 39 to 35 (5 absten-

65 ILC (1947a); ILC (1947b), p. 76; ILC (1948).

66 ILC (1947a); ILC (1947b), p. 76; ILC (1948), p. 10.

tions).[67] The limited success of Convention 34 and the failure to revise it necessitated a renewed discussion during the 1949 conference, for which a resolution was submitted and adopted.[68]

2.1.13 1948, questionnaire regarding revision of Convention 34; 1949, Convention 96 as a compromise[69]

In preparation to the discussion, a questionnaire was despatched to the governments. Nineteen governments, i.e. Burma, Canada, Ceylon, Chile, China, Egypt, Finland, France, India, Italy, the Netherlands, New Zealand, Norway, Pakistan, South Africa, Sweden, Switzerland, Turkey and the United Kingdom proved to be in favour of regulation, including regulation of the private for-profit employment agencies. The remaining thirteen appeared to prefer the abolition variant. This outcome induced the ILO office to present a compromise text, opting for a two-variant convention.

One variant, part II, was based on abolition of the private for-profit employment agencies at a date yet to be determined. To the extent that private for-profit employment agencies continued to exist, they were to be subject to supervision and to a prescribed fee structure. Exemptions for certain categories of workers continued to be possible, with the proviso that supervision, annually renewable licences also applied to them. A requirement for permission and for prescribed fee structures applied to not-for-profit employment agencies.

The other variant, Part III, was based on the regulation of the private, for-profit employment agencies conditional on supervision, licensing and a prescribed fee structure. This variant also included the option of private not-for-profit employment agencies requiring government authorisation and compliance with a scale of charges fixed by national government.

Thus, Member States who wanted to ratify the convention could comfortably remain on the fence by choosing between both variants. Although the majority were in favour of the abolition variant, they obviously did not want to risk there being a total ban on the private for-profit employment agencies. The 1948 discussion, which did not yield a convincing majority for either option, together with the fact that the strict Convention 34 had led to few ratifications, apparently prompted the ILO Office to compromise.

After forty years' discussion about whether or not to allow fee-charging employment agencies, a solution appeared to be at hand by passing this ILC-adopted revised version.

67 ILC (1948), p. 34.
68 ILC (1948), p. 2.
69 C096 (1949).

2.1.14 Focusing on temporary agency work

It took 43 years for the ILO to put the topic of private employment agencies back on the agenda; the Governing Body took this decision during its 254th session in November 1992.[70]

In the interim period, the topic did excercise many minds within the ILO. In 1966, the Swedish government, confronted with the increasing role of temporary employment agencies within its borders, inquired whether these operational activities could be considered to fall under Convention 96, under the concept of fee-charging employment agency. The Director-General of the ILO took the view that it did, and therefore that the relevant exemption clause in the convention must be reconsidered. Many countries did not agree with this view, since a temporary employment agency is, after all, not an intermediary but an employer that lends its workers to another commissioning employer. Thus, the convention would not apply, which is why various countries developed specific legislation of their own.

In 1973, the Member States voted on a draft resolution[71] containing the proposal to analyse in more detail the role that temporary employment agencies played and to put this topic on the agenda of one of the following conferences. However, the resolution was shelved due to a lack of the requisite quorum. Since then, this topic has repeatedly come up for discussion within the ILO, but no decision has ensued. In the interim the temporary employment sector continued to grow.

In 1991 however, during the 250th and 251st sessions of the Governing Body, this changed, as the idea came up to view temporary agency work from the wider perspective of placement and to enter this topic on the 1993 ILC agenda. The difference between that and earlier attempts was the idea to first have a general discussion on the topic.[72]

2.1.15 The Ricca report[73]

The ILO prepared this discussion by means of a study by Sergio Ricca that had been rounded off in 1944 and was therefore appropriate for treatment in a general discussion in that year. Ricca was working for the ILO at the time and had been requested by the Office to conduct this study. In his report *The role of private employment agencies in the functioning of the labour market,* Ricca challenged the monopolistic approach to thinking about placement. In his report he had included an inventory of no fewer

70 ILC (1994), p. 1.
71 ILC (1994), p. 1.
72 ILC (1994), p. 3.
73 ILC (1994), p. 1.

than fifteen types of intermediary services that existed at the time. Apart from the fee-charging employment agencies, he listed:

> Overseas employment agencies, agencies for the recruitment and placement of foreigners, temporary work agencies (TWAS), contract labour agencies, staff leasing agencies, executive search agencies, outplacement agencies, job search consultants, personnel management consultants, training and placement institutes, job shops or cooperatives, employment advertising agencies, computerized job database agencies, career management agencies, employment enterprises or intermediary associations.[74]

Ricca stated that this list was not exhaustive and that there were certainly overlaps; moreover, while some types faded away, others emerged. The analysis made it clear that the world of the intermediary services was hugely dynamic.

He also provided an analysis of the backgrounds of these old and new types of intermediary services. As growth factors he listed: the need for flexibility, quick changes in skills structures, reducing production costs, reducing labour costs, changes in organisational methods of enterprises, a new role for the State, proliferation of agencies, structural adjustment programmes, rising unemployment, innovative services, reconsideration of the role of public employment services, the notion of the state as a client, self-regulation of private agencies and new lifestyles (behaviour shifts).[75] Ricca also pointed out the legal aspects of these intermediary services, including the triangular relations that are inherent in temporary agency work.[76]

He observed eight arguments against and seven in favour of intermediary services. First, he listed the arguments against:[77]

- Private agencies are skimming off the market; they are not interested in those who are less fit for work.
- There is no further investment in people by means of training.
- The promotion of labour mobility is only motivated by profit.
- Precariousness is on the increase.
- Collecting labour market information is made difficult.
- Competition creates too many negative effects.
- Agencies circumvent the law.
- Agencies abuse the situation.

74 ILC (1994), p. 11.
75 ILC (1994), p. 31.
76 ILC (1994), p. 40.
77 ILC (1994), p. 49.

As arguments in favour Ricca listed:
- Intermediary services create scope for experiments in transitional periods.
- The market function is much improved.
- There is a lower cost/benefit ratio compared to monopolies.
- There is freedom of choice
- Good and bad market players are easier to tell apart.
- The State does not function optimally either.
- The market has the last word.

Ricca concluded that a partial or total ban no longer has any value. He stated:

> Now that it is clearly no longer practicable, the prohibition approach should reasonably be discarded. But how can this be done without at the same time abandoning the principals that inspired the supporters of a ban, i.e. the principals of protecting vulnerable unemployed workers, of defending the interests of all those involved in the labour market and not just those of private groups and of equal opportunity in employment for all? This is certainly the heart of the problem. Our hopes of finding a way out of this controversy which has exercised so many minds for so many years, depend directly on our ability to come up with a valid answer tot this question.

He went on as follows:

> The problem is to define a model of labour market organization that will reconcile the activity of private agencies with the priority of public over private interest. Formidable as it may seem, the problem is not insoluble to start with. A definition of a model should be based on a number of clear principals.[78]

At that stage in his report, Ricca presented the notion of shared labour market management, including regulation and control of private agencies by the State, and a complementary role aimed at cooperation for the private agencies. He also advocated a new ILO standard that, from a practical point of view, would mean a revision of Convention 88 and Recommendation 83 relating to the employment services, together with Convention 96 (revised) relating to the Fee-Charging Employment Agencies.[79]

78 ILC (1994), p. 57.
79 ILC (1994), p. 60.

2.1.16 1994, scope for variety [80]

The report was discussed during the 1994 ILC. On that occasion, the relevant committee declared that the time had come to acknowledge that there was a rich variety of activities to help jobseekers find employment and assist employers in hiring workers, and that the activities in the market place should increase. Both public and private parties should have market positions as complementary partners. However, the Member States had a fundamental responsibility to ensure that the labour market functions properly and to take that responsibility by guaranteeing the presence of a properly funded and well-functioning public no-cost employment service. The committee supported the principles of Convention 88 and in particular the duty of the employment service to ensure the best possible organisation of the labour market in cooperation with other public and private parties.

It stated that, in view of the labour market dynamics during the past years, it had become clear that the increasing role and position of well-functioning private employment agencies could be positive and that the essential role of the public employment agencies must be maintained. According to most Member States, only a public institution may be responsible for unemployment insurance, labour market information, the management of specific labour market programmes in order to get young people into work, and the management of subsidised job plans. Therefore, private employment agencies could not be considered in isolation from public employment services.

Well-functioning private employment agencies can certainly contribute to an effective labour market. They can:

- shorten the time involved in filling vacancies;
- show vacancies;
- appreciate changes in the labour market and react quickly;
- bring together supply and demand, without losing time;
- fill a need that public employment services cannot fill;
- bridge a gap between unemployment and permanent positions, mainly through temporary jobs and gradually (re)integrating jobseekers in the labour market;
- enhance information about jobs;
- shorten the time between jobs by means of outplacement techniques, contributing to improved labour mobility;
- provide short-term training, bridging the gap between the supply of and demand for skills.

80 ILC (1997a).

However, the circumstances under which private placement took place and the developing labour relations with jobseekers could well result in exploitation and improper conduct. Employees made accusations, stating that private employment agencies skirted the law by lowering wages, making it difficult, if not impossible, to carry out trade union work, ignoring equal opportunities legislation, failing to acknowledge terms of employment that workers were entitled to, and replacing permanent positions with temporary jobs. New standards must therefore pay ample attention to the protection of agency workers without getting entangled by over-regulation. Also, the cooperation between private and public parties must be promoted.

Most committee members considered the principles of Convention 96 to have lost their relevance; they no longer reflected the current state of affairs, with the exception of the principle that workers should not pay placement fees. Part II of Convention 96 differed most from the new practice, as had become clear from the recent denunciations by countries such as Finland, Germany, Sweden, Ivory Coast and the Netherlands. But likewise, part III no longer fitted in with the new reality: limited scope (only placement in a strict sense), inflexible supervision (only a licensing system); bureaucratic (only an annual licence); insufficient market orientation (fee structure).

2.1.17 Revision of Convention 96 is called for [81]

All in all, Convention 96 must be revised. The following targets were formulated:

- Respond to the dynamics of the changing labour market and redefine the role of the actors.
- Describe the 'parameters' of the public and private employment agencies and the nature of their relationship with their clients.
- Develop general principles and provide guidance that
  - protects labour markets from unethical behaviour;
  - protects the interests of workers, including in situations jeopardising the stability of labour relations (particularly in the case of 'tripartite relationships', including arrangements for contract labour, TWA and staff leasing);
  - protects migrant workers.
- Create an environment that invites improved functioning of all employment agencies.
- Ensure that national governments are free to choose their own policies towards realising these targets.

81 ILC (1997a), p. 70.

On the basis of the Ricca report, in 1995 the Governing Body decided to place the topic on the agenda of the 80th ILC in 1997. Remarkably it opted for a single discussion procedure. In contrast to earlier discussions that had been effected in two stages, it now assumed that a result could be achieved in one attempt. The ILO Office produced a discussion report[82] in which the elements of the 1994 discussion recurred.

2.1.18 Questionnaire about revising Convention 96: 1997, Convention 181 and Recommendation 188[83]

The ILO Office conducted a comprehensive survey among the national governments. Generally, the majority reacted positively to all 36 questions. Therefore, on the face of it, the ILO Office had a broad popular mandate to develop the approach it had in mind. Particularly the most important questions 1 and 2 – respectively, whether there should be a convention and a recommendation about private employment agencies – evoked positive answers from 63 out of 68 and 59 out of 67 responding countries.[84]

Eventually, Convention 181 and Recommendation 188 were adopted. The convention defines the private employment agency (art. 1) as:

> 1. […] any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:
> (a) services for matching offers of and applications for employment without the private employment agency becoming a party to the employment relationship which may arise therefrom;
> (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a 'user enterprise') which assigns their tasks and supervises the execution of these tasks;
> (c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information that do not set out to match specific offers of and applications for employment.[85]

Crucially, the definition is no longer restricted to private employment agencies alone, but also comprises the triangular relations that may arise if the employment agency is also acting as a formal employer.

82 ILC (1997a).
83 C181 (1997).
84 ILC (1997a).
85 ILO (2007a), p. 52.

The convention applies to all private employment agencies, except for seafarers; as its purposes, it states allowing private employment agencies and the protections of the workers using their services (Article 2, paragraphs 2 and 3). Under certain circumstances, private employment agencies may be prohibited 'from operating in respect of certain categories of workers or branches of economic activity in the provision of one or more of the services referred to in Article 1, paragraph 1'(Article 2, paragraph 4a) and workers from specific branches of economic activity or branches thereof may be excluded 'from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned' (Article 2, paragraph 4b).

Article 3 requires that the legal status of private employment agencies as well as the conditions governing their operations shall be determined (by means of licensing, certification, or otherwise) (Article 3, paragraph 1 and paragraph 2 respectively).

Article 4 ensures workers' right to freedom of association and their right to collective bargaining.

Article 5 contains non-discrimination provisions, with the exception of positive action.

Article 6 ensures workers' rights to privacy and careful use of their personal data.

Article 7 contains the key provision that private employment agencies may not charge fees to the workers. Exceptions may be made for certain categories of workers after consulting the employer and employee.

Article 8 deals with the position of migrant workers. Member States must protect them and prevent abuses, for instance on the basis of bilateral agreements with the countries concerned.

Article 9 calls for measures to preclude child labour.

Article 10 ensures that a complaints procedure is in place to investigate abuses and fraud.

Article 11 focuses on specific worker protection in relation to freedom of association, collective bargaining, minimum wages, working time and other working conditions, social security, training, occupational safety and health, compensation in case of occupational accidents or disease, compensation in case of insolvency, maternity and parental protection as well as benefits.

Article 12 stipulates that Member States allocate the above responsibilities to the parties concerned.

Article 13 is aimed at the promotion of public and private cooperation, with the proviso that the public authorities retain final responsibility.

The remaining provisions – articles 14 through 29 – deal with enforcement and procedural provisions.

Recommendation 188 functions as a more detailed manual to promote good practices. The main elements include:
- working with written contracts;
- refraining from strike-breaking;
- refraining from employing workers for hazardous situations;
- providing migrant workers with reliable information;
- refusing discriminatory commissions;
- paying attention to positive action;
- preventing non-functional records;
- formulating a recruitment and selection policy;
- ensuring free mobility;
- encouraging public and private cooperation.

The realisation of Convention 181 and Recommendation 188 has concluded an almost ninety-year discussion about whether or not to allow fee-charging private employment agencies. Interestingly, a total ban was never achieved during this long period. Resistance to a total ban continued to be vast over the years, and practical experience superseded the theory of the international legal framework.

2.2 FLESHING OUT THE REGULATORY FRAMEWORK

The realisation of Convention 181 and Recommendation 188 has created a global regulatory framework for private placement and temporary employment agencies. How have they developed since then, and what can be said about the results?

2.2.1 Licensing, certification and scope [86]

The key provision is Article 3, stating:

> 1. The legal status of private employment agencies shall be determined in accordance with national law and practice, after consulting the most representative organizations of employers and workers.
> 2. A member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification except where they are otherwise regulated by appropriate national law and practice.

86 ILO (2007a), p. 5 ff.

In an explanation, the ILO states that licensing and certification must be executed objectively and transparently, i.e. in such a way that the agencies can function appropriately and adequately. The basis for legislation is found in existing law or can be found in ordinances and decrees.

The ILO points out that in order to enforce the rules the national government will have to take its available capacity into account. Setting up a concise regulation that is easy to enforce is preferable to a regulation that is difficult to monitor effectively.

Article 3 also indicates that the Member State will consult the social partners involved before drafting legislation. Many countries where temporary employment agencies are operational have a licensing or certification requirement in place. An analysis regarding the members of CIETT makes clear that such a requirement exists in nearly all the countries where CIETT has members. Remarkably, not all these countries have ratified Convention 181.[87]

Article 2 (4) (9) of Convention 181 indicates that after consulting the most representative social partners, temporary employment agencies may be prohibited from operating in certain industries or for certain categories of workers.[88] The ILO states that such a prohibition is only sensible if the need for placement can actually be met by public employment services and if there is support for this.

By now, such prohibitions are in place, albeit on a modest scale. Of the countries that ratified Convention 181, prohibitions are known for Algeria (public sector, management and migrants), Hungary (creative industries, education) and Panama (cross-border activities). Belgium, the Czech Republic and Morocco have included the prohibition option in their legislation, but so far have not made use of it. Italy also has it, and in 2006, it opened its agricultural sector and construction industry on an experimental basis.[89]

2.2.2 Definition

Article 1 of the convention states that:

> 'for the purpose of this convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services'.[90]

87 Internal analysis by CIETT.
88 ILO (2007a). p. 6.
89 ILO (2010), p. 80 e.v.
90 ILO (2010), p. 73 e.v.

Subsequently, three activities are listed:
a. job matching services without the private employment agency concluding a labour agreement;
b. employing workers with the aim of making them available to a third party, the user enterprise;
c. other services relating to jobseeking.

Activity *a* comprises the real employment activities, including overseas and the executive searchers; activity *b* includes temporary employment agencies, but also services known as staff leasing, job shops, career management agencies, employment enterprises and outplacement agencies; activity *c* comprises the rest, but no examples are known.

2.2.3 Worker protection [91]

Articles 4, 11 and 12 all safeguard employee protection for the temporary agency workers involved. Article 4 specifically guarantees the rights to freedom of association and collective bargaining. Article 11 compels the ratifying Member States to take measures resulting in adequate protection for workers in relation to:
a. freedom of association;
b. freedom of collective bargaining;
c. minimum wages;
d. working hours;
e. social security;
f. training facilities;
g. health and safety;
h. compensation for occupational diseases and accidents;
i. compensation for insolvency;
j. maternity and paternal protection and benefits.

In relation to these rights, with the exception of ad a, article 12 asks for a closer definition of roles and allocation of the respective responsibilities in the triangular relations of temporary agency employer, temporary agency employee and commissioning client (user enterprise). This provision relating to worker protection particularly provokes criticism. The British Trades Union Congress (TUC) states that protection from unfair dismissal is restricted and that temporary agency workers are in a weak position when industrial disputes occur. The ILO stipulates that – on the basis of article 11 mentioned above in combination with article 14 calling for further implementation

91 ILO (2010), p 76 ff. See also ILO (2007a), ad. 110, p. 24 ff

of the convention by means of laws or regulations – it is for the national governments of the ratifying Member States to take action.[92]

Furthermore, Recommendation 188, section 11, paragraph 6 states that temporary employment agencies are not allowed to act as strike breakers. 'Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike'. This provision has been included in the recommendation because, both internationally and within the ILO, the right to strike is under discussion.[93] In this context, an issue has come up in the United States. American temporary agency workers do not automatically become members of the same bargaining unit that represents permanent staff, and although they can establish a bargaining unit of their own, this disparity essentially places them at a disadvantage.[94] In this context, the Canadian CSN (Confédération des Syndicats Nationaux) also refers to an interesting judgment by the Supreme Court of Canada:

> … situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The Labour Court (of Quebec) was essentially designed for bipartite relationships involving an employer and an employee. It is not very helpful when a tripartite relationship must be analysed. The traditional characteristics of an employer are shared by two separate entities – the personnel agency and its client – that both have a certain relationship with the temporary employee. When faced with such a legislative gaps, tribunals have used their expertise to interpret the often terse provisions of the statute. In the final analysis, however, it is up to the legislature to remedy those gaps.[95]

Therefore, it is for the national governments to clarify the matters listed in the articles 11 and 12. In any case, these rights are also guaranteed when these matters have been dealt with by ratifying other conventions.[96]

92 ILO (2010), p 76, items 309 and 310.
93 Van der Heijden (2013).
94 ILO (2010), p. 77, item 311.
95 ILO (2010a), p. 77, item 312; see also Pointe-Claire (City) v. Quebec (Labour Court) (1997) S. C. R. 1015, § 63.
96 ILO (2010a), p. 78.

Table 2.1 Matters listed in Article 12 and the most current respective Conventions[97]

Freedom of association (to which reference is also made in Article 4 of Convention no. 181)	Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87)
Collective bargaining (to which reference is also made in Article 4 of Convention no. 181)	Right to Organise and Collective Bargaining Convention, 1949 (no. 98)
Minimum wages	– Equal Remuneration Convention, 1951 (no. 100) – Minimum Wage-Fixing Machinery Convention, 1928 (no. 26) – Minimum Wage Fixing Convention, 1970 (no. 131)
Working time and other working conditions	– Hours of Work (Industry) Convention, 1919 (no. 1), Hours of Work (Commerce and Offices) Convention, 1930 (no. 30), Hours of Work and Rest Periods (Road Transport) Convention, 1979 (no. 153) – Holidays with Pay Convention (Revised), 1970 (no. 132) – Weekly Rest (Commerce and Offices) Convention, 1957 (no. 106), – Night Work Convention, 1990 (no. 171), Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 – Part-Time Work Convention, 1994 (no. 175)
Statutory social security benefits	– Social Security (Minimum Standards) Convention, 1952 (no. 102) – Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (no. 128), Medical Care and Sickness Benefits Convention, 1969 (no. 130), Employment Promotion and Protection against Unemployment Convention, 1988 (no. 168) – Maintenance of Social Security Rights Convention, 1982 (no. 157)
Access to training	– Paid Educational Leave Convention, 1974 (no. 140), – Human Resources Development Convention, 1975 (no. 142)
Protection in the field of occupational safety and health	– Occupational Safety and Health Convention, 1981 (no. 155), Protocol of 2002 to the Occupational Safety and Health Convention, 1981 – Promotional Framework for Occupational Safety and Health Convention, 2006 (no. 187)
Compensation in case of occupational accidents or diseases	– Employment Injury Benefits Convention, 1964 (no. 121), – Medical Care and Sickness Benefits Convention, 1969 (no. 130) – Maintenance of Social Security Rights Convention, 1982 (no. 157)
Compensation in case of insolvency and protection of workers claims	– Protection of Wages Convention, 1949 (no. 95) – Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (no. 173)
Maternity protection and benefits, and parental protection and benefits	– Maternity Protection Convention (Revised), 1952 (no. 103) – Maternity Protection Convention, 2000 (no. 183)

97 ILC (2010a).

2.2.4 Social dialogue

A fair amount of legislation can also be effected through negotiations, following social dialogue. 19 out of the 38 CIETT members conduct a kind of social dialogue. This takes place on the temporary agency sector level, on a cross-sector level as well as on a national level, whether the user enterprises – the commissioning employers – are involved or not.[98] In that respect, the Netherlands, Belgium, Italy and Germany are at the forefront of landmark collective agreements.

2.2.5 Data protection[99]

Article 6 of the convention stipulates that the processing of personal data of workers must be restricted to matters regarding their qualifications and work experience. The collection, storage and presentation must be in line with national legislation. In section II, articles 11 and 12, Recommendation 188 lists more specific guidelines.

It is also important to mention that article 7 of that same section calls for governments to combat unfair and misleading advertising practices, including advertising for non-existing jobs.

2.2.6 'No fee to worker'[100]

Another key provision of the Convention is Article 7, anchoring the no fee to worker principle. This means that private employment agencies must not charge workers with costs or other fees. In the interests of the workers concerned exceptions are possible, after consulting the social partners.

About one third of the ratifying countries turn out to use this option, which allows asking jobseekers for fees, or to consider using it.

2.2.7 Fundamental rights[101]

Convention 181 also encompasses the ILO core conventions in the field of freedom of association and collective bargaining, forced labour, child labour and equal opportunities. Above, we discussed the articles 4, 11 and 12, anchoring the principles of Conventions 87 and 98.

98 BCG (2011), p. 71, figure 48.
99 ILO (2007a), ad 110, p. 31; see also ILO (2010), ad 113, p. 78.
100 ILO (2007a), ad 110, p. 29; see also ILO (2010), ad 113, p. 81.
101 ILO (2007a), ad 110, p. 24; see also ILO (2010), ad 113, p. 35 ff.

The preamble to Convention 181 recalls the provisions of the 1930 Forced Labour Convention (no. 29) that is aimed against forced labour and exploitation: 'Thus, temporary employment agencies have to abstain from illegal practices that tie workers forcibly to their own agencies or to specific employers, for example through debt bondage (possibly linked to the illegal imposition of recruitment fees or illegal wage deductions), the illegal retention of identity documents or other forms of threats.'[102]

Also, temporary employment agencies must abstain from activities relating to child labour, as included in Convention 182 in respect of the 'worst forms of child labour'. To this end, article 9 states: 'a member shall take measures that child labour is not used or supplied by private employment agencies'.

2.2.8 Non-discrimination

Furthermore, article 5 of the Convention states that private employment agencies 'should treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin or any other form of discrimination covered by national law and practice, such as age or disability'. This right to non-discrimination is of fundamental importance, particularly for women and for migrants who find it difficult to realise their rights with respect to wages, working conditions and more generally the freedom of association.

2.2.9 Migrant workers[103]

Article 8 of the Convention directs attention to migrant workers. A Member State must, after consulting the representative social partners, take measures within its jurisdiction and, where appropriate, in collaboration with other Member States, to provide adequate protection to migrant workers and to prevent abuses of migrant workers who have been placed in their countries by agencies. These measures must also imply liability to punishment, including a ban on agencies that engage in fraudulent practices and abuses. Article 8 refers to the UN convention of December 1990 concerning Protection of the Rights of all Migrant Workers and Members of their Families.

A later UN convention, dated 1 July 2003, aims to realise equal treatment, including equal working conditions for both national and migrant workers, as well as equal access to protective measures. Equally important in this context is article 5 from Recommendation 188, calling for written contracts and giving workers adequate information about their working conditions before their assignment begins.

102 ILO (2007a), ad 110, p. 25

103 ILO (2007a), ad 110. p. 26; see also ILO (2010), ad 113, p. 88.

2.2.10 Complaints procedure [104]

Article 10 supplies the need for an adequate complaints procedure. It asks for 'adequate machinery and procedures, involving as appropriate the most representative employers and workers organizations for the investigation of complaints, alleged abuses and fraudulent practices…' Taking the case to court need not be the only option. Often alternative dispute settlements often give more comfort.

2.2.11 Public/private cooperation [105]

Article 13 aims to promote the cooperation between public employment services and private employment agencies in the labour market, with the proviso that the public employment services stay in charge of formulating the labour market policy and the usage of funds. Convention 88 has a similar provision in article 11, in which the authorities are called on to realise an effective cooperation between public employment services and private, not-for-profit employment agencies. This provision, which does not cover cooperation with for-profit private employment agencies, appears to have been superseded by article 13 from Convention 181, but must be seen in its historical context.

Paragraph 17 from Recommendation 188 gives examples of cooperation, including:

- pooling of information;
- exchanging vacancy notes;
- launching joint projects;
- outsourcing by public to private, such as projects for the integration of long-term unemployed;
- training of staff;
- consulting with a view to improving professional practices.

By now, there are many clear examples of these types of cooperation. They tend to particularly aim at exchanging candidates and vacancies.

In Belgium, agreements have been in place since 1999, which were renewed recently. In Denmark, cooperation likewise focuses on exchanging information, but also increasingly on outsourcing jobs from the public employment services to the private agencies. In France, a similar form of cooperation existed, which also drew criticism. Apart from outsourcing, the cooperation involves exchanging information, which, as laid down in agreements, must remain confidential. Germany has a frame-

104 ILO (2007a), ad 110, p. 37; see also ILO (2010), ad 113, p. 64.

105 ILO (2007a), ad 110, p. 45 ff; see also ILO (2010), ad 113, p. 57 ff.

work agreement between the German federation of temporary employment agencies, the BAP, and the public employment services. Exchange of information, collaboration on placing target groups, organisation of joint *job fairs* and regular strategic consultations comprise the main elements of the cooperation. In Italy the cooperation has taken shape mainly at a local level, i.e. in Lombardy, the province of Florence and the Marche region. It mainly relates to the public funding of private outplacement and education projects.

The Netherlands is likewise evincing increasing cooperation. It started in the 1980s with public co-funding of target groups placement by the private sector. By now, temporary employment agencies also take part in the 33 mobility centres across the country. The job website werk.nl run by the public employment services is being supplied with a generous number of vacancies by the temporary employment agencies. A service point called Flex has been founded that acts as a knowledge centre to facilitate and promote the cooperation between private and public. Moreover, agreements are being made with municipalities to tackle the rising youth unemployment at a local level and more generally, to place more specific target groups. To promote a better match between supply and demand, so-called 'speed-dating sessions' are held on the public service premises, in an attempt to bring the jobseeker into contact with the existing demand quickly and efficiently.

In Spain, negotiations are ongoing on far-reaching forms of cooperation. Although in Sweden, whilst cooperation has not yet been formalised, certain forms are being used in practice, such as the exchange of information on the local level as well as joint outplacement and coaching programmes.

In the United Kingdom the cooperation between the British temporary employment confederation REC and the public Job Centre Plus was sealed with a renewed Memorandum of Understanding. Specific support programmes were set up together with private parties to combat the rising unemployment, following earlier experiences with information exchange and seeing applicants on the Job Centre Plus premises. Strategic labour market consultations likewise contribute to further cooperation.

Lastly, the European Commission is promoting this cooperation and putting it at the top of its agenda.[106] Article 13 stipulates that the private employment agencies are to supply information at regular intervals 'to allow the competent authority to be aware of the structure and activities of private employment agencies in accordance with national practices'. This information can contribute to creating a better picture of the labour market in general.[107]

106 The examples have been taken from CIETT data.

107 See also Koeltz (2013).

2.2.12 Implementation

Article 14 calls for an adequate implementation by means of laws or regulations that are consistent with national practice, for supervision by the labour inspection services or another supervisory public body, as well as measures, including penalties, to prevent violations.[108]

2.2.13 Revision

Article 16 provides that this Convention 181 revises the Fee-charging Employment Agencies Convention (revised), 1949 and the Fee-charging Employment Agencies Convention 1933.

2.3 IMPACT

2.3.1 Number of ratifications

If we consider the impact that Convention 181 has had, it is important to see how many countries have now ratified this convention. As per June 2016, that number amounted to 32.

The question is how significant this number is. The ratifying countries only make up 17% of ILO's 186 Member States. One might conclude that, so far, the impact has been modest. However, it is important to regard this number in relation to other ILO conventions; on the basis of 32 ratifications as per mid-2016, where does Convention 181 rank?

Table 2.2 Countries that have ratified Convention 181

1999	Albania	30 June
	Ethiopia	24 March
	Finland	25 May
	Japan	28 July
	Morocco	10 May
	Netherlands	15 September
	Panama	10 August
	Spain	15 June
2000	Czech Republic	9 October
	Italy	1 February
2001	Moldavia	19 December
2002	Georgia	27 August
	Portugal	25 March

108 See ILO (2010), ad 113, p. 65.

2003	Hungary	19 September
2004	Belgium	28 September
	Lithuania	19 March
	Uruguay	14 June
2005	Bulgaria	24 March
2006	Algeria	6 June
	Surinam	12 April
2008	Poland	15 September
2010	Bosnia and Herzegovina	18 January
	Slovak Republic	22 February
2012	Israel	4 October
	(FYR) Macedonia	3 October
2013	Fiji	21 January
	Serbia	15 March
	Zambia	23 December
2015	Mongolia	17 April (effective as of 17 April 2016)
	Nigeria	14 May (effective as of 14 Mei 2016)
	France	28 October 2015 (effective as of 28 October 2016)
2016	Mali	12 April 2016 (not yet effective)

At the beginning of 2016, of the 177 so-called technical ILO conventions, Convention 181 ranked 59th. At that time, the technical conventions saw an average of 28 ratifications, and with its 32 ratifications, Convention 181 tops that. We can also consider all conventions concluded since 1990. What picture emerges? Convention 182 concerning the Worst Forms of Child Labour from 1999 and the Maritime Labour Convention are well ahead of Convention 181 by 180 and 70 ratifications respectively. As a result, Convention 181 shares the third position with Convention 185 concerning the Seafarers' Identity Documents (Revised) from 2003.

If we look at the ILO conventions that cover specific forms of labour, such as part-time work, home work and domestic work, these conventions, i.e. Part-Time Work Convention 1994 (no. 175), the Home Work Convention 1996 (no. 177) and the Domestic Workers Convention 2011 (no. 185) turn out to have been ratified by a few as 14, 10 and 22 Member States, thus lagging far behind the 32 ratifications for Convention 181.

These reasonably healthy positions may be partly influenced by a waning eagerness to ratify ILO conventions during the past years; still they have been achieved.

2.3.2 Prospects

In 2010, the ILO conducted a survey among its Member States regarding their interest in ratifying at a later date. On this occasion 38 Member States came forward as prospects, i.e.:

Table 2.3 Prospects for ratification of Convention 181 in 2010

Bangladesh	Estonia	Montenegro	Sudan
Belize	France	Mozambique	Sweden
Benin	Honduras	Myanmar	Syria
Bolivia	Israel	Nepal	Tunisia
Brazil	Ivory Coast	Nigeria	Ukraine
Cameroon	Jordan	Peru	United Arab Emirates
Central African Rep.	Latvia	Rwanda	Venezuela
Chile	Madagascar	St Vincent and the Grenadines	Yemen
Egypt	Malawi	Serbia	Zimbabwe
Eritrea	Mongolia		

They include countries such as Serbia, Israel, Mongolia, Nigeria and France, which have since ratified the convention, but also countries such as Chile, Peru and Sweden, which may possibly see no further impediments to future ratification.

Nevertheless, impediments to ratification remain. After all, 23 countries adopted Convention 96, 15 of which opted for the strict Part III that is aimed at total prohibition of private employment agencies carried out for profit. As we saw earlier, the ILO takes that to include the commercial temporary employment agencies.

Table 2.4 Ratifications of Convention 96 that are still in force [109]

Part II		*Part III*
Bangladesh	Guatemala	Argentina
Bolivia	Luxembourg	Ireland
Costa Rica	Libya	Ivory Coast
Cuba	Mauretania	Malta
Djibouti	Pakistan	Mexico
Egypt	Swaziland	Senegal
Gabon	Syria	Sri Lanka
Ghana		Turkey

Of the countries that have ratified Convention 96 there are four that are listed among the prospects for Convention 181, i.e. Ivory Coast (Part III) and Bolivia, Egypt and Syria (Part II). Countries that have ratified Convention 96 and not yet ratified Convention 181 continue to be bound to follow the obligations of Convention 96. Only upon ratification of Convention 181 the obligations of Convention 96 automatically cease, as this ratification also counts as a denunciation of Convention 96.

By now, France has ratified Convention 181 and thus taken leave 'ipso jure' of Convention 96.[110] The French government had pre-empted this by removing the state monopoly in the field of employment services and instituting the *Pôle Emploi*.

109 ILO (2010), ad 129.

110 *La Tribune* (2015).

However, in 2012, the Committee on Applications and Recommendations had to remind the French government that it was not in line with international law. In a direct request in 2013, the Committee addressed the governments of Egypt, Brazil and Syria in similar terms. In France, by the way, parliamentary scrutiny did draw criticism. Members of parliament particularly raised objections to the so-called 'marchandisation' of the unemployed.[111]

Countries on this Convention 96 list, such as Cuba and Guatemala, indicated that they did not intend to allow temporary agency work. Even though they now have laws or regulations regarding temporary employment agencies, other countries stated that they do not wish to ratify, since their legislation is not fully in line with Convention 181 and they do not intend to align it. For instance, Canada, Denmark, South Korea, New Zealand, Romania, the United Kingdom and the United States have issues with the no fee to workers principle; South Korea, Mali and Mexico do not want to implement provisions with regard to migrant workers. Moreover, the United Kingdom and Switzerland have issues with articles 11 and 12 and the corresponding requirements regarding collective bargaining. Furthermore, Canada states that its legislation is implemented regionally and that not all regions comply with Convention 181.[112]

It is ascertainable that thanks to its 32 current ratifications Convention 181 has more Member State support than Convention 96, which is clearly losing ground; at one point 42 Member States had ratified it, but by now 19 of those have renounced this convention. If the remaining 33 prospects actually were to decide to ratify Convention 181, it would arrive at 65 ratifications, which will then far exceed the 19 remaining adherents of Convention 96, and is considerably higher than the current average of 28 ratifications per convention.

2.3.3 Survey: more ratifications needed for Convention 181[113]

During its 99th ILC session in 2010, the ILO gave attention to the topic of employment instruments, in the context of the 2008 Declaration on Social Justice for a Fair Globalization. The ILC regularly focuses on this declaration by putting related topics on the agenda. This time, it was a survey of a number of employment instruments, which were examined by Committee of Experts in the Application of Conventions and Recommendations (CEACR).

111 Chaignon & Rousseau (2014).

112 This was derived from data from the correspondence between ILO and its Member States, with reference to Survey ad 113, which I perused.

113 ILC (2010b), Part I, p. 27–49.

There were discussions about the Employment Policy Convention, 1964 (no. 122); the Human Resources Convention, 1975 (no. 142); the Employment Service Convention, 1948 (no. 88), and the Private Employment Agencies Convention, 1997 (no. 181). Likewise, attention was given to the Job Creation in Small and Medium Sized Enterprises Recommendation, 1998 (no. 189) and the Promotion of Cooperatives Recommendation, 2002 (no. 193).

Many of the above data are derived from the survey report. Interestingly, Convention 181 was seen in the wider context of international standards that are essential to the desired labour market policy. The preamble of the 1964 Employment Policy Convention refers to the Universal Declaration of Human Rights from 1948, which states that 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. This convention focuses on full employment and free choice of employment.

These principles can also be found in the International Covenant on Economic, Social and Cultural Right, adopted in 1966, which provides that the right to employment implies that everybody has the right to build a life by means of work that they have chosen or accepted freely, and that the Member States take adequate measures to ensure that right. Note that this does not entail an absolute right to work, but rather free choice of employment, meaning that everyone is free to freely accept or choose employment without being forced into a job. 'Right to employment' also implies a system guaranteeing that everybody has access to employment.

Such a system in turn requires efforts in the field of adequate education and training. The latter is anchored in the 1975 Human Resources Development Convention (no. 142) and can also be found in the articles 11 and 12, sub e, commissioning the Member States that have ratified Convention 181 to ensure that the necessary training takes place.

The CEACR report shows the mutual commitment between public employment services and private employment agencies, as well as the connection between the 1948 Employment Service Convention (no. 88) and the 1997 Private Employment Agencies Convention (no. 188). Earlier on, we noted that Article 11 of Convention 88 relating to public-private cooperation in the labour market is a mirror image of Article 13 of Convention 181.

Deliberations

During the ILC deliberations, the employers appealed to their governments to ratify Convention 181.[114] They also remarked that the Convention did not contain any

114 ILC (2010b), Part I, p. 35, item 117.

regulations concerning strikes.[115] Article 6 of Recommendation 188, which aims to prevent the replacement of workers who are on strike by temporary agency workers, was merely advisory. Moreover, they stated that adequate employee protection did not guarantee that temporary agency workers' protection should equal that of other workers.[116] Furthermore, they asked for supervision of Article 7 of the Convention – the no fee to worker principle – as well as for attention to the potential extraterritorial effect of Article 8 regarding types of migration between countries.[117]

Referring to Conventions 88 and 181, the employees stressed that the role private employment agencies play in achieving full and productive employment should not be considered decisive, or that the public employment services should be overrated. It had become clear that abuses by private employment agencies were ongoing, particularly in cross-border activities, which the governments as yet had failed to get a grip on. There was also a relation with the more general and polymorphous phenomenon of precarious employment that emerged in many countries and about which little was yet known.[118] The employees also requested attention to the 2006 Employment Relations Recommendation (no. 198) that aims to prevent that atypical forms of labour lack employee protection.[119] For a labour market to be effective, it was necessary to link the services of private employment agencies to a licensing and certification requirement.

The government of the United Kingdom reacted to allegations that temporary agency workers in particular lacked rights by stating that they are free to join a trade union and that they do not need to inform their employer. They can ask trade union representatives for support everywhere, and the employer is not allowed to discriminate on the grounds of trade union membership. On the basis of studies, many temporary agency workers are thought to prefer the flexibility of temporary agency work. The United Kingdom likewise has regulations and facilities for labour protection, also for migrant workers.[120]

A key priority for the employees turned out to be that more Member States were to ratify the relevant Conventions, including Convention 181.[121] Also, they requested attention to the serious problems related to the labour market, which is becoming more and more precarious and segmented, and for the problems that the tripartite relations of Convention 181 evoke. The 2006 Employment Relations Recommendation

115 ILC (2010b), Part 1, p. 36, item 118 and item 122.
116 ILC (2010b), Part 1, p. 36, item 119.
117 ILC (2010b), Part 1, p. 36, items 120 and 121.
118 ILC (2010b), Part 1, p. 36, item 130.
119 ILC (2010b), Part 1, p. 36, item 131.
120 ILC (2010b), Part 1, p. 39, item 133.
121 ILC (2010b), Part 1, p. 42, item 149.

(no. 198) should be taken forward. A thorough survey should take place, followed by a discussion about what the ILO might be able to do about it. Moreover, it should look at guaranteeing the freedom of association and collective bargaining for temporary agency workers, also in relation to their involvement in strikes.[122]

The employers emphasise that more jobs are the only way to face the economic uncertainties, and this requires better thought out and more effective regulations that manage to combine flexibility and social protection.[123]

Eventually, the chairman of the committee in charge of the discussion about the report on the employment instruments stated that it had been logical to include Convention 181 in the deliberations, even though only 23 Member States had ratified it at that moment and had not yet acquired a great deal of experience with the convention. The committee posited that private employment agencies should undoubtedly play an increasingly important role in bringing supply and demand together; it was to be hoped that more Member States would choose to ratify Convention 181.[124]

2.3.4 Consequences of ratification

Interestingly, some countries that have ratified the convention do not yet meet the requirements to implement it, as is the case with Uruguay and Surinam.

For that matter, ratification does not automatically mean that legislation or regulations are directly in accordance with the provisions of Convention 181. This may involve a lengthy process, in which efforts are made to work towards this agreement. It has been indicated above that this applied to Surinam and Uruguay. It likewise applies to Morocco, which ratified the Convention simultaneously with the Netherlands in 1999, but does not yet have legislation in place that is up to standard.[125] This is also the case in, for instance, Surinam, which ratified the employment agency convention in 2006, but so far has only produced a draft law.[126]

On the other hand, non-ratification does not preclude adequate legislation. Sweden, for example, has fairly far-reaching legislation that matches the principles of Convention 181.[127] Sweden wishes to consider ratification in relation to its implementation of the European Temporary Work Directive.

122 ILC (2010b), Part 1, p. 43, items 154 and 155.
123 ILC (2010b), Part 1, p. 44, item 157.
124 ILC (2010b), Part 1, p. 45, item 162.
125 Ahmed (2011).
126 The draft roughly translates as: 'draft law for placement of workers by intermediaries', 2009.
127 Van Liemt (2013), p. 21 ff.

Non-ratification may also indicate that there is yet work to be done to ensure acceptable temporary employment relations. In South Africa, discussions about this topic are ongoing. As early as 1983, this country did acknowledge temporary agency work on the basis of tripartite relations. Sadly this phenomenon increasingly left employees vulnerable to abuse. Moreover, legislation has been adjusted for triangular relations, making commissioning clients jointly and severally liable for wage payments (1995), yet implementing the legislation proved difficult. The government cannot implement the solution proposed in Convention 181 that the national government is to allocate responsibilities. In 2010 this resulted in a de facto ban on temporary employment agencies by no longer classifying them as formal employers. Since then, the government has dropped this provision and proposed a maximum placement period of 3 months, later extended to 6 months. Trade unions resisted this proposal, favouring the prohibition of temporary employment agencies. On the other hand, employers prefer a maximum placement period of 24 months. Moreover, there is the proposal to apply the no fee to worker principle, together with the ensuring of data protection.[128] The discussion and the bills have not yet resulted in a solution that is acceptable to all parties. Thus, ratification of Convention 181 is by no means imminent in South Africa.

A similar discussion is taking place in India. This country has had outsourcing legislation in place since 1970,[129] but it hardly takes into account the alternative role that temporary agency work plays. Therefore, ratification of Convention 181 and specific national legislation for temporary employment agencies are being advocated.[130]

2.3.5 Supervision by the CEACR

Ratifying a convention begins a process in which a Member State commits itself to aligning its legislation with the provisions of the convention. Within the ILO governance structure, the Committee of Experts on the Application of Conventions and Recommendations (CEACR)[131] monitors that this actually happens. In the framework of its supervisory role, the Member States must report periodically on their compliance with the ratified conventions: every other year regarding the eight fundamental and the four priority conventions, and at five-yearly intervals in respect of the other conventions.

In its supervisory role, the Committee can make use of direct requests and observations. Analysing the report in relation to Convention 181, it becomes clear

128 Benjamin (2013), p. 2 ff.

129 The contract labour (regulation and abolition) Act 1970. Act no.37 of 1970.

130 ISF (2012). See also: Papapostolou & Nurthen (2012).

131 Van der Heijden (1999b); Van der Heijden (2014a)

that the majority of the questions deal with Articles 11 and 12 (employee protection), Article 7 (no fee to workers principle), Article 13 (public-private cooperation), Article 8 (migrant workers), Article 10 (complaint procedures) and Article 5 (equal treatment). In this respect, the committee requests further particulars.

2.4 2009 WORKSHOP: PROMOTING CONVENTION 181

In 2009, the ILO organised a workshop to promote further ratifications of Convention 181. A special issues paper was produced for that purpose, entitled: *Private Employment Agencies, Temporary agency workers and their contribution to the labour market*. This paper went into the background of the various provisions in Convention 181, the regulations themselves, the sectoral aspects, the impact of the economic crisis and the social dialogue.[132] In respect of the benefits of the Convention it stated that:

> The Convention can be an engine for job creation, structural growth, improved efficiency of labour markets, better matching of supply and demand for workers, higher labour participation rates and increased diversity.
> It also sets a clear framework for regulating, licensing and self-regulation, thereby encouraging reliability; ensuring effective protection of workers against unfair practices, for example as regards pay, contract conditions, safety and health by unscrupulous providers or user enterprises of temporary agency workers; discouraging human trafficking; and promoting cooperation between public and private employment services.
> Private employment agencies can act as an entry-port to the labour market, especially for disadvantaged jobseekers, and can enhance worker employability by facilitating access to training and offering opportunities for professional experience in different working environments.[133]

Thus, it stated the significance of Convention 181 plainly and clearly. 28 governments, together with 26 employee representatives and 34 employer representatives participated in the workshop. The points under discussion related to: the contribution to the labour market, legislation, employees' rights, the economic crisis, how to promote further ratifications and finding points of consensus. With regard to the contribution to the labour market it was established that the services of private agencies that respect the principles of the convention can contribute to:

– matching supply and demand in the labour market, including the necessary flexibility for enterprises;

132 WPEAC (2009).

133 WPEAC (2009), p. 41.

- implementing active labour market policies and creating pathways between unemployment and employment by:
  - helping jobseekers (re)entering the labour market;
  - helping disadvantaged people entering into the labour market;
  - creating more job opportunities for more people;
- facilitating the transition between education and the labour market by giving students and other young people the opportunity to gain work experience;
- providing temporary agency workers with vocational training;
- converting types of contracts, e.g., transition from a temporary agency contract to a fixed-term or permanent contract;
- promoting life-work balance, e.g., by providing flexible working time arrangements;
- fighting undeclared work;
- decent working condition for cross-border work;
- implementing national policies to promote public-private cooperation.

It was also established that appropriate regulations by national governments, developed either jointly or independently, incorporate the principles, rights and obligations in Convention 181.

The participants passionately advocate engaging in ratification and implementation of Convention 181, aided by means of various actions including help from the ILO.

2.5 MARITIME CONVENTION AND DOMESTIC WORKERS CONVENTION

Apart from Convention 181, temporary agency work has also required attention in respect of the creation of other conventions. On page 20 I mentioned that in 1920 a ban on private placement was included in the Maritime Convention. It took until 1996 for this ban to be lifted. In 1996, prior to the creation of Convention 181, the Recruitment and Placement of Seafarers Convention (no. 179) was created, making further provisions for private recruitment and placement services for seafarers. Convention 179 included essentials such as no fee to workers and privacy, licensing and certification requirements. Ten Member States ratified this convention, until its integration into the comprehensive Maritime Labour Convention in 2006 caused its abolition. The latter convention provides that private placement as well as temporary agency work is allowed.[134]

134 Heerma van Voss et al. (2006), p. 26.

Since then, 78 Member States have ratified this convention. The Netherlands ratified the convention in 2011, and specified arrangements regarding placement and provision of workers in a government resolution dated 27 August 2012.[135]

In 2011, the Domestic Workers Convention (no. 189) was created. Article 15 gives specific attention to the role that private employment agencies play in combating abuses. By now, this convention has 22 ratifications.

135 Resolution dated 27 August 2012, containing rules on seafarers' entitlements, placement and provision of seagoing workers, and on amending the Working Hours Decree and the Working Condition Decree with reference to the implementation of the Maritime Labour Convention 2006, Dutch law gazette (*Staatsblad*) (2012) 397, art. 9 to 11.

CHAPTER 3

Complications

Chapter 2 outlined the development towards a new convention for private placement and for temporary agency work in particular. This chapter will explore the ensuing complications.

While Convention 181 was nearing its completion, a discussion started about contract labour, which overlapped the phenomenon of temporary agency work and actually also needed further regulation. This discussion turned into a consultation that led to a recommendation in respect of the employment relationship. Simultaneously, however, a newer, broader discussion began about precarious work, which was thought to supersede standard employment to an increasing extent. Subsequently, temporary agency work was also categorised as being a type of precarious work.

In addition, the stances social partners take, the potential bottlenecks and the introduction of the novel concept of Non-Standard Forms of Employment (NSFE), will be discussed.

3.1 CONTRACT LABOUR

3.1.1 Attention for contract labour [136]

The Adoption of Convention 181 meant that private placement was finally allowed and that regulations were drawn up for the triangular employment relationships that are attendant on the fact that in temporary agency work three parties tend to play a role, i.e. the temporary worker, the temporary agency and the user company.

In article 1b, the Convention phrases this as follows:

> […] services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to as a "user enterprise") which assigns their tasks and supervises the execution of these tasks.

136 Governing Body 262\92–2A E95 IV 2, p. 68 ff.

Essential in this passage are the placing agent who also acts as the employer and the workers who actually work for a third party that acts as commissioning client and supervises the work that needs to be done. The breeding ground for this triangular employment relationship is the allocation of labour, i.e. bringing supply and demand together in the labour market, which is characteristic of all the conventions named in chapter 2.

However, it had also become clear that these allocation services involve intermediaries acting as employers, so that regulations also had to be drawn up for them. And this touches on the other issue that was occupying the ILO at the time: contract labour. It has always been hard to interpret this concept. Contract labour can take a great many shapes, and the problem was and still is that no clear-cut definition is available.

Apart from placing temporary agency workers as defined in Convention 181 (art. 1b), temporary employment agencies also engage in contract labour. That is why further analysis of the contract labour discussion is relevant. Moreover, the concepts of temporary agency work and contract labour overlap.

The Governing Body of the ILO did not only place the revision of the Fee-Charging Employment Agencies Convention (no. 96) on the agenda, but also the issue of contract labour. This had to do with the obscurity of the concept, which would not yield sufficient social protection for the workers concerned. The Governing Body discussed the topic at their 258th and 259th sessions (in November 1993 and March 1994 respectively), concluding that further research on the subject was necessary to find our whether the development of an international standard would be feasible.

At the March 1994 session, the Governing Body anticipated the various discussions by distinguishing three types of labour relationships, i.e.:

- on the basis of a 'employment agreement',
- on the basis of 'labour only contracting';
- on the basis of 'job contracting'.

In case of an 'employment agreement', the worker agrees to work for and under the authority of the employer. The employer is responsible for providing the necessary working materials, paying the wages, ensuring that occupational health and safety regulations are observed and also for taking care of social security arrangements.

'Labour only contracting' is only about providing manpower, which makes it compatible to temporary agency work. It involves a worker who is assigned to a third party (commissioning client) by an intermediary who also acts as the employer.
'Job contracting' involves a subcontractor, who can be a large or small business or a self-employed worker rendering services to a contractor. From a formal legal perspective, this involves a commercial contract by which the enterprise outsources work to a subcontractor who employs the workers under his supervision or acts independently.

In reality, however, it is often hard to distinguish 'labour-only contracting' from 'job contracting', as many hybrid forms are conceivable. In some countries, 'labour-only contracting' is banned, and in such cases, parties will resort to fictitious 'job contracting'. Likewise, it is hard to distinguish between 'contracting *of* service', which makes use of an employment or services contract, and a 'contract *for* services' (i.e. job contracting). Meanwhile the distinction is quite relevant as it indicates exactly who is responsible for what.

'Contract labour' is a commonly used term and denotes both 'labour only contracting' and 'job contracting'. According to the ILO Office's report to the Governing Body in March 1995[137], 'contract labour' is a rising phenomenon that is mostly found in sectors such as construction, the clothing industry, plantations, forestry, the oil and gas industry and transport; it is also common in the IT sector.

Reasons to opt for outsourcing include capitalising on cyclicity, cost management, the need for flexibility, enhancing the job security of the core-team, the need to minimise risks and anticipating growing insecurity.[138]

Generally, the report observes that this increasingly popular form of organising labour jeopardises worker protection. Hence the call on the ILO to pay attention to this growing phenomenon.

3.1.2 Extensive report of 1997 conference

The ILO Office compiled an extensive report on contract labour[139] for the 1997 ILO conference. The topic was examined in 1997 according to a so-called double-discussion procedure, which meant that the topic would recur on the agenda for the 1998 conference. The report provides an extensive analysis of the phenomenon, linking up with earlier reports to the Governing Body.

Again, the concepts of 'job contracting' and 'labour only contracting' are discussed. With regard to 'job contracting', a distinction is made between 'contracting in' and 'contracting out'; if the former applies, the work is carried out at the premises of the commissioning client; in the latter case, the work is carried out at the premises of the subcontractor.[140]

The 'contract labour' arrangements can be tripartite or bipartite in nature. A tripartite relationship either involves a worker, a user company and a third party – being an established business supplying goods and services – or a worker, a user company

137 Governing Body 262\92–2A E95 IV 2, p. 282.

138 Governing Body 262\92–2A E95 IV 2, p. 287.

139 ILC (1997b).

140 ILC (1997b), p. 8.

and a third party that specialises in providing manpower. The bipartite form involves an individual who provides the user company with labour. These are the main categories, but they do not exhaust the full spectrum of possibilities.[141] Thus, in practice, it is often difficult to ascertain which form of contract labour we are dealing with, especially if employment relationships are informal.

In the report, temporary agency work is looked upon as a form of 'labour only contracting', which has given rise to controversies in legal literature. Specifically, the question arose as to whether the temporary employment agency as a mediator and employer actually implies an acceptable form of employer practice and whether the user company should be considered to be the employer instead.[142]

This critical note may be considered remarkable, as efforts were made simultaneously to regulate temporary agency work in the framework of the Convention 96 revision and in essence to assign the role of employer to the temporary work agency.

The ILO report names the factors that influence the supply of contract labour. It mentions the high levels of unemployment[143] that cause people to be generally more receptive to forms of so-called non-standard work, work that deviates from the standard of open-ended careers on a full-time basis. Female labour and the ageing labour force also make non-standard work more popular. There is a younger generation of workers with a different outlook on work, although many still prefer the old pattern.

The demand for contract labour[144] is driven by the global trend towards enhanced flexibility, decentralisation and specialisation of manufacturing processes, the rise of new technologies and new working methods that arise from an increasing global economic competition and a growing interdependence of economic and financial markets.

The report also gives examples[145] of how labour law and collective bargaining have capitalised on the phenomenon of 'contract labour'. Essential in that respect is the judgment of the court as to whether a commercial contract or an employment contract applies. The report concludes[146] that adequate legislation is needed in view of an increasing use of contract labour. It lists three important reasons:

- the dependence on the material employer;
- the obscure role of the third party/ intermediary;
- the difficulty if interpreting the phenomenon in general.

141 ILC (1997b), p. 9.
142 ILC (1997b), p. 11.
143 ILC (1997b), p. 15.
144 ILC (1997b).
145 ILC (1997b), p. 26 ff.
146 ILC (1997b), p. 73 ff.

Although this analysis also appears to acknowledge forms of temporary agency work, the ILO Office turns out to have taken a different view. According to the report, it is legitimate to exclude temporary employment agencies from new contract labour legislation, since the status of temporary agency worker means that social law applies and the revision of Convention 96 will imply an unambiguous worker protection.[147]

3.1.3 Survey among member states[148]

In order to draft a proposal for adequate international regulations, the ILO Office carried out a survey among the member states. Questions were asked, among others, about:

- the need for either a convention, a recommendation or a convention supplemented by a recommendation;
- whether the preamble should include adequate worker protection as an objective;
- what should be taken into consideration with respect to the implementation of new standards;
- which topics must be regulated;
- whether contract labour may be prohibited;
- whether a registration and licensing requirement may be feasible;
- whether equal treatment is required and who must be the benchmark;
- how the responsibilities with regard to the financial, employer, occupational safety and health, social security and liability obligations should be allocated;
- whether measures for migrant workers are needed.

84 member states responded to the questionnaire. 74 of which reacted positively to the question about an instrument, 15 wanted a convention and 27 preferred a recommendation; 34 wanted a convention supplemented by a recommendation. In any case, 78 wanted a new standard aimed at worker protection; for implementation methods, 62 wanted legislation, collective agreements, arbitration and jurisdiction; 61 wanted unambiguous definitions of 'contract worker', 'subcontractor' and 'intermediary'; 55 wanted a general application, but 52 wanted to allow for exceptions.[149] In this respect, the ILO Office remarked that the provision was aimed at the temporary agency activities that were to be covered the new Convention 181. In view of the intended definitions, temporary agency workers would be included in both conventions and that would require an exception.[150] 72 member states agreed with the substantive

147 ILC (1997b), p. 75.
148 ILC (1997b), p. 77 ff. See also: ILC (1997c)
149 ILC (1997b), p. 13 ff.
150 ILC (1997b), p. 49 ff.

proposals; 51 supported a registration and licensing requirement and 54 agreed with an obligation to guarantee equality of treatment; 37 member states were in favour of distribution of responsibilities; 53 wanted protection for migrant workers.[151]

3.1.4 A laborious discussion on worker protection

The Committee on Contract Labour presented the above-mentioned reports at the 1997 ILC. It set out to explain the topic by means of a slide presentation.[152]

It became clear that the main issue concerns the contractual status of the workers involved and the corresponding worker protection. Arrangements on the basis of an employment relationship with either the user company or the subcontractor are conceivable. Other arrangements, however, do not involve employment relationships with the subcontractor or the intermediary, even though they supply labour that benefits the user company. Nor does an employment relationship apply if the worker supplies his labour or services directly to the user company, as is the case for a self-employed subcontractor (figure 3.1). To determine whether worker protection was in place, the concepts of subordination and dependency were introduced.

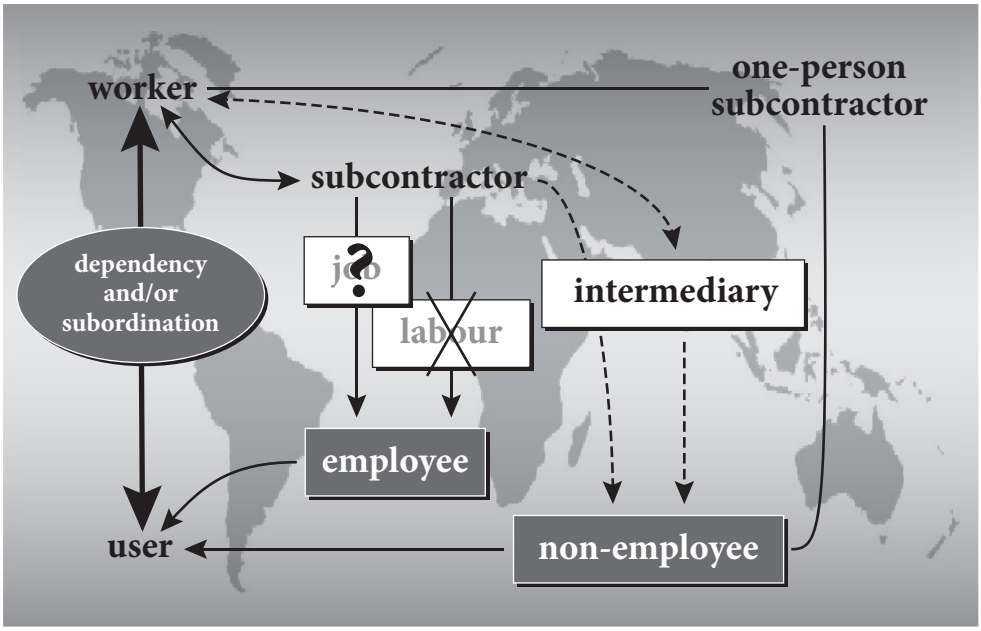


Figure 3.1 Scope of possible instrument(s) Slide presentation on worker protection at 1997 ILC

151 ILC (1997b), p. 98.

152 Slide presentation worker protection at 1997 ILC.

From the start, the employers' attitude in the Committee on Contract Labour has not been positive.[153] The employers' spokesperson reminded the Committee that the Governing Body's decision to place contract labour on the agenda in April 1995 had certainly not been unanimous. At the time, the employers had opposed the employees' proposal, and many national government had also had doubts. There was a fair amount of conceptual, definition-related and practical problems, and even the Office itself was thought to have serious doubts about the feasibility of regulating this phenomenon by means of ILO standards.

In fact, the employers could not provide a good definition. They did spot opportunities to tackle so-called bogus arrangements, fraud and illegal activities that took place to evade legal obligations and that encroached on workers' rights.[154] However, the present proposal was not satisfactory in that respect. The proposal was contrary to national legislations and practices; it created issues with tax and premiums, limited outsourcing of work and harmed employment. Producing an adequate definition proved impossible and the solution of working with an evolving criterion of dependency was unworkable. Achieving consensus would not be feasible, particularly for employers and various governments.

By contrast, the employees were happy[155] with the fact that the topic had been placed on the agenda; they took the view that the ILO Office had acquired sufficient knowledge and had presented a clear concept as a basis for a potential standard. They harked back to the ILO principle that labour is not a commodity and that the employment contract imposes an obligation on the employer to protect employees adequately, which is a measure of social justice that benefits society as a whole.

The employees' spokesperson argued that the employment relationship was at risk due to the increasing use of 'co-employment' and 'triangular employment relationships', which could place workers outside the scope of labour legislation. The employees argued that even though subordination and dependency resulted, in principle, in protection for many workers by ILO instruments, many other workers were by now excluded, and therefore a new instrument was needed to extend worker protection. There were no negative consequences for employment and, at worst, contract labour was simply a form of fraud in order to evade employers' obligations. Still according to the employees the complexity of the issue should not be exaggerated either.

The national governments[156] gave various reactions based on a wide range of experiences. For instance, the national governments of Australia and New Zealand

153 ILC (1997d), p. 3 ff.
154 ILC (1997d), p. 4.
155 ILC (1997d), p. 5 ff.
156 ILC (1997d), p. 6 ff.

were not enthusiastic, while the EC countries aimed for a positive approach to the discussion on the basis of the proposals. In view of the negative results of contract labour in their region, the national government of Trinidad & Tobago, speaking also on behalf of the Caribbean community, advocated measures. Canada and Japan were in favour of a recommendation.

The francophones were having difficulties with the French translations of the definitions, which were not clear. A number of national governments, including those of Canada, Chile, Cyprus, Hungary, Mauritius, the Netherlands (speaking on behalf of the EC), Switzerland and the United States likewise asked for clarification of definitions. The French government argued that well-defined subcontracting between two companies was beyond the scope of the proposed convention, but might come under the recommendation and thus they asked for clarification.

All in all, the attitudes of the governments did nothing to lessen the employers' concerns; in many respects they were actually exacerbated. The employers also realised that a third category of workers was emerging. The first category relates to the clearly independent worker, the second category to the worker who is working on the basis of an employment relationship, while the third category relates to the worker who does not have employee status, but who should have the corresponding advantages.

The employees opposed the introduction of a third category.[157] The employers held the view that international legislation should not concern itself with commercial contracts if this meant that the corresponding advantages were also taken from workers. The employers stressed that they did not want to support illegal, fraudulent or 'bogus' labour practices.[158]

The employees indicated that the essential problem was the existence of 'disguised' employment and 'triangular' employment relationships, which had shown a sharp increase in the years preceding the conference and undermined the basis of labour legislation. If the ILO could not remedy this, then obviously the ILO could not adjust to the changing world of work.[159]

By means of an amendment, the employers tried to have article 1 of the draft convention changed; this article stipulates that the International Labour Conference should adopt standards for contract labour, and the employers wanted this section struck off as soon as the discussion began. However, the amendment was rejected with 4072 votes in favour and 7260 against (44 abstentions). Thus, the playing field was staked out for the time being.[160]

157 ILC (1997d), p. 11.
158 ILC (1997d), p. 12.
159 ILC (1997d), p. 12.
160 ILC (1997d), p. 13.

3.1.5 Temporary agency work is excluded

A further interesting point is that in the proposals for a convention, temporary agency work is excluded from its application. By 'contract labour' the draft convention means:[161]

> 5. For the purpose of the proposed convention the term 'contract labour' should mean work performed for a natural or legal person (referred to as a 'user enterprise') by a person (referred to as a 'contract worker') pursuant to a contractual arrangement other than a contract of employment with the user enterprise, under actual conditions of dependency on or subordination to the user enterprise, where these conditions are similar to those that characterize an employment relationship under national law and practice.
> 6. The proposed convention should apply to all branches of economic activity and to all contract workers. It should not apply to employees of private employment agencies, who are made available to a user enterprise to perform contract labour.

At the employers' request, the committee eventually extended this exclusion to all workers who are working on the basis of an employment relationship. One proposed amendment read: 'It should not apply to workers who in accordance with national law and practice have a recognized employment relationship'. By means of a sub-amendment this was later changed to: 'It should not apply to workers who in accordance with national law and practice have a recognized contract of employment'.

This would have been a logical continuation of the exclusion of temporary agency workers who are working on the basis of an employment relationship. However, following a suggestion made by the South African government, the employees requested adding the words 'with the user enterprise' at the end as a sub-amendment. This proposal was carried with 14,364 in favour and 13,965 against, a modest majority.[162]

The employers' representatives much regretted this outcome regarding such an essential and fundamental part of the proposal. They stated that the ILO works on the basis of tripartism and consensus, which was why they found it disappointing that half of the governments did not vote. The governments only made up a small part of the majority vote, supplemented by employees. Thus, tripartism hardly applied in this case. The employees' representatives even proposed an amendment in an attempt to get the exclusion of temporary agency work struck off. However, this proposal was not carried.

161 ILC (1997e), p. 133.
162 ILC (1997d), p. 27 ff.

3.1.6 The proposition is still controversial

In the event, the discussion did yield the odd amendment. Apart from a clarification of the definition, the scope (see paragraph 3.5), a provision about equality of treatment was adopted; moreover, the worker protection was extended.[163]

The spokesperson for the employers[164] was opposed to an instrument and regretted that the discussion had not managed to change this attitude in the least; the employers continued to have issues with the definitions, the concept of dependency and subordination, the introduction of an equality of treatment provision, the allocation of responsibilities, the licensing requirement and the ban on replacing striking employees.

Likewise, the participation by the national governments – especially where fundamental issues were concerned – was disappointing. The employees were better satisfied and continued to hope for a positive outcome. In a joint resolution the parties made an appeal to again place the topic on the 1998 ILO conference.[165]

3.1.7 Second reading in 1998[166]

In preparation for the 1998 conference, the member states received three proposals to comment on. Generally, the ILO Office has the possibility to revise proposals in view of the second reading. However, the ILO Office refrained from revision due to the doubts that emerged with regard to the draft convention, its sheer complexity and the requests for clarification. While some comments were of a technical nature; others were so fundamental in nature that the ILO Office preferred, partly because of a lack of time, to firstly have a discussion and to leave the proposal texts largely unchanged.

Nearly half of the approximately fifty general comments made by the member states and other organisations proved to be negative or to contain requests for further clarification. Thus, it looked like a hopeless task.

The American comment asked for a further discussion about the scope, the definition and the obscure language. If there were to be anything to ratify, there had to be a clear understanding of the intentions of the convention and the recommendation.

What is also interesting is that the exclusion of temporary agency work was rather controversial.[167] Particularly the Dutch, Danish and Japanese trade unions were against it. The FNV argued that the fact that Convention 181 now existed was not a valid reason for the exclusions:

163 ILC (1997b), Proposed Conclusions, § v, art. 19 ff.
164 ILC (1997d), p. 64 ff.
165 ILC (1997d), p. 72 e.v.
166 ILC (1998a en b).
167 ILC (1998a), p. 54.

- since Convention 181 was more focused on the labour market situation than on worker protection;
- that moreover, the conventions concerning private employment agencies and contract labour should be considered separately; after all, ratification of the contract labour convention did not automatically mean that Convention 181 would be ratified, and that meant that temporary agency workers could end up being marginalised;
- and furthermore, Convention 181 would not take into account the factual relationship between the temporary agency worker and the user company, which the new contract labour convention did set out to do.

The provision with regard to equality of treatment seems equally controversial. It raised more questions than answers.[168] The subsequent discussion did not bring the parties closer together. The employers insisted that the semantic and conceptual problems, the definition questions, made clear that this topic was not suitable for the new ILO standards. However, the employees persisted that the problems could certainly be overcome. Contract workers lacked adequate social protection; it was absolutely worth a new discussion. The basic principles and the justification of the employee contract could not pass over the changing world of work. The discussion was repetitive.

3.1.8 A last attempt[169]

During the discussion, the ILO Office made a highly remarkable attempt by presenting a new, much abbreviated drafting proposal. It proposed a part I containing general provisions and a part II containing provisions for contract workers who are employed by another company.

Part I considers guaranteeing worker protection in the fields of freedom of association, collective bargaining, non-discrimination, minimum age, occupational health and safety, compensation in case of occupational accidents or diseases, and social charges, for those who factually work as an employee for a user company, but are not actually employees. Temporary agency work continued to be excluded according to Convention 181. Also, there should be regulations to determine whether or not an employee relationship exists.

Part II considers the regulation of triangular employment relationships, in view of which the member states should allocate responsibilities. Member states could choose between parts I or II.[170]

168 ILC (1998a), p. 60 e.v.

169 ILC (1998b), Addendum.

170 ILC (1997b), Annex: Suggested changes to the text of the proposed instruments.

3.1.9 A 'delaying resolution'[171]

However, this much-simplified text possibly came too late. The parties concerned were no longer able to conduct an in-depth discussion.

Eventually, the Conference adopted a resolution to the effect that, among other things, the Committee on Contract Labour has identified situations where worker protection has been requested, that the Committee has made progress on this topic and therefore is inviting the ILO Governing Body to place this topic back on the agenda of the ILO conference within four years, with a view to possibly adopting a convention supplemented by a recommendation. In such a case, the resolution asked the Governing Body to request the Director-General of the ILO:

- to organise meetings of experts to examine the following issues that have risen from the deliberations:
  - which workers in situations so far identified by the Committee need protection;
  - appropriate ways in which workers can be protected, possibly dealing with the various situations separately;
  - how to define these workers, taking into consideration the various legal systems and language differences;
- to take other measures with a view to completing the work that the Committee started.

Thus, this resolution provisionally concluded a lively and complex discussion that had not yet yielded any tangible results. Now it was up to the 'experts'. They met in 2000.

3.1.10 2000 Meeting of experts[172]

When the meeting of experts took place in May 2000, it unanimously issued a statement containing policy guidance on the various actions, including ILO support, that were needed to ensure that employment law grants adequate protection to workers. Moreover, the statement included the possibility of adopting instruments, i.e. a convention and/or a supplementary recommendation.

During the meeting, the experts observed that the global phenomenon of 'transformation' of the nature of work has led to situations in which the scope of employment law (which determines whether or not workers are entitled to protection) does not correspond with the reality of the labour relations. There is a trend where workers

171 ILC (1998c), p. 21.

172 ILO (2000). See also: ILC (2003a), annex 2.

in need of the protection of labour law, do not legally or actually receive it. The government and employee experts noted an increasing trend, but the employer experts were not convinced. The perceived discrepancy between law and reality varies from country to country and from industry to industry. And while it became clear that some national governments had adjusted the scope of their employment law, this had not taken place in every country.

The meeting noted that much information had become available by now, but that the ILO should be authorised to conduct additional studies, synthesize the studies, and promote exchanges between the authors of the country reports, as well as other experts and representatives of social partners, including the organisation of an ILO conference.

The experts also established that countries should develop policies to clarify – and if necessary adapt – the scope of their employment contract legislation at regular intervals; social partners should be allowed to participate in this. Any national policy should at least include the following elements:

- providing guidelines regarding employment law, particularly with respect to the distinction between dependent and self-employed workers;
- providing appropriate protection to workers;
- combating disguised employment, which deprives dependent workers of their protection;
- refraining from hinder to genuine commercial contracts or genuine independent contracting;
- making available appropriate mechanisms to determine the status of workers.

The meeting took the view that the ILO could play a key role in ensuring that employment law provides adequate protection to workers.

This may imply the adoption of instruments, i.e. a convention and/or a supplementary recommendation, providing technical cooperation and assistance in developing policies and gathering information.

3.1.11 2003, the scope of the employment relationship [173]

In March 2001, the Governing Body decided to place the scope of the employment relationship on the agenda of the 2003 International Labour Conference .

Thus, the Governing Body focused the discussion, emphasising the labour protection of dependent workers, particularly their rights, claims and obligations as stated in law, regulations and collective agreements on the basis of employment law. This concerns the relationship between an employer and an employee. In preparation to

173 ILC (2003a), p. 2.

the discussion, the ILO Office drew up a report. This report relates to the growing phenomenon of the dependent worker who lacks labour protection as a result of one or more of the following factors:

- The scope of the law is too narrow or is too narrowly interpreted.
- The law is formulated poorly or ambiguously, so that the scope is not clear.
- The employment relationship is disguised.
- Due to ambiguity, there is doubt about the nature of the employment relationship.
- An employment relationship exists, but it is unclear as to who the employer is, what rights the worker has and who is responsible for ensuring that they have these rights.
- There is a lack of compliance and enforcement.[174]

In its report, the Office clearly indicates that the above phenomena are on the rise and contribute to increasing insecurity and poverty. They also have an adverse impact on the competitiveness and viability of businesses. Likewise, the report refers to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, in which the Conference has officially established the general applicability of the ILO instruments regardless of the worker's status.[175] Furthermore, it observes a growing insecurity. The lack of worker protection undermines productivity and distorts competition. The workers' commitment deteriorates, which leads to increasing and costly turnover of workers. Workers receive less training and occupational heath and safety regulations are disregarded.

Ultimately, the crux is to find a balance between equity and adaptability.[176] This balance must be found by achieving consensus through social dialogue.

Although the ILO Office indicated in its report that the phenomenon of the dependent worker was on the rise, further on it produced study data demonstrating that stable and sustainable employment relationships still prevailed in industrialised countries. The data make clear that the employment tenure averaged 10.4 years in 2000 (ranging from an minimum of 8.2 to a maximum of 13.5 years), which does not deviate much from the 1992 figure. While the average share of employees with less than one year's tenure increased by 11.3%, the share of employees with more than ten years' tenure increased by 1.1%[177] (see table 3.1).

174 ILC (2003a), p. 2.
175 ILC (2003a), p. 4.
176 ILC (2003a), p. 16.
177 ILC (2003a), p. 20.

Whether an employment contract applies is determined by the facts and not by what the contract is called. The ILO Office calls this the 'primacy of fact'.[178] Disputes about the nature of the working relationship may have to do with 'disguised' or simply 'objectively ambiguous' employment relationships. Labour relations are given 'an appearance that is different from the underlying reality with the intention of nullifying or attenuating the labour protection afforded by the law'.[179]

Table 3.1 The scope of the employment relationship. Average employment tenure (years) and share of employees with less than one year and more than ten years (%)

	Average tenure		*Change %*	*Under one year*		*Change %*	*Ten years and over*		*Change %*
Country	*1992*	*2000*	*1992–2000*	*1992*	*2000*	*1992–2000*	*1992*	*2000*	*1992–2000*
Belgium	11.0	11.5	4.5	10.4	13.6	30.8	45.3	46.2	2.0
Denmark	8.8	8.3	–5.7	17.9	23.0	28.5	33.6	31.1	–7.4
Finland[1]	10.7	10.1	–5.6	17.6	21.6	22.7	39.6	42.1	6.3
France	10.4	11.1	6.7	13.8	15.8	14.5	42.9	44.8	4.4
Germany	10.7	10.5	–1.9	14.0	14.8	5.7	41.7	39.7	–4.8
Greece	13.5	13.5	0.0	7.2	9.4	30.6	53.0	53.2	0.4
Ireland	11.1	9.4	–15.3	12.1	21.8	80.2	42.1	33.6	–20.2
Italy	11.9	12.2	2.5	7.0	11.1	58.6	48.8	50.7	3.9
Japan[1]	10.9	11.6	6.4	9.8	8.3	–15.3	42.9	43.2	0.7
Luxembourg	10.1	11.4	12.9	17.4	11.6	–33.3	38.8	45.5	17.3
Netherlands	8.9	9.1	2.2	14.5	20.5	41.4	34.5	36.1	4.6
Portugal	11.1	11.8	6.3	17.0	13.9	–18.2	48.8	44.6	–8.6
Spain	9.9	10.1	2.0	23.6	20.7	–12.3	39.7	40.3	1.5
Sweden[1]	10.6	11.5	8.5	14.8	15.7	6.1	39.7	46.7	17.6
United Kingdom	8.1	8.2	1.2	15.6	19.3	23.7	31.5	33.3	5.7
United States[2,3]	6.7	6.6	–1.5	28.8	27.8	–3.5	26.6	25.8	–3.0
European Union (EU-14)[4]	10.5	10.6	1.3	14.5	16.6	14.7	41.4	42.0	1.4
Average	**10.3**	**10.4**	**1.5**	**15.1**	**16.8**	**11.3**	**40.6**	**41.1**	**1.1**

1 Data refer to 1995, change from 1995 to 2000.
2 Average tenure data refer to 1991 instead of 1992.
3 For United States and Japan, data refer to 1998 instead of 2000.
4 Without Austria.

Source: P. Auer & S. Cazes, *Employment stability in an age of flexibility: Evidence from industrialized countries*, Geneva: ILO (2003).

The report gives examples to illustrate the changes in status that have taken place. Truck drivers, for instance, have experienced a shift towards self-employment. The ILO office indicates that 'disguise' and 'ambiguity' cannot be contributed solely to

178 ILC (2003a), p. 23.
179 ILC (2003a), p. 24-25.

obscurity and issues relating to the scope of the law, but that it also has to do with failure to comply with the law and with lack of enforcement.[180]

The problems are exacerbated in case of 'triangular' employment relationships, the Office argues in this report. Examples are derived from construction, clothing, sales staff in department stores as well as supermarkets and hypermarkets. Relevant questions are: who is the employer; what are the worker's rights; who is responsible for what? Some ILO conventions address these questions; the examples include the 1997 Private Employment Agencies Convention (no. 181) that allocates the duties and responsibilities to the various parties.[181]

In 2000, the experts advocated clear guidelines to clarify the scope of the working relationship. Responses have included redefining the scope of the employment relationship more precisely, staking out the boundary between dependent and independent work, combining both elements and introducing specific legislation with regard to certain types of work.[182]

The report gives examples of broader definitions in New Zealand and Finland of the interpretation of the employment relationship. From Ireland it derives an example of clear guidelines to establish the appropriate status of the workers. South Africa is working with a 'legal presumption in favour of employee status', i.e. an employment relationship applies if one or more of seven factors exist. Specific legislation has been formulated in Chile, New Zealand, Venezuela and Peru. The report gives specific examples of how the issue has been solved when three parties are involved,[183] i.e. the worker, the employer and the user company. It must become clear who the employer is and which rights and obligations must be allocated to whom. American and Argentinian examples indicate that in this instance, too, the new Convention 181 is considered to be the best practice.

3.1.12 Conclusions relating to employment relationship[184]

The deliberations about the employment relationship, partly as a result of the abovementioned report, produced the following conclusions:

– The protection of workers is one of the ILO's key duties. The Decent Work Agenda provides that all workers, regardless of their status, must work in conditions of 'decency and dignity'. Self-employed and independent work based on commercial and civil contracts are excluded.

180 ILC (2003a), p. 33 ff.
181 ILC (2003a), p. 50.
182 ILC (2003a), p. 54.
183 ILC (2003a), p. 65 ff.
184 ILC (2006a), Annex 2, Resolution concerning employment relationship. See also: ILC (2003b), p. 52.

- The criteria to determine whether there is an employment relationship must be sufficiently clear.
- Changes in the labour market and in the way work is being organised may obscure the nature of the working relationship.
- There is a growing phenomenon of workers who in fact perform dependent work, but are not protected by an employment relationship. This is a form of false self-employment.
- Clear rules are needed for the wide variety of work arrangements, in connection with:
  - the fact that the law is unclear, too narrow in scope or otherwise inadequate;
  - the fact that the employment relationship is disguised as a civil or commercial contract;
  - the fact that the working relationship is obscure;
  - the fact that the worker is an employee, but that it is unclear who the employer is, what rights the worker has and who is responsible for these rights;
  - lack of compliance and enforcement.
- Clear and predictable legislation is in everyone's interest.
- Disguised employment occurs when the person who commissions the work misrepresents the employment relationship; this should be combated unequivocally.
- 'Ambiguous' labour relations occur when there is genuine doubt about the existence of an employment relationship;
- In the case of triangular employment relationships it must be verified whether lack of worker protection occurs. It must be determined who the employer is, what rights the employee has and who is responsible for which of them. Mechanisms are needed to ascertain with whom the responsibilities lie. With respect to temporary agency work this has been arranged in Convention 181 and Recommendation 188.
- Respect for the law is a fundamental principle.
- Attention for enforcement mechanisms is needed; appropriate training is important in this respect as well.
- All major parties must be involved in the realisation of law and regulations.
- Attention must be paid to women in vulnerable positions; see also the relevant ILO convention.
- Attention must be given to clear guidelines, effective worker protection, combating disguised employment, non-interference with genuine commercial contracts and an adequate dispute settlement mechanism.
- More efforts should be made with regard to data collection.
- Compliance and enforcement must be monitored at regular intervals.
- The ILO must look for an international response to this issue. The Committee considers a recommendation to be an appropriate response. The recommendation should focus on the 'disguised' employment relationship. It must be flexible

> and take into account the wide variety of employment relationships; however it should not interfere with genuine commercial contracting arrangements. Also, it should promote social dialogue and collective bargaining as means of solving the issue. The Governing Body is invited to place the topic of the employment relationship on the agenda. Otherwise, the issue of triangular employment relationships was not yet solved.

On the basis of the discussion about the scope of the employment relationship yielding the above conclusions, a resolution was adopted to place the topic on the agenda of a subsequent ILC.

3.1.13 Recommendation within reach

The main point was that a recommendation had come within reach. A standard for contract labour had met with opposition for a long time. This concept continued to be unclear and it still was not possible to define it more clearly. Moreover, it was feared that a new category of workers was emerging alongside employees and self-employed workers. However, the employees' experts held the view that something urgently needed to be done about this growing phenomenon that deprived more and more workers of an employment relationship even though they were in a position of dependence. National governments remained ambivalent, but thought something might be arranged.

Through a meeting of experts the focus shifted from contract labour to the scope of the employment relationship.

It is actually rather surprising that an agreement was reached. Employers gave up their 'total resistance' and employees apparently settled for the less far-reaching instrument of a recommendation. The consensus about this was the result of a Finnish amendment.[185] In a constructive social dialogue, the employers proved willing to commit to this aspiration, although they continued to be worried about the viability of a standard. The employees considered this result to be a sound basis for further action. Some national governments were negative, but most supported the results, including the desire to work on a recommendation.[186]

3.1.14 2006, recommendation fleshed out

In March 2004, the employment relationship was placed on the agenda of the 95th ILO Conference in 2006. To that end, the ILO Office prepared a report about legis-

185 ILC (2003b), p. 48.
186 ILC (2003b), p. 48.

lation and practices the various member states. The report included a questionnaire inquiring about the experiences so far.[187]

The questionnaire contained 18 questions. They related to the national policy that must be implemented or continued with regard to worker protection in the employment relationship and to which role the tripartite partners played in it, how it should be determined that an employment relationship existed, the manner in which disputes should be settled, compliance with and enforcement of the regulations and the inviolability of commercial agreements.

78 countries replied to the questionnaire; 68 countries were positive about the question as to whether the ILC should adopt a national instrument concerning the employment relationship; 7 countries were negative: 2 countries held other views. 68 countries answered affirmatively to the question as to whether there should be a national policy to periodically clarify and review the measures to maintain worker protection in the context of an employment relationship; 61 countries were in favour of a new mechanism that should also involve the social partners. 66 member states affirmed that the instrument should provide criteria to determine the employment relationship; according to 53 countries the instrument should provide a list of indicators to help establish these criteria. 65 countries were in favour of including a dispute arrangement; 62 countries were positive about adopting compliance and enforcement measures and 56 countries agreed that the new instrument should not restrain the establishment of civil or commercial contractual relationships.

Table 3.2 Replies from governments

Question	*Affirmative*	*Negative*	*Other*	*Question*	*Affirmative*	*Negative*	*Other*
1	68	7	2	6(2)(e)	70	2	2
2	67	6	2	6(2)(f)	68	4	1
3(1)(a)	55	18	0	7	58	16	2
3(1)(b)	52	19	1	8	61	9	0
3(1)(c)	54	14	3	9(a)	49	21	0
3(2)	58	16	0	9(b)	59	11	0
3(3)	62	12	0	9(c)	55	16	0
3(4)	66	6	0	10	67	4	4
3(5)	67	6	1	11(1)	66	6	1
3(6)	58	13	1	11(2)	53	21	0
4	68	5	1	12	50	21	2
5	67	6	1	13	65	5	4
6(1)	70	4	0	14	67	8	0
6(2)(a)	68	5	1	15	62	6	4
6(2)(b)	71	3	0	16	56	14	2
6(2)(c)	57	13	5	17	10	58	1
6(2)(d)	62	6	2	18	10	57	3

187 ILC (2006a en b).

The answers to the questionnaire indicated that most governments were positive about the development of an instrument. The employers stressed that the instrument was to tackle disguised employment in particular and that must not restrict the liberty to enter into genuine commercial contracts. The employees argued that, if labour relations are ambiguous or unclear, it is important to have an instrument that defines the scope of the employment relationship.

On the basis of the answers to the questionnaire, the elements for the intended recommendation were established.

3.1.15 Essential provisions of the recommendation [188]

The ILO presented the draft recommendation to the meeting for further discussion. The draft contained 18 provisions with respect to:

- formulating a national policy;
- establishing the existence of an employment relationship;
- monitoring and implementing;
- international information exchange.

With respect to formulating a national policy the ILO particularly met the desire to at least have guidelines that may help establish the existence of an employment relationship and distinguish between employed and self-employed workers. Also, there should be measures to combat disguised employment. With respect to triangular employment relationships, measures should make clear who is responsible for what; there must be a dispute settlement mechanism, and effective compliance with and application of these laws and regulations is desired.

Special attention must be paid to groups that are affected most, for instance, women, young workers, older workers, undeclared workers, migrants and generally the most vulnerable workers. The national policy must be realised in cooperation with employers and employees. National policy must not interfere with genuine civil and commercial relationships.

The facts relating to the execution of and payment for the work play a guiding role in establishing the existence of an employment relationship. The member states must clearly define what conditions apply for establishing the existence of an employment relationship; specific indicators may be helpful in that respect, for instance the fact that the work is carried out under the supervision and control of another party; that the worker is integrated in the organisation of the enterprise; that the work is being carried out solely or mainly for the benefit of another party; that the work must be carried out personally; that the work must be carried out during specific hours at the

188 ILC (2006c).

workplace of the party requesting the work; that the work is of a particular duration and has a certain continuity; and that the work requires the availability of the worker.

Another indicator can be the fact that the party requesting the work makes tools, materials and machinery available to the worker. Likewise, periodic payments; the fact that it is the worker's only income and provision of food, lodgings or transport are indicators, as are the recognition of rest periods, annual holidays, travel costs and absence of financial risks for the worker.

Member states must provide facilities to establish an employment relationship quickly. Apart from using indicators they can use measures such as 'legal presumptions'. Dispute arrangements must grant access to the relevant legal and arbitration authorities. The national government must adopt measures to guarantee, particularly through the labour inspectorate, that the relevant laws and regulations are respected and implemented.

Collective bargaining also needs to play a role in clarifying the existence of an employment relationship. Member states should put a mechanism in place to monitor developments related to work and employment; social partners must be closely involved. Moreover, the member states need to carry out research on the changes in the patterns and structure of work. The ILO likewise needs to provide up-to-date information about this.

Recommendation 198 was realised more or less along the lines set out above. One important amendment adopted during the discussion related to the temporary employment agencies. The employers wanted to make sure this new instrument would not change Convention 181 or Recommendation 188, which had been realised in 1998.

Even though there were doubts about the legal necessity, it was established that 'this Recommendation does not revise the Private Employment Agencies Recommendation 1997 (no. 188) nor can it revise the Private Employment Agencies Convention 1997 (no. 181)'.

3.1.16 Recommendation 198 [189]

The employers turned out not to endorse Recommendation 198. They felt the draft text went way too far. For one thing, they objected to establishing indicators and criteria, as well as to the so-called legal presumptions. In their view, the current text could result in abuses, turning too many self-employed workers into employees. This was threatening too many operational activities in the services sector. The instrument had 'degenerated' into a bipartite instrument, i.e. something between governments and employees. Ironically, the employees had been the ones who had sought solutions for specific problems in cooperation with the employers rather than with the

189 ILC (2006d).

governments. This way, an important new instrument was realised, but one that was badly damaged by lack of support by the employers.[190]

3.1.17 Resolution emphasising support

Towards the end of the deliberations, a resolution[191] was adopted asking the ILO Office for support with monitoring and implementing the Recommendation, collecting and supplying information and undertaking comparative studies on changes in the patterns and structure of work, and particularly with collecting information on the criteria that are used to determine whether or not an employment relationship applies. In November 2006, this resolution featured on the Governing Body agenda[192] and the Director-General was asked to pursue this resolution, both substantively and financially.

The recommendation and resolution appear to end what had been a lengthy discussion about what began with contract labour and, for the time being, ended with the scope of the employment relationship. In his book *The Employment Relationship, a Comparative Overview,* Guiseppe Casale comments as follows:

> Comparative research and debate, including those within the ILO, have recognised that the employment relationship remains one of the challenging issues in the labour market. The question of whether an employment relationship exists between two parties is of crucial importance for many reasons, not least of which is that most jurisdictions link worker protection and access to social security to the existence of such a relationship. From a comparative viewpoint, the trend towards more flexible working arrangements generated to a great extent by globalization has affected the employment relationship debate. It is no longer a matter of purely academic interest, but it touches the day-to-day life of workers and employers in the world of work. Whereas many countries have already adopted measures to deal with this issue, many others are interested in finding a balanced approach to the development of national policies to address it. The ILO is expected to give initial guidance on this matter and the adoption of Recommendation no. 198 is an important step in this direction.[193]

The contract labour discussion has resulted in Recommendation 198. During that discussion, everyone has tried continuously to exclude temporary agency work, as regulated in Convention 181, from the definition of contract labour.

190 ILC (2006d), Proposed Recommendation concerning the employment relationship.
191 ILC (2006d), p. 80.
192 ILO (2006a).
193 Casale (2011), p. 33. See also: ILO (2007b).

It is hard for (user company) employers to accept more legislation and regulations about contracting. It lies at the very heart of freedom of enterprise. The fact that the employers declined to endorse Recommendation 198 may be hard to defend, but it is understandable.

However, true to their nature, the trade unions managed to lead the fight once more using a new paradigm: precarious work. Supported by the social sciences, they now hold that precarious work will lead to the loss of standard full-time employment. We shall analyse this assumption below.

3.2 PRECARIOUS WORK: THE STANDARD EMPLOYMENT CONTRACT ON THE WAY DOWN?

We have seen before that the lengthy deliberations at ILO level about the phenomenon of contract labour have resulted in the Employment Relationship Recommendation 2006 (no. 198). This recommendation is an instrument for member states to tackle 'disguised' and 'objectively ambiguous' employment relationships.

In his speech for the 2013 ILC,[194] Director-General Guy Ryder quoted the CEO of Gallup, who stated: 'What everyone in the world wants is a good job'. Ryder wondered, however, what a decent job is supposed to be if the world economy continues to evolve and the standard full-time job with a single employer culminating in a pension no longer reflects reality, however desirable it may be. 'Nor was it ever the reality for most working people, who are more likely to have been occupied in rural and informal settings, often with minimal protection or security.' The ILO has estimated that 82% of all jobs in South Asia are informal, 66% in Sub-Saharan Africa, 65% in East and Southeast Asia (excluding China), 51% in Latin America and 10% in Eastern Europe and Central Asia (see also p. 159).

Ryder went on to state that today, about half the global workforce has salaried employment, but many workers do not work full-time for a single employer. What once was 'atypical' has become standard, while the 'standard' has become the exception. And there is a marked lack of agreement about what this means for realising the Decent Work Agenda, and whether anything can be done about this.

Ryder mentions the laborious discussions about this issue that have taken place in the context of the ILO over the past years. The ILO adopted a number of conventions regarding part-time employment, homework and private employment agencies and lastly, following many years of discussion about contract labour and without the endorsement of the employers, it adopted the Employment Relationship Recommendation detailed above. Ryder's words likewise hold true for the Termination of Employment Convention 1982 (no. 158) that goes to the heart of so-called external

194 ILO (2013).

flexibility issues. If the ILO wants to continue to be relevant, consensus will have to be achieved on this topic, states Ryder.

Interestingly, Ryder uses the words 'standard' and 'atypical', but refrains from using the word 'precarious', which is quite common in this context. In the discussions about the future of labour, it is mostly the trade unions and science that express the problems inherent to new forms of employment by speaking of precarious work. We need a clearer definition of *precarious* work as it has been interpreted by scientific literature as well as by key stakeholders such as the trade unions and employers to make full sense of it.

3.2.1 Reference literature [195]

In recent years there have been extensive discussions about the concept of precariousness.[196] In the 1970s, French sociologists associated the concept of *precarité* with poverty. Only later did they start using this concept to refer to specific labour relations.

Barbier argues that the term 'de-standardisation of labour' vies with alternative descriptions such as: atypical, precarious, vulnerable, and various other terms in different languages. The real issues of this discussion were labour market segmentation and the 'dual' labour market.

From a Francocentric perspective, Barbier expresses his amazement at the fact that until the turn of the century sociologists throughout the world had hardly ever paid attention to 'precariousness'. For instance, Sennett[197] gave his opinion about the consequences of flexibility for mankind, without using the word 'precariousness'. His Anglo-American background repressed the French, Italian and Spanish perspectives that did connect to this concept. Likewise from a Francocentric perspective, Bourdieu[198] stated: 'la précarité est partout' while it became more common in France to refer to 'situations précaires' and 'statuts précaires'.

From the 1970s onward, the concept gained a political significance in French relations, while the concept was not used beyond France until the late 1990s. Only the ETUC and the European Commission used the concept when they were working with French sociologists. Later on, activist and radical groups in many European countries and in the United States appropriated the concept. Barbier also refers to German

195 Sources used apart from the ones quoted below: Koch & Fritz (2013); Fashouin et al. (2013); Stone & Arthurs (2013). See also: Ross (2009); Thornley et al. (2010); Lew Chuk et al. (2011); Garcia (2012); Doussard, M. (2013).

196 See Barbier (2013) on this topic.

197 Sennett (1999).

198 Bourdieu (1998).

relations where the word 'Prekariat' symbolised everything that ensued from capitalism and was harmful to mankind.

In the United States and Canada, the concept of 'precarious work' also boomed thanks to the writings of Kalleberg[199] and Vosko.[200] To Kalleberg, precarious work means 'employment that is uncertain, unpredictable and risky from the point of view of the worker'.

Vosko distinguishes two ways of thinking in literature. Both assume that specific job characteristics result in precariousness, but the one only looks at the degree of job insecurity, while the other takes more characteristics into account. Thus, the one is one-dimensional and the other is multi-dimensional. According to Vosko, the multi-dimensional approach is dominant. In connection to this, she quotes Rodgers[201] who distinguishes four dimensions of precarious work:

- short-term horizon, limited duration or high risk of job loss;
- little or no control over working conditions, pace of work or wages;
- little or no worker protection (by law, through collective agreements, in terms of access to social security);
- low income jobs at or below the poverty line.

Laparra[202] also takes a multi-dimensional approach, distinguishing between:

- a time-related facet (duration/continuity of employment (prospects));
- a social facet (social rights and social protection);
- an economic facet (security of income);
- a working conditions aspect.[203]

Thus, the one-dimensional approach only looks at the specific forms of non-standard work and contrasts them with standard work. Standard full-time employment is then viewed as the norm and as the ideal model.

Johnson and Nijberg[204] argue that all work can be potentially precarious and consequently that precariousness occurs in three gradations, i.e.:

- highly precarious: no rights to the social system (undocumented workers);
- moderately precarious: basic rights to the social system (housewives);
- least precarious: full rights to the social system.

199 Kalleberg (2009 and 2011).
200 Vosko (2000 and 2006); Vosko et al. (2009).
201 Rodgers (1989).
202 Laparra et al. (2004).
203 Vosko et al. (2009); McKay et al. 2010, p. 82. See also Barbier (2011).
204 Johnson & Nijberg (2009).

Subsequently, four areas determine the degree of precariousness:
- job insecurity: the result of time (contract length) or uncertainty in the form of unpredictability ;
- low wages: below minimum pay rates and lack of opportunity to improve pay;
- subordinate work: work that gives no access to social rights or labour protection laws;
- no representation: no effective negotiating power in collective bargaining and difficulty in accessing social rights.[205]

For Porthé[206] too, an important aspect is that the negotiating power is much weaker in the case of precarious work than for workers engaged in standard employment.

On the basis of the 2006 Eurobarometer Survey, Fullerton[207] argues that insecurity is higher in countries with high unemployment, weak trade unions, few part-time jobs, low spending on unemployment benefits, as well as in the post-socialist countries.

The multi-dimensional approach takes more aspects into account, and thus, any job can, in principle, be precarious, including standard employment. Clement et al.[208] also take the multi-dimensional approach and argue that:

> Precarious lives include precarious employment and the social conditions in which it is embedded. These social conditions include household structures, kinship networks and access to welfare services, independent of labour market status. We define 'precarious' as being in a situation that is not autonomously sustainable, where the situation includes the labour market, the social support system and conditions affecting both entities into and exit out of the labour market.
> Social vulnerability potentially includes such things as divorce (change in household circumstances), responsibility for children or dependent adults and/or issues concerning shelter and health. All these vulnerabilities interact with precarious employment, that is non-sustainable jobs or forms of contingent employment.

For Vosko[209] these approaches indicate that the concept of precariousness is broader than insecurity in the sense of job loss. Clement et al. likewise argue that precariousness is related to so-called 'new social risks'. These are the risks one runs as a consequence

205 McKay et al. (2010), p. 83; see also Porthé et al. (2010).
206 Porthé et al. (2010).
207 Fullerton et al. (2011); see also McKay et al. (2010).
208 Clement et al. (2010); see also: McKay et al. (2010), annex C: *A review of recent literature for the study on precarious work and social rights*, p. 5.
209 Vosko (2010), p. 9.

of the economic and social changes inherent to the transition to post-industrial society. New social risks used to be marginal, but now affect larger groups of people. Old risks had to do with retirement insecurity and illness, i.e. risks that affected older people. New social risks are more widespread and occur upon labour market entry. They have to do with job insecurity, duties of care, weakening trade unions with diminishing negotiating powers; all elements that can be attributed to the 'new economy'. This results in losses in welfare:

- within the family circle, where care and income obligations must be balanced;
- in the labour market, where people lack the skills that are needed to find well-paid and secure employment;
- in social security, for people who have a-typical careers and do not build up pensions.

The main problem is that the current welfare state no longer protects people from these new risks. All these people have to fend for themselves and need to sort out provisions for child-minding, pensions and training for themselves.

Standing[210] refers to various types of insecurity that determine precariousness, as indicated in the box below. In his book *The Precariat, the new dangerous class,* Standing lists seven different classes, i.e. the Elite, the Salariat, the Profician, the Manual Worker, the Precariat, the Jobless and the Hopeless. If one of the securities mentioned below is missing, one is doomed to be part of the Precariat.

Forms of labour security under industrial citizenship

Labour market security – Adequate income-earning opportunities; at the macro-level, this is epitomised by a government commitment to 'full employment'.

Employment security – Protection against arbitrary dismissal, regulations on hiring and firing, imposition of costs on employers for failing to adhere to rules and so on.

Job security – Ability and opportunity to retain a niche in employment, plus barriers to skill dilution, and opportunities for 'upward' mobility in terms of status and income.

Work security – Protection against accidents and illness at work, through, for example, safety and health regulations, limits on working time, unsociable hours, night work for women, as well as compensation for mishaps.

Skill reproduction security – Opportunity to gain skills, through apprenticeships, employment training and so on, as well as opportunity to make use of competencies.

210 Standing (2011), p. 10.

Income security – Assurance of an adequate stable income, protected through, for example, minimum wage machinery, wage indexation, comprehensive social security, progressive taxation to reduce inequality and to supplement low incomes.

Representation security – Possessing a collective voice in the labour market, through, for example, independent trade unions, with a right to strike.

3.2.2 Temporary agency work is also precarious

It is bound to be clear that according to various sociological sources temporary agency workers also belong to the group of precarious workers, especially from the one-dimensional perspective. However, some differentiation is in order: precariousness is also a matter of perception; it is all in the eye of the beholder.

Table 3.3 Perceptions of precarious forms of employment (percentages)

	Not precarious	*Slightly precarious*	*More precarious*	*Most precarious*
Informal/Undeclared	1	3	11	83
Bogus self-employment	1	4	28	63
Casual	2	7	29	59
Zero hours	4	8	20	54
Temporary agency	4	24	37	29
Seasonal	8	32	34	24
Fixed term	13	31	38	14
Posted	16	31	36	12
Part time	27	41	22	5

Source: London Metropolitan University (2012), *Study on precarious work and social rights*

A study that was commissioned by the European Commission and conducted by the London Metropolitan University makes clear that temporary agency work cannot be classed among the worst forms of precariousness.[211] Seasonal work, telework, casual work, zero-hours contracts, bogus self-employment and informal work score significantly worse.[212] The study includes a survey among experts that makes clear that, on a number of dimensions, temporary agency work scores nearly as high as standard full-time employment.

211 McKay et al. (2010), p. 77.

212 McKay et al. (2010), p. 78, 79.

Table 3.4 Perceptions vs. reality: employment relationships and rights in 12 member states, 2011, average ratings between 1 (no rights) and 5 (full rights)

	Job security	*Job conversion*	*Working time limits*	*Discrimination protection*	*Pensions*	*Welfare*	*Training*	*Decent pay*	*Representation*	***Average ratings***
Informal	1.1	1.3	1.0	1.4	1.2	1.4	1.1	1.1	1.3	**1.2**
Bogus self-employed	1.2	1.4	1.3	2.5	2.9	2.4	1.3	1.4	1.2	**1.7**
Zero hours	1.7	1.5	2.3	3.8	2.9	3.2	1.7	2.6	2.5	**2.5**
Casual	2.4	1.8	3.0	3.7	2.9	3.4	1.9	2.6	3.0	**2.7**
Teleworkers	2.5	2.1	3.7	4.5	3.9	4.1	2.3	2.8	3.4	**3.3**
Seasonal	2.4	1.9	3.9	4.4	3.7	4.0	2.3	3.5	3.9	**3.3**
Agency	3.0	2.0	4.3	4.7	4.0	4.5	2.7	4.0	3.8	**3.7**
Fixed term	3.1	2.2	4.6	4.7	4.4	4.5	2.6	4.0	4.2	**3.8**
Part-time indefinite	3.2	2.3	4.5	4.8	4.4	4.6	2.6	3.8	4.3	**3.8**
Full-time indefinite	3.8	2.3	4.7	4.8	4.4	4.8	2.3	4.4	4.0	**3.9**
Average ratings	**2.6**	**2.0**	**3.4**	**3.9**	**3.4**	**3.6**	**2.0**	**2.9**	**3.4**	**3.0**

Source: McKay et al. (2010)

Furthermore, OECD research shows that more security in terms of job security and job protection does not automatically mean that people actually *feel* more secure. The OECD states that unemployment benefits are appreciated more than job protection. In terms of the OECD, UI – Unemployment Insurance – is positively correlated to perceived job security, which in turn has a negative correlation with EPL – Employment Protection Legislation.[213] The OECD states more generally that job security and employment protection cannot be seen in isolation from unemployment protection and an active labour market policy. The requirement of employment protection should not be exaggerated; an active labour market policy promoting rapid re-entry of those who recently lost their jobs is more effective. Olsthoorn argues that in the current flexible labour market, the universal systems of unemployment benefits are to be preferred to the insurance systems.[214]

What is also interesting in this context is the proposal by the Brabants-Zeeuwse Werkgeversvereniging (BZW)[215] to radically change the labour market. In their set-up, everybody should be given an individual mobility budget, to be funded from social security funds, education and training funds and the transition compensations.[216] What is certain is that since the 1980s and especially since the 1990s all social

213 OECD (2004b), p. 92.

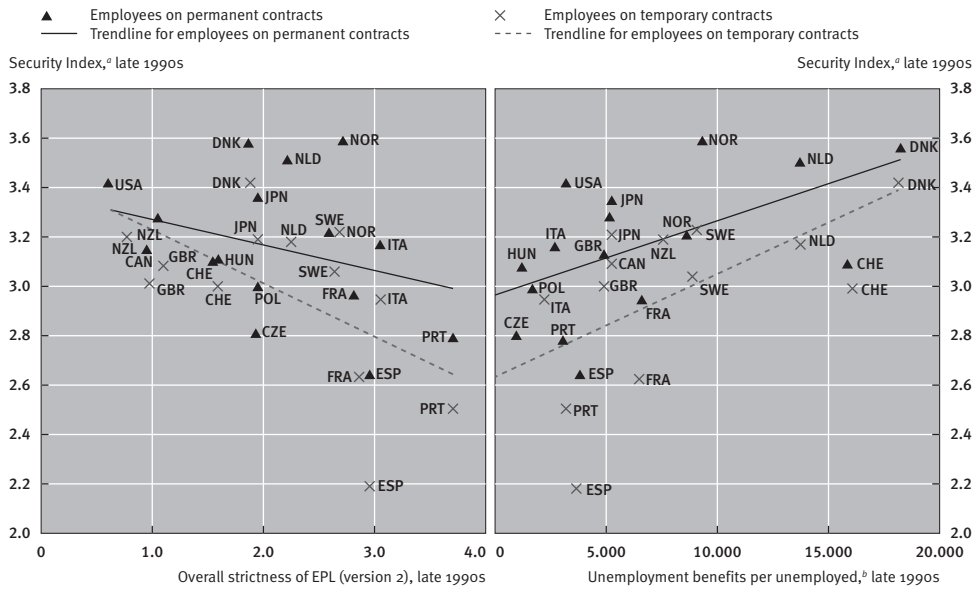
214 Olsthoorn (2015), p. 227.

215 Employers' organisation for two of the southern Dutch provinces.

216 Leupen & Hinrichs (2016).

security arrangements that guarantee income security have deteriorated, as much as by 35%.[217] The issue also affects the basic income discussion. In the Netherlands, experiments in this field with the Dutch Social Assistance Act – now succeeded by the Dutch Participation Act – are ongoing. Although not economically viable, the basic income may turn out to be a solution, and it is worthy of further research.[218]

For the rest, measures to enhance labour market flexibility may lead to fierce resistance, as they did in France in May 2016. In this context, decreasing job security, partly as a result of lack of prospects, has also been related to the number of suicides.[219]



***, **, * means statistically significant at 1%, 5% and 10% levels, respectively.
Note: Pearson correlation coefficient for the EPL is –0.35 for permanent contracts, –0.57** for temporary contracts. For the unemployment benefits per unemployed, it is 0.58** for permanent contracts and 0.59** for temporary contracts.
a) Average answer, by country, to the following question for ISSP "Do you worry about the possibilities of losing your job?" – Scale from 1 (I worry a great deal) to 4 (I don't worry at all).
b) Expenditure on unemployment compensation divided by LFS unemployment.
Source: Data on security index taken from the International Social survey Programme 1997 (ISSP); OECD database on Labour Market Programmes; OECD database on Labo Force Statistics.

Figure 3.2 Unemployment benefits re-assure workers while EPL makes them worry

Recently, the OECD stated that temporary agency workers benefit from more training/development than workers with fixed-term contracts do, and that they are also supported in getting new commissions. Moreover, temporary agency workers tend to

217 Vrooman (2016), p. 10.
218 Bregman (2014), p. 51 ff. De Graaf (2015).
219 Prick (2016), p. 207. See also: Pouchard (2016).

work on the basis of permanent contracts, benefiting from continued payment for the duration of the contract (for instance in Austria, Italy, Slovenia and Sweden). In at least eight countries, the permanent contract with a temporary employment agency prevails (see figure 3.2).[220]

Table 3.5 Permanent and fixed-term contracts with a temporary employment agency. Percentage of all employees, average 2006–2010

	Permanent contract		*Fixed-term contract*	
	Not with a temporary employment agency	*With a temporary employment agency*	*Not with a temporary employment agency*	*With a temporary employment agency*
Austria	89.3	1.6	8.8	0.2
Belgium	91.8	0.0	6.5	1.7
Czech Republic	90.7	0.8	8.3	0.2
Denmark	90.4	0.9	8.3	0.4
Estonia	97.2	0.1	2.6	0.0
Finland	84.3	0.7	14.6	0.5
France	85.2	0.0	12.6	2.2
Germany	83.8	1.6	13.9	0.7
Greece	88.3	0.2	11.4	0.1
Hungary	91.5	0.4	7.8	0.3
Ireland	91.3	0.5	7.9	0.2
Italy	87.0	0.1	12.5	0.5
Luxembourg	92.9	0.5	6.2	0.5
Netherlands	81.6	0.5	15.0	3.0
Norway	91.4	0.0	8.4	0.1
Poland	72.7	0.0	26.7	0.6
Portugal	76.7	0.7	21.2	1.4
Slovak Republic	94.3	0.7	4.5	0.5
Slovenia	82.1	0.5	12.2	5.2
Spain	69.1	1.8	27.1	1.9
Sweden	82.9	0.7	16.0	0.4
Switzerland	86.3	0.5	12.9	0.3
Turkey	88.5	0.0	11.5	0.0

Source: OECD calculations based on EU-LFS microdata and OECD Labour Force Statistics Database.

Also, in the OECD countries, temporary agency work turns out to be to more highly regulated than fixed-term contracts are. These regulations mainly relate to the maximum number of hours in temporary agency jobs, equal treatment regulations, restrictions to the extension of assignments, and licensing and reporting requirements (see figures 3.3 and 3.4).[221]

220 OECD (2013a), p. 24.

221 OECD (2013a), p. 25.

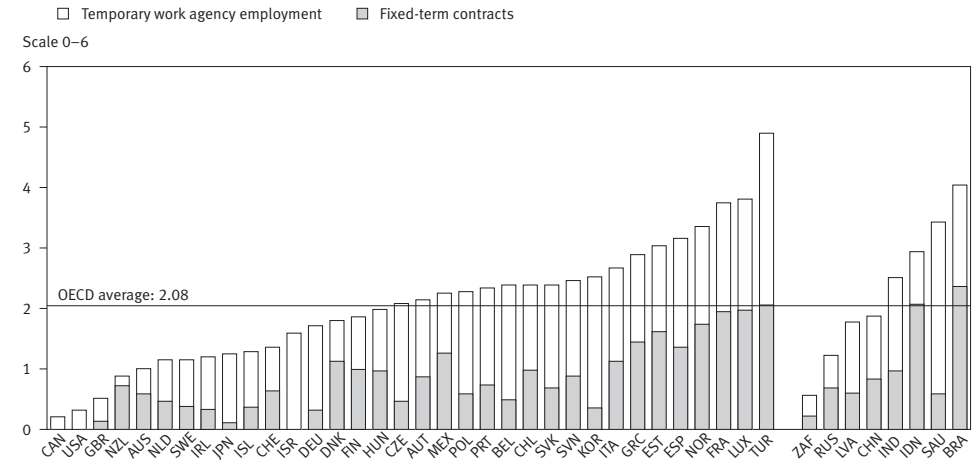


Figure 3.3 Regulation on temporary contracts

Source: OECD Employment Protection Database, 2013 update

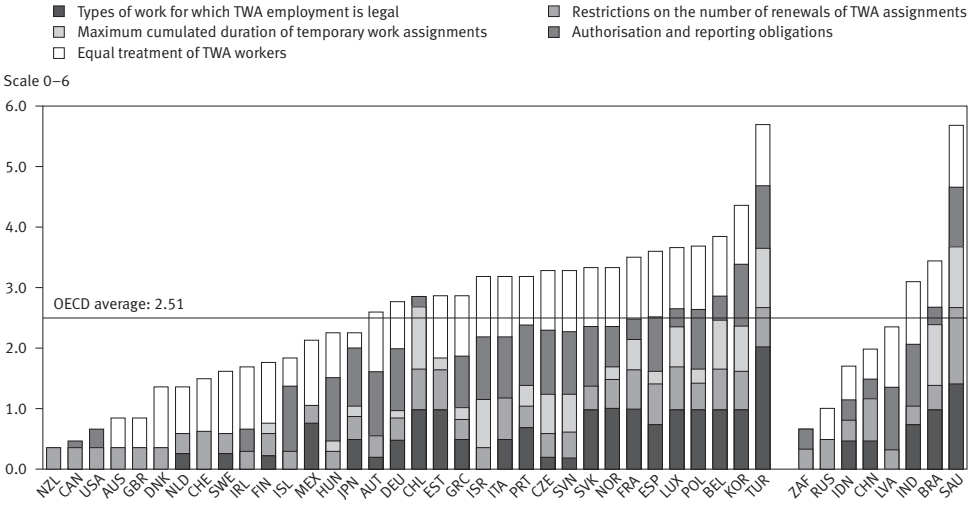


Figure 3.4 Regulation on temporary-work-agency employment

Source: OECD Employment Protection Database, 2013 update

All in all, the sociological literature does not paint a rosy picture of temporary agency work, which generally belongs to the forms of precarious work that have expanded enormously over the past years. However, some differentiation is called for. As becomes clear from tables 3.3 and 3.4, job security is a matter of perception; with regard to social policy elements, experts perceive temporary agency work to be almost equal to standard full-time employment. From a security perspective, the OECD considers job security to be less relevant than unemployment protection. The OECD also indicates

that, in OECD countries, temporary agency work is more strictly regulated than permanent contracts are.[222]

3.2.3 Causes

Sociological literature presents a variegated picture of precarious work. The same goes for the answer to the question what causes this changing world of work.

Rodgers & Rodgers[223] attribute the changes to the deterioration of the labour market situation, increasing unemployment and changing work organisation. Walterman[224] also points at the deregulation process in Germany and other EU countries, which has led to an increase of precarious work. This liberalisation was deployed to combat unemployment, resulting in more temporary agency work, temporary employment, marginal employment and part-time employment. Barbier[225] argues that the issue of precarious work is generally oversimplified and that it has more to do with the increasing and diverse forms of inequality in today's world. Outsourcing and subcontracting are seen as major drivers of precarious work, resulting in economically dependent workers.[226] McDowell and Christopherson[227] rather see the growth of complex organisations and inter-organisational networks of co-production as its causes.

Kalleberg[228] lists six main causes:

- the neo-liberal globalised economy that increased competition between enterprises and resulted in outsourcing to lower-wage countries, thus opening up 'new labor pools through immigration';
- technological changes;
- changes in laws and regulations;
- the decline of the trade unions, weakening the labour protection of workers;
- increasing individualism emphasising personal responsibility for work and family;
- the growth of the services industry, leading to an information-based economy organised around flexible production.

Apart from these structural causes, the economic recession is pointed out as a factor. The recession results in so-called low-road approaches to competition, new forms of subcontracting and outsourcing and new types of management and contracts.

222 OECD (2013a), p. 27
223 Rodgers & Rodgers (1989).
224 Waltermann (2010).
225 Barbier (2013).
226 Perulli (2003).
227 McDowell & Christopherson (2009).
228 Kalleberg (2009), p. 2 ff.

Another essential cause is said to be the financialisation of the socio-economic relations. The work framework has changed more and more from a balance between management and labour to a balance between management and shareholders. Prioritising so-called shareholder value leads to changes on the work floor, including outsourcing and trans-nationalisation of the production chain. This must be seen in combination with the weakening of the labour factor, the strengthening of management, the decrease in government involvement and increased scope for the private sector, growing labour market flexibility and deregulation of the financial markets as well as access to new regional markets.

3.2.4 Kalleberg's periods

Kalleberg argues that until the end of the Great Depression in the 1930s, most jobs in the United States were precarious. Pensions and health insurance hardly featured; they were favours rather than rights. The creation of the market-based economy in the nineteenth century exacerbated precariousness during this period.[229]

The 'Great Transformation' – a term coined by Polany[230] – set things in motion, actually there was a 'double movement': one side of the movement was directed towards economic liberalism and 'laissez-faire'; the other side was directed towards social protections in response to the psychological, social and ecological disruptions that the free market entailed (figure 3.5).

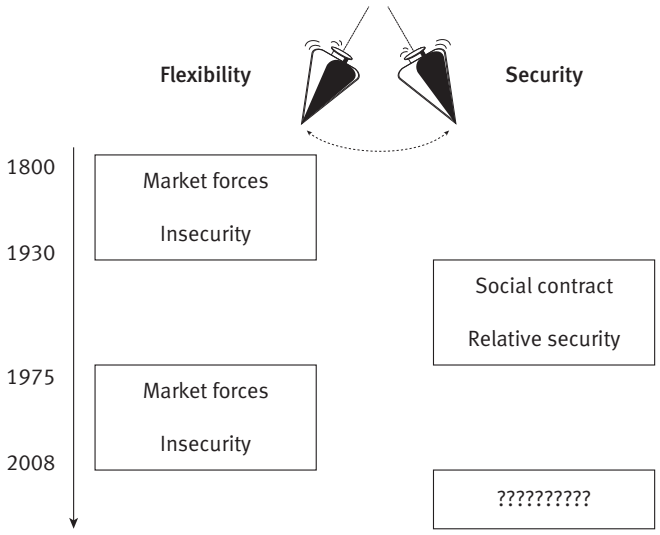


Figure 3.5 The double movement

Source: Kalleberg (2009)

229 Kalleberg (2009).
230 Polany (1944).

This resulted in the New Deal politics and other protections in the 1930. According to Kalleberg, the 'Great Transformation' was succeeded by a transitional period stretching from 1940 to 1970, called the 'Great Compression', that brought most people more equality thanks to more social security. Since 1970, we find ourselves in the 'Contemporary Period', in which precariousness is characterised in fundamentally different ways from before the Second World War. Kalleberg characterises them as follows:

- Production is no longer location-based, so-called 'Spatialisation'. Thanks to advanced telecommunications and new technologies, today's world is much larger than before and choosing a production location has become much easier.
- The rise of the services sector has brought new jobs and new services.
- Dismissal, whether or not collective, has become more widespread and is now a basic component of the employers' strategy. It reflects short-termism: lowering labour costs without clarity about what this will mean in the long run.
- In the earlier precarious period, there were clear ideologies that indicated what the world would look like without market domination. These concepts have now been discredited, so that we no longer know what to do about precariousness.
- In the past, precarious work was described in terms of the dual labour market. Nowadays, precarious work has spread to all sectors of the economy; it can be found among both professionals and managers as well.[231]

3.2.5 What, who, where, how much?

It is not easy to come up with a precise definition of precarious work. There is a wide range of definitions. Academic literature does make clear which worker groups could be most vulnerable to precariousness. Young workers, women, temporary workers, older people and migrants are mentioned most frequently. The above-mentioned study by the European Commission made clear that the most vulnerable people in this context are various groups of migrants, followed by young workers and older female workers.[232] According to the same study, the cleaning industry is the most precarious sector (table 3.7)[233]

To gauge the extent of precarious work, reference is made to research by SEO,[234] which has been collecting data regarding flexible work relations (temporary employment, temporary agency work and self-employed workers) for some time. SEO arrives at approximately 20 to 25%, with some higher findings in the Mediterranean countries and a lower result in the United States. These figures indicate that during

231 ILO (2006a), p. 4.
232 McKay et al. (2010), p. 48
233 McKay et al. (2010), p. 47.
234 SEO (2013).

the last decade, and especially the last five years, no spectacular increase occurred. This trend can also be seen in later publications. Only the Netherlands takes up an exceptional position in this respect, which will be discussed further in part III.[235]

Table 3.6 Groups of workers perceived as being at risk of precarious work (% of survey responses)

	Not precarious	*Precarious*	*More precarious*	*Highly precarious*
Undocumented migrants	2	2	6	83
Third country migrant woman workers	2	7	33	55
Third country migrants	2	11	43	40
Young workers	7	19	33	37
Older women workers	12	22	37	24
Trainees	10	26	36	24
Interns	14	27	32	22
Apprentices	15	41	25	14
Working students	14	40	27	14
Women workers	13	32	37	13
Older workers	15	31	38	11
Economically dependent autonomous workers	11	32	40	11
Women who are pregnant or returning from maternity leave	20	32	34	9
Workers with caring responsibilities	13	38	35	8

Source: McKay et al. (2010)

Table 3.7 Sectors in 12 member states and perception of their degree of precariousness, 2011 (% of survey responses)

	Not precarious	*Precarious*	*More precarious*	*Highly precarious*
Cleaning	4	15	34	43
Construction	3	20	35	40
Agriculture	4	17	41	36
Hotels, catering and tourism	3	18	45	31
Private security services	9	26	38	23
Retail	7	39	41	9
Transport	11	45	35	5
Not for profit sector	13	39	31	7
Private health care	22	41	27	5
Logistics	17	52	23	4
Public sector education	40	37	16	2
Public sector health	39	39	15	2
Information technology	42	44	9	1
Public sector administration	58	27	9	1

Source: McKay et al. (2010)

235 Blanchflower (2015); CIETT (2015), p. 13.

Table 3.8 Share of flexible labour relations in total employment (percentages)

	2001	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*
United States	11.1	11.1			11.4		11.4			11.0		
Canada	21.5	21.6	21.1	21.2	21.5	21.1	21.1	20.4	20.9	20.9	20.9	20.9
Japan	26.9	27.1	27.1	27.0	26.9	24.1	25.6	25.0	24.8	24.8	24.8	24.8
EU27	**25.3**	**25.2**	**25.5**	**26.2**	**26.7**	**27.3**	**27.2**	**26.7**	**26.1**	**26.8**	**26.8**	**26.6**
EU-Anglosaxon	17.6	17.2	17.4	17.4	17.1	17.5	17.9	17.5	17.8	18.5	18.6	19.1
Scandinavia	21.2	21.1	21.3	21.3	21.6	22.5	22.3	21.3	20.9	21.2	21.2	20.9
EU-Rhineland	21.1	20.8	21.2	22.0	23.3	23.5	23.8	24.0	23.8	24.4	24.4	24.0
EU-Francophone	22.7	22.0	21.9	21.5	22.1	23.6	23.4	22.9	22.5	23.5	24.0	23.9
EU-Mediteranean	37.6	37.4	36.8	38.6	39.0	39.4	38.6	37.8	35.4	35.4	35.7	35.2
Eastern Europe	24.3	25.0	26.2	27.2	27.5	27.6	27.4	26.7	27.0	28.0	27.8	27.9

Source: Berkhout et al. (2013), p. 15.

* For the USA, data from the Bureau of Labor Statistics are not used because of the incompatibility of definitions.

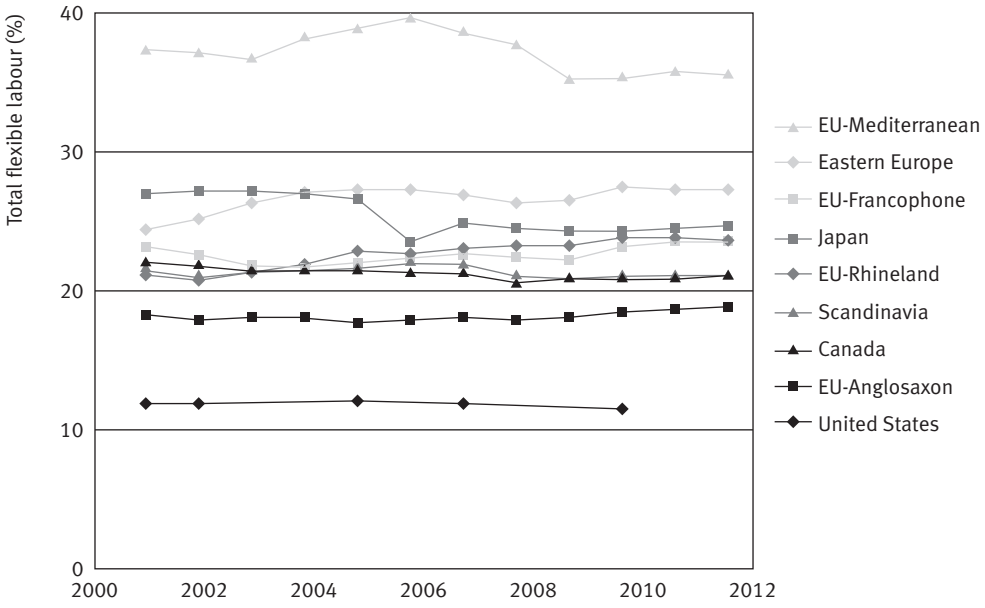


Figure 3.6 Share of flexible labour relations in total employment (percentages)

Source: Berkhout et al. (2013), p. 15.

If we focus on temporary agency work, the penetration rate generally averages 2 to 3%. However, in South Africa, the penetration rate of temporary agency work exceeds 7%. This spectacular increase does not hold for the other non-European countries concerned, let alone for most Western European countries. More recent sources do not suggest otherwise.[236] (See table 3.9 and figure 3.7.)

236 Blanchflower (2015), p. 189; CIETT (2015), p. 28 and 29.

Table 3.9 Share of temporary agency workers in total employment (percentages)

	2001	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*
United States	1.3	1.8	2.0	2.1	2.2	2.2	2.1	1.9	1.5	1.8	1.9
Argentina	0.3	0.2	0.3	0.4	0.4	0.5	0.5	0.5	0.3	0.4	0.4
Brazil						0.9	1.0	0.9	1.0	1.0	1.1
South Africa					2.3	2.2	2.1	3.4	6.4	7.1	7.2
Japan	1.0	1.1	1.2	1.4	1.7	1.9	2.1	2.2	1.8	1.5	1.5
South Korea				0.2	0.3	0.3	0.3	0.3	0.4	0.4	0.5
Australia									2.8	2.7	2.8
EU27	**1.4**	**1.4**	**1.5**	**1.6**	**1.6**	**1.8**	**1.9**	**1.7**	**1.4**	**1.6**	**1.6**
EU-Anglosaxon	3.6	3.6	3.9	4.0	4.1	4.3	4.6	4.1	3.6	3.1	3.7
Scandinavia	0.6	0.6	0.5	0.6	0.7	0.8	1.1	1.1	0.9	1.0	1.2
EU-Rhineland	1.2	1.1	1.1	1.3	1.4	1.7	2.0	2.1	1.8	2.1	2.2
EU-Francophone	2.4	2.3	2.2	2.2	2.3	2.4	2.5	2.3	1.7	2.0	2.2
EU-Mediterranean	0.5	0.5	0.6	0.7	0.7	0.8	0.9	0.9	0.7	0.8	0.9
Eastern Europe	0.0	0.1	0.2	0.3	0.3	0.5	0.6	0.7	0.5	0.9	1.1

Source: Berkhout et al. (2013), p. 22.

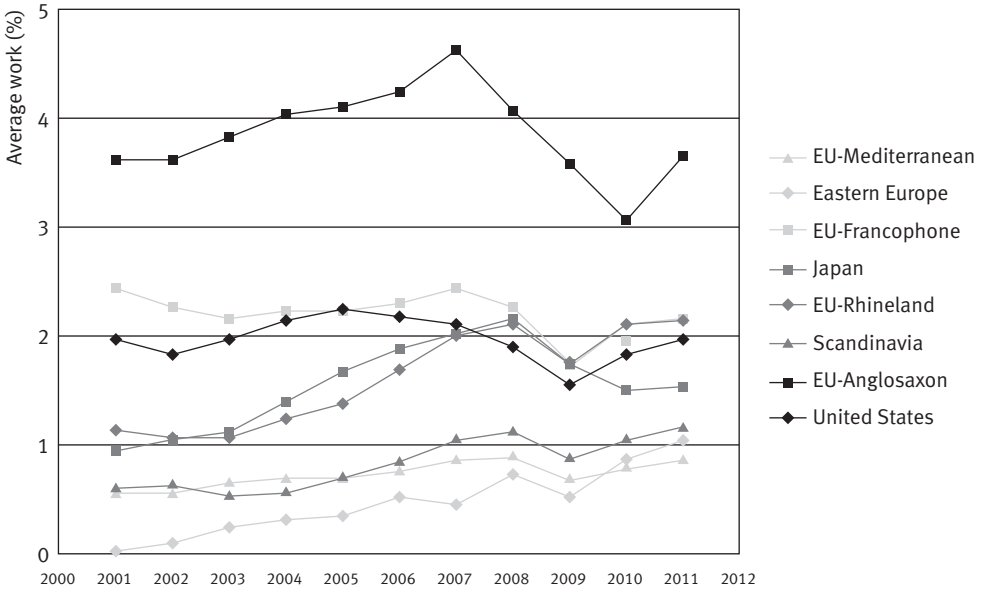


Figure 3.7 Workforce in temporary employment, selected European countries

Source: Berkhout et al. (2013), p. 22.

This leads to the following conclusion by SEO:

> There is no clear evidence that the strong growth in the share of flexible labor relations between 2002 and 2007 points at a worldwide trend towards a larger share of flexible labor at the expense of traditional open-ended labor contracts. The growth in flexible labor varies too much between countries and periods to draw such a conclusion. In

> most countries in Europe, in North America and Japan, the share of flexible labor has declined during the recent economic recession that started after 2007.[237]

While SEO sees no clear indication that flexible work grows at the expense of the open-ended employment relationship, others argue against SEO's findings. Stone[238] for example, considers these findings to be controversial, and thinks she has sufficient evidence to underpin this trend.

From 1995 tot 2005, the so-called contingent workforce in the United States decreased in various definitions (definition 1, from 2.2% to 1.8%: definition 2, from 2.8% tot 2.5% and definition 3, van 4.9% to 4.1%). Nevertheless, among older people – aged 45 to 54 – Stone notices an increase by 3 to 7 percentage points.

Within Europe, temporary employment, which includes all forms, has more than doubled between 1985 and 2009 in France, the Netherlands and Italy. Moreover, a marked increase could be observed in countries such as Germany, Japan and Spain (but not in the United Kingdom or Denmark). This involves vast numbers: in Germany from 10% in 1985 to 14% in 2009; in Italy from 5% in 1985 to 12% in 2009 and in Spain from 16% in 1987 to 33% in 2005, after which it decreased again to 25% in 2009. From another recent record covering the period from 2001 to 2012, countries such as Poland (+183%), Italy (+53%), the Netherlands (+47%) and Germany (+28%) emerge as high-growth countries with regard to temporary employment. However, in Spain, temporary employment has plummeted (-30%).[239]

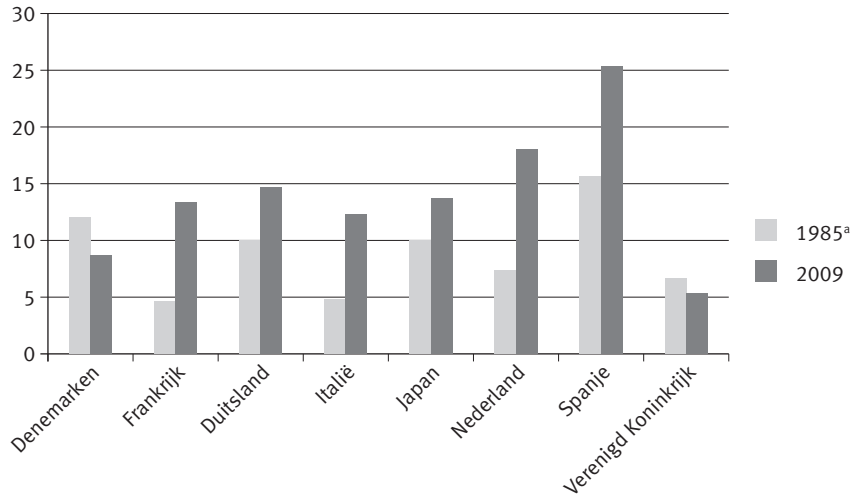
Stone also observes that increasingly fewer workers below the age of 25, who have just entered the labour market, start working in standard employment. This holds true in the United Kingdom, Japan, Italy, France, Germany and the Netherlands. A contrary development applies to Denmark and Spain.

With respect to Australia, Stone quotes Buchanan, who argues that in the course of the 1980s and 1990s precarious work has grown more than full-time permanent employment. Stone also produces figures about temporary agency work. In the United States, the number of temporary agency workers increased from over 1 million in 1990 to over 2 million in 2008. In Europe, temporary agency work also increased; from 1992 to 2002, the number of temporary agency workers in Denmark, Spain, Italy and Sweden increased fivefold, and in Austria it quadrupled. In Japan, the number of dispatched workers increased from 400.000 in 1994 to nearly 2 million in 2005.

237 SEO (2013), pp. 9, 15, 22.

238 Stone & Arthurs (2013), p. 5, see also Stone (2013b).

239 Vacas-Soriano (2015), p. 8



a Data for Spain for the period 1987–2009.

Figure 3.8 Workforce in temporary employment, selected European countries

Source: Stone & Arthurs (2013), p. 372.

Part-time employment likewise soared between 1985 and 2009. The Netherlands beats the other countries, growing from approximately 20% in 1985 to nearly 40% in 2009. However countries such as Germany (+11.8%), Italy (+8.7%), Spain (+8.2%), the United Kingdom (+3.7%) and Canada and France (each +2.2%) also showed a marked increase.

Moreover, Stone also researched whether the job tenure – the length of time someone has been in his or her job – has changed. She discovered that the duration of employment in European countries such as France, Germany, Italy, the Netherlands, Spain and the United Kingdom has generally increased.

Table 3.10 Average years on job, 1992–2009. Men and women, all ages

Country	*1992*	*2009*	*% change*
Denmark	7.94	7.63	–3.9
France	9.95	11.64	17.0
Germany	10.31	11.12	7.9
Italy	10.75	11.72	9.1
Netherlands	8.31	10.86	30.8
Spain	8.48	9.61	13.3
United Kingdom	7.77	8.53	9.8

Source: OECD.Sstat: Job Tenure for Dependent Employment

The United States likewise presented a stable overall picture. However, from 1983 to 2010, the average job tenure for men in mid-career had decreased from 13-16 years to approximately 8-10 years (in the age brackets 55–64 and 45–54 respectively). Women presented a completely opposite picture: their job tenure increased in all age brackets. Comparable figures are available for Europe and Canada. Between 2000 and 2009, the average job tenure for Australian men in all age brackets decreased.

Stone also dwells on the relationship with union density and collective bargaining coverage and notes that they have declined since 1970, especially in the Netherlands, the United States and Japan. In Australia, Canada, Denmark, France, Germany, Italy and the United Kingdom they also declined, except for an interlude in the late 1970s. The question is whether non-standard work is the cause or the consequence of the weakened trade unions and collective bargaining structure. If people switch jobs more often, they may be less interested in joining trade unions. Conversely, the changing world (neo-liberal, deregulating, anti-trade unions/social policies) may also result in fewer open-ended employment contracts.

Furthermore, Stone notes a trend towards decreasing income disparity, accompanied by the decline of standard work. The picture of the waning importance of the standard employment contract is ambiguous. Even though many countries show evidence of a trend towards more temporary employment, temporary agency work, part-time employment and self-employed workers, it remains to be seen whether this trend will endure. With regard to flexible work (temporary employment, temporary agency work and self-employed workers) SEO shows in figure 3.6 that the first years of the past decade showed an increase of non-standard work, followed by a decrease in more recent years. Indeed, Stone is right if we consider the past 20 years, but the increase of non-standard work during the last 10 years was not spectacular. This only changes if we include part-time employment in non-standard work. Part-time employment has grown, but the question is whether this type of employment is as non-standard as the other types of flexible work.

Likewise, the figures relating to temporary agency work turn out to be relative. Although it has grown during a prolonged period, if we include the last years (since 2007), there are no marked increases of the penetration rate of temporary agency work. According to CIETT data, the weighted average penetration rate of temporary agency work in 2009 was (back) at the level of 2000/2001 i.e. 1.5%, rising to 1.6% in 2013.[240]

The job tenure figures likewise fail to convince. The general picture does not appear to produce any spectacular changes. While it is true that male job tenure continues to decrease in mid-career, i.e. 8 to 10 years, the job tenure for women in mid-career has been 6 to 10 years for a long time. And the latter figure has never been an indication for the proposition that the permanent contract is clearly on the way down.

240 CIETT (2014).

3.2.6 Solutions

Still, if 20 to 25% of the workers have flexible work and if 10 to 40% work part-time, the policy that may have to be developed for these groups does deserve some thought.

Stone[241] points at the dangers of the dual labour market, the increasing risks of unemployment, the decline of the trade unions and the increasing income disparity. She advocates a new regulatory framework to promote fairness at work and to ensure a new kind of social safety net. This entails the introduction of new forms of contract that balance the needs for corporate flexibility and job security. In Europe, this has resulted in placing the flexicurity concept[242] on the agenda as a means to find the right balance.

Also, there are plans to reorganise unemployment insurance[243] and supply a severance pay as transition compensation. The important thing is to consider social programmes that support the increasingly indispensable labour market transitions. Types of regional cooperation by labour pooling are options, too.[244]

Vosko assesses three approaches to the Standard Employment Relationship (SER), i.e. a tiered SER, a flexible tier and the 'beyond employment' approach. The tiered SER is about new forms of employment derived from the SER, for instance the partial and pro rata protection with regard to part-time and temporary employment.

Figure 3.9 Functions of the old and the new SER. (Additional functions of the new SER are in italics.) Source: Bosch (2004)

241 Stone (2013a), p. 12 ff.
242 Wilthagen (2007).
243 Stone (2013a), p. 18 ff.
244 Vosko (2010), p. 212 ff.

The flexible tier approach[245] fits the ideas Bosch developed in response to the eclipse of the SER as the dominant form of employment. As regards the position of the workers, in addition to the current welfare and security arrangements that are applicable, the new forms of employment encompass concepts such as employability and work-life balance.

For companies, cooperating with workers and investing in human capital continue to be relevant, as is internal flexibility. For society as a whole, reducing inequality and creating human capital are relevant, on the understanding that the human capital of both men and women must be used. This approach specifically calls for child-minding, flexible work, lifelong learning, the option to choose working hours and the individualisation of social security.

The beyond employment approach fits in with the ideas of the French professor of labour law Alain Supiot.[246] In 1999, the European Commission asked him and a number of fellow-professors of labour law from the EU to think about the future of work and the corresponding legislation. The Supiot report comprised a number of recommendations of which the notion of the 'social drawing rights' has raised the most eyebrows. This idea entails that workers can accumulate a reserve during their career from which they can draw when switching from one job to another or in family-related situations. The recommendation did not specify how the plan was to be funded, and so far it has hardly been developed.

Also deserving of special attention is the concept of the single employment contract that can be seen as a special development of the notion of flexicurity. This concept is (has been) particularly under discussion in Italy, France and Spain, with the aim of arriving at a new form of employment contract that rebalances the corporate need for flexibility on the one hand and sufficient security for workers on the others. However, all provisos conceived in this context result in cost increases that entrepreneurs consider problematic. These cost increases arise from the introduction of automatic financial compensation upon dismissal without any option of legal settlement of the labour dispute. Thus, these provisos beg the question as to whether this is in line with the ILO Termination of Employment Convention (Convention 158) and article 30 of the European Charter of Human Rights. In this regard, Casali and Perulli[247] argue that the:

245 Vosko (2010), p. 215, and Bosch (2004).
246 Vosko (2010), p. 218, and Supiot (1999).
247 Casali & Perulli (2014).

> … pros and cons of the single employment contract will continue to be debated. What is really needed at this stage is a new balance between flexibility and security, but from a point of view of labour protection based on the employment relationship and not on the economic market alone. This would require the rethinking of social protection systems, creating the conditions for a more inclusive society in terms of income guarantees in the event of unemployment, along with a reconsideration of the nature of work, overcoming excessive fragmentation and insecurity. All these issues are unavoidable and common to all European legal systems.
> There is a need for European and international institutions to take a more active role in addressing this task, and for a wider involvement of organizations representing the various interests involved, with a view to finding a broadly applicable and sustainable compromise to the current jobs crisis. The world of work needs it.

Interestingly, Italy appears to have made progress with its new Jobs Act that, thanks to introducing a 'contratto a tutele crescenti', has yielded a major liberalisation of labour law, and as a result of which open-ended employment contracts are said to be on the rise again.[248]

Broadly speaking, the phenomenon of temporary agency work constitutes one of many changes in the world of work. And traditional labour law offers less and less grip to shape these changes. In that respect, Van der Heijden[249] points at the increase of a grey area of economically dependent workers, the eroding notion of subordination in employment law, the reciprocity and the 'private-lawisation' of labour law, the increasing participation and the need for pluralism and differentiation. In that respect, he refers to the farewell collection for judge Mancini, in which T. Koopmans[250] observes that a new pluralism is on the rise and that watersheds between the various fields of law are becoming obscure; old boundaries between these fields are disappearing and Anglo-Saxon doctrines are influencing the continental fields of law. Instead of legislation, case law is also needed to solve the problems.

Van der Heijden also refers to Gérard Lyon-Caen,[251] who wrote in 1996 that, as a legal sub-discipline, labour law is no longer able to assess all societal changes. If they want to be able to follow all transitions, practitioners of labour law must widen their scope to multiple legal disciplines. Furthermore, he refers to Rood,[252] who foresees

248 Cheyvialle (2016).
249 Van der Heijden (1999a).
250 Koopmans (1999).
251 Lyon-Caen (1996).
252 Rood (1998).

that the future in various forms of employment contracts probably lies in pluralism and differentiation.

The conceptual framework for labour law on the basis of the Fordist production structure is outmoded, Van der Heijden argues. There is a need for individualisation, flexibilisation and de-solidarisation. This requires a tailor-made approach, granting freedom to professionals who want to shape their own future and making adjustments as soon as possible to keep up with global competition.

Van der Heijden advocates a new legal order of labour. He argues that the new labour law paradigm will be guided more by private law than by public law, more by labour law created at corporate level than by labour law that has arisen at other levels, more by pluralism than by unity, more by case law than by legislation, and more in keeping with economic dependence than with legal subordination.

And thus, he observes how the outlines of a new legal order pertaining to labour are being created. Interdisciplinary scientific labour studies will have to assist in further deepening, development and realisation of this new legal order.[253]

3.3 THE ILO DELIBERATES

3.3.1 The position of trade unions: watershed 2012

Under the motto 'From Precarious work to Decent work' a so-called ACTRAV symposium was held in 2011 on Policies and Regulations to Combat Precarious Employment.[254] In his introduction to this symposium, the then ILO Director-General Somavía argued that the informal economy is the biggest source of precariousness.[255] On behalf of the trade unions, Ron Oswald, General Secretary at the IUF, argued that the destruction of the direct, open-ended contracts should be countered. He said:

> Permanent, direct employment is on the way out. It is increasingly replaced with 'temporary' contracts which in fact can last for decades or whole lifetimes; by outsourced agency contracts, which conceal the real employment relationship and hence the balance of power in the workplace and in society; with 'seasonal' contracts which are year round, bringing all seasons together in a single workplace; with bogus 'self employment' schemes which turn wage earners into 'contractors', with stand-by and on-call work; and with phony 'apprenticeships' often dressed up in the language of 'life-long learning'.

253 Van der Heijden (1999a), p. 19.

254 ILO (2012a).

255 ILO (2012a), p. 9

And further on:

> Language, as I have said, is essential. The opposite of decent is indecent, and another word for indecent is obscene. It is indecent to suggest that private employment agencies, often incorrectly termed 'temporary' agencies, somehow create jobs, 'fuel' social progress or contribute to decent work. It is investment, and capital's need for labour, which creates employment. What kind of jobs in turn depends on the wider environment, including the degree of basic protection, including protection for the right to organize and bargain. We see social regression rather than progress, and the less progress we see the more agency work we find. Agency work is by definition precarious – the 'user enterprise' can terminate the relationship at will. Private job agencies are not contributing to decent work: they are undermining it by institutionalizing insecurity, concealing the true employment relationship and blocking effective access to rights.[256]

This statement marks a clear turnabout on the part of the trade unions: in the new approach, temporary agency work leads to more job insecurity and weakens the legal position of the workers as well as that of the trade unions.

Sharon Burrow, General Secretary of ITUC, asks for one or more ILO instruments with respect to disguised, ambiguous and triangular employment that go beyond recommendation no. 198 (2006), possibly a convention on precarious work.

Only the introduction by Luc Cortebeeck,[257] the chairman of the ILO Workers Group, refers to Convention 181, which is said to have a limited scope, because it has no provisions against excessive use of temporary employment.

3.3.2 Focus

The ACTRAV symposium focused on two categories of contractual arrangements, i.e. the limited duration of the contract (fixed-term, short-term, temporary, seasonal, day-labour and casual labour) and the nature of the labour relations (triangular and disguised employment, bogus self-employment, subcontracting and agency contracts). Furthermore, the symposium looked at four precarious working conditions, i.e. low wages, poor employment protection, poor social protection (often associated with standard full-time employment) and lack of possibilities to exercise one's rights at work.

The study shows a spectacular growth of temporary employment from 1987 to 2007 and calculates that the weighted average for the entire OECD area grew from

256 ILO (2012a), p. 12

257 ILO (2012a), p. 18

9.4% in 1985 to 12% in 2007. While permanent salaried employment increased by 21% during that period, temporary employment increased by 55%. Higher growth figures apply for the European Union.

According to the report, 'precarious work has a deep impact on workers and on societies. Over the past years, economic crises and turbulences on the financial markets have led to widespread anxiety among workers. Increasing rates of unemployment and precarious work arrangements deteriorate the quality of working and living conditions.'[258] Particularly, temporary workers cannot make effective plans to get married, have children or buy a house, because their prospects are uncertain and their wages tend to be low. Precarious work can also lead to health problems and to unhealthy and dangerous working conditions. Relatively speaking, this phenomenon affects women more.

Furthermore, all these developments have a weakening effect on society as a whole. A sense of powerlessness and fear discourages the precarious workers to join trade unions or other organisations promoting social participation, which results in social exclusion. Technological and institutional changes are the drivers of this development. Neo-liberal thinking has boosted it even more.

To put a stop to this development, the following key elements are advocated: restoring full employment as the pivot of economic policy; restricting the so-called financialisation of the world order; balancing the tax burden; public investments in sustainability; pay rises in line with increasing productivity.

For the labour market, the report advocates a level playing field without unfair competition. Imposing quotas for external hiring, 5% for instance, as well as demanding valid reasons for it could be the answer. If no valid reason for external hiring is evident, a permanent contract should automatically start after a maximum of three months.

3.3.3 Legislation

The ACTRAV report states that labour law has not kept abreast with the reality of new forms of work, which results in an increase of precarious work. In some cases, certain categories of work are excluded from the current labour legislation, which applies to farm workers and domestic staff for instance, and in other cases, practices have arisen that are not covered by the definition of employee and/or employer. Moreover, hiring temporary employees and forms of subcontracting are not sufficiently restricted, which renders workers vulnerable to unjust dismissal, low job security, low wages and little or no social security. It also results in erosion of trade union

258 ILO (2012a), p. 35

power. According to the report, there are various routes towards tackling this, i.e. the national route, the international route and the legal route.

At a national level, exclusions for certain categories of workers can be rectified. Likewise, ambiguous employment can be tackled by tightening up the definitions of employees and employers. In this case, triangular employment relationships demand special attention.

The Global Unions reached an agreement on this, providing that 'the primary form of employment should be permanent, open-ended and direct; agency workers should be covered under the same collective bargaining agreement as other workers in the user enterprise: temporary agency workers should receive equal treatment in all respects; the use of temporary agencies should not increase the gender gap on wages, social protections, and conditions; temporary work agencies must not be used to eliminate permanent and direct employment relationships; and the use of agency workers should never be used to weaken trade unions or to undermine organising or collective bargaining rights'.[259]

The report refers to legislation in Belgium where hiring temporary agency workers is restricted to special circumstances, such as replacement, covering peaks of work, work of unusual nature, artistic work. In France, Belgium's first and second restrictions apply, plus 'intrinsically time-limited posts'. Moreover, in France, temporary agency work must become a permanent contract after 18-24 months. According to the report this is an improvement compared with European countries such as Poland, Romania and Italy, where the limit is set between 2 and 3 years. Taking measures that offer more income security, e.g., statutory minimum wages, and measures to enhance labour law enforcement is also important.

Most international labour standards appear not to distinguish between forms of employment, but to protect all workers. According to the report, international law seems not to protect against precarious work as such.

Furthermore, the use of temporary employment and temporary agency work is not sufficiently restricted, while existing instruments lose protective power due to poor ratification rates and inadequate implementation.

The report lists various conventions that include regulations for specific categories of workers, for instance:

- the Migration for Employment Convention (revised) 1949 (no. 97) and the Migrant Workers (Supplementary Provisions) Convention 1975 (no. 143);
- the Workers with Family Responsibility Convention, 1981 (no. 156);
- the Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (no. 159);
- the Maternity Protection Convention 2000 (no. 183);

259 ILO (2012a), p. 51

– the Home Work Convention, 1996 (no. 177);
– the Domestic Workers Convention, 2011 (no. 189).

Likewise, the above international instruments all pivot on the principle of equal treatment. This is expressed in several ways, but the principle stipulates that workers should not be discriminated against 'on the basis of race, colour, sex, religion, political opinion, national extraction, social origin or any other form of discrimination covered by national law and practice'. Controversially, this equal treatment principle does not apply to differences in contract form.[260]

With respect to Convention 181, the ACTRAV report states that it 'constitutes an effort to address abuses' and that licensing, certification, guaranteeing workers' rights to freedom of association and collective bargaining as well as the allocation of responsibilities by governments are important elements in dealing with any unscrupulous agencies. Still, the convention does not restrict the use of temporary agency workers. Nor does it include provisions with respect to how the responsibilities in the matter of collective bargaining must be allocated.

Furthermore, the report argues that international labour law fails to provide an instrument on temporary employment. A new ILO convention and recommendation should first address the conditions under which employers are allowed to hire temporary employees or agency workers, and it should impose quantitative restrictions on the number of workers hired on precarious contracts at a given enterprise and on the maximum duration of temporary contracts, after which the workers concerned must be given permanent contracts. In line with Recommendation 198, such a binding instrument should also include clear criteria to define employment relationships. Furthermore, such an instrument should ensure that workers are treated equally and pay special attention to social security, occupational health and safety and trade union rights, including the right to collective bargaining.

Until the time such a convention has been created, priority should be given to Convention 158 on termination of employment and the accompanying Recommendation 166. The latter instrument recommends limiting fixed-term contracts to those cases in which the nature of the work or the working conditions necessitate temporary contracts and, if the rules are broken, to provide that a permanent contract is deemed to exist.

To conclude, the ACTRAV report lists the ILO jurisprudence regarding right to organise and bargain collectively. This makes clear that both the CEACR and the CFA have respected the rights of precarious workers in several reviews. This is particularly striking in relation to a case the CFA reviewed in Colombia. Here, the Union of Chemical and Pharmaceutical Industry Workers wanted to be registered by the

260 Rossman (2013).

authorities. Its objectives stated that they wanted to include temporary agency workers. The government held the view that the Union could only represent workers who had contracts of employment with companies belonging to the same industry, which did not apply to temporary agency workers. The CFA ruled that the conditions under which workers are hired should not affect their right to join a trade union and take part in its activities.[261]

The ACTRAV symposium concluded that the ILO is to develop a new economic paradigm that is in line with ILO's Global Jobs Pact and the four pillars of the Decent Work Agenda. The symposium requested further research on the obstacles that precarious workers come up against with regard to collective bargaining. It also placed on the agenda the promotion of a number of existing instruments – apart from the ones for specific categories listed above, for instance:

- the Employment Policy Convention 1964 (no. 122);
- the Employment Relationship Recommendation 2006 (no. 198);
- the Termination of Employment Convention 1982 (no. 158);
- the Collective Bargaining Convention 1981 (no. 175);
- the Minimum Wage Fixing Convention 1970 (no. 131);
- the Labour Inspection Convention 1947 (no. 81) and the Labour Inspection (Agriculture) Convention 1969 (no. 129);
- the Labour Clauses (Public Contracts) Convention 1949 (no. 94).

Lastly, the report expresses the need to examine the meaning, scope, impact and application of Convention 181 in the light of the rapid growth of triangular employment relationships through temporary agency work.

3.3.4 The employer position

Meanwhile, employers have also considered their position. In 2014, the IOE published a position paper on flexible forms of work.[262] Precarious work is not a workable topic for employers. They even worry about the lack of clarity and usefulness of the definition of 'precarious work' and about the frequently made suggestion that all flexible forms of employment are systematically precarious.

Employers argue that flexible forms of employment, such as fixed-term contracts, part-time employment and temporary agency work all form part of the labour market and make up useful and much-needed additions to the full-time permanent contract.

261 CFA case no. 2556.

262 IOE (2014a). See also: BDA (2012), which shows that in 2011 alone 675,000 mainstream jobs and 122,000 temporary jobs were created.

Flexibility matters not only to employers, but to employees as well, because it contributes to the quality of working life and the employability of the workers. It improves the work-life balance, enhances workers' opportunities to find new employment and increases their chances of gaining work experience. Flexible work, employers argue, helps the most vulnerable groups, such as young people, long-term unemployed people and low-skilled workers to (re)gain a foothold in the labour market. Flexible work enables enterprises to retain and create jobs while staying adaptable and competitive.

Flexible work does not automatically mean precarious work, and thus lack of social benefits, low wages and high occupational health and safety risks, in short, lack of decent working conditions and fringe benefits. Poor working conditions apply to a much greater extent to informal and illegal work. To employers, decent work is based on:

- compliance with national labour law and effective enforcement of legal rights, including national laws that implement international legal standards;
- respect for the internationally acknowledged rights as included in the ILO's Declaration on Fundamentals Principals and Right at work (1998);
- a legal framework that promotes the integration in the labour market of people with varied needs and meets the corporate need for flexibility.

Moreover, employability and career advancement are much more relevant to an increasingly dynamic labour market than focusing on one's current job is. This is the work-security concept that pivots on transitions in the labour market. Temporary employment agencies invest in training and development and thus in the employability of their workers.

Employers argue that flexible work does not supersede the traditional forms of employment. Figures are available showing that the number of mainstream jobs far exceeds the number of temporary jobs.[263] Flexible forms of employment often constitute a 'stepping stone' into the labour market.

Furthermore, employers argue that while flexible workers earn lower wages, this has to do with the workers' schooling and skills levels, which tend to be lower.

Flexible work enables companies to respond quickly and efficiently to demand fluctuations. It is a stabilising factor that helps employers retain permanent staff; it offers various replacement opportunities due to illness, holidays or maternity leave. Moreover, research shows that a wider variety of labour contracts results in increased job creation and higher labour market participation.[264] Furthermore, flexible work and temporary agency work help the search processes in the labour market run more efficiently and effectively.

263 BDA (2012).

264 Schmid (2010), p. 130; Berkhout & Van den Berg (2010).

3.3.5 2011 Global Dialogue Forum

In 2011, the ILO organised a GDF (Global Dialogue Forum) about temporary agency work. The Governing Body had taken the decision in 2009. 144 participants attended the Forum, 25 of whom represented governments, as well as 62 employee and 50 employer representatives.[265] Whereas the 2009 workshop was characterised by a positive attitude, resulting in a lot of common ground, the 2011 Global Dialogue Forum made it clear that the trade unions took up a much more critical position. They had by then considered a joint attitude with regard to precarious work, as became abundantly clear during the consultation.

For this meeting a paper was produced: *Private Employment agencies, promotion of decent work and improving the functioning of labour markets in private services sectors*. The report explores the various trends that cause the growing phenomenon of temporary agency work, supplies economic data regarding various sectors, explores who the workers are and dwells on the social aspects of temporary agency work and its contribution to the labour market.

The following issues were placed on the agenda:[266]

1. temporary employment agencies' contribution to job creation and, more in general to decent work;
2. legislation;
3. temporary agency workers' rights: how to comply with legislation and how to effectively link the sector's development to improved worker protection;
4. how to promote the social dialogue regarding temporary agency work at all levels.

Ad 1, job creation and decent work

With respect to job creation, it was tentatively suggested that if well-regulated and effectively respecting the workers' rights that have been recognised in international labour standards, temporary employment agencies[267] can play a role. Therefore, it is important not to get mixed up in casuistry and keep looking at the bigger picture.

Research is needed on the scope and impact of Convention 181 on the labour market.

Combating rogue agencies and illegal practices serves a common cause; there is a need for social dialogue as well as for reinforcing freedom of association and collective bargaining, provided that commissioning clients must also take part in the social dialogue with temporary workers.

265 GDFPSS/ILO (2011a).

266 GDFPSS/ILO (2011b).

267 GDFPSS/ILO (2011b), p. 8.

The fundamental principles and rights at work must be respected in all cases; this also applies to temporary employment agencies.

The participants failed to achieve consensus on a number of points. For instance, on the so-called reasons of use that would need to be implemented, i.e. criteria for when temporary agency workers can be hired, and on imposing limits on the extent of hiring them. Temporary agency work was neither the best nor the worst form of temporary employment. Employment was created by investments on the part of commissioning clients, i.e. the user companies, while temporary employment agencies merely matched the supply and demand for labour. Some agencies do actually operate within the law, but still violate workers' rights, the employee representatives argued.

Ad 2, legislation

In the first instance, the participants more or less achieved consensus on the fact that there is broad recognition of the need for regulation[268] on the basis of relevant international standards. Regulation must be balanced, must promote decent work and grant employees labour rights, the rights to social security, pension, leave and training. Meanwhile, the temporary employment agencies must also be able to realise labour flexibility. Ratification of Conventions no. 87, no. 98 and no. 181 as well as effective implementation of Recommendations 188 and 198 must be promoted. Likewise, social dialogue must play a role and codes of conduct may make a useful contribution.

Ad 3, temporary agency workers' rights

With respect to the issue of workers' rights, several agency employers presented examples from the various countries to make clear that appropriate regulation fully guarantees workers' rights.

The Argentinian employer participant advocated ratification of Convention 181 and argued that informal work is a much bigger issue in his country than temporary agency work. An estimated 40% of the working population did unregistered work. The worker spokesperson argued[269] that real-world examples were needed from outside Europe and from non-CIETT members. According to him, the development of the temporary agency industry undermined freedom of association and collective bargaining and replaced open-ended contracts by precarious work. The spokesperson stressed the importance of equal treatment, which comprised more than fair treatment, as the (agency) employers had underlined earlier. The direct open-ended contract should be the norm; temporary employment agencies should

268 GDFPSS/ILO (2011b), p. 13.

269 GDFPSS/ILO (2011b), p. 14.

not charge workers any fees; workers should be given written contracts; temporary agency workers should be given information on occupational health and safety and be treated equally, which included freedom of association and collective bargaining.[270] In respect of worker's rights the chairperson established that consensus had been achieved about the necessity of appropriate regulation to ensure respect for the fundamental principles and rights at work, supplemented by special measures to that to be agreed on in 'a spirit of mutual respect and recognition'; furthermore, that equal treatment for temporary agency workers regarding pay, occupational health and safety, training, hiring and firing as well as information about vacancies registered by the commissioning clients; and temporary employment agencies, commissioning clients and trade unions are to collaborate on sector-level collective agreements. National governments are responsible for promoting this.

Temporary agency work should be decent, safe and legal, and should hold out the prospect of direct, open-ended employment if possible; temporary employment agencies should not charge fees; written contracts should be obligatory, containing information that enables workers to assess whether they are being treated equally.

Ad 4, social dialogue

Lastly, tripartite dialogue is needed to meet the decent work challenge and promote effective implementation of Convention 181.

With regard to this dialogue, the employee representative remarked that temporary agency work disrupts the collective nature of bargaining. It proved to be really difficult to organise collective bargaining among temporary agency workers when they were assigned to a user company through various agencies, especially if the working relationship between employers and temporary agency workers could easily be terminated at any time. The real bargaining takes place between the commissioning client and the temporary employment agency. In future, all social partners should be involved in collective bargaining, including the trade unions of the user company and employers' representatives.[271]

The issue was further clarified from the workers' perspective by means of an example at Unilever in Pakistan, where a temporary agency worker did not receive equal treatment. Only when Unilever was willing to take responsibility and no longer distanced itself from this issue, could the solution be found.[272] The employer representative commented that there was an excessive focus on the bilateral nature of labour relations and that the triangular employment relationship inherent in temporary agency work should by now be taken into account. Article 12 of Convention 181

270 GDFPSS/ILO (2011b), p. 17.

271 GDFPSS/ILO (2011b), p. 19.

272 GDFPSS/ILO (2011b), p. 20.

covers this relationship and has the member states allocate the respective responsibilities. The Unilever issue as described above would possibly never have arisen if Pakistan had ratified and implemented Convention 181.

The chairperson summarised that temporary employment agencies, governments, commissioning clients and trade unions all acknowledge the importance of social dialogue. As a result, collective agreements can be concluded at a national, sectoral and corporate level to define the terms and conditions of employment. Ratification of Convention 181 and other international labour standards is desirable and must be promoted. However, there is also a clear need for effective implementation and enforcement. Practical solutions flowing from social dialogue call for acknowledgement by all social partners.

It proved impossible to achieve consensus on granting the agency sector the right to unrestricted collective bargaining. Social dialogue in triangular employment relationships should be organised differently.

3.3.6 No agreement

At the end of the dialogue, an attempt was made to limit so-called points of consensus to five key points:[273]

1. The points of consensus of the 2009 workshop to promote ratification of Convention 181 are confirmed.
2. To the extent that temporary employment agencies are employers, they must be recognised as legitimate social partners in the social dialogue; user companies can be involved as social partners according to national law and practice.
3. Ratifying Conventions 87, 98 and 181 must be promoted, as well as implementing Recommendations 188 and 198. Social dialogue should be instrumental in achieving this.
4. The ILO must expand its knowledge base through research on regulation in both developed and developing countries; this should serve to promote Convention 181.
5. The Forum requested that the ILO organise within three years an expert meeting on the role of temporary employment agencies. The Forum recognises the importance of social dialogue and collective bargaining in relation to temporary agency work. This dialogue should involve governments, temporary employment agencies, commissioning clients and trade unions.

In the event, it proved impossible to achieve consensus on these five points. Particularly point 2, on social dialogue and which parties would need to be involved in it, led

273 GDFPSS/ILO (2011b), p. 23.

to a difference of opinion. The trade unions wanted to oblige the user companies, i.e. commissioning clients, to be involved in collective bargaining. Employers thought that this was a step too far. They did want involvement, but not as a worldwide obligation. Involvement should be voluntary, in line with national law and practice.[274]

To conclude, the chairperson remarked that the deliberations during the Forum had not been easy. However, they had contributed to a better understanding of how various countries perceived temporary agency work, and how the employers', workers' and government groups viewed it. The reflections could contribute to future work, even though no consensus had been achieved.[275]

3.3.7 Trade unions redefine their positions

Some time after this GDF, the joint global unions adopted their Global Union Principles on Temporary Work Agencies.

General principles

- The most important form of employment is permanent, open-ended and direct employment. Temporary employees must be treated equally and are entitled to equal pay for equal work, in line with the terms and conditions accorded to permanent employees. They are also entitled to a written contract specifying the terms and conditions of employment. Where temporary employment agencies are allowed to operate, they need to be strictly regulated, which includes licensing.
- Temporary employment agencies must not be used to supersede permanent and direct employment, to erode terms and conditions of employment, to counter collective bargaining or to prevent trade union membership. Before hiring temporary agency workers, employers must consult trade unions on the use of these workers and on its effects on permanent employment, working conditions or collective agreements.
- The use of temporary employment agencies must be restricted to instances of legitimate need. As a minimum, specific restrictions must be imposed with regard to both the use and the duration of temporary agency work.
- Temporary agency workers must be ensured access to information on health and safety measures in the commissioning client's workplace and must be provided with the same equipment and facilities as permanent employees.

274 GDFPSS/ILO (2011b), p. 24.
275 GDFPSS/ILO (2011b), p. 28.

- Employers and national governments must ensure social protection for temporary agency workers, including social security coverage.
- Temporary employment agencies must treat their workers without discrimination; to ensure this, an appropriate regulator framework must be in place, including the minimum standards of Convention 181.
- In view of the over-representation of women in temporary agency work, special attention must be given to the disparity in wages between permanent employees and temporary agency workers, particularly to the application of Convention 100, including equal pay for work of equal value.
- The ILO must play a more active role in ensuring that temporary employment agencies respect the basic labour standards, and collect data on abuses, best practices and trends in public and private employment services. The Global Unions must participate in this work.
- Temporary agency workers must not be hired to replace striking workers.
- Temporary employment agencies must not charge workers any fees for their services.
- The commissioning client must be held liable for all financial and other obligations that are not met by the temporary employment agency.

Government responsibilities with respect to temporary agency work

- National governments must work at stable labour relationships and ensure the application of labour law. They may restrict or ban temporary agency work in order to protect societal interests.
- Governments must set strict regulations and if temporary agency work is allowed, they must impose licensing conditions. Governments must consult with trade unions about matters relating to the terms and conditions of (assigning) temporary agency work.
- If an employment relationship exists between the temporary employment agency and the agency worker, the several roles, obligations and rights of the temporary agency workers, the commissioning client and the temporary employment agency need to be clarified.
- National governments must ensure that temporary agency workers can effectively exercise their trade union rights, including membership of a union that has a collective bargaining relationship with the commissioning client, being part of the negotiating unit for direct employees on the commissioning client's premises and being included in the collective bargaining agreements that apply to the commissioning client.
- National governments must reinforce labour inspection and supply adequate means to apply labour law and agency regulations effectively.

- Governments must develop mechanisms for the application of the occupational health and safety conditions and ensure that the same conditions apply to temporary agency workers and permanent employees alike.
- There must be sanctions in place for commissioning clients that fail to comply with these requirements.

Migrant workers

- Migrant workers must be given details about their living and working conditions in their native language before leaving their country of origin.
- National governments must take measures to combat human trafficking and exploitation by intermediaries, including temporary employment agencies.
- Governments must ensure that immigration legislation does not impose restrictions on migrant workers' trade union rights that conflict with labour law.
- Migrant workers must not be asked for 'pay-deposits, visa fees, transportation fees and hiring fees'.
- Migrant workers must have full rights to legal redress in the country where they are working.[276]

3.4 INTERIM REVIEW: BOTTLENECKS

Surveying the above developments it becomes clear that, following the failed contract labour dialogue that did actually result in Recommendation 198 in 2006, in the context of the issue of precarious work widespread criticism was directed against changes in the labour market that would lead to the loss of the open-ended contract.

A number of sociologists have taken the lead in a discussion that appears to be ongoing. It is doubtful whether the relevant literature is right about the postulation that permanent employment is on the way out. It became clear above that, on the basis of figures about the period 2000-2012, SEO (p. 94) sees no further increase in the displacement of permanent employees by flexible workers.

On reflection, the tenor in the literature is not really borne out by the figures. The most remarkable figures are those relating to the German labour market, indicating that in 2011 alone, Germany gained 675,000 mainstream jobs, five times the number of 122,000 temporary workers that were added during that same period.

If temporary employment stabilises in general, this applies especially to temporary agency work in the more developed regions, such as the United States, Japan and the European Union as a whole. Only the relatively new markets in Eastern Europe are growing. However the penetration rates of temporary agency work tend to average 1 to 2%, sometimes nearer 3%, and hardly ever exceed that level. The figures do

276 CGU (2012).

not justify the anxiety that emanates from the views expressed in the literature and by the trade unions.

But even though temporary employment in general tends to stabilise and the volume of temporary agency work tends to be small, it is still useful and necessary to keep reflecting on the criticisms that are being expressed.

3.4.1 Aspects of ongoing discussion demanding further analysis

Taking into account science and the points of view of the social partners, particularly those of the trade unions, and the ILO deliberations on this score, four key aspects from the above discussion invite further analysis:

- employment is insecure;
- wages are not equal;
- the trade union movement, particularly collective bargaining, is weakened;
- the use of temporary agency work is insufficiently restricted.

In the paragraphs above, it was said that security is all about perception. According to the OECD the sense of security does not increase proportionally to additional security protection (employment protection) but rather depends on the social safety net (social benefits), which generates income security. Also, the sense of security does not increase in proportion to job tenure. Moreover, temporary agency work turns out to score no worse than open-ended employment in general. In this respect, informal work and bogus self-employment turn out to score worst.

The OECD also indicates that temporary employment agencies offer open-ended contracts in a number of countries. Thus, security is a relative concept that is determined by more aspects than the contract alone.

Honourable though the principle of equal treatment – equal pay for equal work – may be, the question always remains what to compare to. In the labour market, differences simply will occur. A secretary of the same age with equal experience and qualifications can earn more with the one employer than with the other. And temporary employment agencies must always take into account the re-assignability of their workers. Particularly if they offer open-ended contracts, they need to minimise their risk of under-utilisation, which results in their 'own' wages policy.

Article 12 of Convention 181 has come with a solution to this: member states are to allocate responsibilities, including that for collective bargaining, to the parties concerned. Many European countries have enacted the principle of the 'user pay' and this is currently also a starting point in the 2008 EU Temporary Agency Work Directive.

Non-discrimination with respect to remuneration has been entrenched in Conventions 100 and 111 that provide that discrimination based on characteristics such as sex, nationality, et cetera is forbidden. Still, a general ban on discrimination based on differences in contract, which actually occur with respect to temporary agency work, has also been advocated. Support for this point of view can be found in article 7a(i) of the ICESCR that entitles workers to 'fair wages and equal remuneration for work of equal value, without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those engaged by men, with equal pay for equal work'.

This concerns a provision that may become relevant in the case of operations in breach of the OECD Guiding Principles. It seems highly doubtful whether this view is feasible. Firstly, the precise meaning of 'equal pay for equal work of equal value' will need to be established; with whom exactly do you compare; with another worker hired by the temporary employment agency or with an employee of the commissioning client's? Secondly, are the conventions on the freedom of association and collective bargaining at stake if an agency-specific wage policy for its workers is established and agreed on in a collective agreement? What should prevail in that case?

Furthermore, precarious work, together with temporary agency work, are said to erode the position of the trade unions, and the question is whether these forms of employment institutionalise the waning trade union power and influence. As became clear above, this is a much-used argument, and during the last GDF this was what divided (temporary agency) employers and workers. In practice, various types of social dialogue exist between (temporary agency) employers and workers.

Table 3.11 Types of bargaining arrangements

Bargaining arrangement	*Social partners*	*Collective agreement*	*Coverage*
Multi-employer inter-sectoral	Employers' federations, union confederations and federations	**Belgium:** Inter-professional agreement, FEB/VBO, UNIZO, UCM & BB, FGTB/ABVV, CSC/ACV, CGSLB/ACLVB (2011–2012)	All private sector employees (including part-time, fixed-term, temporary agency workers)
	Associations of temporary employment agencies, union federations	**Spain:** National Collective Agreement on temporary work agency workers, AGETT, AETT, FEDETT, AGETT & CCOO, UGT (2008)	Temporary agency workers
Multi-employer sectoral	Sectoral employers' federations and one or more trade unions	**Germany:** Stahl & IG Metall (2010, 2011) for North Rhine-Westphalia, Lower Saxony and Bremen: general pay increase, regulates use of TAW and equal pay for work of equal value.	All fixed-term regular employees and temporary agency workers in the sector in three regions

Bargaining arrangement	*Social partners*	*Collective agreement*	*Coverage*
	Temporary work employers' organizations and trade union	**Germany:** BAP and iGZ & IG Metall (2012): sectoral bonuses for temporary workers in the metal industry depending on the length of their assignment.	Temporary agency workers in the metal industry
Enterprise	Enterprise and trade union(s)	**Japan:** Post Holdings & enterprise union (2007, 2010): 2,000 yen monthly wage increase for fixed-term employees, hire 2,000 fixed-term as regular.	All fixed-term salaried employees (including non-unionized) at enterprise
		Turkey: UPS and Tümtis (Türkiye Motorlu Tasit Iscileri) supported by ITF (2011–2013): regulates use of subcontracting; 260 subcontracted workers become regular employees.	All members
	TWA and trade union	**Germany:** IG Metall and Adecco for Audi (2007): equal pay for work of equal value (departing from industry agreement for Bavaria that derogates from equal treatment)	Temporary agency workers at enterprise

Source: Hayter & Ebisui (2013)

Table 3.12 Employment, pay and equal treatment

Issue	*Outcome*	*Agreement*
Employment	Limit segmentation	**South Africa:** SAA & SATAWU/AIWU: use of labour brokers to be phased out over 18 months from 1 April 2009. During phase out, ratio of broker employees: permanent employees to be 20:80 for cabin crew, 40:60 for cargo and 30:70 for other division.
		United States: IKEA Swedwood & IAMAW supported by BWI (2012): limits the number of temporary workers that can be hired and requires them to undertake safety training before entering plant.
	Transition to regular employment	**India:** GlaxoSmithKline & Milk Food Factory Workers' Union supported by IUF (2010): regularization of 443 temporary agency workers in a phased manner.
		France: Caterpillar & FO, CFTC and CGT – Grenoble and Echirolle plants (2012): transformation of 80 precarious labour contracts to convert in 2012 into permanent contracts.
		Germany: Deutsche Post & Ver.di (2011): 1,500 part-time employees to receive regular full-time contracts.

Issue	*Outcome*	*Agreement*
Wages and working time	Equal pay	**Germany:** Adecco for Audi & IG Metall (2007): equal pay for equal work. In July 2012, Audi announced intention to cut hundreds of temporary jobs.
		South Africa: Metal Engineering and Industries Bargaining Council (2011–2014): all workers procured through Temporary Employment Service to enjoy existing terms and conditions of employment outlined in the Main Agreement. Duration limited to four months, after which employment regularized. Portable entitlements to industry fund.
	Narrowing pay gap	**Netherlands:** ABU & FNV, CNV, De Unie and LBV (2012–2017): initially derogated from the principal of equal pay. Renewed agreement signed in November 2012 introduces users (equal) pay 'hirer's remuneration' from the first day with the hiring company. Implementation date as of first week of 2015.
		Germany: IG Metall & BAP and iGZ (2012): sector-related supplement to close the pay gap between regular and temporary workers, works agreement to agree on engagement of temporary agency workers.
Benefits	Equal access to benefits, pension and skill development	**South Africa:** AMEO & NUMSA (2009/2010): short-term workers entitled to participate in industry's multi-skilling programme and social security and medical aid extended to them.
		Japan: Aeon & enterprise union (2004 and ongoing): equal training opportunities previously limited to regular workers.

Source: Hayter & Ebisui (2013)

On the basis of these arrangements, it would go too far to ignore completely the bargaining rights of temporary agency employers and leave them to the commissioning clients. On the other hand, it is not defensible for agency employers to claim these bargaining rights exclusively, also in view of the existing arrangements. In practice, the various usable forms need to develop and the best practices must be held up as examples.

In view of the weakened position of the trade unions as a consequence of temporary agency work, a judgment by the Supreme Court in Namibia and the specific American context deserve further consideration. Likewise, a review of the *OECD Guidelines* through a case that was reported to the German NCP, concerning possibly excessive use of temporary agency work, is worth mentioning.

3.4.2 Namibian case

In Namibia, the Supreme Court examined arguments that the trade unions have difficulties organising temporary agency workers and that temporary agency work should be banned for that reason. Although this country has a modest position in the world ranking of countries, this judgment is deserving of some attention. The

Supreme Court found that the trade unions' inability to organise temporary agency workers cannot be a reason to ban temporary agency work.

> The substance of the respondents' complaint [...] is that the structure and mobility of agency work make it more difficult for unions to access and organise agency workers. These difficulties manifest themselves [...] throughout the employment spectrum in Namibia, especially where employees are thinly scattered over vast and often remote areas – such as farm and domestic workers. Challenging as it may be for labour unions to access and organise them, it does not diminish the freedom of workers in those 'difficult' sectors to form and join trade unions entrenched in Article 21 (1)(e) of the Constitution and it can not be said that these organisational difficulties caused by employment in those sectors is 'inimical' to the State's 'duty' under Article 95 (c) to actively encourage the formation of independent trade unions – and, needless to note, it is hardly a reason to ban domestic or farm labour altogether. By parity of reasoning the difficult challenges presented to trade unions [...] are not inimical to policies regarding the formation of trade unions contemplated in Article 95 (c) of the Constitution. The respondents' submission to the contrary and their contention that agency work should be banned on that basis cannot be sustained.[277]

3.4.3 American context

It looks as if much of the criticisms directed against the poor trade union position are also caused by the special situation that has arisen in the United States. Although US law has banned discriminating workers on the grounds of their trade union membership or collective bargaining activities since 1935,[278] and the freedom of association has been a fundamental right since 1958 and is protected by the First Amendment in the Constitution[279], in practice this is open to question. In 2004, the NLRB[280] took a decision that makes it difficult for temporary agency workers to join the commissioning client's bargaining unit, unless that client and the temporary employment agency approve. Thus, this does create a practical problem, which can explain why relatively few workers in the United States actually participate in a collective agreement.[281]

277 Supreme Court of Namibia, Africa Personnel Services (PTY) Ltd v. Government of Republic of Namibia and others (SA51/2008) (2009) NASC 17; (2011) BLLR 15 (NMS); (2011) 32 ILS 2005 (MNS) (14 December 2009), http://www.saflii.org/na/cases/NASC/2009/17.html.

278 National Labour Relations Act (Wayner Act).

279 NAACP v. Alabama, 1958, Supreme Court.

280 Oakwood Care Center, 343 NZRB 76 (2004).

281 Sweeney, S. (2006). See also: Compa (2010); reactions from the companies concerned can be found on www.hrw.org/news/2010/09/01/45-european-corporatehypocrisy; and Compa (2000).

For that matter, the so-called Oakwood decision by the NLRB of 2004, to restrict the admission of temporary agency workers to the commissioning client's bargaining unit, has been challenged. Opponents argue that this decision is inconsistent with international labour standards, as they have been entrenched in Convention 181 and the Fundamental Declaration on Principles and Rights at work. Although the United States have not ratified Convention 181, they would be held to it through endorsing the Fundamental Declaration as an ILO member. After all, the ILO obliges all its member states 'to respect, to promote, and to realize the freedom of association and the right to bargain collectively'. Another provision states that these rights must be granted 'without distinction whatsoever', that the workers may join organizations of their own choosing without previous authorisation. Through the years, the CFA, the Committee on Freedom of Association, has supported and interpreted these principles. However, a reversal of the Oakwood case and readopting the 2000 M.B. Sturgis standard is advocated. On the basis of this case a temporary agency worker being 'jointly employed and commonly interested, possesses an unqualified right to join the unit, notwithstanding employer resistance'.[282] Ratification of Convention 181 by the American senate is also advocated, as well as its implementation by law by the US Congress, so that Article 4 will be in force, providing that the member states must take measures to 'ensure that the workers recruited by private employment agencies […] are not denied the right to freedom of association and the right to bargain collectively'. Likewise Article 11 of the convention will apply in that case, which also ensures adequate protection on this score.[283]

However, the specific problem with regard to the United States is that traditionally they hardly ever ratify ILO conventions, although the Americans do tend to support the ILO's efforts. The reason is that in the United States, treaties must be ratified by each of its 52 states individually, and this system hinders ratification by the United States itself.

3.4.4 German case

Another key criticism concerns the absence or lack of conditions under which temporary agency workers may be hired. It was noted before that various countries, including Belgium and France, have restrictive regulations in place with regard to the extent of hiring that is allowed. For that matter, provisions like that may also have negative effects on employment.[284]

282 *M.B. Sturgis*, 331 NLRB – 1308.

283 Lafler (2014).

284 Andersson, Elffers & Felix (1982).

In this case, the judgment of the German NCP (National Contact Point) in respect of the OECD Guidelines for Multinational Enterprises is also interesting.

> Considered that the deployment of agency workers does not represent a direct violation of the OECD Guidelines or other internationally applicable standards, deployment of agency workers is not expressly prohibited under the OECD Guidelines, nor is its extent regulated. Similarly, the internationally recognised human rights and the International Labour Organisation Declaration on Fundamental Principles and Rights at Work of 1998 (core labour standards) do not contain any provisions in this regard. Convention 181 on Private Employment Agencies, which covers the deployment of agency workers, has not been ratified by Germany or the majority of ILO member states.
>
> Even this Convention, however, does not prohibit or quantitatively restrict the employment of agency workers. To the NCP there were no hints to a widespread use of agency workers – and thus an intention to refuse regular pay or avoid trade union rights, either. Therefore, the NCP did not accept the complaint for further evaluation.[285]

In any event, there is a lot to be said against the criticisms. Temporary employment agencies employ many people who find it easy to work this way, and commissioning clients also benefit from this form of work. It looks as if temporary agency work is scapegoated[286] by the prevailing western wind[287], further enhanced by the economic crisis that started in 2008.

Deregulation and labour market flexibilisation have become widely accepted in recent years and temporary agency work moves with this fluctuation. In part, temporary agency work is a reaction to increasing unemployment. Deregulation is also criticised, and temporary employment agencies are blamed for bringing a growing number of workers into precarious situations. Some people wonder if this may just be a guilty verdict of the messenger bringing the bad news. For instance, Bergström[288] argues that although temporary employment agencies offer less favourable working conditions if the labour market is out of balance, they change this when the market

285 Joint final statement by the German National Contact Point for the OECD Guidelines for Multinational enterprises (NCP) Uni Global (UNI) and International Transport Workers' Federation (ITF) and Deutsche Post DHL (DP-DHL) on the complaint by UNI/ITF against DP-DHL/Bonn; Berlin 2014.

286 The most explicit attack on temporary agency work is to be found in Holdcroft (2012). The most recent attack can be found in Spooner (2014).

287 Van der Heijden (2004).

288 Bergström et al.(2007), p. 214 ff.

rights itself. Rather than considering this to be a characteristic of temporary agency work, this must be traced back to the general labour market situation.

When the 'high tide' in the labour market is coming in once more, better terms of employment will be offered; however, they will get worse if the supply of (temporary agency) workers exceeds the demand. In other words: temporary agency work is the result of all the changes in the world of work rather than being the cause or driver of all these perceived changes.

3.5 EXPERTS TO MAKE A MOVE

A new discussion at ILO level concerns the NSFE, Non-Standard Forms of Employment. During the 101st ILC, a resolution was adopted asking:

> … to organize a meeting of experts, undertake research and support national studies on the possible positive and negative impacts of employment on fundamental principles and rights at work and identify and share best practices and their regulations.

In June 2014, the Officers of the Governing Body proposed to plan this meeting for February 2015, intending to let the conclusions play a role in the preparations for the recurrent discussion on labour protection that was placed on the agenda for the 104th ILC in June 2015.

3.5.1 Non-Standard Forms of Employment (NSFE); listing the facts

The earlier report for discussion that the ILO had issued[289] argues that there is no official definition of non-standard forms of employment. Actually, these concern all forms of employment other than a standard employment relationship, which is full-time, open-ended and dependent. The following forms of employment were included in the discussion (1) temporary employment, (2) temporary agency work and other contract types involving multiple parties, (3) *ambiguous* forms of employment and (4) part-time employment. Self-employed workers were not included, as they are not employees.

It looks as if this designation opts for a more neutral terminology than the concept of precarious work. Temporary agency work and similar forms of employment are included as well. These are defined as follows.

289 ILO (2015a).

> Workers who are not directly employed by the company to which they provide their services may be performing work under contractual arrangements involving multiple parties, such as when a worker is deployed and paid by a private employment agency to perform work for a user firm. In most countries, the agency and the worker enter into an employment contract or relationship, whereas the agency and the user firm conclude a commercial contract. Although there is generally no employment relationship between temporary agency workers and user firms, some jurisdictions impose legal obligations on user firms vis-à-vis temporary agency workers, especially in respect of health and safety. The user firm pays fees to the agency, and the agency pays the wages and social benefits to the worker. In some countries, temporary agency work is referred to by the term 'labour dispatch' (such as China, Japan and the Republic of Korea), 'labour brokerage' (South Africa) and 'labour hire' (Namibia). Although temporary agency workers are commonly recognized as being in an employment relationship, there may be limitations imposed on the rights of the worker or confusion regarding these rights because multiple parties are involved, particularly if the worker has provided services at the user firm for an extended period of time.

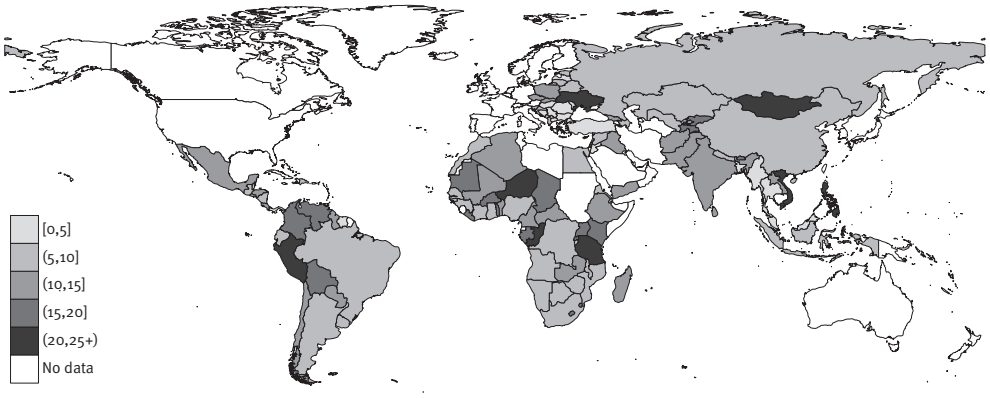
The report indicates that, apart from the fact that NSFE creates scope for responding to seasonal fluctuations in production, there are three major reasons for organisations to make use of these forms of employment: cost advantages, flexibility and technological innovation. Temporary employees are often cheaper because of lower non-wage labour costs. Using temporary employees meets the need for both numerical and functional flexibility, and technology enables virtual contacts across the world.

The report finds that, although these forms of employment are legitimate, the standard employment relationship, accounting for 70% of all jobs in Europe and the United States, is the dominant form of employment. In emerging markets such as Brazil and Argentina, mostly formal jobs with open-ended contracts have been created since 2000. And in low-income countries self-employment and *casual* work continued to be the dominant form of employment.

The report refers to a study by the World Bank that shows widely diverging use of temporary employment (figure 3.10), ranging from 5% for counties such as Jordan, Lithuania and Sierra Leone to more than 25% in Mongolia, Peru and Vietnam.

With regard to temporary agency work, the study refers to CIETT figures that present a total of 36 million temporary agency workers in 2012 (11.5 million on a daily basis). The highest numbers can be found in the United States (11.5 million), followed by Europe (8.2 million), Brazil (7.1 million), Japan (2.5 million) and South Africa (2.2 million). The report argues that these workers are only a part of the numbers hired across the world in these and similar tripartite relationships. These numbers only reflect the visible CIETT membership. The penetration rate of temporary agency work

is low and within Europe it ranges between 2.5% for the Netherlands and 0.3% for Greece, averaging 1.3% (figure 3.11).



Note: Data for 132 countries, for the latest available year, ranging from 2005 for Morocco and Egypt to 2014 for Afghanistan and Myanmar. For the majority of countries (67), the data refers to 2009 or 2010. Industrialised countries were not surveyed. Computations based on the World Bank Enterprise Survey, 2014

Figure 3.10 Incidence of temporary employment, as a percentage of total employment, in the private sector, circa 2010

Source: ILO (2015a), p. 9.

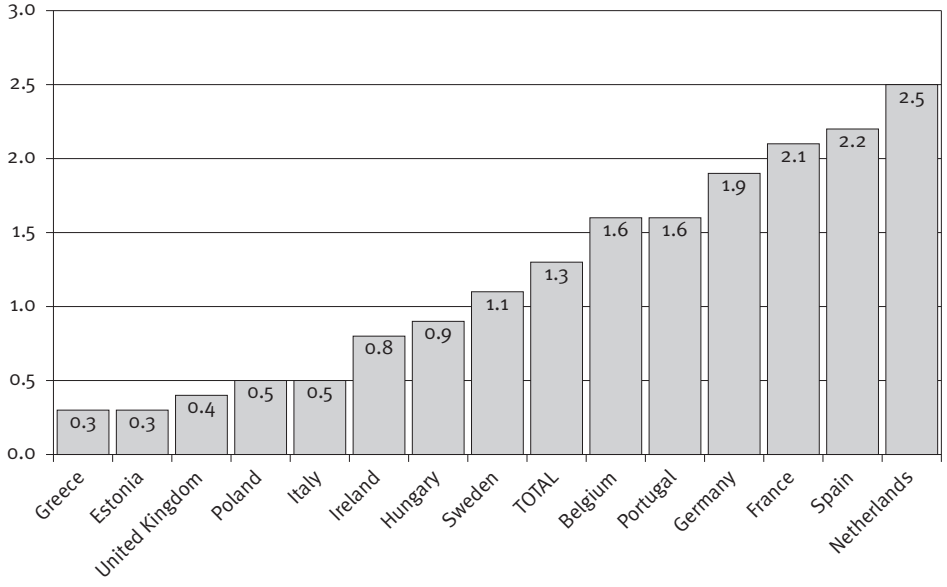
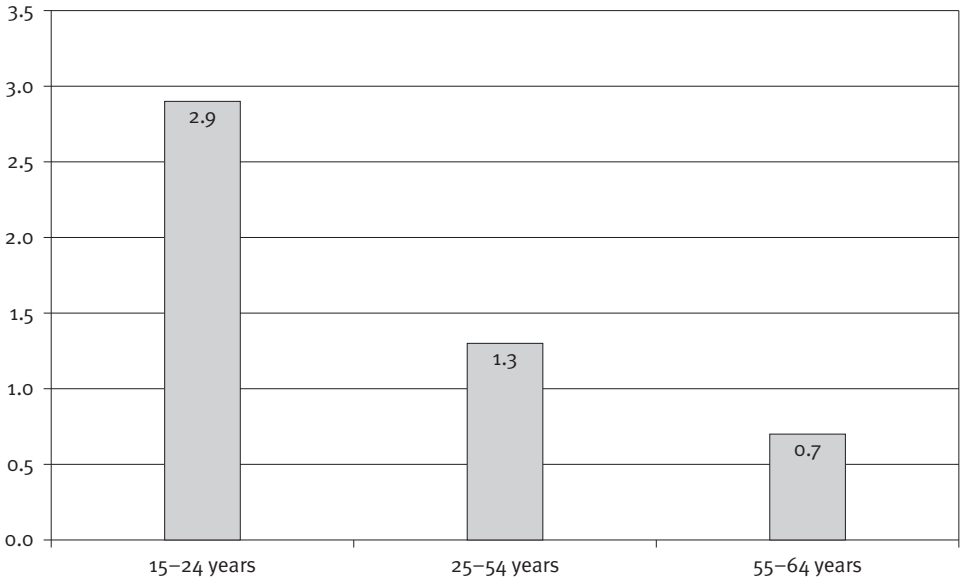


Figure 3.11 Temporary agency employment as a percentage of the working population, 2012. Source: ELFS 2012, yearly data weighted for annual estimates

Source: ILO (2015a), p. 11.

Young workers are relatively heavily represented in the temporary agency population (figure 3.12).



Note: Includes Belgium, Germany, Estonia, Spain, France, Greece, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Sweden and United Kingdom (Source: ELFS)

Figure 3.12 Percentage of workers employed in temporary agency work by age, 2012.
Source: ILO (2015a), p. 12.

In the United States, the number of temporary agency workers doubled between 1990 and 2000. In 2001, the penetration rate of temporary agency work was 2.1%. Otherwise, there were vendor on premise workers[290] (0.9%) and workers at professional employer organisations (0.9%).

In 2013, 3.5% of the working population of Korea were temporary agency workers, a marked increase compared with 2.3% recorded in 2011. Apart from that figure,

290 Worldwide, various terms are in use to refer to triangular employment relationships, other than *temporary employment agencies. Vendor on premises* is a type of contracting in which the vendor takes over local management of specific duties or a division from the commissioning client. Employers' responsibilities are outsourced to a *professional employer organisation,* which acts as a formal employer, while the material employer remains in charge of recruiting and selecting workers. The term d*ispatched worker is* almost synonymous to temporary *agency worker*, but is more commonly used in Japan and Asia. *Agency-hires* are the opposite of *direct-hires*, i.e. workers recruited by temporary employment agencies as opposed to workers hired directly by the employer. *Contractual workers* are workers who carry out outsourced work on a contract basis, in which case they either work directly for or are managed and supervised by the commissioning client.

1.1% of the working population were dispatched workers. In 2009, 2.3% of the Japanese workers belonged to the latter category, likewise a clear increase up from the 0.7% recorded in the year 2000.

In 2012, 44% of all non-agrarian establishments in the Philippines had agency-hired workers. In addition, 16% of the workers in non-agricultural establishments were contractual or project-based workers. In 2011, one fifth (60 million) of the urban Chinese employees were dispatched workers, likewise a marked increase on the 27 million recorded in 2007. For India, a strong growth of contract labour was recorded: from 13.5% in 1990–1991 to 26.5% in 2004–2005, and to 33.9% in 2010–2011.

In Israel the number of contract labourers is estimated at 5.4%. South Africa employs an estimated 6.7% of the workers through labour brokers. In Zambia in 2009, 48% of the workers were working in the mining industry through contractors and labour brokers.

In Chile, the number of companies using temporary agency work increased from 2.8% in 2008 to 3.6% in 2011. However, in companies with over 200 staff this proportion had increased to 13.6%. Subcontracting occurred more often and increased from 31% in 2008 to 38% in 2011.

The ILO report deals extensively with the impact that non-standard forms of employment (may) have on the position of workers and companies, as well as on the overall labour market. Non-standard forms of employment can be an excellent way for workers to gain experience, for school leavers to enter the labour market and for people who lost their job to reintegrate. Temporary employment agencies attract workers who have difficulty in finding a job, offering support services such as transport and providing the information that workers need to cover the distance between home and work. Part-time employment enables people to combine work with care responsibilities. Thus, non-standard work can improve the work situation and promote a better work-life balance, providing the terms and conditions of employment are *decent* and the worker has chosen for this type of employment voluntarily. It only becomes a challenge, the report states, if people are forced into non-standard contracts and the options for transitioning into standard forms of employment are limited.

OECD data on temporary workers show that in Denmark, France, Sweden, Switzerland and the United Kingdom approximately one fifth of all workers with fixed-term contracts opted for this work because they do not want to have a permanent position, while the rest agreed to fixed-term contracts because they were on probation or could not find a permanent position. The percentage of temporary workers that could not find permanent employment ranged from 30% in Ireland, 40% in the Netherlands, 67% in Sweden to 90% in Greece, Portugal and Spain. In Australia, it became clear in 2007 that 52% of the *casual* workers preferred to carry out casual work.

Transitioning from non-standard to standard employment is a big worry for workers with fixed-term contracts and temporary agency workers. Instead of being a stepping stone, temporary employment and temporary agency work can also prove to be a dead end, causing workers to relapse into unemployment at the end of the assignment or to be trapped in non-standard work, if their subsequent assignment is also non-standard. Various studies (see table 3.13) show that in most countries an annual transition does exist, albeit a modest one.

The stepping stone hypothesis is confirmed for countries such as Denmark, Italy, the Netherlands and the United States, particularly for young graduates, immigrants and disadvantaged workers. They can benefit from lower screening, gaining general work experience and expanding their networks. This changes when temporary employment continues to be liberalised and the supply of temporary workers increases. This is the case in Japan and Spain, where transitions from non-standard work to unemployment are more likely than would have been the case if the workers had started with a permanent contract.

Various studies on temporary agency work present a mixed picture. Out of the eight studies referred to in the ILO report, five appear to confirm the stepping stone hypothesis (Denmark, Germany, United States twice, Italy). Three studies, relating to temporary agency workers in Germany, the United States and Sweden, did not show a stepping stone effect. It should be noted that the German study did not show a higher risk of unemployment either.[291]

The ILO report also indicates that there are clear wage differences between non-standard and standard work. Various studies provide an insight into this income disparity. Six studies specifically focus on temporary agency work, four of which confirm the disparity. Two studies show that non-standard workers clearly get paid more than standard workers in similar circumstances. The studies relating to Germany and Italy do show that the differences diminish in the course of the assignment.

Workers can also experience differences with respect to social security coverage. Non-standard work often does not comply with the minimal criteria for access to certain social securities. With regard to temporary agency work, the ILO reports a less extensive access to pensions and health insurance for the United States and South Africa.

291 Other studies indicate either a positive or a negative stepping stone effect. García Pérez & Muñoz-Bullón (2003) show a positive effect, while Givord & Wilner (2014) show a negative effect. The studies do state that the differences result from the study period, which can be more or less stimulating with regard to this effect, the temporary agency worker's profile and the study method.

Table 3.13 Effects of temporary agency work

Transitions

	Country	*Period*	*Source*	*Findings*
1	Denmark	1997–2006	Jahn & Rosholm (2014)	Stepping-stone effect is confirmed while being with the temporary work agency, but not afterwards. Temporary agency work increases transition into permanent jobs by 19% for men and by 7% for women; the effect is largest for immigrants.
2	Germany	2010–2011	Eichhorst & Tobsch (2013)	Yearly transitions to permanent jobs: 28%, rest remain in agency work.
		1994–1996	Kvasnicka (2009)	No stepping-stone effect, but no increased probability of unemployment either; temporary agency workers seem to remain in this type of employment relationship.
3	Italy	2001	Ichino et al. (2008)	Stepping-stone effect is confirmed, it is highest in Tuscany, in services, among youth transitioning from school to work.
4	Sweden	1997–2008	Hveem (2013)	No stepping-stone effect: 'Joining a temporary agency … decreases the probability of getting a regular job for years to come in general but not for non-western immigrants'; 'women showed stronger and more persistent negative regular employments effects'.
5	United States	1993–2001	Andersson et al. (2007)	Stepping-stone effect confirmed; it is strongest for low-wage earners as it improves their access to higher wage employment. To temporary agency work: 36,9–61,2% over three years, for workers for whom temporary agency is a primary employer.
		1999–2003	Autor & Houseman, (2010)	No stepping-stone effect; increased churning: 'Rather than helping participants transition to direct-hire jobs, temporary help placements initially lead to more employment in the temporary-help sector, which serves to crowd out direct-hire employment'.
		2000–2001	Cappell & Keller (2013)	Over 90% of establishments have converted temporary agency workers to permanent employees… Hiring may be very important part of what temporary agencies do for their clients.

Wage differentials

Country	*Period*	*Source*	*Findings*
Germany	1995–2008	Jahn & Pozzoli (2013)	WPNR*: 22% for men, 14% for women. Wage penalty decreases with tenure in TAW.
Italy	2000–2002	Picchio (2006)	WPNR: 13%, reduced by about 2,3% after one year.
Philippines	1994–2006	Hasan & Jandoc (2009)	WPR: up to 45–51%, highest wages in services.
South Africa	2001–2007	Bhorat et al. (2013)	WPNR: 17–35% as compared to those employed in the formal sector.
United States	1994	Nollen (1996)	WPNR: 34%.
	1980–mid. 1990	Carey & Hazelbaker (1986)	Engineers and technicians frequently can earn more take-home pay in temporary jobs than they can in regular jobs.

Training

Country	*Period*	*Source*	*Findings*
European Countries (Austria,Belgium, Denmark,-Finland, Greece, Ireland, Netherlands, Portugal, Spain, United Kingdom)	2000	Nienhüser & Matiaske (2006)	85% of temporary agency workers received no training as compared to 63% of permanent workers over a year.

TAW: temporary agency work; WPR: wage premium for regular workers; WPNR: wage penalty for non-regular workers.

Source: this study data is derived from the surveys published by the ILO in reports on NSFE for the Meeting of Experts in February 2015, pp. 22–24, 25, 28.

In the case of non-standard work, training is often also an issue. Workers in non-standard forms of employment generally receive less training. Specifically for temporary agency work, the ILO cites a European study[292] showing that 85% of the temporary agency workers did not receive training, compared with 63% of the workers with permanent contracts.

Another negative effect relates to occupational health and safety. In France, the accident rate involving temporary agency workers is 13.3%, compared with a national average of 8.5%. In Spain, between 1988 and 1994, the accident rate for temporary agency workers turned out to be 2.5 times higher than for workers with permanent contracts. In Belgium, in 2002, the accident rate for permanent manual workers was 62 per 1000, compared with 125 for temporary agency workers.

Furthermore, the ILO reports that non-standard forms of employment can cause problems with respect to freedom of association and collective bargaining. The report points at fragmentation of the bargaining unit, resulting in diminished bargaining power and the undermining of the effective exercise of collective bargaining rights of the regular workers. In relation to this, the report specifically refers to anti-union practices in the United States. Non-standard forms of employment also have consequences for the companies that use them. The ILO report mentions, among other things, that due to the increased use of NSFE, training and development as well as career planning are becoming more of an individual responsibility. Also, the report relates the use of non-standard work to a diminished innovation capacity.

Moreover, there is said to be a negative effect on job motivation and efforts made. This contrasts with the view that where monotonous work is concerned, it is better to hire temporary and part-time employees for this.

For the labour market in particular, non-standard forms of employment can increase labour market segmentation, which may also cause wage disparity and lower productivity.

292 Nienhüser & Matiaske (2006).

The ILO report goes on to discuss the various instruments regulating non-standard forms of employment. They include:

- The Termination of Employment Convention 1982 (no. 158) and the Termination of Employment Recommendation (no. 166)
- The Employment Relationship Recommendation 2006 (no. 198)
- The Private Employment Agencies Convention 1997 (no. 181) and the Private Employment Agencies Recommendation 1997 (no. 188)
- The Part-time Work Convention 1994 (no. 175)
- The Maternity Protection Convention 2000 (no. 183)
- The Workers with Families Responsibilities Convention 1981 (no. 156)
- The Social Protection Floor Recommendation 2012 (no. 202)
- The Employment Policy Convention 1964 (no. 122)
- The Labour Inspection Convention 1978 (no. 150)
- Core Labour Standards.

Otherwise, the ILO refers to regional and national regulation of non-standard forms of employment. Specifically with respect to temporary agency work, it refers to regulations that determine when the recourse to temporary agency work is justified and when it is not.

Table 3.14 Objective or temporary reason for recourse to temporary agency work

Type of reason	*Countries*
Temporary reason	Argentina, Belgium, Brazil, Chile, China, Colombia, Estonia, Finland, Luxembourg, Morocco, Norway, Peru, Poland, Portugal and South Africa
Objective reason	Austria, Slovakia and Spain
No limitation	Australia, Canada, Denmark, Germany, Ghana, Greece, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Latvia, Malaysia, Namibia, Netherlands, New Zealand, Russian Federation, Singapore, Slovenia, Sweden, Switzerland, United Kingdom, United States, Uruguay and Zimbabwe

Source: ILO (2015a), p.42.

It also refers to regulations that maximise either the number of renewals of the temporary agency assignments or the duration of the assignment.

Table 3.15 Limitation regarding the number or renewals of assignments and the maximum duration of assignments

Type of limitations	*Countries*
Limitation on number of assignments/renewals:	Switzerland
Provision for a maximum duration of assignment (also cumulative) (number of months):	Belgium (variable: 3–18), Brazil (3), Colombia (12), Chile (variable 3–6), Czech Republic (12), Greece (36), Hungary (60), Israel (9–15), Italy (36)**, Republic of Korea (variable 3–24), Norway (48)*, Panama (12)*, Poland (variable 18–36), Portugal (variable 6–24), Romania (36)
Both: (i) limitation on number of assignments; and (ii) max duration (number of renewals/number of months):	Estonia (2/120), Luxembourg (2/12)
No limitation	Argentina*, Australia, Canada, China*, Denmark, Finland*, Germany*, Iceland, India, Indonesia, Ireland, Latvia*, Mexico, New Zealand*, Russian Federation*, Slovakia*, Slovenia*, South Africa, Spain*, Sweden*, United Kingdom and United States

* Countries where a fixed-term contract between a temporary agency worker and an agency is subject, entirely or partially, to the limits applicable to direct fixed-term employment between a worker and a firm.

** The 36-month limit in Italy refers to the duration of a single assignment; it is debatable whether a series of assignments would be subject to the 36-month limit.

Source: ILO (2015a), p. 43.

In many countries, the principle of equal pay for equal work is entrenched in legislation.

Table 3.16 Principle of equal treatment

Type of limitations	*Countries*
Basic terms and conditions of employment	Austria*, Belgium, Colombia, Croatia, Czech Republic, Denmark, Estonia, France, Finland, Germany*, Greece, Iceland, Hungary (six-month qualification period may apply regarding pay), India, Ireland, Israel*, Italy, Republic of Korea, Latvia, Luxembourg, Mexico, Namibia, Netherlands*, Norway, Poland, Portugal (two-month qualification period for full equality regarding pay), Slovakia, Slovenia*, Spain, Sweden*, United Kingdom (three-month qualification period) and Uruguay
Partial	Argentina (pay), Brazil (pay), China (pay), Ethiopia, Peru (exceptions possible), Romania (exceptions possible), Switzerland
No principle of equal treatment	Australia, Canada, Chile, Japan, New Zealand, Panama, Russian Federation, South Africa, Singapore and United States

* Significant derogation from the principle of equal treatment may be provided by collective bargaining agreements.

Source: ILO (2015a), p. 44.

Furthermore, the ILO report gives an overview of legal measures taken in Asia and South America to curb non-standard forms of employment.

- In 2012, Indonesia amended its legislation with regard to outsourcing, restricting it to auxiliary services that were not part of a commissioning client's core business.
- In 2013, Vietnam introduced legislation that limited labour dispatching to seventeen job categories.
- In 2012, Japan imposed a ban on hiring former employees on a dispatch basis within a year of terminating their employment.
- In the Republic of Korea, a dispatched worker is entitled to obtain direct employment with the user company if the dispatched work was illicit.
- The Philippines have introduced legislation concerning (sub)contracting.
- Chile and Mexico have also laid down provisions in relation to (sub)contracting and temporary agency work. The commissioning client has a subsidiary liability and temporary agency work is only allowed for temporary reasons.
- Uruguay introduced the principle of equal pay for equal work into its legislation.
- As early as 2006, Argentina enacted a decree to restrict temporary agency work to temporary reasons.

Finally, the ILO report invites the Experts to discuss the following:
- the trends and driving forces of non-standard forms of employment;
- the practices that have developed, including legislation;
- the main priorities for ILO action;
- better use of existing ILO standards and identification of potential gaps;
- NSFE-related aspects that warrant further research.

3.5.2 Expert deliberations [293]

During the deliberations, the employee representative stated, among other things, that 'the question was not to be in favour of or against flexibility, but to address the challenge of how tot ensure a balanced outcome'. The employer representative stated, among other things:

> While other forms [of work] were increasingly labelled negatively, permanent full-time work could no longer be viewed as the only effective approach to the economic reality. The changing world of work was not paralleled by changes in regulations and institutions to support it, with protections and benefits of employment tied to the idea of the standard contractual relationship.

Furthermore, he stated:

293 ILO (2015c).

> Moreover, a fast growing economy was a precondition for job creation, which required labour market flexibility. In this regard, there should be no limits to types and rise of NSFEs as any job was better than no job.

The employee representative did not agree with the view that any job was better than no job and advocated quality jobs. Poor quality jobs had diminished the employees' bargaining positions, which had negative outcomes for both social partners.

It was important to identify the deficits resulting from the proliferation of NSFE, as well as to investigate the conditions under which NSFE could be considered decent. She held the view, as did various governments, that there was a need for rigorous enforcement and compliance with the labour standards. She argued that the international labour standards showed gaps that should be addressed. Firstly, she mentioned the principle of equal treatment for workers in NSFE and protection from discrimination on the basis of employment status; she argued that fixed-term contracts needed to be addressed not only by the Termination of Employment Convention, 1982 (no. 158), but also directly, in order to enhance protection. Secondly, the scope of regulation of triangular employment relationships needed to be extended beyond temporary agency work. Convention 181 did not suffice in that respect. Thirdly, the use of temporary agency work had to be regulated more extensively. Fourthly, collective bargaining rights needed to be clarified and strengthened, to ensure that – in case of triangular employment relationships – bargaining could take place with the employer(s) who actually determined the conditions of work. Lastly, forms of work that denied workers all their rights, such as zero-hour contracts, needed to be tackled.

All parties ended in agreeing that such gaps existed. Further research was in order. The employee representative suggested holding a Meeting of Experts that could help find solutions, particularly where regulating temporary employment and the discrimination of NSFE workers were concerned.

During the Meeting of Experts held on this score, there turned out to be broad consensus regarding the deficits that needed tackling. It is questionable whether Convention 181 should be amended. This convention is clear, addresses the issues that need addressing and meets a growing need. Thus, as a minimum standard it can be considered adequate. The deficits respecting equal treatment and the use of temporary agency workers can be solved by means of other instruments, as is currently the case. Article 12 in Convention 181 actually instructs member states to clarify the position of the trade unions. That still leaves the instruments needed for the fixed-term contracts and triangular employment relationships in general.

The most obvious course of action would be to address the fixed-term contracts in connection with a revision of Convention 158 and Recommendation 166, regarding

the termination of employment. They are already under discussion and it would be good to reassess them.

Where a separate instrument for triangular employment relationships in general is concerned: it is reminiscent of the attempts to regulate contract labour. The attempts failed, but it may be worth a new try. In that case both bipartite and tripartite contracting should be addressed.

Both the employee and the employer representative wanted further information and research regarding the questions raised. The employee representative established that there was a considerable lack of study results in respect of the use of temporary employment and adequate protection. Issues where further research was needed included existing practices and innovative concepts that counter the circumvention of employment protection through NSFE, existing practices and innovative concepts that avoid unfair competition, and the externalization of employment costs through NSFE. Similarly research was needed on the question of equal treatment and possible discrimination based on employment status.

3.5.3 Expert conclusions

The Meeting of Experts reaffirms the:

> commitment of the ILO to implement its constitutional mandate, as reflected in the Decent Work Agenda, which applies to all workers, including those in non-standard forms of employment and whereby full productive and freely chosen employment is promoted simultaneously with fundamental rights at work, social dialogue, an adequate income from work and the security of social protection.

The experts state that the world of work has shown continuous development, which includes the growth of various forms of work and contractual arrangements in labour markets worldwide. Non-standard forms of employment have always existed and can serve various purposes, including use in seasonal sectors, replacing temporarily absent workers or offering more choices for balancing work and private life. These forms of employment have contributed to the adaptability and growth of businesses as well as to increasing labour market participation. Globalisation and yet other factors have boosted their growth.

However, there is also a downside to this development, in the sense that lack of employment protection occurs more often. Therefore non-standard forms of employment must meet:

> … legitimate needs of workers and employers and should not be used to undermine labour rights and decent work, including freedom of association and the right to collective bargaining, equality and non-discrimination and security of employment. Adequate protection is achieved by having an appropriate regulatory framework, compliance with and strong enforcement of the law and effective social dialogue.

Well-designed and regulated forms of NSFE can help businesses to enhance their ability to adapt to the market. Businesses can use them for retaining and recruiting workers, as well as for quickly having the requisite skills and experience at their disposal. This goes wrong when employers abuse these types of work to evade legal and contractual obligations and other employment-related responsibilities, thus eroding fair competition, which is harmful for 'responsible businesses, workers and society at large'.

The many new forms of work facilitate workers' entry into the labour market, particularly if those forms of work are well-regulated and freely chosen, for instance part-time employment and other forms of work that enable workers to balance work and private life. While in some cases NSFEs can serve as stepping stones to standard work, in many other cases they fail to do so. This warrants serious attention. Women, young workers and migrants, who are over-represented in these types of employment, are prone to discrimination and run a greater risk of getting stuck in these forms of employment against their will.

> Non-standard forms of employment, in parts of the world, exhibit a higher incidence of decent work deficits. These are often not sufficiently addressed by regulatory frameworks, enforcement and labour inspections systems, active labour market policies or the judicial system, all of which should be effective and accessible. A significant number of Member States have adopted adequate regulations and ratified the relevant Conventions, and are addressing the deficits and protecting workers. Workers in non-standard forms of employment may face barriers to collectively addressing decent work deficits. These workers are more often than other workers unable to exercise their fundamental rights, including the right to freedom of association and to bargain collectively with the relevant employer(s). As a result, workers in non-standard forms of employment risk facing decent work deficits along one or more of the following dimensions of work: (1) access to employment and labour market transitions to decent work; (2) wage differentials; (3) access to social security; (4) conditions of work; (5) training and career development; (6) occupational safety and health; and (7) freedom of association and collective bargaining. If left unchecked, these decent work deficits risk contributing to increased insecurity and greater inequality.

Measures that need to be taken include:

- *Decent work.* Government and social partners should work at ensuring continuous progress towards decent jobs. Employers should provide adequate protection to workers in NSFE.
- *Labour market transitions.* In order to promote labour market transitions, governments and social partners should work at creating quality employment. They should invest in labour market policies that promote economic growth and development, lifelong learning, skills training and development and access to decent work.
- *Equality and non-discrimination.* Action must be taken to promote equality and to ensure protection against discrimination for all employees, regardless of their contractual status.
- *Social security coverage.* Restrictions on social security coverage for NSFE workers should be eliminated, in the sense that NSFE workers are to be included in conditions that are equivalent to those for workers in standard employment.
- *Occupational health and safety.* Governments and employers should take measures to ensure that NSFE workers have healthy and safe workplaces. They must receive adequate training, be provided with safety equipment and be fully integrated into the health and safety systems and processes.
- *Freedom of association and collective bargaining.* In reference to the Declaration of Social Justice for a Fair Globalization, the freedom of association and collective bargaining must also be warranted for NSFE workers. NSFE, and particularly some triangular employment relationships, may pose challenges where effective realisation of these freedoms is concerned. Governments, employers and workers should take the initiative to develop regulations aimed at providing NSFE workers with access to 'the protection afforded to them under the applicable collective agreements'.

  These initiatives should include promotion of effective bargaining systems and mechanisms to determine the relevant employer(s) for the purpose of collective bargaining, in coherence with international standards, laws and regulations.
- *Labour inspection.* Labour inspectorates should be given sufficient resources to develop various strategies, including sector-specific actions, taking into account that non-compliance occurs with NSFE.
- *Highly insecure forms.* Special attention should be paid to preventing and eliminating NSFE that fail to respect the fundamental rights at work and fail to comply with the elements of the Decent Work Agenda ('is one in which freely chosen productive employment is promoted simultaneously with fundamental rights at work, an adequate income from work and the security of social protection').

The experts recommended that the ILO Office should develop a wide range of activities, such as data collection and reporting, to promote ratification of relevant ILO Standards, analysing whether there are gaps, identifying best practices, research and distribution of the study results, also with respect to approaching the labour inspectorate and experiences with social security. Furthermore, the ILO should support member states to identify and tackle decent work deficits. This should include the roles that men and women play. Furthermore, the ILO should document trends and analyse the effects of NSFE to promote better understanding. Lastly, the ILO should create a repository of data.

In June 2015, during the discussion about labour protection at the 104th ILC session, the conclusions of the above-mentioned meeting of experts were referred to.[294] Also, the relevant resolution that was adopted during this ILC included the ILO priority of 'Effective protection of workers in NSFE'.[295]

In a recent study regarding inequality[296] the OECD also establishes a link with NSFE. This study observes a growing inequality, which hampers economic growth. The increase of NSFE would influence this as well. The report likewise records lower wages and diminished opportunities for skills training and transition. Another recent survey of the European labour market[297] shows that temporary agency workers have equal access to social security, such as unemployment benefits, sick benefits, maternity leave as well as healthcare and pension benefits, compared with permanent employees. Moreover, temporary agency workers end up receiving virtually the same amount of training[298] as directly hired colleagues with open-ended or fixed-term contracts (77% versus 82 and 78%). Furthermore, this survey shows that temporary agency work clearly serves as a stepping stone[299] into employment. Many temporary agency workers were jobless prior to their assignment. Temporary agency work is a more sustainable transition option than direct temporary employment.

Many temporary agency workers are still working one year after they started working (either as a temporary agency worker, or in temporary or permanent employment). Compared with other forms of temporary employment or in comparison to unemployment, temporary agency work may be also 'more efficient in facilitating transitions to open-ended contracts', albeit under certain conditions. Also remarkable is that 79% of the temporary agency workers are satisfied with their working conditions. This comes quite close to the general scores for workers with open-ended contracts.

294 ILC (2015a), p. 68, 69.
295 ILC (2015b).
296 OECD (2015), p. 31.
297 IDEA Consult (2015), p. 54.
298 IDEA Consult (2015), p. 55.
299 IDEA Consult (2015), p. 101.

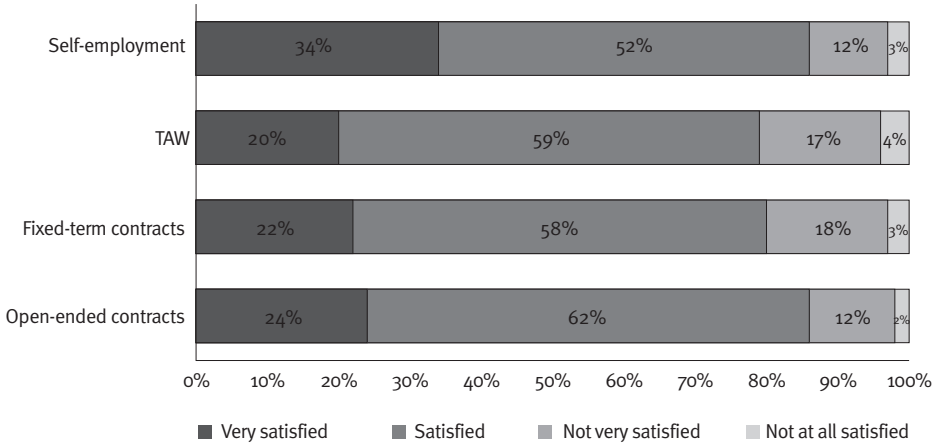


Figure 3.13 General satisfaction with working conditions IDEA Consult (2015), p. 83

PART II

INTERNATIONAL SOCIAL LAW DEVELOPMENTS AND CONVENTION 181

CHAPTER 4

Decent work

In the previous chapter, we paid ample attention to the discussion on contract labour, precarious work and non-standard forms of employment (NSFE). We learned that the contract labour discussion resulted in a recommendation on the employment relationship, which ultimately failed to be endorsed by the employers.

In its pursuit of improving the position of workers, the trade union movement – supported by scientific reference literature – redefined its position on precarious work, including temporary agency work. Convention 181 was also called into question since it was said to contain gaps.

In an attempt to gain a complete overview, experts made efforts to analyse all non-standard forms of employment. The term precarious work was studiously avoided, but the instruments continued to show gaps, including Convention 181. In spite of a name change, from precarious work to non-standard employment, the precarious work discussion still continues to play a role. The term is the opposite of decent work – a concept that implies that all requisites of adequate work are complied with.

Referring to Juan Somavía, the former Director General of the ILO who expressed himself in similar terms, Klara Boonstra[300] describes decent work as follows:

> It is the deepest desire of people in emerging and developed societies alike. It is the way ordinary men and women express their needs. If people in the streets or in the country are asked what they need in view of all the new insecurities that globalisation has brought us, they answer: work! Work that enables them to keep their families safe and healthy, to send their children to school, work that ensures an income once they have retired, a workplace that treats them justly and respects their rights. That is decent work.

According to Boonstra the term precarious work can serve as an antonym of decent work:

300 Boonstra (2014); see also Boonstra (2010), p. 11.

> On the one hand it is characterised by the frequent use of atypical forms of contract, such as fixed-term contracts, very short fixed-term contracts, seasonal work, day contracting and other forms of informal work. On the other hand, it is characterised by atypical forms of the labour relations themselves. For instance, triangular employment relations and payrolling services, subcontracting, bogus self-employment and obscure forms of mediation and provision of labour services. These generally result in low wages, lack of employment protection and limited access to social security and facilities normally related to wage labour. In short, generally a slim chance of labour protection.

Furthermore, Boonstra argues that 'precarious work has become rooted in the deficits and weaknesses of both national and international labour law'.

How does the phenomenon of temporary agency work relate to this discussion? What should we mean by 'decent work' and how can this be viewed from the perspective of temporary agency work pursuant to Convention 181? Chapter 4 will focus on these questions.

4.1 ORIGIN, CONTENT, MEANING

4.1.1 Origin

Since the ILO was established, it has gone though several stages of development.[301]

In the first stage, from 1919 to 1944, the ILO focused on the social consequences of the emerging industrialisation. The ILO was established in the context of the Treaty of Versailles in 1919. The perception was that peace is not possible without social justice: 'Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice…'[302]

The Declaration of Philadelphia marked a new stage, from 1944 to 1989. This declaration, issued in 1944, was annexed to the ILO constitution. Embracing the motto 'labour is not a commodity', it extended the ILO's field of activity to social policy as a whole, including employment, working conditions, social security, health care, nutrition, housing, schooling and equal treatment.

In the third stage, from 1989 onwards, the need for reorientation arose. In his report to the International Labour Conference, the Director-General argues:[303]

301 Heerma van Voss (2008), p. 15.
302 Heerma van Voss (2008), p. 15.
303 ILC (1999), p. 7.

> 'Except for a handful of Conventions most ILO standards are not well known. Ratification is also a problem because of treaty congestion. Of the 23 Conventions and two Protocols adopted in the fifteen years from 1983 to 1998, only three have received at least twenty ratifications. Even when ratified, many conventions are only weakly implemented.'

Moreover, declining interest in the ILO standards went hand in hand with an emerging and fast progressing globalisation of the economy. Furthermore, social law treaties no longer were the exclusive field of the ILO. To them had been added the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Rights of the Child, together with regional instruments such as the European Social Charter (1961).

The World Bank and the IMF had placed deregulation of the labour markets on the agenda, and a discussion started to include so-called social clauses in international trade agreements, such as GATT (General Agreement on Tariffs and Trade) and its 1994 successor, the WTO (World Trade Organization). This also threatened the reason for the ILO's existence. It was feared that non-compliance of ILO standards would no longer exist merely by the grace of the mobilisation of shame, but through trade sanctions.[304]

Following the Copenhagen World Summit for Social Development in 1995, the WTO Ministerial Conference in Singapore in 1996 decided that:

> The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. (…) We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries (…), must in no way be put into question. In this regard, we note that the WTO and ILO secretariats will continue their existing collaboration.[305]

The developments resulted in a need for reorientation, which is characteristic of the third stage. If world peace had previously been paired to social justice, social justice now became an essential element of equal economic progress and poverty reduction.

This reorientation led to establishing and promoting a social minimum, establishing priorities and setting an international social agenda from a comprehensive approach. We are referring to the Declaration on Fundamental Principles and Rights at Work and the Decent Work Agenda.

304 Heerma van Voss (2008), p. 21 ff.
305 Heerma van Voss (2008), p. 18.

4.1.2 Declaration on Fundamental Principles and Rights at Work[306]

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. This declaration contains four fundamental social principles that ILO member states must observe, even if they have not ratified the corresponding conventions. These fundamental principles are considered to be so essential to the creation of social justice that they must be observed by all member states.

Thus, the declaration serves as a 'point of reference for the entire global community'. The declaration provides a framework for globalisation that is still socially just.

The Declaration pivots on the following fundamental principles:

- the freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour;
- the elimination of discrimination in respect of employment and occupation.

On the basis of these fundamental principles, the ILO has focused on eight conventions that are connected to these principles. These fundamental conventions are numbers 29 and 105 (forced labour), 100 and 111 (discrimination) 138 and 182 (child labour) and 87 and 98 (freedom of association and collective bargaining).

The ILO calls on the member states to prioritise the ratification of these conventions. But, as emphasised above, all member states must respect these conventions, even if they do not ratify them. By extension, it has been agreed that the non-ratifying member states are supposed to submit an annual report on the way they apply the principles. Also, the Director-General is submitting annual reports to the International Labour Conference on the compliance of one of the principles.

Table 4.1 ILO core conventions

Category	*Core convention*
Freedom of association and the right to collective bargaining	No. 87 Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 98 Right to Organise and Collective Bargaining Convention, 1949
Elimination of all forms of forced or compulsory labour	No. 29 Forced labour Convention, 1930 No. 105 Abolition of Forced Labour Convention, 1957
Effective abolition of child labour	No. 138 Minimum age convention, 1973 No. 182 Worst Forms of Child Labour Convention, 1999
Elimination of discrimination in respect of employment and occupation	No. 100 Equal Remuneration Convention, 1951 No. 111 Discrimination (Employment and Occupation) Convention, 1958

306 Heerma van Voss (2008), p. 19 ff.

Table 4.2 Ratification of the core conventions

Category	*Number of ratifications (as per February 2016)*
No. 87 Freedom of association	153
No. 98 Freedom of collective bargaining	164
No. 29 Forced labour	178
No. 105 Abolition of forced labour	175
No. 138 Minimum age	168
No. 182 Worst forms of child labour	180
No. 100 Equal remuneration	171
No. 111 Non-discrimination	172

The ILO core conventions turn out to be the most ratified conventions. The Worst Forms of Child Labour Convention (no. 182) leads with 180 ratifications, while the Freedom of Associations Convention (no. 87) lags behind with 153 ratifications. In view of the total number of 185 ILO member states, this makes clear that automatically linking the ILO membership to the obligation to comply with the core conventions adds value in any case.

4.1.3 Decent Work Agenda [307]

Apart from prioritising the fundamental principles and rights at work, the reorientation also necessitated refocusing on the objective. In his 1999 *Decent Work* report, the Director-General of the ILO states that a common purpose and an integrated approach are needed: 'The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'.

As the cornerstones of this objective, four strategic objectives were formulated that constitute the framework of the Decent Work Agenda. These elements are:

- promoting and realising fundamental principles in relation to labour (fundamental labour standards);
- creating better opportunities for women and men to find a job and generate an income (employment);
- strengthening the coverage and effectiveness of social protection for everyone (social protection);
- strengthening tripartism and social dialogue (social dialogue).

This Agenda is the answer to the globalising economy. As a new policy framework, the Agenda serves as the guiding principle for ILO activities.

307 Heerma van Voss (2008), p. 20 ff.

To assist the member states in an integrated way, the ILO developed Decent Work Country Programmes. These programmes also constitute the main instrument to integrate the ILO contribution to UN country programmes.

4.1.4 Millennium Development Goals [308]

The Decent Work Agenda has further gained authority thanks to the support given by the World Commission on the Social Dimension of Globalization in 2004. This commission, which was established by the ILO, consisted of heads of government, Nobel Prize winners and other key stakeholders. In its report *A fair globalization: creating opportunities for all* [309] the commission recommends that the creation of Decent Work should be the overarching policy objective:

> Decent Work for all should be made a global goal and be pursued through coherent policies within the multilateral system.

The UN adopted this proposal at its 2005 World Summit, and the Decent Work Agenda was coupled to the so-called Millennium Development Goals:[310]

> We (Heads of States and Governments) strongly support fair globalization and resolve to make the goal of full and productive employment and decent work for all, including for women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies as part of our efforts to achieve the Millennium Development Goals. These measures should also encompass the elimination of the worst forms of child labour, as defined in ILO convention 182 and forced labour. We also resolve to ensure full respect for the fundamental principles and rights at work.

In both 2005 and 2007, the UN Economic and Social Council made an appeal to include the Decent Work Agenda in all multilateral activities, in order to realise the Millennium Development Goals (particularly the one to eradicate poverty) in 2015. The European Union likewise supported the Decent Work Agenda.

As a follow-up to the Millennium Development Goals, the United Nations formulated the Sustainable Development Goals in September 2015, i.e. '17 goals to transform our world'. Goal 8 relates to promoting 'inclusive and sustainable economic growth, employment and decent work for all'. Among other things, this means fight-

308 Heerma van Voss (2008), p. 21.

309 World Commission on the Social Dimension of Globalization (2004).

310 Heerma van Voss (2008), p. 23, ILC (2001).

ing the globally increasing unemployment and poverty by creating stable and well-paid jobs, with the proviso that 470 million jobs are needed worldwide, just for the new entrants to the labour market between 2016 and 2030.[311]

4.1.5 Putting it in place

In 2001, the Director-General drew up a mid-term review.[312] He called the concept a significant objective for people everywhere. It constitutes an important policy framework consisting of essential (side-)objectives regarding employment, workers' rights, social protection and social dialogue. Moreover, it is an important means to (re)organise the ILO's activities. It constitutes an ambitious programme that is a signpost rather than a blueprint.

The essence of the Decent Work Agenda stems from the Declaration of Philadelphia, which likewise affirms the right to 'conditions of freedom and dignity, of economic security and equal opportunity'. It underscores the importance of ensuring 'a just share of the fruits of progress to all'.

Against this background, the Director-General draws attention to the global decent work deficits, which reveal themselves as underemployment, insufficient social protection, denial of rights at work and shortcomings of social dialogue.[313]

Across the world, many people were still unemployed at the time (160 million, in 2001). Creating jobs must have the highest priority. Access to work is the best way to fight poverty. Apart from this employment gap, there is a rights gap, which can be adjusted by means of legislation and political action. Child labour in particular requires well-designed policies. The social protection gap is alarming enough, with only about 20% of the world's workers having truly adequate social protection. The social dialogue gap mainly comes down to a 'representational gap'; particularly for agricultural workers and domestic workers, SMEs and migrants. The report also draws attention to the workers in the informal economy. This includes the majority of workers worldwide.

The objective must be to reduce all these deficits. With the support of the international community, every country must contribute to this objective according to its means.[314]

311 Sustainable Development Goals – United Nations, www.un.org/sustainabledevelopment.

312 ILC (2001).

313 ILC (2001), p. 3 ff.

314 ILC (2001), p. 14.

4.2 KNOWLEDGE IS POWER?

Since then, the concept of decent work has gained momentum. For many people in the world of work it has really inspired deliberation and action. However, soon after its introduction it became clear that the concept needed fleshing out. A concept is well and good, but how do you use it in day-to-day practice? How do you know that a country does or does not score highly on decent work and how do you measure progress or setbacks? And can you actually describe types of labour, such as temporary agency work, as decent or not? The ILO Office has made a substantial contribution to answering this question. In his report to the International Labour Conference in 2001, the Director-General stated:

> In order to effectively promote the goal of decent work for all, the office must be able to measure and monitor progress and deficits (...) At present our information systems provide only a partial, and sometimes only rudimentary picture of decent work deficits (...) If there is one place in the world where people can turn for quality information on decent work, it should be the ILO. We need to make a major investment in the design and implementation of our data and statistical base.

4.2.1 Working paper 2002 [315]

The need for a set of statistical indicators had already been passed on to the Director-General in 2001. A first step was taken in 2002 by issuing a working paper. It attempted to supply a framework to:

- measure decent work by means of statistical indicators in order to gain a detailed picture of progress across the world;
- acquire empirical material regarding the various aspects of decent work and regarding the connections between decent work, poverty and economic performance.

The working paper intended to translate the concept of decent work into easily understood work characteristics, and to establish statistical indicators of these characteristics that can be measured with some consistency, accuracy and cross-national compatibility. Further statistical activities would need to be undertaken and indicators would be required to improve the measuring activities in future.

315 Anker et al. (2002).

4.2.2 Six dimensions

The primary objective of the ILO as presented in the *Decent Work* report, 'opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity', comprises six dimensions:

1. Opportunities for work refers to the need for all persons (men and women) who want work to be able to find work, since decent work is not possible without work itself. The underlying concept of work is a broad one, encompassing all forms of economic activity, including self-employment, economic unpaid family work and wage labour in both the informal and formal sectors.
2. Work in conditions of freedom underscores the fact that work should be freely chosen and not forced on individuals and that certain forms of work are not acceptable in the 21st century. It means that bonded labour and slave labour as well as unacceptable forms of child labour should be eliminated as agreed by governments in international declarations and labour standards. It also means that workers are free to join workers' organisations.
3. Productive work is essential for workers to have acceptable livelihoods for themselves and their families, as well as to ensure sustainable development and competitiveness of enterprises and countries.
4. Equity in work represents the workers' need to have fair and equitable treatment and opportunity in work. It encompasses absence of discrimination at work and in access to work and ability to balance work with family life.
5. Security at work is mindful of the need to help safeguard health, pensions and livelihoods, and to provide adequate financial and other protection in the event of health and other contingencies. It also recognises the workers' need to limit insecurity associated with the possible loss of work and livelihood.
6. Dignity at work requires that workers are treated with respect at work, and are able to voice concerns and participate in decision-making about working conditions. An essential ingredient is workers' freedom to represent their interests collectively.[316]

According to Anker, the first two dimensions (opportunities for work and freedom of choice of employment) relate to the availability of work and the acceptable scope of work. The other four dimensions (productive work, equity, security and dignity) relate to the quality of the work. Apart from these six dimensions, the socio-economic context also matters, since it determines what decency brings the society concerned and how it boosts national economic and social and labour market achievements.

316 Anker et al. (2002), pag 2 ff.

4.2.3 Eleven characteristics

The working group established eleven characteristics or indicator groups that are generally considered to be decisive factors of decent work:[317]

- employment opportunities,
- unacceptable work,
- adequate earnings and productive work,
- decent hours,
- stability and security of work,
- combining work and family life,
- fair treatment in employment,
- safe work environment,
- social protection,
- social dialogue and workplace relations,
- economic and social context of decent work.

In the context of these characteristics, more indicators have been established to give further shape and substance to this 'measurement framework'.

4.2.4 Further measuring methods

Apart from this input provided by the ILO there have been other contributions to operationalising the concept of decent work. For instance, in an article dating from 2003, we also find the forms of requisite security noted earlier in this study, the lack of which result in precarious work: 'labour market security', 'employment security', 'job security', 'work security', 'skills reproduction security', 'income security' and 'voice representation security'.[318] This measuring method yields a ranking of countries, a decent work index.

317 Anker et al. (2002), p. 7 ff.
318 Bonnet et al. (2003), p. 86.

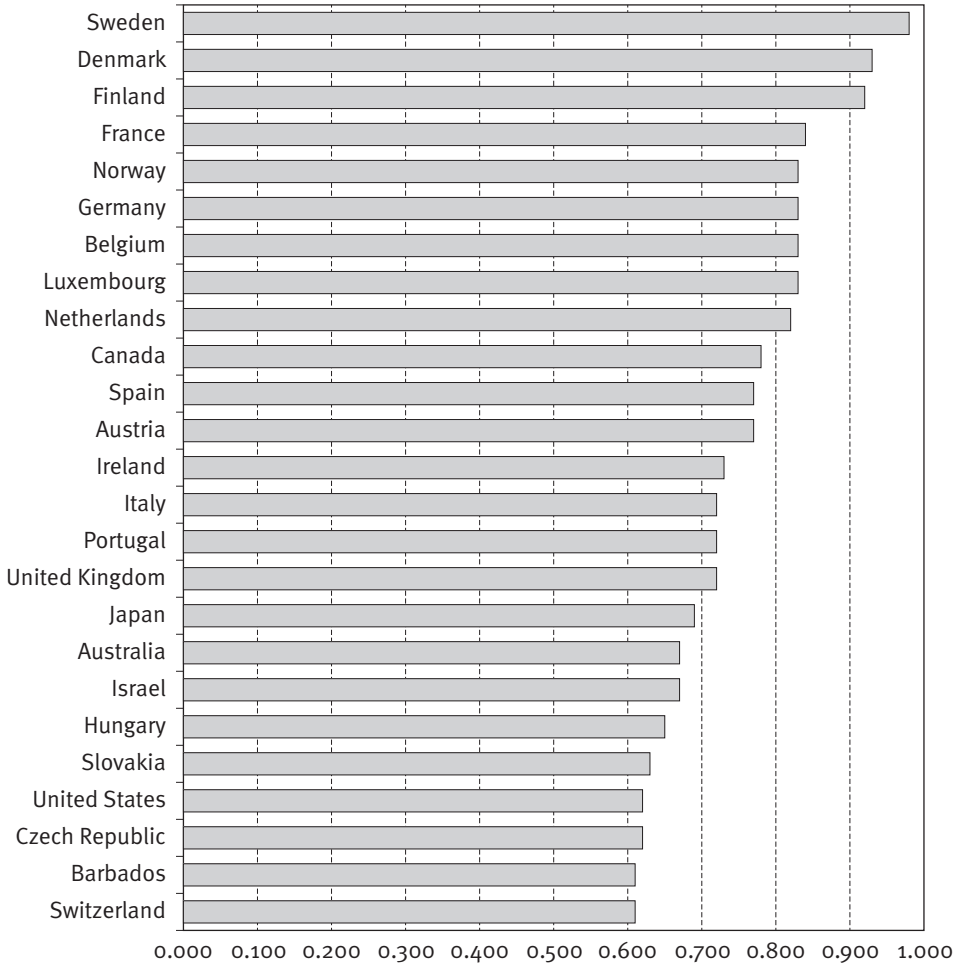


Figure 4.1 Decent work index (DWI) – 25 best scores [319]

The same issue of the *International Labour Review* also includes a contribution that makes the measuring system more dependent on the decent work deficits, i.e. low pay, excessive working hours, national unemployment, non-enrolment rate, youth unemployment, male-female gap in labour force participation rate, old age without pension.[320] Here, too, a country ranking ensues.

319 Bonnet et al. (2003), p. 230.
320 Bescond et al. (2003).

Table 4.3 International comparisons of seven decent work indicators: an illustration of methodology[321]

Country	*1 Non-enrollment rate*	*2 Low pay*	*3 Excessive hours of work*	*4 Unemployment*	*5 Youth unemployment*	*6 Male-female gap in LFPR*	*7 Old age without pension*	*Trimmed mean*
Sweden	0.0	...	7.8	4.1	8.3	3.5	...	5.1
Denmark	5.5	...	12.0	4.8	...	8.2	0.6	6.2
Iceland	6.5	...	30.8	2.8	6.0	9.5	...	7.3
Switzerland	12.7	5.6	...	2.5	5.7	18.6	...	8.0
France	4.2	...	8.9	8.9	20.2	13.4	0.0	8.9
Russian Federation	...	...	4.3	9.8	18.9	11.7	...	10.8
Finland	3.9	...	11.3	13.1	25.1	8.6	...	11.0
United Kingdom	7.2	9.3	21.8	5.2	12.2	15.8	...	11.1
Belgium	7.8	...	10.9	8.6	21.1	18.1	3.7	11.4
Germany	11.6	...	11.1	9.2	...	14.1	...	11.4
United States	8.2	...	18.2	6.0	12.4	15.1	...	11.9
Korea, Republic of	4.7	...	51.5	2.9	6.1	25.1	...	12.0
Canada	7.4	...	12.9	9.4	15.2	14.4	...	12.2
Macau, China	...	10.9	44.0	6.2	10.0	16.0	...	12.3
Portugal	11.4	...	16.5	4.1	9.9	16.9	...	12.6
Japan	0.0	13.7	30.3	5.0	9.6	26.5	...	13.7
Tanzania, United Rep. of	...	...	48.2	3.4	7.2	4.6	29.4	13.7
Lithuania	...	...	12.4	14.1	26.5	13.6	...	13.9
Australia	8.7	...	20.5	6.0	12.4	16.2	48.4	14.5
Estonia	14.7	...	12.5	9.4	17.4	14.3	19.7	14.7
Thailand	...	...	54.3	5.0	13.5	17.8	13.0	14.8
Romania	22.4	...	12.2	6.4	18.4	14.0	...	14.9
Slovakia	...	...	10.6	19.5	38.5	15.6	...	17.6
Nepal	68.8	...	41.6	1.8	3.0	8.3	...	17.6
Ireland	11.8	...	11.8	11.8	18.6	30.0	48.6	18.1
Jamaica	23.6	...	18.4	15.7	33.6	16.3	...	19.4
Indonesia	24.9	...	30.0	4.9	14.6	27.7	...	22.4
Italy	...	...	19.4	11.3	32.4	28.5	20.6	22.8
Poland	5.1	...	29.7	17.9	40.1	14.0	31.3	23.2
Greece	12.0	...	35.6	10.3	32.2	26.7	...	23.6
Yemen, Rep. of	...	...	29.3	8.4	18.7	45.4	...	24.0
Hong Kong, China	...	...	42.2	6.9	27.2	20.9	...	24.1
Mauritius	...	...	23.8	9.8	46.8	38.6	0.0	24.1
Mexico	28.7	17.0	27.9	1.7	3.4	43.9	80.7	24.2
Spain	...	...	15.2	19.6	37.2	25.9	32.0	25.8

321 Bescond et al. (2003), p. 207. 'The international comparisons in this table are given for illustrative purposes only. The limited number of indicators used in calculating the trimmed mean and the large number of missing values in certain cases preclude definitive conclusions as to the relative position of countries. A more complete set of data with a larger number of indicators may give different ranking of countries.'

Country	1 Non-enrollment rate	2 Low pay	3 Excessive hours of work	4 Unemployment	5 Youth unemployment	6 Male-female gap in LFPR	7 Old age without pension	Trimmed mean
Costa Rica	39.5	11.5	62.1	5.2	10.9	39.7	59.9	32.3
Jordan	27.3	15.4	41.3	14.9	30.0	53.5	67.0	33.5
Sri Lanka	39.7	...	40.0	8.7	24.6	36.6	...	33.6
Turkey	39.1	...	42.1	7.9	13.6	46.7	77.1	35.4
Bangla Desh	72.8	...	43.9	3.4	...	58.9	...	51.4

Source: Compiled from national labour force surveys.

4.2.5 Tripartite expert meeting [322]

In 2008, another important meeting took place on the measurement of decent work. The ILO Declaration on Social Justice for a Fair Globalization reconfirmed that the ILO and its member states were committed to the four (sub-)targets of the Decent Work Agenda.

The Declaration stressed the importance of national and regional strategies for decent work and emphasised that member states may consider establishing appropriate indicators and statistics, if need be with the assistance of the ILO, in order to monitor and evaluate their progress. To this end, the ILO arranged a tripartite meeting of experts in order to set up a global methodology to chart the progress member states make with regard to decent work.

The report resulting from this expert meeting[323] fits in with the earlier findings with regard to the eleven characteristics (see table 4.4).

322 ILO (2008a). See also: ILO (2008b).

323 ILO (2008a).

Table 4.4 Measurement of decent work (September 2008)

Substantive element of the Decent Work Agenda	*Statistical indicators*	*Legal framework indicators*
Numbers in brackets refer to ILO strategic objectives: 1. Standards and fundamental principles and rights at work; 2. Employment; 3. Social protection; 4. Social dialogue.	Selection of relevant statistical indicators that allow monitoring progress made with regard to the substantive elements. M – Main decent work indicators A – Additional decent work indicators F – Candidate for future inclusion/developmental work to be done by the Office C – Economic and social context for decent work (S) indicates that an indicator should be reported separately for men and women in addition to the total.	L – Descriptive indicators providing information on rights at work and the legal framework for decent work. Description of relevant national legislation, policies and institutions in relation to the substantive elements of the Decent Work Agenda; where relevant, information on the qualifying conditions, the benefit level and its financing; evidence of implementation effectiveness (as recorded by ILO supervisory bodies); estimates of coverage of workers in law and in practice; information on the ratification of relevant ILO conventions.
Employment opportunities (1 + 2)	M – Employment-to-population ratio, 15–64 years (S) M – Unemployment rate (S) M – Youth not in education and not in employment, 15–24 years (S) M – Informal employment (S) A – Labour force participation rate, 15–64 years (1) [to be used especially where statistics on Employment-to-population ratio and/or Unemployment rate (total) are not available] A – Youth unemployment rate, 15–24 years (S) A – Unemployment by level of education (S) A – Employment by status in employment (S) A – Proportion of own-account and contr. family workers in total employment (S) [to be used especially where statistics on informal employment are not available] A – Share of wage employment in non-agricultural employment (S) F – Labour underutilization (S) Memo item: Time-related underemployment rate (S) grouped as A under 'Decent Working Time'	L – Government commitment to full employment L – Unemployment insurance
Adequate earnings and productive work (1 + 3)	M – Working poverty rate (S) M – Low pay rate (below 2/3 of median hourly earnings) (S) A – Average hourly earnings in selected occupations (S) A – Average real wages (S) A – Minimum wage as % of median wage A – Manufacturing wage index A – Employees with recent job training (past year/past 4 weeks) (S)	L – Minimum wage

Substantive element of the Decent Work Agenda	*Statistical indicators*	*Legal framework indicators*
Decent Working Time (1 + 3)*	M – Excessive hours (more than 48 hours per week; 'usual' hours) (S) A – Usual hours worked (standardized hour bands) (S) A – Annual hours worked per employed person (S) A – Time-related underemployment rate (S) F – Paid annual leave (developmental work to be done by the Office; additional indicator) L – Maximum hours of work L – Paid annual leave (developmental work to be done by the Office; additional indicator)	L – Maximum hours of work L – Paid annual leave Combining work, family and personal life (1 + 3) F – Asocial/unusual hours (Developmental work to be done by the Office) F – Maternity protection (developmental work to be done by the Office; main indicator) L – Maternity leave (incl. weeks of leave, and rate of benefits) L – Parental leave*
Work that should be abolished (1 + 3)	M – Child labour [as defined by ICLS resolution] (S) A – Other worst forms of child labour (S)** A – Hazardous child labour (S) A – Forced labour (S)**	L – Child labour (incl. public policies to combat it) L – Forced labour (incl. public policies to combat it)
Stability and security of work (1, 2 + 3)	Stability and security of work (developmental work to be done): M – Precarious Employment rate** A – Job tenure** A – Subsistence worker rate** A – Real earnings casual workers** (S) Memo item: Informal employment grouped under employment opportunities.	L – Termination of employment* (incl. notice of termination in weeks) Memo item: 'Unemployment insurance' grouped under employment opportunities; needs to be interpreted in conjunction for 'flexicurity'.
Equal opportunity and treatment in employment (1, 2 + 3)	M – Occupational segregation by sex M – Female share of employment in senior and middle management* (ISCO88 groups 11 and 12) A – Gender wage gap A – Share of women in wage employment in the non-agricultural sector A – Indicator for Fundamental Principles and Rights at Work (Elimination of discrimination in respect of employment and occupation) to be developed by the Office A – Measure for discrimination by race/ethnicity/ of indigenous people/of (recent) migrant workers/of rural workers where relevant and available at the national level. F – Measure of dispersion for sectoral/occupational distribution of (recent) migrant workers F – Measure for employment of persons with disabilities Memo item: Indicators under other substantive elements marked (S) indicator should be reported separately for men and women in addition to the total.	L – Equal opportunity and treatment* L – Equal remuneration of men and women for work of equal value*
Safe work environment (1 + 3)	M – Occupational injury rate, fatal A – Occupational injury rate, nonfatal A – Time lost due to occupational injuries A – Labour inspection (inspectors per 10,000 employed persons)	L – Employment injury benefits* L – Safety and health labour inspection

Substantive element of the Decent Work Agenda	*Statistical indicators*	*Legal framework indicators*
Social security (1 + 3)	M – Share of population aged 65 and above benefiting from a pension (S) M – Public social security expenditure (% of GDP) A – Healthcare exp. not financed out of pocket by private households A – Share of population covered by (basic) health care provision (S) F – Share of econ. active population contributing to a pension scheme (S) F – Public expenditure on needs based cash income support (% of GDP) F – Beneficiaries of cash income support (% of the poor) F – Sick leave (developmental work to be done by the Office; additional indicator) [Interpretation in conjunction with legal framework and labour market statistics.]	L – Pension L – Incapacity for work due to sickness/sick leave L – Incapacity for work due to invalidity Memo item: 'Unemployment insurance' grouped under employment opportunities.
Social dialogue, workers' and employers' representation (1 + 4)	M – Union density rate (S) M – Enterprises belonging to employer organization [rate] M – Collective bargaining coverage rate (S) M – Days not worked due to strikes and lockouts* F – Indicator for Fundamental principles and rights at work (Freedom of association and collective bargaining) to be developed by the Office	L – Freedom of association and the right to organize L – Collective bargaining right L – Tripartite consultations
Economic and social context for decent work	C – Children not in school (% by age) (S) C – Estimated % of working age population who are HIV positive C – Labour productivity (GDP per employed person, level and growth rate) C – Income inequality (percentile ratio P90/P10, income or consumption) C – Inflation rate (CPI) C – Employment by branch of economic activity C – Education of adult population (adult literacy rate, adult secondary-school graduation rate) (S) C – Labour share in GDP C (additional) – Real GDP per capita in PPP (level and growth rate) C (additional) – Female share of employment by industry (ISIC tabulation category) C (additional) – Wage/earnings inequality (percentile ratio P90/P10)	L – Labour administration** Developmental work to be done by the Office to reflect environment for Sustainable enterprises, incl. indicators for (i) education, training and lifelong learning, (ii) entrepreneurial culture, (iii) enabling legal and regulatory framework, (iv) fair competition, and (v) rule of law and secure property rights. Developmental work to be done by the Office to reflect other institutional arrangements, such as scope of labour law and scope of labour ministry and other relevant ministries.

During the meeting, the employers[324] objected to the creation of an ILO-driven methodology that was to serve as a template to take countries' measures with regard to progress towards decent work.

Some government experts and independent experts, as well as the union-nominated experts supported the framework that the Office proposed.

324 ILO (2008b), p. 3.

The meeting did not lead to full acceptance of the proposed methodology. A report on the meeting was to be submitted to the Governing Body and the International Conference of Labour Statisticians. Also, efforts would be made to clearly define indicators and test them in a number of pilot-countries.

With funding by the European Union the ILO-implemented project Monitoring and Assessing Progress on Decent Work was to run from 2009 to 2013. To that end, a manual was developed in May 2012. The project covers nine countries, including two in Africa (Niger and Zambia), four in Asia (Bangladesh, Cambodia, Indonesia and the Philippines), one in Europe (Ukraine) and two in Latin America (Brazil and Peru).

4.2.6 Further criticism

In January 2014, the employers again drew attention to the fact that it is useful to gather more and better data on decent work, but that this cannot result in the creation of a measuring system for a concept as subjective as decent work.[325]

In the scientific reference literature[326] the concept of decent work has likewise been criticised, as has the concept of precarious work. This makes clear that there is no adequate standard to measure the quality of labour. Although there is a lot of literature on the quality of labour, no consensus has been achieved on what actually constitutes a 'good job' and how this can be reliably measured.

Recently, the OECD has started a project that pivots on promoting the quality of labour. It fits in with characteristics such as: income disparities, labour market security and working environment quality. The OECD argues that more research is needed to fathom the various dimensions of labour quality and to examine how they interact, and also how labour quality impacts on labour quantity.[327]

4.3 INFORMAL WORK

To gain a good insight, it is also important to relate the concept of decent work to the concept of informal work. After introducing the Decent Work Agenda, the ILO had already drawn attention to this. In its report *Reducing the decent work deficit – a global challeng*e the ILO argues:[328]

> While a majority of people worldwide work in the informal economy, most of them lack adequate protection, security, organization and voice. Yet I believe that the

325 IOE (2014b).
326 Burchell et al. (2013).
327 OECD (2014), p. 47.
328 ILC (2001), p. 7.

> principles of decent work are as important in the informal as in the formal economy. The right to organize, because it is an enabling right, also permits other goals to be attained.
>
> The way people organize may be different in the formal and informal economies, because much informal work is not wage work and the immediate purposes of organization may vary. But the goal of voice and representation is the same. This is also true for other core labour standards. Discrimination, for instance, may limit access to credit, to land, to space for trading activities and to many other aspects of informal self-employment. Child labour prevents escape from low-income informal activities.
>
> The real issue then is, how to extend these rights to all people, not to limit their application.

4.3.1 What is informal work?

At the particular request of the employers in the Governing Body, the phenomenon of informal work has been placed on the agenda several times. Under the heading of 'Transitioning from the informal to the formal economy' it was the subject of debate at the 2014 and 2015 International Labour Conferences[329], with an eye to a recommendation that was to serve as the guiding principle in promoting the transition from informal to formal work.

It was stated in 2002 that, even though no generally applicable, accurate or accepted definition existed, there is still a broad understanding that the term 'informal economy' represents a considerable variety of workers, enterprises and entrepreneurs that share recognisable characteristics. They experience specific disadvantages and problems that vary in intensity.

Informal work concerns all the activities of workers and economic units that – by law or in practice – are not or insufficiently covered by formal arrangements. Their activities are not conducted in accordance with the law, which means that they fall outside the scope of the law; or they are not covered in practice, which means that although they fall inside the scope of the law, the law is not applied or observed; or that the law is not applied since it is not adequate, too onerous or too costly.

During the 2014 deliberations, the conference took the framework below, as defined by the 15th International Conference of Labour Statisticians.[330], to be the reference point for the conceptual framework.[331]

329 ILC (2014).
330 Hussmanns (2003).
331 Hussmanns (2003).

Table 4.5 Conceptual framework: informal employment

Production units by type	Jobs by status in employment								
	Own-account workers		Employers		Contributing family workers	Employees		Members of producers' cooperatives	
	Informal	Formal	Informal	Formal	Informal	Informal	Formal	Informal	Formal
Formal sector enterprises					1	2			
Informal sector enterprises[a]	3		4		5	6	7	8	
House-holds[b]	9					10			

(a) As defined by the Fifteenth International Conference of Labour Statisticians (excluding households employing paid domestic workers).
(b) Households producing goods exclusively for their own final use and households employing paid domestic workers.

Note: Cells shaded in dark grey refer to jobs, which, by definition, do not exist in the type of production unit in question. Cells shaded in light grey refer to formal jobs. Un-shaded cells represent the various types of informal jobs.

Informal employment: Cells 1 to 6 and 8 to 10.
Employment in the informal sector: Cells 3 to 8.
Informal employment outside the informal sector: Cells 1, 2, 9 and 10.

4.3.2 Extent of the informal economy

The ILO estimates[332] the non-agrarian informal economy to comprise 82% of total employment in South Asia, 66% in sub-Saharan Africa, 65% in East and South-East Asia (excluding China), 51% in Latin America and 10% in Eastern Europe and Central Asia. Within these regions, large differences can be measured between countries. In Latin America, these range from 40% in Uruguay to 72% in Bolivia. For sub-Saharan Africa, they range from 33% in South Africa to 82% in Mali; in South and East Asia (excluding China), from 42% in Thailand to 83.5% in India; in North Africa and the Middle East, from 30.5% in Turkey to 58.5% in the West Bank and Gaza.

If we include the agrarian sector (18% in Latin America and the Caribbean; 17% in Eastern Europe and Central Asia; 54% and 57% in South Asia and sub-Saharan Africa respectively) the informal work figures are even higher. The share of women in these figures is relatively high. In this context, the term undeclared employment[333] is also used, and Schneider estimates the size of the undeclared economy in figure 4.2.

332 ILC (2014), Report V(1), p. 6.
333 Renooy & Williams (2014).

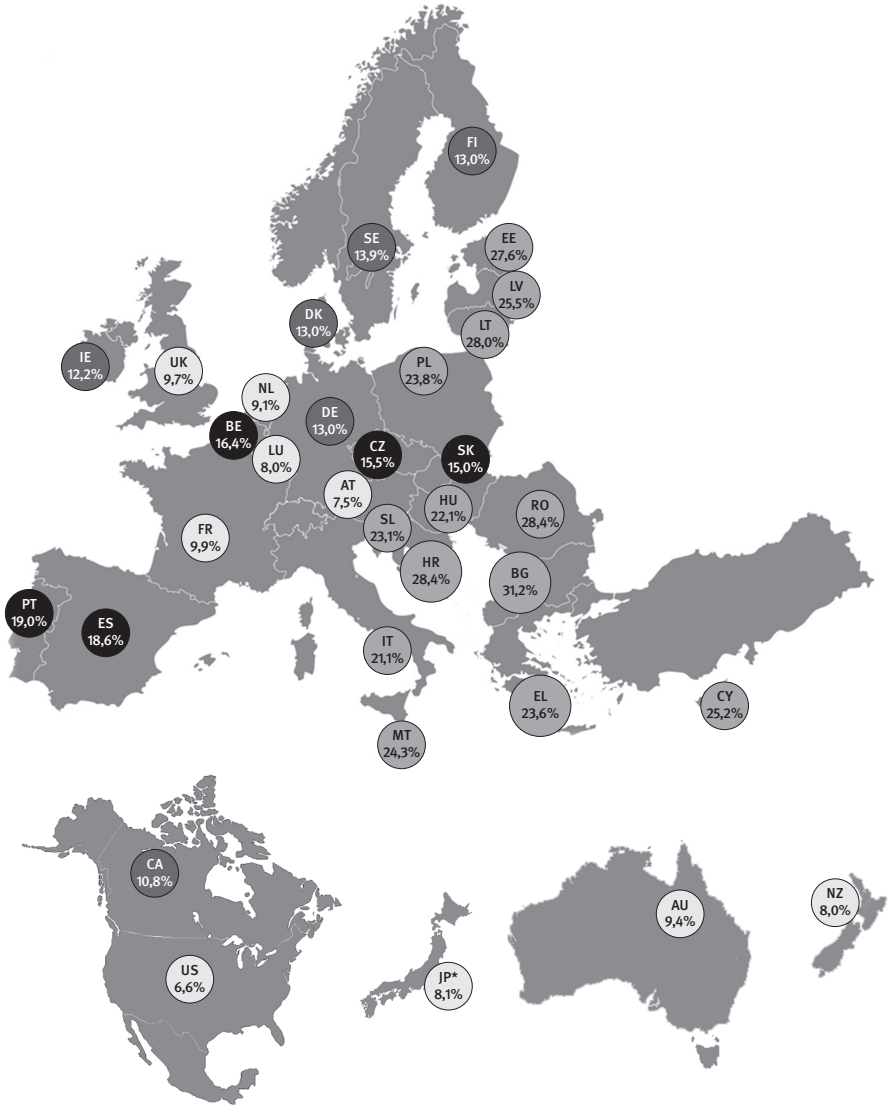


Figure 4.2 Size of the undeclared economy as % of GDP, 2013: by country
Renooy & Williams (2014), p. 21, gathered from Schneider (2013).

4.3.3 Approach [334]

The informal economy entails high costs for business, workers and the community. The workers lack status, are vulnerable and dependent. The businesses lack access to the facilities of the formal sector and make insufficient profits to be able to innovate.

334 ILC (2014), report V (1), p. 12 ff.

This also leads to unfair competition, particularly since no taxes and premiums are paid, and the community as a whole is vastly disadvantaged by missing out on these revenues.

On the basis of the Decent Work Agenda the ILO has developed a policy framework involving seven key avenues towards formalisation. They include:

- growth strategies focusing on quality;
- the regulatory framework;
- organisation, representation and social dialogue;
- promotion of equal treatment and addressing discrimination;
- measures to support entrepreneurship, skills and finance;
- extending social protection;
- local development strategies.

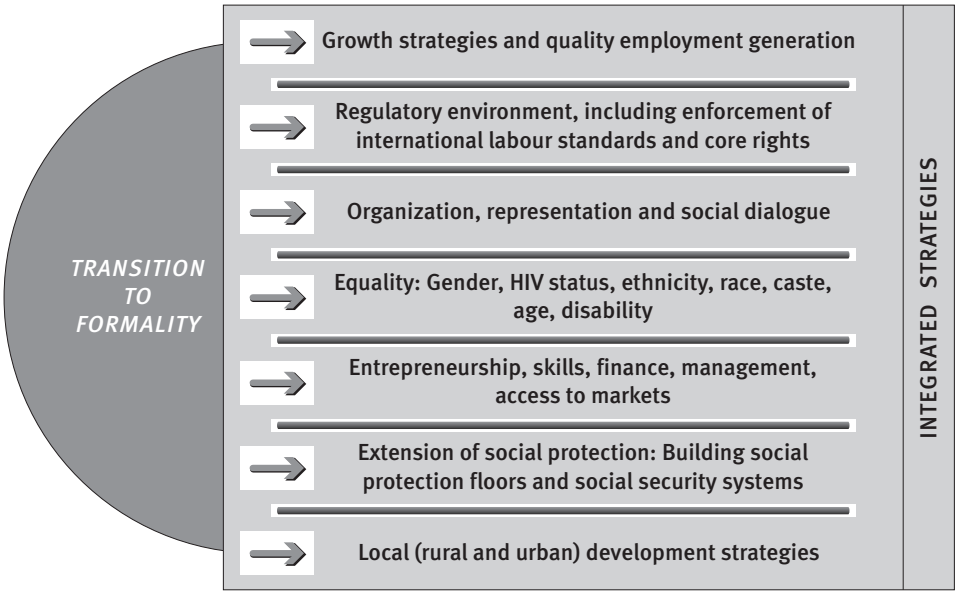


Figure 4.3 Decent work strategies for the informal economy ILC (2014), p. 13.

Many of these elements can be found back in the Transition from the Informal to the Formal Economy Recommendation (no. 204, 2015). Interestingly, the ILO advises the member states to include employment services 'when formulating and implementing an integrated policy framework' (art. 12). In the annex to the recommendation, ILO convention 181 is listed among the instruments that ILO considers relevant to facilitating the transition from the informal to the formal economy.

4.4 A ROLE FOR TEMPORARY AGENCY WORK

The question arises as to how temporary agency work relates to the Decent Work Agenda. As we saw before, the concept of decent work is a subjective one. And the social partners, let alone the scientific reference literature, have never achieved consensus on what decent can be taken to mean. There is a certain feeling about what is or is not decent, but that may differ from one person to another. However, it is worthwhile to interpret what decent is, even though subjective elements will then still manifest themselves. Such an interpretation involves two questions, namely:

- How must temporary agency work be considered in relation to the four objectives relating to employment, social protection, employee rights and social dialogue?
- Can temporary agency work in particular be denoted as decent in accordance with certain indicators supplied by the ILO Office?

4.4.1 Decent work objectives: employment

Temporary agency work plays a role in the labour market. The Decent Work Agenda looks at promoting employment. There has been debate on the question as to whether temporary agency work actually promotes employment. The unions argue that this is only the case if investments are made, and this is not what temporary employment agencies are doing. However, the Director-General does state in his 1999 report:[335]

> Employment services have a great deal to offer in overcoming labour market inequality. Ideally they should be integrated with labour market policies, training and unemployment insurance within a single consistent framework. These are issues that need to be dealt with together so as to deliver a coherent package of public information, counselling, placement and training services, capturing both the supply and the demand side of the labour market. An integrated approach would be particularly important for workers displaced by economic restructuring that will be addressed in the In Focus programme on skills. Integrated action is also important for other groups that face longer-term labour market disadvantages. A greater effort to extend support to national policies in this field is needed, and the ILO could take the lead in promoting research at the international level on how to develop the necessary integrated institutions.

Thus, promoting employment does actually benefit from attention directed at balancing supply and demand, something in which temporary employment agencies can

335 ILC (1999), p. 12

also play an important role. When the ILO developed the Decent Work Agenda, Convention 181 already existed, and article 13, which relates to promoting cooperation between private and public employment services, is particularly relevant here.

It is also relevant to refer to the significant remarks made by Wim Kok in the *Report of the Employment Taskforce,* dated November 2003. In it, he states:[336]

> Temporary agency work can be an effective stepping stone for new entrants into the labour market and hence contribute to increased job creation, for example by facilitating recruitment instead of overtime. Acting as human capital managers – rather than mere manpower suppliers – these agencies can also play the role of new intermediaries in the recruitment and management of both qualified and unqualified staff, offering employers an attractive alternative to traditional recruitment channels.
>
> Temporary work agencies should have their place in a modern labour market as new intermediaries that can support flexibility and mobility of firms and of workers, while offering security for workers in the form of improved job opportunities and high employment standards, including in terms of pay, working time and training opportunities. SMEs would particularly benefit from greater opportunity to use temporary work.
>
> In some Member States, the development of temporary agency work is impaired by legal obstacles affecting the setting up of agencies, conditions imposed on firms using agency services and restrictions on the length of contracts that can be negotiated. Removing obstacles to temporary agency work could significantly support job opportunities and job matching. This is the direction the Taskforce advises Member States to go. At the same time guaranteed minimum levels of protection and access to training for temporary workers would be required to ensure equal treatment of all workers and to raise the attractiveness of agency work. Collective agreements for temporary agency workers can support this.

Thus, Kok's Taskforce makes a clear statement regarding the positive role that temporary employment agencies can play in enhancing job opportunities. Although they may not directly create employment, at least they will raise the employment rate.

Various studies show that if temporary employment agencies had not existed, the commissioning client would only in very few cases have resorted to permanent employment (14 to 26%) or another form of external flexibility (12 to 31%). Thus, temporary employment agency services have contributed to 55 to 62% extra work. Without the temporary employment agency this work would not have existed.[337]

336 Kok (2003), p. 29 ff. Wim Kok is a former prime minister of the Netherlands.

337 McKinsey & Cie (2003), p. 22; Bain & Cie (2007), p. 14.

Furthermore, various studies show that, as a result of temporary agency work, employability or having work increases and the risk of unemployment decreases.[338] This may make clear that a stepping stone effect does in fact exist, i.e. an easy stepping stone into open-ended employment.

However, there are also doubts about this effect. The OECD recently reported on perceptions[339] of job insecurity, opportunities for new jobs and redundancy costs, concluding that – compared with permanent employment, dependent self-employment and fixed-term contracts – temporary agency contracts involve the highest job insecurity, the slimmest chances of new jobs and the highest redundancy costs. Although there is a stepping stone effect, just as clearly, there are risks involved.

To what extent does national labour law contribute to the labour market efficiency, i.e. an optimum balance between the flexibility that temporary agency work may add and the required security for the workers involved?

In 2011, the Boston Consulting Group (BCG) conducted a study commissioned by CIETT, from which a ranking may be derived concerning the differences in national legislation with regard to labour market efficiency. This concept is substantiated by analysing the degree of freedom of establishment, collective bargaining and services provided, as well as the degree of involvement in the labour market, as reflected in national legislation, and by determining the relative shares for a large number of countries.

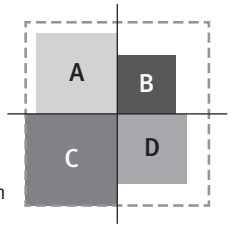
The updated figures below show that countries such as the Netherlands, Italy, Canada and the United States score high on the Regulatory Efficiency Index, while countries such as Turkey, Brazil and Vietnam score very low.

338 CIETT (2014), p. 36.

339 Bassanini & Cazes (2014), p. 41.

A – Right of establishment
1. Legal recognition of the triangular work relationship in all countries
2. No limitation of services to be delivered (real private employment agencies)
3. No unjustified and disproportionate barriers to enter the market

B – Right to provide services/to contract
4. Ability to offer the full range of labour contracts
5. Removal of key restrictions on the use of AW[1]



C – Right to negotiate/social protection
6. AW recognized as a sector on its own
7. Ability to implement social protection for agency workers that can be capitalized and portable

D – Right to contribute to labour policies
8. Access to training for agency workers to be as broad and easy as possible
9. Existence of public-private partnerships in terms of employment services
10. PrES are committed an involved in the fight against illegal practices and unethical agencies

1 Agency work

Figure 4.4 Regulatory Efficiency Index. Index assesses degrees of flexibility to operate and security for workers.

BCG (2011), p. 78, gathered from: National federations, BCG analysis

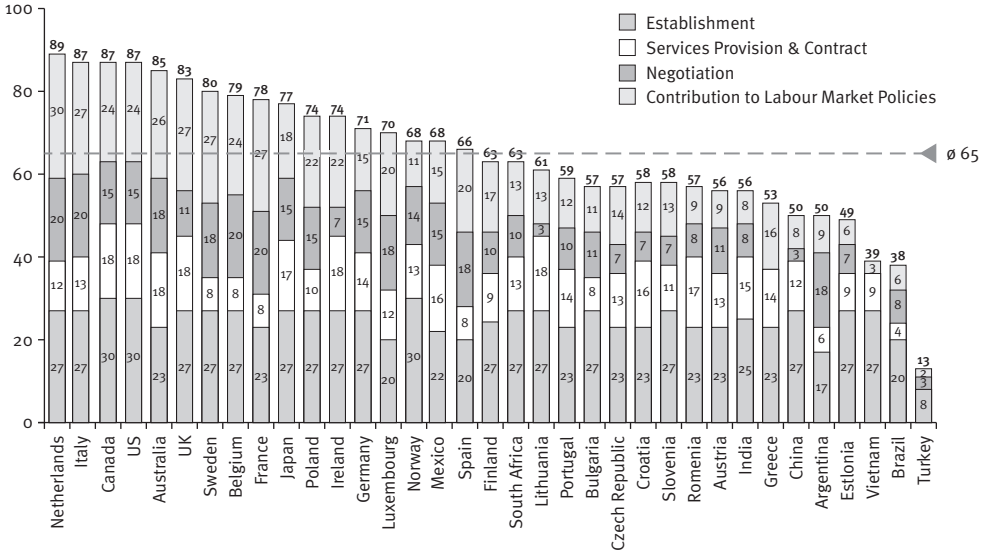


Figure 4.5 Regulatory efficiency index score 2015

BCG (2011) (update by CIETT), p. 78, gathered from: National federations, BCG analysis

4.4.2 Decent work objectives: social protection

With regard to social protection in temporary agency work, many countries have a substantial amount of specific legislation in place. The survey below makes clear which conditions have been applied, and to what extent.

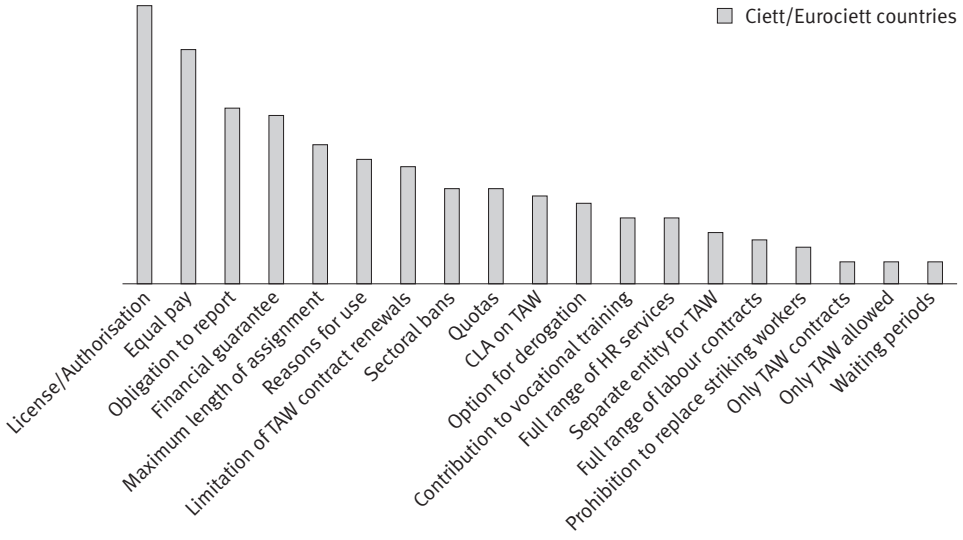


Figure 4.6 Applicable conditions on TAW/PrES

Source: internal analysis by CIETT on the basis of member state data.

A CIETT survey of member states and the key elements regarding legislation shows that the licensing/certification requirement and the application of the equal pay principle score most, immediately followed by maximum length of assignment, the reasons for use and sectoral bans. All in all, it becomes clear that adequate legislation is in place that specifically touches on the social protection of the temporary workers.

Table 4.6 Key indicators temporary agency legislation

Country	*Licensing/certificate requirement*	*Reasons for use*	*Maximum length of assignment*	*Sectoral bans*	*Equal pay*
AR	×	×		×	×
AU	×				×
AT	×				×
BE	×	×	×	×	×
BR	×	×	×		×

Country	*Licensing/certificate requirement*	*Reasons for use*	*Maximum length of assignment*	*Sectoral bans*	*Equal pay*
BG	×	×			×
CA	×				
CL	×	×	×	×	
CN	×	×	×		
CO	×	×	×	×	×
CZ	×	×	×		×
DK	×				×
EE	×				×
FI	×	×	×	×	×
FR	×	×	×	×	×
DE	×			×	×
GR	×		×	×	×
HU	×				×
IN	×	×			
IE	×				×
IT	×	×	×		×
JP	×		×	×	
LV	×				×
LT	×				×
LU	×			×	×
MK					
MX	×		×		
MA					
NP					
NL	×	×		×	×
NZ					
NO					
PE	×	×	×		
PL	×	×	×	×	×
PT	×	×	×		×
RO	×	×			×
RU			×		×
SG					
SK	×				×
SL	×		×		×
ZA				×	
KR					
ES	×		×	×	×
SE	×		×		×
CH					
TR					
UK	×				×
US	×		×	×	
ZM					
49	*37*	*17*	*21*	*14*	*30*

Source: internal analysis by CIETT on the basis of member state data.

4.4.3 Decent work objectives: fundamental rights

The fundamental rights regarding freedom of association and collective bargaining, child labour, forced labour and non-discrimination have been guaranteed through Convention 181. Even if they do not ratify the relevant covenants, the ILO member states are obliged to respect the workers' rights entrenched in the convention.

4.4.4 Decent work objectives: social dialogue

In the temporary employment agency sector, social dialogue takes place at various levels: at cross-sectoral level, at sectoral level, at temporary employment agency level and at user company level. How social dialogue takes place is heavily dependent on the (temporary agency) labour relations, as they have evolved in practice.[340]

Table 4.7a What role for social dialogue in regulating TAW? (Europe)

Countries/ Europe	*Cross-sectoral*	*AW sector*	*AW company (own staff)*	*User companies*
Austria		✓		✓
Belgium	✓	✓	✓	✓
Denmark		✓	✓	✓
Finland		✓	✓	✓
France		✓	✓	✓
Germany		✓	✓	✓
Ireland	✓			✓
Italy		✓		✓
Luxembourg		✓		✓
Macedonia		✓		
Netherlands		✓	✓	✓
Norway				✓
Poland	✓			
Portugal		✓		
Spain		✓		✓
Sweden	✓	✓	✓	✓
Switzerland		✓		✓
United Kingdom[1]	(✓)		✓	

340 BCG (2011), p. 17.

Table 4.7b What role for social dialogue in regulating TAW? (Rest of the World)

Countries/ Rest of the World	*Cross-sectoral*	*AW sector*	*AW company*	*User companies*
Argentina				✓
Australia	✓		✓	✓
Brazil	✓	✓	✓	✓
Canada[3]	✓	–	–	–
Chile[2]	–	–	–	–
China				✓
Colombia[3]	–	–	–	–
Japan[4]		(✓)		
New Zealand			✓	✓
Mexico			✓	✓
Peru[3]	–	✓	✓	–
Russia[3]	✓	–	–	–
South Africa	✓	–	–	–

1 In the UK, cross-sectoral level refers to a single agreement between CBI and TUC rather than to collective bargaining as such.
2 Collective agreements are not allowed for agency workers (20.123 law, art. 304 & 305).
3 There are no CLAS in these countries.
4 In Japan, AW sector refers to a single agreement between Rengo and JASSA rather than to collective bargaining as such.

4.4.5 Temporary agency work and ILO indicators

In its endeavour to measure decent work, the ILO Office has issued a manual[341] containing a list of legal framework indicators that may help answer the question as to whether temporary agency work, as discussed by Convention 181, may be considered decent. A comparison shows that nearly all indicators are entrenched in Convention 181 in one way or another.

Table 4.8 List of legal framework indicators

Nr.	*Indicator*	*Relevant ILO instruments*	*Provisions Convention 181*
1	Labour administration	Labour Administration Convention 1978 (no. 150)	Art.14 lid 2
2	Government commitment to full employment	Employment Policy Convention 1964 (no. 122)	Pre-ambule
3	Unemployment insurance	Social Security (minimum standards) Convention 1952 (no. 102)	Art. 11e, 12d
		Protection Against Unemployment Convention 1988 (no. 168)	Art. 11c, 12b

341 ILO (2012b).

Nr.	*Indicator*	*Relevant ILO instruments*	*Provisions Convention 181*
4	Statutory minimum wage	The Minimum Wage Fixing Convention 1970 (no. 131)	Art. 11c, 12b
5	Maximum hours of work	The Hours of Work (industry) Convention 1919 (no. 1) The Hours of Work (commerce and offices) Convention 1930 (no. 30)	Art. 11d, 12c
6	Paid annual leave	Holiday with Pay Convention (revised) 1970 (no. 132)	Art. 11d, 12c
7	Maternity leave	Maternity Protection Convention 2000 (no. 183)	Art. 11j, 12i
8	Parental leave	Workers with Family Respondability Convention 1981 (no. 156)	Art.11j, 12i
9	Child labour	The Minimum Age Convention 1973 (no. 138) Worst Forms of Child Labour Convention 1999 (no. 182)	 Art. 9
10	Forced Labour	Convention on Forced Labour 1930 (no. 29)	Preambule
11	Termination of employment	Termination of Employment Convention 1982 (no. 158) Recommendation 166	?
12	Equal opportunity of employment	Equal Remuneration Convention 1951 (no. 100) Discrimination Employment and Occupation Convention 1958 (no. 111)	Art. 5
13	Equal remuneration of men and women for work of equal value	idem	Art. 5
14	Employment injury benefits	Social Security (minimum standards) Convention 1952 (no. 102) Employment Injury Benefits Convention 1964 (no. 121)	Art. 11h, 12g
15	OSH labour inspection	Labour Inspection Convention 1947 (no. 81) Labour Inspection (agriculture) Convention 1969 (no. 129)	Art. 14, lid e
16	Pension (public private)	Zie ad 14 en Applicability part V and Invalidity Old Age and Survivers Benefits Convention 1967 (no. 128)	 Art. 11e, 12d
17	Incapacity for work due to sichness/sick leave	Zie ad 14 en Part III and the Medical Care and Sickness Benefits Convention 1969 (no. 130)	 Art. 11e, h Art. 12d, g
18	Incapacity for work due to invalidity	Idem	Idem
19	Freedom of association and right to organize	Freedom of Association and the Protection of the Right to Organize Convention 1948 (no.87)	Art. 4
20	Collective bargaining rights	Idem	Art. 4
21	Tripartite consultations	Tripartite Consultation (International Labour Standards) Convention 1976 (no. 144)	Art. 2, lid 4 Art. 3, lid 3 Art. 7, lid 2 Art. 8, lid 1 Art.13, lid 1

The only indicator lacking provisions in Convention 181 relates to termination of employment. However, it would go too far to look on temporary agency work as indecent merely on the basis of this hiatus.

There is a Termination of Employment Convention from 1982 (no. 158) linked to Recommendation no. 166. This Convention 158 states in article 2, par. 2, that member states may exclude 'workers engaged under a contract for a specified period of time or a specified task' from the provisions of the convention.[342] Recommendation no. 166 further develops this article and also includes temporary employment, albeit that justified grounds must be provided for the situations in which this is allowed. Article 3 of Recommendation 166 states:

1. Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention (1982), and this Recommendation.
2. To this end, for example, provision may be made for one or more of the following:
   a) Limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration
   b) Deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration
   c) Deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

Thus, temporary employment is allowed, but it is restricted to specific conditions relating to the nature of the assignment, the circumstances of the assignment or the interests of the worker. If these conditions are not met, an open-ended contract is deemed to exist.

Convention 158 has been ratified by 36 member states, and is by now thought to be controversial. Employers advocate abrogating it, as it no longer complies with current demands.[343] They argue that 'full employment and open labour markets are more important for perceived employment security than strict project dismissal regulation'.[344] This position fits in with Kennedy remarking in the 1960s that 'a rising

342 Rayer (2014), p. 320.

343 ILO (2011), p. 26.

344 ILO (2011), p. 23. See also: Lörcher (2011).

tide lifts all boats', when he defended plans to cut taxes in order to boost economic growth.[345] All in all, the position is that job security is served better by more jobs rather than by more severe dismissal rules. Meanwhile, it must be admitted that the permanent contract is still the mainstay of the world of work.

In some countries, Convention 158 and Recommendation 166 have resulted in temporary agency legislation that couples the hiring of temporary workers to specific reasons for use, as the above survey shows for at least seventeen CIETT member states.

All in all, it can be concluded that Convention 181 complies with nearly all the decent work indicators. The only exception is the 'termination indicator', but as to that it can also be established that this is regulated in Convention 158 (and Recommendation 166) for all types of work, including temporary agency work. Therefore, there was no strict need to regulate this again in Convention 181.

For that matter, it might have caused astonishment if this conclusion could not be drawn. Convention 181 is all about ILO standards, and it would be odd if these were indecent. However, the observations are also relevant, as the concept of decent work has gained importance since Convention 181 was realised and the unions have expressed doubts about various aspects of this Convention (p. 105), which should be examined (p. 106).

Moreover, temporary agency work is seen as a form of precarious work – as we expounded in chapter 3 – which is after all a concept that can be qualified as the opposite of decent work. Furthermore, we saw before that IUF General Secretary Ron Oswald, argued that temporary agency work does not create decent work (see p. 101, 102). However, the ILO supplies an adequate normative framework for regulating decent temporary agency work.

Therefore, from this point of view there is no reason to denote temporary agency work as inherently precarious or indecent. There is, however, a need to obtain more ratifications of Convention 181 and to promote the principles of Recommendation 188, so that temporary agency work can continue to develop in accordance with this instrument. As long as there are no new instruments to supplant Convention 158 and Recommendation 166, they too inspire further legal development.

Otherwise, the main challenge to decent work is – as we saw before – the informal economy. This is where the largest decent work deficit exists. Interestingly, a clear correlation can be observed between the strict regulation of temporary employment agencies and the size of the informal, or undeclared economy. The more flexibly temporary employment agency are regulated, the smaller the undeclared economy.

345 John F. Kennedy Presidential Library and Museum, JFK *on the Economy and Taxes*, http://www.jfklibrary.org/JFK/JFK-in-History/JFK-on-the-Economy-and-Taxes.aspx.

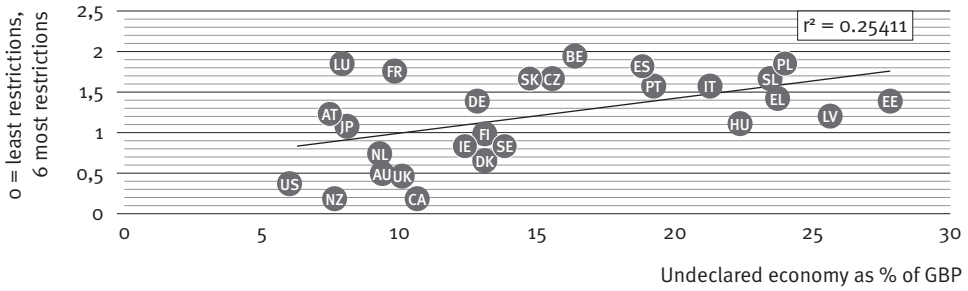


Figure 4.7 Relationship between the strictness of regulation of temporary contracts and the size of the undeclared economy

Source: Renooy & Williams (2014), p. 35 ff.

Therefore, temporary agency work cannot only be considered as decent work because it more than meets the (legal) decent work indicators, but because this type of work can also contribute to the transition from informal to formal, more decent work. This is also confirmed in the recent ILO recommendation 204 regarding the transition from informal to formal work.

Convention 181 can likewise play a role in combating human trafficking. Among other things, the ILO has taken action to that end in the Fair Recruitment Initiative, which, apart from promoting the fundamental ILO conventions – the Migration for Employment Convention (revised) 1949 (no. 97) and the corresponding Recommendation (no. 86), the Migrant Workers (Supplementary Provision) Convention 1975 (no. 143) and the corresponding Recommendation (no. 151) – also promotes the Employment Service Convention 1948 (no. 88) and the Private Employment Agencies Convention 1997 (no. 181).[346]

The United Nations and the EU are likewise engaged in combating human trafficking.[347] The EU has published[348] a 'practical guide' and we may assume that Convention 181 will play an important role in its realisation. Both CIETT and ITUC responded favourably to its application.[349]

346 ILO (2015b).

347 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 Nov. 2000; Anti-trafficking Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA; EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, (COM 2012) 286 final.

348 European Commission (2016).

349 Paraskevopoulou et al. (2016), pp. 19–20.

CHAPTER 5

Human rights

In addition to the concept of decent work, another phenomenon has had considerable influence on international social law: since the end of the Second World War, interest in the concept of human rights has expanded enormously. It has interacted with the role multinationals play in the increasing globalisation of labour relations and the development of Corporate Social Responsibility (CSR).

Half of the world's largest enterprises appear to be multinationals. From 1970 to 2007, the number of multinationals increased from 7,000 to nearly 80,000.[350] Together, these enterprises have approximately one million subsidiaries, many of which operate in developing countries. These multinationals own 70% of all patents and are responsible for 80% of all international trade.

These internationally active enterprises have mainly profited from the universal trend in the 1980s of reduction of government involvement, a development inspired by the Chicago School and politically applied in tandem by Reagan and Thatcher. This meant that markets should not be regulated, but rather facilitated.

As early as 1948, the General Agreement on Tariffs and Trade (GATT) set the tone in this respect. In 1995, the GATT was replaced by the World Trade Organization (WTO), in which 150 countries participate. This organisation aims at promoting international trade, resolving commercial disputes and bringing down trade barriers. In this, globalisation went hand in hand with liberalisation, and this eventually resulted in focusing on protection from market excess, particularly through the tabling of the issue of human rights. Van Dam[351] characterises this development as follows: 'Trade has been globalised, justice not yet'.

Corporate responses include Corporate Social Responsibility, focusing on human rights as the spearhead of the CSR agenda. The concept has by now become more

350 Van Dam (2008).
351 Van Dam (2008).

comprehensive, and for numerous enterprises it forms an integrated part of the company policy.

This chapter will discuss how the human rights have developed and how the results of these developments should be valued in comparison to the achievements of Convention 181.

5.1 GENERAL

Human rights are rights that ensue from the single fact of being human, regardless of sex, skin colour, race, religion, wealth, et cetera. They are not granted; one simply has them. Far from bestowing them, the state, and the authorities in that state, must respect them.[352] Cliteur[353] argues that these rights determine the boundaries of legitimate state practice. They are fundamental values that must be protected by law and that must safeguard human dignity and self-fulfilment. They are part of the highest moral order and as such are inviolable.

Human rights are also known as nature rights, natural rights, subjective public rights, public freedoms, fundamental rights and individual rights.[354]

5.1.1 History of human rights[355]

It is difficult to establish when the first texts on human rights were produced. We may go back as far as the Code of Hammurabi dated 1800 BC, which includes concepts relating to human rights. Through the centuries, there have been religious texts that refer to what we now call human rights. Moreover, several philosophical movements have also had some influence.[356]

The 1215 Magna Carta is generally seen as the beginning of codification. It includes clauses such as: 'To none will we sell, to none deny or delay right or justice'; also: 'No freeman shall be taken or improved or disseized or outlawed, or exited or in anyway harmed… save by the lawful judgement of his peers or by the law of the land'.

These regulations had little to do with the protection of ordinary citizens, but rather dealt with ensuring the rights of the powerful nobility in the face of the excessive demands of the King of England. It should rather be seen as the beginning of restricting an absolute and arbitrary monarch. In later times, that amounted to protecting the individual from a tyrannical and oppressive state.

352 Henrad (2008).
353 Cliteur (1999), p. 19.
354 Henrad (2008), p. 26.
355 Bates (2010), p. 17.
356 Henrad (2008), p. 42 ff.

The English Civil War and the Glorious Revolution culminated in the Bill of Rights dated 1689. In essence, this law established the sovereignty of parliament in relation to the omnipotence of the Stuart kings, who claimed to have 'divine right'.

The crux of this Bill of Rights was that the absolute power of the monarch was to be restricted in the interest of the individual. It was preceded by the abolition of torture in the English legal system in 1641 and the Habeas Corpus Act in 1679. Advocates such as Hobbes and Locke had vast influence on this development.

On the European continent, this development was put in motion by Montesquieu (*De L'Esprit des Lois*, 1748), Rousseau (*Du contrat social*, 1762), Voltaire (*Dictionnaire philosophique*, 1765) and Kant (*On the Relationship of Theory to Practice in Political Right*, 1792), all leading figures in what would later be called the Enlightenment. Particularly Montesquieu's doctrine of the so-called *trias politica* was a guiding force in this respect. His ideas were also the driving force behind the French *Déclaration des droits de l'homme et du citoyen* (1789). This was preceded by the creation in the United States of *The Declaration of Independence* (1776), which commences as follows:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

This *Declaration* made accusations against George III and was a successful follow-up to the American War of Independence. While it only involved five American states in 1776, in 1783 all the states took part in one way or another. The most characteristic was the Virginia Declaration of Rights 1776, which formed the basis for the eventual Bill of Rights. It states (in art. 1) that:

> … all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Then, the Virginia Declaration expounds that governing is subject to consent (all power is invested in the people, art. 2) and that the legislative and the executive

powers must be separate from the judicative, before naming a number of human rights such as basic procedural rights and freedom of expression (art. 3–12).

The French *Déclaration des droits de l'homme et du citoyen* stated that 'l'ignorance, l'oubli ou le mépris des droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements'. Article 16 of this French declaration clearly connects restriction of state power to protection of the human rights ("Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution."). The declaration goes on to state:

> La Loi n'a le droit de défendre que les actions nuisibles à la Société. Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas.

Compared with this French declaration, the American Declaration of Independence was inconsequential. However, in 1791, the first ten amendments to the American Constitution came into force. They had been approved by three-quarters of the States in 1789, and together constituted the U. S. Bill of Rights. This bill provided that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Among other things, these amendments imply the famous right to keep and bear arms (amendment II), protection from unreasonable searches, seizures and arrests (amendment IV), include various measures against unfair conduct (amendments V and VI) and prohibit cruel and unusual punishment (amendment VIII).

During the following decades, the human rights issue continued to occupy the minds. This development received extra impetus during the two world wars. The first proposals for establishing an international human rights code date from 1929, when the Institut de Droit International (Institute for International Law), then situated in New York, published a 'Declaration of the International Rights of Man'. Initiatives in the United Kingdom (such as a publication by H. G. Wells in 1940) and Germany (the Weiße Rose resistance group) made further contributions.

In his 1941 State of the Union address, US President Roosevelt spoke about the four fundamental freedoms (*freedom of speech and expression*, *freedom of every person to*

worship God in his own way, *freedom from want* and *freedom from fear*).[357] Later that year, Roosevelt and Churchill issued the *Atlantic Charter*, which stated that 'all the men in all the lands may live out their lives in freedom from fear and want'. In 1942, this was followed up by the Declaration by United Nations and in 1945 by the Charter of the United Nations. In its preamble, the Charter states that the peoples of the United Nations had determined:

> … to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…

In 1946, the United Nations Commission on Human Rights (UNCHR) was established and given the mandate to work at an international Bill of Rights. Part of that was the Universal Declaration of Human Rights (UDHR). The draft Declaration was realised in 1948 and adopted by the General Assembly of the United Nations by a vote of 48 in favour.

History of human rights

1215	Magna Charta
1689	English Bill of Rights
1776	The Declaration of Independence, Verenigde Staten en Virginia Declaration of Rights
1779	Franse Déclaration des droits de l'homme et du citoyen
1791	U.S. Bill of Rights
1941	Roosevelt's Four Freedoms speech
1942	Declaration by the United Nations
1945	Charter of the United Nations
1948	Universal Declaration of Human Rights
1949	Four Geneva Conventions
1966	ICCPR and ICESCR open for signature
1976	Entry into force of ICCPR and ICESCR, new Bill of Rights

5.1.2 Universal Declaration of Human Rights[358]

The Universal Declaration of Human Rights (UDHR) was drafted by a specially established committee chaired by Eleanor Roosevelt. The idea was to formulate an international Bill of Rights, of which the UDHR formed a part. This document was to consist

357 Schrijver & VerLoren van Themaat (1989), p. 16.

358 Bates (2010), p. 35; for the Declaration text see: http://www.un.org/en/documents/udhr/index.shtml.

of three parts: the Declaration itself, the resulting obligations and implementation provisions, i.e. a supervision and control system. As mentioned above, the General Assembly of the United Nations adopted the Declaration on 10 December 1948.

Six communist member states (the Byelorussian SSR, Czechoslovakia, Poland, the Ukrainian SSR, the Soviet Union and Yugoslavia) abstained, as did Saudi Arabia and South Africa. The 48 member states in favour endorsed the Declaration as a 'common standard of achievement for all peoples and all nations'.

Eleanor Roosevelt stated that the Declaration 'may well become the international Magna Carta of all men everywhere'. It did not imply any obligations and was not legally binding. Roosevelt's emphasis on its non-binding character may well have been the reason why 48 UN member states endorsed it. Since then, the Declaration has become legally binding after all.[359]

Firstly, it is an elaboration of what is provided regarding human rights in the UN Charter. Secondly, it has the status of customary international law. There are many references, not only in constitutions, of which the two general human rights covenants from 1966 are best-known: the International Covenant on Civil and Political Rights (ICCPR,) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[360] These covenants were drafted to develop the 1948 Declaration into legally binding provisions.

In 1966, these covenants were opened for signature and by 1976, 35 member states had ratified them, which meant they were bound by legally binding regulations. Although these regulations are legally binding as customary law, it must be established that there are 'persistent objectors', particularly in the Arab world, who do not accept all the standards. These standards are still part of general principles of law.

Apart from the treaties mentioned above, the UN has developed several others over time to elaborate on the human rights. In 2009, all UN member states had ratified at least one UN human rights treaty and 137 UN member states had even ratified six.

Each UN human rights instrument has its own treaty body, a committee that monitors the further implementation (table 5.1).

359 Henrad (2008), p. 58.

360 For texts and explanations, see: Monash University (2008).

Universal Declaration of Human Rights, abbreviated version [361]

1. Right to Equality
2. Freedom from Discrimination
3. Right to Life, Liberty, Personal Security
4. Freedom from Slavery
5. Freedom from Torture and Degrading Treatment
6. Right to Recognition as a Person before the Law
7. Right to Equality before the Law
8. Right to Remedy by Competent Tribunal
9. Freedom from Arbitrary Arrest and Exile
10. Right to Fair Public Hearing
11. Right to be Considered Innocent until Proven Guilty
12. Freedom from Interference with Privacy, Family, Home and Correspondence
13. Right to Free Movement in and out of the Country
14. Right to Asylum in other Countries from Persecution
15. Right to a Nationality and the Freedom to Change It
16. Right to Marriage and Family
17. Right to Own Property
18. Freedom of Belief and Religion
19. Freedom of Opinion and Information
20. Right of Peaceful Assembly and Association
21. Right to Participate in Government and in Free Elections
22. Right to Social Security
23. Right to Desirable Work and to Join Trade Unions
24. Right to Rest and Leisure
25. Right to Adequate Living Standard
26. Right to Education
27. Right to Participate in the Cultural Life of Community
28. Right to a Social Order that Articulates this Document
29. Community Duties Essential to Free and Full Development
30. Freedom from State or Personal Interference in the above Rights

361 http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-5/8_udhr-abbr.htm

Table 5.1 Overview of the UN treaty bodies [362]

Instrument	*Monitoring body*	*Number of states parties*
International Convention on the Elimination of Racial Discrimination (ICERD)	Committee on the Elimination of Racial Discrimination (18 members)	173
International Covenant on Civil and Political Rights (ICCPR)	Human Rights Committee (18 members)	165
First Optional Protocol to the ICCPR (ICCPR-OP1)	Human Rights Committee	113
Second Optional Protocol to the ICCPR on the Abolition of Death Penalty (ICCPR-OP2)	Human Rights Committee	72
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Committee on Economic, Social and Cultural Rights (18 members)	160
Optional Protocol to the ICESCR (ICESCR-OP)	Committee on Economic, Social and Cultural Rights	0 (not yet in force)
Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (UNCAT)	Committee against Torture (10 members)	146
Optional Protocol to UNCAT (UNCAT-OP)	Subcommittee on Prevention of Torture (10 members)	50
Convention of the Elimination of All Forms of Discrimination against Women (CEDAW)	Committee on the Elimination of Discrimination against Women (23 members)	186
Optional Protocol to CEDAW (CEDAW-OP)	Committee on the Elimination of Discrimination against Women	99
Convention on the Rights of the Child (CRC)	Committee on the Rights of the Child (18 members)	193
Optional Protocol on Sale of Children, Child Prostitution and Child Pornography	Committee on the Rights of the Child	136
Optional Protocol on Children in Armed Conflict	Committee on the Rights of the Child	130
International Convention on the Rights of Migrant Workers and their Families (ICRMW)	Committee on the Rights of Migrant Workers (10 members)	42
Convention on the Rights of Persons with Disabilities (CRPD)	Committee on the Rights of Persons with Disabilities (18 members)	83
Optional Protocol to the CRPD (CRPD-OP)	Committee on the Rights of Persons with Disabilities	52
International Convention for the Protection of all Persons from Enforced Disappearances	Committee on Enforced Disappearances (10 members)	18 (not yet in force)

The institutional structure of the UN Charter includes several bodies that are involved in the UN human rights mandate to a greater or lesser extent (for a survey, see figure 5.1).

362 Connors & Schmidt (2014), table 18.1.

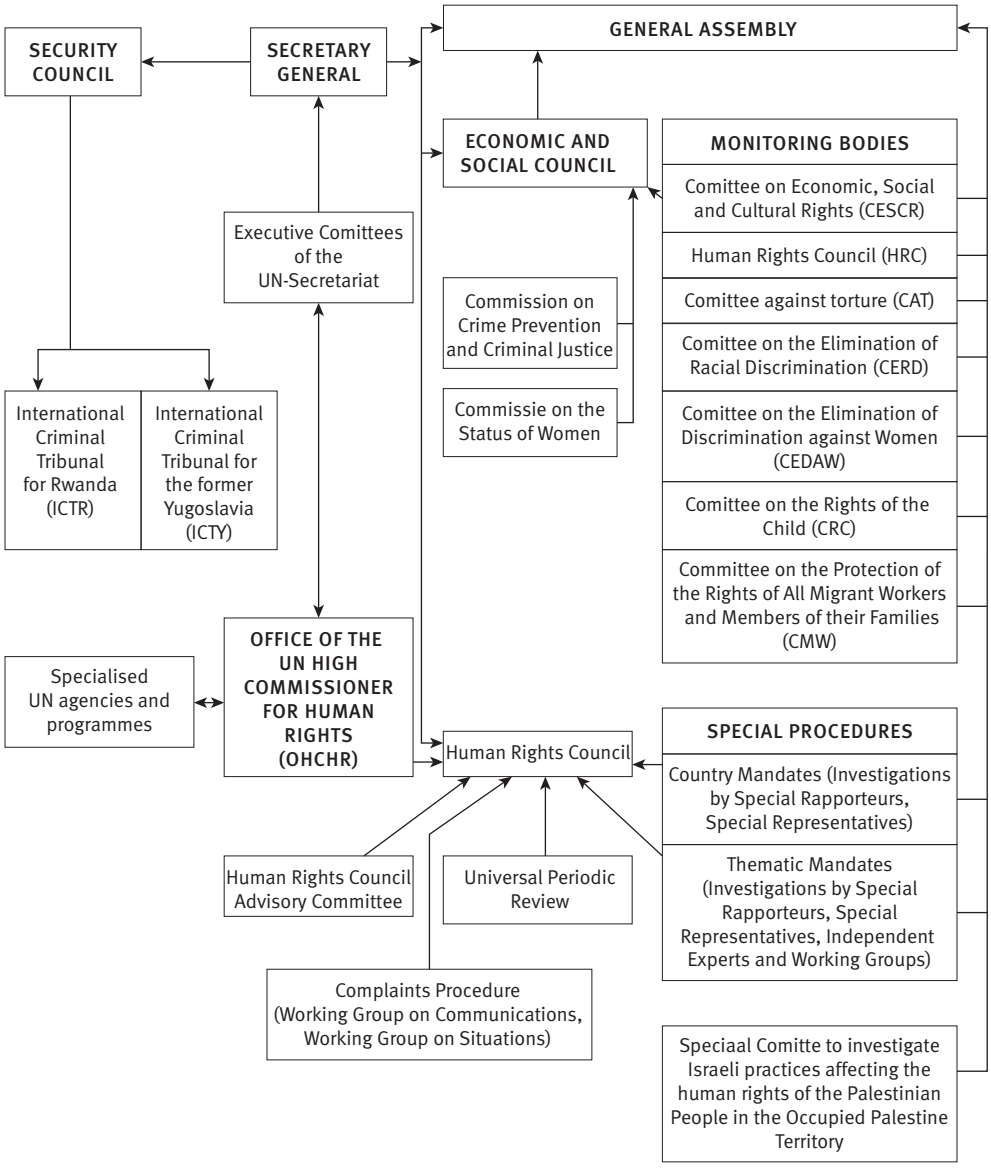


Figure 5.1 The United Nations human rights network [363]

Under article 7, paragraph 2, of the UN Charter, further subsidiary organs can be established according to need. Important to the promotion and protection of the human rights are the former Human Rights Committee and its Sub-Commission on the Promotion and Protection of Human Rights, the current Human Rights Council and

363 Smis et al. (2011), p. 136–137.

its Advisory Committee, the High Commissioner for Human Rights and his Office, and the Commission on the Status of Women.[364]

The UN human rights treaties have several monitoring mechanisms, including supervision of periodical reviews by the monitoring bodies, and complaints procedures.[365] However, the enforceability[366] of the monitoring mechanisms tends to be severely limited. At UN level, no legally binding judgments are possible. On the basis of periodical reports, assessments can take place, and Special Rapporteurs can be assigned to follow up certain decisions. This way, some pressure can be exerted on states to do what is needed.

5.1.3 Regional developments[367]

The UDHR also has its regional equivalents, i.e. in Europe, Africa and on the American continents. South East Asia and the Arab world are playing their part.

Following the UDHR, Europe realised the European Convention on Human Rights (ECHR), which was drafted by the Council of Europe in 1950.[368] This Convention has established a European Court – based in Strasbourg – which can deliver binding judgments. When states have ratified the Convention, they must respect this court's judgments and (1) end any violation, (2) offer *restitutio in integrum* (undo the consequences) and (3) ensure that no more violations will take place in future.

The interpretations by the Court may be important to all parties to the Convention. The Court does not employ an official doctrine of precedent, but it may be expected that the jurisdiction is consistent and coherent. When it deviates from earlier jurisprudence, it will meticulously justify doing so.

The Committee of Ministers of the Council of Europe monitors the execution of the ECHR judgments. This committee is a purely political body and thus only has political power, but it does engage the Department of Execution of Judgments of the ECHR to verify whether the state implements the judgment adequately.[369] The Parliamentary Assembly of the Council of Europe also plays a supervisory role in the execution of the ECHR judgments and in respect of that regularly calls the Committee of Ministers to account.

364 Smis et al. (2011), p. 136–137.
365 Henrad (2008), p. 191 ff.
366 Henrad (2008), p. 227.
367 Henrad (2008), p. 97.
368 The Convention is dated 4 November 1950, *Treaty Series* 1951, 154 (rectification *Treaty Series.* 1961, 8 and 1979, 150, last amended in May 1994, *Treaty Series* 1994, 165. See also www.echr.coe.int.
369 Henrad (2008), p. 228–229.

European Convention on Human Rights and Fundamental Freedoms (ECHR)

art. 1 Obligation to respect human rights
art. 2 Right to life
art. 3 Prohibition of torture
art. 4 Prohibition of slavery and forced labour
art. 5 Right to liberty and security
art. 6 Right to a fair trial
art. 7 No punishment without law
art. 8 Right to respect for private and family life
art. 9 Freedom of thought, conscience and religion
art. 10 Freedom of expression
art. 11 Freedom of assembly and association
art. 12 Right to marry
art. 13 Right to an effective remedy
art. 14 Prohibition of discrimination
art. 15 Derogation in time of emergency
art. 16 Restrictions of political activities of aliens
art. 17 Prohibition of abuse of rights
art. 18 Limitation on use of restrictions on rights
Various protocols

Beside the ECHR, which mainly relates to civil and political human rights, there is also a European Social Charter (ESC) concerning social and economic rights.[370] This was opened for signature to the member states of the Council of Europe in as early as 1961. With regard to content, the ESC is comparable to the ICESCR. Rights that have been listed include:

- housing (houses that suit families' needs, combating homelessness, universally guaranteed access to adequate and affordable housing, equal access to social housing for aliens);
- health (accessible and effective health facilities, disease prevention policies, a healthy living environment, exclusion of occupational hazards, health and safety ensured and guaranteed by law);
- education (labour under the age of 15 is prohibited, free primary and secondary education, free vocational guidance, free basic and advanced vocational training, access to university and higher technical education based on individual aptitude);

370 European Social Charter, Turin 18 October 1961, *Treaty Series*. 1963, 90. Revised *Treaty Series*. 2004, 13 and *Treaty Series*. 2004, 14.

- work (full employment, the right to earn a living in an occupation freely entered into, fair working conditions in respect of wages and working hours, prevention of sexual and psychological harassment, prohibition of forced labour, freedom of establishing and joining trade unions, promotion of joint consultation between workers and employers, collective bargaining, mediation and voluntary arbitration, the right to strike);
- social protection (right to social security, social well-being and social services, protection from poverty and social exclusion, family and ageing policy);
- movement of people (simpler immigration formalities, family reunion, emergency aid to returning aliens, protection in case of extradition);
- non-discrimination (equal treatment and opportunities for men and women, all rights without discrimination).

The European Committee of Social Rights (ECSR) monitors compliance with the commitments by the member states. This committee consists of fifteen independent experts and is elected and appointed by the Committee of Ministers of the Council of Europe. Every year, one state draws up a report on whether the Charter has been implemented *de facto* or *de jure*. If deficits are apparent, the Committee of Ministers will have a recommendation sent to that state, requesting adjustment. Requests cannot be enforced, but they are authoritative.[371]

Since 1995, the ECSR has had a collective right to complain in place for workers' and employers' organisations (i.e. ETUC, Business Europe and IOE), NGOs that have a consultative status with the Council of Europe, workers' and employers' organisations in member states and national NGOs.

There is now also a Charter of Fundamental Rights of the European Union,[372] which in 54 articles brings together the fundamental human rights regarding dignity, freedoms, equality, solidarity, citizens' rights and justice. On 12 December 2007, the chairs of the European Commission, Council of Europe and European Parliament signed the Charter. One day later, all European government leaders signed it simultaneously with the Lisbon Reform Treaty. The Lisbon Treaty includes a reference to the Charter, which thus constitutes a legally binding appendix to the Treaty. Article 6, par. 1, of the Treaty on European Union provides: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

371 Henrad (2008), p. 114.

372 See: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm and Charter of the Fundamental Rights of the European Union, *OJEC*, 18-12-2000 C364/1.

The Charter is somewhat broader in scope than the ECHR and the ESC. For instance, it relates to more social rights of workers, data protection, bio-ethics and the right to good administration. The rights in the Charter apply to EU citizens in relation to their governments.

On 30 April 1948, some seven months before the realisation of the UDHR, the Organization of American States (OAS)[373], adopted the American Declaration of the Rights and Duties of Man. All 35 states of the American continent that are OAS members endorsed this declaration, although Cuba took a special position. In 1965, the declaration was followed by a legally binding American human rights treaty, the Pact of San José.[374]

Several Caribbean states, the United States and Canada have not ratified the treaty. Together with the adoption of the Pact of San José an Inter-American Court of Human Rights was established, comparable to the European Court of Human Rights. This court hears complaints about states that are party to the Pact of San José and have submitted to the court's jurisdiction. These are 22 states, and thus the court's scope is narrower than that of the Inter-American Human Rights Commission that was established in 1955 to enforce the 1948 American Declaration of the Rights and Duties of Man and that monitors the 35 OAS member states.

This Declaration is broader in scope than the Pact, in the sense that it also includes social, economic and cultural rights, whereas the Pact focuses on civil and political rights. Furthermore, this pact includes a protocol regarding social, economic and cultural rights, known as the protocol of San Salvador.[375] Apart from that, the Pact includes duties.

The 1981 African human rights treaty, the African (Banjul) Charter on Human and Peoples' Rights, likewise includes duties.[376] Since 1989, Africa has a human rights commission and a Court (effective since 2004). All 35 member states of the African Union have ratified the Charter. However, Morocco withdrew in 1983.

There is also an Arab Charter on Human Rights.[377] In 1968, the League of Arab States initiated the establishment of a human rights council and in 1979, it initiated

373 See Raimondo & Salvioli (2008).

374 American Convention on Human Rights, O. A. S. Treaty Series no. 36, 1144 V. N. T. S. 123; see http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm.

375 Additional Protocol in the American Convention on human rights in the area of economic, social and cultural rights; protocol of San Salvador: see: http://www.oas.org/juridico/english/treaties/a-52.html.

376 African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981) OAV Doc. CAB/Lei/67/3.5.21 I. L. M. 58/1982, http://www1.umn.edu/humanrts/instree/z1afchar.htm. See also: Adjovi (2012).

377 See http://hrlibrary.umn.edu/instree/loas2005.html

the drafting of a charter. The charter is in line with the UN treaties, but follows the sharia, condemns Zionism, allows for restrictions of the freedom of expression and only rules the death penalty to be illegal for political crimes. A revised version of the charter came into force in 2008 and likewise shows deficits compared to prevailing international law. By the end of 2013, 13 out of the 22 League member states had ratified this charter.

Recently, in 2012, an Asian human rights declaration was adopted at an Asian summit meeting in Phnom Penh.[378] The declaration is broad in scope, containing political, social, economic and cultural rights. It draws attention to development and peace, but also leaves room for exceptions.

5.2 HUMAN RIGHTS TRANSLATED TO THE BUSINESS SECTOR

5.2.1 The Ruggie Framework

The relationship between human rights and the business sector has demanded particular attention. How should the business community, which operates more and more internationally, deal with these rights? In 2004, a sub-committee of the UN Human Rights Commission developed the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'. It was an attempt to impose on the business sector the human rights that the UN member states had endorsed, the main difference being that states have primary duties and enterprises have secondary duties. The norms triggered widespread resistance in the business sector. The UN Commission on Human Rights refused to endorse the document and asked the UN Secretary-General, then Kofi Annan, to appoint a special representative to find a solution to this controversy and also clarify the roles and responsibilities of the states, the enterprises and other actors in relation to human rights.

In 2005, Kofi Annan appointed Harvard Professor John Ruggie to the role of special representative. This appointment was continued when Ban Ki-moon took office as Secretary-General in 2007. Ruggie reported to the UN Commission on Human Rights, later known as the UN Human Rights Council, and to the UN General Assembly.[379]

In April 2008, Ruggie submitted his report to the UN Human Rights Council. He had conducted fourteen multi-stakeholder consultations on five continents, commissioned extensive research, produced a thousand pages of text, received numerous

378 ASEAN Human Rights Declaration 19 Nov. 2012, see: http://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/. See also Severino (2013).

379 See Ruggie (2011).

reactions and reported twice to the Commission and later to the Council. In his 2008 report, he stated:[380]

> The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.

The consultations had revealed that all stakeholders, however divergent their positions, felt a strong need for a joint conceptual and political framework. This framework rested on diverging but nonetheless common responsibilities. It is based on three principles: the state duty to protect against human rights abuse by third parties, including enterprises; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

Each principle is an essential part of the framework: the state duty to protect, since it is at the core of the human rights regime; the corporate responsibility to respect, since society expects enterprises to do so, and the access to remedies, since the existing legal and non-legal avenues to appeal are limited in number, scope and effectiveness. The three principles form a whole in the sense that they support each other in sustainable progress.

The *State duty to protect* has both legal and political aspects. The State has the duty to protect against abuse of human rights by third parties, including enterprises, within the scope of their jurisdiction. In order to help states deal with this in respect of the core human rights treaties, the supervising treaty bodies recommend that states take all necessary steps to protect against such abuse, including preventing, examining and punishing abuse and offering possibilities for correction.

The framework offers UN member states scope for deciding which measures need to be taken, but the treaty bodies indicate that both the regulation and condemnation of business activities in relation to human rights are appropriate measures. The framework addresses all kinds of activities, national and transnational, large and small.

The *Corporate responsibility to respect human rights* is the second principle. It elaborates on the so-called soft law instruments such as the ILO's Tripartite Declaration

380 Ruggie (2008), no. 3.

of Principles concerning Multinational Enterprises and Social Policy and the OECD's Guidelines for Multinational Enterprises. The principle is acknowledged by large, global enterprises, since they state that enterprises 'are expected to obey the law, even if it is not enforced and to respect the principles of relevant international instruments where national law is absent'.[381] It also relates to one of the commitments that enterprises enter into when they join the Global Compact.

How this respect must be given shape and substance requires further attention. It will take a process of *due diligence*, i.e. a process that not only ensures that national laws are complied with, but which also charts where the risk of human rights abuse exists in order to prevent it.

Access to remedy is the third principle. Formal remedies are often insufficient, while the need for them is greatest. However, the non-formal remedies, such as mediation, are underdeveloped, both at corporate and at national and international levels.

In his report, Ruggie makes an attempt to chart the human rights involved. He lists labour rights and non-labour rights.

Business impact on human rights

Labour rights

- Freedom of association
- Right to organize and participate in collective bargaining
- Right to non-discrimination
- Abolition of slavery and forced labour
- Abolition of child labour
- Right to work
- Right to equal pay for equal work
- Right to equality at work
- Right to just and favourable remuneration
- Right to a safe work environment
- Right to rest and leisure
- Right to family life

Non-labour rights

- Right to life, liberty and security of the person
- Freedom from torture or cruel, inhuman or degrading treatment
- Equal recognition and protection under the law
- Right to a fair trial
- Right to self-determination
- Freedom of movement
- Right of peaceful assembly
- Right to marry and form a family
- Freedom of thought, conscience and religion
- Right to hold opinions, freedom of information and expression
- Right to political life
- Right to privacy
- Right to an adequate standard of living (including food, clothing, and housing)
- Right to physical and mental health; access to medical services
- Right to education
- Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests
- Right to social security

381 IOE/ICC/BIAC (2008).

Ruggie recommends charting which human rights are at the greatest risk of being abused. He advises enterprises to formulate and communicate a human rights policy. Moreover, he requests anticipation of possible abuse and the execution of so-called *impact assessments*, i.e. starting a process in which structural attention is paid to possible abuse and to potential remedy.

In connection to this, it is important that thinking about human rights is completely embedded in business policy (*integration*). Lastly, the results of this policy will need to be monitored periodically (*tracking performance*).

5.2.2 Ruggie's extended mandate: guidelines

The Human Rights Council unanimously welcomed the 'protect, respect and remedy' framework in its resolution no. 817, adopted on 18 June 2008. Thus the extended mandate of Special Representative John Ruggie had come to an end.

However, the Human Rights Council wanted to extend the mandate once again, in order to achieve further operationalisation and promotion of the framework. Ruggie was able to fulfil this task in three years. In a progress report dated 9 April 2010,[382] Ruggie stated that he encountered wisdom in the words of Nobel laureate Amartya Sen: 'What moves us,' Sen wrote, '… is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate'. This view resonated with Ruggie's own approach of 'principled pragmatism' and raised the question as to how one can improve actual lives, rather than achieve 'perfectly just societies or institutes', which in any case will remain an illusion, and realise a series of practical guidelines through which the framework could be implemented.

In March 2011, Ruggie submitted his final report on the guidelines.[383] Drafting it involved a great deal of work. In November 2010, a first draft was submitted for consultation. It evoked 3576 reactions from 120 countries and 100 submissions (official points of view), including many made by governments.

Completing this report marked, as the report states, the end of the beginning: 'by establishing a common global platform for action, on which cumulative progress can be built, step by step, without foreclosing any other promising longer-term developments'. The 'Guiding Principles' were not an attempt to create new legal obligations, but rather sought to provide an elaboration and to connect this with the integrated template of the framework.

382 Ruggie (2010b), p. 23, conclusion ad 121.

383 Ruggie (2011). See also Ruggie J. (2010a).

The report lists 31 *guiding principles*. Firstly, the *State duty to protect* is elaborated. States are to enforce the human rights legislation in such a way that it compels the business sector to respect them; they must examine whether the rights are adequate and take action against any gaps. States must also ensure that other laws and policies aimed at enterprises do not detract from the human rights, but rather provide scope for respecting them. Moreover, states must provide enterprises with effective guidance on how to give shape to their respect, promote communications and even make demands about how they must handle human rights (see principle 3).

The responsibility of enterprises to respect the human rights refers to the internationally acknowledged human rights, as they are expressed minimally in the International Bill of Rights and in the principles concerning the fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work (see principle 12).

The *Corporate Responsibility to Respect* requires enterprises to avoid causing or contributing to 'adverse impacts' on human rights through their own activities and to address any abuses as they occur. It also requires preventing and mitigating abuses that follow from their operations, products or from services provided by their business partners, even if they have not contributed to the abuse themselves (see principle 13).

By business partners are meant the partners in the supply chain and other state or non-state entities. This is a complex matter, and what actions can be taken depends on the degree of influence the enterprise has on these entities, on how crucial the relationship is, how serious the abuse is and on whether ending the relationship will ultimately have consequences for the human rights (see principle 19).

The guidelines pay attention to the manner in which the human rights policy is to be formulated (principle 16), the *due diligence* requirement (principle 17), the integration in the internal processes (principle 19) and performance tracking (principle 20).

Access to Remedy is the third pillar of the framework that was further developed. This requires states to guarantee that the people involved in the human rights abuse have the opportunity to do something about it; judicially, administratively, by process of law, or other possibilities.

'Remedy' is also taken to mean apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions and guarantees of non-repetition.

The state-based judicial mechanisms (principle 26), state-based non-judicial grievance mechanisms (principle 27) and non-state-based grievance mechanisms (principle 28) are also elaborated upon. With respect to non-judicial grievance mechanisms, effectiveness criteria are legitimacy, accessibility, predictability, objectivity, transparency and rights-compatibility, being a source of continuous learning and being based on engagement and dialogue.

The UN Human Rights Council has not adopted Ruggie's *Framework* and *Guiding Principles* but it has endorsed it, which means that this Council has accepted them. With respect to this, Eijsbouts argued:

> It is particularly not about adopting. That was not possible, as neither the *Framework*, nor the *Guiding Principles* were the result of a formal realisation and decision-making process within the Council. Those would undoubtedly have resulted in *soft law*. Thus, while the *corporate responsibility to respect human rights* may not have been *adopted*, it is unanimously *endorsed* (a unique event so far) by the UN Commission on Human Rights.

Ruggie characterises the *corporate responsibility* itself as a *global standard of expected conduct,* i.e. a universal societal standard. In view of the unanimous endorsement by the UN Commission on Human Rights it must not be ruled out that national judges applying national laws see this standard as *soft law.* As *soft law* it can further develop into international customary law, i.e. *hard law*.[384]

Eijsbouts has worked out the various CSR regulations in concentric 'circles'. He considers the UN Guidelines to be a 'global standard of expected conduct', belonging to the core of his concentric circles.

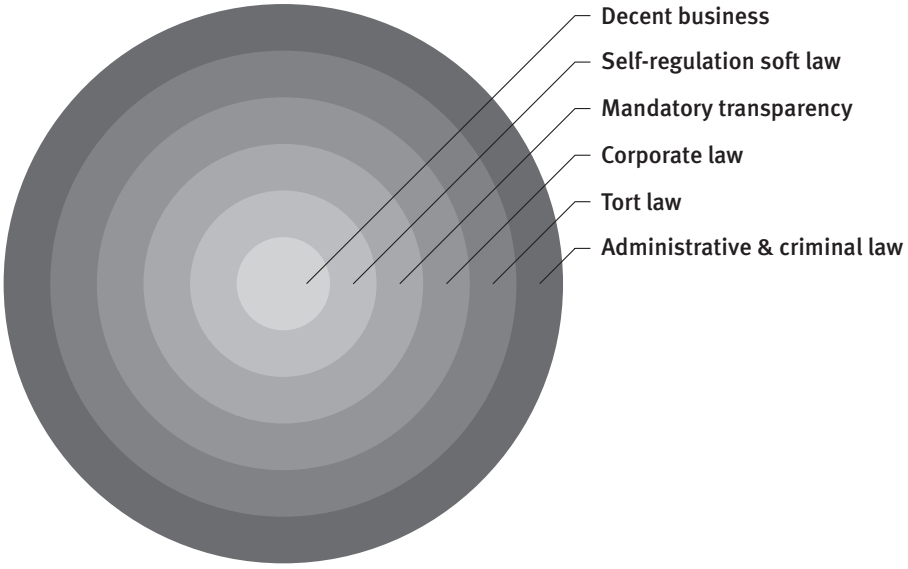


Figure 5.2 The Concentric Circles of CSR Regulation[385]

384 Eijsbouts (2012), p. 819.
385 Eijsbouts (2011), p. 24.

The same resolution that contained the endorsement of the *Guiding Principles* by the Human Rights Council also included the decision to establish a working group that was to engage in promoting and implementing the *Guiding Principles*.[386] In this resolution a broad mandate was formulated for the working group to encourage the implementation of the *Guiding Principles*.

5.3 'SOFT RULES OF THE GAME'

The *UN Guiding Principles* can be seen as a global standard of expected conduct[387] that may possibly develop into some kind of soft law at a national level. Internationally, soft law applies in any event to three initiatives and instruments that target multinational organisations, i.e. the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the ILO[388]; the OECD Guidelines for Multinational Enterprises[389] and the UN Global Compact.[390]

5.3.1 The ILO MNE Declaration

The ILO MNE Declaration dates from 1977 and was formulated jointly by governments, employers' and workers' organisations. In 2000 it was also revised and supplemented with the 'Fundamental Rights and Principles'. In 2006, further adjustments to other ILO instruments followed.

The ILO Declaration contains a very broad international tripartite agreement with respect to appropriate corporate conduct in the fields of work and social policy. The ILO Declaration is aimed at promoting the positive contribution that multinationals make to economic and social progress and to minimising the problems that ensue from their actions.

The Declaration provides voluntary guidelines for multinationals, governments and employers' and workers' organisations for shaping social policies and aims to inspire good practices. It reflects the key ILO declarations, including the fundamental labour standards. The Declaration thus constitutes the most comprehensive summary of labour rights that are important to multinationals and addresses both governments and national and international enterprises. It includes principles regarding general

386 Human Rights Council, seventeenth session, agenda item 3, A/HRC/RES/17/4, 6 July 2016.

387 United Nations 'Protect, Respect and Remedy' Framework, Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Human Rights Council, seventeenth session, agenda item 3, A/HRC/17/31 Advance Edited Version, p. 13 ad A11.

388 ILO (2006b).

389 Dutch Ministry of Foreign Affairs (2011).

390 United Nations (2000).

policy, employment, working and living conditions and labour relations. The main elements are:

- *general policy*: complying with national law and respecting international standards;
- *employment*: promoting employment, respecting the principle of equal treatment and aiming for stable employee numbers;
- *training*: attention for vocational training and education;
- *working and living conditions*: wages, benefits and conditions of work must not be less favourable than those in comparable enterprises in the host country. If no benchmarks are available, enterprises should provide the best possible wages, benefits and conditions of work in accordance with government policy, aimed at the basic needs of employees and their families, respect the minimum age for employment, combat the worst forms of child labour, and pay attention to occupational health and safety;
- *labour relations*: standards should not be less favourable than those in comparable enterprises in the host country; freedom of association and collective bargaining, no abuse by threatening transfer, right to information, attention for consultation, and access to remedy and examination of grievances.

In 1993, the ILO established a Subcommittee on Multinational Enterprises that periodically examines the implementation of the Declaration and expounds its provisions. The Declaration also includes an arrangement for settling disputes.

5.3.2 OECD Guidelines

All OECD member states have adopted the OECD Guidelines for Multinational Enterprises, as have a number of non-members (including Argentina, Brazil, Chile, Egypt, Estonia, Israel, Ireland, Lithuania, Romania and Slovenia). The guidelines aim to provide a balanced and multilaterally supportive code of conduct that reflects the shared values of the participating governments. It is about 'recommendations jointly addressed by governments to multinational enterprises' offering 'principles and standards of good practice consistent with applicable law'. These guidelines aim to enhance the positive contribution to economic, social and environmental progress by multinational enterprises.

In essence, they are a series of recommendations in the field of company policy, information, human rights, employment and labour relations, environment, fighting corruption, bribery and extortion, consumer interests, science and technology, competition and taxes.

The guidelines are part of a more comprehensive OECD instrument, the Declaration on International Investment and Multinational Enterprises, which was set up to encourage direct investments and international economic development and growth.

The recommendations encompass a unique combination of binding and voluntary elements. The governments concerned commit themselves to promoting the guidelines among multinationals that operate in or from their country. The guidelines also imply the commitment to establish a so-called NCP, a National Contact Point, which acts as a kind of coordination point in respect of the guidelines. This also comprises a unique dispute settlement mechanism that includes arbitration. To date over 360 cases have been submitted to NCPs.[391]

The guidelines target both international and national enterprises. SMEs are likewise invited to comply with the guidelines ('to the fullest extent possible').

In 2011, the Guidelines (drawn up in 1976 and revised in 2000) were updated to align with the latest developments in the field of corporate social responsibility (CSR) and chain responsibility, consistent with the UN Guiding Principles on Business and Human Rights. By now, 44 countries have adopted the Guidelines, which are the only government-backed framework for international business management that also implies a unique dispute settlement mechanism. Thus, the Guidelines link up closely with John Ruggie's implementation guidelines (see section 5.2), and in chapter IV, paragraph 39, they state:

> In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.

5.3.3 Global Compact

The third initiative aimed at international enterprises is the UN Global Compact. It enables enterprises to voluntarily endorse ten principles regarding human rights in general, labour standards, environment and anti-corruption. The Global Compact is a practical guide derived from the Universal Declaration of Human Rights, the ILO

391 OECD (2016c), p. 12.

Declaration on Fundamental Principles and Rights at work, the Rio Declaration on Environment and Development and the UN Convention Against Corruption.

The initiative dates from July 2000 and more than 9000 enterprises in 164 countries have since endorsed the Compact.

There is a direct relation between the UN Global Compact and the UN Guiding Principles. The first two principles of the Global Compact regarding human rights have been developed in the UN Guiding Principles.[392] It states:

> As a global standard applicable to all business enterprises, the UN Guiding Principles provide further conceptual and operational clarity for the two human rights principles championed by the Global Compact. They reinforce the Global Compact and provide an authoritative framework for participants on the policies and processes they should implement in order to ensure that they meet their responsibility to respect human rights.

Thus, by subscribing to the Global Compact, enterprises endorse the UN Guiding Principles.

In addition to the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises 2011 and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, which are all considered to be normative international frameworks, Eijsbouts views the Global Compact as a managerial international framework that may help enterprises develop a CSR profile. He also includes the ISO 26000 Guidelines on CSR and the GRI Integrated Reporting Initiative in this category.[393]

392 United Nations Global Compact, the UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments, July 2011, updated June 2014.

393 Eijsbouts (unpublished).

The Ten Principles

The UN Global Compact's ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption:

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

Table 5.2 Government and stakeholder involvement in ILO Declaration, OECD Guidelines and UN Global Compact[394]

	Global?	*Government?*	*Treaty derived?*	*Social Partner?*
ILO MNE Declaration	Yes.	Yes. The revised Declaration was adopted in 1977, and revised in 2000 and 2006 by the ILO.	Yes. References include the Universal Declaration of Human Rights, the ILO Declaration of Fundamental Principles and Rights of Work, the ILO fundamental conventions, as well as a number of other ILO instruments.	Yes. The ILO is a tripartite body, where employer and worker organisations are formal partners.
OECD MNE Guidelines	Yes.	Yes. All 30 OECD member countries subscribe to the Guidelines. A further 10 countries have also subscribed to them. The OECD Guidelines are part of a Declaration which was adopted at Ministerial level and their implementation by adhering governments is governed by binding OECD decisions.	Yes. Referenced are: The Universal Declaration on Human Rights; the ILO Declaration of Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development and Agenda 21; and the Copenhagen Declaration for Social Development.	Yes. The business and trade union bodies were involved in developing the Guidelines and have formally endorsed them as an important reference point.
UN Global Compact	Yes.	Yes. Initially an initiative of the UN Secretary-General, the UN Global Compact has since been repeatedly recognised by the UN General Assembly. In the most recent GA resolution addressing the UN Global Compact (A/RES/62/211), the Global Compact Office was given a strengthened mandate. Every two years the Global Compact Office prepares the Secretary-General's report to the General Assembly on global partnerships, which also addresses the role of the UN Global Compact.	Yes. Referenced are: *The Universal Declaration of Human Rights*; *The Rio Declaration on Environment and Development*; and the *UN Convention Against Corruption*. The four labour principles of the UNGC come from the ILO Declaration on Fundamental Principles and Rights of Work.	Yes. Business, employee organisation and other civil society organisations are involved in governance and advisory roles. Overall, the business sector represents the greatest number of participants.

394 OECD (2009), Table 6.2.

5.3.4 Practical translation

Since the realisation of John Ruggie's Guiding Principles and their application in the OECD Guidelines, much work has been done to translate these guidelines into practical terms. The Global Compact Network Netherlands and ten enterprises that participate in this Dutch network (AkzoNobel, Essent, Fortis Bank Nederland, KLM, Philips, Rabobank, Randstad, Shell, TNT, and Unilever) have collaborated in developing a guidance tool for companies. This is a practical instruction manual for enterprises on how to engage actively in the human rights issue.[395]

At the initiative of the European Commission, this Network has developed a dedicated guide for the temporary agency sector, to support the implementation of the UN Guiding Principles on Business and Human Rights.[396] This guide works out the six core elements of the corporate responsibility to respect. It dwells consecutively on formulating a policy commitment and implementing it into the corporate culture, and on giving shape within the enterprise to the Human Rights Due Diligence, the elements of which are:

- *assessing* actual and potential human rights impacts;
- *integrating* the findings and acting to prevent or mitigate the impacts;
- *tracking* how effectively impacts are addressed;
- *communicating* how impacts are addressed;
- *remediation*: the process through which the company actively engages in the remediation of impacts it has caused or contributed to.

395 Business and Human Rights Initiative (2010).

396 Shift & Institute for Human Rights and Business (2013).

Human Rights Due Diligence: Core Elements and Guidance Points[397]

3.1 Human Rights Policy 'Setting the Tone'

1. Involve senior management and seek approval
2. Identify and evaluate existing commitments and policies
3. Consider carrying out a human rights risk mapping
4. Involve internal and external stakeholders in the process
5. Develop statements of policy on human rights

3.2 Assessing Impacts 'From Reactive to Proactive'

6. Understand impacts on human rights
7. Distinguish various processes of assessing impacts;
8. Conduct a human rights risk mapping
9. Involve the existing risk management function
10. Identify the risks to human rights
11. Prioritize actions to mitigate the risks
12. Feed the assessment results into business operations

3.3 Integration 'Walking the Talk'

13. Assign responsibility for human rights
14. Organize leadership from the top
15. Include human rights in recruitment and hiring
16. Make human rights an integral part of company culture
17. Train key managers and employees
18. Develop incentives and disincentives
19. Develop capacity to respond to dilemmas and unforeseen circumstances

3.4 Tracking Performance 'Knowing and Showing'

20. Get started with tracking and reporting performance
21. Develop company-specific key performance indicators
22. Consider different types of indicators
23. Track performance of suppliers and other relationships
24. Verify performance using various instruments
25. Consider how to report on performance
26. Consider updating performance and due diligence

3.5 Grievance Mechanism 'Early Warning, Effective Solutions'

27. Take full advantage of grievance mechanisms
28. Make a gap analysis of existing grievance mechanisms
29. Bring internal mechanisms in line with the Ruggie principles
30. Consider how to contribute to mechanisms for external stakeholders
31. Integrate grievance mechanism in stakeholder management
32. Improve effectiveness of grievance mechanisms

397 Business and Human Rights Initiative (2010), p. 4.

Multinational employment agencies such as Adecco, Manpower and Randstad[398] participate in the UN Global Compact. They express their human rights policies in various communications.

Adecco

Adecco[399] endorses the Protect, Respect and Remedy Framework and issues a dedicated annual report on CSR in which it dwells on the issue and formulates ambitions with regard to economic, social and environmental policies. The company has formulated six strategic focus areas related to the inclusive workforce (see figure 5.3), i.e. diversity and equal opportunities, integration, business and human rights, team and training development, occupational health and safety, and environmental responsibility. Adecco also endorses Ruggie's Guiding Principles.

The report mentions the fact that most staff have participated in training in the fields of compliance and ethics. Moreover a right of complaint has been developed and the report dwells on the wide range of issues, the majority of which, incidentally, concern employment practices (see figures 5.4 and 5.5).

Figure 5.3 Adecco Group: six strategic focus areas[400]

398 Adecco Group (no date, 2015); Randstad (no date, 2016); Manpower Group (2014).
399 Adecco Group (2015).
400 Adecco Group (2015).

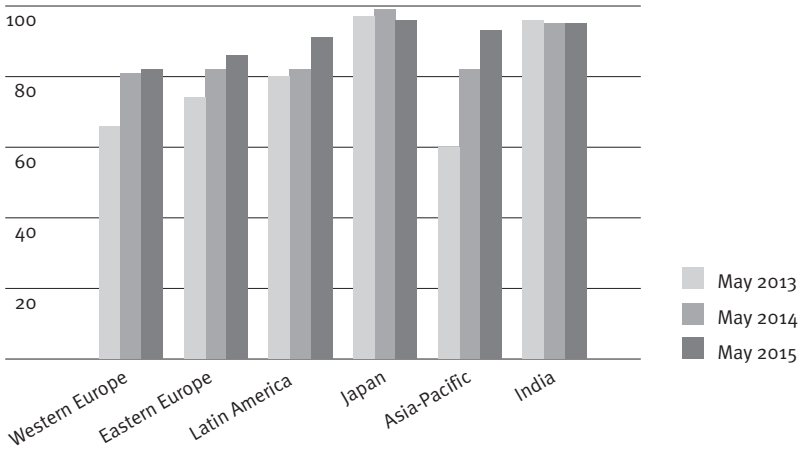


Figure 5.4 Completed online training on Bribery & Corruption prevention (% of all employees) [401]

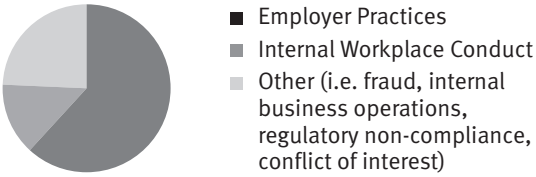


Figure 5.5 Adecco Group: ACE Reporting – Allocation of reported issues 2013 (in %) [402]

Manpower

Manpower[403] likewise issues a CSR report, which also reports on the economic, social and environmental policies of the enterprise. Sustainability is the key in those policies. Manpower formulates a framework of issues that are of increasing importance to stakeholders (figure 5.6). The MNE likewise conducted training in the field of their Code of Business Conduct (figure 5.7). In 2013, Manpower paid ample attention to its performance in relation to the Guiding Principles. The company stated that this had enhanced the staff's awareness regarding any ethical issues and that the Business Ethics Hotline had been improved, also in the sense that it can now be accessed for free across the world.

In 2014, Manpower issued another CSR report, stating that 96% of all staff had participated in ethics training.

401 Adecco Group (2014).
402 Adecco Group (2014).
403 Manpower Group (2013).

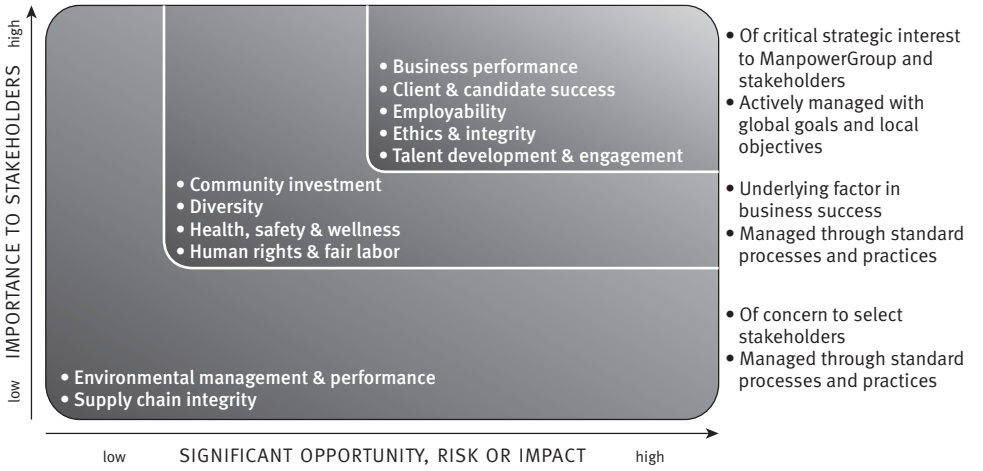


Figure 5.6 Manpower Group: issues in ascending order of importance to stakeholders[404]

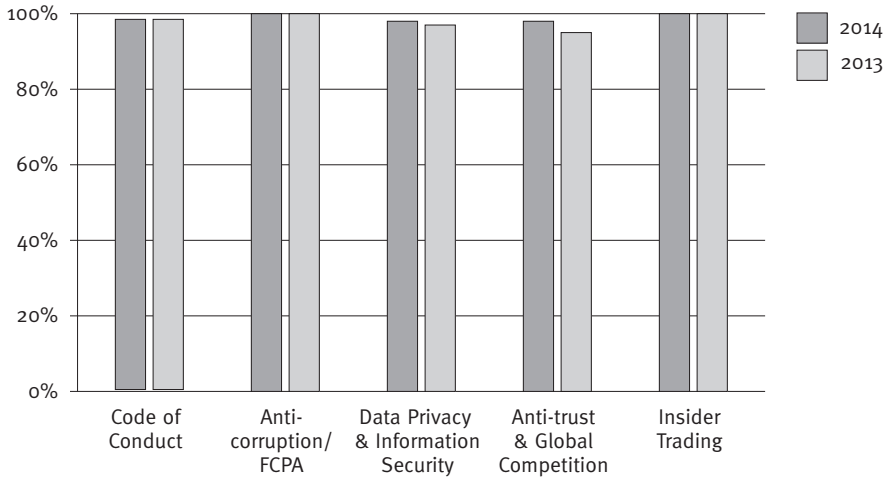


Figure 5.7 Manpower Group: 2013 ethics training completion rates (per cent of required employees)[405]

Randstad

Randstad[406] does not issue a separate CSR report, but instead integrates the CSR elements of its operations in the conventional annual report. This has to do with Randstad's core values in which the aspects of 'knowing', 'serving', 'trust', 'striving for perfection' and 'simultaneous promotion of all interests' set the course (figure 5.8).

404 Manpower Group (2013), p. 8.
405 Manpower Group (2014), p. 12.
406 Randstad (2015).

Randstad has also trained their personnel in the business principles, including Randstad's policies and its misconduct reporting procedure. Partially as a result of this training, awareness is high (table 5.3). Moreover, the annual report dwells extensively on the integrity and grievance mechanism.

Figure 5.8 Randstad: core values[407]

Table 5.3 Randstad: awareness of misconduct reporting procedure (as % of total number of respondents)[408]

	2015	*2014*
North America	72%	72%
Netherlands	85%	54%
France	56%	88%
Germany	83%	81%
Belgium & Luxembourg	63%	65%
Iberia	66%	65%
United Kingdom	67%	64%
Other European countries	73%	70%
Rest of the world	67%	67%
Corporate	87%	85%
Group	70%	70%

Source: Great People Survey

407 Randstad (2015), p. 10.
408 Randstad (2015).

Table 5.4 Randstad: misconduct reporting[409]

	2015	*2014*
New complaints	113	136
Of which anonymous	35	52
Concerns referred to other channels/not legitimate	79	91
Proven or partially proven	10	21
Not (yet) proven	20	24[1]
Under investigation	4	–
Total	113	136

1 The complaint reported as 'Under investigation' in 2014, appeared to be 'Not proven'.

It becomes clear that all three multinational employment agencies mentioned above are serious about integrating the human rights policy into their operations. They appear to have made a start and are making further strides to conform to Ruggie's Guidelines. The rest of the market will need to follow their example.

In their reports, these enterprises go into their corporate social responsibility (CSR). In the following paragraph, this domain will be placed within a broader framework.

5.4 CORPORATE SOCIAL RESPONSIBILITY

The human rights issue belongs to the domain of what we now call Corporate Social Responsibility (CSR). This domain arouses increasing interest. Climate change and the credit crunch have given it added impetus. However, the collapse in April 2013 of the Rana Plaza building near Dhaka in Bangladesh has enhanced the focus on CSR among the enterprises involved. Within the Netherlands, earlier cases such as at Ahold and more recently at SBM Offshore, Imtech, Ordina and Fugro call for reflection.[410] The actual issue at stake is that enterprises become aware that their behaviour can have huge social consequences.

5.4.1 History of corporate social responsibility[411]

Historically, CSR played a role in the Netherlands in relation to nineteenth-century social issues: in 1863, Dutch entrepreneurs addressed their king with the request to take action on the social wrongs related to child labour.[412] In the twentieth century,

409 Randstad (2015).
410 Dekker & Van den Outenaar (2014).
411 Bienefelt (2005), p. 8. See also: Kolk (2003), p. 9 ff.
412 Smit (2014), p. 212 ff.

CSR has been closely linked to the phenomenon of the welfare state, and during the last decades to environmental issues. Since then, the credit crunch has added further fuel to the phenomenon of CSR.

In the United States, CSR is historically linked to the idea that the rich had to do something about poverty, which took the form of philanthropy and which was later adopted by enterprises for lack of a social security system.

In Europe, philanthropy is less dominant. Europe does not have institutions such as The Rockefeller Foundation or the Ford Foundation, but it has had 'social entrepreneurs' such as Van Marken, Stork and Le Poole in the Netherlands, who (out of enlightened self-interest) took care of housing, education, savings schemes and recreation. Meanwhile, however, these entrepreneurs opposed *legal* social amenities, an opposition that, by the way, sprouted the first Dutch employers' organisation. In spite of this, social law did develop in the twentieth century.

CSR has become more comprehensive and deeper in scope. Whereas it started out as philanthropy and stewardship by entrepreneurs who had a broader scope than profitmaking, various elements have been added through time. Enterprises have an economic responsibility (profit objective), a legal responsibility (complying with the law and fulfilling obligations) a moral responsibility (doing what society expects) and a social responsibility (doing what is desirable).
Thus, apart from making profit, CSR must observe other (legal, ethical and social) interests. It is about simultaneous representation of interests. Profit is no longer an objective per se, but is seen as a means to foster continuity.

5.4.2 Elkington: People, Planet, Profit [413]

John Elkington's book *Cannibals with Forks* (1997) has been of particular importance to the development of the CSR framework. In this publication, Elkington introduces the concept of the Triple Bottom Line (TBL), i.e. People, Planet and Profit; he takes stock of the seven revolutions that 21st-century entrepreneurs will need to take into account and of the TBL principle. He argues that, as they gain influence and as liberalisation boosts competition, enterprises can make the difference by underscoring sustainability and the TBL criteria.

In Elkington's view, enterprises must also pay more attention to the so-called soft values, which means that quality is more important than quantity. This, too, should be communicated to the outside world more, which may also be facilitated by technological development. Moreover, enterprises should become aware of what the effect of their products and services can be in a broad sense.

413 Elkington (1997).

Furthermore, entrepreneurs should create trust together with their stakeholders. Elkington likewise draws attention to both the short and the long term and recommends the use of scenarios. He calls for the integration of the TBL aspects into the company policy. By integrating People (the social aspect), Planet (the ecological aspect, the environment) and Profit (the economic aspect), entrepreneurs can achieve the desired sustainability in their operations.

As regards to the 'People' aspect, sustainable entrepreneurship looks at social policies. How does the enterprise treat its staff, but also: what is the social significance of the enterprise? This is pre-eminently where promoting human rights, or the 'corporate responsibility to respect human rights' comes into play. The 'Planet' aspect involves everything to do with environment. And of course the 'Profit' aspect, the economic side of entrepreneurship, cannot be left out.

The Triple Bottom Line has expanded enormously in CSR thinking. The concept has also evoked criticisms. For instance, the Dutch Bishop Van Luyn adds to this triad the P of the '*Pneuma*' aspect in order to underscore the importance of the spirit, or soul. According to Van Luyn, every enterprise also needs *pneuma*, inspiration, spirit needed to survive.[414]

5.4.3 Definitions

CSR is a concept on the move:[415] there is no unequivocal definition. There is, however, some agreement about what the concept comprises:

- CSR is more than philanthropy; it forms an integral part of the core activities of an organisation.
- CSR can be subdivided into social, ecological and economic dimensions. They involve the consequences of operational activities for people within and outside the organisation, the consequences for the (living) environment and the manufacture and the economic effects of products and services respectively.
- CSR means restricting negative effects and giving room for and enhancing any positive effects of the operational activities.
- Organisations should account for the societal effects of their actions.
- CSR reaches beyond merely complying with minimal forms of law and regulations. Developing countries and countries in transitions do not always have a sufficiently developed legal framework and supervision mechanism, or gaps can be observed.

414 Van Luyn (2006).
415 Bienefelt (2005), p. 5 ff.

– An international enterprise must comply with international standards. The OECD Guidelines for Multinational Enterprises, which also pay attention to human rights, are an important frame of reference for the behaviour of international organisations, both SMEs and large enterprises.

On the basis of the many definitions of CSR, Eijsbouts lists the following core characteristics:

– voluntarism, implying that CSR exclusively covers the domain 'beyond the law';
– internalizing or managing externalities, to account for the total cost of business in the market prices for its goods and services;
– multiple stakeholder orientation to balance fairly all impacts of operation on people;
– alignment of social and economic responsibilities, to balance fairly financial and social benefits;
– practices and values to put the CSR practices in the right value context;
– beyond philanthropy, to adopt CSR as a core function in business strategy and policy rather than as a bolt-on nicety.[416]

In its report *De winst van waarden*[417] (which translates as The Profit of Values) the Dutch Social Economic Council (SER) defines CSR as:

> It perceives the company as a profit-driven organisation and as a long-term form of cooperation between stakeholders. Companies differ from other organisations in their drive for profit. But the social and economic value of companies should not be equated with the financial returns to owners/capital providers. Companies create value by producing goods and providing services, which contribute to society's prosperity by satisfying people's needs. The employment that is created in the process is an important instrument for earning income and for the social and personal development of individuals. Consequently, the SER feels that corporate social responsibility also encompasses the core business of any company. This is not to say that all manifestations of corporate social responsibility should by definition be considered part of the core business of the company, but that concern for the social effects of the company's performance is part of it. In other words, the SER's view is that the `social' activities of a firm are an inseparable element of corporate policy, so that the distinction between core business and non-core business is irrelevant.

416 Eijsbouts (2011), p. 10.

417 SER (2000). The English summary can be found on https://www.ser.nl/~/media/files/internet/talen/engels/2000/2000_11.ashx

> The SER feels there are two key elements that dictate whether one can rightly refer to socially responsible business in this day and age:
> – consciously targeting business activities at value creation in three dimensions – Profit, People, Planet – and hence at contributing to society's prosperity in the longer term;
> – maintaining with the various stakeholders a relationship that is based on transparency and dialogue and which responds to the legitimate demands of society.
> –

The Dutch knowledge centre duurzaamondernemen.nl argues that in the Netherlands, sustainability and corporate social responsibility are often seen as synonymous. People take it to mean, the website continues, an entrepreneurial style in which attention for the environment, the social-ethical aspects and the profits are balanced and in line with the expectations of the company stakeholders.[418]

In his preliminary advice, Eijsbouts[419] distinguishes between CSR as a normative concept and as an operational concept. As a normative concept CSR is the entrepreneur's responsibility to fulfil the justified expectations of society with regard to the social consequences of his operations: the economical, social and environmental consequences for all *stakeholders*. CSR as an operational concept, he argues, comprises the systematic and structured manner in which the enterprise gives effect to all relevant aspects of CSR standards in its day-to-day operational practice, propagates them to staff, suppliers and society, guards their effectiveness and accounts for them to society.

Furthermore, Eijsbouts notes that the Dutch government distinguishes three overlapping dimensions of CSR.[420] Firstly, the international dimension that takes place at the intersection of international business management and social topics, including labour standards, environment and human rights, which may lay down conditions for business management. Secondly, the national dimension that mainly comprises the creation and use of responsible production and production methods.

Both these dimensions relate to the core business of enterprises. There is then a third dimension, in respect of which the Dutch cabinet feels that entrepreneurs continue to take further steps, playing an active role in society. The cabinet states that an enterprise takes on a visible role in society that goes beyond the core business and beyond what legislation obliges it to do, which results in added value to both the enterprise and society.

418 Dutch Online Portal for Corporate (Social) Responsibility & Sustainability ('Kenniscentrum Duurzaam Ondernemen'), http://www.duurzaam-ondernemen.nl/english/

419 Eijsbouts et al. (2010), p. 28 ff.

420 Eijsbouts et al. (2010), p. 5.

5.4.4 A comprehensive approach

CSR constitutes a more comprehensive approach to business management. It puts paid to the limited vision of business management as Milton Friedman from the famous Chicago School of Economics formulated it in the 1960. He argued:

> In a free enterprise private property system, a corporate executive is an employer of the owner of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical customs.

Eijsbouts[421] demonstrates that the United States has detracted somewhat from this strict point of view through the years, to the extent that judges in various states have allowed for stakeholders management, although the shareholder primacy principle continued to be the dominant creed.

This school of thought was equally popular in the United Kingdom. However, on the initiative of the British government, a report was issued[422] that proposed compelling directors to review the enterprise's 'impact on the community and the environment'. This led to an 'enlightened shareholder value' approach that meant that directors were also legally obliged to take into account long-term considerations and the interests of various shareholders to promote long-term shareholder value, which has been included in the Section 172 Companies Act under the title 'Duty to promote the success of the company'. While shareholders were thus granted an opportunity to appeal in case of disputes, this did not apply to other stakeholders. After all, extending the possibility to stakeholders would have unduly eroded the position of the shareholders.

According to more recent insights, CSR also yields major economic benefits. On closer analysis, Friedman's mental legacy should not need to be too divergent from the CSR train of thought.[423]

Quite often, accidents or similar occurrences that gain vast publicity are reasons for enterprises to occupy themselves with CSR.[424] For instance, the collapse of the Rana Plaza building near Dhaka in Bangladesh, one of the most serious industrial

421 Eijsbouts (2010), p. 50.
422 Company Law Review Steering Group (2000).
423 Kolk (2004), p. 117.
424 Kolk (2004), p. 118.

accidents in history, was a catalyst for change towards sustainability. CSR has to do with ensuring continuity, for which social acceptance, and thus a good reputation, is a prerequisite. In essence, it is about what is sometimes called the 'licence to operate', also known as the social legitimisation of the enterprise.

In Kolk's view, using CSR as a solution to solve conflicts and crisis situations leads to nothing. She advocates a different approach, which she calls sustainable management.[425]

Originally, CSR was thought to be voluntary.[426] From various perspectives, it has always been seen as something that transcends the law and that should not be regulated. It is subject to soft law rather than to hard law. This line of thought recurs in relation to the human rights issue, in respect of which the Universal Declaration of Human Rights and the OECD Guidelines can in the first instance be considered forms of soft law. In the first instance, for later in this chapter this will be qualified. It is worth mentioning that the Earth Charter, an initiative by a number of politicians from throughout the world, has also vastly influenced the thinking about CSR.[427] This also applies to the *ICC Guide to Responsible Sourcing*, the manual by the International Chamber of Commerce on responsibility for so-called supply chain management.[428]

Since 2008, the national employers' and employees' organisations involved in the Dutch Social Economic Council (SER) have worked at promoting international CSR, or ICSR, and its implementation. 'Living wages' was one topic on the agenda for 2014 and 2015.[429]

5.4.5 Corporate governance

Where the rules of play with regard to CSR are concerned, the development of corporate governance is equally important, as can be inferred from developments in the Netherlands. Initially, Dutch company law was strongly influenced by Friedman's line of thinking. For instance, the recommendations produced by the Dutch Peters Committee in 1997, from which a first code resulted, provided a guideline to the shareholder value theory.[430]

425 Kolk (2004), p. 120.
426 Eijsbouts et al. (2010), p. 25.
427 See Lubbers et al. (2008).
428 SER (2008), p. 53.
429 See www. ser.nl/imvo.
430 Eijsbouts (2010), p. 54.

In 2004, the Dutch Tabaksblat Committee developed the Corporate Governance Code, in which the comply or explain principle gained importance.[431] The British Cadbury Report[432] described Corporate Governance as 'the system by which companies are directed and controlled'.[433]

There are various outlooks on the relationship between CSR and corporate governance.[434] Firstly, there is the view that both co-exist, which was expressed when the Tabaksblat Committee was established. Secondly, there is the view that corporate governance is part of CSR:

> Corporate governance is an increasingly important issue of CSR. And as they continue to develop, corporate governance principles will continue to provide the more solid foundations on which broader CSR principles – and business ethics – can be further enhanced.[435]

Eijsbouts, who is in favour of a comprehensive approach, defends a third view in which CSR is part of corporate governance. Both concepts contribute to value gain and comprise elements of risk management. In this view, Eijsbouts is likewise guided by the OECD Principles of Corporate Governance, which have applied since 2004.[436]

In the Netherlands, this has led to the principle (principle II.1 of the 2001 Corporate Governance Code) that the management is responsible, among other things, for the corporate social dimensions relevant to the enterprise and that it must account for them to its supervisory board and the annual general meeting of shareholders.[437]

Thus, CSR integrates the shareholder interest in the broader stakeholder interest. A forthcoming new amendment to the Dutch corporate governance code, which will put more focus on long-term and cultural aspects of operational management, will underscore this integration even more.[438] Through corporate governance, this CSR philosophy also provides a greater platform for the importance of protecting human rights.

Truth is a multi-faceted jewel that includes a human rights element. The human rights issue is characterised by soft law and hard law approaches. This raises the question as to how binding the corporate responsibility to respect actually is.

---

431 Eijsbouts (2010), p. 54.
432 Cadbury (1992), can be downloaded from: www.ecgi.org/codes/documents/cadbury.pdf.
433 Eijsbouts (2010), p. 55.
434 Eijsbouts (2010), p. 56.
435 Eijsbouts (unpubl.); Eijsbouts (2010), p. 56.
436 OECD (2004a).
437 Eijsbouts (2010), p. 58.
438 MCCG (2016).

5.5 HOW BINDING ARE THE HUMAN RIGHTS? [439]

In recent years, human rights have gained in importance. John Ruggie's 'protect, respect and remedy' framework and the adjustment of the OECD Guidelines as a result of it have given enterprises more clarity and guidance as to how to treat this phenomenon. The CSR philosophy and the changes in corporate governance have also given rise to an attitude that fits in with the corporate responsibility to respect. Still, the question is, how imperative are these aspects?

5.5.1 Voluntariness; soft and hard law

The Dutch way of thinking about CSR is strongly influenced by the voluntary character people want to imbue it with.[440] The 2008 SER Statement posits that:

> … the parties believe that it is primarily up to enterprises themselves to develop national and international CSR and the associated supply chain responsibility, in dialogue with their social environments. With enterprises operating in such a wide range of circumstances, it would be very difficult and, indeed, undesirable to prescribe a precise and uniform set of rules for doing so. Enterprises can be expected to display the necessary transparency in this area, however. Transparency enables enterprises to win the trust of their stakeholders, build their reputations and command their employees' and customers' loyalty. The social context requires openness and transparent communication. That means that the enterprise must respond to legitimate questions and demands.[441]

Subsequently, the Statement refers to the ILO Declaration on Fundamental Principles and Rights at Work,[442] the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[443] the OECD Guidelines for Multinational Enterprises[444] and the ICC's[445] recommendations regarding supply chain responsibility and its Guide to Responsible Sourcing.

All these declarations and recommendations have come up before. They are about frameworks that are usually indicated as soft law.[446] Even though they transcend the

439 Smis et al. (2011), p. 25.
440 Eijsbouts et al. (2010), p. 25.
441 SER (2008), p. 6.
442 ILO (1998).
443 ILO (2006b).
444 OECD (2009).
445 SER (2008)
446 Atleson et al. (2008).

law, they are certainly not non-committal. They are authoritative guidelines that may also refer to hard law, for instance the human rights treaties that have further developed the Universal Declaration of Human Rights, i.e. the two 1966 UN treaties (ICCPR and ICESCR) regarding civil and political, respectively economic, social and cultural human rights. This also holds true for the ECHR, the European Convention on Human Rights. Through ratification of these treaties, the instruments become hard law. In the Netherlands, they constitute such hard law that they affect the national judicial system. Thus, article 93 of the Dutch Constitution provides that: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' Subsequently, article 94 states: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.'[447]

Still, the question arises as to how hard 'hard law' is, and how soft 'soft law' actually is. It has been demonstrated before that the formal enforceability of UN conventions is limited, even if these can be characterised as being 'hard'. Issues often have to deal with judgments that may be authoritative and influential,[448] but are still difficult to enforce legally.

This even holds true for the ECHR, albeit to a far lesser extent. The European Court produces binding judgments, but the Committee of Ministers supervises the observance, and although it may exert political pressure to achieve observance, it cannot impose sanctions. Moreover, so many cases have been introduced to the Court that the waiting period may amount to six years. In 2011, 120,000 cases were pending at the Court, while it can only give 500 decisions a year. The question is whether all this contributes to adequate legal protection. In this way, 'hard' law becomes very soft in its subsequent implementation.

As an example of soft law on the other hand, the OECD Guidelines demonstrate that a judgment by a NCP can hit home hard. Eijsbouts argues that through the NCP mechanism[449] a process of 'naming and shaming' can arise, which may be characterised as a sanction. This applies all the more if obtaining an export subsidy is made conditional on compliance with the OECD Guidelines.

Having studied two cases introduced to the UK NCP (Raid versus Das Air – 21 July 2008 – and Global Witness versus Agrimex – 28 August 2008) Backer concludes that there is a development from a formal non-binding system to a 'binding governance system'.

447 Sybesma-Knol & Van der Heijden (2000), p. 35. See also Schrijver (2014), p. 35.

448 Henrad (2008), p. 227.

449 Smis et al. (2011).

> These cases suggest the parameters within which the *Guidelines for Multinational Enterprises* are beginning to serve as the focal point for the construction of an autonomous transnational governance system that is intended to serve as the touchstone for corporate behaviour in multinational economic relationships.[450]

Eijsbouts also points at the mandatory provision in article 2:291, paragraph 1, of the Dutch Civil Code (amended in 2005 on the basis of the EU Modernisation of Accounts Directive) compelling enterprises to provide information regarding the non-financial performance indicators including environment and staff matters,[451] to the extent that they are necessary in order to understand the results of the enterprise's position.

Earlier on, the Netherlands had produced the Directive 400[452] as a non-binding standard for the management report in accordance with the GRI (Global Reporting Initiative) and the corresponding Guidance Note on Sustainability Reporting, connected to the so-called Guidance Note on Sustainability Reporting. In 2006 the Dutch Supreme Court decided that these guidelines could be an important and authoritative line of action for what should be considered acceptable in concrete instances. Directive 400 was amended in 2005 and 2008, in such a way that a reporting framework was provided for CSR. Thus, in this case soft law applies that should not be considered informal under any circumstances.

Also important in this respect is Directive 2014/95/EU.[453] Under this Directive, it became mandatory for enterprises with more than 500 staff to also disclose their non-financial information as from December 2016. This non-financial statement must include 'information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potentially adverse impacts.' It may be expected that this form of hard law will enhance CSR thinking.

For that matter, the Directive cannot be seen in isolation from the CSR strategy that the EU revised in 2011. In a Communication on this topic, the European Commission[454]

450 Backer (2009).

451 Eijsbouts (2010), p. 63.

452 Dutch Accounting Standard Board ('Raad voor de jaarverslaggeving', 2009). See: http://www.rjnet.nl/Site/English/.

453 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

454 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a renewed EU strategy 2011–2014 for Corporate Social Responsibility. Brussels 25-10-2011 Com (2011) 681 final.

no longer views CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' but rather as 'the responsibility of enterprises for their impacts on society'.

Respect for applicable legislation, and for collective agreements between social partners is a prerequisite. In order to meet that responsibility fully, the enterprises need to make sure they have a process in place to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- creating the maximum added value for their owners/shareholders and for their other stakeholders and society in general;
- identifying, preventing and mitigating any possible adverse impacts.

It will be clear that there is now scarcely any question of freedom from obligation.

5.5.2 Corporate liability law

In his preliminary advice, Eijsbouts dwells extensively on corporate law, which sets out mandatory provisions regarding the management board of the enterprise[455] (art. 2:129/235 BW). He refers to principle II.1 of the 2001 Dutch Corporate Governance Code, which states:

> The management board is liable for managing the company. This includes responsibility for achieving the company's targets, for its strategic policy and associated risk profile, for its financial results and for the relevant corporate social aspects of the business.

The greater part of these duties ensues from Dutch national law (art. 2:141, par. 4, Dutch Civil Code). Article 2:8 of the Dutch Civil Code provides that the company and those who are involved in its organisation pursuant to law and the articles of incorporation, including the management board (and its individual members) must behave towards each other in accordance with what is required by standards of reasonableness and fairness. Article 2:9 of the Dutch Civil Code provides that in the accomplishments of its duties the management board must be guided by the interests of the company and its affiliated enterprise, with explicit provision in respect of the supervisory board in article 2:140/250 of the Dutch Civil Code.

The management board is also responsible for pursuing just policy. In the case of well-funded doubts as to what constitutes just policy, an investigation by the

455 Eijsbouts (2010), p. 66 ff.

Enterprise Chamber ('Ondernemingskamer') can be requested on the basis of article 2:345 in conjunction with article 350 of the Dutch Civil Code. Thus, CSR policy can also be enforced by means of an investigation. If other stakeholders, such as shareholders and employees, do not request an investigation, the Advocate-General could decide to do so in the public interest.

Article 2:15 of the Dutch Civil Code indicates that stakeholders also have the opportunity to correct policy if it has been passed in conflict with the provisions of law or the articles of incorporation that regulate the making of resolutions, if it is in conflict with the standards of reasonableness and fairness, or if it is in conflict with an internal regulation.

Lastly, if the interests of CSR stakeholders are harmed, they can direct a legal action on the basis of a tortious act[456] (art. 6:162 Dutch Civil Code). Formally, such an act is a violation of a right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct (in so far as there was no justification for this behaviour). Among other things, this will result in duties of care, which socially responsible enterprises will have to fulfil. In this context, Van Dam[457] presents a range of aspects of care that need to be observed in this respect, such as the requisite knowledge, the precautions, the role of third parties and subsidiaries and the extent to which the lack of care causes damage. This can also be related to the tenet of being a good employer and the so-called principles of being an adequate employer, which in Dutch labour law take shape through being a reasonable and fair employer under article 7:611 of the Dutch Civil Code and the general standards of reasonableness and fairness (art. 6.2 and art. 6:248 of the Dutch Civil Code).[458]

It is in this vein that Ruggie advocates setting up programmes to give substance to the duty of care in relation to his 'corporate responsibility to respect', 'impact assessment' and 'due diligence'. For that matter, Van Dam argues that many liability cases are filed on the basis of the American Alien Tort Claims Act. This old (1789) act grants a foreigner the right to have an American judge make a decision on 'any civil action by an alien for a tort only committed in violation of the law of nations'. Many of these cases are settled out of court.[459]

456 Eijsbouts (2010), p. 82.
457 Van Dam (2008), p. 55.
458 Heerma van Voss (1999), p. 40 ff.
459 Van Dam (2008), p. 36.

5.5.3 Criminal law

Apart from international, corporate and liability law, criminal law also provides opportunities to enforce CSR standards. For instance, enterprises can be accessories to offences such as murder, manslaughter or abuse. Moreover, they can be complicit in international offences such as genocide, crimes against humanity, war crimes or torture. In such cases, international tribunals, such as the International Criminal Court in The Hague, can also try suspects. This court cannot try legal persons, but it can try individuals such as directors. However, the barrier to prosecution remains high and the enterprise runs little risk.

The furnishing of proof of wilful acts and of the facts in general is problematic. In this context, however, Kristen speaks of a 'growing tendency', although he refers to criminal law as an *ultimum remedium* to tackle injustice, as Dutch Cabinet Minister Modderman advocated in 1886.[460]

The role that jurists play in all this is likewise important to the focus on human rights in the corporate sector. In his oration of September 2015, Van Dam referred to the various legal orientation stages that are crucial in this respect. He distinguishes an inactive stage, a reactive stage, an active stage and a proactive stage, the last of which ultimately provides the best guarantee for a fully-fledged human rights policy.[461]

5.5.4 Developing countries

The discussion above has made clear that soft law may be less soft that it would appear to be on the surface. However, this discussion was largely based on how the legal system works in the Netherlands. How enforceable, then, are human rights in developing countries? A case in point is the collapse of the Rana Plaza building near Dhaka in Bangladesh in April 2013.[462]

Following the incident, this country has become the 'policy laboratory' for how to deal with observance of labour rights. Van der Heijden & Zandvliet (2014) present a so-called network approach, by means of which the lacunae relating to observance of labour rights can be filled. The characteristic feature of this is the wide range of initiatives by various stakeholders to tackle this issue.

Van der Heijden & Zandvliet advocate that enterprises join the example of the Bangladesh Accord on Fire and Building Safety rather than individually establishing their commitment by contract. The ILO must ask itself whether a comprehensive instrument on occupational health and safety is in order; and furthermore, the ILO

460 Kristen (2010), p. 182. See also: Van Dam (2008), p. 26.

461 Van Dam (2015), p.6.

462 Van der Heijden & Zandvliet (2014).

must consult more directly with enterprises and use its authoritative role to reinforce negotiations about supply chain management. The governments must establish an international factory inspectorate, which can act more decisively than is now the case with the ILO missions. Moreover, foreign policies and trade and development co-operation should focus more on observance of international labour rights.

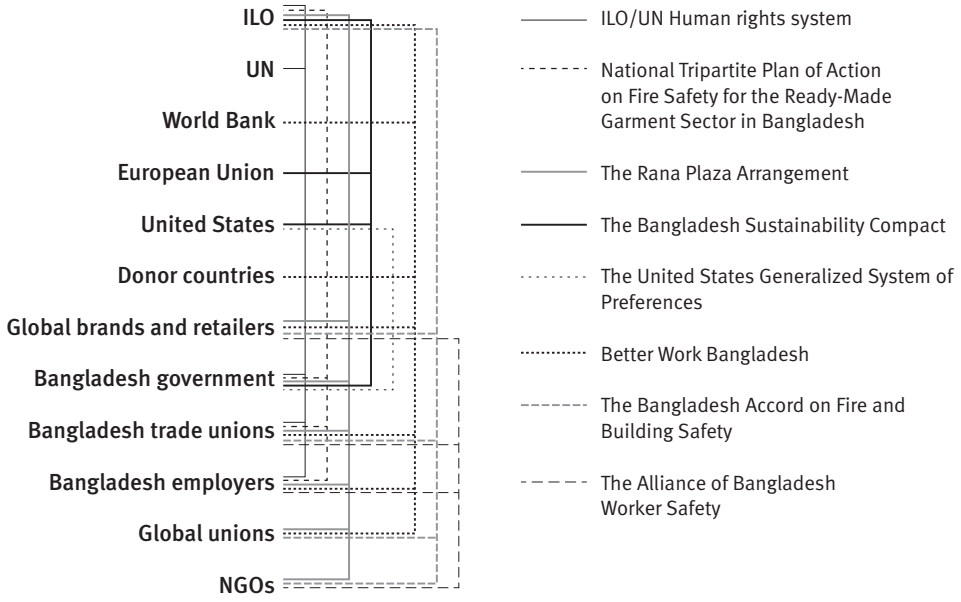


Figure 5.9 RMG Industry Mechanisms and Stakeholders[463]

5.5.5 Enhancing the binding character?

Equally remarkable in this context is the intense debate that is taking place in the UN Human Rights Council on the question as to whether it is not time to introduce a binding human rights treaty for the corporate sector. On 30 June 2014 it adopted a resolution to establish an intergovernmental working group that was to compile a binding draft-human rights treaty aimed at the activities of 'Transnational Corporations and other Business Enterprises'. Voting in the Human Rights Council was much divided (20 in favour, 14 against and 13 abstentions). Notably, Ecuador had taken the initiative, with the support of Bolivia, Cuba, South Africa and Venezuela. At the time of the vote, African countries were the main supporters. The US and the EU were against and China was provisionally in favour.

463 Adaptation van Van der Heijden & Zandvliet (2014), figure 1.

John Ruggie has openly rejected the initiative. On the basis of his knowledge and experience, he considers the realisation of a new binding agreement to be unfeasible. In his view, priority should be given to the further implementation of the UN Guiding Principles on Business and Human Rights that were established in 2011.[464]

Nobel Prize winner Stiglitz[465] has also called for more powerful human rights instruments. He disapproves of enterprises respecting human rights out of sheer self-interest. Stiglitz has sounded a warning that this self-interest is liable to change: it is also a misconception in the sense that this narrow self-interest does not come close to the broad self-interest that Adam Smith once propagated in his book *The Wealth of Nations*. Stiglitz advocates stricter standards, more clarity about what is allowed and what is not, and stricter law and regulations in order to make those who do not comply accountable for their actions.

5.6 CONVENTION 181 COMPARED

If we compare Convention 181 to the Bill of Rights (the Universal Declaration of Human Rights, the affiliated 1966 UN conventions regarding civil political rights, respectively the economic, social and cultural rights), the OECD Guidelines and the ILO Declaration concerning multinationals, it becomes clear that they both overlap and complement each other.

They particularly overlap in respect of fundamental labour rights such as 'non-discrimination', 'freedom of association and collective bargaining', 'forced labour' and 'child labour'. The overlap makes clear that these are essential labour rights. The duplication has a synergetic effect. The various elements regarding worker protection in these instruments also overlap, albeit that their descriptions in the Bill of Rights are more comprehensive than those in Convention 181.

Articles 11 and 12 of this Convention list employee rights, the protection of which the member states need to guarantee, meaning that the member states will also need to indicate the responsibilities of the temporary employment agency and the commissioning client.

The employee rights relate to the 'freedom of association and collective bargaining', 'minimum wages', 'working time and other working conditions', social security benefits', 'access to training', 'safety and health', 'compensation of occupational accidents and diseases', 'claims from workers in case of insolvency', 'maternity and parental protection and benefits'.

464 Ruggie (2014).
465 Stiglitz (2013).

The articles 23, 24 and 25 of the UDHR are broader in scope. They provide that everybody is entitled to work, to just and favourable conditions of work and to protection against unemployment. Everyone also has the right to 'equal pay for equal work' and to 'just and favourable pay that ensures for him and his family an existence worthy of dignity'; if necessary, this must be supplemented 'by other means of social protection'. Moreover, everybody is entitled to 'form and join trade unions'. Furthermore, everybody is entitled to 'rest and leisure, to a reasonable limitation of working hours and periodic holidays with pay'.

Article 25 provides that everybody is entitled to a standard of living adequate for himself and his family, to 'security in the event of unemployment, illness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.

The articles 6, 7, 8, 9, 10, and 11 of the ICESCR develop this further.

Article 6 provides that the member states recognise and safeguard the right to work, which 'includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This also includes 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.

Article 7 develops the right to 'just and favourable conditions' and entitles everybody to minimum remuneration providing 'fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work'. It also entitles everyone to a 'decent living', 'safe and healthy conditions', 'equal opportunity by promotion', 'rest, leisure', and 'reasonable limitation of working hours, and periodic holidays with pay, as well as remuneration for public holidays'.

Article 8 provides that everybody is entitled to form and join trade unions; the right to strike is also provided.

Article 9 gives the right to social security.

Article 10 gives the right to paid maternity leave and generally focuses on the family as the basic unity of society.

Article 11 recognises the right to an adequate standard of living: adequate food, clothing and housing, and to the continuous improvement of living conditions.

Apart from elements aimed at protecting workers, Convention 181 also includes specific provisions regarding the requirements for the temporary employment agency, data protection, no fee to worker, migrants, cooperation between public employment services and temporary employment agencies and access to remedy.

These dimensions also overlap to some extent, albeit not as much as the dimensions above. Article 13 of the UDHR gives the right to migrate to another country, and Article 8 of the UDHR gives the right to an effective remedy. The articles 12, 14 and 17 of the ICCPR give the right to migration, a fair trial and privacy respectively.

The OECD Guidelines particularly fit in with the above-mentioned Bill of Rights and the ILO Declaration on Fundamental Rights (IV.39), and therefore, the above explanation also applies to the comparison with Convention 181.

The ILO Declaration is far more comprehensive and deals with 'non-discrimination' (art. 22, 23), 'freedom of association and collective bargaining' (art. 42–57), 'child labour' (art. 36), 'wages, benefits and conditions of work' (art. 33, 34), 'safety and health' (art. 37–40), 'training' (art. 25–32), 'remedy' (art. 58, 59) and 'security of employment' (art. 24–28).

Thus, the fundamental labour rights included in the UDHR, the ICCPR and the ICESCR, as well as in the OECD Guidelines and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, are also firmly entrenched in Convention 181. The preamble and the articles 4, 5 and 9 pay ample attention to these rights. Convention 181 also pays attention to the workers' rights, although this attention is more specific and more restricted in scope than it is in the Bill of Rights, the OECD Guidelines and the ILO Tripartite Declaration.

The specific provisions in Convention 181 regarding requirements for the temporary employment agency, data protection, no fee to worker, migrants, cooperation between public employment services and temporary employment agencies and access to remedy overlap to a far lesser extent with provisions in the Bill of Rights, the OECD Guidelines and the ILO Tripartite Declaration.

Article 14 of Convention 181 contains a specific enforcement provision. It prescribes that the provisions of the Convention 'shall be applied by means of laws or regulations or by any other means consistent with national practice, such as court decisions, arbitration awards or collective agreements'. 'The labour inspection service or other competent public authorities' are to ensure supervision of the implementation. Moreover, other remedies will need to be developed, including penalties that may be 'applied in case of violations'.

Does this human rights approach give specific attention to the bottlenecks pointed out in chapter 4, such as job insecurity, inequality of remuneration, weaker union movement and excessive use of temporary agency work? In regard to job security it can be noted that the ILO Declaration pays attention to 'security of employment' in the articles 24–28. Article 25 provides that:

> Multinational enterprises equally with national enterprises, through active manpower planning, should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment.

Thus, it is a call for making particular efforts to create permanent jobs, while understanding the need for flexibility.

In regard of unequal pay, it can be noted that the principle of 'equal pay for equal work' is included in the Bill of Rights and that the ILO Declaration refers to 'wages, benefits and conditions of work' that 'should not be less favourable to the workers than those offered by comparable employers'. But as noted before, it is not clear to whom such a worker is to be compared, with someone else working at the temporary employment agency, or with someone working directly for the employer (see paragraph 3.4.1).

As far as the weakness of the trade union movement is concerned, all these human rights arrangements refer to the fundamental right to 'freedom of association and collective bargaining'. Article 12 of Convention 181 was referred to above, which compels member states to expound responsibilities regarding this right.

There are no explicit references to excessive use of temporary agency work; through Ruggie's Guidelines, however the OECD Guidelines now draw attention to efforts:

> … to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.[466]

The requirement of paying close attention to what might (possibly) go wrong in the supply chain fits in with the idea of 'responsible sourcing', as advocated in the ICC Guide to Responsible Sourcing. CSR thinking has resulted in the obligation for commission clients to investigate whether temporary employment agencies give sufficient substance to the 'corporate responsibility to respect'.

466 OECD (2009), no.12

What is equally significant in this context is that, in its report to the 2016 ILC on 'Decent work in global supply chains', the ILO establishes that there is a relationship between the supply chain and non-standard forms of employment, which also include temporary agency work. The ILO points at the need for both quantitative and qualitative functional flexibility and pay flexibility, to help the organisation deal with seasonal demand or with fluctuations in production cycles. The report states that, particularly at the lower end of the supply chain, abuses may occur through the use of 'unethical labour contractors with links to human traffickers, providing one of the channels for "modern-day slavery" in the global economy'.[467]

All in all, it is evident that Convention 181 observes the many human and labour rights that can also be found in the human rights treaties. In these agreements they are broader in scope. Still, a ratified agreement such as Convention 181 will entail more, and more specific, obligations relating to temporary agency work, for instance in respect of the regulation concerning the temporary employment agency's status and to the 'no fee to worker' principle.

The 'human right-ification' of the labour relationships also touches on Convention 181 and the question must be raised as to whether this development has considerably weakened the impact of Convention 181. One might wonder what further use Convention 181 has, if enterprises need to observe the human rights treaties more and more closely. The answer is that Convention 181 is more specific, brings obligations upon ratification and also observes fundamental labour rights; thus, it has retained its value next to the human rights treaties. While there is a considerable overlap, the more individual instruments set course for a certain direction, the more effective they will be.

Thus, it can be established that, from a human rights perspective, Convention 181 has value and that it is substantively adequate.

467 ILC (2016), p. 22–23.

5.6.1 Addenda

Table 5.5 C181 and Bill of Rights, OECD Guidelines, Tripartite ILO Declaration MNE and Social Policy

		C 181	*UDHR*	*ICCPR*	*ICESCR*	*OECD guidelines*	*ILO-Decl. MNE*
I	**Core-issues**						
a.	non-discrimination	art. 5	art. 1,2,7	art. 26	art. 3	IV.39, V.1e	art. 21, 22, 23
b.	freedom of association and collective bargaining	art. 4, 11a,b, 12a	art. 20, art. 23, lid 4	art. 21, 22	art. 8	IV.39, V.1a,b, 2a,b, 3,6,7,8	art. 42 t/m 57
c.	forced labour	Preambule	art. 4	art. 8		IV.39, V.1d	
d.	child labour	art. 9		art. 24		IV.39, V.1c	art. 36
II	**Worker Protection issues**						
a.	right to work		art. 23	art. 10	art. 6	IV.39	
b.	free choice of employment		art. 23		art. 6	IV.39	
c.	working time (rest and leasure, limitation hours, and periodic holidays)	art. 11d, 12c	art. 24		art. 7	IV.39	
d.	conditions of work (just and favourable conditions)	art. 11d, 12c	art. 23, lid 1		art. 7	IV.39	
e.	(minimum-(wages) and (equal) pay (for equal work) (favourable remuneration)	art. 11c, 12b	art. 23, lid 2		art. 7	IV.39 V.4a,b	art. 33, 34
f.	adequate standard of living		art. 3, lid 3, art. 25		art. 11	IV.39	
g.	social security/protection (occ. accidents, diseases, maternity, parental protection, benefits, protection against unemployment sickness, disability, widowhood, old age)	art. 11e, 12d	art. 22, art. 23, lid 3, art. 25, leden 1,2		art. 9	IV.39	
h.	health and safety	art. 11g, 12f			art. 7, 12	IV.39, V.4c	art. 37 t/m 40
i.	training	art. 11f, 12e	art. 26, lid 1			V.5	art. 29 t/m 32
j.	insolvency	art. 11i, 12h					

		C 181	*UDHR*	*ICCPR*	*ICESCR*	*OECD guidelines*	*ILO-Decl. MNE*
III	**Specific issues 181**						
a.	legal status	art. 3 leden 1,2					
b.	privacy and protection personal information	art. 6		art. 17		IV.39	
c.	no fee to worker	art. 7					
d.	migrant workers	art. 8	art. 13, lid 2	art. 12		IV.39	
e.	cooperation public/ private agencies	art. 13, lid 1					
f.	access to remedy	art. 14, lid 3	art. 8	art. 14		IV.39	art. 58. 59
IV	**Other specific issues**						
a.	stability of work						art. 24 t/m 28
b.	unequal pay						
c.	weakened position trade union						
d.	excessive use of agency work						

CHAPTER 6

Global Social Dialogue: IFAs as a new trend?

Following an analysis of the 'human right-ification' of labour relationships and its effects on temporary agency work under Convention 181, the search for the value and adequacy of Convention 181 is continued by means of a study of the meaning of the IFA instrument for the formation of social law in general and for temporary agency legislation in particular.

Globalisation has prompted the global unions to make more and more arrangements with international enterprises regarding the labour standards that need to be observed.

In these arrangements, the IFA (International Framework Agreement) is placed in the framework of the sources of labour law, the nature of labour law and social dialogue. In this chapter, a review is given of the origins of the international trade movement, the reason why the global unions conclude IFAS, what IFAS actually are, the reasons why international social partners conclude IFAS and in what number, and the potential binding power they have.

IFAS will particularly be viewed in relation to temporary agency work. An answer will be provided to the question as to how IFAS relate to ILO convention 181 and whether they can be seen as substitutes for and/or supplements to the convention.

6.1 SOURCES OF LABOUR LAW

6.1.1 Sources

Modern labour law has various sources. Bronstein[468] distinguishes five, i.e. the constitution, the law in a formal sense (statutory regulations), employment contract law, international law and case law.

468 Bronstein (2009), p. 4. See also Heerma van Voss & Barentsen (2015), p. 4.

Bronstein argues that in 1917, Mexico was the first country to bring into its constitution both political and social rights. Besides political and individual rights, such as the right to own property and the right to transact business, the Mexican constitution includes social rights such as the freedom of association and collective bargaining, the right to strike, the right to equal remuneration and equality of treatment for men and women, the right to non-discrimination on the grounds of colour, race, social origin, religion and political opinion, together with bans on child labour and forced labour.

Many constitutions entrenched these rights. Some also included provisions regarding fair dismissal and reasonable working hours. However, this does not apply to all constitutions and it should be noted that countries such as the United Kingdom, New Zealand and Israel do not have a constitution at all.

The second source is the law in a formal sense, on the basis of which various other regulations can be passed. This is the most common form of labour law. There are exceptions, for instance in Belgium and Denmark where labour law flows from employment contract law, and in Australia and New Zealand where arbitration awards define the social playing field. In the United States, 15% of the labour force comes under employment contract law and 85% under statutory regulations.

The third source is employment contract law (collective agreement). In essence, these agreements have a civil law character, however they deviate from civil agreements, both in terms of form and effect. In certain judicial systems, the national government can make them legally binding, as a result of which the provisions also apply to the so-called 'outsiders'.
Collective agreements can be concluded per enterprise, branch and business sector, per region or nationally, depending on the system of labour relationships that has developed in a particular country.

The fourth source is international law, such as the ILO conventions and European law that applies to the 28 member states. ILO conventions are legally binding for countries that have ratified them. Whether a convention has direct effect depends on the judicial system of the country in question. In so-called one-tier systems (for instance, France, Spain and most Latin America countries), ratified ILO conventions have direct effect in the case of individual disputes, but in so-called two-tier systems (such as Australia, Canada, the Scandinavian countries, the United Kingdom and the United States), they need to be transposed into national law. European law creates obligations for the member states as soon as it is accepted at European level; it does not require ratification.

The fifth source of labour law has to do with case law that has been created by national and international judges. This can have vast influence. In Japan for instance, dismissals were initially decided by case law, and have been codified by now. In Germany, Spain and the Netherlands, essential parts of labour law, such as the right to strike, likewise depend on case law. For the Netherlands, the ESC will also take precedence. Furthermore, there are countries where labour law is dependent on so-called arbitration awards (binding decisions made by an arbitration board). These have so far taken place in Australia and New Zealand.

6.1.2 Heteronomous and autonomous

Besides the variety as to sources, there is also variety as to the nature of labour law. Labour law can have both a public and a private basis. Historically, labour law belongs in the public domain, but through the years, the private component has become increasingly stronger.

In labour-related affairs, the question invariably rises as to whether the statutory approach should be preferred, as against the private law approach. As early as the 1960s, Van Esveld[469] argued that an all-embracing government that aims to serve the public interest or the special interest of a particular group from the perspective of social justice also has its drawbacks. He finds that making adequate directions is no sinecure. Apart from that, the government needs machinery that tends to expand more quickly than expected, and in turn, this results in dirigisme and alienation, due to stakeholders no longer feeling involved.

That is why in the 1930s, Molenaar[470] preferred what he called autonomous law, 'law sprung entirely from society itself'. He preferred it to heteronomous law, 'labour law that has essentially been provided by government'. He argues:[471]

> Practical differences aside, it must be acknowledged that the ethical value of autonomous law towers above that of governmental law […] external law is eminently suitable for banishing abuses when private initiative fails. In imposing an ethical minimum, the legislator then performs an outstanding job, for it may be assumed that the social organisation was not healthy. However, if the legislator goes on to prosecute autonomous law with the scourge of uniformity and the lasso of coercion wherever it crops up, then current labour law will eventually only be able to derive value from the coercive power of a penalty clause. In our view, this would be lamentable, for as soon as the structuring of the various communities with our society

469 Van Esveld (1968).
470 Molenaar (1953), p. 375.
471 Molenaar (1953), p. 377.

> no longer flows from the feeling among those concerned that this is unequivocally how it should be, the reasonable basis threatens to be lost as a result of our many actions. It would mean that we will only look at the law to tell us what is allowed and what is not. Our behaviour will have lost reasonable value.

Furthermore, Molenaar argues:[472]

> The idea that Dr Kuyper[473] defended with such talent, taking inspiration from his political example Groen van Prinsterer, and which he characterised as 'sovereignty within one's own circle', has increasingly gained ground. This idea was also expressed by the 1931 *Quadragesimo Anno* encyclical, in which the Pope expounds to the faithful the meaning of the principle of subsidiarity, which requires that the State does not take on regulations that can be brought about equally well (or better) by smaller circles and groups of stakeholders.
> This idea really fits in with the liberal principle of self-efficacy; the 'independent power' which Thorbecke has stressed unremittingly.

At the time, Molenaar's opinions met with criticism. People still remembered the Dutch government's efforts to combat social misery. And possibly, the contradistinction was a trifle absolute. Van Esveld argues that jurisprudence takes place along heteronomous and autonomous poles. While it is commendable to distinguish them, they still are the traits of one character.[474]

Interestingly by the way, is that by the turn of the century Van der Heijden[475] called for a new legal order for labour, in which private law must play a larger role than public law.

6.1.3 'Hard' and 'soft law'

Another distinction that can be made is the one between 'hard' and 'soft' law. In chapter 4, it became clear that much legislation in the field of human rights was 'soft law'. With regard to 'hard' and 'soft' law, Kenneth Abbott and Duncan Snidal[476] make three distinctions. They argue that 'hard law' implies a legal obligation, while 'soft law' implies a weaker obligation or no obligation. Furthermore, there is a difference as to accuracy. 'Hard law' is more accurate, while 'soft law' tends to use more vague,

472 Molenaar (1953), p. 396.
473 Abraham Kuyper was a Dutch journalist and a politician [ed.].
474 Van Esveld (1968), p. 306
475 Van der Heijden (1999a), p. 19.
476 Abbott & Snidal (z.j.). See also Shaffer & Pollack (2010), p. 714.

general and abstract wording. Thirdly, there is a difference as to effectiveness. 'Hard law' often outsources the interpretation and enforcement to an independent third party (such as a court of law), while 'soft law' keeps interpretation and enforcement within its own circle, thus creating more political room for manoeuvre.

With respect to hard and soft law, the American literature[477] distinguishes three trends, i.e. the 'legal positivists', the 'rationalists' and the 'constructivists'. All three movements see hard and soft law as alternatives that may complement each other, but their basic assumptions diverge. The 'legal positivists' consider hard and soft law to be opposites. Hard law is about formal legal obligations, while soft law does not imply formal obligations. On the other hand, 'rationalists' argue that hard and soft law both make contributions, to which governments may appeal in various situations. 'Constructivists' do not state a preference, but they do see that soft law has advantages in the creation of new standards; they consider it to be a potential model for the transition to hard law.

Table 6.1 Theories of hard and soft law and their interaction[478]

	Strengths and weaknesses of hard and soft law as alternatives	*Interaction of hard and soft law as complements*
Legal positivism	Hard law preferable; soft law either problematic or used as stepping stone to hard law	Soft law, at most, can contribute to development or elaboration of hard law.
Rational choice institutionalism	Hard and soft law have different strenghts and weaknesses; choice governed by fators such as certainty of state interest, transaction costs of bargaining, indication of credibility of state commitment, and desire for flexibility.	Abbott and Snidal's three pathways: (i) binding framework agreement leads to greater substantive development over time; (ii) Plurilateral agreement, membership grows over time; (iii) Nonbinding tools evolve into hard law.
Constructivism	Neither hard nor soft law inherently preferable, but soft law can be particularly helpful in elaborating new and transformative norms.	Soft law can contribute to socialization and normative convergence, paving the way for hard law.

The benefits of hard law that Shaffer and Pollack[479] mention are its credibility, the more direct effect ('self-executing'), more handholds for interpreting and elaborating, better enforcement, partly as a result of dispute settlement by courts of law. Benefits

477 Shaffer & Pollack (2010), p. 707.

478 After Shaffer & Pollack (2010), p. 723.

479 Shaffer & Pollack (2010), p. 717.

of soft law[480] relate to its usability and lower initial costs, implementation costs, its enhanced flexibility and learning potential, its enhanced scope for ambition and diversity, and its availability to parties outside government.

6.1.4 Source matrix

In conclusion, labour-related jurisprudence takes place along heteronomous and autonomous poles. They can be contrasted, but not absolutely. They are the flip sides of a coin. This applies in equal measure to the contrast between soft and hard law. These contrasts, both that of heteronomous versus autonomous and that of soft versus hard, have individual, national and international dimensions.

Table 6.2 Source matrix

	Hard		*Soft*	
	National	*Supranational*	*National*	*Supranational*
Heteronomous	• Legislation	• Conventions • Directives (EU) • Regulations (EU)		• Declarations • Guidelines • Recommendations
Autonomous	• Collective agreements		• Codes of conduct	• Codes of conduct • IFAs

6.1.5 Social dialogue

The ILO also uses the concept of social dialogue, stating:[481]

> Where the interest of different segments of society do not coincide, it is generally accepted that people affected by decisions should be able to express their needs, participate in decision-making processes and influence the final decisions so that a proper balance of interests is struck by governments and other decision-makers. This basic principle applies both to the broad political institutions of democracy and to the world of work.

It goes on to state:

480 Shaffer & Pollack (2010), p. 719.
481 ILC (2013), p. 5

> Social dialogue is the term that describes the involvement of workers, employers and governments in decision-making on employment and workplace issues. It includes all types of negotiation, consultation and exchange of information among representatives of these groups on common interests in economic, labour and social policy. Social dialogue is both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces.

Social dialogue can be bipartite, between employees and employers (as social partners) or tripartite, if the government is also involved. Bipartite social dialogue takes place in collective bargaining or other types of negotiations, cooperation and dispute settlement. Tripartite dialogue takes place when employees, employers and government jointly discuss government policies, legislation and other matters that concern employees and employers alike. Collective bargaining plays a role in many countries. It takes place at various levels, i.e. at national (intersectoral), sectoral and at company level.[482]

Table 6.3 Collective bargaining on wages

	Intersectoral level	*Sectoral level*	*Firm level*
Australia	–	xxx	x
Austria	–	xxx	x
Belgium	xxx	x	x
Brazil	–	xxx	x
Bulgaria	–	xxx	x
Canada	–	–	xxx
Chile	–	–	xxx
China	–	x	xxx
Cyprus	–	xxx	x
Czech Republic	–	xxx	x
Denmark	xx	xx	x
Estonia	–	–	xxx
Finland	xx	xx	x
France	x	x	xxx
Germany	–	xxx	x
Greece	x	xxx	x
Hungary	–	xxx	x
India	–	xx	xxx
Indonesia	–	–	xxx
Ireland	xxx	x	x
Israel	–	xxx	x
Italy	–	xxx	x

482 ILC (2013), p. 21

	Intersectoral level	*Sectoral level*	*Firm level*
Japan	–	–	xxx
Republic of Korea	–	x	xxx
Latvia	–	–	xxx
Lithuania	–	–	xxx
Luxembourg	–	xx	xx
Malaysia	–	–	xxx
Malta	–	–	xxx
Mexico	xx	xx	xxx
Netherlands	–	xxx	x
New Zealand	–	–	xxx
Norway	xx	xx	x
Philippines	–	–	xxx
Poland	–	–	xxx
Portugal	–	xxx	x
Romania	–	xxx	x
Russian Federation	x	xx	x
Singapore	–	–	xxx
Slovakia	–	–	xxx
Slovenia	x	xxx	–
South Africa	–	xxx	x
Spain	–	xxx	x
Sweden	–	xxx	x
Switzerland	–	xxx	x
Turkey	–	–	xxx
United Kingdom	–	x	xxx
United States	–	–	xxx

x = existing level of wage bargaining; xx = important, but not dominant level of wage bargaining; xxx = dominant level of wage bargaining. Source: Cazes et al. (2012).

Collective bargaining relates to fewer than 20% of the workers in paid employment in approximately 60% of the ILO member states. Over the last decade, the proportion of collective bargaining has remained stable in some European countries (Austria, Belgium and France), while increasing in some Latin American countries (Argentina and Uruguay). Moreover, it is increasing in some Asian countries (Cambodia, China and Indonesia). Elsewhere, however, decreases have occurred as the result of deregulation measures, decentralisation of bargaining structures and decreasing support for this type of social dialogue.[483]

During the last two to three decades, a new type of social dialogue has arisen, which has a transnational character and takes place between global unions and multinational enterprises.[484] The ILO sees this as another form of social governance, which

483 ILC (2013), p. 22.

484 ILC (2013), p. 55. See also Stevis (2010).

might remedy possible shortcomings in the supply chain.[485] It is important to analyse this development further, partly in relation to international regulations concerning temporary agency work.

6.2 GLOBAL UNIONS

6.2.1 Global business

Across the world, it is estimated that more than 100,000 multinational enterprises are operating that own approximately 900,000 subsidiaries.[486] These enterprises are the driving forces in the flows of foreign investments that have been effected in developing countries. They determine the changing picture of production and labour, and their effect can be felt in every aspect of worldwide trade, industry and services.

In 2004, the World Commission on the Social Dimension of Globalization reported that lack of worldwide regulation was cause for growing concern that 'competition between countries is inducing them to reduce regulations, taxes, environmental protection and labour standards in a "race to the bottom"'.[487]

According to Croucher and Cotton,[488] the current wave of globalisation is characterised by the financial institutions that discourage the developing countries' protectionism. They argue that the financial aspects of globalisation have vast impact, not just for national law and regulations, but also for the enterprises and for the way they are using labour. The opening-up of economies to trade clearly also has negative consequences for the trade union movement. Furthermore, they point out that globalisation encompasses more than the increase of the flow of capital and goods between countries. It has a vast political dimension, in the sense that it has been caused by the liberal economic theories stating that enhancing liberalisation promotes prosperity and boosts development.

Since the end of the 1970s, enterprises have been looking for new production locations, where they can cut costs and market their products. The financial institutions created scope for this by concluding bilateral and multilateral trade agreements. Many countries switched to a 'free market system' and the effects for both employment and the trade unions were considerable.

Croucher and Cotton argue that the current globalisation trend is also characterised by a dramatic increase in the global labour supply. Enterprises can now deploy large numbers of cheap workers, particularly in the former Soviet Union, China and

485 ILC (2016), p. 52 ff.
486 De Felice (2015), p. 518.
487 ILC (2013), p. 55
488 Croucher & Cotton (2011), p. 13

India. This is not only due to the decline of communism, but also to the opening-up of national economies to the global capital market and the increased participation of women in wagepaid work.

Furthermore, there is a mobile brigade of 86 million migrant workers who by and large have few labour rights. According to Croucher and Cotton, a global protection system that compensates for the weakening of the national systems and the power shift to employers has failed to arise. Although there are OECD Guidelines and ILO core conventions, they are 'weak and largely tokenistic'.[489]

From the 1970s onwards, the economic activities of the multinational enterprises have expanded enormously. In the early 1990s, their economic size was estimated to be a third of global GNP.[490]

Multinational enterprises employ more people than they actually have on their own payroll. The capital markets force them to cut costs and resort to cheaper forms of labour, even 'informal' labour.[491] The pressure is further increased by private equity demanding better returns.

The term 'externalisation' is used to indicate that outside of companies' operations, the use of external labour is increasing. Central management is asking local management to outsource labour to an increasing extent. Croucher and Cotton view the expanding role of temporary agency work as the visible tip of the iceberg, which comprises a wide range of labour suppliers.[492]

Globalisation has major consequences for the trade union movement. Old certainties and the support for the union movement that was at one time a matter of course are falling. Due to neoliberal theories, the trade unions have also lost political influence. Multinational enterprises have a greater influence on governments, while the increase of informal labour hampers union membership, and the unions' economic power is waning. The union movement's opportunities to solve problems at national level are diminishing, which is why there is a move towards the international level.[493]

The multinational enterprises take various initiatives to comply with labour standards, both on the part of their various subsidiaries and by their suppliers:[494]

489 Hyman (2002).
490 Croucher & Cotton (2011), p. 17.
491 Croucher & Cotton (2011), p. 18.
492 Croucher & Cotton (2011), p. 19.
493 Croucher & Cotton (2011), p. 22.
494 ILC (2013), p. 56.

Voluntary initiatives involving MNEs

Initiatives generally fall within the following broad categories:

(a) management-driven corporate codes of conduct and statements on business ethics;
(b) industry-driven standardization, such as the Electronic Industry Citizenship Coalition or the Global Social Compliance Programme;
(c) multi-stakeholder initiatives that may involve companies, trade unions, NGOs and other CSOs such as the UN Global Compact and the Ethical Trading Initiative;
(d) commercial standards, such as the International Organization for Standardization (ISO) standard on social responsibility (ISO 26000);
(e) public-private initiatives such as the Better Work Programme; and
(f) negotiated labour-management agreements with cross-border coverage, known as TCAs, including IFAs and European framework agreements (EFAs), and sometimes regional company-based framework agreements.

6.2.2 Global trade unions

The international trade union movement consists of Global Union Federations (GUFs) and the International Trade Union Confederation (ITUC).[495]

This international movement originated in 1864, when the International Workmen's Association/IWMA was established. The International Transport Workers Federation, established in 1897, is one of the oldest GUFs.

The International Trade Secretariats (ITSs) can be seen as precursors to the GUFs. In 2006 the ITUC was formed, a merger between WCL, World Conference of Labour (formerly IFCTU, International Federation of Christian Trade Unions, established in 1920) and the ICFTU, International Confederation of Free Trade Unions, established in 1949, as counterpart to the WFTU, the World Federation of Trade Unions, which was established in 1945.

GUFs are organised per industry sector and have affiliated national sectoral unions in more than 120 countries. GUFs account for 80% of all international union efforts. The sectors range from education, representing teachers, to transport, in which the ITF takes an active part.

495 Croucher & Cotton (2011), p. 6.

Table 6.4 The origins of the international trade union movement

1864	International Workmen's Association (IWMA) is established
1871	IWMA is dissolved
1889	First International Trade Secretariats of cobblers, printers, hat makers and tobacco workers start
1897	International Transport Workers Federation is established
1901	International Secretariat of National Trade Union Centers (ISNTUC) is established in 1913. It is called the International Federation of Trade Unions (IFTU)
1919–1921	29 International Trade Secretariats are established; many are merged
1919	International Federation of Trade Unions (IFTU is re-established
1920	International Federation of Christian Trade Unions (IFCTU) is established (later called World Conference of Labour)
1920	Red International of Labour Unions (RILU) is established
1937	RILU is dissolved
1945	World Federation of Trade Unions (WFTU) is established
1949	International Confederation of Free Trade Unions (ICFTU) is established
1973	European Trade Union Confederation (ETUC) is established
2006	WCL is dissolved, merges with ICFTU, forming International Trade Union Confederation (ITUC)

Source: Croucher & Cotton (2011), p. 25

The GUFS have a wide variety of set-ups. There are three categories. The first is characterised by memberships in the private sector and by an industrial and bargaining focus (BWI, ICEM, IMF, IUF and UNI). The second category (IFJ and ITGLWF) also have private sector members, but focus less on bargaining and have a weak membership base. The third category represents public sector workers (EI and PSI). In 2012, IMF, ICEM and ITGLWF merged into IndustriALL. The GUFS see it as their duty to defend their margin of negotiation for members, to create more scope for them and to develop training activities. The GUFS are flanked by the ITUC that represents the national union umbrella organisations. Together, GUFS and ITUC form the 'Internationals'. GUFS denote the global sectoral unions without the ITUC.

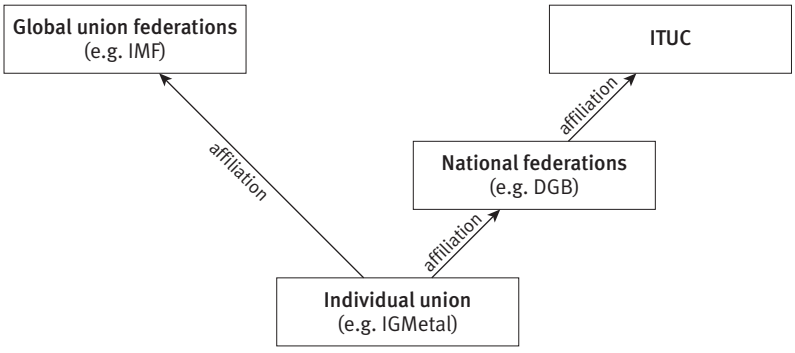


Figure 6.1 National and international levels of trade unionism

Source: Croucher & Cotton (2011), p. 6

Table 6.5 List of global unions, 2008

Global union	*Main sectors covered*	*Estimated total membership (millions)*	*Total number of affiliates*	*Number of countries covered*	*Estimated number of developing country affiliates*	*Estimated percentage of developing country affiliates*
ITUC	Umbrella body	168	311	155	190	61
EI	Education	30	394	171	189	48
Industrial:						
• IMF	Metalworking	25	200	100	unknown	unknown
• ICEM	Chemicals, energy, mining, paper	20	379	117	182	48
• ITGLWF	Textiles, garments, leather goods	9	238	122	163	68
PSI	Public services	20	650	160	323	50
UNI	Telecoms, graphics, media, retail, services	15.5	900	140	unknown	unknown
BWI	Construction and materials	12	318	130	unknown	unknown
ITF	Transport	4.5	654	148	63	10
IUF	Food, agriculture, catering, tourism	2.6	375	127	206	55
IFJ	Journalism	0.6	117	100	43	37

Source: Croucher & Cotton (2011), p. 7

How important are the trade unions nowadays? This is deduced from their membership. OECD figures show that the overall trade union density in the OECD countries has decreased from 18.1% in 2006 to 16.9% in 2013. In 28 out of the 34 countries concerned there was a decrease, while in the remaining 6 countries (Belgium, Canada, Chile, France, Italy and Spain) trade union density increased.

Table 6.6 Trade union density

	2008	*2009*	*2010*	*2011*	*2012*	*2013*
Australia	18.6	19.3	18.4	18.5	18.2	17.0
Austria	29.1	28.7	28.4	27.9	27.4	27.4
Belgium	54.4	54.9	53.8	55.1	55.0	–
Canada	27.1	27.3	27.4	27.1	27.5	27.2
Chile	15.0	15.8	15.0	14.9	15.3	–
Czech Republic	17.7	17.0	15.5	13.9	13.4	–
Denmark	66.3	67.7	67.0	66.4	67.2	66.8
Estonia	7.1	7.7	7.6	6.8	6.4	–
Finland	69.6	69.9	69.1	68.4	68.6	–

	2008	*2009*	*2010*	*2011*	*2012*	*2013*
France	7,6	7,7	7,7	7,7	7,7	–
Germany	19,1	18,9	18,6	18,0	17,9	17,7
Greece	24,0	23,2	22,5	22,6	21,3	–
Hungary	14,4	12,8	12,5	11,4	10,6	–
Iceland	79,3	83,7	84,4	84,0	82,6	–
Ireland	31,9	33,1	32,7	32,6	31,2	29,6
Israel	–	–	–	–	–	–
Italy	33,4	34,7	35,5	35,7	36,3	36,9
Japan	18,2	18,5	18,4	19,0	18,0	17,8
Korea	10,3	10,0	9,7	9,9	–	–
Luxembourg	36,5	36,0	35,1	33,9	32,8	–
Mexico	15,7	15,3	14,4	14,5	13,6	13,6
Netherlands	18,8	19,1	18,6	18,2	17,7	17,6
New Zealand	20,6	21,4	20,8	20,8	20,5	19,4
Norway	52,6	53,6	53,7	53,5	53,3	53,5
Poland	15,1	15,1	14,6	13,5	12,5	–
Portugal	20,5	20,1	19,3	19,5	20,5	–
Slovak Republic	17,2	17,0	16,9	17,0	16,8	–
Slovenia	28,1	–	25,0	23,1	–	–
Spain	17,4	17,8	17,6	17,2	17,5	–
Sweden	68,3	68,4	68,2	67,5	67,5	67,7
Switzerland	17,5	17,3	17,1	16,7	16,2	–
Turkey	5,8	5,9	5,9	5,4	4,5	–
United Kingdom	27,1	27,1	26,4	25,6	25,8	25,4
United States	11,9	11,8	11,4	11,3	11,1	10,8
OECD countries	17,9	18,0	17,6	17,5	17,1	16,9

Source: http://stats.oecd.org

However, the importance of the trade union movement is not deduced from membership numbers alone, but also from the unions' collective bargaining cover rates. According to the ILO, these are close to 20% at a global level, but can be much higher in developed countries such as France, Italy, Austria, Belgium, Finland and Denmark, where it exceeds 90%.

Furthermore, the trade union movement's position is influenced by the way it is entrenched in the national system of labour relationships. In Belgium, for instance, the trade union movement plays a prominent role in the implementation of social security, which boosts union membership. The scope of the collective agreement is partly determined by the system of extension of collective labour agreements that exists, for example, in the Netherlands.

Interestingly, in spite of the fall in membership, the collective bargaining instrument continues to be popular. For instance, a recent poll among Dutch salaried employees showed that 79% sets great to considerable store by collective agreements.[496]

496 Opinion panel dated 26 February 2015, See: http://www.eenvandaag.nl/uploads/doc/Rapport%20vakbonden_1.pdf, p. 7.

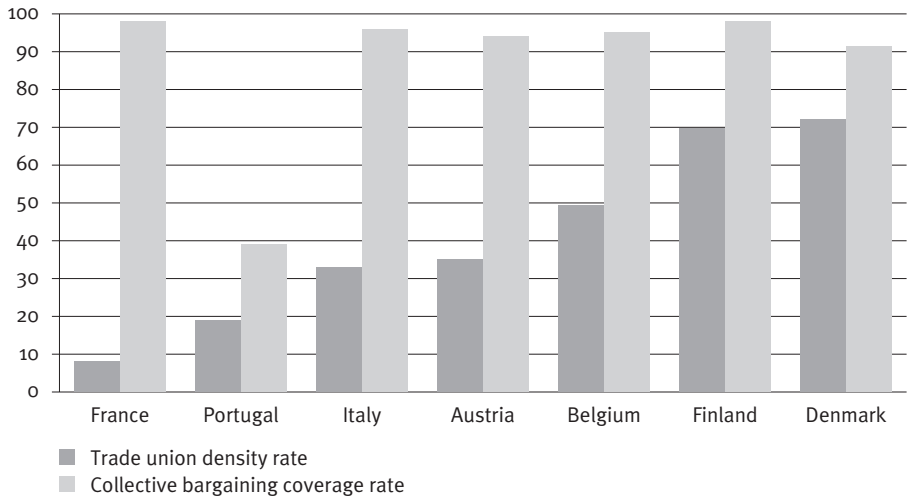


Figure 6.2 Trade union density and collective bargaining covering rates. Selected countries, most recent years
Source: Hayter & Stoevska (2011)

For that matter, there are also signs that if one were to analyse the trade unions and their membership worldwide, no decline would be apparent. Moreover, it is still difficult to attain reliable global figures, since there is quite a wide range of definitions. Should the unemployed, pensioners and students be included? And does one count paying members only or should sympathisers also be included? The ILO does not have up-to-date figures either. Nevertheless, estimates show that between 2000 and 2007 48% of all union federations had grown, 35% had decreased and 17% had remained fairly stable. This observation is based on 444 federations that are said to represent the bulk of global trade unions.

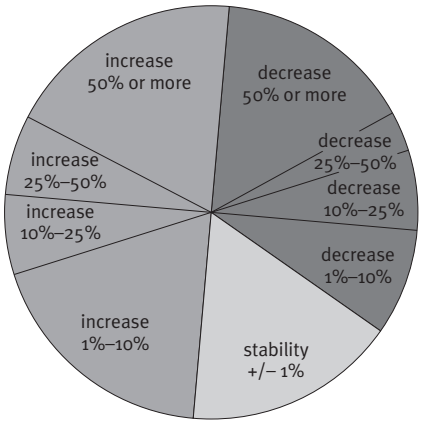


Figure 6.3 Change in union federation
Source: Hall-Jones (2008).

Article 20 of the 1948 Universal Declaration of Human Rights[497] states that 'Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.' Article 23, paragraph 4, of the Declaration states that 'Everyone has the right to form and to join trade unions for the protection of his interests'.

These provisions are further developed in article 22 of the ICCPR and article 8 of the ICESCR. Importantly, the provisions in article 22, paragraph 3, of the ICCPR and article 8, paragraph 4, of the ICESCR refer explicitly to ILO convention 87 concerning freedom of association and protection of the right to organise.

Since it was created in 1948, ILO convention 87 has been ratified by 153 countries. This is an impressive number, but the number of non-ratifying countries is equally considerable: Afghanistan, Bahrain, Brazil, Brunei, China, Guinea-Bissau, India, Iran, Iraq, Jordan, Kenya, Republic of Korea, Laos, Lebanon, Malaysia, Marshall Islands, Morocco, Nepal, New Zealand, Oman, Qatar, Saudi Arabia, Singapore, Sudan, Thailand, Tuvalu, United Arab Emirates, the United States, Uzbekistan and Vietnam. Most conspicuous are Brazil, China, India and the US, whose inhabitants add up to 3 billion, and quite a few countries in the Middle East, all in all representing more than half the world population.

The other important convention regarding the freedom of association and bargaining, i.e. Convention 98 (1949), has been ratified by 164 countries and again the non-ratifying countries include: Canada, China, India, Mexico and the US, jointly representing nearly half the world population.[498]

In respect of freedom of association, there are also ILO conventions 151 (1978) and 154 (1981) regulating respectively the public sector and the promotion of collective bargaining. Respectively 52 and 46 ILO member states have ratified these conventions.

Most national constitutions safeguard the freedom of association. Exceptions are possible, for instance in connection with the armed forces. In 142 constitutions, the freedom of association is explicitly acknowledged. A constitutionally recognised right to strike is in place in 93 countries. The freedom of association is not restricted to trade unions, but also holds for employers' organisations. It is a fundamental right that is at the heart of our democracy.[499]

We saw above that GUFS and ITUC represent the trade unions on the global social playing field. Opposite ITUC as employees' representative, the IOE represents

497 Blanpain (2012).
498 Blanpain (2012), p. 24.
499 Blanpain (2012), p. 15.

employers. The IOE[500], the International Organization of Employers, was established in 1920 and its membership consists of 150 employers' and corporate federations from 143 countries. The IOE particularly looks after the interests of institutions such as the United Nations, the World Bank and the ILO. The IOE represents nearly all employers' federations, i.e. 43 from Africa, 33 from the Americas, 29 from Asia and 43 from Europe. Among other spearheads, the IOE promotes corporate social responsibility and human rights policies in business, but it does not engage in social dialogue or collective bargaining with trade union organisations.

The ITUC[501] represents nearly 170 million workers from 155 countries and encompasses more than 300 affiliated member organisations. They include national, democratic and representative trade union organisations that endorse the constitution of the Confederation, which states among other things: 'The Confederation is inspired by the profound conviction that organisation in democratic and independent trade unions and collective bargaining are crucial to achieving the well-being of working people and their families and to security, social progress and sustainable development for all'. The bargaining activities are in fact left to the GUFs.

At the sectoral level, hardly any employers' organisations can be found that are specialised in negotiating with GUFs. Employers' organisations include the International Association of Public Transport, the International Union of Railways, the Federation of the employers' associations in the metal and electrical industries, the Chemical Employers' Labour Relations Committee, the International Hotel and Restaurant Association, the World Federation of Building Service Contractors, the International Road Transport Union, the World Federation of the Sporting Goods Industry, the International Council of Mining and Metals, the International Confederation of Private Employment Services (CIETT) and the International Chamber of Shipping. However, all these organisations hardly engage in meaningful forms of social dialogue with employees' organisations. The only exception is the maritime sector, where ICS/IMEC (International Chamber of Shipping/International Maritime Employers Committee) and ITF play important roles,[502] partly due to concluding a full, global collective agreement.[503] Possibly, this less pronounced role of international employers' organisations is the main reason why the GUFs have made overtures to an increasing number of multinational enterprises in order to gain some grip on the increasing globalisation.

500 Ojeda-Avilés (2014), p. 234.
501 Ojeda-Avilés (2014), p. 233.
502 Lillie (2008), p. 191.
503 Papadakis (2008), p. 3.

But there are other reasons. Croncher and Cotton list five: [504]

- The multinational enterprises 'drive' globalisation by the role they play in investment, trade, technology and finance.
- Quite often, one of the subsidiaries of these multinational enterprises already has contacts within the trade union movement.
- Multinational enterprises often need the knowledge and experience of the trade union movement, partly on account of their risk management.
- Often, strong links between the trade unionists and corporate management are already in place.
- The dialogue between global employees' organisations and the central management of such a multinational enterprise is invaluable for the trade unions they represent.[505]

Therefore, the GUFs enter into social dialogue with an increasing number of multinational enterprises. They conclude International Framework Agreements (IFAs) and thus set a new trend, although it remains to be seen if it will continue. What is the meaning of this development in general and what does it imply for the regulation of labour? These questions will be answered below.

6.3 IFAs

6.3.1 What is an IFA?

International Framework Agreements (IFAs) are an attempt by the Global Union Federations (GUFs) to respond to globalisation. These IFAs are the result of consultation at a global level between multinational enterprises and the GUFs in their capacity of sectorally organised global unions. They constitute the global development of social dialogue.

Another concept that is being used is TCA, Transnational Company Agreements, which as part of Transnational Collective Labour Relations in turn results from TCB, Transnational Collective Bargaining.[506]

Transnational Collective Labour Relations are characterised by both public and private initiatives.[507] The public initiatives include the OECD Guidelines for Multinational Corporations, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact and the Ruggie

504 Croucher & Cotton (2011), p. 16.
505 Croucher & Cotton (2011), p. 16.
506 Blanpain & Marassi (2015), p. 5 ff.
507 Blanpain & Marassi (2015), p. 11.

Guidelines containing the 'UN Protect, Respect and Remedy' Framework (see chapter 4). The private initiatives include Corporate Codes of Conduct and Transnational Collective Agreements. These agreements are concluded both at a global and at a European level. By now, over 160 enterprises have co-signed more than 250 agreements in that sense.[508] An IFA is in order if a global agreement with a GUF was concluded.

6.3.2 Why should Global Union Federations want IFAs?

The literature[509] lists four important reasons for GUFs to conclude such agreements. Firstly they are about promoting employees' rights and bringing these together for the benefit of the entire labour community of the multinational enterprise (sometimes they even include the entire supply chain) by introducing rules that apply for all subsidiaries. This often fits in with the eight core conventions that belong to the 1998 ILO Declaration. The International Metalworkers' Federation (IMF), now part of IndustriAll Global Union, formulated it as follows:

> [IFAs are] a global instrument with the purpose of ensuring workers' rights in all of the target company's locations. […] Through IFAs the ILO's Core Labour Standards can be guaranteed in all facilities of a transnational company, which is especially helpful in transition and developing countries, where legislation is sometimes insufficient, poorly enforced or anti-worker.[510]

Secondly, these agreements reinforce social dialogue. Local unions can also benefit from this. They are often co-signatories to the agreement. As a result of this reinforced social dialogue, the IFA is a valuable instrument for achieving a situation that is 'free of conflict' and constitutes stable relationships between management and workers. Thirdly, the IFAs enhance the international solidarity. And fourthly, the GUFs can use IFAs to reinforce their organisation by means of expanding their networks, enabling them to look after the employees' interests better.

For multinational enterprises too, various aspects play a role in concluding an IFA.[511] If the corporate brand is widely known, there is a clear relationship with the enterprise's need to maintain its reputation. Furthermore, there is a connection with the EU Directive with regard to the European Works Council. This has been a considerable boost to achieving supranational agreements, which may even extend beyond

508 Blanpain & Marassi (2015), p. 27.
509 Drouin (2010), p. 599 ff.; Telljohann et al. (2009a), p. 513 ff.
510 International Metalworkers' Federation (no date).
511 Blanpain & Marassi (2015), p. 34 ff.

Europe. The International Finance Corporation as part of the World Bank has likewise had a driving role, since the social conditions for the granting of loans could be established in an IFA.

Besides these external factors, there are the internal ones, such as the need for stable relationships between management and workers, and for a positive corporate image. Lastly, specific social groups, for instance environmental groups, can exert due pressure. Thus, multinational enterprises can find valid arguments to justify concluding an IFA.

However, there are also counter-arguments; particularly legal questions that may be raised by the agreement and that may deter enterprises. In this context, the IOE[512] is concerned about the fact that IFAS usually refer to ILO instruments that are actually meant and written for governments. That is why it doubts their added value, pointing out their obscure legal status, which may entail considerable liability exposure at a national level.

Boonstra is positive about IFAS, but moderately so, for employees hardly dare make use of the private liability law, as they fear possible intimidation, repercussions and victimisation.[513]

6.3.3 The rise of IFAS

As early as the 1960s, attempts were made to realise what we now call IFAS.[514] Particularly the International Trade Secretariats (ITSS), as precursors of the GUFS, in the metal industry, chemistry and food industry were confronted with globalisation and wanted to take steps. Charles Levinson – consecutively Assistant Secretary General and General-Secretary of the IMF (1956–1964) and General Secretary of the ICEM (1964–1985) – was a key figure in these attempts. He aimed for international collective negotiations at the level of large multinational enterprises.

He distinguished three stages. Firstly, he wanted to organise international solidarity together with a union that took part in a local conflict involving a multinational enterprise. Then, he wanted to conduct negotiations simultaneously in separate subsidiaries of an enterprise spread across various countries. In the third stage, he pursued integrated negotiations with the multinational enterprise's management board on the basis of a wish list jointly compiled by the various national unions.

The ITSS are also in favour of establishing world councils in order to coordinate union activities and encourage the exchange of information. The idea arose as early as the 1950s, but the first world councils came into being at the end of the 1960s:

512 IOE (2005), p. 11.

513 Boonstra (2014), p. 7.

514 Telljohann (2009b), p. 15 ff. See also: Gallin (2008), p. 15 and Da Costa & Rehfeldt (2011).

one at Ford, one at GM, a joint council at both Chrysler-Simca-Rootes and Volkswagen-Daimler-Benz. Eventually, sixty councils were started, but their influence was restricted, partly due to limited coordination on the part of the trade unions.

Thus, Levinson's third stage, involving integrated negotiations, was never attained. The first stage, seeking to organise solidarity in case of local conflicts, was difficult enough as it was. For stage two, involving simultaneous negotiations, Levinson refers to four examples, three of which are French, i.e. Saint-Gobin, Michelin, Rhône-Poulenc, the fourth one being Royal Dutch Shell.

There are various reasons why Levinson's strategy failed. One reason was that the multinational enterprises were uncooperative, while refusing to acknowledge the ITSS as negotiating partners. Then, due to the economic crisis, the trade unions became more defensive, could not muster solidarity and found it difficult to realise an international approach.

Eventually, this attitude changed due to the europeanisation of labour relationships, particularly as a result of the acceptance and implementation of the European directive on European works councils. This was preceded in 1980 by Vredeling's[515] draft guideline that aimed at regulating participation in multinationals in the case of complete or partial closure of a subsidiary of such an enterprise. Even though this draft was adjusted at a later date, the employers continued to oppose it, with the support of Margaret Thatcher's British government.

In 1994, a directive was drawn up that was acceptable to the European Council, partly as a result of changes to the decision making process in Europe (qualified majority voting, implemented along with the Maastricht Treaty).

In order to encourage regulations by the European Works Council, the European Metalworkers' Federation (EMF) asked various multinational enterprises to form permanent committees of information and advice. In 1985 this proved successful with regard to the French multinational enterprise Thomson Grand Public.

A second agreement at international level was entered into in 1986, involving the French enterprise Danone and the IUF, the GUF in the Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Association. It was this agreement that paved the way to the signing in 1988 of what history considers to be the first IFA.

BSN (Danone) and IUF formulated the following common viewpoint:[516]

1. A policy for training for skills in order to anticipate the consequences of the introduction of new technologies or industrial restructurering. To achieve this

515 Henk Vredeling was a Dutch member of parliament and a European Commission member [ed.].
516 Gallin (2008), p. 26

objective, the social partners will seek to integrate this aspect into present and future plans for training.

2. A policy to achieve the same level and the same quality of information, both in the economic and the social fields in all locations of BSN-subsidiaries. To achieve this objective, the social partners concerned, will seek both through national legislation as well as collective agreement, to reduce the differences observed in terms of the information between one country and another or between one location and another.
3. A development of conditions to assure real quality between men and women at work developing jobs and work processes have led to distortions between the situation of men and women; the social partners will therefore evaluate location by location, the nature of the different initiatives to be adopted to improve the situation.
4. The implementation of trade union rights as defined in ILO conventions. 87, 98 and 135. The social partners concerned will identify where progress can be made in improving trade union right and access to trade union education.

In the meantime, 115 IFAS have been concluded with GUFS. IndustriALL (43) is market leader in this respect, closely followed by UNI (38). IUF, BWI, PSI and IFJ have 7, 22, 3 and 2 respectively. For a survey of all these IFAS, please peruse the survey below.

Table 6.7 Survey of IFAs[517]

	Company	*Employees*	*Country*	*Sector*	*GUF*	*Year*
1	Danone	104,600	France	Food	IUF	08/1988
2	Accor	160,000	France	Hotels	IUF	06/1995
3	IKEA	139,000	Sweden	Furniture	BWI	05/1998 *(2001 IWAY)*
4	Statoil	23,000	Norway	Oil Industry	ICEM	07/1998
5	Faber-Castell	6,500	Germany	Office Material	BWI	03/2000
6	Hochtief	80,900	Germany	Construction	BWI	03/2000
7	Freudenberg	33,300	Germany	Chemical Industry	ICEM	06/2000
8	Skanska	57,100	Sweden	Construction	BWI	02/2001
9	Telefónica	120,000	Spain	Telecommunication	UNI	04/2001 *(03/2011)*
10	Carrefour	365,000	France	Retail	UNI	05/2001
11	Chiquita	20,000	USA	Agriculture	IUF	06/2001
12	OTE Telekom	27,000	Greece	Telecommunication	UNI	06/2001
13	Indesit (Merloni)	16,000	Italy	Domestic Appliances	IMF	12/2001
14	Endesa	22,900	Spain	Energy	ICEM	01/2002

517 Thanks are due to Gijs van Wezenbeek who, in consultation with the author, used various sources to compile an IFA file, on the basis of which the various analyses have been carried out.

	Company	*Employees*	*Country*	*Sector*	*GUF*	*Year*
15	Ballast Nedam	3,100	Netherlands	Construction	BWI	03/2002
16	Fonterra	16,000	New Zealand	Dairy Products	IUF	04/2002
17	Volkswagen	572,800	Germany	Automobile	IMF	06/2002 ***+Charter TAW 11/2012***
18	Norske Skog	3,000	Norway	Paper	ICEM	06/2002 *(12/2013)*
19	Daimler	275,000	Germany	Automobile	IMF	09/2002
20	AngloGold	66,500	South Africa	Mining	ICEM	09/2002 *(05/2009)*
21	Eni	82,200	Italy	Energy	ICEM	12/2002
22	Leoni	62,000	Germany	Cables/Automotive	IMF	04/2003
23	GEA	18,000	Germany	Engineering	IMF	04/2003
24	ISS	533,500	Denmark	Cleaning/Maintenance	UNI	05/2003 *(06/2008)*
25	RAG (Evonik)	33,000	Germany	Mining	ICEM	08/2003
26	Rheinmetall	9,200	Germany	Metal/Automotive	IMF	10/2003
27	SKF	44,000	Sweden	Ball-bearing/Seals	IMF	11/2003
28	Prym	3,500	Germany	Metal Manufacturing	IMF	11/2003
29	H&M	116,000	Sweden	Retail	UNI	01/2004
30	Bosch	281,000	Germany	Engineering	IMF	03/2004
31	SCA	36,000	Sweden	Paper	ICEM	04/2004
32	Club Méditerranée	20,000	France	Hotels/Leisure	IUF	04/2004
33	Lukoil	150,000	Russia	Energy/Oil	ICEM	05/2004
34	Renault	121,000	France	Automobile	IMF	10/2004 *(07/2013)*
35	Impregilo	34,400	Italy	Construction	BWI	11/2004
36	Röchling	7,500	Germany	Automotive industry/ plastics	IMF	11/2005
37	Electricité de France	160,000	France	Energy	ICEM + PSI	01/2005 *(01/2009)*
38	Rhodia	14,000	France	Chemical Industry	ICEM	01/2005 *(03/2008)*
39	Veidekke	6,300	Norway	Construction	BWI	03/2005
40	Falck	32,000	Denmark	Healthcare, Assistance, Safety Services and Emergency	UNI	03/2005
41	BMW	110,000	Germany	Automobile	IMF	04/2005
42	EADS	143,300	Netherlands	Aviation	IMF	07/2005
43	Schwan-Stabilo	4,390	Germany	Writing Material	BWI	09/2005
44	Lafarge	64,000	France	Construction Material	BWI + ICEM	09/2005
45	Arcelor	232,500	Luxembourg	Steel	IMF	09/2005 *(06/2008)*
46	Portugal Telekom	13,000	Portugal	Telecommunication	UNI	01/2006
47	PSA Peugeot Citroën	207,000	France	Automobile	IMF	03/2006 *(05/2010)*
48	Securitas	310,000	Sweden	Security Services	UNI	03/2006
49	Royal BAM Group	23,000	Netherlands	Construction	BWI	04/2006
50	Nampak	1,300	South Africa	Packaging	UNI	05/2006

	Company	*Employees*	*Country*	*Sector*	*GUF*	*Year*
51	Euradius	Bankrupt	Netherlands	Printing	UNI	08/2006
52	Staedtler	2,000	Germany	Writing Material	BWI	11/2006
53	NAG	40,000	Australia	Banking	UNI	12/2006
54	France Télecom (Orange)	161,000	France	Telecommunication	UNI	12/2006
55	VolkerWessels	14,500	Netherlands	Construction	BWI	01/2007
56	Brunel	11,000	Netherlands	Recruitment	IMF	04/2007
57	Quebecor (Quad Graphics)	43,000	Canada	Printing	UNI	05/2007
58	WAZ	16,000	Germany	Media	IFJ	07/2007
59	Umicore	14,300	Belgium	Metal/Chemicals	ICEM + IMF	09/2007
60	Inditex	128,000	Spain	Textiles/Clothing	ITGLWF + UNI	10/2007 *(10/2009) (05/2012)*
61	Vallourec	24,000	France	Steel architecture/ Automotive	IMF	04/2008
62	Italcementi	18,300	Italy	Building	BWI	06/2008
63	Danske Bank	21,500	Denmark	Banking	UNI	09/2008
64	ICOMON	80,000	Brazil	Telecommunication	UNI	10/2008
65	Ability	150,000	Brazil	Telecommunication	UNI	10/2008
66	Aker	28,000	Norway	Offshore Fishing, Constructing and Engineering	IMF	10/2008
67	Takashimaya	???	Japan	Retail	UNI	11/2008
68	CIETT (Randstad, USG, Olympia, Manpower, Kelly, Adecco)	???	Belgium	Temporary Work	UNI	11/2008
69	G4S	618,000	United Kingdom	Cleaning/Maintenance	UNI	12/2008
70	Elanders	8,300	Sweden	Printing	UNI	01/2009
71	Wilkhahn	600	Germany	Furniture	BWI	02/2009
72	Telecommuniçoes Ltda	25,000	Brazil	Telecommunication	UNI	03/2009
73	Shoprite	100	South Africa	Retail industry	UNI	02/2010
74	Media Prima Malaysia	1,920	Malaysia	Media	UNI	03/2010
75	Antara	66,400	Indonesia	Agriculture	UNI	03/2010
76	Norsk Hydro	22,000	Norway	Energy	IFM + ICEM	03/2010
77	Telkom Indonesia	25,600	Indonesia	Telecommunication	UNI	09/2010
78	Electrolux	55,000	Sweden	Metal	IMF	10/2010
79	Pfleiderer	5,300	Germany	Building Materials	BWI	10/2010
80	GDF Suez	147,400	France	Energy	BWI + ICEM + PSI	11/2010
81	Banco Do Brasil	111,500	Brazil	Banking	UNI	06/2011
82	Mann-Hummel	15,200	Germany	Automobiles	IMF	06/2011
83	ZF	72,600	Germany	Engineering	IMF	10/2011
84	Petrobas	86,100	Brazil	Oil	ICEM	11/2011
85	Mizuno	5,400	Japan	Textile	ITGLWF	11/2011

	Company	*Employees*	*Country*	*Sector*	*GUF*	*Year*
86	Sodexo	420,000	France	Food and Facility Management	IUF	12/2011
87	FCC Building	63,000	Spain	Building and Developing	BWI	02/2012
88	MAN SE	53,500	Germany	Automobile	IMF	03/2012
89	Ford	224,000	United States	Automobile	IMF	04/2012
90	Ferrovial	70,000	Spain	Constructing and Infrastructure	BWI	06/2012
91	Saab	14,000	Sweden	Automobile	IMF	06/2012
92	Siemens	343,000	Germany	Engineering	IndustriAll	07/2012
93	OHL	22,000	Spain	Building and Engineering	BWI	09/2012
94	Eurosport (groupe tf 1)	4,000	France	Media	UNI	12/2012
95	Telenor	4,200	Norway	Telecom	UNI	01/2013
96	Codere	13,800	Spain		UNI	03/2013
97	ENEL	71,000	Italy	Energy	IndustriAll + PSI	06/2013
98	Melia	38,000	Spain	Hotels	IUF	12/2013
99	Solvay	29,400	Belgium	Chemical and Plastics	IndustriAll	12/2013
100	Loomis	20,000	Sweden	Banking Management	UNI	12/2013
101	Metro		Germany	Distribution	UNI	12/2013 *(9/1999)*
102	ITAU Unibanco SA Brazil	96,000	Brazil	Banking	UNI	03/2014
103	Dragados (Grupo ACS)	130,000	Spain	Construction	BWI	10/2014
104	Acciona	34,000	Spain	Construction	BWI	10/2014
105	Sacyr (Grupo SYV)	21,000	Spain	Construction	BWI	10/2014
106	AEON	360,000	Japan	Retail	UNI	10/2014
107	Felaban		Brazil	Banking	UNI	06/2014
108	Indosat		Indonesia	Telecommunicatie	UNI	09/2014
109	Total		France	Energy	IndustriAll	1/2015
110	Gamesa		Spain	Engineering	IndustriAll	2/2015
111	Thyssen Krupp		Germany	Metal Manufacturing	IndustriAll	3/2015
112	Sociéte Géneral		France	Banking	UNI	6/2015
113	ABN-AMRO		Netherlands	Banking	UNI	9/2015
114	Hennis & Mauritz		Sweden	Retail	UNI	11/2015
115	Media Network		Qatar	Media	IFJ	12/2015

6.3.4 IFAs through time

Following the Danone contract, a period of quiet lasted until 1995, when Accor and IUF entered into a global agreement. Post-millennium, the number of IFAs grew steadily, culminating in 10 IFAs being signed in 2005. Until then, IFAs had largely been the territory of European multinational enterprises. From 2006, the importance

of non-European multinational enterprises has increased considerably. Out of all IFAs signed since then, one third are from outside Europe. In 2010, the proportion of Europe/non-Europe was fifty-fifty, and in 2011 non-European IFAs were in the majority. The year 2010 yielded 10 IFAs, but that annual number has been waning since. The last three years have averaged 7 to 8. It remains to been seen whether this trend will endure.

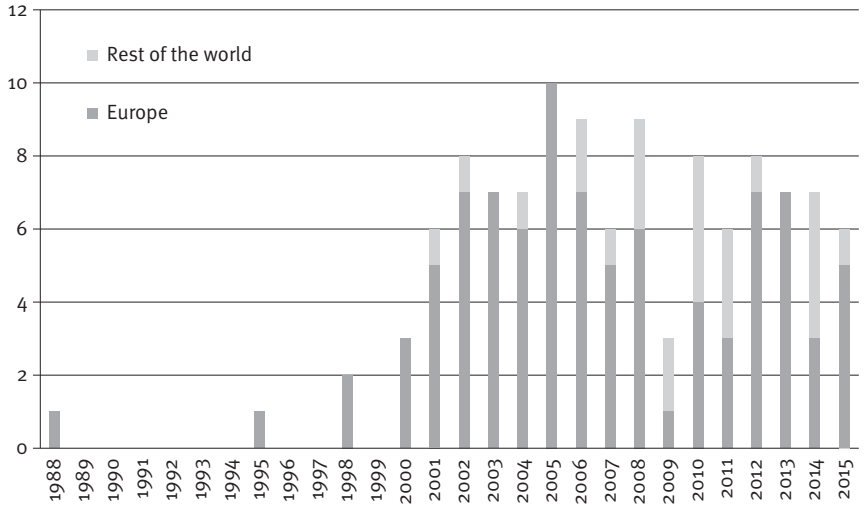


Figure 6.4 IFAs through time

With thanks to Gijs van Wezenbeek.

Upon further analysis of the substance of the IFAs it becomes clear that they entrench the ILO core conventions on freedom of association and collective bargaining, non-discrimination and child labour. These topics are included in nearly all IFAs. Much attention is likewise paid to employee protection. The IFAs regulate that wages must be living wages, and that they must be 'decent, adequate, reasonable and fair'. Also, the working hours must be reasonable. The directions regarding occupational health and safety must be observed. Moreover, appropriate living and working conditions must be created. Furthermore, training and education is awarded attention. A number of IFAs regulate that the permanent employment relationship is the starting point for (labour and employment conditions) policies.

Equally important are the provisions regarding the supply chain, through which the IFA regulations are extended to include suppliers and subcontractors. The approaches range from supplying information and encouragement to imposing obligations under penalty of breaking the commercial relationship if the supplier fails to comply with the IFA provisions.

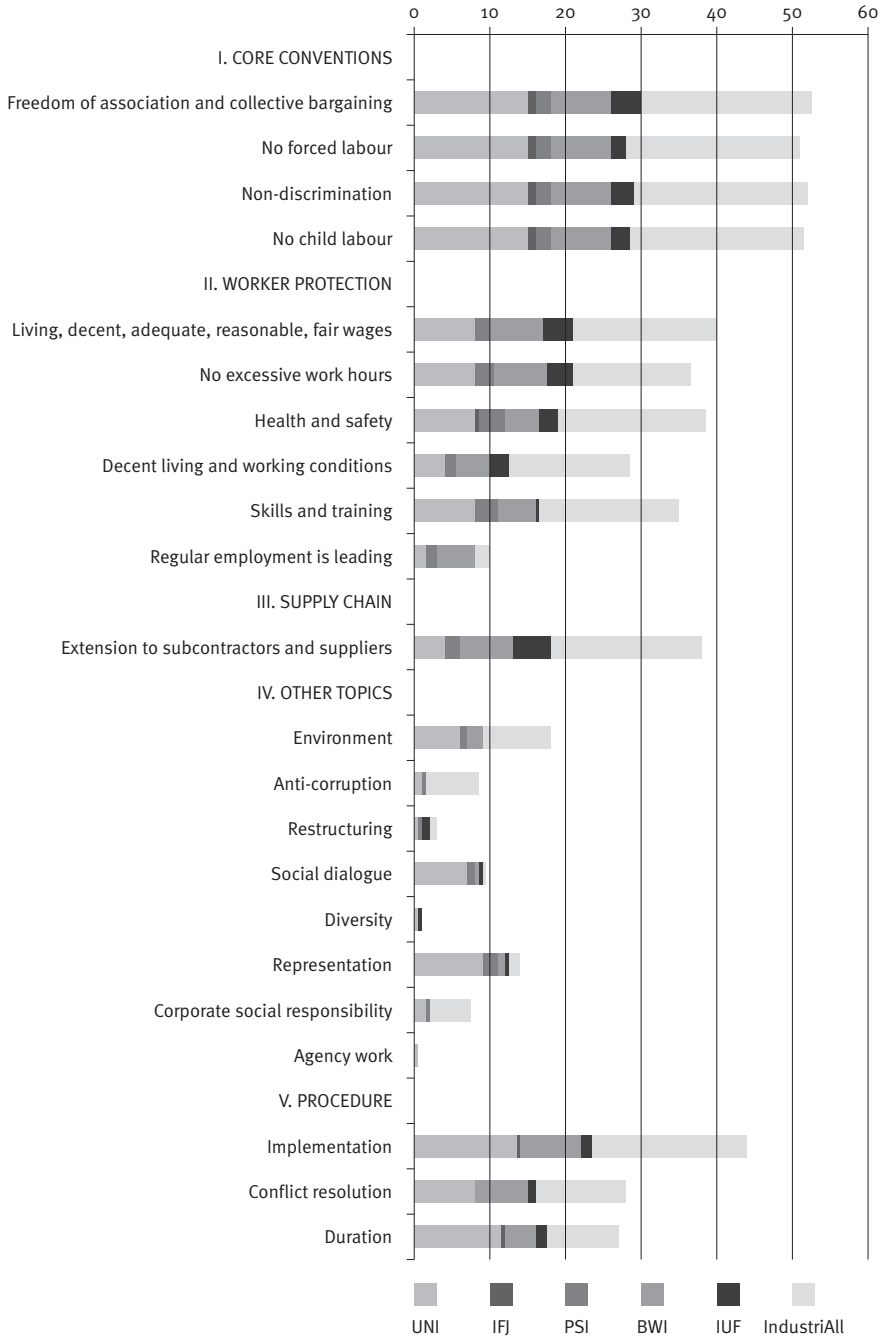


Figure 6.5 *IFAs, substance*

With thanks to Gijs van Wezenbeek.

A Eurofound[518] study shows that on the basis of the consulted IFAS nearly half the enterprises commit to informing their suppliers; 23% takes a step further by committing to taking measures (14%) or taking responsibility for the entire supply chain (9%). Nearly one third of the enterprises studied did not mention suppliers and subcontractors at all.

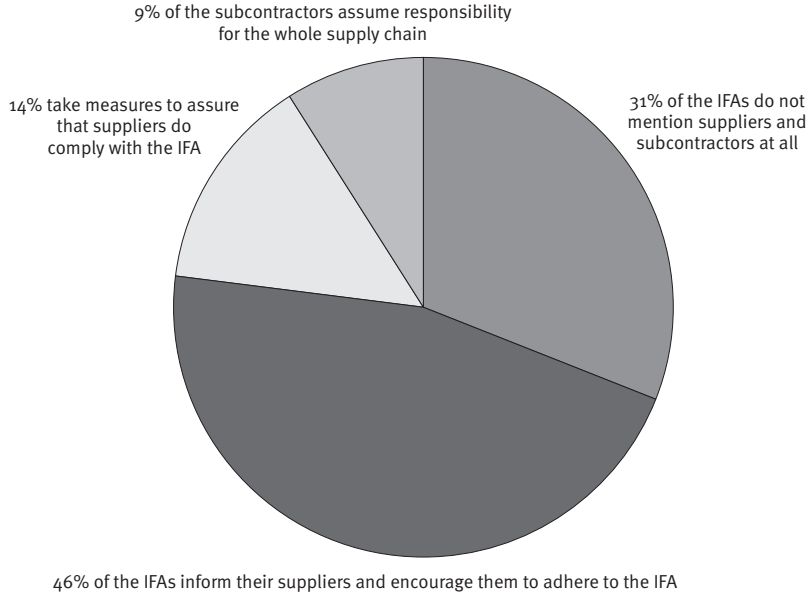


Figure 6.6 Inclusion of suppliers and subcontractors in the scope of application
Source: Telljohann et al. (2009b), p. 32.

The analysis mentioned earlier shows that special subjects can also be included in the IFA, for instance the environment, anti-corruption, restructuring, social dialogue, corporate social responsibility, and also temporary agency work.

In many IFAS, the implementation is further developed. This is often left to bipartite committees that meet periodically to discuss the course of events from the perspective of the IFA. Moreover, many IFAS include provisions on how to deal with differences of opinion on certain matters. Furthermore, the duration of the agreement comes up for discussion. Tacit renewal is quite usual, unless one of the parties involved cancels the agreement.

It becomes clear from an earlier analysis based on 80 IFAS[519] that many of them do not only refer to the ILO core conventions, but also to numerous other ILO instruments.

518 Telljohann et al. (2009b), p. 32.
519 Papadakis (2011), p. 249 ff.

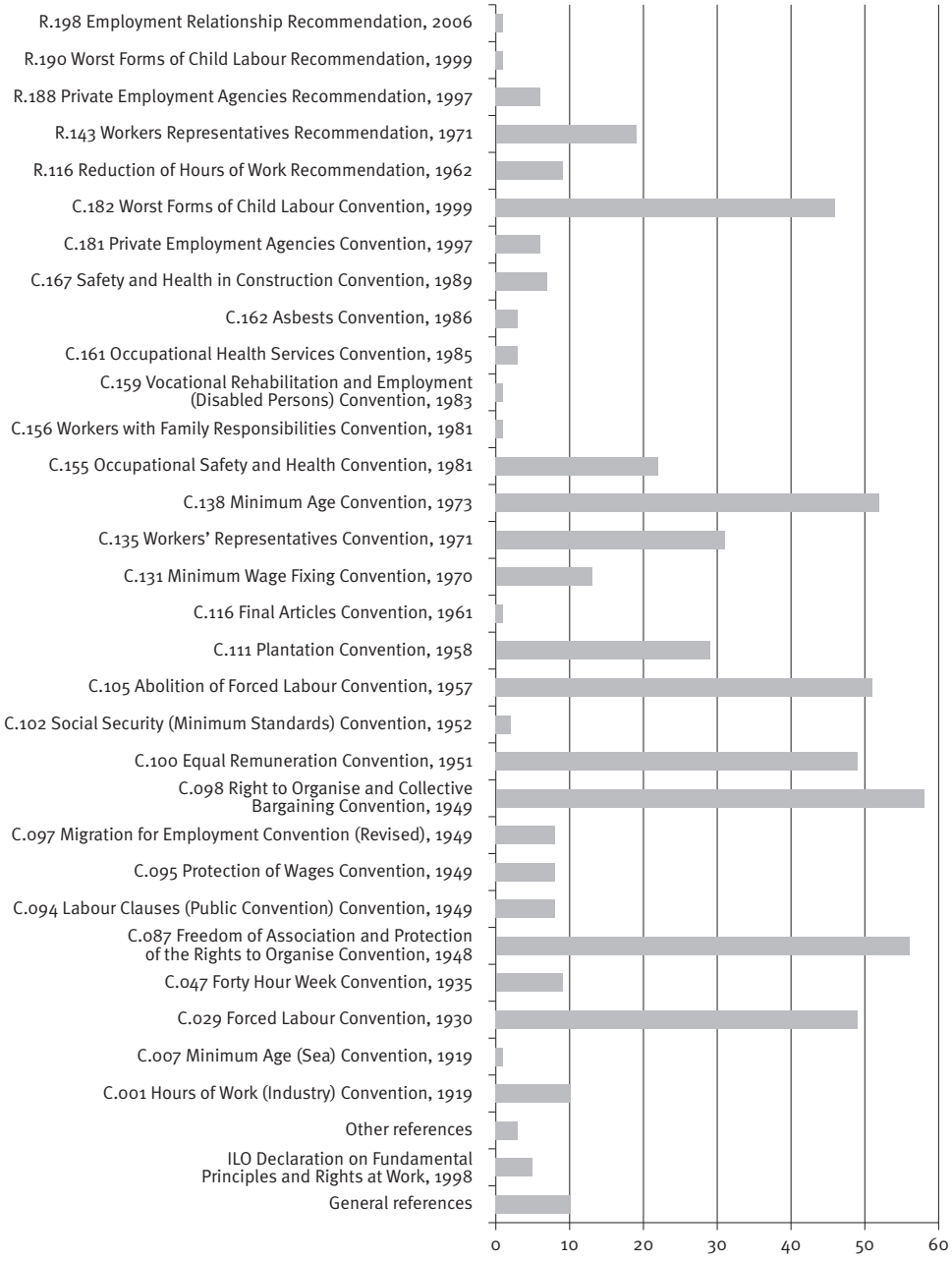


Figure 6.7 IFA references to ILO instruments

With thanks to Gijs van Wezenbeek, based on Papadakis (2011).

6.3.5 How binding are IFAs?

Blanpain and Marassi[520] argue that IFAs (and also EFAs, European Framework Agreements) usually cannot be characterised as national collective agreements. Even the involvement of national trade unions as co-signatories does not automatically mean that such an agreement is binding at a national level. According to Blanpain, IFAs clearly relate to soft law: they are not enforceable in national courts. Nevertheless, through their implementation, the agreements result in periodic consultations. Although they are not legally binding, they can actually have practical consequences.

Blanpain and Marassi only perceive a legal effect if the IFA takes the form of a national collective agreement. Their examples include implementation provisions in the IFAs of Arcelor Mittal (2008), Danone (2007) and EDF (2005–2009), which refer to local practices and legislation. They also see a legal effect if the parties commit to the IFAs. As a striking example they point out the IFA of Arcelor Mittal, which refers to the Luxembourg judge in respect of the CSR commitments that have been included.

Van Wezenbeek[521] argues that multinational enterprises generally do not want to carry any legal responsibility for an IFA. Although IFAs are often called 'agreements', any real 'contract' is out of the question. Some IFAs also explicitly preclude any collateral effect, as a result of which their employees cannot derive rights from it.

On the other hand, IFAs that have been signed by the employees' and employers' representatives do have an air of an 'agreement' about them, entailing rights and obligations. Three out of four IFAs actually use the term 'agreement', which does imply some form of binding character. This applies particularly to the dispute settlement regulations that are included in the IFAs. Moreover, the collateral effect turns out to be excluded in only very few cases.

Van Wezenbeek goes on to argue that 'since even an unilateral initiative such as a code of conduct, potentially creates a sort of contract, a signed commitment like an IFA, between two authoritative parties, can indeed have a binding effect for the signatories'. In the event, he looks on an IFA as soft law with potentially binding (moral) effects.

The International Metalworkers' Federation (IMF)[522] points out enforcement problems that may occur due to a lack of any 'global industrial relations regulatory framework'.

520 Blanpain & Marassi, (2015), p. 189 ff.
521 Van Wezenbeek (2009), p. 81 ff.
522 IMF (2006), p. 13

The IMF argues that implementation is labour-intensive and cannot always count on the support of the enterprises. It does, however, create the opportunity for organisation and network extension. What is striking in this context is the conclusion drawn from an analysis of the IFA effects in Brazil and the United States to the effect that:

> … we could show, while Kansas is still very much a reality, it is not altogether immune to the impact of globalization. Indeed the existence of a global policy tool such as an IFA, made use of proactively by informed actors at the local level, can have a dynamic and constructive influence on labour relations across a variety of instrumental and legal settings.[523]

Interesting in this context is also the Unilever case, where the IUF proved to be able, even without an IFA, to start a corporate campaign against the 'casualisation' of labour (turning permanent jobs into temporary ones), to be acknowledged in its global role by the United Kingdom thanks to a complaint lodged by the NCP (the OECD's National Contact Point), and to achieve the creation of permanent jobs at a Unilever subsidiary in Pakistan.[524]

All in all, IFAs are a new form of social dialogue that may be added to the management toolbox of our labour relationships. It only applies to small numbers (merely 108), which have limited reach in terms of workers. Still, they send a positive signal, creating:

> … an additional channel for the communication, implementation and monitoring of social human rights whilst at the same time helping to get preconditions for their impacts by promoting the international networking of trade unions and the transnationalisation of labour relations at the corporate level.[525]

6.4 IFAs AND TEMPORARY AGENCY WORK

6.4.1 The IFA for temporary agency work

One IFA applies specifically to temporary agency work. This IFA was co-signed by UNI Global Union and the Corporate Members of CIETT, i.e. Adecco, Kelly Services, Manpower Group, Olympic Flexgroup, Randstad and USG People.[526]

523 Fichter & Helfen (2011), p. 110.

524 Croucher & Cotton (2011), p. 69 ff.

525 Platzer & Rüb (2014), p. 17

526 Memorandum of Understanding between Adecco, Kelly Services, Manpower Group, Olympia Flexgroup, Randstad and USG People, CIETT corporate members, and Uni Global on temporary agency work. http://www.enidea.gr/wp-content/uploads/2011/11/MoU-UNI-CiettCMC-Final-EN.pdf.

This IFA constitutes a Memorandum of Understanding. The parties acknowledge that Convention 181 and Recommendation 188 provide a regulatory framework for temporary agency work; they commit to the core conventions that safeguard decent temporary agency work. Moreover, they state that temporary agency work contributes to the improved functioning of the labour market, fulfils the specific needs of both enterprises and jobseekers, and in that sense complements other forms of employment. They also acknowledge that further topics will need to come up for discussion.

Furthermore, the partners acknowledge that temporary agency work can contribute to:
- evening out fluctuations in the labour market;
- implementing active labour market policies by helping jobseekers re-enter the labour market, helping disadvantaged people enter into the labour market and providing more work opportunities for more people;
- facilitating transitions on the labour market for students and young workers (helping them find their first job and gain work experience);
- organising vocational training and education between assignments;
- promoting the transition of temporary agency work to fixed-term and open-ended contracts;
- improving life work balance by enabling part-time work and flexible working hours;
- combating undeclared work.

The partners advocate an adequate regulatory framework that:
- guarantees that temporary agency work does not infringe on employees' rights;
- clarifies the role of the temporary employment agency as the employer;
- provides adequate protection for temporary workers, by means of decent working and employment conditions, and offers proper conditions for temporary employment agencies in a well functioning labour market;
- ensures that the regulations regarding the use of temporary agency work are proportionate, non-discriminatory and objective and prevent such potential abuses as can be caused by undermining employment and working conditions;
- promotes quality standards in the temporary employment sector, fights unfair competition by fraudulent temporary employment agencies and commissioning clients, also combats abuses and illegal practices, and takes action against human trafficking.

According to the partners, a regulatory framework should include and promote:
- the principles as guaranteed by Convention 181 and Recommendation 188, with a particular focus on the no fee to workers rule;

- fair treatment of temporary agency workers with regard to their basic working and employment conditions, based on the principle of non-discrimination (for instance, equitable, objective and transparent principles for the calculation of wages and benefits, in accordance with national legislation and practices);
- respect for the freedom of association and bargaining as guaranteed by ILO conventions 87 and 98;
- social dialogue at national, sectoral or corporate level, using collective bargaining as an adequate means;
- banning the replacement of striking workers without prejudice to national legislation and practices;
- attention to and clarity of benefits (salary, social insurance, pension, vocational training).

At a national level, the partners want to spearhead the following actions:
- identifying and removing obstacles to the performance of temporary employment agencies and if possible, cooperating with national governments to eliminate these obstacles;
- reviewing licensing and inspection systems and, where relevant, introducing them in collaboration with national governments (including possible financial guarantees), to contribute to good industry standards, provided they are proportionate, non-discriminatory, objective and do not aim at hindering the development of temporary employment agencies;
- cooperating with national governments to provide adequate and lasting social protection for temporary agency workers, which includes providing subsistence payments in the case of unemployment;
- promoting social dialogue as a means to further develop working conditions of temporary agency workers and the conditions of use of temporary agency work.

At a global level:
- cooperating with the ILO to promote ratification of Convention 181 and Recommendation 188;
- cooperating with the ILO to promote the international instruments that fight human trafficking;
- continuously conducting research and exploring opinions and conditions in the interests of both workers and employers (regarding job creation, precarious work et cetera);
- promoting a global platform for social dialogue.

The partners commit to communicate this memorandum through their own channels. UNI and the Corporate Members agree to meet twice a year.

The Memorandum has evoked considerable criticism, particularly from the other GUFS. This has also resulted in the stalemate described in paragraph 3.3.6.

Cotton[527] argues that such a memorandum should never have involved just one GUF. Temporary agency work does not restrict itself to the work area of one GUF and therefore it cannot profess to represent all GUFS. She advocates a form of transnational private labour regulation and lists three possible developments:

- the route through an IFA involving a number of, if not all, GUFS;
- a real collective agreement with its own certification and inspection system, based on the model in the maritime sector;
- a social dialogue between CIETT and the Council of Global Unions (the cooperation of the GUFS).

Besides the Memorandum, CIETT has a Code of Conduct[528]. These rules of conduct call for respect for laws and regulations, for ethical and professional conduct, for the no fee to worker principle, transparent terms of engagement, for health and safety at work, non-discrimination, workers' rights, confidentiality, quality of service and fair competition, and (new) access to remedy.

A Quality Standards and Compliance Officer (a CIETT board member who safeguards the quality and observance of the rules) will coordinate any compliance issues regarding the Code of Conduct.

Apart from the comprehensive IFA concluded with the CIETT Corporate Members another IFA has been co-signed by the International Metalworkers' Federation (IMF, since then merged into IndustriAll) and Brunel. Through this IFA, Brunel commits to the fundamental human rights. The agreement incorporates the core conventions and includes anti-corruption provisions. Furthermore, Brunel directs attention to vocational training, remuneration, working hours, and occupational safety and health. With regard to remuneration, Brunel states that 'is committed to ensuring that remuneration is better than, or at least equal to the conditions set forth in the national legislation or collective bargaining agreements'.

6.4.2 IFAs and temporary agency work

Do other IFAS pay attention to temporary agency work, or do they contain elements that touch on temporary agency work as regulated in Convention 181? It can be established that the IFAS pay ample attention to the core conventions regarding freedom

527 Cotton (2015).

528 CIETT Code of Conduct, now the WEC Code of Conduct, on http://www.wecglobal.org/fileadmin/templates/ciett/docs/CIETT_Code_Conduct.pdf

of association and bargaining, forced labour, child labour and non-discrimination. To that extent, there is a clear overlap with Convention 181. Moreover, many IFAs include provisions in the area of wages, working hours and occupational safety and health, which also constitute overlaps. But that is as far as the IFAs will go.

However, this does not mean that the IFAs are irrelevant to temporary agency work. Through their supply chain provisions, these IFAs can clearly influence the operations of temporary employment agencies. Moreover, IFAs turn out to have labour market provisions that are relevant to temporary agency work.

6.4.3 Supply chain

It has been established above that nearly all IFAs contain provisions encouraging suppliers and (sub)contractors of these multinational enterprises to comply with all provisions of the IFA. As we saw, these IFAs have different variants. For instance, one can read with regard to the automotive sector:

> (Company) supports and encourages its suppliers to introduce and implement equivalent principles in their own companies. (Company) expects its suppliers to incorporate these principles in their own business policies as a basis for relations with (Company).

In the Statoil IFA, it says:

> This agreement covers all activities where Statoil has direct control. Where Statoil does not have direct control, it will exercise its best efforts in order to secure compliance with the standards in this agreement. Statoil will notify its subcontractors and licensees of this agreement and encourage compliance with the standards.

The Ballast Nedam IFA states:

> Ballast Nedam acknowledges that it not only bears responsibility for the conditions under which its own employees work, but also shares responsibility for the conditions under which the employees of its contractual partners do their work.
> Ballast Nedam therefore requires that its contractual partners shall support this agreement and shall also ensure that it is adhered to by any of their contractual partners who are in any way active in connection with the business activities of Ballast Nedam.

The Staedler IFA includes the following statement:

> The respect of employees' rights is an integral part of Staedler's continuing development, and Staedler will therefore aim to collaborate only with those contract partners, subcontractors and suppliers who recognise and also implement the criteria mentioned in the agreement. In this respect, Staedler will inform its contract partners about the agreement it has entered into. When entering into contracts with suppliers, Staedler will take up the appropriate clauses in the contract and will require suppliers to fill in a questionnaire regarding their own compliance with the clauses to the agreement.

Telefonica states in its IFA:

> As Telefonica considers respect for workers' rights mentioned in this agreement as an element of progress in industrial relations, the company will tell the companies that would like to provide contracts and services of the need to adhere to these principles.

Thus all IFAS, some more obligatorily than others, request the suppliers and (sub) contractors to join the IFA. These provisions also touch on temporary employment agencies. The question is, however, how this agreement develops in practice. What penalties can be applied? Ending the relationship with the supplier/contractor should be seen as a last resort and will evoke continuity questions. Still, pressure can be exerted.

The trade union movement's role can also be influential. In the Unilever case[529] above, we saw that trade unions' corporate campaigns can actually yield results. Trade unions continue to develop successful strategies.[530]

Remarkably, it looks as if the supply chain provisions completely pass over the rights that third parties may have. Temporary employment agencies as third party service providers are employers too, and as such have free negotiating rights that flow from the ILO conventions 87 and 98. Article 12 of Convention 181 contains the solution that national governments allocate the responsibilities of temporary agency work. Still, the question arises how conflicting interests must be dealt with if this provision is not applied.

529 Croucher & Cotton (2011), p. 65.
530 IndustriAll (2014). See also Ebisui (2012).

6.4.4 Labour market provisions

Various IFAS have provisions with regard to the permanent or temporary character of the employment or assignment.

In the Veidekke IFA we can read:

> Employment shall, as a main rule, be based on permanent employment. Temporary and part-time employees should as a main rule receive the same relative terms and conditions as fulltime permanent employees.

The Wilkhahn IFA states:

> Wilkhahn shall endeavour to keep temporary employment (jobs via third parties) to a minimum.

The UNITEL Telecom IFA declares:

> National employment legislation and agreement shall be respected in an attempt to create stable employment wherever possible.

The Norsk Hydro IFA includes the following provision:

> Hydro recognizes that permanent employment is preferable and will not use hired-in personnel, part-time and temporary employment to undermine wages and working conditions. Both parties acknowledge that hired-in, part-time and temporary workers are occasionally necessary, and that effective use of such allows Hydro to quickly adapt to changing conditions, thereby increasing job security and predictability and permanent employment.
> Temporary and part-time employees should receive the same training, follow-up and necessary equipment to carry out their functions in a safe manner.

The Vallourec IFA notes:

> Vallourec bases its development on (among others) a qualified permanent staff adjusted to the sustainable level of activity of the company. Through the use of appropriate short-time working management tools (use of time accounts, hiring of personnel from other Group units, short-term contracts), the Group aims to avoid large-scale staff lay-offs due to market fluctuations. This approach allows recourse to large-scale staff lay-offs to be limited to cases of structural changes.

GDF Suez IFA states:

> GDF SUEZ recognizes the importance of secure employment for both the individual and for society through a preference for permanent, open-ended and direct employment. GDF SUEZ and all subcontractors shall take full responsibility for all work being performed under the appropriate legal framework and, in particular, shall not seek to avoid obligations of the employer to dependent workers by disguising what would otherwise be an employment relationship or through the excessive use of temporary or agency labour. GDF SUEZ and all subcontractors shall respect legal and contractual obligations to all workers under labour and social security laws, regulations, and collective bargaining agreements arising from the regular employment relationship (Social Security Minimum Standards Convention C.102). GDF SUEZ and all subcontractors shall pay social security and pension contributions for their workers where such provisions exist. Companies will ensure that workers are not classified as self-employed when working under conditions of direct employment (bogus self-employment). GDF SUEZ expects its partners to apply comparable principles and regards this to be an important basis for a lasting business relationship.

The Telecom Group Portugal IFA puts forward:

> The parties hereto shall engage jointly in finding solutions that will enable to maintain permanent and stable employment.

The Sodexo IFA declares:

> IUF underlines its special concerns regarding (among others):
> – The use of casual rather than regular employees. Sodexo HR leadership and the IUF Secretariat will work cooperatively in order to examine the conditions under which they may progressively address these concerns, wilhout creating a competitive disadvantage which could hinder Sodexo's business growth or have negative consequences on employment.

The Inditex IFA states:

> External manufacturers, suppliers and their subcontractors undertake that all the employment formulas they use are part of the ordinary labour practice and applicable local laws. External manufacturers, suppliers and their subcontractors shall not impair the rights of workers acknowledged under the labour and social security laws and regulations by using schemes of: subcontracting, homeworking, training

> and apprenticeship contracts or any other like formula which prevents promotion of regular employment in the framework or regular employment relationships.

The Enel IFA observes:

> Enel, recognizing the importance of permanent and secure employment, adopts and promotes the ILO definition of 'Decent Work' as work that is productive and delivers a fair income, provides security in the workplace and social protection for workers and their families, and gives people the freedom to express their concerns to organize and to participate in decisions that affect their lives.

The Solvay IFA states:

> Solvay favors the direct employment of people under open-ended work contracts. Solvay undertakes to apply a fair wage policy comparable with good standards in the profession for the country concerned.

The MELIA IFA includes the following provision:

> IUF-UITA emphasises its major concerns as: the working and social conditions of employees, direct employment of workers rather than through subsidiary or external companies.
> The management of MELIA and the IUF-UITA International Secretariat will cooperate in order to define how to improve conditions regarding the concerns of IUF-UITA, without creating a competitive disadvantage, which could hinder business growth at MELIA or have negative consequences on employment.

Hennis & Mauritz reports:

> Obligations to employees, under labour or social security laws and regulations arising from the regular employment relationship, shall not be avoided through the use of labour-only contracting or through apprenticeship schemes where there is no real intent to impart skills or provide regular employment.
> The employers should strive for permanent employment and take steps beyond those required by law to limit the use of fixed-term contracts of employment.

These provisions give an interesting overall picture of the agreements that multinational enterprises and the GUFs have entered into with regard to employment. There is a striking preference for permanent employment, although outsourcing labour has not been declared as completely taboo. Moreover the implementation of

existing regulation is requested. Furthermore the partners appear to aim for a proper balance between maintaining permanent staff and the need to adjust to change (Norske Hydro), to prevent future dismissals (Vallourec) and adequate competition relationships (Sodexo, Melia). Furthermore, there is a desire for focusing on solutions (Telecom Group Portugal). Here too, the trade union movement can rely on successful strategies.[531] The most important attainment in this respect is the Volkswagen charter.

6.4.5 Charter on Temporary work for the Volkswagen Group

In 2012, Volkswagen and IndustriALL entered into the Charter on Temporary Work for the Volkswagen Group. It included important arrangements about deploying temporary agency workers. The partners agreed on:

- reasonable use of temporary employment or temporary agency work as a key tool to attain flexibility within the Volkswagen group;
- phasing in the 'equal pay' principle; the remuneration of temporary agency workers keeps pace with their increasing experience and qualifications in the same way as it does for permanent workers;
- there always being a connection with the range of vocational training facilities;
- the fact that, besides the use of interns and employing young graduates, temporary employment or temporary agency work is a third route to hiring permanent staff.

Temporary employment/temporary agency work gives an individual a chance to find permanent employment if his or her qualifications are adequate and if the opportunity presents itself. At the same time, temporary employment/temporary agency work is a means for Volkswagen to even out fluctuations and carry out special tasks. It is complementary to the permanent staff, which constitutes good HR policy, provided the principles that have been agreed on are being observed.

The agreement covers limiting the number of temporary agency workers, equal pay, limiting the duration of the assignment, right to permanent employment and selecting temporary employment agencies: these must endorse the Charter.

The number of temporary agency workers must be reasonably proportionate to the permanent workforce. For the proportion per subsidiary, a 5% benchmark is adhered to. The partner may agree to vary. If the proportion of temporary employment/temporary agency work increases, consultations are in order, in accordance with the arrangement in the Charter of Labour Relations that regulates consultation. The management must inform the European and Global Works Councils about the numbers.

531 Benassi (2016).

In respect of remuneration, it has been agreed that after a nine-month period, temporary agency workers are to receive the same wages as permanent employees working at the same level. After two years, a temporary agency worker is likewise entitled to the variable remuneration, which is comparable to what the permanent employee would be paid by that time. Working hours for temporary agency workers are the same as those in the employee's plant. The temporary agency worker is entitled to the same working conditions as the permanent employee has, in the sense that he or she has equal occupational and health rights, together with, as a rule, access to the common facilities, services and other provisions.

The protection of a temporary agency worker covers a maximum of three contracts with a 36-month limit. If a temporary agency worker has reached this limit, the possibility of permanent employment is looked into. There is also a minimum assignment of 6 months. As a rule, each extension should cover 6 months. After 18 months, a temporary agency worker is entitled to be eligible for permanent employment at Volkswagen, provided he or she meets the qualification requirements.

Only temporary employment agencies that endorse the 'Volkswagen Group requirements regarding sustainability in its relationships with business partners' can be accepted as service providers.

In case of differences of opinion regarding the interpretation of the Charter, the president and general secretary of the European and/or Global Works Council must seek a solution together with the international HR director.

All in all, the Volkswagen package is the most far-reaching IFA in this field. It makes clear what global social dialogue can achieve.

The charter also raises the question as to how to deal with the negotiating rights of temporary agency workers, which have been safeguarded for them by ILO conventions 87 and 98. In 2013, new collective agreements were concluded in Germany[532] between the temporary employment federations IGZ (Interessenverband Zeitarbeit) and Bundesarbeitgeberverband der Personaldienstleister (BAP) on the one hand and a number of Deutscher Gewerkschafts Bund (DGB) unions on the other. The agreements included salary supplements that may rise from 15% after 6 weeks' work to 50% after 9 months.[533] It may be clear that conflicting interests can play a role. Who is the employer, Volkswagen or the temporary employment agency? At any rate, the possibility of conflicting regulations requires room for consultation between the parties involved, including opportunities for synchronising the regulations.

532 Tarifverträge Zeitarbeit, BAP/DGB-Tarifgemeinschaft, vom 22-7-2003, geändert durch Änderungstarifverträge vom 22-12-2004, 30-5-2006, 9-3-2010, 17-9-2013, ergänzt durch Ergänzungstarifverträge über Branchenzuschläge www.tuja.de, p. 29.

533 Sperman (2013).

Table 6.8 Example of collective agreement provision re time-based salary supplements[534]

Branchenzuschläge ME West ab 01.01.2014

Entgelt-gruppe	*DGB-Tarif-vertrag*	*nach 6 Wochen*	*nach 3 Monaten*	*nach 5 Monaten*	*nach 7 Monaten*	*nach 9 Monaten*
Zuschlag		*15%*	*20%*	*30%*	*45%*	*50%*
E1	8,50	9,78	10,20	11,05	12,33	12,75
E2	9,07	10,43	10,88	11,79	13,15	13,61
E3	10,61	12,20	12,73	13,79	15,38	15,92
E4	11,22	12,90	13,46	14,59	16,27	16,83
E5	12,67	14,57	15,20	16,47	18,37	19,01
E6	14,25	16,39	17,10	18,53	20,66	21,38
E7	16,64	19,14	19,97	21,63	24,13	24,96
E8	17,90	20,59	21,48	23,27	25,96	26,85
E9	18,89	21,72	22,67	24,56	27,39	28,34

Branchenzuschläge ME Ost ab 01.01.2014

Entgelt-gruppe	*DGB-Tarif-vertrag*	*nach 6 Wochen*	*nach 3 Monaten*	*nach 5 Monaten*	*nach 7 Monaten*	*nach 9 Monaten*
Zuschlag		*15%*	*20%*	*30%*	*45%*	*50%*
E1	7,86	9,04	9,43	10,22	11,40	11,79
E2	8,01	9,21	9,61	10,41	11,61	12,02
E3	9,36	10,76	11,23	12,17	13,57	14,04
E4	9,90	11,39	11,88	12,87	14,36	14,85
E5	11,19	12,87	13,43	14,55	16,23	16,79
E6	12,58	14,47	15,10	16,35	18,24	18,87
E7	14,68	16,88	17,62	19,08	21,29	22,02
E8	15,79	18,16	18,95	20,53	22,90	23,69
E9	16,67	19,17	20,00	21,67	24,17	25,01

It becomes clear that the formation of social law takes place through various channels. The IFA can be seen as a new instrument that may be added to the toolbox containing instruments to give form and substance to this jurisprudence. What also becomes clear is that the IFA instrument cannot replace Convention 181. While corporate CIETT members refer to the convention and the corresponding Recommendation 188, inclusion of these can hardly supplant the convention. It is supportive and supplementary.

534 Tarifverträge Zeitarbeit, BAP/DGB-Tarifgemeinschaft, vom 22-7-2003, geändert durch Änderungstarifverträge vom 22-12-2004, 30-5-2006, 9-3-2010, 17-9-2013, ergänzt durch Ergänzungstarifverträge über Branchenzuschläge www.tuja.de, p. 29.

This also applies to the supply chain and employment provisions. The IFAS can play a flanking role tackling bottlenecks with regard to temporary agency work, such as employment insecurity, unequal pay, weak trade union positions and excessive use of temporary agency work. The supply chain provisions can direct attention to decent wages and other labour and employment conditions.

Labour market provisions can prioritise permanent employment and encourage reasoned choices in decisions on the use of temporary agency work. Moreover, standards can be set in instances where excessive use is made of temporary agency work.

IFAS grant trade unions a prominent position in the ongoing globalisation. The Volkswagen Charter may be seen as a promising prospect towards mature temporary agency relationships.

Nevertheless, serving the justified interests of temporary agency employers continues to be important. Scope for consultation between all parties involved in temporary agency work and opportunities for further synchronisation must be guaranteed.

All in all, the IFAS do not replace Convention 181; they are supplementary, providing scope for additional measures. Convention 181 continues to be an adequate instrument in its own right.

CHAPTER 7

The European approach to temporary agency work

This last section of part II examines the developments that have by now come up in Europe with respect to temporary agency work. Firstly, a picture will be drawn of what Europe now signifies from a social perspective. This social picture is important to be able to understand why the EU has eventually embraced the topic of temporary agency work. It will become clear why the EU, which was established as the EEC, i.e. the European *Economic Community*, has increasingly taken up social issues.

The first treaties were mainly about safeguarding the so-called four freedoms, i.e. the free movement of persons, goods, services and capital. We shall see, however, that to an increasing extent the social dimension – both in a procedural and a substantive sense – also demands attention and is entrenched in EU regulations. The jurisprudence by the European Court likewise puts in efforts. More and more, these pivot around the question as to how the freedom of movement of persons and services relate to the social aspect.

The social dimension culminated in the Treaties of Maastricht (1992), where a social protocol was drawn up, which was eventually entrenched in the Treaty of Amsterdam (1997). Lisbon, and its Charter of Fundamental Rights, should likewise be mentioned in this context.

Freedom of movement of persons and services also involves temporary agency work, and it is in this specific field where people are employed and services are provided. As such, regulations on temporary agency work are rooted in the core of European economic and social regulations. Hence the significance of examining the EU's social dimension first. Largely parallel to this social law development at EU level, temporary agency regulations have developed, and these will be discussed extensively below.

Particular attention warrants the Posting of Workers Directive, the Enforcement Directive and the social dialogue on temporary agency work. After the latter failed, a protracted discussion ensued on a directive regarding temporary agency work, which was eventually realised in 2008. It will also become clear that Europe attaches great

importance to the concept of flexicurity and that the social partners in the temporary agency sector are committed to positioning temporary agency work as a flexicurity concept.

Lastly, elements in Convention 181 will be compared to the European regulatory framework on temporary employment agencies. The pivotal question in all this is how adequate Convention 181 (still) is. Has the development of European temporary agency regulations overtaken Convention 181 and is it is now partly superfluous from a European perspective, or does this convention still have added value for Europe?

7.1 SOCIAL EUROPE

7.1.1 How it started: Treaty of Paris

The history of the European union started in the 1950s. France and Germany drove the development towards the Treaty of Paris, on which occasion the European Coal and Steel Community (ECSC) was founded, and towards the two treaties signed in Rome, establishing Euratom and the European *Economic Community*.[535]

The dream of a United States of Europe had existed for much longer. During the Franco-German war (1870–1871) Victor Hugo addressed the Assemblée Nationale on 1 March 1871, declaiming: 'No more frontiers! The Rhine for everyone! Let us be the same Republic, let us be the United States of Europe, let us be the continental federation, let us be European liberty, let us be universal peace'.[536]

The war of 1870–1871 and the First and Second World Wars engendered barbarities that focused attention on the desire to have 'no more war, ever'. It pushed the perpetual strife and rivalry between Germany and France to the background.

On 19 September 1946, Churchill, Prime Minister of the United Kingdom from 1940 to 1945 and from 1951 to 1955, delivered a speech in Zurich, in which he stated:

> I wish to speak to you today about the tragedy of Europe. This noble continent (...) is the fountain of Christian faith and Christian ethics. It is the origin of most of the culture, arts, philosophy and science both of ancient and modern times (...) Yet it is from Europe that have sprung that series of frightful nationalistic quarrels, originated by the Teutonic nations, which we have seen even in this twentieth century and in our own lifetime, wreck the peace and mar the prospects of all mankind (...) Yet all the while there is a remedy which, if it were generally and spontaneously adopted, would as if by a miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and as happy as Switzerland

535 Buitenweg et al. (2014), p. 73.
536 Gardner (2016), p. 247.

> is today. What is this sovereign remedy? It is to recreate the European Family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe.[537]

The Schuman Declaration, dated 9 May 1950,[538] stated that 'the contribution which an organized and living Europe can bring to civilisation is indispensable to the maintenance of peaceful relations'; and that 'Europe will not be made at once, or according to a single plan'.

By signing the Treaty of Paris on 18 April 1951, France, Germany, Italy, Belgium, the Netherlands and Luxembourg pledged themselves to the European Coal and Steel Community (ECSC), which served as the model for the later European Union. They transferred part of their sovereignty to a supranational power that was to govern the coal and steel market as the so-called High Authority.[539]

The social dimension had not been explicitly included in the Paris Treaty. However, the common market for coal and steel was to have positive effects. Article 2 of the treaty provides that the common market is to contribute to economic expansion, the development of employment and the improvement of the standard of living.[540]

7.1.2 Wat came next: Treaty of Rome

In the years following the Treaty of Paris, attempts were made to realise a European political community and a European defence community.[541] The latter plan was eventually thwarted owing to French resistance. Thus, the idea of a comprehensive federation was let go.[542] A so-called Benelux memorandum constituted a joint proposal by the Ministers of Foreign Affairs Beyen (the Netherlands), Spaak (Belgium) and Bech (Luxembourg). The proposal can be seen as a concerted re-launch to achieve more European cooperation.[543] On 25 March 1957, in Rome, the Benelux countries – Belgium, the Netherlands and Luxembourg –, together with Germany, France and Italy signed the treaties for the European Economic Community and Euratom.[544]

Euratom was tasked with encouraging the peaceful application of nuclear energy, which was intended to become an alternative for traditional sources of energy.

537 The full text of the speech can be found on www.churchill-society-london.org.uk/astonish.html.
538 Hendrickx (2011), p. 9.
539 Buitenweg et al. (2014), p. 76.
540 Buitenweg et al. (2014), p. 83.
541 Verhofstadt (2015), p. 24.
542 Buitenweg et al. (2014), p. 81.
543 Buitenweg et al. (2014), p. 87.
544 Buitenweg et al. (2014), p. 87.

The EEC treaty implied agreements with respect to the establishment of a customs union, agreements in the field of transport and competition, and agreements regarding the development of a joint agricultural policy.[545]

Economic collaboration was both an aim and a means to realise closer relations between the states united in the Community (art. 2) and guarantees for peace and security (preamble).[546]

The social dimension plays a minor role in the treaty. Only two articles are dedicated to social measures: article 3 c) eliminates obstacles to the freedom of movement of persons, services and capital, and article 3 i) relates to the establishment of the European Social Fund (ESF) in order to improve employment opportunities for workers and to contribute to raising their standard of living.[547] In the further development of the free movement of workers, articles 48–51 provide that the special Council of Ministers can take measures unanimously in the field of social security in order to prevent migrants losing their social security rights when moving to another member state.[548]

Part III, title III of the treaty, titled 'Social Policy', contains the further elaboration of the EEC's social agenda.[549]

Article 117 formulates the justification for social measures, stating:

> Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.[550]

Article 100 authorises the Commission to make proposals to the Special Council of Ministers to issue directives for the closer harmonisation of such provisions laid down by law, regulations or administrative action in member states as directly affect the establishment or functioning of the common market.[551]

545 Buitenweg et al. (2014), p. 88.
546 Buitenweg et al. (2014), p. 88.
547 Buitenweg et al. (2014), p. 102.
548 Buitenweg et al. (2014), p. 102.
549 Buitenweg et al. (2014), p. 103.
550 The full text of the Treaty of Rome can be found on https://www.cvce.eu/content/publication/1999/1/1/cca6ba28-0bf3-4ce6-8a76-6b0b3252696e/publishable_en.pdf.
551 https://www.cvce.eu/content/publication/1999/1/1/cca6ba28-0bf3-4ce6-8a76-6b0b3252696e/publishable_en.pdf, p. 37.

The articles make clear that social development is a by-product of economic development.[552] Article 118 elaborates on article 117, providing that the member states need to work more closely together in matters relating to occupational and continuance training, employment, industrial hygiene, labour legislation and working conditions, protection against occupational accidents and diseases, the law as to trade unions and collective bargaining between employers and workers.[553]

The largest social impact has been attributed to article 119 of the EEC Treaty. It deals with equal pay for equal work and has shaped equal treatment through the jurisprudence of the European Court, for instance in the Defrenne judgments.[554]

Moreover, the jurisdiction of the European Court regarding the human rights constitutes an important contribution to the creation of social law by respecting human rights duties as 'general principles of law'. In 1975, the Court first referred to the ECHR, the European Charter of Human Rights, and in 1978, it also referred to the ESC, the European Social Charter.[555]

7.1.3 The 1970s and 1980s

On 8 April 1965, the treaties of Rome were integrated in a single treaty that became effective on 1 July 1967.[556]

By the end of the 1960s, people worried about the poorly functioning economy, which caused exchange rate turbulence. Eventually it resulted in the establishment of the European Monetary System (EMS), in which the member states were obligated to limit currency fluctuations.[557] The goal laid down in the Single European Act was an economic and monetary union. At the 1972 Paris Summit, the government leaders argued that this could not be achieved without social policy. More coordination in the field of employment opportunities and conditions of employment was needed. In 1974 this resulted in the first Social Action Programme, which was to mobilise the Community in the field of full and better employment opportunities, the improvement of working and living conditions and the enhancement of social partners' involvement in the economic policy process.[558]

552 Buitenweg et al. (2014), p. 104.
553 https://www.cvce.eu/content/publication/1999/1/1/cca6ba28-0bf3-4ce6-8a76-6b0b3252696e/publishable_en.pdf, p. 43.
554 Buitenweg et al. (2014), p. 105.
555 Buitenweg et al. (2014), p. 109.
556 Buitenweg et al. (2014), p. 111.
557 Buitenweg et al. (2014), p. 112.
558 Buitenweg et al. (2014), p. 113.

Whereas the Treaty of Rome still referred to promoting employment, this programme was all about concrete objectives. Although many proposals were submitted, only a few were agreed upon, for instance: the directives for equal treatment of men and women and the directives regarding the protection of workers' rights upon the transfer of an enterprise and in case of mass redundancy.[559]

This action was based on article 119, which had already been included in the Treaty of Rome in 1957. While this article had been formulated for economic reasons, it was now being used to fulfil social and emancipatory objectives.[560]

A plan by the Dutch European Commissioner Vredeling, tasked with social affairs and employment, to create a form of pan-European employee participation fell through, mostly as a result of British resistance.[561] Based on the amendments to the Treaty of Maastricht, a less far-reaching form was eventually adopted. Thus, it could no longer be torpedoed by the United Kingdom.[562]

In the slipstream of the Social Action Programmes, non-binding programmes were set up, such as plans to give specific target groups, including young and poor people, better opportunities in the labour market. The Social Action Programme (1974–1976) can be seen 'as part of the pursuit of a more interventionist social policy than had been foreseen by the EEC Treaty, a pursuit that was thrown overboard in the early 1980s'.[563]

At that time, a political wind of deregulation and flexibility got up in response to the protracted economic crisis. There was no more agreement on directives, except in the field of occupational safety. Guidelines were drawn up for protection against excessive noise, against the hazards of being exposed to chemical, physical and biological agents at work, and against asbestosis. Reaching unanimous agreement was not a problem in this field, not even for the British, who already had relevant regulations of their own.[564]

The French President Mitterand was dissatisfied with this halting attitude towards shaping social policy. In 1981, he opted for an 'espace social'. He enlisted the support of his fellow-countryman Jacques Delors, who became the chairman of the European Commission in 1985.[565] However, Delors did not manage to have the social dimension evolve in line with the economic one. That same year, his commission published the white paper *Completing the internal market* comprising three hundred

559 Buitenweg et al. (2014), p. 114.
560 Buitenweg et al. (2014), p. 115.
561 Buitenweg et al. (2014), p. 116.
562 Buitenweg et al. (2014), p. 116.
563 Buitenweg et al. (2014), p. 116.
564 Buitenweg et al. (2014), p. 117.
565 Buitenweg et al. (2014), p. 117.

largely economically driven measures.[566] Still, Delors was convinced that something had to happen in the social domain:

> The creation of a vast economic area, based on the market and business cooperation is inconceivable – I would say unattainable – without some harmonisation of social legislation. Our ultimate aim must be the creation of a European social area.[567]

The white paper led to the 1986 Single European Act for which treaties were signed on 27 and 28 February in Luxembourg and The Hague respectively.[568] These were not merely agreements on the internal market, but also included amendments to the texts of treaties, new objectives and codification of jurisprudence. The preamble refers to the ECHR and the ESC, stating that the member states wish to express the determination to:

> ... work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.[569]

Besides this preamble, a number of new treaty articles reinforced the social dimension. Occupational health and safety were designated as social objectives, and article 118 of the EEC Treaty, which tasks the Commission with promoting 'close cooperation in the social field' was supplemented with article 118A stating: 'the Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area'[570]

Delors also wanted member states to converge more. He aimed at organising coherence between rich and poor regions.[571] By way of cushioning the differences, he set out to shape an 'espace social'. It was necessary to prevent rich countries from benefitting from the internal market more than the poorer ones. To that end, article 130 was adopted, stating: 'In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of

566 Buitenweg et al. (2014), p. 118.
567 Buitenweg et al. (2014), p. 118.
568 Buitenweg et al. (2014), p. 119.
569 The full text of the Single European Act can be found on http://eur-lex.europa.eu/resource.html?uri=cellar:a519205f-924a-4978-96a2-b9af8a598b85.0004.02/DOC_1&format=PDF.
570 Buitenweg et al. (2014), p. 120.
571 Buitenweg et al. (2014), p. 118.

its economic and social cohesion'.[572] This resulted in Community support to less-favoured areas, but not to binding social policies.

Moreover, the Single European Act resulted in article 100A, which gave the Council the opportunity to act by a qualified majority rather than by the unanimity that had applied until then.[573] This concerned measures that had as their object the establishment and functioning of the internal market. Moreover, the veto right was abolished in fields related to the internal market, for instance measures concerning the free movement of workers (article 49), the freedom of establishment (art. 54 and 56), the recognition of qualifications (art. 57) and with regard to the ban on discrimination (art. 7).[574]

This vested the European Parliament with more power. Cooperation was the name of the game. If the European Commission endorses an amendment adopted by the European Parliament, the Council can only torpedo it by unanimity.[575] Furthermore, it can act by qualified majority to lay down directives aimed at improving the environment.[576]

Delors also wanted to create more scope for social partners at European level. Some form of social dialogue already existed, but by means of the Single European Act, Delors gave it new impetus in article 118B: 'The Commission shall endeavour to develop the dialogue between management and labour at European level, which could, if the two sides consider it desirable, lead to relations based on agreement'. This dialogue has resulted in several collective binding agreements in the fields of parental leave, part-time work, fixed-term contracts, teleworking and stress.[577]

By the end of the 1980s, the pressure to enhance European cooperation from a social perspective increased. A poor economic situation and the entry of Greece (1981), Spain and Portugal (1986) underscored the differences in living standards. At the 1988 Euro Summit in Rhodes, the government leaders stated that the 'completion of the internal market must be accompanied by progress in implementing its provisions on social policy, and by the strengthening of economic and social cohesion'.[578] By that time, listing workers' fundamental rights was considered. An alternative proposal meant signing the European Social Charter, but in the end, a working group for the Commission decided to draft a catalogue of fundamental social rights. This Community Charter of the Fundamental Social Rights of Workers was adopted without

572 Buitenweg et al. (2014), p. 120.
573 Buitenweg et al. (2014), p. 121.
574 Buitenweg et al. (2014), p. 121.
575 Buitenweg et al. (2014), p. 121.
576 Buitenweg et al. (2014), p. 122.
577 Buitenweg et al. (2014), p. 122.
578 Buitenweg et al. (2014), p. 123.

the support of the British. The preamble provides that the same importance must be attached to the Community's social aspects as to its economic aspects. The Community Charter is not legally binding, and constitutes no more than a solemn statement, although the Court does refer to it in its jurisprudence.[579]

7.1.4 From Maastricht to Amsterdam

On 7 February 1992, the Maastricht Treaty was realised, the Treaty on European Union (TEU). Following ratification by all national parliaments, it became effective on 1 November 1993.[580]

In 1989, the Berlin Wall had come down. There was fear of a strong unified Germany, and Kohl, then Chancellor of Germany, was willing to enter into a monetary union.[581] 'Maastricht' meant a common currency, focus on a form of citizenship in a European context, agreements regarding justice and internal affairs, and a common foreign and security policy. In the social domain, the so-called social protocol was realised, in which the eleven member states of the Union, without the British, committed to agreements that would apply to them only.[582] This protocol was linked to the social agreement in which the new provisions for the eleven countries in question were laid down.

Together with the Maastricht Treaty, a so-called co-decision procedure was implemented, which made the European Parliament and the European Council equal partners, who had to agree through negotiations before adopting a directive.[583]

This procedure usually requires attaining a full or qualified majority in both institutions. A proposal is rejected if one of them does not agree. It is one of the four main forms of decision-making where the European Parliament does not have the last word. The other three forms are the consultation procedure, the assent procedure and the cooperation procedure of the Single European Act.[584] Through the negotiation procedure, the Commission has the authority to introduce amendments that the Council can adopt by qualified majority, or by unanimity if it wants to impose changes.

Whereas human rights were included in the 1986 Single European Act through reference in the preamble to the ECHR, the European Charter of Human Rights, and the ESC, the European Social Charter, in 'Maastricht' the reference to the ESC

579 Buitenweg et al. (2014), p. 123.
580 Buitenweg et al. (2014), p. 128.
581 Buitenweg et al. (2014), p. 128.
582 Buitenweg et al. (2014), p. 130.
583 Buitenweg et al. (2014), p. 131.
584 Buitenweg et al. (2014), p. 133.

disappeared and the reference to the ECHR was enhanced.[585] Apart from a reference in the preamble, the introductory article F, par. 2 stated: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms (...) and as they result from the constitutional traditions common to the member states, as general principles of Community law'.[586] For that matter, the Union can only apply this respect in the areas where the EU is competent.

Although the British steered clear of the aforementioned protocol, they did commit to article 2 of the new Treaty on European Union that states:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.[587]

All in all, it meant an enhancement of the social objectives. Furthermore, it meant a broadening of scope as the by now well-known articles 117–222 were supplemented with topics such as education (art. 126), vocational training (art. 127) and youth.[588]

The social agreement linked to the social protocol that was concluded by the eleven member states posits in article 1:

> The Community and the Member States shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, particularly in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.[589]

585 Buitenweg et al. (2014), p. 133.
586 Buitenweg et al. (2014), p. 134.
587 Buitenweg et al. (2014), p. 137.
588 Buitenweg et al. (2014), p. 138 and 139.
589 Buitenweg et al. (2014), p. 142.

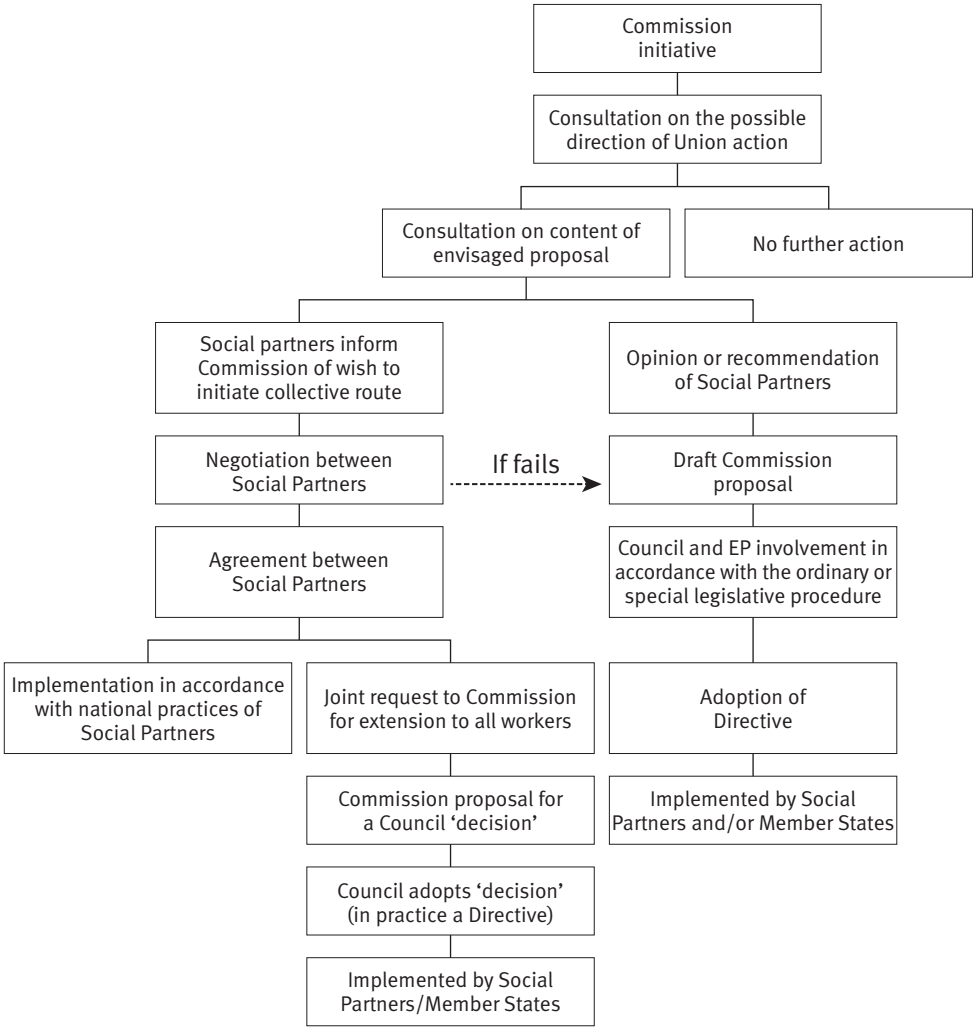


Figure 7.1 The Legislative Process Barnard (2012)/COM(93) 600, 43 with updates

According to article 2, the EC will support and complement the activities of the member states in the fields of occupational health and safety, labour and employment conditions, equality between men and women with regard to labour market opportunities and treatment at work, the information and consultation of workers, and the integration of persons who have been excluded from the labour market.[590]

590 Buitenweg et al. (2014), p. 142.

Directives can be drawn up, containing minimum requirements in line with the co-operation procedure, i.e. without veto rights, except for amendments by the European Parliament that are endorsed by the Commission.[591]

According to article 2, par. 3, social security and the social protection of workers, protection of workers where their employment contract is terminated, co-determination and financial contributions for the promotion of employment and job creation are exempted from majority voting.[592]

Article 2, par. 4, provides that, at the request of the social partners, the member states can task them with the implementation of the directives.[593]

Article 2, par. 6, measures in respect of the right of association, the right to strike or the employers' right to impose lock-out are completely exempted.[594]

Article 3 obligates the Commission to consult with social partners on the 'possible direction' of Community action. The social partners can choose to develop an agreement of their own, and in principle, the duration of this procedure must not exceed nine months.

Article 4 enables the conversion of such an agreement into a Council decision. It has been arranged that agreements by social partners are not legally binding in the member states without a Council decision.

In 1993, in the Green Paper *European Social Policy,*[595] the European Commission cautioned about the danger of social dumping. It also drew attention to the question as to how labour law could be reconciled with the economic objectives. The Green Paper stated that 'this process will be taking place at a moment when the attention of the community is focused on the whole issue of how to reconcile economic and social objectives in the face of rising unemployment and growing concern about Europe's ability to remain competitive into the 21st century'.

It discussed 'labour market adaptability',[596] anticipating the concept of flexicurity, which will be expounded below. The discussion was also related 'to the problems which all Member States are having in funding the growing demand on social protection systems and the search for greater efficiency in the operations of these as one means of making savings'.[597]

591 Buitenweg et al. (2014), p. 143.
592 Buitenweg et al. (2014), p. 143.
593 Buitenweg et al. (2014), p. 143.
594 Buitenweg et al. (2014), p. 143.
595 EC Commission (1993).
596 Hendrickx (2011), p. 24 and 25.
597 Hendrickx (2011), p. 25.

It was proposed to introduce minimum standards, but the eventual White Paper, titled *Growth, competitiveness, employment*[598] did not contain any. Instead, social dumping was to be prevented through co-optation, coordination and convergence.[599] The White Paper on *European Social Policy*[600] did not develop the discussion. At the Essen Summit (December 1994), member states agreed to make arrangements for improving employment through 'increasing the employment-intensiveness of growth, in particular by more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition'.[601]

In this context, the Commission took the initiative to make arrangements under the 'Maastricht' protocol in the field of fixed-term contracts,[602] part-time work and temporary agency work.

Moreover the Essen Summit saw the formulation of concrete objectives, which the member states were to translate into multi-annual programming. Non-compliance with these objectives was not subject to sanctions.[603]

On 2 October 1997, the Amsterdam Treaty was signed, and following ratifications by the member states it reached completion on 1 May 1999.[604] The most important aspect of the Amsterdam Treaty has been its inclusion of the social agreement. In the United Kingdom, Tony Blair had become prime minister, and he was willing to put an end to the social schism that had arisen as a result of Maastricht. The old articles 117–120 of the EC Treaty were replaced by articles 136–143. Article 136 (ex art. 117) formulates the objective and integrates article 1 of the social protocol. It states:

> The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

598 European Commission (1994).
599 Buitenweg et al. (2014), p. 145.
600 Commission of the European Communities (1994).
601 Hendrickx (2011), p. 27.
602 Hendrickx (2011), p. 27.
603 Buitenweg et al. (2014), p. 146.
604 Buitenweg et al. (2014), p. 147.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.[605]

This article is seen as a major milestone, under which all EC member states committed to a broadly formulated social policy.[606]

Moreover, 'Amsterdam' constitutes the basis for a European employment policy. The treaty speaks of 'a high level of employment and social protection' as part of the EU's new task (art. 12). This entails the task of developing a coordinated strategy for employment (art. 3).[607] On 24 January 2000, the Council decided to establish an Employment Committee.[608] The Council noted that the Amsterdam Treaty only lays down the procedures, 'by which Member States and the Community shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change'.[609]

And thus, the so-called Open Method of Coordination (OMC) was born, a method whereby member states make efforts to develop their employment policy according to guidelines set by the Commission.[610] The added value lies in the inherent peer pressure.[611]

7.1.5 From Lisbon and back again via Nice

In 2000 (six months prior to the Nice Summit), when optimism soared due to the favourable economic development by the turn of the century, the European Council took the initiative to the creation of the so-called Lisbon Strategy. Its aim was to become 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.[612]

605 Buitenweg et al. (2014), p. 156.
606 Buitenweg et al. (2014), p. 156.
607 Buitenweg et al. (2014), p. 161.
608 Buitenweg et al. (2014), p. 162.
609 Buitenweg et al. (2014), p. 162.
610 Ter Haar (2012).
611 Buitenweg et al. (2014), p. 162.
612 Buitenweg et al. (2014), p. 174.

Later on, 'sustainable development' was added, so that the Lisbon Strategy had three objectives, i.e. economic policy, social policy and environmental policy.[613] The European Council appointed itself coordinator.

According to the objectives, member states should aim for an average economic growth increase by 3 per cent, rising employment rates from 61 to approximately 70 per cent and increasing the participation of female workers from 51 per cent to over 60 per cent. In this context, the European Council stated: 'Human capital is Europe's most important asset and should be at the heart of EU policy.[614] Rather than for legislation to realise the objectives, the Council opted for the above-mentioned OMC, the Open Method of Coordination. Through this type of 'gentle' pressure it attempted to realise policy coordination, accompanied by a learning process among member states through reports and exchanges of best practices.[615] Some years after the Lisbon Strategy was launched, it reached an impasse and the focus shifted back to the primacy of economic growth. A High Level Group chaired by Wim Kok advised that realising economic growth and reinforcing Europe's competitiveness are core requirements for the success of the Lisbon Strategy and that, thus, the social and environmental dimensions are once again dependent factors. This way of thinking is also at the core of the 2020 Strategy, adopted in March 2010, which prioritised growth, although it had to be 'smart, sustainable and inclusive'. The EU set five headline targets for 2020:

1. Employment: 75 per cent of the 20–64 year-olds to be employed.
2. Research, development and innovation: 3 per cent of the EU's GDP to be invested in research & development and innovation.
3. Sustainability: greenhouse gas emissions to be 20 per cent lower than in 1990, 20 per cent of the energy from renewables, and energy efficiency must be increased by 20 per cent.
4. Education: at least 40 per cent of the 30–34 year-olds must have completed the third level of education and the school drop-out rates must be reduced to below 10 per cent
5. Poverty and social exclusion: at least 20 million fewer people are in or at risk of poverty and social exclusion.[616]

Reports follow a set pattern containing integrated guidelines. By now, the 2020 strategy has become inseparably interwoven with the EU budget cycle, which has been tightened due to the economic crisis.[617]

613 Buitenweg et al. (2014), p. 174.
614 Buitenweg et al. (2014), p. 174.
615 Buitenweg et al. (2014), p. 175.
616 Buitenweg et al. (2014), p. 247.
617 Buitenweg et al. (2014), p. 248.

Following the Lisbon Summit, the Nice Treaty was concluded by the end of 2000. The treaty was marked by the entry of ten new member states. Earlier on, a committee of wise men, consisting of Von Weizsäcker, Dehaene and Lord Simon, had indicated that it was necessary to make the EU regulations and treaties more citizen-friendly.[618]

In the final act of the Nice Treaty, the government leaders called for a deeper and wider debate about the future of the European Union.[619] It formed the overture to designing a European Constitution. The Nice Treaty did contain several amendments to the chapter of 'social provisions', in title XI 'social policy, education, vocational training and youth'.

In particular, decision-making in the various fields of activity was simplified. The Council can promote the social objectives both by encouraging cooperation between the member states, for example through the exchange of knowledge or the evaluation of experiences, and by establishing minimum guidelines. This applies to (a) the improvement in particular of the working environment to protect workers' health and safety; (b) the labour and employment conditions; (c) social security and social protection of workers; (d) the protection of workers upon termination of their employment contract; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination; (g) the conditions of employment for third-country nationals legally residing in Community territory; (h) the integration of persons excluded from the labour market; and (i) the equality between men and women with regard to labour market opportunities and treatment at work. It does not, however, apply to (j) combating social exclusion.

In principle, the co-decision procedure (including qualified majority and Parliamentary involvement) holds, unless the areas c, d, e, f, and g are concerned, about which Parliamentary consultation takes place and for which Council unanimity is requisite. In case of unanimity, decisions for the areas d, f and g can still be made by qualified majority voting, but this does not apply to c, social security.

A new field of competence is the modernisation of the social security systems (n). Just like combating social exclusion (j), this field of competence makes use of the OMC (the Open Method of Coordination).[620]

Moreover, the Nice Treaty enables incentive measures to combat discrimination by qualified majority of the Council and co-decision by Parliament. Unanimity continues to be mandatory for directives.[621]

At a later date, these amendments, particularly article 137 EC, were to prove extremely relevant to regulating temporary agency work at EU level. The Treaty of Nice

618 Buitenweg et al. (2014), p. 166.

619 Buitenweg et al. (2014), p. 166 and 167.

620 Buitenweg et al. (2014), p. 172. See also: Ter Haar (2012).

621 Buitenweg et al. (2014), p. 172.

also came to include a supplement to article 7 EU Treaty of Amsterdam, which authorises the European Council to take measures in case of a serious and persistent breach of the Union principles by a member state. This concerns a prevention mechanism stating that:

> On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.[622]

In Nice, the chairpersons of the European Parliament, the European Council and the European Commission also had the opportunity to sign the Charter of Fundamental Rights of the European Union. Although no agreement on the Charter's status could be reached at the time, a debate was arranged on the future of the European Union. According to the Laeken Declaration dated 14 and 15 December 2001, a new treaty should address:

- a better division and definition of competence in the European Union;
- simplification of the Union's instruments;
- more democracy, transparency and efficiency in the European Union;
- the legitimacy of a Constitution for European citizens.[623]

Jacques Chirac had earlier uttered the word 'constitution', and this fitted in with ideas of, for instance Spinelli in 1984[624] and Herman[625] in 1994. A new Constitution would be both a definitive acknowledgement of the member states' partial loss of sovereignty and a definitive instrument for preconditions and guarantees for the transfer of sovereignty. A so-called convention led by the former French head of state Valérie Giscard d'Estaing was tasked with its development, and on 29 October 2004 the draft Constitution was signed by the Council and the Ministers of Foreign Affairs.[626] The realisation of the draft Constitution involved discussion on the social aspect, which would not need to be featured, but was eventually included through proposals by

622 Buitenweg et al. (2014), p. 169.

623 Buitenweg et al. (2014), p. 180.

624 Altiero Spinelli (1907–1986) was the driving force behind the draft of a first European Constitution; see https://europa.eu/european-union/sites/europaeu/files/docs/body/altiero_spinelli_en.pdf

625 In 1993 Fernand Herman conducted a study on the feasibility of a European Constitution, resulting in a draft-Constitution in 1994; See http://www.europa-nu.nl/id/vgzlnoiotgpk/herman_grondwet_van_1994. See also: Buitenweg et al. (2014), p. 165 and 166.

626 Buitenweg et al. (2014), p. 182.

the 'Social Europe' working group. In the Constitution text this resulted in qualified majority voting both for social policy aspects relating to the freedoms of the internal market, such as the mutual recognition of diplomas and rights of third-country nationals, and for decisions regarding the social security of migrant workers and self-employed persons.

Qualified majority voting was not extended to social protection that was to guarantee adequate living conditions in case of old age, disability, maternity, unemployment or dependency, and with regard to social assistance and housing. It was provided, however, that: 'in defining and implementing the policies and actions referred to in this Part, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the combating of social exclusion, and a high level of education, training and protection of public health' (art. 111–117).[627]

Be this as it may, a declaration was furnished (declaration 18, ad art. III-213) providing that areas of social policy essentially fall under the competence of member states, and that the Union can only take complementary or supporting action.[628]

In any event, the inclusion of the Charter of Fundamental Rights of the Union, which is declared binding in article 1–9 can be called an achievement.

However appealing the project appeared to be, the draft-Constitution was finally rejected by France and the Netherlands. This put a stop to the Constitution project, and the Treaty of Lisbon, dated 13 December 2007, took over its position. This reform treaty consists of two parts, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Many elements of the draft-Constitution were included in this treaty. Article 2 TEU, adopted from the Constitution, states that:

> … the EU is a Community of values. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[629]

Article 3 TEU aims, firstly, to promote peace, its values and the well-being of the European peoples; secondly, to offer its citizens an area of freedom, security and justice

627 Buitenweg et al. (2014), p. 188.

628 Buitenweg et al. (2014), p. 188.

629 Buitenweg et al. (2014), p. 203. The TEU can be downloaded on en.euabc.com/upload/rfConstitution_en.pdf.

without internal frontiers and, thirdly, the realisation of an internal market with a social dimension, aiming at full employment and social progress: the Union 'shall combat social exclusion and discrimination and shall promote social justice and protection (…)'.[630]

Article 8 TFEU states that, in all its activities, the Union shall aim to promote equality between men and women.[631] Article 9 TFEU provides that, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'.[632]

Article 10 provides that, in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[633]

In the articles 151–161, the TFEU (title X, Social policy) has adopted the former articles 136–145 from the TEC. Article 152 is new, however, as it establishes the tripartite 'Social Summit for Growth and Employment'.[634] Article 156 provides that the Commission can propose studies, guidelines and indicators, including periodic monitoring and evaluation, and that it can also promote and coordinate them through the OMC, the Open Method of Coordination.[635]

European social policy does not merely involve legislation and guidelines, but also jurisdiction. In this respect two judgements are significant: Viking and Laval, in which the Court assessed how the right to take collective action relates to the freedom of establishment (art. 49 TFEU, ex art. 43 TEC) and the freedom to provide services within the Union (art. 56 TFEU, ex art. 49 TEC).

The Viking judgment[636] concerned the Finnish ferry company 'Viking Line' that ran ferry services between Estonia and Finland. The vessel in question, the 'Roselle', sailed under Finnish colours and was obliged to apply the Finnish terms of employment. The company wanted to change this by reflagging the vessel to Estonia and by concluding a 'more profitable' collective bargaining agreement with an Estonian trade union. The Finnish union FSU announced a strike and the ITF, the International Transport Workers' Federation, called for an expression of solidarity and a boycott of

630 Buitenweg et al. (2014), p. 204.
631 Buitenweg et al. (2014), p. 205.
632 Buitenweg et al. (2014), p. 205.
633 Buitenweg et al. (2014), p. 205 and 206.
634 Buitenweg et al. (2014), p. 206.
635 Buitenweg et al. (2014), p. 206.
636 Viking, judgment of the Court of 11 December 2007, case C-438/05.

negotiations with Viking. Viking stated that all this was contrary to the freedom of establishment. The European Court decided that the right to strike is a fundamental right and as such forms an integral part of Community law, and that this may constitute a justified interference with the freedom of establishment, which put the trade unions in the right. However, the Court also argued that such an interference was only tenable if there were overriding reasons of public interest and if the interference were necessary and proportionate, which would apply only if jobs and terms of employment were really at risk or in serious danger. Furthermore, the national court was to examine whether the actions had been proportionate, which amounted to examining possible alternatives.

The Laval judgment[637] was about the clash between the right to strike and the freedom of providing services. Baltic, a Swedish trading partnership owned by Laval, a Latvian company, was licensed to build a school in Sweden. The Swedish construction union demanded that the Swedish collective construction agreement be applied to the posted workers. Baltic concluded a collective agreement with a Latvian union, arranging lower wages. The Swedish union organised blockades and solidarity strikes, which resulted in Baltic going bankrupt. The Swedish court asked the European Court of Justice whether these actions were in line with the freedom of providing services. The Court judged that interferences are allowed, but that actions must be aimed at complying with the hard core of labour law, as provided by the Posting of Workers Directive. This did not apply in the case in question, as the actions were directed at the more favourable conditions of the Swedish collective construction agreement.

Again, the Court ruled that it was up to the national court to test whether the restriction of that freedom is guaranteed by 'a legitimate objective compatible with the Treaty', whether it is justified by overriding requirements in the general interest, and whether it is suitable for securing the attainment of the objective they pursue, and do not go beyond what is necessary in order to attain it.[638]

Also relevant in this context are the Rüffert and the Commission vs. Luxembourg judgments from 2008.

The Rüffert judgment[639] was about a public contract awarded to a German construction company that was carried out by a Polish subcontractor. The Polish workers earned considerably less than required by the local collective agreement, whereupon the government of Niedersachsen withdrew the contract and demanded compensation. The case was brought before the European Court of Justice, which argued that

637 Laval, judgment of the Court of 18 December 2007, case C-341/05.

638 Buitenweg et al. (2014), p. 207 ff. Hendrickx (2011), p. 31.

639 Rüffert, judgment of the Court of 3 April 2008, case C-346/06.

article 49 of the Treaty prohibits the demand to pay wages 'that are at least at the level of the wages that are foreseen on the basis of the collective agreement that applies to the place where the work is done', because these are higher than the mandatory minimum wage that would otherwise be applicable, and more generally this kind of public procurement obligation would prevent foreign service providers from competing on the basis of lower wages.

The Court stated that the rate of pay laid down by the law of Niedersachsen cannot be seen as a minimum rate of pay ensuing from the 2006 Posting Directive, which will be discussed below. Following the line of reasoning in the Laval judgment, this Directive was considered a maximum Directive rather than a minimum Directive from which member states may deviate in a positive sense.

The Commission vs. Luxembourg judgment[640] revolved around the interpretation of article 3.10 of the Posting Directive, enabling member states, by way of derogation from article 3.1, which lays down minimum rates, to guarantee workers other terms and conditions of employment, whether laid down in universally applicable collective agreements or arbitration awards or not, on the grounds of public interest. The Court was negative about a series of arrangements that Luxembourg had adopted upon the implementation of the Posting Directive. The Court judged that the derogation option in article 3.8 impinges upon the freedom to provide services, and as such must therefore be interpreted strictly.

Requirements such as a written contract, automatic wage indexation, prevalence of Luxembourg collective agreements, minimum rest periods, information requirements and demands regarding national representation all constituted hindrances to the freedom to provide services, as entrenched in the EU regulations.

These judgments evoked resistance on the part of the trade unions, whereupon the Commission issued a regulation, the so-called Monti-II regulation, which however achieved the opposite of what it set out to do, namely that the right to strike should not hinder the freedom to provide services. The regulation in turn evoked much resistance, after which the Commission revoked it.[641]

We saw before that the Charter of Fundamental Rights of the European Union can be considered an important achievement, which has since been entrenched in the Treaty of Lisbon, not as a separate part, as in the draft-Constitution, but as an important annex.

Socially tinted topics have been included under Chapter IV, Solidarity, containing twelve articles, of which the articles 27–33 cover the 'labour rights'.

640 Commission v. Luxembourg, judgment of the Court of 19 June 2008, case C-319/06.

641 Buitenweg et al. (2014), p. 214.

Article 27 grants the right to be guaranteed information at the appropriate levels. Article 28 grants the right of collective bargaining and collective action. Article 29 acknowledges the right of access to free placement services. Article 30 is about protection in the case of unjustified dismissal, followed by article 31 that grants the right to fair and just working and employment conditions.

Article 32 provides an explicit ban on child labour and grants young workers the right to be protected against economic exploitation and against any work likely to harm their health, safety or development, or to interfere with their education. According to article 33, the family is the mainstay of society, and in order to combine work and family there are the rights to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34 expresses the right to social security benefits and social services.[642]

For all that, the Dutch Council of State put the value of the Charter into perspective, stating that:

> The Charter provides a powerful and inspiring phrasing of common values and basic principles, but the very attractively robust straightforwardness and decisiveness, which constitutes the power of a declaration of principles, renders the texts less suitable to be integrated into the regulations of the European Union in a legally binding way at this point in time.[643]

7.1.6 Conclusion

Meanwhile, the economic crisis has resulted in tightening up the 1997 Stability and Growth Pact and in improving coordination within the Eurozone, called the European Semester. This improved coordination of the member states' budgetary and economic policy was further enhanced in 2010 by means of six economic governance measures, the so-called Sixpack,[644] followed by the EuroPlus Pact[645] and the Two-Pack.[646]

In early December 2011, in Brussels, this in turn resulted in the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, which the seventeen euro countries and those who voluntarily joined it signed on

642 Buitenweg et al. (2014), p. 222.
643 Buitenweg et al. (2014), p. 229.
644 Buitenweg et al. (2014), p. 241.
645 Buitenweg et al. (2014), p. 243.
646 Buitenweg et al. (2014), p. 245.

2 March 2012. On 1 January 2013, this treaty came into force. Thus, budgetary discipline has easily gained the highest priority, which has evoked criticism. The Treaty of Lisbon provided a solid entrenchment of social policy in Europe, but the political and economic course that the EU has been forced to steer shortly after Lisbon has pushed the social dimension further and further into the background.

Meanwhile, the EU will need to find its way between a Brexit discussion, which may well result in damage to the social dimension because of introducing migrant discrimination, and the ideal of the United States of Europe, as Verhofstadt[647] has voiced it. A clear-cut outcome is not yet in sight.

7.2 EUROPE AND TEMPORARY AGENCY WORK

We saw earlier how the social domain has developed in the European Union since the 1950s. While initially the aim for a common market drove the social face of Europe, in the course of time more and more individual social elements have been added to the European repertoire. 'Maastricht', 'Amsterdam' and 'Lisbon' were highlights in this respect. Against these backgrounds, we shall now discuss how temporary agency work has been given attention on the European agenda.

7.2.1 Social security

Temporary agency work first received attention due to a question about the application of the rules coordinating social security. They provided that only one social security system applies to migration, the single state rule, and that this was to be the country of employment (*lex laboris*). At first, an exemption obtained (art. 14 Regulation 1408/71), providing that in the case of cross-border employment, the social security of the country of residence applied for a certain period (at first, one year, later two years).[648] The question was whether this also applied to temporary agency work.

In 1970, in Manpower vs. Caisse Primaire d'Assurance Maladie Strasbourg,[649] the European Court of Justice ruled that this was the case. The Court decided:

> Although under the contract each temporary worker is required to comply with the working conditions and discipline laid down by the internal rules of the establishment to which he is sent, it appears from an examination of the file that this fact does not affect the maintenance of the worker's relationship with the undertaking

647 Verhofstadt (2015), p. 202 and 255.

648 Regulation 1408/71/EC art. 14; amended by no. 883/2004/EC.

649 Manpower v. Caisse Primaire d'Assurance Maladie Strasbourg, judgment of the Court of December 17th 1970, case 35/70.

> which has engaged him. It is thus the latter undertaking which is at the centre of different legal relationships, because it is at the same time a party to the contract with the worker and to the contract with the hiring undertaking.

According to the Court, 'the object of the undertaking is not to do work but to engage workers to put them for a consideration at the disposal of other undertakings'. In the Manpower case:

> The undertaking which has engaged the worker remains their sole employer. The maintenance of the worker's relationship with such an employer for the entire duration of employment arises in particular from the fact that it is the employer who pays the salary and can dismiss him for any misconduct by him in the performance of his work with the hiring undertaking. Further, the hiring undertaking is indebted not to the worker but only to his employer.

Thus, this decision recognised the temporary agency business model. Moreover, the Court decided in the Webb case[650] that 'the activity of contracting out workers constitutes a provision of services within the meaning of the Treaty'. However, the Court stated:

> (…) it must be noted in this respect that the provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workplace concerned. That is evident, moreover, in the legislation of some of the Member States in this matter, which is designed first to eliminate possible abuse and secondly to restrict the scope of such activities or even prohibit them altogether.

The Court has also studied the question as to whether in the case of cross-border temporary agency work, the so-called countries of employment are justified in imposing restrictive provisions on the temporary employment agencies operating from abroad. At issue here is the application of article 49 EC, which regulates the freedom to provide services. This freedom can be restricted if the public interest is at issue and to the extent that the country of origin of the temporary employment agency offers no guarantees of its own.

650 Webb, judgment of the Court of 17 December 1981, case 279/80.

In the Commission versus Italian Republic case,[651] Italy's requirements that temporary employment agencies have a branch office on its territory and meet certain financial conditions were rejected as it had failed to verify whether protective measures were in place in the country of origin.

In the 1990s, the Court also took decisions regarding the tenability of the state monopoly in the field of work placement. A strong lobby had been launched to liberalise the temporary employment sector in Europe, and in 1992, CIETT, the international umbrella organisation of temporary employment agencies, filed complaints with the Commission against Germany, Spain and Italy.[652] Moreover it started a trial action regarding the situation in Italy.

A first judgment regarding the state monopoly in the field of work placement was given in the Höfner versus Macrotron case, which revolved around the admissibility of 'headhunting'.[653]

The second presented itself in the Job Centre case[654], which dealt with both the admissibility of private work placement and outsourcing. Both judgments came down to the following.

- Placing workers is an economic activity, even if it is entrusted to public placement offices.
- Public placement offices can be designated as enterprises in the sense of the European Community's competition rules.
- In principle, public placement offices remain subject to the competition regulations.
- Article 86 of the EC Treaty applies in case of activities that clearly cannot be carried out by public placement offices.
- According to article 86(b) of the EC Treaty, abuse may apply upon restriction of the services.
- According to the Commission, the work placement market is broad and very diverse. Supply and demand aim at both unskilled and highly trained workers.
- In such a market, which is subject to enormous socio-economic changes, public placement offices may not be able to satisfy all the demands.
- Prohibitions entailing penal and administrative sanctions for private parties create a situation as referred to in article 86(b) EC Treaty, if the public placement offices are incapable of satisfying all the market demands.
- One possible effect of abuse suffices and is particularly relevant if work placement is also aimed at nationals in the territories of other member states.

651 Commission v. Italian Republic, judgment of 7 February 2002, case C-279/00.

652 Randstad (1995), p. 19.

653 Höfner v. Macrotron, case 41/90.

654 Job Centre, case 55/96.

The Court's judgment is clear. A labour market monopoly violates the European competition law:
- if the public placement offices fails to satisfy all the market demands;
- if private work placement is rendered impossible by prohibitions, on pain of penal and administrative sanctions;
- if the relevant work placement activities may also extend to the nationals or to the territory of other member states.

The judgments, and particularly the Job Centre case, resulted in a de-monopolisation process in all countries concerned. In Italy, Act no. 264 from 1949 was gradually replaced.[655] In 1994, Germany discontinued the state monopoly of the so-called Federale Arbeitsamt, which had been in place since 1922, as a result of this judgment.[656] And in 1993–1994, in Spain, the INEM lost its monopoly and reforms were implemented.[657]

7.2.2 Resolutions of the European Council and Parliament, first draft directive

In anticipation of these developments, the issue of regulating temporary agency work had received some attention. In the discussion on the adaptation of working time, the Council had drawn up a resolution dated 18 December 1979, asking for 'specific communications… regarding part-time work and temporary employment' (page 3 Final Provisions). The Council stated that these forms of labour had become a reality in the labour market and that it was appropriate to take action 'to ensure that temporary work is supervised and that temporary workers receive social protection'. On 17 September 1981, the European Parliament likewise requested regulation through a resolution[658] and in 1982, a draft directive was first presented.[659]

Item 3 of the Explanatory Memorandum acknowledges that temporary employment is not always to the detriment of the workers (in the sense that it meets the needs of certain categories of workers, such as young, female and older workers), but that this type of labour was increasingly forced upon a number of workers looking for permanent employment. They were said to fall victim to various forms of discrimination and above all to suffer due to the insecurity of their jobs when compared with permanent employees.

655 Colucci (2004), pag 146.
656 Weiss (1999). Zie ook Weiss (2004).
657 Duran Lopez & Martinez Rodriques (1999).
658 Ahlberg et al. (2008), p. 156.
659 Ahlberg et al. (2008), p. 157.

According to the Commission, two systems to regulate temporary work would be feasible:[660]

1. systems to protect permanent employees by limiting the cases in which temporary work was used and the duration of temporary work, which meant that temporary workers would not be given equal rights;
2. systems allowing employers to hire temporary workers, provided they were to have the same social advantages as permanent employees according to labour law, collective contracts or customary practices in labour relationships.

Due to resistance on the part of the employers, certain groups within the European Parliament and above all a veto by the British government, the draft did not make it through.

7.2.3 A new attempt in 1990

In 1990, a new attempt was made to address temporary work. As we have seen before, the Community Charter had been published, and it was time to take action in order to improve the living and working conditions with regard to 'forms of employment other than open-ended contracts, such as fixed-term contracts, part-time work, temporary work and seasonal work'.

On the basis of various legal principles, three directives were proposed.[661] The directive on occupational safety and health on the basis of article 118 A of the EC Treaty was the only one to eventually make it through. The other two were related to working conditions, proposed on the basis of article 100 of the EC Treaty and to 'distortion of competition', which attempted to create a level playing-field in terms of costs in the case of atypical work on the basis of article 100A EC Treaty. Underlying the proposals was the desire to further restrict non-standard forms of employment.

As mentioned above, only one directive was realised: Directive 91/383/EEC[662] dated 25 June 1991, which addressed both workers with fixed-term contracts and temporary agency workers.

The reason for issuing the directive was that workers with temporary contracts were more subject to occupational accidents and diseases. By implementing the principle of equal treatment, the temporary workers should be granted a level of occupational safety and health equal to that of others working at the user enterprise. There was no justification for allowing differences in treatment. The directive also requires the temporary agency employer (or commissioning client) to provide temporary

660 Ahlberg et al. (2008), p. 158.

661 Ahlberg et al. (2008), p. 159.

662 Directive 91/383/EEC; see also: Ahlberg et al. (2008), p. 161.

workers with information and training with regard to occupational risks before they start their assignment.

The temporary agency employer must provide information on the nature of the assignment and the required qualifications, according to particulars supplied by the commissioning client.

7.2.4 Posting of Workers Directive and Services Directive

In the context of the freedom to provide services, it proved to be equally necessary to regulate the posting of workers from one member state to another. This resulted in the Posting of Workers Directive.[663] Paragraph 7.3 will discuss this further.

Besides this directive, the Services Directive likewise turned out to exercise the minds in the mid-1990s. Proposed by European Commissioner Bolkestein in early 2004, it opted for a purely economic approach to creating a common market for services. The country of origin principle was introduced, intending that the service providers could operate throughout the EU using the conditions that applied in their country. This fired up a fierce debate in which the danger of social dumping was pointed out, i.e. a situation in which the countries with the fewest and the least expensive regulations would profit most. Opposite this country of origin principle was the equal treatment principle, providing a level playing field across the EU for both domestic and foreign service providers.

The resistance of the trade union movement and the European Parliament in particular was considerable. The providers of temporary employment services should be particularly exempted from this Services Directive, especially since so far no enabling regulations for temporary employment agencies existed in Europe.[664]

Bolkestein did not prevail and in due course, a much watered-down Services Directive ensued,[665] which provided in article 2 e that the Services Directive did not apply to temporary employment agencies. Also, it provided in article 1, par. 6:

> This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

663 Directive 96/71/EG.
664 Kowalski (2006).
665 Directive 2006/123/EC.

In par. 7, it subsequently provided:

> This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

The Services Directive has fallen short of the impact that it was initially intended to have. In 2010, only seven member states turned out to have implemented what was left of the Directive.

7.2.5 Continuous demand for regulation of temporary agency work

The trade union movement, however, considered it a major victory to have changed the Services Directive so drastically in collaboration with the European Parliament. As indicated above, temporary agency work was still exempted, and the demand for EU regulations on temporary agency work continued to be discussed. As mentioned above, 'Maastricht' made it possible to make another attempt. A social dialogue on temporary agency work ensued. This dialogue failed and resulted in a new Commission proposal. After discussing the Posting of Workers Directive in paragraph 7.3, this temporary agency dialogue and the draft-Directive, together with what they resulted in, will be expounded on.

7.3 POSTING OF WORKERS DIRECTIVE AND ENFORCEMENT DIRECTIVES [666]

7.3.1 Posting of Workers Directive

The posting of workers issue was already part of Jacques Delors' action programme for perfecting the Single Market as planned in his White Paper.[667] On 1 August 1991, the Commission presented a proposal regarding the *posting of workers* (having work carried out on a temporary basis in a EU member state different from where the worker is based), in the context of the freedom to provide services. The proposal was amended by input from the European Parliament and by the stance taken by the Economic and Social Committee. On 16 December 1996, it was adopted by a qualified majority, Portugal abstaining and the United Kingdom dissenting.[668]

666 Directive 96/71/EC and Directive 2014/67/EU.

667 Commission of the European Communities (1985).

668 Slachter (2014), p. 166 and 167.

The then article 57, par. 2, in conjunction with article 66 (now art. 53, par. 1, in conjunction with art. 62 TFEU) was chosen as the legal basis for authorising through an 'ordinary' co-decision procedure by qualified majority the establishment of guidelines regarding the 'coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons'.

The preamble recites the objective laid down in the Directive to eliminate barriers to the freedom of movement of services and persons. Moreover, it argues that the internal market increasingly evidences cross-border service provision. Besides promoting this dynamic, it is also necessary to regulate employee rights and competition. Internationalisation raises questions and requires legal certainty.[669]

In actual fact, three objectives present themselves, i.e.: the protection of the employees concerned, fair competition and creating legal certainty. Statutory international private law arrangements are referred to, provided that Community law may deviate from them. In this context, coordination of national and labour law arrangements is opted for, in the sense that a 'hard core' of mandatory provisions is laid down for the minimal protection of (posted) workers in the country of employment. Employers from a member state other than the country of employment must likewise comply with them.

This does not change the arrangements that are in place in the field of social security coordination (Regulation 1408/71). Nor does it obstruct the existing provisions with regard to third countries. Moreover, there is no obligation to acknowledge the existence of temporary employment agencies. Furthermore, it does not affect the applicability of national legislation to cross-border temporary employment service providers. Lastly, it does not affect the workers' right of collective action to promote interests.

The hard core of minimal protection may be deviated from in a positive sense. Also, no distinction must be made between EU employers and non-EU employers.

The preamble consists of 25 recitals, and the Directive itself amounts to 9 articles. Article 3, the core of the Directive, states that the member states shall ensure that workers posted in their territory are guaranteed the terms and conditions of employment that have been laid down by law, regulation or administrative provision and/or by collective agreements or arbitration awards that are universally applicable within the meaning of article 8, insofar as they concern the activities included in the annex:

a. maximum work periods and minimum rest periods;
b. minimum paid annual holidays;

669 Houwerzijl (2004), p. 115.

c. the minimum rates of pay, including overtime rates (this point does not apply to supplementary occupational retirement pension schemes);
d. the conditions of hiring-out workers, in particular the supply of workers by temporary employment agencies;
e. health, safety and hygiene at work;
f. protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
g. equality of treatment between men and women, and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to under c is defined by the national law and/or practice of the member state where the worker is posted.

Graham[670] concludes from this article that the core provisions do not apply to temporary agency workers, for whom a separate provision (d) is in place, relating to 'the conditions of hiring-out of workers, in particular by temporary employment agencies'. He also concludes this from article 3, par. 9, since it provides that member states may arrange that foreign temporary employment agencies must guarantee their workers the same terms and conditions as apply to domestic agencies. The question arises as to whether article 3, par. d, automatically commits temporary employment agencies to provisions regarding 'equal pay for equal work' or whether the member states must explicitly provide this through article 3, par. 9. Thus, is 'equal pay for equal work' a duty or a right on the basis of the Posting of Workers Directive?[671]

For the other forms of posting, i.e. for contracting work (art. 1, par. 3a) and intra-corporate transfers (art. 1, par. 3b) the legal and administrative provisions and/or the collective agreements of arbitration awards that have been declared universally applicable in the country of employment apply. For that matter, the annex to this Directive effectively limits this to the construction sector. According to article 3, par. 8, in the absence of a system for declaring agreements or awards to be universally applicable, member states can also take other decisions that have a similar effect, provided that they make no distinction between domestic and foreign enterprises.

The core provisions of article 3, par. 1, are valid from the first working day. There is no waiting period, as had been suggested in an earlier proposal. With the exception of the construction sector, the core provisions with regard to the paid annual holidays (art. 3, par. 1, under b) and 'minimum rates of pay' (art. 3, par. 1, under c) do

670 Blanpain and Graham, 2004, p. 282
671 See also: ETUC (2010), p. 14.

not apply in the case of initial assembly and/or the first installation of goods, where this is an integral part of a contract for the supply of goods, necessary for taking the goods supplied into use and carried out by qualified and/or specialist workers of the supplying enterprise.

In the case of contracting and intra-corporate transfers, the member states can choose not to apply the provisions regarding minimum rates of pay if an assignment takes less than one month. Also, they can disregard the provisions regarding minimum rates of pay and paid annual holidays in case of very small assignments. The provision on compliance is significant. The member states are to designate so-called 'liaison offices' and must ensure cooperation on supervision. Such cooperation must also respond to requests for information in order to draw attention to and combat abuses and unlawful use. Thus, the member states are to take measures to make the 'core provisions' generally available (art. 4). Moreover, adequate provisions must be made available to workers and/or their representatives for the enforcement of the obligations (art. 5).

However well-intentioned the Posting Directive was, its implementation did not resolve the issue of the vulnerable position of cross-border workers. The media continue to publish articles on the infringement of workers' rights.[672]

7.3.2 Evaluation

In 2003, the Commission evaluated the Directive.[673] In its report it mentions the various deficiencies and issues concerning inappropriate implementation and/or application of the Directive. In 2006, guidelines were established in order to make clear how control measures under prevailing EU law, in line with the case law of the Court could be justified and proportionate. In 2007, it pointed at the deficient monitoring, the poor administrative cooperation and the inadequate access to information. It has been discussed above that the Court's Viking[674] and Laval[675] judgments raised the question as to the proper balance between the freedoms of establishment and providing services, as entrenched in the TFEU, and fundamental social rights, such as the right to strike. Added were the judgments in the Rüffert[676] and Commission vs. Luxembourg[677] cases, which allowed the principle of the free movement of services to prevail over various national social regulations. There was also debate on the concept of public order, which could justify the infringement of fundamental

672 Govaers & Van Beers (2013). See also: Witteman (2016).
673 See European Commission (2012), p. 4.
674 Viking, judgment of the Court of 11 December 2007, case C-438/05.
675 Laval, judgment of the Court of 18 December 2007, case C-341/05.
676 Rüffert, judgment of the Court of 3 April 2008, case C-346/06.
677 Commission v. Luxembourg, judgement of the Court of 19 June 2008, case C-319/06.

social rights, the material scope of the core provisions in the Directive, and the nature of the mandatory minimum rates of pay.

All in all, great concern had been aroused, and both Barroso, as President of the European Commission, and Monti, as former European Commissioner internal market and competition, wanted to take action. The Commission had already called for enhanced cooperation between the national administrations, improved exchange of information between member states and better access to information.[678]

The European unions and certain parties in the European Parliament vented strong criticism on the Court's judgments, which they designated as 'licences for social dumping'. They put forward two key demands:

- revision of the Posting Directive, including the principle of equal pay for equal work and the opportunity for the country of employment to apply more favourable terms of employment than the core conditions provided by article 3, par. 1, of the Directive;
- inclusion in the Directive of a protocol regarding social progress.[679]

The European employers, united in Business Europe, and most member states, were happy with the jurisdiction. In 2010, the European Economic and Social Committee issued an advice, which included enhancing the implementation of the Posting Directive and partially revising it, so that the legal obligations of national governments, enterprises and workers were made clearer.[680]

In its 2010 communication 'Towards a Single Market Act',[681] the Commission stated that it would ensure that an effective enforcement of the Charter of Fundamental Rights would consider the right to strike, and that it would submit a legislative proposal with an eye to improved enforcement of the Posting Directive. Subsequently, on 13 April 2011, the 'Single Market Act'[682] set out twelve levers to boost growth and encourage confidence, and it also contained a legislative initiative for improving and enhancing the conversion, the application and the practical compliance with the Posting Directive.

This legislation will also comprise measures to prevent and punish any abuse or circumvention of the applicable law and will be accompanied by regulations to make clear the relation between the pursuit of the freedom of establishment and of the freedom to provide services on the one hand and the fundamental social rights on the other.

678 European Commission (2008a), p. 1.
679 SWD (2012) 63 final, SWD (2012) 64 final, p. 7.
680 Advice 2011/C44/15.
681 COM (2011) 608, final/2 dated 11.11.2010.
682 COM (2011) 206, final.

7.3.3 Enforcement Directive

The above eventually resulted in a proposal for the so-called 'Enforcement Directive' aimed at enhancing the protection of the rights of posted workers, improving the climate of fair competition and facilitating cross-border provision of services.[683]

Article 53, par. 1, in conjunction with article 62, TFEU constituted its legislative basis. Among other things, the preamble recited that:

- abuse must be prevented by improved implementation and monitoring;
- adequate and effective enforcement plays a key role;
- an electronic information exchange system will facilitate administrative co-operation;
- relevant information must be supplied to service providers and workers;
- the member states may conditionally implement control procedures or administrative formalities;
- effective and adequate inspections will be carried out;
- cooperation and information exchange on the application of the regulations shall take place;
- effective complaints mechanisms must be in place;
- a form of sequential liability must be introduced;
- there must be rules shaping the cross-border enforcement of penalties and sanctions;
- the Charter of Fundamental Rights must be observed.

Important articles are:

- article 4, prevention of abuse and circumvention, which provides that competent authorities shall pay more attention to the factual elements characterising the activities;
- article 5, arranging improved access to the information;
- article 6, arranging mutual assistance;
- article 11, aimed at the defence of rights, the facilitation of complaints and the back payments;
- article 12, dealing with subcontracting liability;
- article 13 including provisions about mutual assistance and mutual recognition.

By now, the Directives still prove to fall short of practical needs. There appears to be a need for modernising the Posting Directive. A new discussion has been started at European level, led by the Dutch minister of Social Affairs and Employment, advocating 'equal pay for equal work in the same place'. Apparently, the Posting Directive

683 SWD (2012) 63 final, SWD (2012) 64 final, p. 11.

and the social security legislation provided too much scope for allowing posting on competitive terms of employment. A so-called 'targeted review' is advocated. In the meantime, the Dutch minister Asscher has enlisted the backing of seven member states (the Netherlands, France, Germany, Sweden, Belgium, Luxembourg and Austria). To be continued.[684]

However, one month after the letter from the seven, there was a letter from the nine, i.e., Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, who spoke out against a revision. They pointed out the risk that such an amendment would harm some of the fundamental principles of the EU, including the freedom to provide services. A principle such as 'equal pay for equal work in the same workplace' is misleading and derogates the common market principle that a sustainable economic development benefits from efficient, innovative and competitive enterprises and from robust legislation. Such a revision goes against the European Commission's aim to enhance the common services market, these member states argued.[685] For now, it looks as if the European Commission opts for Asscher's approach.[686]

For one thing, a proposal was made to amend the Posting of Workers Directive, changing the reference to 'minimum rates of pay' to 'remuneration'. Moreover, member states may involve supply chains in imposing obligations, while the principle of equal pay for equal work in the Temporary Agency Work Directive, as included under article 5, also applies to cross-border temporary agency work, so that any doubt on this matter will be resolved. Furthermore, the duration of a posting is limited to 24 months, after which the labour law of the host member state will apply.[687]
The Eastern European resistance has not yet abated, although according to Euro Commissioner Thyssen there are no opposed blocks (Eastern Europe against Western Europe). On that subject, she stated:

684 Letter of the Dutch minister of Social Affairs and Employment, dated 18 June 2015. See also: Schout et al. (2015).

685 Letter to Marianne Thyssen, European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, dated 7 July 2015 about Revision of the Posting of Workers Directive. See also: Schout et al. (2015).

686 'Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market', press release European Commission, 8 March 2016.

687 Proposal for a directive of het European Parliament and of the Council amending Directive 96/71/EC of het European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Strasbourg, 8.3.2016 Com (2016) 128 final, 2016/0070(COD).

> Various countries want to study the proposal seriously and have not yet defined their position. We shall listen to each other and if that means we must revise parts of the proposal, we shall do so, but it must be fairer and more balanced.[688]

Since then, ten member states, i.e. the nine that are opposed to revision of the directive, backed by Denmark, have shown the yellow card. National parliaments have this option, if they fear erosion of national sovereignty. However, on 20 July 2016, the European Commission announced that it considers the revision proposal not to be in breach of the so-called subsidiarity principle. Again, to be continued.[689]

7.4 SOCIAL DIALOGUE ON TEMPORARY AGENCY WORK

We saw earlier that in the 1980s, two attempts were made at European level to regulate temporary agency work by means of a directive. Eventually regulations were limited to occupational health and safety. Lack of unanimity, and later even lack of a qualified majority meant that the realisation of a Temporary Agency Work Directive has been a long, drawn-out process.

At first, 'Maastricht' and 'Amsterdam' appeared to change this. The social protocol enabled achieving agreement by means of a social dialogue. And surprisingly, this worked out well for topics such as parental leave, part-time work and fixed-term contracts. The fact that the Council could by now decide on these proposals by qualified majority voting obviously contributed to the positive outcome.

In the preamble of the framework agreement pertaining to the social dialogue on fixed-term contracts, the parties indicated that they intended to consider the need for a similar agreement relating to temporary agency work.[690] They were not certain, but they were willing to think about it. In any case, temporary agency work was excluded from the framework agreement on fixed-term work that was concluded on 18 March 1999.

7.4.1 Viewpoints of the social partners

In general, the European trade union movement was in favour of negotiations through social dialogue. In these circles, there was some hesitation regarding temporary agency work. Trade unions preferred to wait until the directive on fixed-term

688 Cats (2016b).

689 'Detachering van werknemers: Commissie bespreekt bezorgdheden van nationale parlementen' ('Posting of Workers: Commission discusses national parliaments' concerns'), europa-nu.nl, 20 May 2016 (Dutch only).

690 Ahlberg et al. (1999), p. 71. See also: Ahlberg et al. (2008), p. 196.

work had been implemented. UNICE, representing the employers, appeared to hesitate even more. Whereas ETUC decided on 2 December 1999 to enter into the social dialogue on temporary agency work, it took until 3 May 2000 before UNICE reached a positive decision. It can be established that this has definitely been influenced by the stance CIETT had taken as the international temporary agency employers' representative, together with Euro-FIET (renamed Uni-Europa as of 1 January 2000) as the European services workers' union. They had entered into a sectoral dialogue in 1999 and were determined to achieve a sectorial solution in the event that UNICE and ETUC would not enter into a 'cross-sectoral' dialogue on temporary agency work.[691] A draft-directive had already been drawn up.[692]

To ETUC this was unacceptable, because Euro-FIET/Uni-Europa could not conduct negotiations on behalf of all sectors and according to the employers, CIETT could not represent the interests of their commissioning employers.

Both sides – UNICE, CEEP, UEAPME and CIETT representing employers on the one hand, featuring CIETT as observer, and ETUC representing employees on the other – set up negotiating teams containing approximately thirty people. The chief negotiator for the employers was Wilfried Bernaert and his counterpart for the employees was Jean Lapeyre, who had also conducted the earlier negotiations. Jean Degimbe, who had also presided the social dialogue on fixed-term contracts, was appointed chairperson.[693]

The trade union movement held the view that the quality of temporary agency work must be improved on the basis of two principles: laying down the conditions under which temporary agency work can be deployed and ensuring equal treatment for the workers concerned.

A European regulation had to reach farther than ILO convention 181. There were three key criteria that an agreement would have to meet:

- it should promote structured collective bargaining;
- it should dovetail with the Posting Directive;
- the subsidiarity principle should be applied, in the sense that the agreement should be converted into collective agreements at the national level.[694]

It was important to the employers that a balance should be achieved between flexibility and security for the workers. The positive contribution that temporary agency work makes to employment and the lifting of restrictions were key starting points.[695]

691 Ahlberg et al. (2008), p. 196
692 CIETT (2000a).
693 Ahlberg et al. (2008), p. 198 and 199
694 Ahlberg et al. (2008), p. 200
695 Ahlberg et al. (2008), p. 200

7.4.2 Viewpoints CIETT and Uni-Europa

Op 3 May 2000, CIETT and Uni-Europa issued a joint declaration in the context of the sectoral social dialogue they had started before. They stated:

> Both organisations are hopeful and confident that the sectoral Social Dialogue will have positive effects on this important industry which will benefit all parties involved in Europe – employees, the agencies and user enterprises. […] On the basis that agency work may play a positive role in the labour market, the sectoral social dialogue should work towards improving the quality and the operation of the European labour market, the employment and working conditions of agency-supplied workers as well as the further professionalisation of the sector.

They declared that they supported ongoing negotiations between UNICE/CEEP and ETUC and aimed at playing an active role in their progress.[696]

In the trade union movement, the role played by Euro-FIET (Uni-Europa) evoked criticism. Subsequently, a number of meetings took place in the framework of the social dialogue on temporary agency work, and in the third round, on 11 and 12 October 2000, draft texts were exchanged.

7.4.3 Developing viewpoints

With regard to the principle of non-discrimination ETUC stated:

1. Temporary agency workers shall not be treated in a less favourable manner than comparable workers, unless different treatment is justified on objective grounds.
2. With regard to the following employment conditions the comparable worker is considered to be the worker in the user enterprise unless explicitly regulated otherwise by collective agreement at the national or sectoral level:
   - remuneration;
   - working conditions, including working time and rest periods;
   - health and safety, taking into account the Directive 91/383 EEC.
3. In regard to the other employment conditions, Member States, after consultation with the social partners and/or the social partners at national or sectoral level, shall define in which cases the comparable worker is that of the user enterprise and in which cases that of the temporary work agency.

696 Joint declaration of Euro-Ciett and Uni-Europa on the sectoral social dialogue on Agency Work, July 2000.

4. The arrangements for the application of this clause shall be defined by the Member States after consultation with the social partners and/or the social partners having regard to Community law, national law, collective agreements and practice.[697]

The employers stated:

1. In respect of employment conditions, temporary agency workers assigned to work for and under the control of an undertaking or establishment shall not be treated in a less favourable manner than a comparable worker, defined in accordance with point 4, unless different treatment is justified on objective grounds, and without prejudice to length of service or seniority criteria relating to particular benefits.
2. Where appropriate, the principle *pro rata temporis* shall apply.
3. The modalities of application of this clause shall be defined by the Member States and/or social partners having regard to national law, collective agreements or practice.
4. The responsibility to define the term comparable worker is incumbent upon Member States and/or social partners.
5. Temporary employment agencies established in one Member State assigning a worker to work for and under the control of an undertaking/establishment in another Member State shall respect the provisions of Directive 96/71.[698]

The various statements represented huge differences in opinion. The trade union movement wanted equal pay, i.e. a remuneration as would be applicable in the user company, unless other arrangements would be made, for instance through collective bargaining. For terms of employment other than wages and occupational health and safety, regulations could be left to the member states, following consultation with the social partners. The trade unions' point of view was not acceptable to the employers. They wanted the member states and/or social partners to decide who should be the comparable worker whose wages should be leading in determining the remuneration. Nor did the employers condone any reference to wages, since this would be in breach of article 137, par. 6, EC.[699]

During the fourth and fifth negotiation rounds in November and December, ETUC proved willing to a degree of compromise. They were set on achieving a result regarding

697 Ahlberg et al. (2008), p. 202.
698 Ahlberg et al. (2008), p. 202.
699 Ahlberg et al. (2008), p. 203.

equal pay. The employers were willing to accept the 'comparable worker' in the user company where maximum working hours, minimum hours of rest and occupational health and safety were concerned, but wanted to continue to leave the other terms of employment, including pay, to the member states and/or the social partners.

On 18 December, a drafting group met up and the trade union movement presented a new draft version. Proposals were made to clarify the legal position of temporary agency workers and to attach conditions of use to the deployment of temporary agency work. They dovetailed with provisions regarding objective reasons for contract renewal, maximum, duration or the maximum number of renewals of such contracts or relationships assignment that had been included in the framework agreement on fixed-term work.

Moreover, there should be supervision by means of licensing or certification, protection of migrant workers, a ban on temporary agency work in case of strikes, no fee to workers, a ban on hindering the entering of direct contracts with the commissioning employer and opportunities for sectoral or categorial bans as provided for in Convention 181.[700]

Temporary agency workers should also count with regard to quantitative requirements for establishing works councils, both at the temporary employment agency and with the commissioning client.

In the sixth negotiation round, the employers responded. They recognised that the permanent employment contract was to remain the basic principle. Temporary agency workers should be informed of any new vacancies in the user enterprise in the same way as the enterprise's permanent employees. Temporary employment agencies must comply with the no fee to worker principle. Moreover, there should be no impediments to concluding a direct contract of employment. The temporary agency workers were to count with regard to co-determination, and representative bodies should be supplied with information about the temporary agency workers deployed and should be able to consult about them.

While the employers would not accept a compromise regarding the non-discrimination regulations, they did concede that member states and social partners should evaluate the provisions in respect of temporary agency work and abolish them wherever possible. Employers held on to restricting the agreement to temporary agency workers with a temporary contract.[701]

The ETUC declared that it would be flexible regarding the so-called 'conditions of use', if the employers were to accept the non-discrimination provision, sectoral or categorial bans, and bans on replacing striking workers with temporary agency workers.

700 Ahlberg et al. (2008), p. 205.
701 Ahlberg et al. (2008), p. 206.

The employers were willing to accept the user enterprise's standards for determining the maximum working hours, minimum resting periods and occupational health and safety, however, for other terms of employment, including pay they did not want to do so. The determination of those other terms had to be left to the member states and/or social partners.

The Commission's Legal Service advised that strikes not be mentioned in a framework agreement, but perhaps to include this in the preamble. Moreover, the Legal Service argued that employment conditions also imply pay but that it would be unwise to include the word 'pay' in the text.[702] Furthermore, it argued that if the rates of pay were determined with reference to the 'comparable worker's' wages at the user enterprise, this would indirectly determine the sectoral wage level, which would definitely be in breach of article 137, par. 6.[703]

This resulted in major confusion, not only on the part of the trade union movement. In the eighth negotiation round, another attempt was made to reach a solution. The employers were willing to move on the topics of occupational training and striking, but not on non-discrimination provision. ETUC wanted a reference to the user company for basic employment conditions and a clear indication by the employers that pay was included in these conditions. The latter was given by the employers. Also, ETUC proposed a new text in respect of non-discrimination: 'For basic employment conditions, the comparable worker would be a worker in the user company unless explicitly regulated otherwise by a collective agreement concluded by the social partners at the national or sectoral level assuring the principle of non-discrimination'.

For countries that have no sectoral or national collective bargaining systems, a paragraph 2 was provided, suggesting the possibility of achieving equivalent solutions in another manner.[704]

7.4.4 No compromise

On 14 March 2001, the chairperson of the negotiations reported that a compromise did not seem possible. Eventually, ETUC addressed two questions to UNICE: can employers accept the user pay reference, and is it possible to agree on provisions that aim to combat abuse?

Employers argued that the user company reference was acceptable in respect of occupational health and safety, maximum working hours and minimum resting hours. However, they did not find it acceptable as a reference for other terms of employment. Employers were willing to allow bans on temporary agency work in

702 Ahlberg et al. (2008), p. 209. See also: Schömann & Gueda (2012), p. 15.

703 Ahlberg et al. (2008), p. 209.

704 Ahlberg et al. (2008), p. 210 and 211.

certain sectors or for certain activities on the basis of specific reasons, provided that these restrictions would be regularly evaluated in order to establish whether the bans were still justified.

On the basis of these responses, ETUC considered the negotiations to be over. On 6 April 2001, European Commissioner Anna Diamantopoulou initiated another consultation between the parties at the request of European Commission chairman Romano Prodi. Diamantopoulou asked them to make another attempt. Thereupon, the employer's chairperson Bernaert informally proposed that the user pay reference might be acceptable, if restricted to temporary agency workers with temporary contracts, but ETUC would not accept this proposal.

Shortly afterwards, Diamantopoulou made yet another attempt, proposing that the user pay reference could be deviated from if this were justified by an objective reason, such as an alternative adequate level of protection. ETUC rejected this proposal, as did the employers who wanted an exception for workers with open-ended contracts.

Thus, the social dialogue on temporary agency work had utterly failed. The initiative was now fully with the Commission.[705]

7.5 TEMPORARY AGENCY WORK DIRECTIVE

7.5.1 Joint declaration 2002

After the social dialogue had failed – in May 2001 – it took until March 2002 before the Commission presented a draft for a Temporary Agency Work Directive. In the meantime, Euro-Ciett and Uni-Europa presented a joint declaration regarding elements that should be taken into account in a new proposal. Both parties aimed at achieving a good balance between protecting the temporary agency workers and underscoring the positive role that temporary agency work can play.

The Declaration[706] proposes the following essential elements:

- The basic principle is that non-agency employment and permanent contracts are the most common types of labour, while it is recognised and acknowledged that temporary agency work can contribute to the economic and employment targets of the European Union.
- The quality of temporary agency work opportunities and relations must be improved, considering the interests of workers, commissioning clients and temporary employment agencies with regard to flexibility and security.

705 Ahlberg et al. (2008), p. 212.

706 Euro-Ciett/Uni-Europa joint declaration, Objectives of the European Directive on Private Agency Work, October 2001.

- Temporary agency work must be acknowledged as a way to help disadvantaged workers integrate in the labour market, for instance through vocational training and educational activities.
- The quality of temporary agency work is underscored by taking into account the equal treatment obligations that flow from both the temporary employment agency's relationship with its workers and the temporary agency worker's relationship with the commissioning client and its staff.
- Following consultation with social partners, member states will need to be asked to remove any impediments to the proper functioning of the temporary employment agency, provided that legislation may be needed to combat any abuse, such as the possible undermining of labour and employment conditions in the user enterprise and otherwise.
- It must be guaranteed that EU and national law and regulations in the field of non-discrimination are respected, provided that the tripartite relationships pertaining to temporary agency work require a specific approach; furthermore that temporary employment agencies do not replace striking workers by agency workers, and that temporary agency workers may exercise collective bargaining and union rights.
- Temporary agency workers are employed by the temporary employment agency, as a result of which the agency has obligations as an employer and the workers are protected by the applicable labour law.
- It must be guaranteed that temporary agency workers have access to adequate occupational training and education opportunities at the temporary employment agency and in the user enterprise, and that – neither directly nor indirectly – fees are charged to the temporary agency worker for the services provided.
- It must be encouraged that social partners implement the above principles, which must be included in the directive.
- It must be recognised that updating of benefit systems is necessary in order to adjust them to current circumstances and especially to facilitate continuity of rights.

7.5.2 Commission proposal

The purpose of the Directive is (art. 2):

1. to improve the quality of temporary agency work by ensuring that the principle of non-discrimination is applied to temporary agency workers;
2. to establish a suitable framework for the use of temporary agency work.[707]

707 Ahlberg et al. (2008), p. 221.

In the recitals, one can read, among other things, that 'temporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their working and private lives. It thus contributes to job creation and to participation and integration in the labour market' (recital 11).

The recitals also state that 'with respect to basic working and employment conditions, temporary workers should not be treated any less favourably than a "comparable worker", i.e. a worker in the user undertaking in an identical or similar job, taking into account seniority, qualifications and skills' (recital 15).

It states that deviations are possible for workers with a permanent contract (recital 17). Moreover, social partners may deviate from the 'equal pay for equal work' rule laid down in recital 15 (recital 18). Furthermore the principle of non-discrimination should be applied flexibly for assignments that do not exceed six weeks.

The protective provisions of the Directive enable 'that any restrictions or prohibitions which may have been imposed on temporary work to be reviewed and, if necessary, lifted if they are no longer justified on grounds of the general interest regarding in particular the protection of workers' (recital 20).

Article 1, par. 1, provides that: 'This directive applies to the contract of employment or employment relationship between a temporary agency, which is the employer, and the worker, who is posted to a user undertaking to work under its supervision'.

In total, the directive has seventeen provisions. The most important ones are the articles 4 and 5 regulating respectively 'review of restriction or prohibitions' and 'the principle of non-discrimination', as stated in recitals 15 and 20.

Article 4 specifically states that after consulting the social partners, the member states must regularly and at least every five years review 'any restrictions or prohibitions on temporary work' and 'verify whether the specific conditions underlying them still obtain'. If they do not, the member states should lift the restrictions or prohibitions. The result of the review must be reported to the Commission, who must also be informed as to why maintaining certain restriction or prohibitions is justified.

Article 5, par. 1, states: 'Temporary workers during their posting shall receive at least as favourable treatment, in terms of basic working and employment conditions, including seniority in the job, as a comparable worker in the user enterprise, unless the difference in treatment is justified by objective reasons. Where appropriate, the *pro rata temporis* principle applies'.

Thus, exemptions can be made when temporary workers who have a permanent contract of employment with a temporary employment agency continue to be paid in the time between postings. ('German exemption') (par. 2).

Also, a collective agreement may be concluded that derogates from the principle of equal treatment, on the condition that an adequate level of protection is provided for temporary workers (Swedish exemption') (par. 3).

Moreover, member states may provide that assignments taking up six weeks at most will be exempted from this principle. Furthermore, it is stated that if no comparable worker exists, reference will be made to the collective agreement applicable in the user enterprise; if no such collective agreement exists, reference will be made to the collective agreement applicable to the temporary employment agency. And if that does not exist either, the treatment of temporary agency workers must be regulated by national legislation and practices.

Article 6 gives temporary workers the right to be informed of any vacancies in the user enterprise in a similar way as other employees of this user enterprise (par. 1). Any clauses banning or preventing the conclusion of a permanent contract are null and void (par. 2). Moreover, the no fee to workers principle applies and furthermore, in principle, temporary workers have a right to access to the social services of the user enterprise (par. 3 and par. 4).

Lastly, measures are required, or must be promoted through social dialogue, to improve temporary workers' (access to) occupational training and to enhance their employability.

Article 7 provides that temporary workers count for the purposes of calculating the threshold above which representative bodies must be formed at the temporary employment agency, and in principle also in the user enterprise.

Article 8 gives the representative bodies the right to information on the use of temporary agency work as part of the information provided by the user enterprise on the employment situation in that enterprise.

The articles 9, 10, 11, 12 and 13 constitute the final provisions. Article 9 states that member states may apply provisions that are more favourable. Article 11 provides a period of two years for further implementation and article 12 regulates a review after five years.

The Commission assessed the effectiveness of the Directive, putting the cost increases that result from it into perspective. It also referred to a CIETT study that underscores the importance of applying all new provisions and conditions in respect of temporary agency work – especially in the field of wages and job security – by means of adequate labour legislation. All these measures will benefit the sectoral image and enhance social acceptance of temporary agency work. This is vital if the temporary employment agency industry is to develop further.[708]

708 CIETT (2000b), p. 40.

7.5.3 Reactions

The member states responded diversely, focusing particularly on article 4 and article 5. In view of the revision provision, many member states wondered what this would mean for regulating temporary agency work in the individual countries; with regard to article 5, there was criticism about the 'six-week period' that would constitute the exemption on the principle of non-discrimination. There were both member states that did not want any exemptions and those who wanted to considerably extend this period.

Apart from the discussion on articles 4 and 5, there was the question as to whether the freedom to use temporary agency work as a labour market instrument was at issue. The British voiced doubts about whether the Directive could be based on article 137 of the Treaty establishing the European Community, now that article 137, par. 5, ruled out the possibility to discuss pay at European level.

Debate likewise arose on the comparable worker, which would not serve as a suitable concept for comparison. Also, the non-discrimination principle as such and the exemptions from it came up for debate. The British felt that such a principle would be unjustified, since a jobseeker who starts his career as a temporary agency worker can hardly be compared with a permanent worker. The Germans, whose legislation on temporary agency work included a 12-month period after which user-pay was mandatory, also had problems with the way this principle was to be regulated in the Directive.

Moreover, the British stated that they have no tradition of collective bargaining and that it would be difficult to find a 'comparable worker" in the user enterprise in order to be able to determine the rate of pay. This earned the British the support of the Irish and the Portuguese. Opposite them were the Belgians, the French, the Spaniards and the Greeks.

Eight countries (Austria, Belgium, Spain, France, Greece, Luxembourg, the Netherlands and Sweden) were opposed to the six-week exemption. Germany, Ireland and the United Kingdom were in favour, although they actually wanted a longer exemption period.[709]

On 23 October 2002, the European Parliament gave its judgment. The Parliament proposed more than 50 amendments. According to the rapporteur, existing legislation, such as ILO convention 181 and ILO recommendation 188 had not been taken sufficiently into account. There were also many technical questions. In the course of the deliberations, the Legal Service issued a point of view on the potential breach with article 137, par. 5, that ruled out pay from the European competences. The Legal

709 Ahlberg et al. (2008), p. 222 ff.

Service stated that the provision in article 5 aimed to regulate non-discrimination and was not intended to regulate the pay level. The latter continued to be at the discretion of the member states.

The Commission also presented an amendment to article 5 stating: 'The basic working and employment conditions applicable to temporary agency workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job.' Thus, the 'comparable worker' had made room for the 'hypothetical comparable worker'.

The majority of the member states appeared to react positively to this amendment, although Germany, Ireland, the United Kingdom and Sweden continued to have reservations.

The European Parliament proposed amendments, among others with regard to article 4, which was brought more into line with the prohibition options of ILO convention 181, and with regard to article 5, where the 'German exemption' would only apply to 'pay and specific pay elements' and where payment must be adequate and continuous whether they are on an assignment or not.

The 'Swedish exemption' was amended by deleting 'as long as an adequate level of protection is provided'. The six-week exemption was fully deleted, as it would keep a large number of temporary agency workers outside the scope of the Directive.[710]

7.5.4 Amended proposal

On 28 November 2003, the Commission presented an amended proposal. Out of the 58 amendments by the European Parliament, 31 were accepted.

Article 2 was supplemented with the following purpose: to ensure the protection of temporary workers, recognising temporary employment agencies as employers and the use of temporary agency work to contribute to creating jobs. According to the amended article 3, the definition of 'pay' should be left to the member states. Article 4 on the prohibitions or restrictions was adjusted in total accordance with the European Parliament's amendments. The prohibitions or restrictions were justified 'on grounds of general interest relating in particular to the protection of temporary workers, the requirements of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented'. The review obligation was less strict, and the obligation to review periodically and within a five-year period was deleted.

Article 5 aligned with the amendment presented earlier during the deliberations, i.e. the so-called 'if clause'.

710 Ahlberg et al. (2008), p. 229 ff.

The 'German exemption' was now only to apply to pay. Deleting the phrase 'adequate level of protection' in the context of the Swedish exemption was not adopted by the Commission. The six-week period exemption would now only apply to pay, but not to any other basic working and employment conditions.[711]

7.5.5 Further reactions

The subsequent deliberations showed some progress, but at least three items continued to be undecided. The Members of the European Parliament agreed om the purpose of the Directive, i.e. elements such as 'protection of temporary workers', 'recognising temporary agencies as employers' and 'use of temporary agency work to contribute to creating jobs' remained intact, and Sweden was satisfied with the provision regarding the 'Swedish exemption' that social partners could derogate without derogations being subject to a legal opinion.

There continued to be discussion on article 3, the scope, on article 4 with regard to the prohibitions or restrictions and on article 5 with regard to the six-week period as exception to the rule on user pay. Article 3 concerned the question as to how an exception could be made for the integration of jobseekers in the labour market.

During the Greek presidency, compromises were proposed. In article 4, the obligation to lift the prohibitions or restrictions – the obligation to discontinue – was deleted, as it was said to be a superfluous provision. In article 5, the six-week period was amended, in the sense that a transitional arrangement would apply, in line with proposals by the European Parliament that amounted to member states having the option during five years following the Directive's implementation to waive the user pay obligation for assignments the duration of which is to be determined by the member states. Following the evaluation of the Directive, the five-year period could be further extended.

During the Dutch presidency, four items were deliberated on:

- The transitional arrangement: should it be five years, eight years or for an indefinite period?
- In that case, how long should the derogation period in article 5, par. 4, now established at six weeks, be?
- Should the derogation apply to pay only, or be extended to essential terms of employment?
- What was needed with regard to article 4; should a review be held 'once and for all' through the implementation, or will deleting the requirement in the prohibitions and restrictions of temporary agency work be sufficient?[712]

711 Ahlberg et al. (2008), p. 237 ff.

712 Ahlberg et al. (2008), p. 248.

During the subsequent deliberations, solutions hardly proved feasible. The discussion on article 4 in particular made no progress.

7.5.6 Fundamental criticism

Scientists mainly criticised article 5 concerning the principle of 'equal pay for equal work'. Grapperhaus was critical, arguing that the application of the principle of equal pay raises questions on the issues of equal treatment, freedom of contract/individual autonomy and the right to collective bargaining.[713]

Grapperhaus argued that the (amended) draft directive 'does not deal correctly with the right of temporary agency workers to be treated equally to their comparable workers'.[714] According to him the wording of the amended article 5 par. 1 – The basic working and employment conditions of temporary workers shall be, for the duration of their posting at a user undertaking, at least those that would apply if they had been recruited directly by that enterprise to occupy the same job – does not:

> … sufficiently meet the requirements of the principle of equal treatment for equal work as set out in various international treaties, and as elaborated further in decisions of the Court. To achieve unrestricted equal treatment, it would be necessary to at least take into account that there is a certain sliding scale of comparison that requires temporary agencies to achieve that temporary agency workers receive treatment equal to either their colleague temporary agency workers or the comparable user enterprise employee, depending on the relevant work related circumstances.[715]

But what is a comparable user enterprise employee? The temporary agency worker starting his or her assignment can hardly be compared with a permanent worker, since the temporary agency worker lacks the work experience, lacks experience with the user enterprise, has not yet been integrated within the user enterprise's company, is free to go any day or any week, in contrast to the user enterprise's permanent worker and has a closer bond with the temporary employment agency than with the user company.

Grapperhaus argues that, in the course of time, the temporary agency worker is increasingly integrated within the user enterprise's company. He becomes familiar with the work, gains experience, becomes more socially integrated and more interested in the user enterprise's company, and he will find it more difficult to cut short

713 Grapperhaus (2003), p. 12.
714 Grapperhaus (2003), p. 57.
715 Grapperhaus (2003), p. 57.

the assignment. There is a gliding scale, as it were. In the beginning, the 'comparable worker' cannot be said to be the permanent employee at the user enterprise; this is only relevant following a process of integration.

Referring to jurisprudence by the European Court,[716] Grapperhaus holds the view that to determine who the 'comparable worker' is, it is necessary to take into account all the aspects of each individual case, for instance the nature of the assignment, the training requirements and the working conditions:

> As equal treatment demands equal circumstances, it is always necessary to judge all circumstances before one can truly establish a comparable worker. Since circumstances at work change over a period of time, it is inevitable that both the employer in question as well as the comparable worker will go through changes during that time.

Ultimately, Grapperhaus proposes to let the member states decide how the 'comparable worker' is to be defined. He suggests facilitating this after a twelve-month period. Although the criticism was fundamental in nature and certainly made sense, it played no great role in the ensuing discussion.

The presidencies of Luxembourg and the United Kingdom (2006) stated that they would do anything to achieve an agreement on the Temporary Agency Work Directive. The subsequent presidencies of Germany and Portugal (2007) did not manage to make any progress either.[717] This only changed during Slovenia's presidency in the spring of 2008.

A breakthrough in this discussion was achieved through a deal that was concluded by the national employers' and workers' organisations and the government of the United Kingdom. It was agreed to introduce a twelve-week 'period of grace' before the user pay obligation becomes effective. This agreement paved the way for a new proposal by the Commission.[718]

716 Grapperhaus (2003), p. 15–17.

717 Ahlberg et al. (2008), p. 251

718 Government agrees fair deal on Agency Work, News Release Department for Business, Enterprise and Regulatory Reform, reference 2008/199, 20 May 2008, http://www.wired-gov.net/wg/wg-news-1.nsf/lfi/161038. See also: More rights for agency workers: what does the political deal announced today means for users and suppliers of temps and contractors. Blake Lapthorn, Tailo Lyons, 2008, joint declaration by the Government; CBI and TUC, 21 May 2008

7.5.7 Joint declaration 2008

Approximately at the same time, Euro-Ciett and Uni-Europa issued a joint declaration[719] that attempted to indicate the contours of a new directive. This declaration included the following 'guiding principals':

- An EU regulatory framework must be in the interest of both the business and the workers.
- An EU regulatory framework must be drawn up for the entire EU, i.e. for all the member states.
- The draft directive will need to be judged on its own merits.
- The proposed regulations need to combine adequate protection for temporary agency workers with the role that temporary employment agencies can play in a properly functioning labour market, need to supply measures that prevent unfair competition by fraudulent temporary employment agencies and/or commissioning clients, and need to combat abuse and illegal practices.
- The principle of equal treatment with regard to basic working and employment conditions must be applied.
- A proper regulatory framework promotes social dialogue, collective bargaining and a functioning system of labour relationships in the sector.
- Any impediments to the adequate functioning of temporary employment agencies must be identified and eliminated. Certain restrictions are necessary to combat potential abuse and the potential undermining of labour and employment conditions.
- Licensing, certification, inspection and registration systems can contribute to a healthy development of the sector, provided the regulations are proportionate, non-discriminatory and objective.
- ILO convention 181 and ILO recommendation 188 must be taken into account, as must respect for organisational freedom and freedom of negotiation, as laid down in the ILO conventions 87 and 98.
- National legislation on replacing striking workers by temporary agency workers must be observed.
- It is recognised that, under the right conditions, temporary agency work can play a positive role in the labour market.
- Temporary employment agencies may not compete on labour and employment conditions.
- The principle of non-discrimination applies from the first day onward, unless social partners or tripartite bodies have agreed on a qualifying period at a national level.

719 Euro-Ciett/Uni-Europa (2008).

- For the duration of the assignment, the basic working and employment conditions must be equal to those of a comparable worker at the user enterprise, or to what would be applicable if the worker in question had been hired directly.
- A collective agreement may derogate from the principle of non-discrimination.
- Other solutions, including transitional regimes, qualifying periods to be agreed on by social partners and/or tripartite bodies are feasible.
- Permanent contracts with the temporary employment agency may derogate from the principle of non-discrimination, if the worker continues to be paid between assignments.
- In accordance with Directive 91/383/EEC with regard to occupational health and safety, temporary agency workers must be fully protected in the same way as other workers at the user enterprise.

Remarkably, in this declaration CIETT relinquished the stance that there are obligations with regard to equal treatment both at the user enterprise's level and at the temporary employment agency's level. Equally remarkably, Uni-Europa accepted the derogation option for permanent employees. Earlier on, both items had been non-negotiable for these parties.

7.5.8 A new directive[720]

Eventually, the Slovenian presidency managed to formulate a proposal that would be acceptable to all parties. A number of amendments/supplements were made to the 2002 proposal. The recitals refer to the Lisbon strategy and the aim for flexibility, security, and decrease of segmentation. Moreover, they refer the Council's opinion that new forms of organisation and a wider range of employment contracts, leading to a better combination of flexibility and security, contributes to adjustability. Furthermore, they drew attention to the by now accepted concept of flexicurity (recital 9).
The Directive establishes a protective framework that is non-discriminatory, transparent and proportionate, while respecting the diversity of the labour markets and industrial relations (recital 12: joint declaration 4). Permanent contracts are the general form of employment relationship (recital 15).

The member states may in a flexible manner take into account the diversity of the labour markets and industrial relations and define the working and employment conditions, provided that the overall level of protection for temporary agency workers is respected (recital 16). Furthermore, member states may derogate from the principle of the non-discrimination as long as an adequate level of protection is in place (recital 17).

720 Directive no. 2008/104/EC. See also Monika Schlachter, p. 249 ff.

A review of the restrictions or prohibitions must take place, however, without any explicit obligation to eliminate them if they fail to comply with the requirements (recital 18). The Directive does not affect the autonomy of social partners (recital 19). Administrative and judicial procedures should be provided for to safeguard the rights of temporary agency workers, combined with effective dissuasive and proportionate penalties for breaches of the obligations (recital 21).

The Directive comprises 13 articles. Article 4, on the review of restrictions or prohibitions, and article 5, the principle of equal treatment, continued to be important. The essence of article 4 is par. 2, stating:

> By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.

The grounds mentioned in paragraph 1 are grounds of general interest relating to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented. If the provisions have been laid down in collective agreements, the review may be carried out by the social partners.

Apart from the 'German exemption' in par. 2 and the 'Swedish exemption' in par. 3, article 5, the article that regulates non-discrimination, now also has a 'British exemption' in par. 4, stating:

> Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

Also important is a new paragraph 5, stating:

> Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and,

> in particular, to preventing successive assignments designed to circumvent the provisions of this Directive. They shall inform the Commission about such measures.

Another amendment concerns the purpose article, article 2, which provides:

> The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

Furthermore, the Directive includes, as did the 2002 proposal, article 6 regulating access to employment, collective facilities and vocational training. Article 7 deals with the representation of the temporary workers, article 8 regulates the information of workers' representatives, and the final provisions in articles 9, 10, 11, 12 and 13 on respectively minimum requirements, penalties, implementation, review, and entry into force.

Article 10 in particular has undergone considerable changes since the 2002 proposal. In order to combat non-compliance, member states must provide appropriate administrative and judicial measures. These penalties must be effective, proportionate and dissuasive, and workers and/or their representatives must have adequate means of enforcing them.

7.5.9 Effects

The question is what has by now been the effect of the Temporary Agency Work Directive. The Commission issued a report on its application in March 2014.[721] The report shows that all the member states have implemented the directive, although in a number of cases transposition occurred late and only after the Commission had launched infringement proceedings. What is interesting is the extent to which member states have made use of the derogation options provided for in article 5. Five member states made use of the so-called 'German exemption': Hungary, Ireland, Malta, Sweden and the United Kingdom;[722] ten member states made use of the 'Swedish exemption':[723] Austria, Bulgaria, Denmark, Finland, Germany, Hungary,

721 European Commission (2008b).
722 European Commission (2008b), p. 6
723 European Commission (2008b), p. 7

+ Conditions and Restrictions added	− Restrictions lifted
Germany: Stricter regulation on Equal Pay (2013) based on sectoral/branch pay supplements **Spain:** Higher sum as financial guarantee + stricter reporting obligations on operations (2015) **Slovakia:** Maximum length of assignments + limitation to assignment renewals + restrictions on use of TAW (2015) **Slovenia:** Need of financial guarantee + stricter reporting obligations on operations + quota on nr. of agency workers in a firm (2013) **Estonia:** Limitation to assignments **France:** Potential ban on the use of agency work in public services, with the exception of the health sector/ hospitals (2016)	**France:** Easing of regulation on assignment renewals (from 1 to 2) + easing of regulation on max. length of assignments + removal of waiting period between assignments for open-ended contracts (2015); lower financial guarantee; types of contract offered (2013) **Greece:** Reasons for use (2014); Restrictions on sectoral bans lifted + restrictions on hiring after dismissals eased + shorter waiting period for TAW contracts renewals after max. length of assignments reached (2014); exclusivity of purpose of TWAs (2012); lower sum as financial guarantee + requirement on minimum staff working in TWA lifted (2012) **Italy:** Use of TAW eased for vulnerable workers & young people, reasons for use and extension of maximum length of assignments (2014) **Romania:** Sectoral bans lifted + extension maximum length assignment, more balanced licensing system (2013) **Spain:** Permanent recruitment + cooperation with PES (2012) + Legal bans in public and construction sector lifted (2012); specific training and learning contracts for agency workers (2013); apprenticeship contracts (2013) **Luxembourg:** No need of authorization for job-training contracts in periods between assignments (2014) **Portugal:** Lower sum as financial guarantee (2014) **Czech Republic:** Restriction on hiring of disabled people lifted (2014) **Latvia:** Maximum length of assignments (but with longer waiting period) (2014) **Estonia:** Licensing system removed

Figure 7.2 Evolution of national regulation on TAW; 2012–2015: Changes after the AWD implementation phase

CIETT, internal communications

Ireland, Italy, the Netherlands and Sweden; the United Kingdom and Malta made use of the 'British exemption'[724].

With regard to the review of the restrictions and prohibitions, 24 member states provided reports. Four member states - Ireland, Luxembourg, Malta and the United Kingdom - stated that no restrictions or prohibitions were in place. The justifications of the restrictions and prohibitions were very general, referring to the protection of temporary agency workers, the requirements of health and safety at work, the proper function of the labour market and prevention of abuse.

The Commission reports that Romania, Sweden and Belgium have removed restrictions and prohibitions.[725] Romania has added 'the execution of specific temporary tasks' as a reason for using temporary agency work. Sweden has lifted the six-month waiting period before a new assignment at the same user enterprise may be accepted. In Belgium, integration purposes, i.e. with a view to possible direct

724 European Commission (2008b), p. 8

725 European Commission (2008b), p. 12

recruitment of the worker by the user enterprise, have been added as a reason for using temporary agency work. The Commission states that few restrictions or prohibitions have been removed, although the review was still work in progress in several member states. For that matter, a CIETT report shows that between 2012 and 2015, ten countries had removed restrictions and prohibitions, while six countries had added or re-implemented restrictions and prohibitions, or intended to do so.

The social partners were mostly involved in the review of article 4 and/or the implementation of the directive.[726]

The cost increases appeared to be limited or could hardly be traced.[727] Most member states thought that the directive had achieved its socio-political aims. The employers – both Business-Europe and Euro-Ciett – were of the opinion that the aims had not been fully achieved. The results of the review of the restrictions and prohibitions were disappointing, and some member states had even recently introduced restrictions and prohibitions. There are still too many examples of sectoral prohibitions, excessively restricted maximum durations of temporary assignments, excessively limited reasons for using temporary agency work and restrictions to the maximum number of temporary agency workers. Another source shows that particularly such quota rules can distort competition.[728]

A clear majority of the member states did not consider clarifying of amending the directive, or parts of it, to be necessary.[729] Only Finland responded that article 4 was unclear. Business-Europe asked the Commission to provide an interpretative communication on this article. Euro-Ciett stated that it would request a revision of article 4 if substantial progress in its implementation proved unfeasible. ETUC responded that it was yet too early to judge, although it found the derogation options to article 5 very problematic, particularly the 'German exemption'. The Commission concluded that the provisions of the directive have been correctly implemented and applied,[730] although its twofold objective – equal treatment and reviewing the restrictions and prohibitions of temporary agency work – has not yet been fully achieved.

The wide range of derogation options provided for in article 5 has led to a situation where the application of the Directive has no real effect on the improvement of the protection of temporary agency workers. On the other hand, the review of restrictions and prohibitions on the use of temporary employment agencies has served, in the majority of cases, to legitimate the status quo, instead of giving an impetus to the

726 European Commission (2008b), p. 13
727 European Commission (2008b), p. 15
728 Lundvall & Strand (2014).
729 European Commission (2008b), p. 18
730 European Commission (2008b), p. 19.

rethinking of the role of temporary agency work in modern, flexible labour markets. The fact that according to the CIETT report ten countries have by now amended their temporary agency legislation in a positive way does not alter this conclusion.

7.5.10 The Finnish case

Meanwhile, a case in Finland involved asking the European judges to clarify article 4 of the directive. The Finnish transport workers' union (Auto- ja Kuljetusalan Työntekijäliitto AKT ry) requested the Finnish labour court (Työtuomioistuin) to condemn Shell Aviation Finland oy and its employers' organisation (Öljytuote ry) for infringing on a provision on temporary agency work in the collective agreement. As a result, the Finnish judge wondered whether restricting the use of temporary agency work is actually in line with article 4, par. 1, of the directive and requested a ruling from the European Court of Justice. In his conclusions, the Advocate General dealt with the case in detail.[731] The provision in the Finnish collective agreement is as follows:

> Undertakings shall restrict the use of temporary agency workers to dealing with peaks of work or to the performance of other tasks of limited duration or of a specific nature which, for reasons of urgency or because of their limited duration or skill requirements or the use of special tools or other similar reasons, they cannot have performed by their own staff [...] The use of temporary workers is an unfair practice if the temporary agency workers employed by undertakings using external workers carry out the undertaking's usual work alongside the undertaking's permanent workers under the same management and for a long period of time.

AKT argued that Shell and Öliytuole were infringing this provision by regularly employing temporary staff. The question was whether this provision was in line with article 4, par. 1, which only considers restrictions and prohibitions acceptable if they serve the general interest, particularly relating to the protection of the temporary agency workers, the requirements of health and safety at work, a proper functioning of the labour market and the prevention of abuse.

Among other things, the Advocate General M. Szpunar stated that article 4 clearly provides that unjustified restrictions are prohibited. The article does not concern a procedural requirement, but rather a substantive rule. He deduced this from both the literal text and the origins of the provision. He also rejected the contention that the legal basis of article 137, par. 1 and par. 2, EC would be insufficient for prohibiting restrictions on the use of temporary agency work, since such a prohibition would

731 Conclusion by Advocate General M. Szpunar delivered on 20 November 2014 (1), case C-533/13 Auto- ja Kuljetusalan Työntekijäliitto AKT ry v. Öljytuote ry and Shell Aviation Finland oy.

be an acceptable by-product of the objective of equal treatment. The A G argued furthermore that the right of collective bargaining is enshrined in article 28 of the Charter, but that this right is not absolute and may be restricted by Community law such as article 4 of the directive. The A G went on to argue that European law resists the interpretation that article 4 comprises a purely procedural obligation, and that the national court and the European Court of Justice perform essential functions for the nature of Union law. He argued:

> The interpretation advocated by certain Member States in this case, according to which the Member States must review restrictions on the use of temporary agency work but are under no obligation as regards the outcome of that review, seems to me to be irreconcilable with that principle.

Furthermore, he concluded that article 4, par. 1, reflects article 56 TFEU and specifies the compelling reasons that may justify the restriction. Therefore, he advised that article 4, par. 1, be considered as a prohibition of unjustified restrictions on the use of temporary agency work rather than as a purely procedural requirement. He also argued that the wording of the so-called peak/sick leave clause in the collective agreement tends to suggest that it is justified. He stated:

> To my mind, a Member State may, without overstepping the bounds of that discretion, provide that the use of temporary agency work is permitted in circumstances which are consistent with the temporary nature of that form of work, albeit that temporary work must not have a detrimental effect on direct employment. […] I consider that Article 4(1) of Directive 2008/104 does not preclude national rules which, first, restrict the use of temporary agency work to the performance of tasks that are temporary and which, for objective reasons, cannot be carried out by workers employed directly by the user undertaking and, secondly, prohibit the employment of temporary agency workers alongside workers employed directly by the user undertaking to carry out tasks identical to those carried out by its own workers for a long period of time.

All in all, the A G argued that article 4, par. 1, really provides a prohibition of unjustified restrictions on temporary agency work rather than merely a procedural requirement, and that a so-called peak/sick leave clause is not unjustified.

The Court's judgment[732] did not act on the A G's advice. It did however establish that the member states are obliged to review any restrictions or prohibitions on

732 Auto- ja Kuljetusalan Työntekijäliitto AKT ry versus Öljytuote ry and Shell Aviation Finland Oy, judgement of the Court of March 17, case-533/13.

the use of temporary agency work: 'in order to verify whether they are justified on grounds mentioned in article 4 (1)', that the member states must inform the Commission of the results of this obligation and that the obligation is imposed on the competent authorities of the member states rather than on the national court. Depending on the results of this review the member states could have been obligated to amend their national legislation on temporary agency work. The Court did not enlarge on how this was to take place. It did, however, establish that a legislative framework is not obligatory. Consequently, the Court established that article 4 is addressed only to the competent authorities of the member states and does not impose an obligation on the national courts.

Grapperhaus[733] holds the view that:

> This means that on the basis of article 4 (1) of the Directive, Member States can be required to remove or adapt any unjustified prohibition or restriction in national law, but they can not be required to adopt national legislation. […] In addition on the basis of article 4 (2) and (3) of the Directive, Member States can be required to conduct a review of any restrictions or prohibitions on the use of temporary agency work in national legislation or – if it concerns collective agreements – ensure that a review is conducted by the social partners, in order to verify whether they are justified if such review has – factually – not yet taken place, such review should be conducted by the Member States or – if it concerns collective agreements – by the social partners.

Moreover, Grapperhaus holds the view that reviews of unjustified restrictions or prohibitions on temporary agency work can be achieved through the directive's limited direct applicability. Through this so-called 'vertical effect' private parties can address member states. Also, an appeal can be made to the European Commission, which will be able to take the necessary action.

And thus it appears to have become clear that article 4, which at the start of the discussion was essentially a valuable element of the directive, has ultimately turned out to be a cumbersome procedure that does not facilitate a reasonable review. Therefore, acceptance of the principle of non-discrimination turns out to be scantily rewarded by a much-weakened article with which to review the restrictions or prohibitions on temporary agency work on the basis of the positive role that temporary agency work is by now playing. The question is whether article 2 of the directive is respected, since it now states:

733 Grapperhaus (2015).

> The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

7.6 FLEXICURITY

7.6.1 Definition and origins

We shall now examine the concept of flexicurity. What is it? What position does it hold in the European employment policy? What principles does Europe now follow with regard to this concept? And how does temporary agency work relate to this currently accepted labour market concept?

Wilthagen and Tros[734] define flexicurity as 'a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, work organizations and labour relations on the one hand and to enhance security employment – security and social security – notably for weaker groups in and outside the labour market on the other hand.'

In later versions, Wilthagen has left out the reference to weaker groups in the labour market. The definition pays attention both to the process of flexicurity and to its substance. Both are considered to be relevant. The concept originated at national level,[735] in the Netherlands, as a result of the implementation of the Dutch Flex Act (the Flexibility and Security Act) in 1999. The terminology was first coined by the Dutch sociologist Hans Adriaansens, who used it in the context of this new Flex Act. In 1996, a study was published by the WRR (Netherlands scientific council for government policy) under the supervision of Adriaansens, in which the term was used again:

> It is a requirement of justice, rightfulness and efficacy that a community that needs flexible labour ensures that the social security system likewise invests flexible employment relationships with adequate security. However, such forms of 'flexicurity' call for particular alertness to improper use by employee or employer.

734 Bekker (2011), p. 27.
735 Bekker (2011), p. 104.

In Denmark, too, the concept was discussed in national politics. In the autumn of 2005, the Danish Prime Minister Rasmussen emphasised the satisfactory results of the flexible Danish labour market in combination with strong social security. The Danish model of flexicurity showed good economic results, high labour mobility, strong social security and a happy population.

Following the turn of the century, the concept drew more and more attention among academics and policy makers. In 2004, the concept was well established, and by that time Rasmussen advocated this system at European level:

> … equipping people to adapt to – inevitable – change: to go from jobs of the past to the new and better jobs of the future […] Flexicurity is about flexibility and security. Security is about shortening the distance between the old and the new jobs while socially and economically securing people between jobs. And it's about making social partners in the labour market co-responsible for development.[736]

At the time, the EU Commissioner for Social Affairs Špidla termed it as: 'this month's special offer in the supermarket of ideas' and said it fitted in with the European employment strategy.[737] Departing from the Danish model, it boiled down to a system of easy hiring and firing, high unemployment benefits and a proactive labour market policy. The policy concept had the potential to solve many of the unemployment problems in Europe.

But how was the concept interrelated with European employment policy? To understand that, it is necessary to list the developments chronologically.

7.6.2 Flexicurity as a concept of European employment policy

In paragraph 7.1 it was seen that the Treaty of Amsterdam had laid the foundations for a European employment policy. This was preceded by the White Paper, titled *Growth, competitiveness, employment referred to above*,[738] which focused on the combination of a deregulation agenda with active labour market measures. This, in turn, aligned with the 1994 Essen Summit, resulting in the so-called European employment strategy, comprising a wide range of priorities that were later to become employment guidelines. Hendrickx argues that, on hindsight, the abovementioned white paper already contained the ingredients of what was later to become the flexicurity concept.[739]

736 Bekker (2011), p. 106.
737 Bekker (2011), p. 106.
738 European Commission (1994).
739 Hendrickx (2011), p. 26.

This is connected to topics such as: training, the insider-outsider theory, active labour market policy and the adjustment of income guarantee mechanisms. In the European employment strategy, these and similar topics were tabled through OMC, the Open Method of Coordination. Article 145 of the Treaty of Amsterdam (ex article 125 EC) provides:[740]

> Member States and the Union shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the Treaty on European Union.

Article 146 (ex art. 126 EC) makes clear that the ball is in the member states' court. They are requested to promote their employment policies in accordance with the Broad Economic Policy Guidelines. The Council and Commission are to issue annual employment reports. Conclusions shall be drawn during a Council meeting. On a proposal from the commission, the Council will subsequently, and by means of a qualified majority vote, establish guidelines that the member states are to take into account. Together with the Broad Economic Policy Guidelines, these guidelines constitute a package that the member states must comply with. In this context, the employment committee advises the Commission. The member states are to draw up NAPS (National Action Programmes), later called NRPS (National Reform Programmes), in which they are to respond to the guidelines. The Council may, by qualified majority vote, make recommendations to the member states if they fail to comply with guidelines. However, no sanctions are imposed in case of breaches of the guidelines, as opposed to non-compliance with the Broad Economic Policy Guidelines, in which case penalties are applicable.

This process of establishing employment guidelines is sometimes called the so-called Luxembourg process because such guidelines were first established during a Luxembourg summit in 1998. At the time, these guidelines focused on four main points, i.e.:

- employability,
- entrepreneurship,
- adaptability,
- equal opportunities.

740 Barnard (2012), p. 90 ff.

Table 7.1 The Luxembourg process: employment guidelines 1998

Pillars	*Guidelines*	*Examples of activities and targets*
I Improving employability	Tackling youth unemployment	Within a period not exceeding five years: • every unemployed young person is offered a new start before reaching six months of unemployment (e.g. training, retraining, work practice • unemployed adults to be offered 'fresh start' before reaching 12 months of unemployment
	Transition from passive measures to active measures	To increase the numbers of unemployed who are offered training, each MS will fix a target of the average of the three most successful states and at least 20%
	Encouraging a partnership approach	Social Partners to conclude agreements to increase the possibilities of training, work experience, traineeships and equivalent MS and Social Partners to develop possibilities for lifelong training
	Easing the transition from school to work	MS to improve the quality of school to reduce substantially the number of young people with greater ability to adapt to technological and economic changes
II Developing entrepreneurship	Making it easier to start up and run businesses	Reduce significantly the overhead costs and administrative burdens for businesses, especially SME's, particularly in hiring workers Encourage the development of self-employment by removing obstacles (e.g. tax and social security) to setting up as self-employed or running small businesses
	Exploiting the opportunities for job creation	MS must investigate measures to exploit fully the possibilities for job creation at local level, especially concerning new activities not yet satisfied by the market
	Making the taxation system more employment friendly and reversing the long-term trend towards higher taxes and charges on labour[1]	MS to set a target for gradually reducing the overall tax burden and for reducing the fiscal pressure on labour and non-wage labour costs MS to examine the advisability of reducing the rate of VAT on labour intensive services not exposed to cross-border competition[2]
III Encouraging adaptability in businesses and their employees	Modernizing work organization	Social Partners to negotiate agreements to modernize work, including flexible working arrangements (e.g. annualized hours, reduction of working hours, reduction of working time, development of part-time work, lifelong training and career breaks) striking a balance between flexibility and security MS to look at the possibility of incorporating in its law more adaptable types of contracts
	Support adaptability in enterprises	Examine obstacles, especially tax obstacles, to investment in human resources

Pillars	*Guidelines*	*Examples of activities and targets*
IV Strengthening policies for equal opportunities	Tackling gender gaps	MS to reduce the gap in unemployment rate between women and men by actively supporting the increased employment of women and acting to reverse the under-representation of women in certain economic sectors and over-representation in others
	Reconciling work and family life	MS to implement the Directives on Parental Leave and Part-time Work MS to raise levels of access to care services where some needs are not met
	Facilitating return to work	MS to examine the means of gradually eliniating the obstacles to return to work for women and men
	Promoting the integration of people with disabilities into working life	MS to give special attention to the problems people with disabilities may encounter in participating in working life

MS = Member State

1 These increased from 35% in 1980 to more than 42% in 1995.

2 This has now become a permanent Directive: Council Dir. 2009/47/EC (OJ [2009] L116/18).

Barnard (2012), p. 97–98

At the time, these employment guidelines still used the term 'adaptability' and not yet 'flexicurity'. This only changed when the Integrated Guidelines for Growth and Jobs 2005–2008 were established, in which Guideline 21 stated in so many words: 'Promote flexibility combined with employment security and reduce labour market segmentation, having due regard to the role of the social partners'.

Table 7.2 Integrated guidelines for growth and jobs 2005–2008, Annex II, Brussels European Council Presidency Conclusions, 16–17 June 2005

17.	Implement employment policies aimed at achieving full employment, improving quality and productivity at work, and strengthening social and territorial cohesion
18.	Promote a lifecycle approach to work
19.	Ensure inclusive labour markets, enhance work attractiveness, and make work pay for job seekers, including disadvantaged people and the inactive
20.	Improve matching of labour market needs
21.	Promote flexibility combined with employment security and reduce labour market segmentation, having due regard to the role of Social Partners
22.	Ensure employment-friendly labour cost developments and wage-setting mechanisms
23.	Expand and improve investment in human capital
24.	Adapt education abd training systems in response to new skill requirements

Barnard (2012), p. 103

In 2008, these eight integrated guidelines, established in 2005 (see above), were further developed. The objectives continued to be what had been determined in 2003, but three priority actions were to be implemented, i.e.:

1. Attracting and retaining more people in employment, increasing labour supply and modernising social protection systems (18–20);
2. Improving the adaptability of workers and enterprises (21–22);
3. Increasing investment in human capital through better education and skills.

Eight objectives were added, including a coherent approach to unemployment, a targeted approach to long-term unemployment, the basic principle that all jobseekers can look up the vacancies in their own country, increasing the retirement age, improving childcare, reducing the number of drop-outs, improving the level of education, and more efforts towards lifelong learning.

This package continued to apply in 2009 and 2010, although a review had taken place in 2009 as a result of the financial crisis. This review resulted in the Europe 2020 guidelines, six of which focused on the economy and four on employment, such as:

1. Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality;
2. Developing a skilled workforce responding to labour market needs and promoting lifelong learning;
3. Improving the quality and performance of education and training systems at all levels and increasing participation in tertiary or equivalent education;
4. Promoting social inclusion and combating poverty.

In a fifteen-year period the guidelines were renewed time and again, decreasing in number rather than increasing. In essence, however, they were all about more active labour market policies, modernisation of the social models, combating labour segmentation and increasing flexicurity. By means of the Amsterdam and Lisbon Treaties and the Luxembourg process an attempt was made to create a so-called third way between the Anglo-Saxon model of deregulation, low unemployment and fewer social facilities on the one hand and the European continent model of employee protection, high unemployment and a generous package of social facilities. This third way focuses on flexibility for enterprises combined with security for employees, i.e. flexicurity.

7.6.3 Flexicurity principles

The main policy contribution in this respect has been the communication of European Commission, titled: *Towards Common Principles of Flexicurity*.[741] According to the Commission, flexicurity[742] promotes a combination of flexible labour markets

741 European Commission (2007).
742 Barnard (2012), p. 163

and adequate security. This relates to deregulation, the freedom that entrepreneurs have to shift their responsibility to the employee, entailing less security. Flexicurity is about taking people to adequate jobs and developing their talents. The Commission stated:

> Flexibility, on the one hand, is about successful moves ('transitions') during one's life course: from school to work, from one job to another, between unemployment or inactivity and work, and from work to retirement. It is not limited to more freedom for companies to recruit or dismiss, and it does not imply that open-ended contracts are obsolete. It is about progress of workers into better jobs, 'upward mobility' and optimal development of talent. Flexibility is also about flexible work organisations, capable of quickly and effectively mastering new productive needs and skills, and about facilitating the combination of work and private responsibilities. Security, on the other hand, is more than just the security to maintain one's job: it is about equipping people with the skills that enable them to progress in their working lives and helping them find new employment [i.e. from job security to employment security]. It is also about adequate unemployment benefits to facilitate transitions. Finally, it encompasses training opportunities for all workers, especially the low skilled and older workers.

The Commission recognised that four policy aspects were on the agenda:
- flexible and reliable contractual arrangements,
- comprehensive lifelong learning (LLL),
- Effective Labour Market Policies (ELMP),
- modern social security systems.

In an earlier Green Paper *Modernising Labour Law to meet the challenge of the 21st century,*[743] the Commission recognised that changes in production methods result in the business sector's need for both permanent employees and workers employed on the basis of various other contracts.

The Commission also made recommendations and suggestions, and so-called 'pathways', i.e. approaches that the various member states could make use of depending on their specific employment situation. The first pathway dealt with labour market segmentation; the second discussed how flexicurity could be shaped at enterprise level, offering 'transition security'. The third pathway related to tackling skills and opportunity gaps among the workforce and the fourth focused on improving opportunities for benefit recipients and informally employed workers.

743 Commission of the European Communities (2006).

Employers tended to be satisfied with these principles, but the trade unions proved more critical. The Commission 'was mainly focusing on reducing key workers' rights, such as the right to stable jobs and secure contracts'. In the trade unions' view, the Commission's vision would result in 'precarious' work. The Commission would not provide a credible and sufficient political agenda to promote job security.

This led to the adoption by the European Council of a renewed set of flexicurity principles. This was preceded by a great many deliberations. The European Parliament adopted a resolution by 496 to 92, with 49 abstentions, in which it stated:

> The rationale for an integrated flexicurity approach is the need to achieve the objectives of the renewed Lisbon Strategy, in particular more and better jobs, and at the same time to modernize the European social models. This requires policies that address simultaneously the flexibility of labour markets, work organization and labour relations, and security – employment security and social security.

The joint analysis by the European social partners has been equally remarkable. They jointly proposed flexicurity measures that were to comprise – in a balanced and holistic way – elements agreed at the appropriate level. These elements were:
- labour law and contractual arrangements;
- effective and high quality labour market policies;
- lifelong learning policies;
- efficient and sustainable social protection systems;
- a social dialogue.

On 12 December 2007, the European Council issued its version of the flexicurity principles. The concept was introduced as a useful method, while the value of the standard full-time open-ended contract was emphasised as the mainstay of employment relationships.

The following eight principles were approved:[744]

> **The Common Principles of Flexicurity**
>
> **Principle 1** Flexicurity is a means to reinforce the implementation of the Lisbon Strategy, create more and better jobs, modernise labour markets, and promote good work through new forms of flexibility and security to increase adaptability, employment and social cohesion.
>
> **Principle 2** Flexicurity involves the deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective

744 Bekker (2011), p. 254 and 255.

active labour market policies, and modern, adequate and sustainable social protection systems.

Principle 3 Flexicurity approaches are not about one single labour market or working life model, nor about a single policy strategy: they should be tailored to the specific circumstances of each Member State. Flexicurity implies a balance between rights and responsibilities of all concerned. Based on the common principles, each Member State should develop its own flexicurity arrangements. Progress should be effectively monitored.

Principle 4 Flexicurity should promote more open, responsive and inclusive labour markets overcoming segmentation. It concerns both those in work and those out of work. The inactive, the unemployed, those in undeclared work, in unstable employment, or at the margins of the labour market need to be provided with better opportunities, economic incentives and supportive measures for easier access to work or stepping-stones to assist progress into stable and legally secure employment. Support should be available to all those in employment to remain employable, progress and manage transitions both in work and between jobs.

Principle 5 Internal (within the enterprise) as well as external flexicurity are equally important and should be promoted. Sufficient contractual flexibility must be accompanied by secure transitions from job to job. Upward mobility needs to be facilitated, as well as between unemployment or inactivity and work. High-quality and productive workplaces, good organisation of work, and continuous upgrading of skills are also essential. Social protection should provide incentives and support for job transitions and for access to new employment.

Principle 6 Flexicurity should support gender equality, by promoting equal access to quality employment for women and men and offering measures to reconcile work, family and private life.

Principle 7 Flexicurity requires a climate of trust and broadly-based dialogue among all stakeholders, where all are prepared to take the responsibility for change with a view to socially balanced policies. While public authorities retain an overall responsibility, the involvement of social partners in the design and implementation of flexicurity policies through social dialogue and collective bargaining is of crucial importance.

Principle 8 Flexicurity requires a cost effective allocation of resources and should remain fully compatible with sound and financially sustainable public budgets. It should also aim at a fair distribution of costs and benefits, especially between businesses, public authorities and individuals, with particular attention to the specific situation of SMEs.

The principles had been altered considerably. For one thing, they no longer referred to sufficient flexibility in recruitment and dismissal, but rather to sufficient contractual flexibility. Earlier on, Commissioner Špidla had pointed out that:

> Flexicurity should not be misconceived as giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Flexicurity does not mean 'hire and fire'; nor does it imply that open-ended work contracts are a thing of the past. Flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organisation to offer jobs with future. They need to invest in their workers' skills. This is part of 'internal flexicurity'. However keeping the same job is not always possible. Sometimes it is better to focus on finding a new job rather than reserving the job one has at the moment. 'External flexicurity' attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed.[745]

The emphasis on employment security made way for 'staying in employment, within the same enterprise or into a new enterprise'.

7.6.4 Temporary agency work as a flexicurity concept driven by social temporary agency partners

Just before the turn of the century, Euro-Ciett and Uni-Europa had started a social dialogue at a European sectoral level. Already in 2001, following the failure of the cross-sectoral dialogue on temporary agency work, the sectoral social partners had declared themselves in favour of finding the right balance between protection of temporary agency workers and the need for flexibility as shaped by the temporary agency sector. In line with this earlier declaration, the social partners wanted to issue another joint declaration on the ongoing flexicurity debate in early 2007. They acknowledged that adequate legislation was essential to preventing any abuses and undermining of the working and employment conditions at the user enterprise, while at the same time being necessary to abolish redundant regulations. Its implementation into the 2008 Temporary Agency Work Directive has been discussed above.

In the context of the flexicurity debate particular attention was drawn to the transitional role that temporary agency work can play in the labour market. For instance, temporary agency work can be a pathway from being unemployed to being hired. It can also facilitate the transition from education to work. More generally, temporary agency work can ease the transition into the labour market. It can also can contribute

745 Bekker (2011), p. 258.

to the conversion of the various contract forms, from a temporary agency contract to a fixed-term or an open-ended contract. Furthermore, temporary agency work can contribute to improving the personal work-life balance.

Euro-Ciett and Uni-Europa drew attention to a number of issues in order to find the right balance between protecting temporary agency workers and the possible role that temporary agency work can play in the labour market, in other words, flexicurity. They drew attention to, among other things, equal treatment, no temporary agency work to replace striking workers, clarifying the role of the temporary employment agency as an employer, transparency of the employment benefits, also between assignments, vocational education, cooperation between public and private employment agencies, promotion of Convention 181, monitoring systems such as licensing, certification and registration, in combination with sectoral social dialogue at national level, engaging in contractual relationships with private employment agencies on a voluntary basis, revision and abolishment of redundant regulations, creating a level playing field in respect of other forms of flexible labour, implementing issues, and further research.

Assuming that temporary agency work can play a positive role in the labour market, 'the sectoral social dialogue committee will continue to work towards improving the employment and working conditions of agency-supplied workers'.[746]

In a separate leaflet, Euro-Ciett indicated the following:

> **Executive summary**[747]
> Private employment agencies provide an essential form of embodiment of flexicurity, by striking a balance between flexibility and work security in the labour market.
> As well-regulated flexible labour service providers, private employment agencies contribute to work security in the labour market:
> – Private employment agencies represent a well regulated response to flexible labour needs.
> – Private employment agencies offer an essential stepping-stone function to the labour market.
> – Private employment agencies create job opportunities that would not exist otherwise.
> – Private employment agencies help 'outsiders' to re-enter the labour market.
> – Agency workers benefit from a social status that other flexible workers do not have access to.

746 Euro-Ciett/Uni-Europa (2007).
747 Euro-Ciett (2007).

- Private employment agencies provide flexible working conditions, which a growing number of workers are looking for.
- Private employment agencies help to increase work mobility while protecting working conditions of workers.

Private employment agencies provide a statutory answer to the flexibility requirements companies are facing:

- Private employment agencies are essential intermediaries that improve the fluidity and efficiency of the labour market.
- Private employment agencies provide an efficient external solution for companies to manage their need of workforce flexibility.
- Private employment agencies make companies more competitive by enabling quick personnel adjustments in client firms..

In the sectoral social dialogue on temporary agency work, Euro-Ciett and Uni-Europa have constantly worked towards tabling evidence that might shed light on the role that temporary agency work plays in the labour market and in the necessary measures. From the employers' side, this sectoral social dialogue is maintained by what is considered their key representative, Euro-Ciett. The main workers' representative is Uni-Europa, flanked by further relevant workers' representatives, such as IndustriALL and ETUC.[748] Various studies have been conducted with the support of the European Commission,. Prominent projects in this context were the European Observatory on cross-border activities (2009),[749] which provided input for improving cross-border temporary agency work, *The role of temporary agency work and labour market transitions in Europe* (2013) including interesting data on the transitional role of temporary agency work[750] and the study *How temporary agency work compares with other forms of employment* (2015),[751] benchmarking temporary agency work with fixed term contracts and self-employed activity.

The 2013 transition study shows clearly that temporary agency work promotes the transition from unemployment to work. In Germany, 60% of the workers had been unemployed previous to the temporary agency work period, and in countries such as France and Italy that proportion had exceeded 40%. For the Netherlands and Belgium, previous unemployment figures amounted to 30%. Moreover, it became

748 Voss (2016), p. 33.

749 European Observatory on cross-border activities within the temporary agency work sector; Euro-Ciett 2009. See also: Rodriquez et al. (no date).

750 Voss et al. (2013), executive summary.

751 IDEA Consult (2015).

clear that temporary agency workers continued in employment. For instance, it was demonstrated that French unemployment previous to and one year after the period of temporary agency work had decreased from 55% to 21%. Furthermore, temporary agency work results in permanent contracts. A Dutch study of 2009 showed that 56% of the temporary agency workers were looking for permanent employment, and that 29% actually found it. In 2010, 16% of the French temporary agency workers found permanent employment within one year. The same held for 66.5% of Italian temporary agency workers in the period 1998–1999. Although these figures paint a positive picture, it must also be concluded that many temporary agency workers, particularly those belonging to so-called target groups, are solely dependent on temporary agency work.

Temporary agency work also plays a role in the transition from education to work. Many young people find a job along this pathway.

In Germany 49.5% of all temporary agency workers are under the age of 35; in Italy 44% are under 30 and in the Netherlands 46% are under 25. In France 85% of the temporary agency workers under 25 turned out not to have worked prior to the temporary agency work period, because they had attended college or been unemployed. Following one year of temporary agency work, 62% appeared to be working.

Social partners can play a key role in improving the quality of the transitions by means of supplementary arrangements and other initiatives, such as the establishment of education and pension funds.

The transitional role of temporary agency work was also underscored in the study *How temporary agency work compares with other forms of work*.[752] In France, relatively more temporary agency workers (54%) turned out to be employed again one year later than fixed-term contract workers (43%).

The results of the 2010 EWCS (European Working Conditions Survey) showed the existence of an increased perception of unemployment risk and a decreased re-employment probability. Other studies show that temporary agency work constitutes an efficient pathway towards permanent employment compared with other forms of temporary work. Temporary agency work increases the employment level. The more temporary agency work, the higher the employment level. Moreover, it decreases the proportion of workers over the age of 45 in the labour market.

Another study result is that temporary agency work proves to be regulated more restrictively than fixed-term employment. In respect of social facilities temporary agency work turns out to have similar conditions compared with permanent employment. This applies to facilities in respect of unemployment, illness, maternity leave, medical expenses and pensions. There is a problem for workers on very short-term

752 IDEA Consult (2015).

contracts who cannot reach the threshold to qualify for these facilities. However, social partners in the temporary agency sector can take measures to remedy this.

The study shows that permanent employment generally yields better working and employment conditions. With regard to working hours, workers with permanent contracts and self-employed workers appear to score better than workers with fixed-term contracts and temporary agency workers. According to the EWCS (2010) temporary agency workers feel slightly safer (79%) in their working environments than workers with permanent contracts (76%), fixed-term contracts (76%) and self-employed workers (72%). According to this survey, many temporary agency workers had undertaken training during the past twelve months (77%). This proportion was higher for workers with permanent contracts (82%) and fixed-term contracts (78%) but for self-employed persons this was much lower (55%). Furthermore, the study shows that, in contrast with other types of flexible work, such as fixed-term contract and self-employment, the temporary agency sector is capable of taking supplementary measures that result in enhancing the social protection of temporary agency workers.

These are the observations that Euro-Ciett and Uni-Europa make in their sectoral social dialogue on temporary agency work. They regularly result in joint declarations that are to give further substance to the acceptability of temporary agency work. Moreover, social dialogue sessions have been set up in countries such as Bulgaria (2009), Turkey (2010), Croatia (2013) and Serbia (2014) in order to promote the quality of temporary agency work. During those sessions, efforts are made to give further shape and substance to temporary agency work as a concept of flexicurity.

7.7 CONVENTION 181 COMPARED TO EU LAW

If we compare Convention 181 with the laws and regulations on temporary agency work that have by now been realised at EU level, it becomes clear that EU laws and regulations are in place for nearly all provisions in Convention 181. In the field of *non-discrimination* (article 5 c Convention 181) Europe has distinguished itself by means of a series of directives regarding equal treatment. Thus, we have Directive 75/117/EEC in respect of equal pay for male and female workers in which the principle of 'equal pay for equal work', as entrenched in article 157 TFEU, has been elaborated. We also have Directive 76/207/EEC, regulating access to work, vocational training, promotion and working and employment conditions, aimed at banning all forms of direct and indirect discrimination in the world of work. This directive was amended by Directive 2002/73. Moreover, there is Directive 79/7/EEC, regulating equal treatment in respect of social security.

In the 1980s, Directive 86/378/EC was added, which was amended to Directive 96/97/EC as a result of the Barber judgment providing that pension should also be considered as wages. Directive 86/613/EEC was issued for self-employed persons.

In the Charter of the Fundamental Rights of the European Union, which was effected in 2007 on the occasion of the Treaty of Lisbon, considerable attention was paid to equal treatment. Article 20 provides that 'everyone is equal before the law'. Article 21 provides: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' Moreover, in paragraph 2 'any discrimination on grounds of nationality' is prohibited.

Article 23 provides that 'equality between women and men must be ensured in all areas, including employment, work and pay', except that positive discrimination is allowed in favour of the under-represented sex (par. 2).

Besides non-discrimination, Convention 181 also pays attention to *fundamental labour rights* such as the freedom of association and collective bargaining (art. 4, art. 11 a, b and art. 12 a), forced labour (recital 10) and child labour (art. 9). By now, all these fundamental labour rights figure in the Charter of Fundamental Rights of the European Union, in articles 12 and 28, article 5 and article 32 respectively.

Article 12 provides the freedom of assembly and association and article 28 regulates the right of collective bargaining and action. Article 5 provides the prohibition of slavery and forced labour, and article 32 regulates the prohibition of child labour and the protection of young people at work.

With regard to *working hours* (art. 11 d and 12 c Convention 181) there is a comprehensive European equivalent in article 31, par. 2 of the Charter, providing that 'every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave', and in the EU Working Time Directive (2003/88/EC).

For *other working conditions* (art. 11 d, 12 c) mention should be made of the Posting of Workers Directive and the Temporary Agency Work Directive (Directives 96/71/EC and 2008/104/EC).

Both Directives include provisions on wages. In article 3, par. 1c, the Posting Directive imposes the obligation to adopt minimum wages, including overtime rates, on member states that have workers posted on their territory. The Agency Directive takes it one step further and makes equal pay for equal work obligatory as part of the basic working and employment conditions.

ILO Convention 181 demands that the member states take the necessary measures in relation to, among other things, minimum wages (art. 11 c). Moreover, the member states must allocate the respective responsibilities in the tripartite temporary agency relationships (art. 12 b). One may argue that for the EU this allocation of responsibilities has taken place through these two directives.

Through Convention 181 (art. 11 e, art. 12 d) *social security* is another topic that needs to be regulated. Under the conditions imposed by Union law and national legislations, the Charter recognises and respects the right of access to social security benefits and social services that offer protection under circumstances such as maternity, illness, industrial accidents, dependency or old age, or following loss of employment.

In principle, the European Union has nothing to do with social security, as it is the responsibility of the individual member states. Coordinating regulations were, however, laid down long ago (Regulation EC 1408/71 and Regulation EC 883/2004). Also, there are rules with regard to pregnant workers (Directive 92/85/EEC) and parental leave (Directive 2010/18/EU) that can be considered as comprehensive equivalents of the provisions in Convention 181 (art. 11 j, art. 12 i).

At EU level, the *occupational health and safety provisions*, laid down in article 11 g and article 12 f of Convention 181, have a comprehensive foundation in Directive 91/303/EEC. Moreover, the Charter states in article 31, par. 1, that 'every worker has the right to working conditions which respect his or her health, safety and dignity'.

Convention 181 provides in articles 11 f and 12 e that member states must guarantee access to *training* and must allocate responsibility in that respect. In EU law, we find a provision in article 6 of the Agency Directive, which obliges the member states to instigate the necessary measures or promotes social dialogue to improve temporary agency workers' access to training. In this respect, article 14 in the Charter provides that 'everyone has the right to education and to have access to vocational and continuing training'.

Insolvency is also an area of concern provided for in Convention 181 (art. 11 i, art. 12 h). By now, this issue has been regulated in the EU through Directive 2008/94/EC.

Article 3 of Convention 181 concerns the *status of the temporary employment agency,* stating, among other things, that it shall be determined in accordance with national law and practice, and after consulting with social partners, by the member states 'in accordance with a system of licencing or certification, except where they are otherwise regulated or determined by appropriate national law and practice'. EU law is less far-reaching on this point, as the Agency Directive only provides in article 4, on the

review of restrictions or prohibitions, that national requirements in respect of registration, licensing, certification, financial guarantees or the monitoring of temporary employment agencies must be respected.

Article 6 of Convention 181 safeguards the workers' *privacy*. In the EU, this topic is regulated through Directive 95/46/EC. The Charter provides in article 8 that 'everyone has the right to the protection of their personal data'.

The *'no fee to worker' principle*, as laid down in article 7 of Convention 181, now has its equivalent in article 6, par. 3, of the Agency Directive.

The status of the *migrant worker*,[753] as provided in article 8 of Convention 181, is comprehensively reflected in European law in the Posting of Workers Directives (Directive 96/71/EC and Directive 2014/67/EC).

The *cooperation between public and private parties* (art. 13 Convention 181) is not reflected in EU law, in contrast to access to remedy, (art. 14, par. 3, Convention 181), which is regulated at EU level in article 47.

Among the *bottlenecks* discussed earlier on in this study (paragraph 5.4) the topic of remuneration has been included in European law, i.e. in article 5 of the Agency Directive, which considers the user company standard regarding the basic working and employment conditions to be the guiding factor. Furthermore, it is provided in article 30 of the Charter that 'every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices', which enhances the stability of work.

The weakened position of trade unions is discussed generically in articles 12 and 28 of the EU Charter.

EU law has nothing to say about *excessive use of agency work*.

In some respects, European law takes matters further than Convention 181. For instance, article 6 of the Agency Directive contains provisions on *information on vacancies at the user enterprise*, *access to collective facilities* at the user enterprise and *occupational training*. Moreover, the *representation of temporary agency workers in*

753 See also Rodriquez et al. (no date), provided that it distinguishes between treatment in the Posting of Workers Directive and that in the Temporary Agency Work Directive.

representative bodies (art. 7), and the *obligation to provide information* to these *representative bodies* on the use of temporary agency work (art. 8) have been regulated.

The right to introduce *more favourable provisions* as laid down in article 15 of Convention 181 is also found in the Agency Directive (art. 9). Likewise, the *sanctions* (art. 14, par. 3, Convention 181) have been regulated in article 10 of the Agency Directive.

It can be concluded that European law has adopted regulations in nearly all the fields covered by Convention 181. Some of them are less far-reaching, for instance the status provisions on licensing and certification requirements, some of them reach farther, for example on the principle of equal pay for equal work instance in the Agency Directive, and the key provisions on the working and employment conditions in the Posting Directive.

The existence of more comprehensive regulations at EU level raises the question as to whether Convention 181 is still adequate. As can be seen in the table below, the EU has regulated 28 topics relating to temporary agency work to a greater or lesser extent, while ILO convention 181 regulates 22 topics. One might contend that this ILO convention regulates matters less extensively, but as a result has more focus. In that sense, it is adequate for the EU, albeit as a minimum regime.

On balance, it looks as if Convention 181 did actually serve as an agenda for Europe, even though it was not intended as one beforehand. When the Agency Directive was realised, the European Parliament did plead for a better alignment with the Convention. However, the Commission appeared to be against this and embarked on its own course.[754]

But, the question also arises as to whether Convention 181 still has any added value for the member states. If everything has been comprehensively, and even more extensively regulated at EU level, what is the purpose of an ILO convention that largely regulates the same topics?

In this context, a number of aspects are worthy of attention. We mentioned the focus of the Convention, promoting overview and clarity. Being an international covenant, Convention 181 also provides guarantees for adequate temporary agency worker protection and a proper functioning of temporary employment agencies. National governments that have ratified Convention 181 are to develop regulations in accordance with the conditions laid down in the convention, including the fundamental labour rights. Through the Charter of Fundamental Rights, EU law also provides guarantees for those fundamental rights, but only to the extent that they flow from EU regulations. This conditional binding force does not apply to a ratified

754 K. Ahlberg et al. (2008), p. 231. See also: Herzfeld Olssen (2011), p. 50.

covenant such as Convention 181. Upon ratification, the ILO provisions thus appear to be stronger than the relevant EU provisions.

EU law also comprises contrasts and interpretation issues. We saw earlier that there is no unequivocal answer to the question as to which remuneration regulations should be observed on the basis of the Posting Directive. Furthermore, an ILO convention offers a better guarantee for continuity, since it can only be denounced once in every ten years.

And lastly, ILO Convention 181 provides a guarantee against the prohibition of temporary agency services. It has been discussed before that prior to Convention 181 there have been conventions aiming to ban private placement, which also included temporary agency services. The essential merit of Convention 181 is also that it conditionally allows service provision by temporary employment agencies. That does not tally with measures that render temporary agency services unfeasible, although specific prohibition may apply.

What is also interesting in this context is that in its 2002 recommendations on the proposal for a directive, the Economic and Social Committee advised the EU member states to ratify Convention 181.[755]

All in all, Convention 181 offers more focus, clarity and guarantees for respecting fundamental labour rights and continuity of the temporary agency services, also for the EU member states.

Table 7.3 Convention 181 compared with EU law

	C181	*EU Law*
I Core Issues		
a. Non-discrimination	Art. 5	Directives 75/117/EEC, 76/207/EEC; 202/73/EEC, 79/17/EEC, 86/378/EEC Charter 20, 21, 23; art. 19, 157 TFEU Directive 86/613/EEC
b. Freedom of association and collective bargaining	Art. 4 Art. 11 a, b Art. 12 a	EU-Charter art. 12, 28
c. Forced labour	Preambule	EU-Charter art. 5
d. Child labour	Art. 9	EU-Charter art. 32
II Worker Protection Issues		
a. Right to work		EU-Charter art. 15
b. Free choice of employment		EU-Charter art. 15
c. Working time (rest and leisure, limitation hours and periodic holidays)	Art. 11 d Art. 12 c	EU-Charter art. 31 lid 2 Directive 2003/88/EC
d. Conditions of work (just and favourable conditions)	Art. 11 d Art. 12 c	Directive 2008/104/EC art. 5. Directive 96/71/EC art. 3

755 Herzfeld Olssen (2011), p. 50.

	C181	*EU Law*
e. Minimum (wages) and equal pay for equal work (favourable remuneration)	Art. 11 c Art. 12 b	Directive 2008/104/EC. Art.5 Directive 96/71/EC art. 3
f. Adequate standard of living		
g. Social security protection (occasional accidents, diseases, maternity, parental protection, benefits, protection against unemployment, sickness, disability, widowhood, old age	Art. 11 e Art. 12 d	EU-Charter art. 34 Regulation(EC) 1408/71 art. 14, (EC) 883/2004 Directive 2010/18/EU Directive 92/85/EEC
h. Health and safety	Art. 11 g Art. 12 f	EU-Charter art. 31 lid 1 Directive 91/383/EEC
i. Training	Art. 11 f Art. 12 e	EU-Charter art. 14 Directive 2008/104/EC art. 6 par.5
j. Insolvency	Art. 11 i Art. 12 h	Directive 2008/94/EC
	C181	European Law
III Specific Issues		
a. Legal status	Art. 3 par. 1, 2	Directive 2008/104/EC art. 4
b. Privacy and protection personal information	Art. 6	EU-Charter art. 8 Directive 95/46/EC
c. No fee to worker	Art. 7	Directive 2008/104/EC art. 6 par. 3
d. Migrant workers	Art. 8	Directive 96/71/EC Directive 2014/67/EC
e. Cooperation public/private agencies	Art. 13	
f. Access to remedy	Art. 14, par. 3	EU-Charter art. 47 Directive 2008/104/EC art. 10
IV Other Specific Issues		
a. Stability of work		EU-Charter art. 30
b. Unequal pay		Directive 2008/104/EC art. 5
c. Weakened position trade unions		
d. Excessive use of agency work		
V Other European Issues		
a. Access to employment, collective facilities, vocational training		Directive 2008/104/EC art. 6
b. Representation of temporary agency workers		Directive 2008/104/EC art. 7
c. Information of workers representatives		Directive 2008/104/EC art. 8
d. Favourable provisions	Art. 15	Directive 2008/104/EC art. 9
e. Penalties	Art. 14, par. 3	Directive 2008/104/EC art. 10
f. Implementation and review	Art. 18	Directive 2008/104/EC art. 11 en 12
g. Free placement	ILO conv. 88	EU-Charter art. 29

If we survey the number of ratifications by EU countries, it becomes clear that thirteen member states have ratified Convention 181 while fifteen have not. The question is why the majority of the EU chooses not to link up with Convention 181, in spite of the Commission's call to do so.[756]

756 Commission of the European Communities (2008), p. 32.

Among the fifteen countries that have not ratified the Convention are three so-called prospects, i.e. Estonia, Latvia and Sweden. Conspicuous in the list of countries that have not ratified is Luxembourg, which has still ratified Convention 96 part II.

When the ILO took stock of potential interest in, among other things, ratifying Convention 181 among its member states in 2010, some countries turned out to have objections to the Convention, as it was thought to also regulate outsourcing and does not prohibit the replacement of striking workers (Austria), demands specific requirements such as permits, licenses or otherwise and prohibits charging the temporary agency worker with a fee (Germany) and, even though many elements of Convention 181 are complied with, priority must first be given to implementation of the Agency Directive (Sweden). Norway feels that the Convention is too wide in scope by regulating not just temporary employment; nor does this country have provisions for minimum rates of pay, as required by the Convention. This objection also holds for Switzerland, which likewise objects to the no fee to worker principle, as do Romania, Denmark and the United Kingdom.

In view of all these objections, the question is whether the opportunities (and shortcomings) of the Convention are fully appreciated. For instance, the no fee to worker principle can be deviated from in consultation with the social partners, and permits and licenses can make way for other specific national legislation.

At EU level, interests are best served by ratifying Convention 181, but various member states voice objections that can be traced back to other applicable regulations, and possibly to lack of understanding. Time will tell whether these objections can be overcome.

In any case, the partners in the social dialogue on temporary agency work show wisdom in directing their actions at the Commission in order to encourage member states to ratify the Convention.

Ratifications of C181 by EU Member States[757]

EU countries that have ratified Convention No. 181 (12):

- Belgium
- Bulgaria
- Czech Republic
- Finland
- France
- Hungary
- Italy
- Lithuania
- Netherlands
- Poland
- Portugal
- Slovakia
- Spain

757 CIETT & Euro-Ciett (2015), p. 16.

EU countries that have not yet ratified Convention No. 181 (16):

- Austria
- Croatia
- Cyprus
- Denmark
- Estonia
- Germany
- Greece
- Ireland
- Latvia
- Luxembourg
- Malta
- Romania
- Slovenia
- Sweden
- United Kingdom

PART III

A NATIONAL LEGAL FRAMEWORK ON TEMPORARY AGENCY WORK: THE DUTCH CONTEXT

Before 1930	Private and public placement coexisted, but were not regulated.
1930	The Dutch Placement Act (*Arbeidsbemiddelingswet*) potentially creates a monopoly for public employment services; private placement on a not-for-profit basis is allowed on condition of licensing; private for-profit placement is prohibited.
1940	Centralisation of the public employment services under German occupation.
1960–1970	Temporary agency work increases and posting workers causes unrest in employment relationships. The Manpower Provision Act (*Wet op het ter beschikking stellen van arbeidskrachten*) is adopted in 1965 and becomes operational by decree in 1970. Work placement and posting workers are restricted by licences.
1990	A new Employment Services Act (*Arbeidsvoorzieningswet)* subjects all employment services, including manpower provision, to a tripartite board, on the understanding that private for-profit placement and manpower provision are allowed on condition of licensing.
1997–1998	In 1997, ILO convention 181 is adopted. The Netherlands are quick to ratify this convention, with the tacit approval of the Lower and Upper Houses.
1998	Legislation on flexibility and security is implemented, including the secondment agreement into the BW (Dutch Civil Code) as a special employment contract. The Dutch Posting of Workers by intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs,* Waadi Act) is also implemented, abolishing the licensing system for temporary employment agencies and maintaining it for all private work placement.
1999	The European Posting of Workers Directive is adopted, which is implemented as the Dutch Terms of Employment (Cross-Border Work) Act *(Wet arbeidsvoorwaarden grensoverschrijdende arbeid*, WAGA Act*).*
2003	The Waadi Act is amended, in the sense that the licensing requirement for private work placement is abolished.
2004–2006	There are signs that manpower provision is affected by fraud, abuses and illegality. The Dutch government considers reintroducing a licensing requirement. A motion by Dutch MP Bruls reverses this consideration and results in the establishment of the Dutch 'Labour Standards Register' that introduces a certification system.
2008–2012	A European Temporary Agency Work Directive and the need for a comprehensive strategy result in an amendment of the Waadi Act, implementing the Temporary Agency Work Directive and incorporating the 'Registration requirement for intermediaries providing manpower act'. Earlier on, the hiring liability regarding minimum rates of pay and minimum holiday allowance is introduced in the BW.
2012	The private members' bill by Hamer and Ulenbelt on the so-called excessive flexible labour is before Dutch Parliament.
2014	This bill is largely incorporated into the Work and Security Act (*Wet werk en zekerheid*, Wwz), which is implemented in 2014 and 2015.
2015	The Act on Combating Sham Arrangements (*Wet aanpak schijnconstructies*) introduces total sequential liability to fight sham arrangements.

CHAPTER 8

Development

Following 'decent-isation', 'human right-ification', 'IFA-isation' and 'Europeanisation' of the labour relationships and international social law, this section will discuss the Dutch context. We saw before that Guy Ryder, Director-General of the ILO, sees the Netherlands as the forerunner of the flex changes that are to take place in European labour relationships. He also looks upon this country as a testing ground. This is reason enough to discuss specifically how temporary agency legislation has developed in the Netherlands.

This discussion goes back to how work placement was originally regulated in a strict sense, in order to arrive at the broader concept of labour services, which included the notion of manpower provision. It will then be made clear how the so-called 'flex-akkoord' ('flexibility agreement') further regulated temporary agency work through the flexibility and security legislation of the late 1990s. Almost simultaneously, the Netherlands ratified Convention 181, an account of which will follow below.

Moreover, this chapter will discuss the effects on Dutch law and regulations on the Posting of Workers, Enforcement and Temporary Agency Work Directives, which were examined in the context of the European approach in chapter 7.

The Netherlands is further characterised by a unique form of public-private arrangement, including a certification system that is still under development. Meanwhile, collective labour agreements (CLAS) for temporary agency work regularly come into effect. This chapter will look at certification and CLAS, after which chapter 9 will discuss complications regarding the development of temporary agency legislation in the Netherlands.

8.1 WORK PLACEMENT

At an early stage in the social history of the Netherlands, forms of matching supply of and demand for labour can be recognised. In the Middle Ages, a precursor of the labour exchange existed. Moreover, regulations were adopted early on. Van Drongelen & Fase tell us that on 26 March 1527, the Amsterdam court ruled that nobody is allowed

to be 'idle'; 'Anyone who is idle, must find himself at the old Bridge in the morning, so that the people who want work done, will be able to find him, to hire him and put him to work.'[758]

When guilds were banned, the need for intermediaries arose, and by 1850 primitive labour exchanges were set up, for instance in The Hague in 1846 and in Maastricht in 1852. They were locally oriented and had a marked philanthropic slant.

The need for work placement was closely intertwined with the need for poor relief and for tackling the so-called 'Sociale Quaestie' (social issue), which pivoted on the problems of the 19th-century working classes.

Work placement was practised by small enterprises in inns and public houses, but not always in an acceptable manner. These practices evoked criticism, and attempts were made to professionalise this activity. In this context, Van Drongelen & Fase mention the initiatives of the Maatschappij van de Werkende Stand ('working class society') in Amsterdam in 1886; the Christelijke Volksbond ('Christian people's association') in The Hague in 1850 and the Centrale Arbeidsvereniging 'Samenwerking' ('central labour union "Cooperation" ') in Arnhem in 1897.

The poor relief engendered relief for the unemployed, at the specific request of the municipalities, which granted subsidies. Thus, the first municipal labour exchange was launched in Schiedam in 1902, followed by Haarlem (1905), The Hague, Hilversum, Leiden and Venlo (1906), and Arnhem and Groningen (1907).[759] In 1918, a federation of Dutch labour exchanges was established, which can be seen as an important trailblazer of work placement in the Netherlands.

During the First World War, however, this federation could not manage the rising unemployment, so that national work placement came under government supervision.

The 1930 Placement Act legislated what had more or less developed in practice. A national system for public work placement services was distinguished from types of special work placement that were subject to licensing. Although the for-profit types could be licensed, this system was due to be discontinued. This aligned with the ILO's ideas, described in chapter 2.

During the Second World War, a state-run employment office was established in the occupied Netherlands, which was fully dedicated to German warfare. This meant that many thousands of Dutch people were put to work in the German war industry.[760]

758 Van Drongelen & Fase (2005), p. 13.
759 Van Drongelen & Fase (2005), p. 16.
760 Van Drongelen & Fase (2005), p. 25.

After the Second World War, the field of activity extended to 'employment services', which encompassed not only work placement, but also help with vocational orientation and vocational (re)training, re-education and resettlement. As a result of this extended set of duties, it was fitting not to refer to 'work placement services' any longer, but rather to 'employment services'.[761]

8.2 PROVIDING MANPOWER

Apart from employment-finding, the 1960s Dutch labour market became acquainted with the phenomenon of manpower provision, which was taken to mean assigning temporary agency workers and posting workers.[762] While these activities are closely related, at the time they were quite different in nature. Temporary agency work was mainly about workers informally assigned by a temporary employment agency to do office work. Married women in particular were attracted to this type of labour.

The posted workers were usually male breadwinners working in industrial sectors such as shipbuilding and construction. Particularly in construction, problems were rife. It was well-known that labour subcontractors forcibly recruited the construction workers they posted illicitly. They had to be stopped.

The Dutch Secretary of State for Social Affairs at the time, Dr. A. A. van Rhijn LLM, asked the SER ('social and economic council of the Netherlands') for advice on how to put an end to illegal labour subcontracting. This resulted in a non-unanimous recommendation. While the majority recommended regulations prohibiting these practices coupled with licensing, the minority opted for binding wage regulation, coupled with an obligation to report on the part of the user enterprise, which would facilitate monitoring.

In the first instance, the ministry opted for binding wage regulation. When this proved ineffective, the Dutch Minister of Social Affairs, Dr. G. M. J. Veldkamp, put forward a bill for the Manpower Provision Act, containing a new concept: manpower provision. Distinctions between assigning and posting workers were thus neglected. The one concept was to encompass both phenomena.

The Act aimed to 'protect the interests of good labour market relations and the interests of a socially strong position of the workers involved'.

The Minister clearly distinguished the concept of manpower provision from the concept of work placement as defined in the 1930 Placement Act. In his explanatory memorandum to the bill he stated as follows:

761 Van Drongelen & Fase (2005), p. 26.

762 Van Haasteren & Overeem (1976), p. 19.

> Firstly, be it remarked that the state of affairs aimed at by the bill differs significantly from providing work placement services in the sense of the 1930 Placement Act. The bill deals with providing a third party with manpower; work placement, however, is all about helping another party find workers or jobs. These are two essentially different notions. The term 'manpower provision' suggests that the 'posted' worker is working in the enterprise where he has been made available on the basis of a legal relationship between himself and the 'poster'. This state of affairs does not apply in the case of work placement. Also from the perspective of the party that is employing the workers, the two states of affairs are clearly different: in the case of manpower provision, the work is done without any labour relationship arising between the worker and the hirer; on the other hand, in the case of work placement, effecting a labour relationship between the worker and the party for whom he will carry out the assignment will be the object of the intervention, upon completion of which the work placement officer will step back. Thus, in the view of the undersigned, both distinguishable areas of activity have been satisfactorily delineated.[763]

The Dutch Manpower Provision Act remained a dead letter until 1970, when labour riots took place in the Waterweg area, as a result of which Minister Roolvink – upon the recommendation from the Dutch Labour Foundation – felt obliged to act. He implemented a licensing system, subject to a dozen of conditions that, for the sake of brevity, boiled down to the following:[764]

1. One must keep appropriate accounting records.
2. Changes in the company's management and changes of address must be immediately reported to the Minister of Social Affairs.
3. One must not pay higher wages than those earned by a comparable worker in the same position at the user enterprise.
4. One must not pay bonuses on top of the workers' hourly wages to compensate for regular remittances to workers with permanent contracts.
5. The expenses refunded to workers must not exceed what permanent workers at the user enterprise are entitled to.
6. A worker must not be hindered in accepting a permanent contract.
7. Workers who are under the age of 18 years may not be assigned, except during holidays.
8. Providing manpower abroad is not allowed.
9. Intra corporate provision of manpower is not allowed.

763 Explanatory memorandum to the Act of 31 May 1965, regarding regulations on providing manpower (Stb. 379), 'Nederlandse Staatswetten' in the Schuurmans & Jordens edition no. 40 edited by Mr. A. B. Raven, pag. 151; see also Van Haasteren & van Overeem (1976) p. 24

764 Van Haasteren & Overeem (1976), p. 32

10. At the request of the user enterprise, copies of the pay sheets of the workers assigned to the user enterprise must be supplied.
11. In 1971, the amount of manpower provided, expressed in working hours, must not exceed the number of hours worked in 1970.
12. Specific data must be periodically supplied to the Ministry of Social Affairs.

Later on, condition 11 was amended in the sense that assignments exceeding three months were to be reported and that assignments exceeding six months were subject to approval by the Ministry of Social Affairs. This measure was meant to strictly limit the employment agency and posting activities to temporary assignments.

In 1973, it was also determined that manpower provision was prohibited in the construction sector across the Netherlands and in the steel sector in the Rijnmond area. Moreover, contacts were made with the trade union movement in the early 1970s, which resulted in the first temporary agency worker CLA in 1971.[765] By then, social security legislation had been extended to apply to temporary agency workers.[766]

The 1960s and 1970s were characterised by a difficult relationship between the temporary agency sector and the Minister of Social Affairs and Employment. This only changed in 1982 after the swearing in of the first Lubbers cabinet, which in its first government declaration advocated a generous policy on temporary agency work.[767]

The fact that manpower provision, including the posting of workers and temporary agency work, were legally classed under the new 1990 Employment Services Act, marked a major mind shift. These forms of employment were presented as phenomena that could make a positive contribution to the labour market, rather than as forms of employment that must be combated in view of the risks they presented in the fields of illegal labour subcontracting, abuse, fraud and illegality.

8.3 EMPLOYMENT SERVICES[768]

Through the years, the employment services organisation has evolved increasingly from being a work placement institution into becoming a body that focuses on labour market policy as a whole. This also included a coordinating role with regard to policies in the fields of economy, education labour relations and social facilities. Alongside this, individual services continued to be provided in the fields of work placement, granting permits to terminate employment and involvement in the field

765 Van Haasteren & Overeem (1976), p. 35.
766 Van Haasteren & Overeem (1976), p. 25.
767 Goldschmeding (1998), p. 6.
768 Sol (2000).

of vocational (re)training, re-education, vocational orientation and intermediation of disabled persons.

In the 1990 Employment Services Act, the board of the employment services organisation was rendered tripartite, i.e. placed under central control – the 'central employment services authority' (CBA) – consisting of employers, workers and government representatives. Its field of activity included:[769]

- registration of jobseekers and vacancies,
- vocational orientation,
- work placement,
- processing applications for work placement licences,
- processing applications for manpower provision licences,
- training and education,
- subsidising third parties.

The Employment Services Act replaced the 1930 Placement Act and the 1970 Manpower Provision Act. The new act allowed for private placement, conditional to a licence, which was to be granted by the CBA. Private for-profit work placement was also allowed, contrary to what had been provided for by the Placement Act, which had prohibited this. This policy change did require the Netherlands, which had ratified Convention 96, to switch from the convention's strict prohibition regime II to the more lenient regime III.

In terms of its definition of providing manpower, the Employment Services Act is fully consistent with the definition of the Manpower Provision Act. This definition reads as follows:[770]

> Providing paid manpower to a third party to perform customary work in that party's enterprise, under that party's supervision or management, other than by virtue of an agreement concluded with that party.

Exceptions to the above definition include a) provision of manpower by way of assistance and without profit motive, b) provision of manpower for a limited period in connection to an item delivered or a job completed and c) provision of manpower without profit motive by a joint venture of entrepreneurs.

The provision of manpower is prohibited without a licence granted by the CBA. Exemptions are possible for certain categories of workers. A licence may be condi-

769 Van Drongelen & Fase (2005), p. 30.
770 Van Drongelen & Fase (2005), p. 32.

tional to regulations, and it can be modified or revoked in the case of well-founded fear that the objective stated by the law is harmed.

In respect of providing manpower, the law has a number of further specific provisions, such as the so-called 'ban on obstructions', the ban on hindering workers from entering into employment relationships with third parties, and the so-called 'scab ban', the ban on providing manpower to an enterprise in the case of an ongoing labour dispute, a strike, a lock-out or a sit-in.

Another condition is that the manpower can only be temporarily provided. Further regulations stipulate that manpower provision must not exceed six months. Moreover, it has been provided that the worker that has been assigned to a user enterprise should, in principle, be paid the wages that are customary for that enterprise.

Providing manpower without a licence, infringing on the licensing conditions and not observing the ban on conditions and the scab ban are regarded as criminal offences and constitute economic crimes.

As early as 1996, it became clear that the Employment Services Act fell short of expectations. The tripartite management of labour market policy turned out to have hardly any added value compared with government-directed labour market policy. As a result, the Employment Services Act was revoked. For the time being, however, the regulations on work placement and manpower provision remained in force through the 1996 Implementation Act of the Employment Services Act. This proved to be a temporary measure, since a review of the usefulness and necessity of these labour market regulations had by then already been commenced upon. The memorandum titled *Heroverweging vergunningstelsel arbeidsbemiddeling en ter beschikking stelling van arbeidskrachten* ('review of licensing system work placement and manpower provision') concluded that the regulations no longer had any value and proved to be more and more outmoded.[771]

The government sought advice from the SER and the CBA. It also sought advice from the Netherlands social insurance council SVR regarding an alternative regulation on fighting tax and premium fraud in relation to manpower provision.

In the view of the SER, a licence was required for private work placement under Convention 96, but this should be implemented soberly and flexibly. Regarding manpower provision, the views were less unanimous. The worker representatives wanted the licensing system to remain in place, and if it should be revoked, they were in favour of at least some legal behavioural standards, i.e. a ban on obstructions and a pay equivalence rule. Abolishing the legal assignment period should have consequences for the legal status of the workers.

The employers opted for abolishing the licensing requirement and for a scab ban.

771 Van Drongelen & Fase (2005), p. 34.

In its recommendation, the SVR developed various modalities for exemption from the liability to pay tax and premiums, and what it considered to be the corresponding pros and cons.[772]

8.4 FLEXIBILITY AND SECURITY

In 1994, the CBA announced that it would no longer reinforce the six-month period and would tolerate twelve months. Minister De Vries had already communicated his intention to abolish the licensing system for manpower provision. Subsequently Minister Melkert introduced his 'flexibility and security' memorandum in 1994,[773] which contained the contours of new policy. He adopted the SER recommendation, expressed his appreciation for the many variants in the field of manpower provision, such as temporary employment agencies, pools of labour and secondment services. He also pointed out their downsides, such as supplanting direct employment by less adequately regulated labour in tripartite relationships. This entailed that, while the licensing system could be abolished, legal standards should be introduced, for instance:

- maintaining the pay equivalence rule, the scab ban and the ban on obstructions;
- improving the legal position of the temporary agency worker;
- facilitating a blocked account (G-account) system.[774]

Under strong pressure from the temporary agency sector, the 'flexibility and security' memorandum was presented to the Dutch Labour Foundation for advice. This was interesting, since the so-called 'purple government'[775] had announced upon taking office that it wanted to govern on its own authority, without reserving a role for 'the polder' (i.e. consensus-based policy-making).

The resistance of the temporary agency sector was particularly directed at the memorandum's aspects relating to the legal position of workers. It was meant to qualify the temporary agency relationship as an employment contract, with all the obligations this entailed. In practice, the temporary employment relationship had acquired a non-binding status, which contributed considerably to the labour market's flexibility. This was particularly about the provision 'end of assignment equals end of contract', which in the ensuing discussion became known as the so-called agency clause.

772 Van Drongelen & Fase (2005), p. 34 ff.

773 'Flexibility and security' memorandum (*Flexibiliteit en Zekerheid)*, Proceedings of the Netherlands Lower House 1995/96, 24543.

774 Van Drongelen & Fase (2005), p. 35.

775 In Dutch politics a coalition government consisting of liberals and social democrats (symbolized by the colors blue and red, respectively).

In April 1996, the Dutch Labour Foundation (StvdA, formerly STAR) presented a largely unanimous recommendation.[776] It was in favour of the temporary agency relationship being henceforth qualified as an employment relationship. It would, however, be a special kind of employment relationship, because of the option of the so-called agency clause, which gave the commissioning client the authority to end it. Moreover, it became possible to conclude three fixed-term employment contracts in a three-year period. These new regulations were to have the character of statutory provisions enabling derogations by CLA. Therefore, the Foundation recommended establishing a special 'dismissal guideline' for the temporary agency sector. It was also in favour of maintaining the pay equivalence rule and the scab ban. It could, however, do without the ban on obstructions.

The so-called temporary agency covenant was included as an annex to the Foundation's recommendation. This covenant was concluded between the representatives for temporary employment agencies, the ABU and the NBBU, on the one hand and trade unions FNV, CNV, Unie BLHP and LBV on the other. It included a special four-phase regime of 'the longer the work period, the more rights for the worker'. During the first two phases, the temporary agency relationship legally ended at the end of the assignment; the third phase was characterised by a limited number (eight) of fixed-term employment contracts that could be concluded in a two-year period. The fourth phase constituted open-ended contracts. Apart from this 'growth contract' the temporary agency covenant included agreements relating to pensions and vocational training.

The question is how this annexed temporary agency covenant annexed to the Foundation's recommendation must be interpreted legally. In my opinion, we are dealing with a CLA, albeit a special one.

Minister Melkert's 'flexibility and security' memorandum, the temporary agency covenant and the STAR agreement comprised the fundamental elements of the new legislation relating to flexibility and security, which have been further developed in the Netherlands Posting of Workers by Intermediaries Act (Waadi Act) and the BW (Dutch Civil Code).

8.5 WAADI ACT

The non-public i.e. private work placement and manpower provision were regulated by the 1998 Netherlands Posting of Workers by Intermediaries Act (Waadi Act). The public employment services were regulated in the 1996 Employment Services Act, which was repealed through the Work and Income (Implementation Structure) Implementation Act (SUWI).

776 STAR Nota *Flexibiliteit en Zekerheid*, publicatie no. 2/96 ('STAR-akkoord').

Private work placement is subject to a licence that implies obligations, such as the scab ban and that is, in turn, subject to further regulations. The licence can be refused or revoked in case of a well-founded fear that the licensee does not comply with the obligations imposed on it, or that the policy of good labour market relationships or the workers' interests will be otherwise harmed.

As soon as the Netherlands was to ratify ILO convention 181, this licensing requirement would lapse. In that case, various behavioural standards were to remain in force, including the no fee to worker principle and the scab ban. It must also remain possible to establish special regulations for specific categories of jobseekers and employers.

By the time the Waadi Act was implemented, the licensing requirement for manpower provision had been abolished. Fraud prevention and the protection of the interests of good labour market relationships continued to be objectives that required specific regulations. They were included in the Waadi Act, specifically:

- article 8, the pay equivalence rule;
- article 9, no fee to worker;
- article 10, the scab ban;
- article 11, information on occupational safety;
- article 12, sector-specific provisions;
- articles 16 and 17, hirer liability and exemption.[777]

The maximum assignment period, which had still been included in the 1996 Employment Services Act, and the ban on obstructions were no longer included in the Waadi Act.

8.6 SECONDMENT AGREEMENT IN THE DUTCH CIVIL CODE

Among academics and in jurisdiction in the Netherlands, the nature of the temporary agency relationship has evoked much discussion. As early as 1962, Koopmans argued in his doctoral thesis that manpower provision – 'hiring relationship' – can thus be considered as a temporary delegation of employer authority to the third party/commissioning client by the (contracting) employer.[778] Koopmans acknowledged the phenomenon that the 'contracting' employer's business model is providing manpower to others, i.e., assigning temporary agency workers.[779] He argued that this may both be a question of an employment relationship between temporary employment

777 Van Drongelen & Fase (2005), p. 37
778 Koopmans (1962), p. 296.
779 Koopmans (1962), p. 296.

agency and temporary agency worker, and of an assignment agreement between these parties. In that case, and depending on the actual circumstances, it would need to be established whether an employment relationship applied.[780]

To Zwemmer, the judgments of the Dutch Supreme Council of 1977, 1980 and 1988 confirmed the existence of an employment relationship, since there was an obligation to do work at the commissioning client's enterprise under his direction. However, Zwemmer observed that the Supreme Court did not formulate a rule of thumb on the basis of which an employment relationship would apply. Each and every time, the actual circumstances decided the outcome. Zwemmer particularly found confirmation for his hypothesis in Stein.[781]

Heerma van Voss[782] argued that the temporary employment agencies have long allowed the legal status of the temporary agency worker to be ambiguous. They were said to be worried about the consequences of an obligation to pay wages between assignments and about the consequences of the application of redundancy rules. Even though the realisation of the CLA for temporary workers brought some relief, ambiguity continued unabated. In jurisdiction and literature, Heerma van Voss recognises the assumption that an employment relationship did apply, in any case for the duration of the assignment at the user enterprise. He quoted Advocate General Koopmans, who endorsed a conclusion that this was the prevailing doctrine.[783] According to Koopmans, the absence of obligations, which is essential to the temporary agency relationship, would have no practical value,.

The temporary agency practice has always looked upon this discussion as being largely academic. The CLA for temporary workers and its increasingly extensive implementation supplied solutions; furthermore, the temporary agency practice could live with this ambiguity for some time. Eventually, a compromise was found in the Flex agreement, entailing that the secondment agreement was included in the BW as a special employment contract.

In article 7:690 BW the secondment agreement was defined as follows:

> A secondment agreement (or temporary employment agency agreement) is an employment agreement under which the employer, within the framework of his business or professional practice, places the employee at the disposal of a third party in order to perform work under the supervision and direction of that third party

780 Zwemmer (2012), p. 79.

781 Dutch Supreme Court 23 May 1980, *NJ* 1980, 633 with note on Stein.

782 Heerma van Voss (1996), p. 20.

783 Dutch Supreme Court 7 April 1996 (conclusion by A.-G. Koopmans), *JAR* 1996/168.

> by virtue of an agreement for the provision of services between the third party and the employer.

Legal academics have wondered whether article 7:610 is still applicable to the question regarding the requirements for the existence of an employment contract. In other words, should this article be considered first, to establish that the constitutive requirements of this article are present, i.e. subordinate work (employer-employee relationship) and the obligation of continued payment of wages, following which article 7:690 can be looked at; or does the latter article apply directly through dedicated legal provision?

Verhulp,[784] Asscher-Vonk[785] and Christe[786] appeared to be in favour of the legal provision theory. Grapperhaus[787] holds the view that both articles must be taken into consideration. For that matter, jurisprudence has moved away from the legal provision theory.

The definition of the secondment agreement is comprehensive, and the Minister's argument in the explanatory memorandum is significant:

> The proposed regulation for the secondment agreement does not merely relate to the temporary agency relationship that is currently found in practice, but also encompasses all other tripartite relationships in which the employer's business model constitutes making the employee available to carry out work under the direction and supervision of a third party. Such manpower provision may also comprise posting workers, provided that such posting activity complies with the elements of the definition. If that is the case, the special regime of the secondment agreement, as set out in art. 691 book 7 BW applies to this tripartite relationship.
>
> Thus, the proposed regulation for the secondment agreement provides a uniform legal regulation for the many forms of manpower provision occurring under a variety of names, including: temporary agency work, hiring out, posting or employing in the framework of a labour pool.
>
> In practice, it thus relates to temporary employment agencies, labour pools and other organisations that professionally provide manpower on a temporary basis, however they describe it.[788]

784 Verhulp (2001). Zie ook www.sprengersadvocaten.nl/publicaties/kort-van-memorie-de-onterechte-degradatie-van-een-arbeidsovereenkomst-tot-een-uitzendovereenkomst/.

785 Asscher-Vonk (1997).

786 Christe (2001), p. 171.

787 Grapperhaus & Jansen (1999), p. 39.

788 Dutch Parliamentary papers TK 1996/1997, 25263 no.3, p. 9–11 (Explanatory Memorandum), *Parl. Gesch. Flexwet ('parliamentary history of flexibility legislation')*, p. 936. See also Verburg (2013), p. 910.

Article 7:691 provides the special rules for the secondment agreement:
- par. 1 provides the delayed effect of the chain provision included in article 7:668a, to commence after 26 weeks;
- par. 2 provides that parties to the secondment agreement may stipulate in writing that, by law the agreement will end when the situation in which this employee is placed at his disposal for the performance of work is ended. This is the so-called agency clause;
- par. 3 provides for the duration of the legal validity of the clause, i.e. 26 weeks;
- par. 4 concerns the interval regulations;
- par. 5 concerns revolving door cases;
- par. 6 precludes intra corporate transfers;
- par. 7 concerns a collectively agreed derogation of the periods in the paragraphs 1, 3, 4 and of the revolving door cases in par. 5.

Article 7:668a provides that several fixed-term contracts can be concluded over a period of three years; derogations by CLA are possible.

8.7 RATIFICATION OF ILO CONVENTION 181

In 2003, the licensing requirement for work placement lapsed. This became possible once the Netherlands had ratified Convention 181. In chapter 2, the previous history of Convention 181 and the fundamental changes it initiated in international social law were discussed at length.

In the summer of 1999, after hearing the Council of State, the Dutch Minister of Foreign Affairs presented the convention to the Upper and Lower Houses of Dutch Parliament for tacit approval.[789] In his explanatory memorandum, the Minister stated that:

> … it is desirable to raise or maintain as few obstructions as possible for (re)integrating jobseekers in employment. Private temporary employment or work placement agencies fulfil a useful intermediary function in this respect.

The Minister indicated that, as chair of the European Union during the ILO negotiations, the Netherlands had been tasked with coordinating the points of view of the then fifteen member states and had managed to reach a consensus on many topics. The Netherlands had always held the view that Convention 96 was not aimed at

789 Letter from the Minister, session 1998–1999 no. 2, 26601 Private Employment Agencies Convention (Convention. 181, adopted by the International Labour Conference, having met in its eighty-fifth session), Geneva, 19 June 1997, p. 2. See also: Jacobs & Blanpain (1999), p. 299 ff.

manpower provision. The new Convention 181 applied unequivocally to both work placement and manpower provision. Furthermore, the Minister stated in his explanatory memorandum that Dutch law already complied with the provisions in the convention.

The convention relates to agencies that match offers of and applications for employment without becoming a party to the employment relationship (placement) (art. 1, par. 1, part a), and to agencies that employ workers with a view to making them available to a third party, to carry out work under his supervision (manpower provision) (art. 1, par. 1, part b of the convention). As a third category, the convention lists other services relating to jobseeking, determined by the competent authority after consulting the most representative employers' and workers' organisations. Where definitions of placement and manpower provision are concerned, the Waadi Act tallies with the provisions in the convention.

Article 2 precludes the recruitment and placement of seafarers from Convention 181 and also provides the opportunity to prohibit operations under specific circumstances. Article 12 Waadi Act aligns with this.

Article 3 provides that the legal status of private temporary employment agencies shall be determined in accordance with national law and practice after consulting with social partners; par. 2 provides that member states must choose between a licensing system, certification or another regulation. Therefore, a licensing system is not obligatory, and the Minister stated that the Dutch government's proposals for flexibility and security likewise aimed to steer this course, i.e. no licensing requirement for either work placement or manpower provision.

Article 4 safeguards the freedom of bargaining, and the Minister stated that this was ruled by the general regulations of Dutch associations law. According to Book 2 BW, people in the Netherlands are free to establish a trade union without prior consent of the government. The 1927 Act on Collective Agreements further developed these collective bargaining rights, and CLAS are taken into account in the Waadi Act. Thus, the pay equivalence rule of article 8 Waadi Act that the so-called user enterprise standard is decisive for fixing the remuneration, unless a CLA applies to the temporary employment agency (par. 2) or to the user enterprise, which provides that this user enterprise must ensure that workers are remunerated in conformity with that CLA. According to the Minister, the Netherlands complies with the convention's obligations through these regulations.

Article 5 includes provisions regarding equal treatment and non-discrimination, listing the following grounds: race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law, such as age or disability; par. 2 provides that positive discrimination is allowed. The Minister refers to article 3, par. 3, Waadi Act, which acts as a safeguard against discrimination, to the Equal Treatment Act (AWGB), to article 1 of the Dutch Constitu-

tion, and to the Disability (Reintegration) Act (REA Act), and feels he may justifiably conclude that the Netherlands complies with article 5 of the convention.

Article 6 provides that the privacy protection and processing of personal data must be accurate and in accordance with national law and practice. This related first to the Act on Registration of Personal Data that was in force at the time and the subsequent Personal Data Protection Act, which implemented EU Directive 95/46/EC.

Article 7 concerns the no fee to worker principle. Article 3, par. 1, Waadi Act regulates that workers may not be charged a fee for work placement services. In respect of manpower provision, this has been regulated in article 9 Waadi Act.

Article 8 protects migrant workers. ILO member states must protect migrant workers from abuses. Crucial in this respect is article 48, par. 2, EC Treaty (a provision with direct effect), implementing the freedom of movement for workers, which entails the abolition of any nationality-based discrimination between workers of the member states as regards employment, remuneration and other labour and employment conditions. In 1968, this prohibition of discrimination was developed in EC Regulation 1612/68, on freedom of movement for workers within the Community. 'Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State' (art. 1 EC Regulation 1612/68). Furthermore, Council Directive 68/360/EEC provides (in art. 1) that restrictions on the movement and residence of nationals must be abolished.

Article 3 of the Posting of Workers Directive imposes on member states the obligation to guarantee workers so-called 'core employment conditions'. Under article 28 of the Agreement on the European Economic Area, freedom of movement for workers is secured for EC member states and EFTA states, which entails the abolition of nationality-based discrimination and with respect to employment, remuneration and other labour and employment conditions.

In the Netherlands, restrictions for nationals from outside EFTA states are laid down in the 1994 Labour Act for Aliens (WAV), which requires work permits. One ground for refusing permits is the presence of prioritised supply. If the work and employment conditions comprise restrictions with respect to filling the vacancy by means of prioritised supply (art. 9, under b, WAV) a work permit can be refused.

The Minister states that these regulations regarding migrant workers provide sufficient protection, as required by article 8 of Convention 181.

Article 9 of Convention 181 prohibits child labour. The ban on child labour is laid down in in article 3:1 of the Netherlands Working Hours Act. Article 1:2 of this act provides that any person under the age of 16 is considered to be a child. Article 3:2 of the Working Hours Act provides exceptions, including light, non-industrial work by 13-year-olds and morning paper rounds by 15-year-olds. Furthermore, derogations

are possible, to be decided by the Dutch Labour Inspectorate (art. 3:3 of the Netherlands Working Hours Act).

Article 10 of Convention 181 requires a complaints procedure. Under article 13 Waadi Act the Dutch Labour Inspectorate is designated as supervisor. The Minister has also designated it as complaints institute. Article 15 Waadi Act provides that non-compliance of the Waadi Act provisions can be reported to the employer and worker in question, the works council and the relevant employers' and workers' organisations.

The articles 11 and 12 of the convention relate to the protection of the workers employed by private employment agencies. Article 11 provides that member states must ensure adequate legal protection in relation to freedom of association (art. 11, a), collective bargaining (art. 11, b), minimum wages (art. 11, c), working times (art. 11, d), social security benefits (art. 11, e), access to training (art. 11, f), occupational safety and health (art. 11, g), compensation in case of occupational accidents or diseases and compensation in case of insolvency and protection of workers' claims (art. 11, h and i), maternity protection and benefits, and parental protection and benefits (art. 11, i). Article 12 provides that member states must divide the respective responsibilities between the temporary employment agencies and the user enterprises, in accordance with national law and practice.

The protection of the freedom of association and collective bargaining were discussed earlier, under article 4. Minimum rates of pay are guaranteed in the Netherlands by the Minimum Wage and Minimum Holiday Allowance Act (WML).

The Netherlands Working Hours Act guarantees the legal protection of workers in relation to working hours. In the Netherlands, temporary agency workers are also insured under the social security scheme, as they are employees, or are considered to be equivalent to employees.

Agreements on training and education have been made in the two existing CLAS on temporary agency work.

Article 7:658 BW monitors occupational health and safety; par. 2 also provides liability in this respect; par. 4 has extended this liability to the person who in the course of his professional practice or business enables a worker, with whom he has not concluded an employment agreement, to carry out work. Furthermore, the Netherlands Law on Working Conditions regulates various subjects in the field of occupational safety and health and the well-being of the worker.

The Dutch Unemployment Benefits Act (WW) regulates claims in the case of employer insolvency, relating to back pay, the wages for the notice period and holiday allowances.

The Dutch Sickness Benefits Act regulates maternity allowances and childbirth benefits.

With respect to the allocation of responsibilities, as provided in article 12 of the convention, the Dutch Working Conditions Act and the Netherlands Working Hours Act include regulations that take into account the tripartite employment relationship inherent in temporary agency work. Moreover, article 8 Waadi Act includes a pay equivalence rule that takes this into consideration.

As a contribution to occupational safety and health, article 11 Waadi Act obligates the provision of information on specific characteristics of the workplace and of the assignment. Article 4, par. 5, of the Dutch Working Conditions Act obligates the user enterprise to make this information available to the temporary employment agency, who in turn has to pass this information on to the temporary agency worker under article 11 Waadi Act.

Article 34 of the Dutch Collection of State Taxes Act provides that joint and several liability exists for the payment of premiums and taxes in the case of the temporary employment agency's insolvency.

Article 13 of Convention 181 promotes the cooperation between private temporary employment agencies and public employment services. In chapter 2 (p. 44), it was noted that meantime this public-private cooperation has come about in various ways.

Article 14 of the convention requires supervision. According to article 13 Waadi Act, by an order of the Minister of Social Affairs and Employment, this rests with the officials working at the Dutch Labour Inspectorate. The payment of premiums and taxes on the basis of social security legislation is supervised by the wage inspectors of the executive bodies and by the Dutch Tax Authority.

Article 15 Waadi Act also makes clear that non-compliance with the Waadi Act provisions in the field of manpower provision may be investigated. The results of this investigation may be reported to the worker, employer, works council and relevant employers' and workers' organisations.

Likewise, when article 11 Waadi Act is not observed, the worker in question can bring a civil action. Any violation of the Dutch Working Conditions Act is punishable as an economic offence. The Labour Inspectorate, too, can take measures, such as instructions or an order to suspend work. Violations of the Dutch Working Hours Act or the Dutch Labour Act for Aliens are also punishable as economic offences.

Breaching prohibitions of discrimination is punishable by law. The worker can also go to (civil) court if legal provisions and obligations in respect of, for example, wages, holiday allowance and dismissal that arise out of CLAS are not observed.

This completes the Minister's explanatory memorandum. It also refers to Recommendation 188, which the Minister viewed as a guideline for further policy development. In his opinion, the recommendation mostly contained provisions that can be

characterised as provisions regarding the ethical behaviour of private intermediaries. Most of such provisions are self-evident in Dutch labour law.

The Minister wanted to ratify speedily, since this would automatically result in the cancellation of Convention 96. Without this opportunity, the Netherlands would be bound to this convention for a longer period, i.e. until 2003. In that case, the desired abolition of the licence requirement for work placement would need to be postponed.

Moreover, the Netherlands did not wish to lag behind other EU member states that likewise aimed for imminent ratification. Furthermore, ratification satisfies the basic principle that it is useful, since it relates to a regulation that is desirable from a global perspective and since ratification contributes to the realisation of a broadly-based international labour standard.

In respect of this type of conventions, it is common usage to also consult employers' and workers' organisations. The Dutch employers agreed without comment. The Dutch trade union FNV asked for a few additions and for further motivation in the explanatory memorandum, but eventually they, too, agreed, as did the fellow trade unions CNV and MHP.

8.8 POSTING OF WORKERS THROUGH THE NETHERLANDS TERMS OF EMPLOYMENT (CROSS-BORDER WORK) ACT (WAGA ACT)

The Posting of Workers Directive has been extensively discussed in chapter 7. The Netherlands implemented it in 1999 through the Posting of workers through the Netherlands Terms of Employment (Cross-Border Work) Act (WAGA Act). The discussion preceding the implementation of the Posting of Workers Directive particularly focused on the scope of the regulation. It was restricted to the construction sector, and Dutch Members of Parliament (PvdA, VVD, CDA, GreenLeft) challenged this. A level playing field in terms of working conditions should likewise be created for other sectors. However, the Minister foresaw that this might engender complexity, and he intended to gain experience first. The issue was put to the Dutch Labour Foundation, which presented divided opinions. The employers were in favour of a free market, while the workers wanted to be protected from wage competition.

In 2004, a shift occurred, as a result of which the Dutch government did consider extension of the WAGA ACT to be a solution for the ever-widening pay gap.

The WAGA ACT itself consisted of a limited number of articles. Article 1 explained several provisions from book 7, title 10 BW (employment contract law) that apply to workers posted in the Netherlands. The articles in question were 634 to 642, 645 (holidays and leave), 646 to 648 (equal treatment), 658 (occupational safety/liability in case of industrial accidents) and 670, par. 2 (termination ban in case of pregnancy).

While this concerned explicit implementation, implicit implementation applied to the Minimum Wage and Minimum Holiday Allowance Act (WML), the Working Hours Act, the Working Conditions Act, the Posting of Workers by intermediaries Act (Waadi Act) and the Equal Treatment Act (AWGB).

The government took the view that these rules had been mandatory on the basis of article 7 of the Rome Convention (1980) and that explicit implementation was therefore unnecessary.

Houwerzijl[790] argues that this makes the accessibility and quality of the legislation questionable, particularly because foreign employers and workers need clarity, especially regarding the implementation of European law to protect persons.

Article 2 focused on posted workers residing in the Netherlands. These workers, who have a foreign employment contract, are also protected by the Posting of Workers Directive.

Article 3 extended article 2 of the Act governing the universal applicability or inapplicability of collective labour agreements (AVV). A new par. 6 provided that CLA provisions that have been given the force of law apply to posted workers in respect of the hard core of the labour and employment conditions; par. 7 restricted itself to the construction sector and was said to expire if other sectors would need to be included. Key labour and employment conditions were:

- maximum working hours and minimum resting hours;
- the minimum number of days of holiday during which the obligation to continue to pay wages exists;
- minimum rates of pay, including overtime rates and excluding supplementary pension schemes;
- conditional to manpower provision;
- occupational health, safety and hygiene;
- protective provisions relating to the labour and employment conditions and the working conditions of children, young workers and pregnant workers, or workers who have recently given birth;
- equal treatment of men and women, together with other non-discriminatory provisions.

Article 4 WAGA Act amended article 98 of the Dutch Code of Civil Procedure, adding a new par. 3 to authorise the regional judge in disputes brought before the court by posted workers. Trade unions could also make claims. Houwerzijl points out that a subsequent amendment of the Dutch Code of Civil Procedure repealed this important authorisation, which made the Netherlands breach article 6 of the Posting of Workers Directive. Moreover, she observed that other provisions of the Posting of

790 Houwerzijl (2004), p. 335.

Workers Directive (art. 1, par. 2, art. 2, par. 2, art. 3, pars. 3 and 5, art. 4, pars. 2 and 3, art. 5) have not been implemented at all, or insufficiently, or too implicitly.[791]

That is why Houwerzijl considers the implementation to be more or less problematic. She quotes Jaspers, who sees the manner in which the authorisation has been dealt with as an indication of the legislator's interest in actively and, if necessary, vigorously realising legislation. The weaker the authorisation, the more tokenistic legislation becomes.

Houwerzijl concludes that the WAGA Act can be improved upon in many respects. It can be seen in chapter 7 that the application of the 'equal pay for equal work' principle to temporary agency work is also unclear. Did article 3, par. d, automatically commit to this principle if there is adequate legislation in place, or should this still be further provided through article 3, par. 9?

In any case, the Dutch social partners have regulated for this in the ABU CLA for temporary workers in article 68, in which the 'equal pay for equal work' principle, the so-called hirer's remuneration (art. 29 of the CLA) has also been declared applicable to posted temporary workers in the sense of the WAGA Act. Whether this is sufficient depends, among other things, on the scope of this CLA and on its universal applicability or inapplicability. Moreover, we should realise that posting workers is more than merely assigning them. The fact that Minister Asscher of Social Affairs and Employment, with the support of seven EU member states, started a campaign for equal pay for equal work in the same workplace,which had already been rejected by nine other member states, makes it clear that there is still work to be done.[792,793]

Equally important in this context is the implementation of the Enforcement Directive, which was due to take place before June 2016, and the combating of sham arrangements, which will be discussed in more detail in chapter 9.

In February 2016, the Minister introduced a bill in Parliament to implement the Enforcement Directive and simultaneously integrate the WAGA Act. The WAGA Act has been repealed in June 2016 to be replaced by Terms of Employment Posted Workers in the EU Act (WagwEU).

Remarkably, the Minister aims to introduce an obligation to report, applicable to foreign enterprises who want to perform work in the Netherlands. This requirement would also apply to self-employed workers. The Council of State is more critical, and fears an increased administrative burden both for the authorities and for the self-

791 Houwerzijl (2004), p. 334.

792 Letter from the Dutch Minister of Social Affairs and Employment of 18 June 2015.

793 Letter to Marianne Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour Mobility, dated 7 July 2015 on revision of the Posting of Workers Directive.

employed workers. The Minister argues that this system already applies in eighteen other EU member states.[794]

8.9 EVALUATING THE WAADI ACT

The Waadi Act prescribed that this had to be evaluated within three years following its implementation. In his letter to the Dutch Lower House, Minister Vermeend stated:

> By and large, the law can be said to meet the objectives, such as more competition and deregulation. There is no reason to propose amendments. The various rules of conduct are functioning adequately.[795]

Once temporary employment agencies had been designated as employers, the ABU held the view that the time had come to abolish the pay equivalence rule (art. 8 Waadi Act). However, the evaluation made clear that this rule continued to be of great importance to the organisation of manpower provision. This applied even more since the Dutch Labour Foundation had issued a recommendation[796] on how to deal with conflicting CLAS. It was particularly recommended that consideration be given to a three-month waiting period (except for skilled workers), if parties wish to include arrangements in the hirer's CLA with regard to wages, allowances and compensations for temporary agency workers. The 'no fee to worker' principle was undisputed, as was the so-called 'scab ban'.

The obligation to communicate safety information was generally adopted as a standard, although actions to improve the effectiveness of this article were yet to be taken. Thus, there was no need for amendment of the article; nor did the enforcement regulations need to be amended.

The special regime of article 12 Waadi Act and the indemnification scheme (art. 16 and 17) also had to be continued. It became clear that the ABU's desire to be free from the so-called SFT regulation (issuing declarations of good payment conduct) could not be honoured for various reasons.

The potential problems resulting from the abolition of the ban on obstructions had to be faced on the basis of the principles of reasonableness and fairness.

794 Terms of Employment Posted Workers in the EU bill 09/02/2016; recommendation Dutch Council of State 09/02/2016 regarding Terms of Employment Posted Workers in the EU bill. See also Cats (2016a).

795 Letter from the Minister evaluating the Posting of Workers by Intermediaries Act (Waadi), Lower House of the States General, session 2001–2002, 28365.

796 STAR (2001).

The abolition of the licensing system for manpower provision had its disadvantages, but reintroduction of a generic licensing regime, or selective deployment of such a regime as provided in article 12, was out of the question. The policy line was and continued to be:

> … strict and concentrated enforcement in respect of the breach of existing laws and regulations, using severe (partly new) sanctions, including an administrative penalty. Furthermore, additional measures are desired through self-regulation, something on which the social partners agree. The added value of a licence in a sector or region is decidedly limited, while it entails a lot of effort. In that case, there is a considerable risk that, instead of an average of four laws, an extra law/decree is breached (not having a licence; which had not hindered fraudulent intermediaries in the past).[797]

The abolition of the assignment period had coincided with laying down the legal position in the Flexibility and Security Act. This development was not assessed negatively in the evaluation. As a result, temporary employment agencies would have been able to enter the posting agency market and thus extend their services provision.

Several studies have assessed the flexibility regulation. Interestingly, the longer the regulations had applied, the more positive the overall opinion became. While most temporary agency employers negatively assessed the flexibility regulation in 1999,[798] this had changed considerably when the second assessment took place in 2007. Then, approximately 12% of the respondents assessed the regulation negatively. Just over 60% were positive and nearly 30% were neutral.[799]

Table 8.1 Percentages of offices assessing the Flex Act regulations, by branch size and total score[800]

	Branch size (representative)			
	4–9	*10–100*	*100+*	*total*
– very negative 0.0%	0.0%	0.0%	0.0%	
– negative 11.8%	13.2%	21.8%	11.9%	
– neutral 27.5%	33.7%	17.3%	27.9%	
– positive 60.8%	47.2%	58.1%	59.7%	
– very positive 0.0%	5.9%	2.8%	0.5%	
Number of organisations	51	51	41	143
Total score Flex Act assessment *	0.62	0.61	0.60	0.62

* 0=very negative, 0.25=negative, 0.50=neutral, 0.75=positive, 1=very positive.

797 Letter from the Minister to the Lower House of Dutch Parliament, TK 2001–2002, 28365, p. 2.
798 Grijpstra et al. (1999), p. 108.
799 Knegt et al. (2007), p. IX.
800 Knegt et al. (2007), p. 94.

During the first years after its implementation the assessment of the flexibility legislation boiled down to 'never change a winning law', i.e. an increasingly positive feeling about its effect. At the same time, however, the dissatisfaction about fraudulent intermediaries grew. The ABU had studies conducted on that subject both in 2004 and in 2008, in 2008 partly with an eye to the enlargement of the EU and the entry of residents from the ten new EU member states into the Dutch labour market. The results of the studies have been summarised in table 8.2.

Table 8.2 Fraudulent temporary employment agencies and intermediaries and illegal placement[801]

	Number of agencies (branches)		*Number of fraudulent offices*		*Number of illegally assigned workers*		*Illegal assignments in terms of working years*	
	2004	*2006*	*2004*	*2006*	*2004*	*2006*	*2004*	*2006*
Organised temporary employment agencies	500 (3,050)	700 (3,500)	minimal	minimal	minimal	minimal	minimal	minimal
Registered, non-organised temporary employment agencies	1,500 (1,900)	1,400 (1,600)	750 (600–900)	stable	12,000 (7,000–15,000)	stable	5,250 (3,000–7,500)	increase
Intermediaries not registered as temporary employment agencies	10,000	10,000+	4,000 (3.500–5,000)	increase	30,000 (25,000–35,000)	increase	13,750 (10,000–17.500)	increase
Non-registered temporary employment agencies	300–750	750+	300–750	increase	23,000 (16,000–30,000)	increase	8,500 (5,000–12,000)	increase
Total			more than 5,000	5,500–6,000	65,000 (48,500–80,000)	80,000 (60,000–97,000)	27,500 (20,000–35,000)	45,000 (29,000–56,000)

It becomes clear that in the period 2004–2006 the number of temporary employment agencies belonging to the ABU and NBBU increased from 500 to 700 enterprises. The total number of offices, including those of non-organised enterprises increased from less than 4950 to more than 5100. It is estimated that fraudulent assignment is growing by 5 to 10% per year. In 2006, there were thought to be a total of 5500–6000 fraudulent temporary agency offices that jointly assigned 80,000 persons (60,000–97,000) illegally, which amounted to 45,000 working years (29,000–56,000).

As a result, the Dutch temporary agency sector was said to lose 271 to 524 million euros in revenue and the Netherlands was said to lose 135 to 260 million euros in social security contributions and income tax payments.

801 Dijkema, Bolhuis & Engelen (2006), p. 7.

The sector had by then started a certification system, which will be discussed further below. The researchers recommended enhancing this system and directing the monitoring efforts of the enforcers to the non-certified temporary employment agencies, in which category the fraudulent entrepreneurs can also be found. Moreover, it is important to develop an after-tax indemnity for user enterprises that work with a certified temporary employment agency.

8.10 LICENCE OR CERTIFICATE?

Dutch State Secretary Van Hoof challenged the extent of fraudulence described in the last paragraph.[802] He argued that the calculations were very much in doubt; they were estimations based on expert observations, while the study in question also pointed out that no studies had recently been conducted that might have yielded a substantiated estimate of the number of fraudulent temporary employment agencies.

Nevertheless, his predecessor, State Secretary Rutte,[803] had held the view that the illegal practices called for action. In his Illegals Memorandum,[804] he had already made a point on combating fraud and illegality in the temporary agency sector. According to Rutte, the Dutch cabinet held the view that self-regulation in the temporary agency sector by means of private hallmarking systems, agreements in CLAS and other sectoral activities could make a positive contribution to containing fraud and illegality, but the cabinet was still in favour of further measures, particularly the introduction of a licensing requirement for temporary employment agencies. In order to obtain such a licence, these agencies needed to meet a number of requirements, and thus a permit system may act as a deterrent to temporary employment agencies that are not overly particular about the prevailing laws and regulations. Proposals for a public hallmark by the ABU and the Dutch institute for employee benefit schemes UWV were rejected for the following reasons:

- It would increase the annual administrative burden for business and the government.
- It would have too little appeal for non-organised agencies. A certification system mainly effects changes in the healthy segment of the sector, but has little or no effect on fraudulent intermediaries and user enterprises. Thus, the cleansing effect is expected to be disappointing.

802 Letter from the Dutch State Secretary of Social Affairs and Employment of 10 October 2006, reference AM/BR/2006/82822, on the report *Grenzen verleggen* ('pushing the boundaries') and the proposals by the ABU.

803 Letter from the Dutch State Secretary of Social Affairs and Employment and the State Secretary of Finance, The Hague 23 April 2004, to the Lower House of Parliament, TK 2003–2004, 17050 no. 261.

804 Illegals Memorandum, TK 2003–2004, 29537 no. 2.

– Connecting the proposed indemnity to the public hallmark would result in loss of tax and social insurance premium revenues.
– The proposal would add little to the existing enforcement scheme.

There was no preference for reverting to the licensing scheme that had been used in the past, since that met with the same objections as a public hallmark. Nevertheless, the increasing problems in the sector did show the need for a measure to regulate access to the market. That is why a less severe variety of licensing was proposed: a licensing requirement for the entrepreneur. The licence would only need to be applied for once, thus decreasing the administrative burden, while it could still serve as a sieve or barrier. The licence could also play a role in the decision by the Dutch Tax Authority and the UWV to enter into a so-called G-account (blocked account) agreement at the request of the temporary employment agency.

The licence, which would be granted to the entrepreneur rather than to the enterprise, would be valid for a limited period and could be revoked when abuse or fraud have been established. The licence would be granted conditional to certain requirements (such as irreproachable conduct, financial sustainability and transparent personnel administration). Sanctions should take the form of administrative fines.

A list of licence-holders was to be published online, so that every user enterprise could have easy access to this information. Only if assignments are arranged with a licence-holder can indemnity from joint and several liability for the payment of premiums and income tax be obtained. Moreover, a deposit of 75,000 euros must be paid.

This government proposal failed to be by endorsed by the Dutch Lower House. The Member of Parliament for the CDA Bruls tabled a motion. Bruls held the view that the licensing scheme had not proved itself as the vigorous and effective approach that was needed to combat fraudulent labour. According to him, a combination of public enforcement measures, to be initiated by government, and self-regulation, to be developed by the sector, should be worked out. His motion reads as follows:

> **Motion tabled by the Member of Parliament Bruls and co.**[805]
> Proposed 24 March 2005
> The Lower House of Parliament,
> Having heard the deliberations,
> considering that a vigorous and effective approach to illegal labour and fraud through temporary employment agencies is needed;

805 Bruls motion, TK 2004–2005, 17050, no. 287.

considering that the effectiveness of the proposed licensing scheme for temporary employment agencies in this respect has not been proven;
considering that a deposit results in too high a threshold for bona fide employment intermediaries in the small to medium-sized enterprise segment;
considering that a combination of enforcement measures by government and self-regulation by the temporary agency sector is preferred;
considering that one system of voluntary certification and periodical assessment ('MOT test') for the entire temporary agency sector should be realised in 2005;
requests the government, in consultation with the parties concerned, including temporary agency organisation, to promote such a system of self-regulation rather than develop an obligatory licence for temporary employment agencies, and to report to the Lower House on this subject before 1 September 2005,
and proceeds to the regular order of the day.
Bruls
Weekers
Koşer Kaya
Bussemaker

The proposed new licensing scheme did not prove to have a broad support base. The system was out of touch with practice, in the sense that five embryonic hallmarks had been proposed before. The 75,000 euro deposit was also considered to be highly problematic. Moreover, the one-off assessment was looked upon as debatable. In a letter dated 10 February 2005 to the standing committees on Social Affairs and Finance, VNO/NCW, MKB-Nederland (representing Dutch SMEs) and LTO-Nederland indicated that they had great reservations.

According to Bruls, it was unclear why a scheme that had not been effective before might be thought to work now. His motion was adopted by a large parliamentary majority. At the time, motions tabled by the Members of Parliament Bussemaker[806] and Koşer Kaya[807] were also adopted. Bussemaker requested the government to prioritise fighting fraud and illegality in the temporary agency sector by intensifying enforcement in such a way that the probability of apprehending fraudulent agencies would be increased.

Koşer Kaya aimed at changing the administrative liability of temporary employment agencies in such a way that company administrators could also be made personally liable.

806 Bussemaker motion, TK 2004–2005, 17050, nr. 288.
807 Koşer Kaya motion, TK 2004–2005, 17050, nr. 294.

8.11 THE SNA HALLMARK[808]

The government, which – as we have seen – had been in favour of a licensing scheme, was forced to make a U-turn by facilitating self-regulation. A collaboration ensued between NEN, the Ministry of Social affairs and Employment and the existing registers. In due course, this resulted in a single private certification scheme for hiring out and hiring in, comprising a single system of standards, laid down in the NEN-4400-1 for the Dutch businesses and NEN-4400-2 for the foreign businesses, and a public register (Dutch Labour Standards Register) that became operational as of 2007. The operations were delegated to the Dutch Labour Standards Foundation (SNA), comprising four processes:[809]

- *registration*. Businesses are monitored on the basis of inspections, resulting in being entered in or removed from the register.
- *standards management*. The standards are established by a Central College of Experts, consisting of representatives of sector organisations, user enterprises and unions; the SNA provides the secretariat.
- *harmonisation of inspectorates*. The inspections are conducted by affiliated inspectorates. The SNA organises mutual consultations aimed at achieving harmonisation.
- *administrative harmonisation*. The SNA's board is assisted by an advisory board that represents the stakeholders. If a business is deemed worthy of certification, it is entered into the Register. The necessary inspections focus on the payment of tax, VAT and social security contributions, observance of the Aliens Act and of regulations on minimum rates of pay and holiday allowances. In 2014, about nine elements of the CLA were added.

The establishment, implementation and maintenance of all procedures is verified by monitoring. The basic principle is that every business is monitored twice a year. Depending on the risk factors (new application for certification, irregularities during the last check, cash flow volume) the monitoring frequency can be increased. If the business does not comply with a specific requirement, which would eventually raise the level of risk, this is assessed as a minor non-conformity. Non-compliance with a specific requirement that immediately raises the level of risk is assessed as a major non-compliance. In the latter case, the registration is suspended, i.e. the enterprise is removed from the online register. The entrepreneur has a month to rectify a major non-compliance. Once it has been adequately remedied, the suspension is removed. In the case of a minor non-compliance the entrepreneur can use the time until the

808 Van der Voort (2013), p. 157 ff.
809 Van der Voort (2013), p. 157.

next assessment to remedy it. If he fails to do so, the minor non-compliance turns into a major one.

Certification is obligatory for the members of the ABU and the NBBU. Since this system of self-regulation has been developed under the threat of an imminent licensing scheme, Van der Voort referred to an enforced regulation that felt more like co-regulation. In this set-up, public and private supervisors come across each other more and more because of the various forms of collaboration.

Originally, the SNA was aimed at risk reduction for the user enterprise. However, by adding elements from the CLA to the standard, employee protection has also become an objective.

State Secretary Van Hoof was positive about the initiative.[810] The most important thing was that the NEN standard could make an important contribution to alleviating the lack of compliance of laws and regulations in the temporary agency sector at the time. He realised that the work for public enforcement institutions only began once a certificate was refused or revoked. He also established that the hallmark lacked elements that the licence did have, including requirements regarding financial sustainability (i.e. not having been in a state of bankruptcy, suspension of payment or debt rescheduling), the requirement of a certificate of good character, sanctioning of administrative penalty and the deposit requirement. He argued that the NEN standard was successful if:

- the NEN standard were applied on as large a scale as possible, with a broad support base and accessibility for both organised and non-organised agencies;
- the value of the certificate would become so transparent to the Tax Authority and the Labour Inspectorate that double work could be prevented, so that public enforcement could focus on the fraudulent segment;
- the user enterprise were encouraged to work with certified agencies.

The State Secretary mentioned an ex ante investigation that had been conducted to gain insight in the support base and the effects of the self-regulation. This investigation had shown a broad support base for the hallmark among temporary employment agencies and user enterprises. There was uncertainty as to whether the hallmark would attract more agencies than the various systems existing at the time had.

As per the end of October 2015, 4,052 agencies were entered into the register following certification. An estimated total of 12,000 agencies are thought to engage in manpower provision. Thus, there is a 'grey area' of approximately 8,000 temporary

810 Letter from the Dutch State Secretary for Social Affairs and Employment and the State Secretary for Finance, TK 2004–2005, 17050, no. 300, and a letter from the Dutch State Secretary for Social Affairs and Employment and the State Secretary for Finance, dated 28 September 2005, reference AM/BR/05 170308 on combating fraud in the temporary agency sector.

employment agencies. From 2007 to 2015, more than 3,000 agencies were struck off the register, because they no longer aimed for certification, no longer met the criteria, or because they had been liquidated. Out of the certified agencies, 73% only engaged in hiring out temporary agency workers, 17% in contracting and 10% in both hiring out and contracting.

8.12 ACCOMPANYING MEASURES

The SNA hallmark became operational as per 2007. From that moment on, the number of certified agencies grew steadily to over 4,000, as became clear above.

In 2008, the ABU, as the principal spiritual father, issued the report *Registratie en certificering tegen misbruik van uitzending*[811] ('registration and certification against abuse of temporary agency work'), advocating a series of measures to fight fraud. The plan comprised eleven items, i.e.:

1. Every temporary employment agency is obliged to register in a public register.
2. Non-registration results in a fine for the temporary employment agency.
3. Only registered temporary employment agencies can apply for a G-account and an income tax number.
4. Certification ensues from registration on the grounds of NEN-4400, but this is not obligatory.
5. Non-certification means that the agency data is passed on to the government enforcers.
6. Working with non-certified agencies constitutes a large financial risk for the user enterprise.
7. A user enterprises using a non-certified agency must make a first-day notification (EDM).
8. User enterprises are made jointly and severally liable for payment of at least the statutory minimum wage to the temporary agency worker, coupled with reversal of the burden of proof. Cooperating with a certified agency results in indemnity from this joint and several liability.
9. The government continues to be responsible for enforcement.
10. Registration is easy for the temporary employment agency and can easily be verified by user enterprises and enforcers.
11. Obviously, a condition to this model is that the government uses its means of enforcement to act directly on signals that have been transmitted, since enforcement and monitoring are essential to the model.

811 ABU (2008).

The Dutch Labour Foundation supported the outlines of the plan. The SNA had made agreements with the Dutch Tax Authority as early as 2007 to exchange information on the payment behaviour of (potentially) registered agencies. Moreover, agreements were made on the simplification of issuing social security numbers for foreign workers and passing on information regarding fraudulent foreign intermediaries to the Dutch Tax Authority. More generally, measures to enhance government enforcement were discussed. For instance, an administrative penalty became applicable in cases of breaching the statutory minimum wage.

Moreover, an act enhancing tax law enforcement reinforced the position of the Dutch Tax Authority. In this act, the application of the 52% anonymous tax rate was extended and a six-month notion was included in the Dutch Wages Tax Act (Wet LB art. 30a). These are general measures that are not specifically directed at the temporary agency sector, but they do facilitate the fight against fraud in this sector.

Minister Donner felt sympathy for the ABU plan.[812] He aimed to fine-tune the existing requirement for registration at the Dutch Chamber of Commerce (item 1 in the plan), use the existing opportunity to impose fines (item 2 in the plan). The registration at the Chamber of Commerce is already public (item 10 in the plan). He clearly recognised the opportunity of following up on the SNA signals by the public enforcers. He was also positive about joint and several liability for the hirer with regard to paying the statutory minimum wages, which could be regulated for in the BW. The Minister did reject items 3 and 4 for the time being, indicating that he wanted to verify whether alternatives were feasible. All in all, the Minister stated that some of the ABU proposals were worth considering. Soon after, he proposed amending article 7:692 BW in relation to realising hirer liability regarding the payment of the applicable minimum wage and applicable minimum holiday allowance. His proposal was adopted by Parliament. In the second paragraph of article 7:692 BW the user enterprise is offered the option of avoiding joint and several liability by cooperating with a certified temporary employment agency.

Minister Donner clearly supported the choice of self-regulation. However, the problems of fraudulence were not yet at an end. After studies conducted by the ABU in 2004 and 2006 shed light on growing fraudulence, the Dutch foundation for compliance with the collective labour agreement for temporary agency workers (SNCU), issued alarming reports in 2008 and 2010, indicating that the problem had not disappeared and was actually increasing.[813]

Politicians responded to the signals and in due course this resulted in the adoption of the Voortman/Spekman motion. This translates as follows:

812 Letter from the Dutch Minister of Social Affairs and Employment dated 19 June 2008, reference AM/BR/08/15448, on monitoring the temporary agency sector, 2008.

813 De Bondt & Grijpstra (2008); Walz, Frouws & Grijpstra (2010).

Voortman/Spekman motion[814]
Proposed 7 October 2010
The Lower House of Parliament,
having heard the deliberations, observing that more than 50% of the migrant workers in the Netherlands are working through temporary employment agencies;
considering that during the first half of 2010, the SNCU, the CLA police of temporary agency employers and trade unions, has had to process a record number of reported complaints, for instance, about underpayment and bad housing;
considering that on 28 September last, the cabinet indicated that it aimed to have temporary employment agencies registered, and that it aimed to broaden its approach in the field of housing regulations and fighting fraudulent temporary employment agencies;
holding the view that, in spite of having sectoral certification with supportive legislation, the number of fraudulent temporary employment agencies continues to grow;
holding the view that the approach to fraudulent temporary employment agencies can be enhanced by a licensing scheme combined with instruments such as the Bibob Act[815];
requests the government to develop, on the basis of the comprehensive package of measures, a conclusive approach in order to put a stop to fraudulent temporary employment agencies, including the implementation of a licence scheme as an option, and proceeds to the regular order of the day.
Voortman/Spekman

This motion placed the permit as a means of facing the problems back on the political agenda. This aim was enhanced by the so-called LURA report, comprising the deliberations emanating from the parliamentary inquiry.[816]

In this context, it was observed that fraudulent temporary employment agencies were a major problem, that they were not tackled effectively and that NEN certification had failed to be an adequate solution. At any rate, the Ulenbelt/Hamer motion ensued,[817] observing that self-regulation had failed and that a permit requirement for temporary employment agencies should be reintroduced if the number of fraudulent temporary employment agencies were not halved by the end of 2012. The motion was not adopted, but the ball had been set rolling once again.

814 TK 2010–2011, 29407, no. 115.

815 The Bibob Act ('Wet Bibob') is a (preventive) regulatory instrument. If a licence is under threat of abuse, the competent administrative body can refuse the application for or withdraw a licence to prevent the risk of the government facilitating criminal activities.

816 Parliamentary inquiry: Lessen uit recente arbeidsmigratie ('lessons from recent labour migration') TK 2011–2012, 32680 no. 4.

817 Ulenbelt/Hamer motion; TK 2011–2012, 32680, no. 14.

Minister Kamp acted resolutely; he introduced a bill on a registration requirement for intermediaries posting workers. In doing so, he went further than Minister Donner, who had wanted to align the ABU plan with existing legislation regarding registration in the Dutch Trade Register. Minister Kamp explicitly aligned with the ABU plan by proposing a separate act. This act was included in the Waadi Act, as article 7a, stating in par. 1:

> It is prohibited for anyone to post workers in the Netherlands other than through an enterprise or legal body registered in the Dutch Trade Register, designated in article 2 of the Trade Register Act 2007 or about which it has been recorded that it is engaged in the activity of posting workers.

Paragraph 2 provides:

> It is prohibited for anyone to hire and deploy workers that have been posted in breach of the provision in the first paragraph.[818]

In a new article 14b this amendment also regulated that acknowledged certified bodies such as the SNA may be supplied with data regarding administrative fines imposed for non-compliance with:
- article 7a, par. 1, Waadi Act;
- article 2, par. 1, or article 15 van the Dutch Labour Act for Aliens (WAV);
- article 5.20 van the General Administrative Law Act (AWB);
- article 7, 15 or 18b, par. 2, of the Minimum Wage and Minimum Holiday Allowance Act (WML).

Thus, the Minister clearly aimed to enhance self-regulation. However, he also promised to investigate whether reintroducing the licensing requirement would contribute to tackling the problems effectively.[819] The Minister fulfilled this promise by exploring various possible modalities, i.e.:
- the current system of public-private cooperation;
- a certification requirement;
- licensing by registration;
- a licensing scheme.[820]

818 Van Drongelen & Van Rijs (2012), Van Drongelen & Van Rijs (2014).

819 Letter from the Dutch Minister of Social Affairs and Employment dated 14 March 2012, TK 2011–2012, 32680, no. 28.

820 Letter from the Dutch Minister of Social Affairs and Employment dated 10 September 2012, ref. O/AMU/2012/12792; see annex 3,'verkenning vergunningplicht' (exploring the licensing requirement).

The enquiry assesses the modalities on various relevant effects/characteristics.

Table 8.3

Varieties Effect	*1. Current system*	*2. Certification requirement*	*3. Licensing by registration*	*4. Licensing scheme*
Incentive user enterprise	Negative due to risk of a fine due to hiring from non-registered agency (through registration requirement). Positive due to partial indemnification.	Negative due to risk of a fine due to hiring from non-certified agency. Positive due to partial indemnification.	Negative due to risk of a fine due to hiring from non-registered agency.	Negative due to risk of a fine due to hiring from non-licensed agency.
Incentive temporary employment agency	Small incentive to be certified.	Large incentive to be certified.	Large incentive to be licensed.	Large incentive to be licensed. Deposit is impediment to starting a business and enhances the incentive to circumvent the regulations.
Scope	Only SNA members have themselves regularly monitored. The rest of the sector do not.	The larger part of the sector is in sight and has itself regularly monitored through certification.	Public monitoring on licensing conditions.	Public monitoring on licensing conditions.
Sector costs	Only for certified segment.	Increase for part of the sector due to the requirement and possible fines for non-certification.	Remain equal to variant 1.	SNA certificate costs fall away. In their stead comes administrative burden for the sector. Deposit requires investment.
Government costs	For enforcing legal standards.	Remain equal to variant 1.	Increase due to implementation and licence enforcement. Fees may cover the costs.	Increase due to implementation (more so than for variant 3) and licence enforcement. Fees may cover the costs. Deposit offers Tax Authority more guarantee.

According to the Minister, the enquiry shows that licensing has little or no effect on the number of fraudulent temporary employment agencies. He stated:

> Moreover, a licensing requirement has considerable implications for the current system of public-private cooperation. There is a risk that the private sector will cut back on or stop the efforts it has set in motion. This would not be right, since fraudulent practices can only be put an end to by intensive cooperation between the government and the sector. Moreover, it will be complicated for the government to fill the gap the private sector then leaves behind. The means to do so are lacking.[821]

In addition to the registration requirement and the legislative possibilities for co-operation, the Minister presented the following existing and new measures to fight fraudulence:

- AMU (Tackling Fraud at Temporary Employment Agencies) intervention team,
- AMU Reporting centre,
- tackling fraud by means of increased penalties,
- hirer liability WML,
- tighter enforcement policy (as a result of increased monitoring of cost deductions),
- pilot registration data exchange,
- Enforcement Directive – measures,
- tackling bogus self-employment,
- implementation of registration requirement,
- public-private data exchange,
- tax indemnity.

The latter has taken place as a result of the Van Hijum/Spekman motion,[822] advocating indemnity for the user enterprise from additional tax and fines, in connection with its joint and several liability for non-payment of social security contributions and wage tax. This motion was adopted, and resulted in an amendment to the 2008 guideline for tax collection. Now, its article 34.6.1 provides that the user enterprise hiring from a temporary employment agency can be granted exculpation under specific conditions. The user enterprise will not be held liable if:

- it pays 25% of the invoice amount (including VAT) into the G-account of the temporary employment agency (in the event of reverse charge VAT this is 20% of the invoice amount);
- on payment it enters the invoice number and any other invoice identification data into the comments section of the transaction;
- its accounts department provides a direct insight into the hiring data, an account of man-hours and the payments;
- it has the hired worker's citizen service number (BSN/sofi-number);

821 Ibid., p. 5.

822 Van Hijum/Spekman motion. TK 2008–2009, 31833, no. 8.

– it can prove the hired worker's identity;
– it can prove, if applicable, that the hired worker has a valid residence or work permit.

The agency/intermediary must meet the following requirements:
– The enterprise complies with the NEN 4400-1 and the NEN 4400-2 standard and is registered with the Dutch Labour Standards Foundation (SNA). The SNA website (www.normeringarbeid.nl/en) lists the temporary employment agencies that meet these requirements.
– The invoice states:
  • the number or reference of the corresponding agreement to which the invoice applies;
  • the period or periods to which the invoice applies;
  • the description or reference of the assignment to which the invoice applies.[823]

Alternative regulations may apply to temporary agency groups.

8.13 TEMPORARY AGENCY WORK DIRECTIVE INCORPORATED IN THE WAADI ACT

The Temporary Agency Work Directive was implemented simultaneously with the incorporation of the registration requirement through an amendment to the Waadi Act.[824] The development of this European directive was discussed extensively in chapter 7.

The articles 1, scope; 2, aim; and 3, definitions, of the directive did not need to be implemented. Article 4 concerns reviewing prohibitions and restrictions on the use of temporary agency work. Two prohibitions are in place, i.e. for bus drivers and for workers in youth care. During the corresponding deliberations in the Dutch Lower House, the Minister referred to his colleagues at Infrastructure and the Environment, and at Health, Welfare and Sports, who would have to do their homework on this matter. Moreover, he referred to a recommendation by the Dutch Labour Foundation, providing for the review with regard to the CLA provisions. In this recommendation, the Dutch Labour Foundation inventoried the following prohibiting and restricting provisions:[825]

823 Amendment of the 2008 guideline for tax collection, Decision of 27 June 2012, no. BLKB 2012/1062 M.
824 Van Drongelen & Van Rijs (2012).
825 Analysis by the Dutch Labour Foundation for the purpose of reviewing the restrictions and prohibitions on the use of temporary agency work in collective labour agreements, 2011.

- maximisation by absolute numbers/percentages;
- maximisation by period or duration of the assignment;
- CLA provisions on the basis of which temporary agency workers may not perform work that 'by its nature' is usually performed by the employees of the user enterprise;
- conditions of hiring;
- NEN (4400)/SNA certification;
- demand for licensing or another type of recognition or proof of the bona fide character of the temporary employment agency that goes beyond the NEN certification;
- providing information to and/or gaining agreement of trade unions;
- provisions that make payments to a social fund mandatory.

A unanimous recommendation failed to ensue. The Dutch Labour Foundation could only justify the NEN provisions, the condition of allowing the works councils to play a role in the use of temporary agency workers and the provisions that make payments to a social fund mandatory. Views on the other elements continued to diverge. This was not so much about the implementation of a section of a law, but rather about the execution of a concrete assignment. This was different for article 5 of the directive, which develops the principle of equal treatment. The Waadi Act already included article 8 containing the pay equivalence rule. However, this had to meet the requirements of the directive. Instead of 'wages, benefits and other allowances equivalent to the wages, benefits and other allowances that are usual at the user enterprise' article 8 now provides the 'right to at least the same labour and employment conditions as those that apply to employees in the same or similar positions at the user enterprise':

- as regards the wages and other benefits and allowances;
- on the basis of a CLA or other non-legal provision of a general nature that is in force within the enterprise where the assignment takes place, as regards working hours, including overtime, rest periods, work on night shifts, breaks, the duration of the holidays and work performed on public holidays.

Derogation by CLA is allowed (art. 8, par. 3, Waadi Act).

The rights with regard to company facilities at the user enterprise and the information on vacancies provided to temporary agency workers are regulated in article 8a and b Waadi Act.

The no fee to worker principle was included in article 9 Waadi Act. Labour copartnership for temporary agency workers had already been regulated in the Dutch Work Councils Act (WOR), which included an obligation to inform the works council on the use of temporary agency work in article 31b, par. 1.

8.14 COLLECTIVE LABOUR AGREEMENT FOR TEMPORARY AGENCY WORKERS[826]

It has been stated previously that the CLA as an instrument has also played an important role in the development of the regulatory framework on temporary agency work in the Netherlands. In particular it has always been an important instrument for the social partners to put wages in order in derogation of the pay equivalence rule.

The ABU's first CLA was concluded in 1972. At the time, it was restricted to the administrative and office sectors, where most temporary agency workers were assigned. This CLA contained a mere ten pages, providing only the labour and employment conditions. In addition to this CLA, the ABU had issued a so-called 'green folder' in which it had unilaterally established the labour and employment conditions for skilled and unskilled temporary agency workers. The then existing CLA for temporary agency workers in the administrative and office sectors constituted important input for a CLA for the entire temporary agency sector, which was realised in 1987. The CLA contained regulations on the commencement and ending of labour relationships, and on the working hours, the hourly rates of pay, bonuses, expense allowances and holiday entitlements. A paragraph on remuneration was in place for the administrative and office sectors, while for other sectors it had been provided that the wages should 'as a rule and preferably' be in conformity with the hirer's rates of pay.

A dispute about this was brought before the disputes committee appointed by the ABU CLA. This committee indicated that a 10% margin applied compared with the hirer's rates of pay. There has always been pressure on the ABU to establish the remuneration at the level of the hirer's remuneration. The trade union held the view that there were also entitlements on the basis of the various CLAs at user enterprises.

The so-called SMU agreement was concluded to solve this issue of conflicting CLAs, i.e. the one for temporary workers and those at user companies. To this end, the ABU renounced its negotiation rights in respect of wage-setting in favour of the hirers' CLAs. This did require notification, i.e. the partner in the hirer's CLA had to report these specific agreements to the Dutch Temporary Employment Agencies Notification Office (SMU), which had been established in 1991. Thanks to its willingness to comply, the ABU managed to extend the maximum assignment period from 6 to 12 months (1000 hours). The SMU had only existed for little over a decade, until 2004. In that year, the ABU concluded its new CLA for 2004–2009. The aforementioned temporary agency covenant, which was part of the Flexibility and Security Agreement, had been developed in the preceding CLA for 1999–2004, which came into force on 1 January 1999, simultaneously with the other flexibility and security regulations.

826 Van Houte et al. (2004).

In addition to the usual labour law provisions (including continuation of the SMU agreement), the 1999 CLA comprised important provisions in the field of the temporary agency workers' legal position, i.e. the so-called assignment phases system in which the new legal provisions had been developed – statutory provisions – in the field of the secondment agreement, the chain system of the fixed-term employment contract and the exclusion of the obligation to continue payment of wages.

Besides article 7:690 BW, which legally entrenched the assignment period of 26 weeks (art. 7:691, par. 2, BW) on the principle that 'end of assignment equals end of contract, a so-called chain system came into being in article 7:668a BW, legally enabling three fixed-term employment contracts in a three-year period. The ABU CLA developed this provision into four phases.

- Phase 1 was the 26-week secondment phase subject to the so-called agency clause (end of assignment equals end of contract).
- Phase 2 amounted to an extension of this period by CLA by another 26 weeks.
- In phase 3, a maximum of eight fixed-term employment contracts had to be concluded in a two-year period.
- Entering phase 4 is only possible under the condition of concluding an open-ended employment contract.

Other important agreements that had been developed in the ABU CLA for temporary workers concerned pensions and training. In their transition to phase 2, workers acquired rights in these fields.

During the term of this CLA it became clear that the commotion surrounding the introduction of flexibility and security and the related CLA had not made matters clearer and was also intrinsically complex.

The Dutch Economical Institute (NEI) established in an evaluation study that temporary agency workers are actually 34% 'sideliners', 55% 'quitters' and 11% 'stayers'. Differentiation into these various groups was called for, for instance, a 'student regulation'. NEI recommended simplifying the phasing system and rendering the remuneration regulation more transparent. This was expressed in the 2004–2009 CLA. The phasing system was simplified. ABU introduced a phase A constituting 78 weeks' work for the same temporary employment agency, a phase B constituting a maximum of eight contracts during a maximum period of two years, and a phase C comprising the 'permanent' temporary agency workers; those who are working on the basis of a fixed-term employment contract.

As regards wages, it was agreed to cancel the SMU construction. From then on temporary agency workers were remunerated in conformity with their own CLA during the first 26 weeks, after which the remuneration was decided in conformity with the hirer's CLA.

During the first 78 weeks, a temporary agency worker is not entitled to continued payment if the assignment is discontinued; however, if this occurs in the phases B and C, the worker is entitled to so-called reversion pay if he or she is willing to accept an alternative suitable assignment.

The 2009–2014 CLA for temporary agency workers closely resembled the 2004–2009 CLA, but new insights regarding remuneration were included. The temporary agency remuneration could be derogated from for skilled workers who had also been regulated for in the hirer's CLA. A procedure including a remuneration committee provided the rules for this derogation option.

This CLA was dismantled to make room for the 2012–2017 CLA. According to this CLA, the hirer's remuneration becomes the starting point for determining the temporary agency wages (art. 19). The ABU remuneration regulations can be applied to four groups, i.e.:

1. allocation group (school leavers, jobseekers under the Dutch Participation Act, returners, reintegration target groups, long-term unemployed, temporary agency workers without starter qualifications who attend qualifying training, temporary agency workers who attend training at vocational qualification assistant level 1, holiday employees);
2. transition group (the worker is then coached in his/her transition to new employment);
3. temporary workers who cannot be classified (i.e. they have not been included in the hirer's function classification);
4. temporary workers with an open-ended secondment agreement in phase C.

For the first three groups, the ABU remuneration rate may be applied for 52 weeks.

In addition to the ABU CLA there is also the NBBU CLA. This CLA had no wage paragraph of its own and opted for remuneration in accordance with the hirer's standard. In the NBBU CLA, the first and second phases added up to 104 weeks, in contrast to the ABU CLA, in which it had by then been renamed phase A, and amounted to 78 weeks. Both CLAs do have an identical phase B, also known as phase 3, comprising a maximum of six fixed-term employment contracts in a maximum period of four years.

In the meantime, the Dutch Work and Security Act (WWZ) has resulted in interventions in both CLAs, which have brought them even closer together. This will be referred to in the discussion of this act.[827]

827 Collective labour agreement for temporary agency workers 2012–2017, September 2015 (ABU CLA); collective labour agreement for temporary agency workers 1 June 2014–31 May 2019 (NBBU CLA).

CHAPTER 9

Complications

We have seen previously how the Dutch regulatory framework for temporary agency work has developed since the 1960s, these years being characterised by combating abuses. During this decade, the Dutch government introduced its first regulations on temporary agency work, i.e. compulsory social security contributions and the Manpower Provision Act. Subsequently, the 1980s and 1990s witnessed growing recognition through incorporation of manpower provision in the 1990 Employment Services Act, provisionally culminating in flexibility and security regulations.

Since these regulations came into force, various members of the Dutch government have had to occupy themselves with the issue of temporary agency work, particularly focusing on combating fraudulent agency work. Preference was finally given to self-regulation by way of certification, combined with public enforcement of the relevant laws and regulations. The licensing alternative cropped up repeatedly, but eventually Dutch government opted for the continuation of the private-public course. On the basis of a thorough examination, Minister Kamp of Social Affairs and Employment made clear that licensing would not have any added value.

All these deliberations scarcely referred to the foundations that were laid for what came to be termed the 'Flexibility and security approach'.

However, the tide now appears to be turning. During the summer of 2012, the Dutch Socialist Party and the Dutch Labour Party jointly introduced their Security for Flexibility bill to deal with excessive flexibility. Many elements of this bill were used in Minister Asscher's Work and Security Act, which has since been passed.

The 2013 social partnership agreement supported this bill. The agreement also supported tackling sham arrangements, as substantiated in the Act on Combating Sham Arrangements, which by now has also been passed. Also, the social partnership agreement helped place payrolling on the agenda.

Contracting and self-employment were added as new, fast-growing types of flexible work. Temporary agency work clearly no longer monopolises the wide range of flexible work types. Lastly, Minister Asscher made critical observations about

combating fraudulence by means of private certification and public enforcement. He was also dissatisfied with the effects of the Posting of Workers Directive.

Following a legislative development that could be described as positive, particularly since the Dutch government and social partners had finally come to an agreement, a turning point appears to be within reach in which consensus is now increasingly harder to find. Due to their complexity, the issues appear to become more and more uncontrollable. This is clearly a watershed. Above, the development of the temporary agency framework was outlined. To fully understand this development, it is necessary to discuss its complications further.

All this contributes to answering the question as to whether Convention 181 as a global labour standard is (still) adequate from a Dutch point of view.

9.1 SECURITY FOR FLEXIBILITY BILL[828]

Towards the end of 2012, the Members of Dutch Parliament Hamer (PvdA) and Ulenbelt (SP) presented their members' initiative aimed at considerably amending the flexible labour legislation. They established that, at the time, this legislation had been adopted by a large majority (143 out of 150 MPs in favour), but thought it was time for some adjustments. They submitted proposals on the chain system, on terminating the temporary contract, on levying social security contributions, on using the agency clause, on the obligation of continued payment of wages, on probation time, on the competition clause and on a legal presumption regarding payrolling. These proposals were needed to rebalance flexibility legislation. They established that: 'at the moment, the non-secure layer of flexible contracts, temporary agency work and self-employed workers has grown to approximately 30%, which shows that the process of flexibilisation has not been balanced'. This called for modernisation of the labour relationships, the initiators argued. They stated that this development is detrimental to innovation and productivity growth. Furthermore, there were too few transitions from insecure to permanent employment. As they put it, the consequences were immense:

> no mortgage, hardly any career opportunities, little education and training, a lower remuneration than that of colleagues with permanent contracts, reduced pension accrual and fewer social security rights than employees with permanent contracts.

In connection to this, they argued:

828 Bill by MP Ulenbelt to amend Book 7 BW and the Social Insurance (Funding) Act to improve the legal position (Security for Flexibility Act), TK 2012–2013 no. 3, 33499, Explanatory Memorandum p. 4.

> However, there is a large group of people that unintentionally become trapped in flexible work. The divide in the Dutch labour market between workers with temporary contracts and workers with permanent contracts becomes increasingly pronounced. The losers are the group of 'outsiders' with temporary contracts, who would like to have a permanent contract but have little or no chance of getting one. As a result, a large part of the working Dutch is experiencing sustained insecurity. Thus, the fear of a growing multitude of 'working nomads' – as foreseen in 1996 by the Dutch Labour Foundation in the STAR agreement – has become reality.[829]

The Memorandum points out the so-called revolving door abuse of unemployment insurance provisions, which must be acted against. Employers are said to organise flexibility chains in such a way that they make maximum use of the employment suspension rules, causing their employees to apply for unemployment benefits in these intervals. In this way, no worker would ever be entitled to a permanent contract.

The concrete proposals were as follows:
- granting severance pay when the temporary contract ends; a month's salary for every year worked;
- an obligation to inform the worker on ending or extending the contract;
- the so-called 3-in-3 rule – a maximum of three fixed-term contracts in a maximum of three years – is replaced by the so-called 2-in-2 rule – a maximum of two contracts in a maximum period of two years;
- payrolling approach; legal suspicion that 'commissioning client' is also the employer;
- facilitating the permanent contract by means of lower unemployment benefit premiums;
- no more competition clauses in the case of temporary contracts;
- no more probation periods for contracts of less than six months;
- the agency clause may be applied for a maximum of eighteen months;
- derogating the obligation to continue payment by CLA is further restricted;
- every contract must be put in writing.

The proposed measures did not aim at combating fraudulence but set out to achieve a revision of flexibility legislation. The bill clearly reflected the changing spirit of the age. Although at the time they originated from the opposition, these plans ended up on the government's plate due to the 'recolouring' that arose through the Second Rutte cabinet, and even in the social partnership agreement.

829 Bill by MP Ulenbelt to amend Book 7 BW and the Social Insurance (Funding) Act to improve the legal position (Security for Flexibility Act), TK 2012–2013 no.3, 33499, Explanatory Memorandum p. 5.

9.2 SOCIAL PARTNERSHIP AGREEMENT [830]

In the spring of 2013 a social partnership agreement was concluded. Under the motto 'scope for a social and enterprising country: leaving the crisis behind with good jobs on our way to 2020', approximately sixty measures were planned that were to contribute towards realising this prospect.

The Second Rutte cabinet and the social partners were united in a structural approach to the economy and the labour market. The social partnership agreement was the guideline.

Among other things, the agreement dealt with dismissal law and the urgent necessity to improve the rights to and protection of people working in flexible work relations (so-called 'flex workers') and to do everything possible to combat improper forms of flexible work. It established:

> In practice, parts of the current complex of labour contracts and related legislation increasingly lead to excesses, while yielding less than optimum results for the economy. For instance, more and more use is made of (sham) arrangements that only serve to evade CLAS and regulations. Flexible work increasingly overshoots its mark.[831]

In respect of a responsible use of external flexibility and flexible employment contracts, the social partners suggested six routes:

1. combating improper use of flexible labour relations, such as sham arrangements and the 'foreign agencies route' (use of foreign workers through foreign agencies);
2. enforcement and compliance;
3. better regulation of contracting responsibilities;
4. combating excessive use of legal forms of flexible labour;
5. improved structuring of so-called tripartite relationships;
6. investing in employability and training of flexible workers.[832]

Ad 1 Combating improper use of flexible labour relationships

Combating improper use of flexible labour relationships entails addressing the following problems: false self-employment, evading minimum wages, evading social security contributions, evading CLAS, and the problematic transport sector. The Dutch Labour Foundation asked the government for an action plan, including both legislation and enforcement efforts.

830 STAR (2013).

831 STAR (2013), p. 5.

832 STAR (2013), p. 20.

Ad 2 Enforcement and compliance
Improved enforcement relates to CLA arrangements, improved information, increased and tighter control by the Inspectorate SZW (Ministry of Social Affairs and Employment), enforcement of CLAS that have been declared legally binding, establishment of joint CLA compliance agencies ('CLA police forces'), extended competences for the trade union movement and structural application of the 'country-of-employment' principle in relation to levying social security contributions and taxation.

Ad 3 Better regulation of contracting responsibilities
The arrangement of contracting responsibilities and legislation must be improved: both the commissioning client and the user enterprise are responsible. Moreover, the opportunities of the Transfer of Undertakings Act must be viewed in this context, as must the application of ILO Convention 94 on respecting CLAS in the case of public tenders.

Ad 4 Combating excessive use of legal forms of flexible labour
Excessive use of legal forms of flexible labour must be countered by adjusting the general rules on temporary employment, adjusting temporary agency work rules and tackling the min-max and zero hour contracts. Measures regarding temporary contracts include:

- no competition clause for temporary contracts, except for specific cases for which clear reasons are stated;
- a one-month notice period in the event of the termination of a temporary contract with a duration of six months or more;
- no probation period for a temporary contract for a period of less than six months; this also applies to any consecutive contract;
- the 3, 3, 3 chain system is replaced by a 3, 2, 6 chain system, i.e. a maximum of three contracts in a maximum period of three years including a three-month break in between contracts is replaced by a maximum of three contracts in a maximum period of two years with a six-month break, to be derogated by CLA if necessary due to the nature of the work in the sector or enterprise. The 'chain provision' comes into force on the date of the worker's eighteenth birthday. The Dutch Labour Foundation asked the government to change the temporary agency regulations (art. 2:691 BW) in such a way that the so-called 'agency clause' (end of assignment equals end of contract) can be extended by CLA up to 78 weeks. Currently, the extension option is limitless. As regards the min-max and zero-hour contracts, the Foundation requests restraint, asking that they be limited to exceptional situations. Currently, the obligation to continue paying wages can be derogated by CLA. According to the Foundation this should only be allowed if the parties to the CLA can substantiate the necessity on the basis of the

nature of the work in that sector. Measures to counter pressure on tenders that results in lowering wages to the minimum rates of pay, and more information on the rules pertaining to this contract type are also called for.

Ad 5 Improved structuring of so-called tripartite relationships

With respect to (new) forms of flexibility, such as the agreement to provide services, payrolling, contracting and secondment, it is necessary to structure them so as to be subject to labour law, in order that the condition under which such a form may be offered becomes transparent. Issues arise that need to be addressed. The trade union movement has questions about legitimacy, because of inadequate legal protection. In any event, the Foundation wants clarity. The special dismissal regime that was developed in the flexibility and security discussion and that is also applicable to payrolling, should no longer be applicable to the latter. The Foundation also suggests coupling payrolling to a written employment contract in the absence of which it may be assumed that an employment contract with the user enterprise exists.

The Foundation aims to further analyse other issues regarding tripartite relationships, in order to take stock of how tripartite relationships are developing in the Dutch labour market, what the employers' and workers' experiences are, and how sustainable relationships offering good prospects and fulfilling justified employer and worker needs and interests can be promoted. The Foundation was supposed to submit an advice before 1 October 2013, but so far has not managed to do so, not even after the extension of the deadline.

Ad 6 Investing in employability and training of flexible workers

Flexible workers should be offered training up to minimum vocational qualification assistant level 1; they should have access to facilities existing in the enterprise or sector, and if the contract exceeds two years, a so-called transition compensation should be granted.

The social partnership agreement comprises a wide range of measures to tackle the so-called excessive flexibility. Van der Gaag[833] questions the alleged excessive character of flexibility. He observes that since the 1996 'Flexakkoord' ('flexibility agreement'), the flexible layer has expanded from 24.8% to 30.8% of the active population, i.e. by 5 percentage points. And, he argues, this increase is mainly due to the number of workers with fixed-term contracts and self-employed workers. The share of temporary agency work in the total flex layer has actually decreased from 12.4% to 7.4%; the share of temporary work with prospects of permanent employment increased from 10.6% to 18.5%; self-employed workers make up half this flexible layer.

833 Van der Gaag (2013).

Van der Gaag draws the conclusion that 'the more severely one regulates a sector, the more expensive it becomes and the more often employers resort to other (lesser) forms'. We shall discuss below how the flexibility elements of the social partnership agreement have been converted into new legislation.

9.3 WORK AND SECURITY ACT [834]

Important plans, such as those laid down in the social partnership agreement, were incorporated into legislation. The Dutch Work and Security Act was speedily discussed and duly adopted by a large parliamentary majority. The act addresses revision of dismissal law and adjustment of the so-called 'flex provisions'. Termination of employment continues to be subject to preventive supervision, but the double route with freedom of choice between the Employee Insurance Agency (UWV) and a regional judge is replaced by a double route without freedom of choice.

Applying at the UWV for a permit for dismissal is mandatory (a) in the case that the job is cut due to financial circumstances and (b) in the event of long-term disability.

Dissolution by the regional judge is the route for dismissal on the grounds of (a) regular absenteeism (b) failing to carry out the job adequately (c) attributable acts or omissions on the part of the worker (d) refusal to carry out the work for conscientious reasons (e) a breakdown in the working relationship (f) other circumstances due to which the employer cannot be reasonably expected to continue employing a person (for instance, detention or lack of work permit).

Termination with mutual consent continues to be an option and termination with the worker's consent is added. In this instance, the worker does have a fourteen-day reflection period, within which he can revoke his consent.

Also, a transition compensation amounting to one third of a month's wages per year of service after a minimum of two years' service is introduced during the first ten years, increasing to half a month's wages per year of service after ten years' service. The maximum compensation amounted to 75,000 euros or a year's wages, whichever is greater. The worker can appeal to the regional judge against the UWV's consent. In that case, the regional judge may award extra compensation in the case of seriously culpable conduct on the part of the employer. The decision can be appealed in court, after which the parties can bring an appeal to the Supreme Court.

Moreover, the period of entitlement to unemployment benefits is reduced from 38 months to 24 months, with the option of extension to 38 months if the employment is covered by a CLA. The reduction aims at encouraging workers who are receiving unemployment benefits to find another job more quickly. The act's all-embracing theme is employment security rather than job security. Dismissal law should become

834 Joosten & Sprengers (2014a). See also: Houweling & Keulaerds (2015).

simpler, faster, fairer and less costly for the employer, and be aimed at the employee finding a new job, i.e. provide more focus on work mobility.

In addition to dismissal law, flexibility law is also amended. This boils down to six categories of changes[835] regarding:
1. the chain provision,
2. introduction of a notice period,
3. probation period,
4. competition clause,
5. temporary agency work,
6. the 'on-call contract'.

Ad 1 The chain provision
The chain provision is reduced from a maximum of three contracts in a three-year period with a three-month break in between contracts to a maximum of three contracts in a two-year period with a six-month break in between contracts. As soon as this chain rule is exceeded, a permanent employment contract is deemed to exist. This system can be derogated from by CLA, with a maximum of six contracts in a four-year period with a six-month break in between contracts. This derogation applies to secondment agreements and jobs and job groups where 'the intrinsic nature of operations requires this extension.' The minister also has the opportunity to render the law inoperative if the intrinsic operations require this, and to substantiate things by means of a specific CLA. One example is professional football. The regulations do not apply to professional football players under the age of eighteen if they work an average maximum of twelve hours per week and if this is required in the context of their training.

Ad 2 Introduction of a notice period
Further mandatory notice periods for fixed-term contracts will be introduced. If these contracts exceed six months, the worker must be informed on the extension or non-extension of the contract and the conditions that apply. This notice is to be given one month before the end of the contract. The obligation does not apply if the end period of the contract cannot be determined. Non-compliance with the obligation will subject to a fine of one month's salary.

Ad 3 Probation period
Fixed-term contracts can only be included in a probationary clause if they exceed six months.

835 Joosten & Sprengers (2014b).

Ad 4 Competition clause
In principle, competition clauses are forbidden in the case of temporary contracts. They are only allowed if 'serious business or service interests dictate them'.

Ad 5 Temporary agency work
In principle, the 'agency clause (' end of assignment equals end of contract') continues to be possible for 26 weeks, as currently provided for, and can be extended by another 52 weeks if the employment is covered by a CLA (amounting to a total of 78 weeks). The chain system applies, according to which a maximum of six contracts can be concluded in a four-year period.

Ad 6 'On-call contract'
The principle of excluding the obligation to continue payment in writing, as currently occurs in relation to on-call working and zero-hour contracts, is amended in the sense that the employer is obligated to pay the wages, if and to the extent that the worker has not carried out part or all of the agreed job, unless the worker can reasonably be held responsible. The principle thus shifts from 'no work, no pay' to 'no work, continued pay, unless…'.

During the first six months, the principle can be deviated from. After this period derogations by CLA are possible, but only for jobs to be specified in that CLA, concerning occasional tasks that have no fixed date of commencement. At the request of the Dutch Labour Foundation, the minister can provide that the derogation by CLA is not possible for certain sectors or parts of sectors.

Clearly, the act hardly yields any material changes for temporary agency work: 78 weeks of temporary agency work followed by a maximum of six contracts (which used to be eight contracts) in a four-year period continues to be possible. The ABU CLA already took this into account and the NBBU CLA will need to reduce its optional 104-week period to 78 weeks.

Generally, the act has met with some criticism, particularly from academia. Loonstra and Sick[836] observe an increase of complexity; they wonder if the new dismissal law will actually work more quickly. Even though it is fairer, they doubt if it will promote labour mobility among workers. Also, they think that the dismissal costs will rise, particularly for SMEs. Moreover, they wonder whether the flexibility provisions will manage to turn flex workers into 'insiders' sooner. They conclude that the proposals included in the act have fallen short of its intentions.

836 Loonstra & Sick (2014), p. 12 ff.

Verhulp[837] wonders if the increased obligations pertaining to the fixed-term contract may have increased the attractiveness of self-employment. He argues that the act lacks a comprehensive vision on the labour market, although in itself it is a step in the right direction. Wilthagen[838] argues that the act fails to take the reality of the labour market into account and sees 'a mismatch between policy and market' that will cost the Netherlands dearly. The media likewise commented on the act.[839]

VVD and PvdA also gave comments during the discussion of the act, wondering if the flex worker's position might be weakened rather than strengthened, particularly as a result of the amended chain system. Would this not cost employment opportunities? The minister denied this effect, arguing that 'on balance, the measures to strengthen flex workers' positions are expected to cause employers to offer more permanent contracts'.[840] He referred to OECD studies that were said to show this effect. The question is whether these studies actually make this clear. They point out that relaxed flexibility legislation yields a substitution effect, and in Spain in particular this resulted in a considerable increase of temporary contracts. However, this took place without any relaxation of Spanish dismissal law. The OECD concludes that relaxing flex legislation, which happened to a great extent in the 1990s, is not enough, and that dismissal law also needs to be relaxed. The gap between permanent and flex must be reduced, the OECD argues.[841]

The question is whether this applies to the Dutch Work and Security Act. Although dismissal law may have been clarified in some respects, it has not been relaxed, and it remains to be seen whether an employer whose opportunities to deploy flex workers are now more restricted will really decide to hire workers on a permanent contract basis, if this continues to be unattractive in various other respects.

It is certain that the act has restricted flexibility, however it remains unclear whether this will create more permanent jobs. Minister Asscher has not yet proved to be right. Statistics Netherlands figures dating from November 2015[842] indicate that, in comparison with one year earlier, the working population had grown by 81,000 workers to a total of 8.3 million, although the growth had levelled out. However, the number of permanent jobs continued to fall. Since 2008, the number of permanent jobs had decreased by more than 600,000. In the third quarter of 2015, the number of permanent workers in the Netherlands had fallen below 5 million, 39,000 fewer than a year before.

837 Verhulp (2014).

838 Interview with T. Wilthagen in the Dutch daily financial newspaper *Het Financieele Dagblad* dated 28 April 2015.

839 Comments: NRC (2015), Stellinga (2015), *Het Financieele Dagblad* (2014), Nauta & De Dreu (2014).

840 Boot, Houweling & Keulaerds (2015), p. 114–116.

841 OECD (2013b), p. 72 and 106.

842 CBS (2015).

There are more flexible workers; during the preceding year, their number increased by 87,000 to 1.9 million. The increase is mainly attributable to on-call workers and temporary workers, particularly young workers who work less than twelve hours per week. The supply of independent workers had likewise increased by 34,000, totalling 1.4 million workers, nearly all self-employed and without personnel.

All in all, employment was on the rise, but that did not apply to permanent employment at all. Flex work, on the other hand, did increase, particularly for on-call workers and the self-employed. All this evolved in spite of the new act. At the time of writing, it is possibly too early to draw conclusions, but for now the results are reminiscent of the saying: 'You can lead a horse to water, but you cannot make it drink'. All this has induced the OECD to conclude in its most recent report on the Netherlands that in order to encourage permanent employment it is essential to relax its dismissal law and reduce transition compensations.[843]

By now, the discussion on reviewing the legislation appears to be well under way.[844] The main issues have been resolved during consultations with the social partners. Sectors that depend heavily on seasonal work can go back to three-month breaks in between contracts (instead of six months), to be provided for in CLA. Moreover, alternative compensating measures are sought to counter the highly restrictive effect of the transition compensations on dismissal for financial reasons and for disability.[845]

This deal includes an agreement on raising minimum wages, in the sense that what applies for 23-year-olds will now come to apply for 22-year-olds, and following an assessment, may even be extended to 21-year-olds.[846]

In his letter about adjusting the minimum youth wages, the minister also indicated that deductions from minimum wages for housing and health insurance costs will be possible under certain conditions.

9.4 ACT ON COMBATING SHAM ARRANGEMENTS

The discussion of the social partnership agreement made clear that combating sham arrangements and the 'foreign agencies route', or combating improper use of flexible

843 OECD (2016b), p. 41

844 De Koning (2016). See also: Leupen (2016a).

845 Letter from the Ministry of Social Affairs and Employment, dated 21 April 2016, on solutions for labour market issues, ref. 2016-0000 107381, TK 2015/2016, 34351. See also 'Uitkomsten overleg over ervaren knelpunten met betrekking tot de uitvoering van de Wet werk en zekerheid' ('results of the consultation on perceived issues relating to the execution of the work and security act'), 18 April 2016 (Dutch Labour Foundation), TK 2015/2016, 16871.

846 Ministry of Social Affairs and Employment, on revising the Minimum Wage and Minimum Holiday Allowance Act (WML), 21 April 2016, ref. 2016-0000 107397.

labour relations, was at the top of the social partners' agendas, and therefore featured prominently on the cabinet's agenda.

Minister Asscher stated that the cabinet was receiving more and more signals from the inspectorates that some employers were making use of sham arrangements, thus evading laws and regulations. This is undesirable and results in unfair competition on labour and employment conditions. The worker is put at a disadvantage as it leads to displacement, underpaid work and even exploitation. It is detrimental to the employer since there is no longer a level playing field for entrepreneurship.

The cost cuts that the sham arrangements aim at erode the principle of 'equal labour and employment conditions for equal work'. People are getting increasingly inventive at avoiding paying minimum wages. Moreover, people do not comply with CLA arrangements. False self-employment likewise occurs, where people formally work as independent workers, while they are really employees. Furthermore, people are found to be working without work permits.

The Second Rutte cabinet set out to tackle these malpractices, in the sense that equal labour and employment conditions apply to equal work. The policy was aimed both at legal arrangements with undesired effects and at illegal arrangements. The cabinet presented an action plan,[847] comprising the following priorities:

- tackling false self-employment,
- combating minimum wage evasion,
- opposing the evasion of social security contributions through, among other means, shell companies,
- countering the evasion of CLAS,
- fighting fictitious employment,
- tackling migration constructions,
- reaching international agreements.

New legislation has been developed for parts of the action plan, including:[848]

- amending the Minimum Wage and Minimum Holiday Allowance Act (WML) and the BW in respect of:
  - clarification of the pay slip requirements, including expense specifications;
  - improving the entrenchment of the right to and payment of minimum wages;
  - obligation to pay minimum wages by giro;

847 Letter from the Ministry of Social Affairs and Employment, dated 11 April 2014, reference 2013 0000044872, on combating sham arrangements.

848 Act dated van 4 June 2015 changing the minimum wage and minimum holiday allowance act, Book 7 BW and some other acts to improve compliance and enforcement of labour legislation in connection with combating sham arrangements by employers. Stb. 2015, 233

  - corrections of and deductions from minimum wages are no longer allowed as a matter of principle;
- enabling publication of inspection data;
- implementation of sequential liability for the wages owed to the worker;
- improving compliance with and enforcement of CLAS;
- improving public-private information exchange;
- improving the enforceability of the Labour Act for Aliens (WAV).

The bill belongs in a broader framework of combating sham arrangements. The act's name does not really fit its objective. After all, the act is mainly about supporting workers if the wages they are owed are not paid (in full). To this end, a sequential liability regulation is incorporated into the BW.

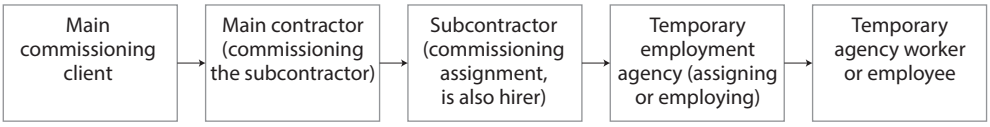


Figure 9.1 Sequential liability

The starting point is that all the links in the chain – which is created when other enterprises are commissioned – become jointly responsible for the wages of the workers in that chain. If the worker does not receive the wages owed to him or her, he or she can consecutively make every link in the chain liable to pay the wages.

Sequential liability arises if a chain of enterprises carries out part of the job or the commission (including foreign enterprises), if commissioning or contracting agreements have been concluded and if the wages that are owed have not been paid (in full). In the first instance, the worker can hold both the employer and the direct commissioning client accountable to pay the wages owed. If the wages are not paid, the worker can go to court. If the judge finds for him/her, he/she can go back to the employer or commissioning client. If that is unsuccessful, the worker can hold the next link accountable. In the event that the employer or direct commissioning client cannot be found, have not registered in the Dutch Trade Register, are bankrupt or fail to pay, the worker can hold the next link accountable, as a matter of principle. The commissioning client can exculpate himself in court by proving he has made every effort to prevent liability.

There is an emergency procedure if no payment has been made after one year and in the event that the worker has been seriously underpaid during a period of six months (or for three months has been paid less than half the wages due, or less than 70% of the minimum wages), in which cases the worker can hold the principal commissioning client directly accountable. Liability can be prevented by ensuring that:

- the enterprise is registered in the Dutch Trade Register;
- the enterprise has a certificate or a hallmark;
- the price is set properly;
- clear agreements are reached;
- sufficient action is taken.

Article 7:692 BW, which regulates the hirer's joint and several liability for payment of the minimum wage and indemnification for certified temporary employment agencies, has been repealed, as a general sequential liability has now arisen for the wages that are owed. The act has become applicable as of 1 July 2015.

The temporary agency sector was concerned about the possible correction prohibition that was to be incorporated into the WML. An ordinance relating to this was due on 1 January 2016. The sector foresaw negative side effects if they could no longer pay health insurance and housing costs directly out of the wages. They expected that fewer workers would be insured for health care and that housing quality would deteriorate. By the end of 2016 the WML was amended in that workers could authorise their employer in writing to pay for housing and health care costs out of their wages.[849]

9.5 SELF-REGULATION EXIT?

During the course of 2013, the self-regulation of the temporary agency sector was called into question again. In this context, Minister Asscher conceded that he would reassess the system of self-regulation and said he aimed to review the reintroduction of the licensing system. This put the question 'licence or certificate?' back on the political agenda. The Minister stated:[850]

> Self-regulation as such is not intended to tackle fraudulence, but does make a substantial contribution to doing so. Self-regulation aims at entrepreneurs who want to comply with laws and regulations. The objective of self-regulation is that businesses can distinguish themselves from other businesses by hallmarking. Self-regulation ensures that entrepreneurs who want to do the right thing can stand out in a positive way. Therefore, businesses do their best to comply with the norm. This has a preventive effect. And if businesses fail to meet the norm, there is an incentive to improve. This is the remedial effect of self-regulation, provided it is functioning properly.

849 https://zoek.officielebekendmakingen.nl/stb-2016-419.html.

850 Letter from the Ministry of Social Affairs and Employment, dated 12 May 2014 on tackling fraudulent temporary employment agencies and self-regulation, ref. 2014–0000067565, p. 2.

Self-regulation can also result in a coherent approach through intensive collaboration between the SNA (as the hallmark manager), SNCU (the 'CLA police') and the government. This enhances the effect of public-private enforcement.

However, the minister held the view that the self-regulation was not sufficiently effective. He particularly based this view on study results from which it would be apparent that in 2013, 17% of the temporary employment agencies that were inspected by the SZW Inspectorate, and 20% of the non-certified temporary employment agencies did not comply with the obligations arising out of the WAV or WML.

What was awkward about these results is that they were not representative of the sector in general, but the minister concluded that the system showed deficiencies and that private hallmarking is no guarantee that all businesses will observe the law. Again, a licensing requirement was considered. This time, the following advantages were attributed to licensing:

- the government can decide on the standards and can thus regulate the market more (for instance, by demanding a deposit, which erects market entry barriers);
- the scope of the supervision is enhanced, since all businesses need to be licensed;
- a licence can be revoked, denying access to the market.

Also, the following disadvantages were listed:

- a loss of support in the sector, including the associated private efforts and funding;
- thwarting the public-private cooperation that has been developed through the years, and the increase of the administrative burden;
- a licensing scheme does not directly combat fraudulence either. The guarantees inherent in a licence are easily evaded (for instance, by using frontmen) and even within a licensing scheme a licensed temporary employment agency can break the law.

The minister concluded that both a public licensing scheme and private hallmarking raised barriers in the market, but neither can prevent fraudulence. Furthermore, he argued that, while the public-private cooperation is a valuable complement to tackling fraudulence, he was not happy with the results of improvements made by the sector so far. 'However, hallmarking is not yet distinctive enough. Too many certified agencies still break the law.'

Nonetheless, the minister was willing enough to give the sector a last chance. In consultation with employers and workers in the sector and with the SNA, he developed a solid package of proposals for improvement. In the course of 2014/2015 it should become clear whether these proposals would yield positive results. The minister stated that if no such results were evident within one year, he would opt for an alternative system. What this system would consist of was not clear. In the letter

about this, he also communicated that in 2012 and 2013, the Inspectorate SZW, the Dutch Tax Authority, the UWV and the SNCU imposed more than 100 million euros worth of corrective measures on offenders in the temporary agency sector.

In consultation with the sector, six points for improvement were established, entailing 28 measures to improve compliance behaviour and tackle fraudulence more effectively. The six points for improvement were:

- enhancing compliance with CLAS,
- enhancing the inspectorates' independence,
- enhancing the quality of private inspections,
- enhancing the intensity and focus of collaboration and enforcement,
- enhancing the directing role of government,
- continuing the tackling of fraudulence.

One year later, the majority of the measures had been implemented (see table 9.1).[851,852]

Through the implementation of the measures, the quality of the inspections and the information exchange was improved and the independence was enhanced. At the time of writing, it was too early to establish the effect of some of the measures, which included the addition of nine CLA elements to the standard. The improved information exchange between the Inspectorate SZW, the Dutch Tax Authority, the SNA and the SNCU brought about tremendous progress (see figure 9.2).

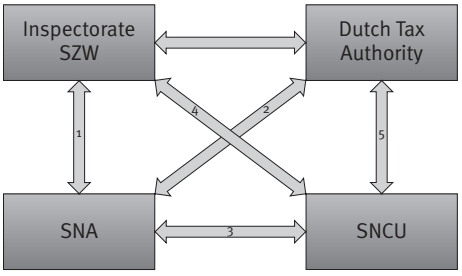


Figure 9.2 Information exchange matrix

851 Letter from the Minister of Social Affairs and Employment, dated 8 July 2015 on the state of affairs in the temporary agency sector, ref. 2015–0000158742.

852 Annex to the letter referred to in the last note.

Table 9.1 Summary table state of affairs (SoA) re improvement measures self-regulation

	Sector	*SoA*
1	Reinforcing the foreign standard.	
2	Including nine CLA elements in the standard. If as a result of this businesses fail to meet the standard, the SNCU receives a signal.	
3	If the nine CLA elements do not have the desired effect, a hirer declaration requirement or another supported option will be implemented in the standard, so that payment of CLA wages can be monitored after all.	
4	SNA produces a survey of normal working hours of the most prevalent CLAs enforced by inspectorates.	
5	SNA becomes scheme manager through acceptance by Dutch Accreditation Council (RvA).	
6	SNA randomly checks the inspectorates' reports.	
7	Independence protocol at inspectorates, comprising all possible risks in the field of independence and associated control measures. The RvA monitors compliance.	
8	Applying on-site observations in specific cases. SNA includes into regulations that on-site observations can be used.	
9	Introducing risk driven spot checks by inspectorates during inspection.	
10	Intensifying and extending the scope of data exchange SNCU-SNA.	
11	SNA includes more information on complaints procedure and conditions into regulations.	
12	SNA studies the feasibility of also registering the director of an enterprise.	
13	Study of overall functioning SNA.	
14	SNA studies the opportunities of differentiating between hiring out and contracting.	
15	Every enterprise with NEN certification has opened a G-account.	
	Joint measures	
16	Reinforcing information exchange: legally regulating earlier information exchange and organising three expert meetings.	
17	Developing an SNA information exchange protocol with Inspectorate SZW and Dutch Tax Authority (also related to 22 and 24).	
18	Conducting a study to analyse differences between certified and non-certified agencies.	
	Government measures	
19	Introducing regular administrative meetings by SZW and Ministry of Finance with SNA and sector (once every three months).	
20	Ministries SZW and Finance attend meetings of the SNA's central body of experts (reference college) as listeners.	
21	Continuing IT AMU in both 2014 and 2015.	
22	More active enforcement by Inspectorate SZW as a result of signals received.	
23	Social partners have been asked for their views on the proposal to insert a one-page document in every CLA containing, among other things, normal working hours.	
24	Introducing periodic consultations with Inspectorate SZW, Tax Authority, SNA and SNCU on exchanging signals (also related to 17 and 22).	
25	If possible, introducing director disqualification legislation.	
26	Improving enforcement of WML (incorporated in bill for Act on Combating Sham Arrangements).	
27	Improving public-private cooperation and data exchange on CLA enforcement (art. 10 AVV).	
28	Introduction civil sequential liability for wages (incorporated in bill for Act on Combating Sham Arrangements).	

realised
being worked
to be started up

source: www.rijksoverheid.nl/regering/inhoud/bewindspersonen/on lodewijk-asscher/documenten/publicaties/2015/07/08/stand-van-zaken-verbetermaatregelen-zelfregulering-gecomprimeerd

Moreover, a study was conducted on the distinctiveness of hallmarking. Exactly how distinctive it was could not be established on the basis of this study. The Inspectorate SZW established that out of a total of 598 certified and non-certified temporary employment agencies – compiled on the basis of risk selection, which always causes bias – 14% of the certified agencies had breached the Labour Act for Aliens (WAV), the Minimum Wage and Minimum Holiday Allowance Act (WML) and the Waadi Act, while the non-certified agencies scored 22%, a significant difference.[853]

Furthermore, it was cautiously established that 5 breaches per billion-euro wage bill were observed among the certified agencies, compared with 27 breaches per billion-euro wage bill among the non-certified agencies. The researchers argue that these results must not be regarded as representative. All in all, the minister expected that the steps that have been taken during the preceding year and the steps that were yet to be started would enhance the quality of self-regulation.

An effective certificate provides bona fide entrepreneurs with a tool for distinguishing themselves and controlling risks. Particularly thanks to the addition of nine CLA elements, workers likewise have more to gain. The certificate can ensure that they receive what they are owed. That is why it is important that both employers and workers are represented in the SNA. The government also has an interest, since the certificate entails regular self-monitoring. As a result, the government can focus more on fraudulent, non-certified agencies. Public and private enforcement can ensure that legal loopholes are reduced or closed altogether. That is why the minister continues to champion adequately functioning self-regulation by means of a distinctive hallmark in combination with enforcement by government.

It is regrettable that the trade unions concerned, FNV and CNV Vakmensen, have since then ended their participation in the hallmark.[854] The disputes about contracting and placement of self-employed workers, which will be discussed further on in this chapter, have made these trade unions unwilling to cooperate. They feel that the product development of the temporary agency sector is moving into a direction they find undesirable. They no longer wish to support legitimisation of these forms via the SNA. Moreover, they feel that monitoring of the proper application of the CLA through so-called on-site observations and the supervision of foreign temporary employment agencies leaves much to be desired.

9.6 AMENDING THE POSTING OF WORKERS DIRECTIVE?

Tackling fraudulence by temporary employment agencies also requires a considerable international agenda. To this end, the minister focuses on three fronts, i.e.:

853 Visee et al. (2015). p. 10 and 15.

854 Letter from the Dutch trade unions CNV Vakmensen and FNV to SNA dated 12 February 2016.

(1) amending the Posting of Workers Directive (2) implementing the Enforcement Directive and (3) improving compliance with and enforcement of the CLA.[855]

The government continues to promote the principle of equal pay for equal work in the same workplace both in the Netherlands and within the European Union. This was discussed in some detail in chapter 7. Ultimately, this relates to the amendment of the Posting of Workers Directive. Implementation of the Enforcement Directive yields tools to enforce the Posting of Workers Directive more adequately, for instance through data exchange, cross-border penalty collection and improved supervision of compliance with labour law.

However, cross-border work continues to be a complex issue. It concerns questions on social and fiscal matters and on social security. From a social perspective, the Posting of Workers Directive regulates that the key labour and employment conditions of the country of employment apply. In principle, the tax legislation regulates that the country of employment also levies taxes, which has been arranged through bilateral agreements. Further, the EU coordination regulations in the field of social security (Regulation (EC) 883/2004 and Regulation (EC) 987/2009) regulate that, in principle, the social security law of the country of origin continues to apply for a maximum of two years.

Actually, in terms of percentage the social security premiums appear to diverge little between the countries. However, there are large differences between the tax bases which have been determined by the local tax authorities. Many EU countries have tax facilities in place to encourage the export of labour or services, which may result in large cost differences. This applies even more if the cross-border work is carried out by self-employed workers. This does not necessarily constitute a breach in any formal sense. Add to this the fact that the Posting of Workers Directive does not provide the necessary clarity on all fronts either, and the issue becomes still more complex. Fraudulence exacerbates the problem even further. It remains to be seen whether amending the directive, as the Dutch SZW minister proposed, will provide a solution. Much can be achieved at a national level by incorporating the key provisions into the CLAS in all the sectors, as is currently happening in the CLAS on the temporary agency and construction sectors in the Netherlands.

The differences between fiscal regulations in the EU continue to be the crux of the problem. And this is a field where the EU has no competences. The fact that a number of EU member states from Central and Eastern Europe have started a counter-campaign against amending the directive, as was discussed in chapter 7, can

855 Letter from the Minister of Social Affairs and Employment, dated 9 February 2015 concerning the third progress report combating sham arrangements, ref. 2015 0000022434.

be seen as the writing on the wall. Amending the directive has a lot in common with tilting at windmills.

Still, self-regulation is not a tool for the prevention of either cross-border or national fraudulence. At most it may contribute to tackling fraudulence and breaches of the law. Public enforcement of laws and regulations continues to be necessary. In this context, we must also realise that temporary agency work only amounts to 10–11% of all cross-border postings.

A decade before, State Secretary Van Hoof announced that by 2006 he would increase the number of inspectors engaged in dealing with labour fraud from 65 to 180.[856] The question is whether this number is still in force today. At a later date, Minister Kamp[857] reported that 15% of his labour fraud capacity was focusing on temporary employment agencies, i.e. 27 inspectors. If we realise that there are currently 4000 certified temporary employment agencies and approximately 8000 non-certified temporary employment agencies in the Netherlands, and if we know that 70 private inspectors are tasked with the 4000 certified agencies, the question arises as to whether the number of 27 inspectors is not a little too modest for adequate enforcement. If we were to depart from equal standards, private and public in terms of staffing, adequate enforcement at the non-certified agencies alone would require a capacity of 140 inspectors.

9.7 PAYROLLING

In the context of discussing the social partnership agreement, it became clear that the social partners had tabled payrolling. This raises the question as to what payrolling actually is, and how academics, social partners and politics interpret this phenomenon. Van Houte[858] distinguishes five types of payrolling:

1. The payrolling bureau keeps the salary records for the commissioning client, who employs the worker.
2. The commissioning client attends to the recruitment and selection of new workers. Subsequently the worker is employed by the payrolling bureau and is seconded to the commissioning client for a specific period, under instructions given to the payrolling bureau. The intention is that the worker will eventually be employed directly by the commissioning client, or will be seconded elsewhere.
3. The commissioning client attends to the recruitment and selection of new workers. Subsequently the worker is employed by the payrolling bureau and is

856 Letter from the Secretary of State dated 15 June 2006, parliamentary year 2005–2006, 17050 no. 326
857 Letter from the Minister dated 14 March 2012, parliamentary year 2011–2012, 32680 no. 28
858 Van Houte (2011).

seconded to the commissioning client on a permanent basis, under instructions given to the payrolling bureau.

4. The commissioning client decides to outsource (part of) his workers to a payrolling bureau. The workers are employed by this bureau and seconded to the commissioning client, under instructions given to the payrolling bureau.
5. Workers or freelancers who do not (yet) qualify for a Declaration of Independent Contractor Status/Business profits (VAR/WUO), but who would like to be entrepreneurs in future, join a payrolling bureau. The worker obtains his or her own contracts and determines his or her own prices. The payrolling bureau posts the worker with the commissioning client, attends to the invoicing to the commissioning client and keeps the salary records.

Payrolling has seen an enormous rise in popularity over the past years. Between 2009 and 2014, organisations' familiarity with the phenomenon increased from 59% to 90%. In that same period, the proportion of organisations making use of payrolling increased from 8% to 11%. The number of payroll workers grew from 145,000 in 2009 to 191,000 in 2014. One third of these workers are working in government sectors.[859]

How can payrolling be interpreted? In the types 2, 3, 4 and 5 they can be qualified as a secondment agreement as defined in article 7:690, i.e.:

- there is an employment agreement in the sense of article 7:690 BW;
- the posting constitutes the employer's business or professional practice;
- the worker is placed at the disposal of the commissioning client;
- the worker performs work under supervision and direction of the commissioning client;
- the placement is carried out by virtue of an agreement for the provision of services between the employer and the commissioning client.

Contrary to Van Houte, Hoogeveen[860] and Zwemmer[861] argue that payrolling does not involve an employment agreement, due to the lack of an allocative function between temporary employment agency and temporary agency worker.

While discussing the realisation of the legislation in the last chapter (p. 368), it became clear that the then minister envisioned a wide range of postings that should be included in the definition of the secondment agreement. He argued that it would concern 'temporary employment agencies, labour pools and other organisations that, within the framework of their business or professional practice, temporarily post workers, of whatever ilk'. This view was apparently based on the assumption that all

859 Winnubst, Vroonhof & Tom (2015).

860 Hoogeveen (2007).

861 Zwemmer (2012), p. 151 and p. 347.

these types also involve a so-called allocation function. That means that the demand for and supply of temporary work were also matched through the posting. Since this allocation function is in place, the regime with the so-called agency clause (end of assignment equals end of contract) is justified.

Academic literature fails to see an allocation function with respect to payrolling, since only legal employer status is transferred. Van Houte finds this understandable where types 3 and 4 are concerned, but challenges types 2 and 5, where the payrolling provider also fulfils an allocation function. She argues that this function thus coincides with the commissioning client's hiring motive and/or the worker's supply motive.

Verburg[862] holds the view that article 7:690 BW actually does apply to payrolling. He considers intra-corporate transfers, which are precluded from using the agency clause in article 7:690, par. 6, as a type of payrolling, and deduces that payrolling also comes within the scope of article 7:690 BW.

Bevers[863] looks at jurisdiction to find indications that a secondment agreement between a temporary employment agency and a temporary agency worker cannot be converted without further ado into an employment agreement between a temporary agency worker and a hirer.[864] On the other hand, Bevers does not take this to mean that in tripartite relationships, a temporary agency contract always relates to an employment agreement between an employment agency and temporary agency worker. She refers to the lower courts where an employment relationship between a worker and a hirer was taken to exist based on the authority of the employer and/or the lack of an allocation function.

Here then, jurisprudence sides with Zwemmer and Hoogeveen. According to Verburg they take the view that article 7:690 BW does not apply, and that in that case, through the jurisprudence on the qualification of the relationship (the Groen/Schroevers judgment[865]), an employment agreement will be taken to exist between a hirer and a worker. He questions this theory. On the basis of the jurisdiction, he argues that it is equally 'decisive whether parties have mutually committed themselves'. He upholds: 'that if the hirer does not pay the worker (the payroll services bureau pays him) and explains correctly and transparently what the contractual relations entail, the worker will find it very difficult to successfully argue that there is an employment relationship with the hirer'.[866]

862 Verburg (2013).

863 Bevers (2015).

864 ABN AMRO/Malhi, HR 5 April 2002 , *JAR* 2002, 1100.

865 See Groen/Schoevers judgment (HR 14 November 1997, *NJ* 1998, 149).

866 STAR (2012).

In 2006, the ABU and the trade unions FNV, CNV and Unie concluded a payroll CLA. This CLA provided that eight fixed-term contracts could be concluded in a three-year period. The remuneration was largely consistent with that for the employees at the user enterprise. Workers became eligible for a pension after two months, and there was a dismissal compensation of three to six months upon closing down for business reasons. By the end of 2011, the trade unions withdrew their cooperation, since a payroll construction would result in an unacceptable dichotomy in the labour market.

In 2011, the minister asked the Dutch Labour Foundation for advice. Employers vigorously defended payrolling; workers wanted legislation that fitted in with Zwemmer and Hoogeveen's views. Particularly the allocation requirement should be added to the definition of article 7:690 BW.

It was arranged in the social partnership agreement to amend the special dismissal regime for payrolling, which has since taken place. Moreover, a further advice by the Dutch Labour Foundation was due on tripartite relationships in general. In the summer of 2015, this Foundation reported to the minister that the advice would not be forthcoming due to the complexity of the subject matter.[867]

The minister then undertook to prepare legislation, considering the Hamer motion asking for measures to combat payrolling, which has been adopted by a parliamentary majority. The motion was formulated as follows:

> **Motion by the member of Dutch Parliament Hamer**[868]
> Proposed on 13 February 2014
> The Lower House, having heard the deliberations,
> considering that the social partners have agreed in the social partnership agreement that the use of payroll constructions to evade labour and employment conditions must be prevented;
> considering that in the Work and Security Act the dismissal rules that currently apply to payrolling are already being amended in such a way that the payroll worker who is working for the hirer receives the same kind of protection as the hirer's own employees;
> requests that the government ensures equal treatment relating to the labour and employment conditions between payroll workers working for the hirer and the hirer's own employees,
> and proceeds to the regular order of the day.
> Hamer

867 Letter from the Dutch Labour Foundation to the Minister of Social Affairs and Employment regarding 'tripartite relationships' dated 29 June 2015, http://www.stvda.nl/~/media/Files/Stvda/Nota/2010_2019/2015/20150629-driehoeksrelaties.ashx.

868 Hamer motion, TK 2013–2014, 33818, no. 43.

It is a pity that the trade unions have ended their cooperation on the payroll CLA. This CLA could have been a pilot for the further regulation of tripartite and bipartite contracting. It is likewise a pity that the general employers' association AWVN stated in its *Arbeidsvoorwaardennota 2016 (*'memorandum on labour and employment conditions 2016') that arranging minimum rates of pay in CLAs for the self-employed is undesirable, since this would be in breach of the competition regulations.[869] A remarkable statement, since article 1, par. 2 of the Act on Collective Agreements enables arranging labour and employment conditions for the benefit of the agreement to provide services and even contracting, and since the CLA for architects bureaus has carried out pioneering work in this respect.[870]

Reviewing the discussion on payrolling, it seems to me that we are dealing with a type of manpower provision that has also been regulated in Convention 181. In his study, Ricca pointed out seventeen forms of private mediation, including 'contract labour agencies' and 'staff leasing agencies'. In ILO terms, we are dealing with 'labour-only contracting' and it can be deduced from the history surrounding the 'contract labour' discussion that this is largely synonymous with temporary agency work.

When the Dutch Parliament discussed the 'flex legislation', and particularly the amendments to the Dutch Civil Code, it also adopted a broad definition of the secondment agreement. As it happened, the minister stated that the legislation pertains to the agency employment relationship and 'to all other tripartite relationships where the employer places the worker at the disposal of a third party within the framework of his business or professional practice, in order to perform work under supervision and direction of that third party'.

The discussion attempts to decrease the playing field of temporary agency work through the necessary element of the 'labour allocation'. But who is to say that payrolling does not involve fine-tuning of demand and supply?

A similar question might be asked in respect of contracting or, in ILO terms, job contracting, of which we know that the ILO could not attain a satisfactory regulation. Nor has this been regulated in Dutch law. The same applies to the phenomenon of the self-employed worker. That is why the following paragraphs will discuss these phenomena further: (job) contracting and self-employment.

9.8 CONTRACTING

In the Netherlands, questions have by now been raised about both payrolling and contracting. Interestingly – as became clear in chapter 3 – contracting also demanded

869 Leupen (2016a).

870 CLA on architectural firms, 1 March 2015 to 28 February 2017, Chapter II A. See also: Dekkers (2016).

quite some attention within the ILO in the 1990s. Contracting means that workers who are employed by the contracting agency in the framework of a construction or assignment agreement are being placed with a third party, i.e. the commissioning client, to carry out work under the supervision of the contracting agency. Forms of hiring out, payrolling and contracting really are all types of labour that meet the need for outsourcing. By now, this need has resulted in 15–33% of all businesses in the EU 28 making use of outsourcing (see figure 9.4).[871]

Many years ago, Goldschmeding[872] argued that the need of outsourcing had arisen because management had become the scarcest production factor in the economy. In order to keep management controllable and transparent in an increasingly complex world, focusing on the core process is needed, which leads to giving up extra and side tasks, i.e. leaving activities that are not part of the core process to others, who can subsequently make them their core processes.

Focusing on the core process can, in time, lead to large businesses with market power and economies of scale, while also enhancing flexibility. The large business develops into a 'think tank' encircled by large numbers of smaller businesses. Examples included project offices, cleaning companies, advertising agencies, organisation agencies and temporary employment agencies. All these forms of outsourcing bring supply of and demand for work together. Goldschmeding imagined this as follows:

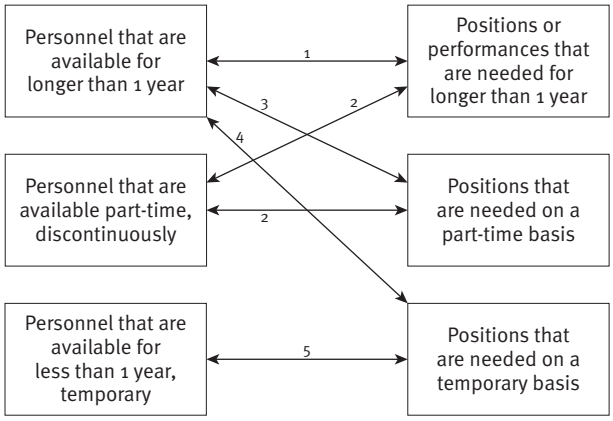
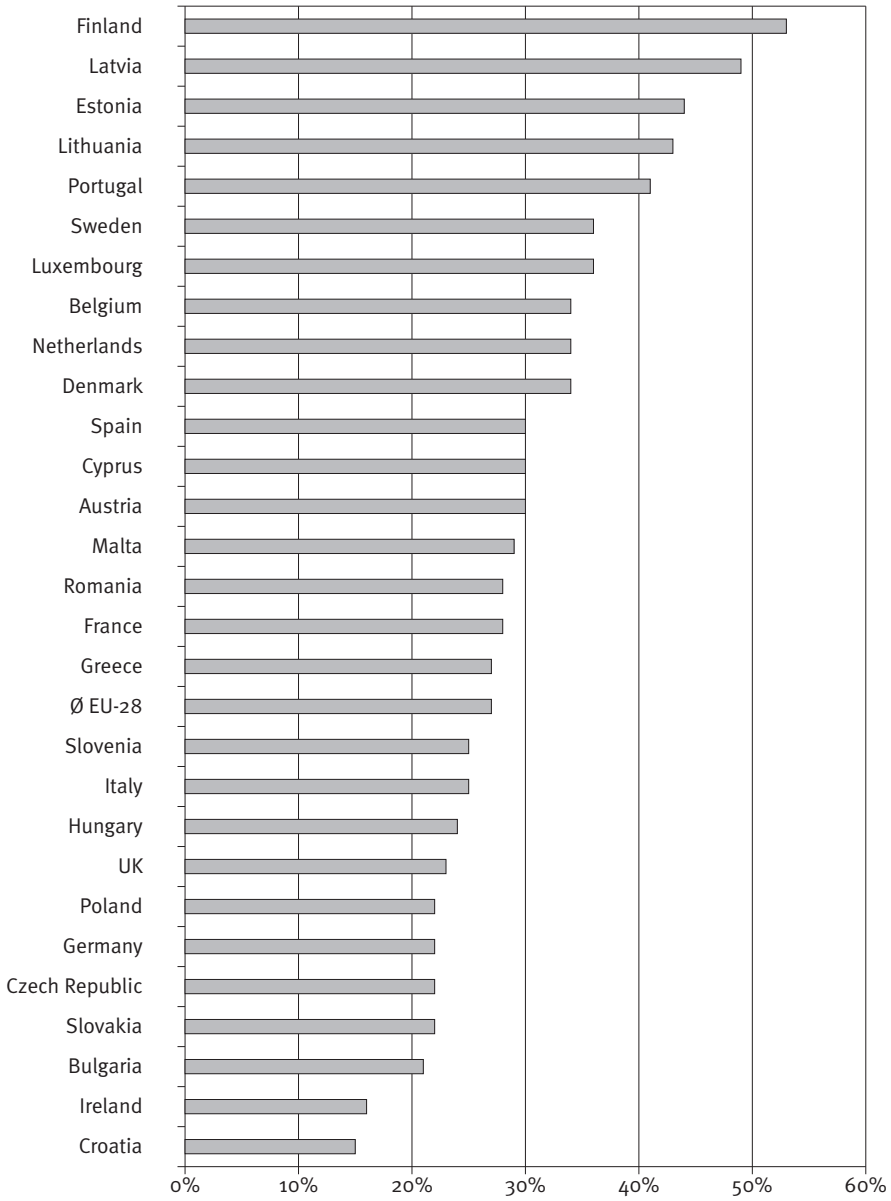


Figure 9.3 Outsourcing and supply and demand[873]

The allocative factor was recognised at an early stage, albeit that it did not restrict itself to temporary agency work, as seems to have become all but the prevailing doctrine by now.

871 Drahokoupil (2015).
872 Goldschmeding (1977), p. 58.
873 Goldschmeding (1977), p. 59.



ECS 2013, own calculation, weighted by establishment; N: 23,326; $\chi^2P = 0{,}0000$; countries in ascending order of percentages; excluding public service cases.

Figure 9.4 Outsourcing of production of goods or services in the EU-28.[874] *Percentages of companies that outsourced the production of goods and services*

874 Drahokoupil (2015), p. 31.

In the early 1990s, the realisation of Convention 181 was preceded by a study by Sergio Ricca,[875] who analysed how the allocation process in the labour market worked in relation to the by then outdated Convention 96. He pointed out seventeen typologies that no longer fitted the then definition of work placement, ultimately culminating in the new Convention 181. The typologies included contract labour agencies and staff leasing agencies. Apparently payrolling and contracting were already in sight. The Convention described temporary agency work as 'services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks'.

In Dutch law, this tripartite relationship of temporary employment agency, temporary agency worker and user enterprise was given further substance in the Dutch Civil Code and the Waadi Act. The crux is that the 'user company' supervises the work. And that essential element is what distinguishes contracting from temporary agency work. Contracting likewise involves a tripartite relationship, i.e. contracting party, worker and commissioning client. Here, however, the work is supervised by the contracting party rather than by the commissioning client. It may relate to a construction agreement as regulated in article 7:750 BW or an assignment agreement, as regulated in 7:400 BW.

Contracting mainly occurs in the construction sector, but it may comprise more, such as laundering or dry-cleaning clothes and repairing utensils. Essentially, it concerns activities consisting of producing and/or processing material objects. The assignment agreement is more appropriate for work of a mental or intellectual nature.

Forms of contracting have increasingly become a threat to trade unions.[876] As far as cleaning, security and catering are concerned, the outsourcing of which has been regulated in the respective CLAS, contracting is still acceptable. However, according to FNV, more and more sham arrangements are made, resulting in inadequate wages and deviation from other labour and employment conditions.

Meanwhile, jurisdiction has occupied itself with the phenomenon. In its judgment of 21 October 2012[877] the 's-Hertogenbosch court saw through a contracting agreement and judged that it really was a secondment agreement. Quatro, as the contracting agency, had concluded a construction agreement for the harvesting of mushrooms with World Champ as the commissioning client, who also supplied the supervisor. The relationships were not very clear. In the event, Quatro was ordered to pay nearly 3,500 euros. The case was brought to court by the SNCU, which looked on this arrangement as disguised temporary agency work.

875 ILC (1994).

876 FNV (2015).

877 See 's-Hertogenbosch court, 4 March 2008, *JAR* 2008/164.

In another case – the Sieraflor case – production work, the machine-based production of flower bouquets for clients, was increasingly outsourced to another party i.e. Ruigrok Productie. Sieraflor applied for a dismissal permit at the UWV for its permanent employees, who had first carried out this work. The UWV refused to comply. Even though the policy rules provide that, in principle, it is possible to make an employee redundant because of outsourcing, they also provide that requests that are only intended for the replacement of permanent employees by flexible workers cannot be granted. Interestingly, the regional court in the case at issue did allow the termination of the employment contracts. While the court realised that outsourcing can seriously erode workers' rights, termination was decided on since it deemed the freedom to resort to outsourcing more important than employee protection.[878]

In response to publicity about the FNV report on contracting, the minister stated:

> There are no objections to outsourcing work as such. In principle, an employer is free to organise his enterprise as he sees fit and to have certain activities carried out by other, specialised businesses, if this should be desirable or necessary for effective business operations.

But he also stated that:

> Questions can however be raised about outsourcing an enterprise's core activities (other than for the sake of specialisation). After all, why should an entrepreneur wish to outsource activities that are part of his core business other than to cut staffing costs?

He reached the following conclusion:

> Contracting has both legal and illegitimate forms. The new dismissal law is an effective tool to combat illegitimate outsourcing of activities that were first carried out on the employer's premises. The employer in question will not be granted permission to dismiss his own employees if outsourcing does not serve the purposes of effective business operations and is only meant to replace permanent employees by flexible or cheaper workers.

Furthermore the CLA on temporary agency work will need to be enforced with the help of the SNCU.[879]

878 ECLI: NL: RBDHA: 2013: B 27313.

879 Letter from the Minister of Social Affairs and Employment, dated 17 April 2015 on contracting, ref. 2015-0000085824.

On the basis of law and jurisdiction, Zwemmer[880] establishes a legally tenable form of contracting, provided it meets the following elements and characteristics:

- the contracting agency has taken over entire production or work processes from the commissioning client;
- the processes or divisions that have been taken over can be effectively demarcated from the rest of the commissioning client's enterprise;
- the contracting agency is specialised in providing services in the relevant sector(s);
- the contracting agency has entered into a result commitment with the commissioning client as regards the products, jobs, services or other measurable results to be delivered, but has not committed itself to manpower provision;
- the commissioning client does not pay per working hour; instead, he pays a previously agreed rate per product, work or service provided;
- the contracting agency makes use of permanent teams of workers;
- the teams deployed by the contracting agency are largely autonomous and the tasks in the workplace are allocated by a supervisor who is also employed by the contracting agency;
- the contracting agency is (financially) accountable for planning, office duties, management and supervision and faces or takes on the employer's risks;
- the teams deployed by the contracting agency make use of that agency's means of production.

He then arrives at the following legal definition:

> In contracting, one party, the contracting agency, commits to carrying out (part of) a work process on the premises of another party, the commissioning client. This entails a result commitment on the part of the contracting agency, while the commissioning client commits to paying a price (per piece) that has been agreed on by both parties to the contracting agency. To fulfil the agreement, the contracting agency makes use of its own means of production and the contracting agency deploys workers who are outsourced to the commission client as a group that is autonomous to a certain extent, under its own management and supervision.

The question is whether the aspect of the autonomous teams can be sustained. After all, contracting can also occur if single workers are deployed, often in expert roles.

In an opinion on contracting[881] Bijpost indicates that a lack of transparency in contracting can have considerable consequences. The contracting workers can cost

880 Zwemmer (2015), p. 18.

881 Bijpost (2015).

less if no CLA applies: neither the sectoral CLA, nor – in the Netherlands – the ABU CLA. Employers who do apply these CLAs are at a competitive disadvantage. Workers have worse labour and employment conditions and are in a position of legal uncertainty. The government is at a disadvantage as it receives lower social benefit contributions and taxes.

It is argued that contracting can best be combated by requiring observance of article 8 Waadi Act and of the applicable CLA. Also, the scope of the provisions of the CLA must be extended to include contracting, and it must be declared generally binding. Furthermore, agreements can be made as to the conditions for outsourcing, even including agreements not to opt for outsourcing. It is recommended that a provision be included in the Act on Combating Sham Arrangements prescribing that the employment conditions applicable at the user enterprise also apply to contracting workers.

Interestingly, this proposal fits in with the result of the NUON case, which was referred to the Dutch NCP by the Dutch trade union FNV Eemshaven. The case concerned an alleged breach of the OECD guidelines by NUON Energy N. V. The parties involved eventually agreed that NUON would implement changes in its future contracts with its main contractors in order to promote compliance with arrangements throughout the entire chain of suppliers. More specifically this means that NUON obligates its main contractors to impose on their suppliers and subcontractors the same requirements regarding labour and employment conditions, rates of pay and compliance with national and European legislation that are applicable to itself. Thus, the main contractor obligates its subcontractors to commit contractually to the law and regulations such as the Dutch Civil Code, the Act on Collective Agreements, the Act governing the universal applicability or inapplicability of collective agreements (AVV), the Minimum Wage and Minimum Holiday Allowance Act (WML) and the applicable EU laws and regulations. The main contractor is to check whether the subcontractors and suppliers comply with the obligations by means of audits.[882]

The social partnership agreement stated:

> Social partners hold the view that issues increasingly arise with regard to outsourcing work through contracting and outsourcing or detachment of employership (by means of payrolling arrangements or onlending) that urgently require a solution. It must be prevented that these constructions are mainly used to evade or avoid complying with legal regulations and labour and employment conditions, whether arranged by CLA or not.

882 NCP (2015).

The Dutch Labour Foundation was to issue an advice on this matter before October 2013, but, as mentioned before, responded in November 2013 to the minister that it had not yet reached a decision and would therefore not issue an advice.[883]

9.9 SELF-EMPLOYED WORKERS

In the context of the complications of the regulatory framework on temporary agency work in the Netherlands it is also necessary to examine the phenomenon of the self-employed worker. This type of flexible labour has grown rapidly, and increasingly dominates the discussion on flexible labour. Moreover, self-employed workers often ask for the assistance of temporary employment agencies in the acquisition of jobs. In that case, the temporary employment agency can act as a mediator, following which the self-employed worker will either work for the commissioning client directly on the basis of a service provision agreement (art. 7:400 BW), or will conclude this agreement with the temporary employment agency, which will then assign the self-employed worker to the commissioning client. In that case, no secondment agreement in the sense of article 4:690 BW will be concluded, since the 'supervision and direction of the third party' will be lacking. After all, the self-employed worker is independent and until recently could prove this by submitting a so-called VAR, a statement of independent contractor status, which was issued by the Dutch Tax Authority. The practice of issuing VAR statements was terminated as of 1 May 2016.

Steps have been taken to replace this system of VAR statements with a new scheme, to which end the Exemption from Payroll Tax Withholding (Implementation) Act, was adopted.[884]

Self-employment has soared in the Netherlands. Between 2003 and 2015, the number of self-employed workers grew from 634,000 to 1,034,000, i.e. by 63%.[885] The increase in the Netherlands has been striking in comparison with other countries.

As a result, the Dutch cabinet established an administrative working group to further analyse this phenomenon. The IBO report[886] was published after the summer of 2015 and yielded the following conclusions. Many self-employed workers indicated that they chose for the freedom and independence that entrepreneurship offers them. The commissioning client and customers indicated that they opted for flexibility and

883 Letter from the Dutch Labour Foundation to the Minister of Social Affairs and Employment regarding 'tripartite relationships' dated 29 June 2015.

884 Act dated 3 February 2016 amending several acts on taxation to abolish the VAR Declaration (Employment Relationships Deregulation Act). *Stb.* 2016 (45).

885 Flexbarometer, an initiative by TNO, ABU and FNV Flex.

886 Dutch Ministry of Finance (2015), submitted to Dutch Parliament on 2 October 2015.

specialist knowledge. A small proportion became self-employed, but would have preferred to have been employed.

The self-employed are a heterogeneous group, and their incomes, reserves and the extent to which they are insured varies widely. The range is wider than is the case with employees. The growth of the number of self-employed workers in the Netherlands is partly due to technological, sociocultural and demographic developments. However, it is plausible that the rapid growth in their numbers as compared with other countries can also be explained by institutional factors.

In the Netherlands, the self-employed are treated very differently from employees in terms of labour law and taxes. A comparison between the employee, the self-employed worker (an entrepreneur subject to income tax) and the director and major shareholder (DGA) in terms of net disposable income with equal gross wage costs/profits makes clear that, on the basis of minimum wages, the self-employed worker ends up with much higher net earnings, i.e. 87%, compared with the employee (72%) and the DGA (69%).

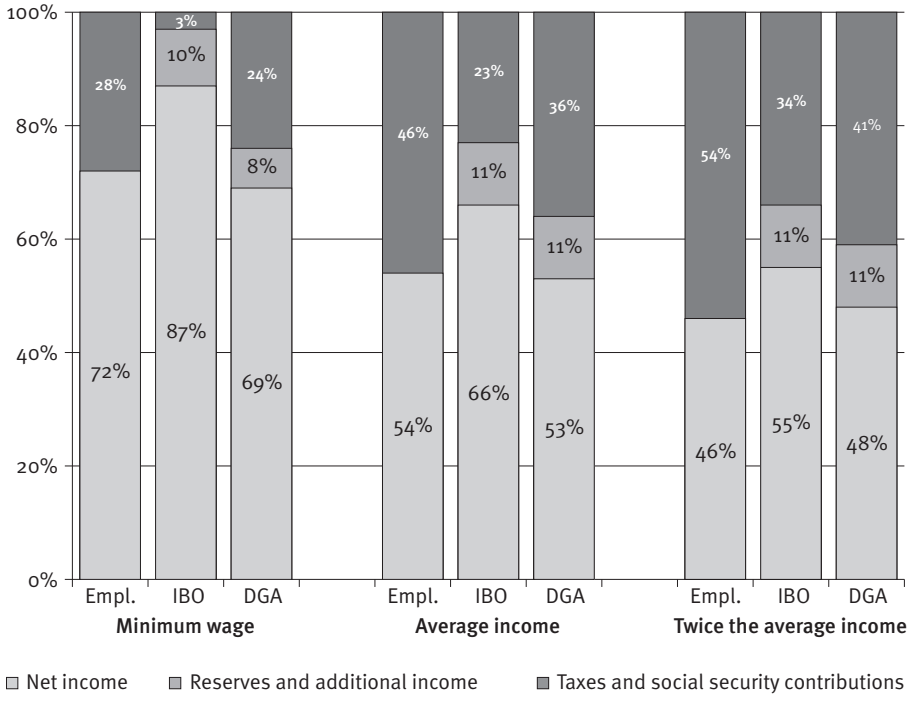


Figure 9.5 Net disposable income in the situation of equal gross wage costs/profits including and excluding contributions towards pension, illness, disability and underutilisation.

The self-employed worker with an average income also takes home more (66%) than the employee (54%) or the DGA (53%). The self-employed worker who earns twice the average income has 55% left, the employee 46% and the DGA 48%.

Together with other flexible workers, the self-employed ensure corporate adaptability in the economy. They play a modest innovatory role. Thus, the positive external effects of the increase in the number of the self-employed are limited. New jobs are probably being generated, partly because their operating costs are lower. There are no indications that the rise in the number of the self-employed leads to a worse average worker risk profile or to an increased use of social assistance, and thus to a decreasing financial basis for the social security system. It can put pressure on the social basis for the system; a large difference in the burden of taxes and social security contributions can lead to unfair competition and to feelings of injustice. As indicated above, the positive external effects of the rise in the number of self-employed workers are limited. However, it results in considerably lower tax- and premium-based revenues and in higher costs of (fiscal) allowances. On balance, the rise in the number of self-employed workers probably has a negative effect on government finances, according to the IBO report.

This report then establishes that the boundaries between self-employment and employment are fuzzy and that the qualifications have major legal consequences, which renders entering into sham arangements attractive.

The current policy creates distinctions in the extent of protection between the self-employed and employees. It would thus be better to gear policy towards the desired degree of solidarity and towards protection of the various groups of workers.

The reporters state that in this context the future policy should not be directed so much at the institutional form in which people work, but rather at the needs of the various groups of workers. That is to say: less policy aimed at the employee versus self-employed worker axis, and more policy aimed at workers differentiating along the dependence-self-reliance axis. This can be achieved by focusing policy more on the workers.[887]

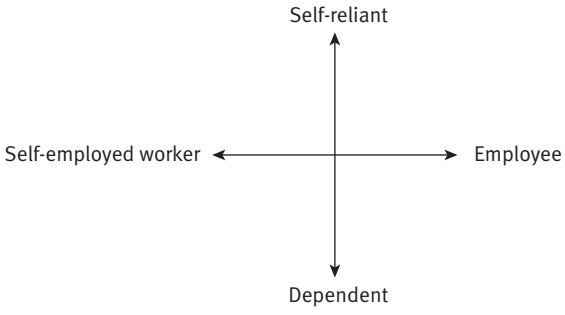


Figure 9.6 From distinguishing between self-employed worker and employee to distinguishing between self-reliant and dependent[889]

887 Hofs (2016).

888 Dutch Ministry of Finance (2015), p. XIV.

Currently, the fiscal entrepreneur facilities do not all contribute effectively to the objectives that the instruments aim for (such as innovation and creating employment). That is why it is desirable to bring the fiscal systems for entrepreneurs (entrepreneurs subject to income tax and DGAs) and employees closer together.

Remarkably, the report that was completed on 12 April 2015, remained in a drawer until October 2015, when it was published. In the meantime, the IMF looks upon the phenomenon of the self-employed as one of the threatening weaknesses of the Dutch economy. While it does provide flexibility, it also erodes the financial support-base.[889] The cabinet stated:

> In the IBO report, it is observed that a large difference exists between the institutional and fiscal treatment of employees and that of the self-employed. Firstly, this contributes to people working independently at the lower end of the market, not because they really want to, but because they have no choice. That is why the cabinet is taking measures to combat sham arrangements and to make hiring low-income workers cheaper. Furthermore, the self-employed have more freedom and responsibility to make their own choices regarding their desired degree of protection than do employees.
>
> The cabinet is willing to support these self-employed workers, enabling them to take on the corresponding responsibilities. Moreover, the cabinet has taken measures to limit the costs of the employment contract and continues to be alert on the risks of hiring workers that employers may experience. Thus, this discussion is not concluded. The IBO report describes some possible solutions, justifiably noting that the selection of measures, their precise form and their extent are dependent on political and social preferences.
>
> To arrive at a sustainable and future-proof solution with a broad support-base, it is necessary to continue raising these social and political issues.[890]

This discussion had already acquired some form by the AWVN manifesto that translates as 'a responsible path to growth',[891] advocating, among other things, a uniform basic scheme for social security for all workers, which provides benefits in the event of unemployment, illness and disability, and a uniform mandatory basic pension scheme for all workers over and above the Dutch state pension (AOW).

889 De Weerd (2015).

890 Covering letter government's response to IBO report dated 2 October 2015.

891 AWVN (2014), p. 5

FNV leader Heerts[892] fundamentally rejected the report, as he believed it would result in the erosion of the Dutch social security system. Van der Heijden[893] stated:

> The fundamental values for labour law and social security are socioeconomic security, personal responsibility and solidarity. These values have been eroded to some extent. That is why we must study the new values for the 21st century.

Lastly, he stated that a wide range of optional variables could be conceived in respect of social security. 'Just as long as something is happening. Because the undermining of legal protection is a fact.'[894]

In the long run, it is all about political choices. The Dutch liberal party VVD cherishes the self-employed worker. Zijlstra stated:[895]

> As a liberal, I admire someone who starts work at his own risk and account. Our prosperity is based on such entrepreneurship.

Referring to the by now 35% of the workers being self-employed or having flexible contracts, Minister Asscher stated:[896]

> It is a large group that does not equally profit from the increasing prosperity. So many people are living in increasing fear for their jobs. They feel like a replaceable cog in the machine of the global economy. Unfortunately, their fears are only too frequently confirmed (…) In our country, the insecurity resulting from flexible labour is a bigger threat to the middle classes.

The words clearly represent two opposing outlooks, with a solution still being a long way off. In the meantime, the the Dutch political party CDA holds the view that all workers, including the self-employed, must have sickness insurance. Minister Asscher requested the SER to issue a recommendation about this.[897]

For now, the VAR statement has been abolished and new legislation (the new Employment Relationships Deregulation Act) is on the agenda.[898] This act, which has

892 Interview with FNV chairman T. Heerts in the Dutch financial daily newspaper *Het Financieele Dagblad* dated 9 Jime 2015.

893 Interview with P. F. van der Heijden in *NRC* dated 2 October 2014. See also: Dekker et al. (2012).

894 Hofs (2016).

895 Text Halbe Zijlstra, general debate, www.vvd.nl 'algemene beschouwingen', p. 6

896 Asscher (2015).

897 Herdersche (2015); see also: Buma & Heerma (2015).

898 Employment Relationships Deregulation Act, EK 2015–2016, 34.036.

by now been adopted by Dutch Parliament, aims to clarify the distinction between real and false self-employment. Bureaucratic overload and lack of clarity are feared.[899]

9.10 DUTCH FIGURES

In the meantime, it can be observed that the issue of temporary agency work has been placed in a much wider context. Temporary agency work is only one of many flexible forms of work. We have seen previously that, parallel to the international developments where a discussion arose on contracting, precarious work and non-standard forms of employment (NSFE), a similar discussion is ongoing in the Netherlands along the lines of payrolling, contracting and self-employment. It is important to have a good insight in the extent of these forms of flexible labour and the growth trends that are taking place in the Netherlands.

On the basis of the so-called 'flexbarometer',[900] which the TNO developed using its own data and data from Statistics Netherlands, in collaboration with ABU and FNV Flex, the following can be established. From 2003 to 2015 (fourth quarter) the labour market containing both permanent employees and flexible workers grew from 7,783,000 to 8,294,000 workers, i.e. an increase of 511,000 (7%). In this period, the number of permanent employees decreased by 598,000. By the end of 2015, the number of permanent employees in the Netherlands approximated almost 5 million. From 2003 onward, however, the numbers employed in flexible labour increased from 1,171,000 2003 to 1,896,000 workers, i.e. by 725,000 (+62%).

This means that the flexible layer has grown between 2003 and 2015 from 15% to 23% of the workers. If we add the self-employed, whose numbers increased by 66% from 634,000 to 1,022,000 and whose market share thus grew from 8% to 12% of the working population, flexible labour now accounts for 35% of the working population of the Netherlands.

Table 9.2 Increase permanent/flexible employment 2003–2015 4th quarter (× 1000) in the Netherlands

	2003	*2015*	*Increase in%*
Permanent	5,612	5,014	–11%
Flexible	1,171	1,896	+62%
Self-employed, no personnel	634	1,022	+61%
Self-employed with personnel	366	362	–1%
	7,783	8,294	+7%

899 Leupen (2016c).

900 Flexbarometer, initiated by TNO that publishes periodically on the basis of its own and Statistics Netherlands' data, in collaboration with ABU and FNV Flex.

Table 9.3 Volume in % working population

	2003	*2015*
Permanent	72%	61%
Flexible	15%	23%
Self-employed, no personnel	8%	12%
Self-employed with personnel	5%	4%

TNO foresees a further growth of flexible labour from 23% now to 30% in 2020.[901] Looking at the development of flexible labour as such, it can be established that of all flexible labour, on-call/substitute work has grown the most proportionately, i.e. by 120%. Temporary agency work lagged, growing by a mere 32%. This resulted in an increased market share of on-call/substitute work, also at the expense of temporary agency work, which saw its market share decrease from 16% to 13%.

A UWV prognosis indicated that temporary agency work could rally in 2016. It foresaw a growth of employment (taking shrinkage into account) by 96,000 jobs, 65,000 of which being attributed to temporary agency work and 33,000 to the self-employed.[902]

Table 9.4 Increase in flexible employment 2003–2015 4th quarter (× 1,000)

	2003	*2015*	*Increase in%*
temporary/prospect of permanent	306	426	+ 40%
temporary › 1 year	90	163	+ 81%
temporary ‹ 1 year	153	163	+ 7%
on-call/substitute worker	255	560	+120%
temporary agency worker	182	240	+ 32%
permanent/hours unspecified	67	126	+ 88%
temporary/hours unspecified	118	218	+ 85%
	1,171	1,896	+ 62%

Table 9.5 Volume in % flexible labour

	2003	*2015 4th quarter*
temporary/prospect of permanent	26%	22%
temporary › 1 year	8%	9%
temporary ‹ 1 year	13%	9%
on-call/substitute worker	22%	30%
temporary agency worker	16%	13%
permanent/hours unspecified	6%	7%
temporary/hours unspecified	10%	11%

901 TNO study among 900 enterprises commissioned by the ABU. See *Flexmarkt* (2014).

902 UWV (2016), p. 10.

The increasing flexibilisation of the Dutch labour market inspired an observation by the OECD[903] that in the period 2007–2013 the job insecurity has substantially increased. The Netherlands ranks among the top three countries, together with Spain and Greece, where job insecurity increased the most.

However, if the income insecurity is factored in, the Netherlands is the eleventh most insecure country, in between Belgium and Germany (figure 9.7).

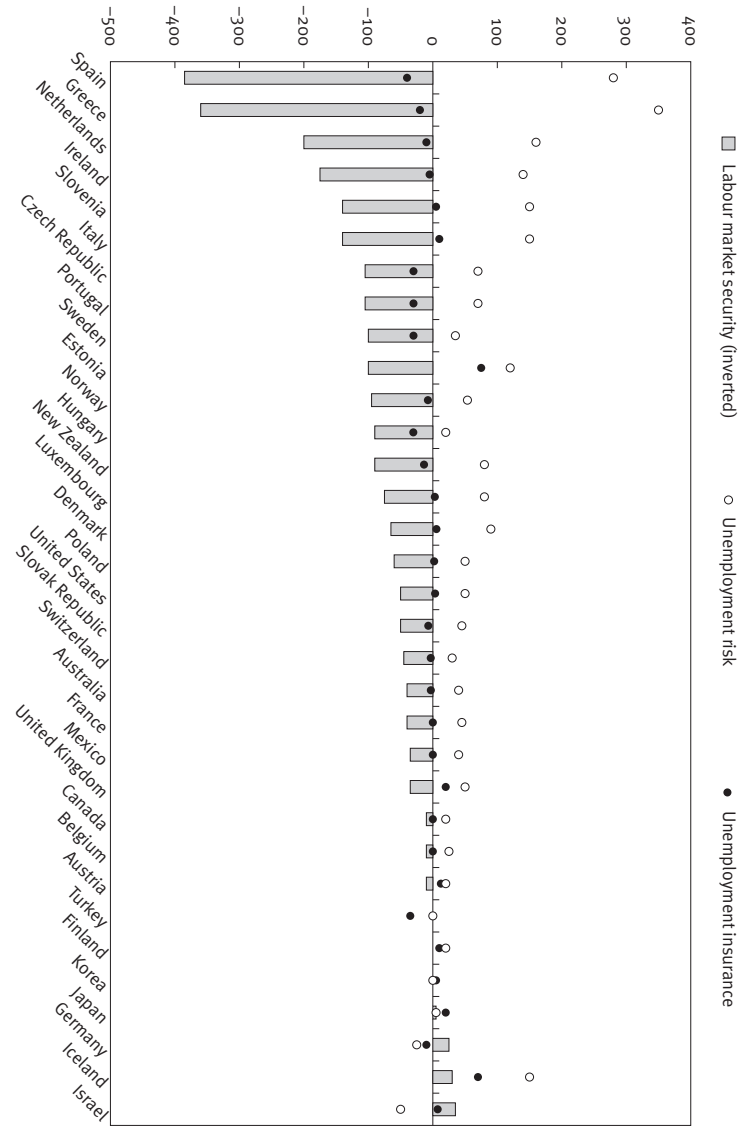


Figure 9.7 Changes in earnings quality (percentage change, 2007–2013) [905]

903 OECD (2016a), p. 4.
904 OECD (2016a), p. 4.

The OECD also studies earnings quality, i.e.: the level and distribution of income. In this respect, the Netherlands comes first (figure 9.8).[905]

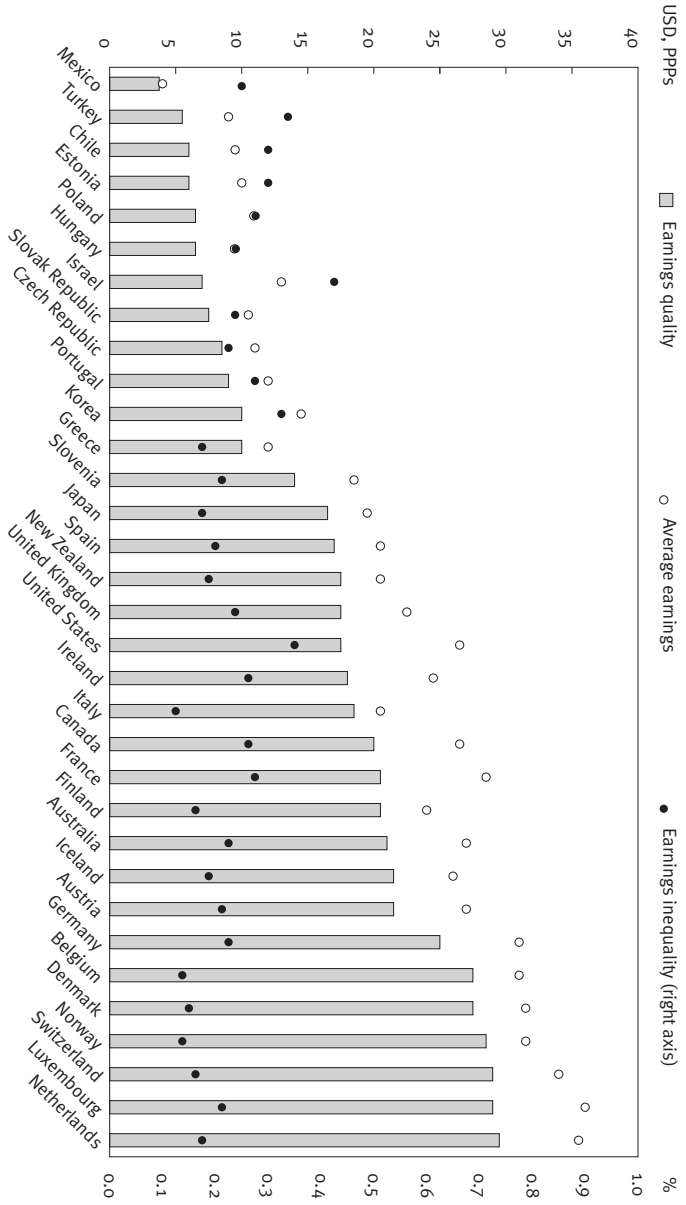


Figure 9.8 Earnings quality (PPP-adjusted gross hourly earnings in USD, 2013 or the latest year available)[906]

905 OECD (2016a), p. 2.

906 OECD (2016a), p. 2.

All in all, the number of permanent employment contracts has been reduced significantly, and flexible work has grown considerably. Temporary agency work has not kept pace with the growth of flexible work. The numbers of temporary contracts, on-call/substitute workers and self-employed workers grew significantly faster. It is only during the past few years that temporary agency work appears to be catching up to other forms of flexible work.

9.11 A COMPARISON WITH CONVENTION 181

The development and complications of the regulatory framework on temporary agency work in the Netherlands have been outlined above. But what does this outline tell us about the question whether Convention 181 is (still) satisfactory from the Dutch point of view? To answer this question, we shall first need to test the elements of Convention 181 to Dutch legislation. It becomes clear that the core issues of Convention 181, i.e. 'non-discrimination', 'freedom of association and the right to bargain collectively', 'forced labour' and 'child labour', have all found their place in Dutch law. The Dutch Constitution (art. 1) and the AWGB (General Act on Equal Treatment) safeguard *non-discrimination,* and article 3, par. 3, Waadi Act likewise pays attention to this. The freedom of association is entrenched in the general associations law of Book 2 BW and the rules for the CLA process are laid down in the Dutch Act on Collective Agreements. Forced labour is prevented because article 19 of the Dutch Constitution provides that the right of every Dutch national to a free choice of work shall be recognised, without prejudice to the restrictions laid down by or pursuant to Act of Parliament.

Child labour has been regulated in the Dutch Working Hours Act, which includes a ban on work being carried out by persons under the age of 16. There are exceptions for non-industrial work carried out by children aged 13 years old and over and for paper rounds by children aged 15.

Employee protection in respect of *working hours* is provided for in the Working Hours Act. The labour and employment conditions have been extended, particularly in the two Dutch CLAS on temporary agency work.

The *wages* have been provided for in the Dutch Minimum Wage and Minimum Holiday Allowance Act (WML) prescribing the minimum rates of pay, and article 8 Waadi Act, prescribing that the wages applying at the user enterprise must be paid, unless a CLA provides otherwise. Both Dutch CLAS on temporary agency work include provisions on wages that now in essence follow this 'hirer standard'. Apart from that, the ABU CLA has its own wage paragraph that may be used for specific groups of workers. Social security is provided for in various Dutch acts: WW, ZW, WIA and WAO and in

the CLAS on temporary agency work, regulating complements to the obligation to continue payment of wages in case of illness.

Occupational safety and health have been provided for in the Dutch Working Conditions Act and in article 11 Waadi Act, which includes an obligation for the temporary employment agency to provide information on the required professional qualifications and the description referred to in article 5, par. 5, of the Working Conditions Act. The subject of training has been comprehensively provided for in the CLAS on temporary agency work (in art. 63 ABU CLA and in art. 30 NBBU CLA).

Insolvency has been provided for in the Netherlands by the WW, providing benefit entitlements in the event that the temporary employment agency is unable to pay wages due to bankruptcy. And by now, the sequential liability of the Dutch Work and Security Act provides additional safeguards.

The *legal status* has by now been explicitly entrenched in the registration requirement incorporated in article 7a Waadi Act. Article 12 Waadi Act provides another specific scheme enabling sectoral bans. Article 10 Waadi Act prohibits the deployment of temporary agency workers in case of a labour dispute.

And self-regulation has found its own place. Through time, a form of public-private cooperation has taken shape that is unique in the world. Although the Ministers Vermeend, Donner and Kamp had firmly supported self-regulation, Minister Asscher came to question it. However, a reasonably successful set of improvement measures induced him to give this unique system the benefit of the doubt. For the rest, Convention 181 already took into account certification as a regulatory scheme for temporary agency work (art. 3, par. 2).

The Dutch *privacy regulations* are safeguarded in the Personal Data Protection Act.

The *no fee to worker principle* is entrenched in article 9 Waga. Through the Posting of Workers Directive, migrant workers have been given additional guarantees, particularly in the Waadi Act, besides those generally provided by European law and regulations.

There is by now a sustained and comprehensive *cooperation between private temporary employment agencies, the UWV and the municipalities*. They do not merely focus on so-called 'no-job-to-job routes', but also on 'job-to-job routes'.[907]

Dispute settlement has been incorporated into the CLAS on temporary agency work (art. 70 ABU and art. 45 NBBU). Under article 13 Waadi Act, the minister appointed the Labour Inspectorate as supervisor. Under article 14a Waadi Act the Labour Inspectorate can exchange data with other administrative bodies to enhance the enforcement measures. Also, under article 14b Waadi Act, data can be supplied to

907 Oosterwaal et al. (2015).

acknowledged certifying institutions such as the SNA, which clearly reinforces private hallmarking.

Moreover, the Dutch Labour Inspectorate can assess the enforcement of the Waadi Act provisions and issue a report to the worker involved, the employer, works council and the relevant workers' and employers' organisations. By now, the chain provision has the option of naming and shaming.

Reviewing the bottlenecks that were discussed in earlier chapters, such as those with regard to stability of work, unequal pay, the weakened position of trade unions and excessive use of temporary agency work, the following can be established.

In relation to temporary agency work, *stability of work* was first provided for in the temporary agency covenant belonging to the 'flexibility agreement', by the implementation of the so-called assignment phases system. The CLAS on temporary agency work have extensively developed this system (ABU: art. 12 ff., NBBU: art. 13 ff.). The Work and Security Act has not brought any material changes to it. It did impose a transition compensation after two years' temporary agency work.

In the current situation, following 78 weeks of temporary agency work subject to the so-called agency clause ('end of assignment equals end of contract') a new phase starts, comprising a maximum of fixed term employment contracts in a maximum period of four years, offering more security than the preceding temporary agency period. Subsequently, an open-ended contract must be offered to continue the assignment. During the second review of the 'flex arrangement', it became clear that 15–20% of the temporary agency workers are now in the latter phase, of which 4 to 7 percentage points had been given an open-ended contract.

In the Netherlands, the problem relating to *wages* has been solved through article 8 Waadi Act and the provisions on wages in the CLAS on temporary agency work (ABU: art. 18 ff., NBBU: art. 22 ff.). The fact that since 1971, trade unions and employers have managed to negotiate increasingly stronger CLAS raises the question as to whether the position of the trade union movement with regard to temporary agency work is really that weak.

In the Netherlands, *excessive use of agency work* has been provided for to some extent in hirers' CLAS that regularly lay down quotas. However, this is controversial, since employers feel that this is in breach of article 4 of the European Temporary Agency Work Directive. Moreover, these quotas have caught the attention of politicians.[908]

The European Temporary Agency Work Directive has entailed further obligations that have (by now) all been provided for by the Waadi Act, for instance, the access to

908 Mulder (2015).

company facilities and services in user enterprises (art. 8a Waadi Act), the information on vacancies (art. 8b) and the WOR in article 1, par. 2, sub b (counting in temporary agency workers), and WOR article 31b, par. 1 (informing the Works council). Furthermore, the Waadi Act regulates the administrative enforcement (art. 16 ff.). These are subjects that have been regulated in greater detail than what was prescribed by Convention 181.

Dutch legislation appears to conform fully to Convention 181, which has in fact served as a satisfactory agenda for the provision of an adequate legal regime in relation to temporary agency work. Nonetheless, the afore-mentioned outline also includes items that are problematic. Subjects such as payrolling, contracting and self-employment are new forms of flexibility that, by now, also concern temporary employment agencies. A study that the ABU conducted among its members made it clear that 92% assign temporary agency workers, 66% second professionals, 64% engage in payrolling and 76% in recruitment and selection. In the years to come the members expected to add activities such as services for self-employed workers, reintegration, outsourcing and outplacement. It is thus clear that ABU members intend to widen their portfolio of services.[909]

Interestingly, the Dutch discussion currently focuses on the new forms of flexibility, such as payrolling, contracting and self-employment. This is reminiscent of the discussion in ILO circles at the end of the 1990s. On the one hand, Convention 181 was adopted by a considerable majority; on the other hand there was a parallel discussion on contract labour that ultimately fell through and was turned into a discussion on the employment relationship. This has been discussed extensively in chapter 3.

Internationally, the crux is the scope of Convention 181. The question is whether it needs to be amended and extended to both bipartite and tripartite contracting, or whether a new discussion on contracting should begin, and on how it should be adequately regulated, considering the merits of Convention 181.

Interestingly, the possibility that 'stronger and tighter regulation of temporary agency work would lead to substitution by "freer" alternative employment relations' was pointed out in the Netherlands as early as 1982. According to the researchers who had been commissioned by the Minister of Social Affairs and Employment:

> The conclusion that can be drawn is that there are alternatives, both including and excluding the involvement of third parties. Thus, temporary agency work is one of many forms of 'loose' employment relations.

909 ABU (2015).

They recommended the realisation of a more integrated policy on 'loose' employment relations. Nowadays, so many years later, this conclusion still appears to hold true.[910]

Social partners in the temporary agency sector would therefore show great courage if they were, for now, to explore the possibility of a CLA on both bipartite and tripartite contracting. Incidentally, the 1982 study cited above also pointed out the negative effects that restrictions on temporary agency work may have on employment.

The question is also to what extent all this necessitates further regulations. The Netherlands easily complies with the standards set by Convention 181. Labour-only contracting is thus provided for. What has not been provided for is both bipartite and tripartite job contracting. Internationally, and in the Netherlands, there is a loophole that should be dealt with.

Another necessity is that labour law uncouples itself from the employment contract as the basis of the employment system. Labour law will need to centre more on the plurality of employment forms that has arisen in the meantime. Besides labour-only contracting, this also includes job contracting. Labour law will need to become detached from the employee and focus on all workers, regardless the form of their employment. Labour law that restricts itself to the employment contract should become employment law![911]

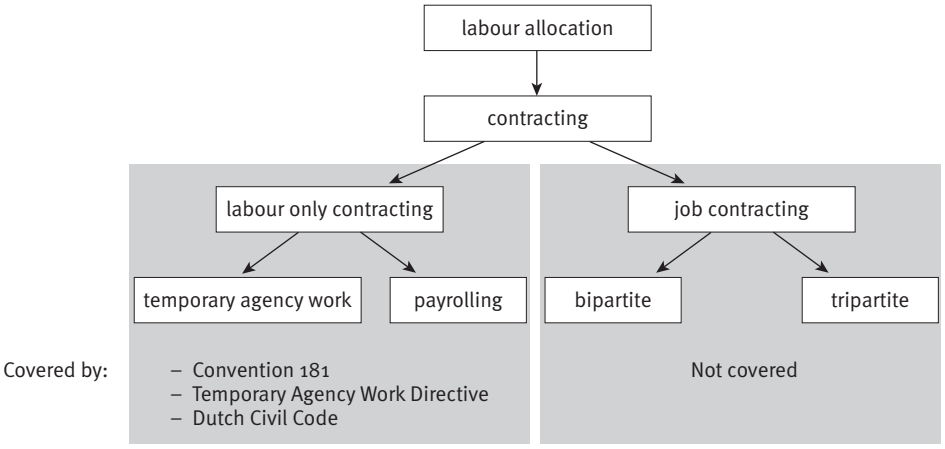


Figure 9.9

910 Andersson, Elffers & Felix (1982).

911 Van der Heijden (2014b).

Table 9.6 Comparing Convention 181 to Dutch labour law

		C 181	*Dutch regulations*
I	**Core issues**		
a	Non-discrimination	Art 5	Art.1 Dutch Constitution AWGB, art. 3, par. 3 Waadi Act
b	Freedom of association and collective bargaining	Art. 4, Art. 11 a, b Art. 12 a	II BW, 1927 Act on collective agreements
c	Forced labour	Preamble	Art. 19
d	Child labour	Art. 9	ATW art. 1; 2, art. 3:1,2
II	**Worker protection**		
a	Right to work		Art. 19 GW
b	Free choice of employment		Art. 19 GW
c	Working time (rest and leisure, limitation hours and periodic holidays)	Art. 11 d, Art. 12 c	ATW
d	Conditions of work (just and favourable conditions)	Art. 11 d Art. 12 c	CLAS on TAW
e	Minimum (wages) and equal pay for equal work/favourable remuneration	Art. 11 c Art. 12 b	WML Art. 8 Waadi Act
f	Adequate standard of living		
g	Social security protection (occasional accidents, diseases, maternity, parental protection, benefits protection against unemployment, sickness, disability, widowhood, old age	Art. 11 e Art. 12 d	WW, ZW, WIA, WAO, WAZ CLAS on TAW ABU: art. 53 NBBU: art. 25
h	Health and safety	Art. 11 f Art. 12 f	Dutch working conditions act: art. 7:658 BW. Waadi Act art. 11
i	Training	Art. 11 f Art. 12 e	CLAS on TAW ABU: art. 63 NBBU: art. 30
j	Insolvency	Art. 11 i Art. 12 h	WW
III	**Specific issues**		
a	Legal status	Art. 3 par. 1,2	Waadi Act: art. 7a, 10, 12
b	Privacy and protection personal information	Art. 6	WBP
c	No fee to worker	Art. 7	Waadi Act: art. 9. EU Treaty
d	Migrant workers	Art. 8	Waga
e	Cooperation public/private agencies	Art. 13	Various agreements
f	Access to remedy	Art. 14, par. 3	Waadi Act: art. 13; 14a, b, c; 15. CLAS on TAW ABU: art. 70 NBBU: art. 45

		C 181	*Dutch regulations*
IV	**Other specific issues**		
a	Stability of work		CLAS on TAW ABU: art. 12 ff. NBBU: art. 1 ff.
b	Unequal pay		CLAS on TAW ABU: art. 18 ff. NBBU: art. 22 ff. Waadi Act: art. 8
c	Weakened position trade unions		CLAS on TAW
d	Excessive use of agency work		Quota regulations hirer's CLA
V	**Other European issues**		
a	Access to employment, collective facilities, vocational training		Waadi Act: art. 8 a, b
b	Representation of temporary agency workers		WOR, art. 1, par. 3 Part b
c	Information of workers' representatives		WOR, art. 31b par. 1
d	Favourable provisions	Art. 15	
e	Penalties	Art. 14, par. 3	Waadi Act art. 16 ff.
f	Implementation and review	Art. 18	Waadi Act art. 23
g	Free placement	ILO C 88	

CHAPTER 10

Conclusion

My study focuses on ILO convention 181 and the regulation of temporary agency work. The central question is: is Convention 181 (still) an adequate instrument for the international regulation of temporary agency work from the perspective of recent social law developments and from the perspective of the Dutch context? The social law developments that will be set against Convention 181 are: decent work, human rights, global social dialogue: IFAs, and increasing attention for the social dimension in Europe. Moreover, the Dutch legislative framework on temporary agency work will be considered from both a historical and an actual perspective, also in relation to Convention 181.

Sub-questions that will be consecutively discussed are:

1. How has the ILO's regulatory framework for temporary agency work developed over the years?
2. Which complications can be perceived in relation to that framework?
3. What do we mean by decent work, and how can this be set against temporary agency work under Convention 181?
4. Which human rights developments have occurred specifically for businesses, and how can their results be assessed in relation to the achievements of Convention 181?
5. How has Global Social Dialogue developed, and how does this development relate to Convention 181? Are the corresponding IFAs substitutes for and/or additions to Convention 181?
6. How has social law developed at the European level with regard to temporary agency work, and what does this mean for the value and scope of Convention 181?
7. How has the Dutch temporary agency legislation developed; which complications have presented themselves and how can this be assessed in relation to Convention 181?

Temporary agency work is a labour market phenomenon that has commanded a great deal of attention. A recurring debate on temporary agency work is taking place in every country where this phenomenon exists.

Temporary agency work is characterised by a tripartite relationship in which the temporary agency worker usually registers as a jobseeker at the temporary employment agency, which then sets out to find him or her a job and, as soon as one is found, hires the jobseeker and assigns him or her to a commissioning client, also known as a user enterprise.

Thus, the temporary employment agency is playing an intermediary role in the process of balancing supply and demand and becomes an employer in a formal sense once the job has been found and the temporary agency worker starts work.

The cause of the recurring debate on temporary agency work referred to above lies in the fact that, over time, social law has strongly focused on the bipartite relationship between employer and employee, while the interference by the temporary employment agency creates a tripartite relationship that evokes questions and gives rise to confusion.

In the background, a more fundamental reason is related to the objections to placement carried out for profit, including hiring out, which conflicts with the ILO's position that 'labour is not a commodity'. Albeda holds the view that it is hard to defend this attitude while accepting the economic order system that pivots on corporate production.

In 2014, an estimated 67 million people across the world were assigned by temporary employment agencies. This process generated a turnover of more than 316 billion euros. The multinational employment agencies Adecco, Randstad and Manpower jointly accounted for 16% of this turnover. The others in the top 10 jointly represented 9%. That means that 75% was turned over by medium-sized and smaller temporary employment agencies.

Worldwide, temporary agency work has a 1.6% penetration rate. This percentage indicates the number of temporary agency workers expressed in proportion to the total working population. The United States have achieved a 2.2% penetration rate, Japan 2% and Europe 1.8%.

Temporary agency workers are often young people; 40% are under 25 and 65% are under 30.

Larger businesses make more use of temporary agency work than smaller ones. The main reasons for a business to use temporary agency workers are the need for flexibility, the need to make sudden adjustments, dealing with peak cycles of productivity and the opportunity to 'try before you buy'.

10.1 DEVELOPMENT

How has the ILO legislative framework developed over the years?

Initially, the international development of social law regarding temporary agency work was strongly linked to the development of private work placement, particularly work placement carried out for profit. Attention was drawn to this topic soon after the ILO was established. Convention 2, dating from 1919, expressed a clear preference for public work placement. Recommendation 1 included the request to prohibit commercial placement. The 1920 Maritime Convention laid down that the member states were to agree to do everything they could 'to abolish the practice of finding employment for seamen as a commercial enterprise for pecuniary gain'.

In 1933, widespread abuses in relation to private placement gave rise to Convention 34 on fee-charging employment agencies. This convention provided that private for-profit placement must be abolished and that non-profit-making placement was to be severely restricted.

By the end of the 1940s an attempt was made to relax the regime of placement carried out on a for-profit basis, subsequently allowing this to be carried out in future, albeit under strict conditions of supervision, licensing, and a prescribed fee structure. The fact that only six of the ILO member states had ratified Convention 34 can be seen as the writing on the wall. In the relevant committee, this employer-initiated proposal was accepted by 26 in favour and 24 against, but eventually the plenary ILC rejected the proposal by 39 to 35 (5 abstentions).

These margins were so unconvincing that the topic was tabled for the 1949 conference. Prior to this, the ILO conducted a survey among its member states that made it clear that a minority was in favour of regulation, including regulation of private for-profit placement, and a significant majority was in favour of abolition. This result induced the ILO Office to present a compromise text, opting for a convention with two variants. One variant, part II, was based on the abolition of private for-profit placement at a date to be determined later. Another variant, part III, started from the regulation of private for-profit placement conditional on supervision, licensing and a prescribed fee structure.

Thus, this new Convention 96 allowed member states to run with the hare and hunt with the hounds. Although the survey made clear that the majority of the member states (13 out of 19 were in favour of an abolition variant), they clearly did not dare risk a total ban. The 1948 discussion not resulting in a convincing majority for either option, together with the low number of ratifications of Convention 34, apparently were sufficient reasons for the ILO Office to present a compromise text.

It took 43 years for the ILO to put the topic of private employment agencies back on the agenda; however, it did continue to be the subject of a great deal of attention. For instance, the Swedish government, being confronted with the increasing role of temporary employment agencies within its borders, asked the ILO whether they could be considered as fee-charging employment agencies as defined in Convention 96. The Director-General of the ILO took the view that they could, and therefore that the relevant exemption provisions of this convention must be reconsidered. This opinion did not tally with the view held by many countries that designated the temporary employment agency as an employer, for which specific national regulations had been developed.

In 1973, the member states voted on a draft resolution proposing to analyse the role of temporary employment agencies in more detail, but this resolution was shelved due to a lack of the requisite quorum.

Eventually the topic, described as 'the role of private employment agencies in the functioning of the labour market' was entered on the agenda of the 1994 ILC. This general discussion was preceded by means of a study by Sergio Ricca. He challenged the monopolistic approach to thinking about placement and listed no fewer than fifteen types of intermediary services existing at the time. Besides fee-charging employment agencies, he included:

> … overseas employment agencies, agencies for the recruitment and placement of foreigners, temporary work agencies (TWA's), contract labour agencies, job search consultants, personnel management consultants, training and placement institutes, job shops or cooperatives, employment advertising agencies, computerised job database agencies, career management agencies, employment enterprises or intermediary associations.

Ricca stated that this list was not exhaustive and that there were certainly overlaps; moreover, while some types faded away, others emerged. All in all, it was a highly dynamic world. He also concluded that a partial or total ban no longer had any value, and advocated a new ILO standard that would result in the revision of Convention 96 and Convention 88, which by then regulated public work placement.

The 1994 ILC demonstrated a clear preference for a wider variety of activities to facilitate the process of matching supply and demand in the labour market. Therefore, revision of Convention 96 was in order, and the Governing Body decided to place the topic on the agenda for the 1997 ILC.

Prior to the ILC, the ILO Office conducted a survey among the national governments. The questions as to whether there should be a convention and a recommendation on private placement yielded largely positive response. Eventually, Convention 181 and Recommendation 188 were adopted. Crucially the definition was no longer re-

stricted to private placement alone, but now also comprised the triangular relations that could arise if the placement agency also acts as a formal employer.

The Convention then formulated provisions on:

- licence, certificate and scope (article 3);
- definition (article 1);
- employee protection (articles 4, 11 and 12);
- data protection (article 6);
- no fee to worker (article 7);
- fundamental labour rights (articles 4, 9, 11, 12);
- non-discrimination (article 5);
- migrant workers (article 8);
- complaints (article 10);
- public/private cooperation (article 13).

By now, the Convention has been ratified by 32 countries. Of the 177 so-called technical ILO conventions concluded in total, Convention 181 ranks 59th. At the beginning of 2016, the technical conventions saw an average of 28 ratifications, and Convention 181 tops that with its 32 ratifications.

If we look at *all* the ILO conventions adopted since 1990, Convention 181 turns out to rank third, together with Convention 185 on the Seafarer's Identity Documents (Revised). Convention 182 on the Worst Forms of Child Labour (1995) and the Maritime Labour Convention (2006) are ahead by 180 and 70 ratifications respectively.

An ILO survey of some years ago made it clear that 38 more countries were interested in ratifying Convention 181, and 5 have done so since then. For that matter, there are apparently still 23 countries that have ratified Convention 96. In 2009, the ILO organised a workshop to encourage further ratifications, stating, among other things:

> The Convention can be an engine for job creation, structural growth, improved efficiency of labour markets, better matching of supply and demand for workers, higher labour participation rates and increased diversity. It also sets a clear framework for regulating, licensing and self-regulation, thereby encouraging reliability; ensuring effective protection of workers against unfair practices, for example as regards pay, contract conditions, safety and health by unscrupulous providers or user enterprises of temporary agency workers; discouraging human trafficking; and promoting cooperation between public and private employment services.

10.2 COMPLICATIONS

Which complications can be perceived?

Convention 181 was adopted by a large majority of 347 votes in favour, 5 votes against and 30 abstentions. This meant a positive ending to a discussion that encompassed the larger part of the twentieth century. However, this is only one side of the matter. The flipside is characterised by unabated discussions on phenomena such as contract labour, precarious work and Non-Standard Forms of Employment (NSFE).

In the same year that the subject of fee-charging agencies had been placed on the ILO agenda, the topic of contract labour also came up for discussion. The confusion that had arisen in respect of this topic caused insufficient social protection of the workers concerned.

A distinction was made between labour-only contracting and job contracting. Labour-only contracting involved outsourcing work by a commissioning client to a contractor in a tripartite relationship, where the commissioning client supervised the work to be carried out. Job contracting involved outsourcing work to a contractor in a tripartite or bipartite relationship, where the contractor supervised the work to be done. A further distinction was that between contracting in and contracting out; in the first case the work was carried out on the premises of the commissioning client; in the latter case the work was carried out on the premises of the subcontractor.

In practice, many hybrid forms were evident, so that while the topic was under discussion the ILO Office had difficulty in creating the desired clarity.

The obvious question arose as to what exactly was the difference between temporary agency work and labour-only contracting. This difference has never become entirely clear, but the question did result in numerous attempts to exclude temporary agency work from the definitions under Convention 181, in order to prevent duplication of the regulations. This suggests that the definitions of temporary agency work and labour-only contracting overlap.

Eventually a draft convention was proposed which, in the course of the two readings in 1997 and 1998 was not adopted. As a result of the confusion regarding the concepts, the lack of participation by the governments and the irritations between parties the proposal foundered.

It was then suggested that the scope of the consultation be shifted to the employment relationship. The discussion was to focus on the employer-employee relationship, as regulated in employment law, and on the growing phenomenon of the dependent worker, who lacks protection. Although the employers were initially against developing an instrument, they later agreed to a recommendation being drawn up.

This recommendation was realised during the 2006 ILC, but did not obtain the employers' support as they felt its scope was too broad, and because it contained indicators on the basis of which the employment relationship could be established – something the employers had opposed. Even though there were doubts about the legal necessity of doing so, it was established that 'this Recommendation does not revise the Private Employment Agencies Recommendation 1997 (no. 188) nor can it revise the Private Employment Agencies Convention 1997 (no. 181)'.

Following the debate on contract labour and its consequential failure in the form of Recommendation 198 on the employment relationship, the discussion came to be dominated by the concept of precarious work. The trade union movement repeatedly made use of this terminology, which expresses the increasing weakening of the workers' position. The term is derived from sociology and raises the question as to whether the permanent full-time employment contract is on the way back.

Over the past years, academics have debated extensively on the concept of precariousness. In the 1970s, French sociologists associated it with poverty. Only later did they start using this concept to refer to specific labour relations. To the American scientist Kalleberg, precarious work means work that is uncertain, unpredictable and risky from the worker's point of view. Vosko distinguishes a one-dimensional and a multi-dimensional approach to the concept. The one-dimensional approach only looks at the degree of job insecurity. The multi-dimensional approach – the dominant theory – involves more characteristics. In this case, Rodgers distinguishes:

- short-term horizon, limited duration or high risk of job loss;
- little or no control over working conditions, the work itself or wages;
- little or no worker protection (by law, through collective agreements, in terms of access to social security);
- low income jobs at or below the poverty level.

According to these sociological sources, temporary agency work would also fall under precarious work, certainly from the one-dimensional approach. However, some differentiation seems to be in order: precariousness is also a matter of perception, and of perspective. Research shows that temporary agency work cannot be classed among the worst forms of precariousness. Seasonal work, telework, casual work, zero-hours contracts, bogus self-employment and informal work score significantly worse. And according to experts consulted in this same research, temporary agency work scores nearly as highly as standard full-time employment on several dimensions. Furthermore, OECD research shows that more security in terms of job security and job protection does not automatically mean that people actually feel more secure. The OECD indicates that unemployment benefit is appreciated more than job protection.

In any event, the trade union movement believed this development to be a cause for concern. It noted that 'permanent direct employment is on the way out' and 'social

regression rather than progress and the less progress we see, the more agency work we find'. The issue is wider in scope; it is about more than just temporary agency work. However, the trade union movement asked for a new binding instrument. It asked for the examination of the meaning, scope, impact and application of Convention 181.

In a social dialogue on temporary agency work – a Global Dialogue Forum (GDF) in 2011 organised by the ILO – the social partners were poles apart as regards the course to be steered.

Four aspects emerged as the main bottlenecks:

- employment is insecure;
- the wages are not equal;
- the union movement's collective bargaining position is weakened;
- the use of temporary agency work is insufficiently restricted.

On this subject, the following can be established.

Security – as we saw before – is all about perception. According to the OECD, the sense of security does not increase proportionally to additional protection of security (employment protection) but rather depends on the social safety net (unemployment benefits), which generates income security. Also, it is apparent that the sense of security does not increase in proportion to longer job tenure. Moreover, temporary agency work appears to score no worse than permanent employment in general. In this respect, informal work and bogus self-employment turn out to score worst. Furthermore, temporary employment agencies in a number of countries conclude open-ended contracts. Thus, security is a relative concept that is determined by more aspects than the contract alone.

The principle of *equal pay for equal work* should be honoured, but in the case of temporary agency work the question is what to compare it with. Should a comparison be made with the comparable worker at the temporary employment agency or with the comparable worker at the user enterprise? In the labour market, temporary employment agencies are confronted with wide differences in pay for the same position between user enterprises, and for that reason they need their 'own wage policy' to ensure the re-assignability of their workers. This certainly applies if temporary employment agencies conclude open-ended contracts and aim to reduce their risk of under-utilisation.

Moreover, temporary agency work and precarious work were thought to erode the *position of the trade union movement*. This was the key issue during the aforementioned GDF, where the trade unions requested that the collective bargaining rights of the temporary employment agencies be assigned to the commissioning clients. In practice, there appear to be many types of bargaining arrangements, demonstrating that the trade union movement also have a strong bargaining position in relation to temporary employment agencies. Thus, it would be going too far to ignore the bar-

gaining rights of temporary agency employers and leave these to the commissioning clients.

On the other hand, it is no more defensible for agency employers to claim these bargaining rights exclusively. In practice, the various usable forms need to develop and the best practices must be held up as examples.

The alleged weakened position of the trade unions may have been partly suggested by the American context, where it is difficult for temporary agency workers to join the commissioning client's bargaining unit. However, it would be going too far to generalise this specifically American issue, which is also in breach of international labour law.

Some countries have specific legislation in place on the *use of temporary agency work*. However, there is no international standard that restricts the use of temporary agency work in terms of quantity. In a qualitative respect, Convention 158 and Recommendation 166 provide a possible solution, but by now these instruments have been deemed controversial.

An ongoing discussion at the ILO has since been taking place on the topic of *Non-Standard Forms of Employment (NSFE)*. This discussion has indicated largely the same bottlenecks as those outlined above in relation to precarious work.

Temporary employment and temporary agency work can provide a stepping stone to permanent employment, but may also prove to be a dead end, where workers relapse into unemployment. The ILO referred to studies that both confirm and deny the stepping stone role of temporary agency work. Moreover, the relevant ILO report points out 'wage differences'. Furthermore, it indicates that many countries appear to have solved this issue by means of specific regulation.

Regarding the 'use of temporary agency work', the report also refers to specific regulation providing the reasons for recourse to temporary agency work and for maximising either the duration of the assignment or the number of renewals of the assignment.

The trade unions proposed the following measures:

- the principle of equal treatment for NSFE workers irrespective of the employment situation;
- a separate instrument for fixed-term contracts;
- an instrument for tripartite employment relationships in general (Convention 181 is too narrow in scope);
- regulating the use of temporary agency work;
- clarifying the position of the trade unions in tripartite employment relationships.

During the expert meeting that was held on the deficits of NSFE, there appeared to be a broad consensus regarding these deficits that needed to be tackled. In this respect, it is questionable whether Convention 181 should be amended. The convention is clear, it addresses the issues that need addressing and meets a growing need. Thus, as a minimum standard it is certainly adequate. The deficits respecting equal treatment and the use of temporary agency workers can be solved by means of law and regulations, as is currently the case.

Article 12 in Convention 181 actually instructs member states to clarify the position of the trade unions.

This still leaves the separate instruments for fixed-term contracts and the tripartite employment relationships in general. The most obvious of action would be to discuss the fixed-term contracts in connection with a revision of Convention 158 and Recommendation 166 on the termination of employment. They are already under discussion and it would be good if they were reassessed.

As regards a separate instrument for tripartite employment relationships in general: this is reminiscent of the attempts to regulate contract labour. The attempts failed, but it may be worth a new try. In that case both bipartite and tripartite contracting should be addressed. For all that, no clarity can be achieved on the trend that the open-ended contract is displaced more and more by precarious work, by NSFE or by flexible work. Stone claims she has strong indications of this. However, SEO argues that during the last decade, flexible work has been stable, approximating 20 to 25% of the total working population, with some higher findings in the Mediterranean countries and a lower result in the United States. Moreover, no spectacular growth in temporary agency work would be evident during the last decade.

10.3 'DECENT-ISATION'

What do we mean by decent work, and how can this be set against temporary agency work under ILO convention 181?

An antonym of precarious work is the concept of decent work. Whereas the first concept denotes the weakening of the workers' position, the latter has developed into an umbrella term indicating the pursuit of improving the position of workers. It originated in the wake of the Declaration on Fundamental Principles and Rights at Work. This declaration provides a framework for globalisation that is also socially just and pivots on the following fundamental principles:

- the freedom of association and the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour;
- the elimination of discrimination in respect of employment and occupation.

The ILO has prioritised eight conventions that are connected to these principles, i.e. Conventions 29 and 105 (forced labour), 100 and 111 (discrimination), 138 and 182 (child labour), and 87 and 98 (freedom of association and collective bargaining).

All these conventions must be observed, whether member states ratify them or not. Apart from this prioritisation, in 1999 the ILO also drew up the Decent Work Agenda, noting as the primary goal: 'to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity'. As the cornerstones of this goal, four strategic objectives were formulated that constitute the framework of the Decent Work Agenda. The elements are:

- promoting and realising fundamental principles in relation to labour (fundamental labour standards);
- creating better opportunities for women and men to find a suitable job and generate an income (employment opportunities);
- strengthening the coverage and effectiveness of social protection for everyone (social protection);
- strengthening tripartism and social dialogue (social dialogue).

How does temporary agency work under Convention 181 relate to this agenda? To answer this question we must know what exactly is meant by decent work. The concept may have gained momentum, but how can we continue to use it in day-to-day practice?

To this end, numerous measuring methods have been produced, but ultimately no consensus has been achieved on any of them. The scientific reference literature was likewise critical. All in all, the 21 indicators that the ILO presented continued to be controversial. Employers in particular objected to the creation of an ILO-driven methodology that was to serve as a template to take countries' measures with regard to progress towards decent work. If we set out to contrast temporary agency work under Convention 181 with the Decent Work Agenda, we run the risk of being subjective. There is a certain feeling about what is or is not decent, but that may differ from one person to another. However, it would be worthwhile to interpret what *decent* is in relation to temporary agency work under Convention 181.

This involves two questions:

- How must temporary agency work be considered in relation to the four objectives relating to employment, social protection, employee rights and social dialogue?
- Can temporary agency work in particular be denoted as *decent* in accordance with certain indicators supplied by the ILO Office?

Temporary agency work plays a role in the labour market. The Decent Work Agenda looks at promoting *employment*. The Director-General of the ILO states among other

things that 'employment services have a great deal to offer in overcoming labour market inequality'. While there are doubts as to whether temporary employment agencies create employment, the promotion of employment also benefits from attention directed at balancing supply and demand, something in which temporary employment agencies can likewise play an important role. In his 2003 Report of the Employment Taskforce, Wim Kok stated as follows:

> Temporary agency work can be an effective stepping stone for new entrants into the labour market and hence *contribute to increased job creation*, for example by facilitating recruitment instead of overtime. Acting as human capital managers – rather than mere manpower suppliers – these agencies can also play the role of new intermediaries in the recruitment and management of both qualified and unqualified staff, offering employers an attractive alternative to traditional recruitment channels.

Thus, Kok's Taskforce makes a clear statement regarding the positive role that temporary employment agencies can play in enhancing job opportunities. Although they may not directly create employment, at least they will raise the employment rate.

With regard to another element of the Decent Work Agenda, i.e. *social protection*, many countries have a substantial amount of specific legislation in place. Temporary agency work is being regulated in relation to various topics. The OECD observes that in various countries the regulations on temporary agency work extend beyond those on fixed-term contracts.

The *fundamental rights* regarding the freedom of association and collective bargaining, child labour, forced labour and non-discrimination are safeguarded by Convention 181.

In the temporary employment agency sector, social dialogue takes place at various levels: at cross-sectoral level, at sectoral level, at temporary employment agency level and at user company level. How social dialogue takes place is heavily dependent on the (temporary agency) labour relations as they have evolved in practice

If we compare temporary agency work under Convention 181 and the decent work indicators issued by the ILO Office, it becomes clear that nearly all indicators are entrenched in Convention 181 in one way or another. The only indicator that is lacking in Convention 181 relates to the termination of employment. However, it would be going too far to look on temporary agency work as *not being decent* merely on the basis of this hiatus.

We saw before that job security is a matter of perception and that income security turns out to be more important to workers than job security. Moreover, from

the ILO's perspective, the Termination of Employment Convention (no. 158) and the associated Recommendation (no. 166) provide scope for facilitating temporary work and temporary agency work, although these instruments are by now deemed controversial, as they no longer fit in with the actuality and dynamism of the labour market. Employers state that 'full employment and open labour markets are more important for perceived employment security than strict project dismissal regulation'

This position fits in with Kennedy remarking in the 1960s that 'a rising tide lifts all boats' when defending plans to cut taxes in order to boost economic growth.

Otherwise, the main challenge to decent work is the informal economy. This is where the largest decent work deficit exists. Interestingly, the stricter the regulation of temporary employment agencies is, the larger the informal economy can grow. All in all, there is no reason whatsoever to look on temporary agency work under Convention 181 as indecent. It more than complies with the Decent Work Agenda and the decent work indicators, and can also contribute to the transition from informal to formal, more decent work.

10.4 'HUMAN RIGHT-IFICATION'

Which developments with respect to human rights have occurred specifically for companies and how can their results be assessed in relation to the achievements of ILO convention 181?

Human rights have a rich history of declarations and regulations that were intended to protect people from an omnipotent monarch. In his 1941 State of the Union address, US President Roosevelt spoke about the four fundamental freedoms (freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want, and freedom from fear). Later that year, Roosevelt and Churchill issued the Atlantic Charter, which stated that 'all the men in all the lands may live out their lives in freedom from fear and want'. This was followed by the 1942 Declaration of the United Nations and the 1945 Charter of the United Nations.

In 1946, a commission was established to work on an international Bill of Rights, which partly took shape in the 1948 Universal Declaration of Human Rights (UDHR).

The latter Declaration was developed into other covenants, of which the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are the best known.

There are various regional equivalents of these human rights covenants. Following the UDHR, the Council of Europe drafted the European Convention on Human Rights (ECHR) in 1950. At a later date, the Council of Europe also drafted the European Social Charter (ESC), concerning social and economic rights, which can be seen as the equivalent of the ICESCR.

The question has always been how the business sector should deal with these human rights covenants. In 2004, the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights were developed. The intention was to impose these norms on the business sector, but they triggered widespread resistance. The controversy had to be solved by appointing a special representative, who was to clarify the roles of the various parties. In 2005, Harvard Professor John Ruggie was appointed, who submitted the Ruggie Framework in 2008. The framework comprised three principles, i.e. the state duty to protect against human rights abuse by third parties, including enterprises; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

Ruggie developed his framework into 31 guiding principles, which he submitted in 2011. As of 2011, these guiding principles have also become part of the OECD Guidelines, which refer to the internationally recognised human rights incorporated into the International Bill of Rights. In turn, this bill consists of the Universal declaration of Human Rights and the main instruments codifying the Declaration: The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the fundamental rights principles incorporated into the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The Global Compact is similarly important, enabling enterprises to voluntarily endorse ten principles relating to human rights in general, labour standards, environment and anti-corruption. The multinational employment agencies Adecco, Manpower and Randstad all endorse the Ruggie Framework and report on their progress in their annual reports. Particularly awareness of the ethical principles ranks high on the agenda.

Paying attention to the human rights issue also flows from the corporate need to engage in CSR, Corporate Social Responsibility, which forms part of the principles of corporate governance. This involves frameworks that are usually indicated as soft law. While transcending the law, they are certainly not non-committal, and they can also refer to hard law. Moreover, soft law can actually prove to be quite 'hard'.

Dutch corporate law also includes provisions that can definitely not be seen as non-committal. For instance, article 2.8 of the Dutch Civil Code (BW) provides that the company and those who are involved in its organisation pursuant to law and the articles of incorporation, including the management board (and its individual members) must behave towards each other in accordance with what is required by standards of reasonableness and fairness. Article 2.9 BW provides that in the accomplishments of its duties the management board must be guided by the interests of the company and its affiliated enterprise, with explicit provision in respect of the supervisory board in article 2:140/250 BW.

The management board is also responsible for pursuing just policy. In the case of well-founded doubts as to what constitutes just policy, an investigation by the Dutch Enterprise Chamber ('Ondernemingskamer') can be requested on the basis of article 2:345 in conjunction with article 350 BW. Thus, CSR policy, including human rights policy, can also be enforced by means of an investigation. Furthermore, criminal law could also provide enforcement possibilities.

How can Convention 181 be appreciated in the light of the 'human right-ification'?

All in all, a comparison of the regulation establishes that Convention 181 observes the many human and labour rights that can also be found in human rights covenants. However, in these covenants, they are broader in scope. The corresponding international normative frameworks (ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises) are soft law instruments, but in practice, they can often have 'hard' effects.

As regards temporary agency work, however, a ratified covenant such as Convention 181 will entail further obligations. This definitely applies to the specific provisions, for instance in respect of the regulation on the temporary employment agency's status and to the 'no fee to worker' principle.

The 'human right-ification' of labour relationships also touches on Convention 181, and the question must be raised as to whether this development has considerably weakened the impact of Convention 181. If observing human rights treaties becomes more and more important, what is the further use of Convention 181?

The answer is that Convention 181 is more specific, it brings obligations upon ratification and also observes fundamental labour rights; thus, it has retained its value next to the human rights treaties. While there is a considerable overlap, the more individual instruments set course for a certain direction, the more effective they will be.

Thus, it can be established that, from the perspective of 'human right-ification', Convention 181 has value and that it is substantively adequate.

10.5 'IFA-ISATION'

How has the Global Social Dialogue developed and how does this development relate to ILO convention 181? Are the corresponding IFAs substitutes for and/or additions to ILO convention 181?

Labour law has various sources; there are five of them, i.e. the constitution, the law in a formal sense (statutory regulations), employment contract law, international law and case law.

Apart from this variety as to sources, there is also variety as to the nature of labour law. Labour law can have both a public and a private basis. Historically, labour law belongs in the public domain, but through the years, the private component has become increasingly stronger. In this context, Molenaar referred to 'autonomous' law in contrast to 'heteronomous' law. The former has 'sprung entirely from society itself'; the latter refers to 'labour law that has essentially been provided by government'.

There is also the distinction between 'hard' and 'soft' law. The former implies legal obligations; the latter implies a weaker obligation or no obligation.

Molenaar preferred autonomous law. Van der Heijden called for a new legal order for labour, in which private law must play a larger role than public law. In this context, the ILO uses the concept of social dialogue, which 'describes the involvement of workers, employers and governments in decision-making on employment and workplace issues'. This dialogue can be bipartite, between employees and employers (as social partners) or tripartite, if the government is also involved.

Social dialogue takes place at various levels, i.e. at national (intersectoral), at sectoral and at company level. Collective bargaining relates to fewer than 20% of the workers in paid employment in approximately 60% of the ILO member states.

A new form of collective bargaining is Global Social Dialogue. This involves international unions entering into dialogue with multinationals and concluding so-called IFAs (International Framework Agreements).

The international trade union movement consists of GUFs (Global Union Federations), to which the national sectoral unions of 120 countries are affiliated, and of the ITUC (International Trade Union Confederation), which represents the national union umbrella organisations. The GUFs are the bodies that conclude IFAs. They do so, because IFAs promote employees' rights, reinforce social dialogue and enhance international solidarity.

IFAs matter to multinationals because they are important for maintaining their corporate reputation, because they are part of the obligation to establish a European Works Council, and because the International Finance Corporation as part of World Bank imposes social conditions that can be established in an IFA for granting loans. Moreover, IFAs yield stable relationships between management and workers, and a positive corporate image.

By now, 115 IFAs have been concluded with GUFs. IndustriALL is market leader (43), closely followed by UNI (38). IUF, BWI, PSI and IFJ have 7, 22, 3 and 2 respectively.

Currently, the IFAs focus on entrenching the ILO core conventions regarding freedom of association and collective bargaining, non-discrimination and child labour. These topics are included in nearly all IFAs. Much attention is also paid to employee

protection. The IFAs regulate that wages must be living wages, and that they must be 'decent, adequate, reasonable and fair'. Moreover, the working hours must be reasonable. The directions regarding occupational health and safety must be observed. Furthermore, attention is paid to vocational training and education. A number of IFAs provide that the permanent employment relationship is the guiding principle for (labour and employment conditions) policies.

Equally important are the provisions regarding the supply chain, through which the IFA regulations are extended to include suppliers and subcontractors. The way this is effected ranges from supplying information and encouragement to imposing obligations under penalty of breaking the commercial relationship if the supplier fails to comply with the IFA provisions.

Apart from referring to the ILO core conventions, IFAs also refer to numerous other ILO instruments.

IFAs can have binding powers if they can be characterised as national collective agreements and if they refer any disputes to national courts. This is not often the case. That is why they usually relate to soft law, not being legally enforceable, even if the terminology, which often makes use of the term 'agreement', suggests otherwise.

There is also an IFA for temporary agency work, which was co-signed by UNI Global Union and the corporate members of CIETT, i.e. Adecco, Kelly Services, Manpower Group, Olympic Flexgroup, Randstad and USG People. This IFA constitutes a Memorandum of Understanding. The parties acknowledge that Convention 181 and Recommendation 188 provide a regulatory framework for temporary agency work. Also, they commit to the core conventions that safeguard decent temporary agency work. Moreover, they state that temporary agency work contributes to the improved functioning of the labour market, fulfils the specific needs of both enterprises and jobseekers, and in that sense complements other forms of employment. Furthermore, they acknowledge that further topics will need to come up for discussion.

In addition to referring to Convention 181 and Recommendation 188 the partners advocate fair treatment of temporary agency workers with regard to their basic labour and employment conditions, based on the principle of non-discrimination (for instance, equitable, objective and transparent principles for the calculation of wages and benefits, in accordance with national legislation and practices). Moreover, replacing striking workers is prohibited, without prejudice to national legislation and practices.

The Memorandum has evoked criticism since it involves only one GUF. Temporary agency work does not restrict itself to the work area of one GUF, and therefore this GUF cannot profess to represent all GUFs. A transnational private labour regulation is advocated, potentially resulting in:

– the route through an IFA involving a number of, if not all, GUFs;

- a real collective agreement with its own certification and inspection system, based on the model in the maritime sector;
- a social dialogue between CIETT and the Council of Global Unions (the co-operation of the GUFS).

Besides this Memorandum, CIETT has a Code of Conduct, which calls for respect for laws and regulations, for ethical and professional conduct, for the no fee to worker principle, transparent terms of engagement, for health and safety at work, non-discrimination, workers' rights, confidentiality, quality of service, fair competition, and access to remedy.

Also worth mentioning is the Charter on Temporary Work, which Volkswagen entered into with IndustriALL. Among other things, the partners agreed on the reasonable use of temporary employment or temporary agency work and in the phased implementation of the principle of 'equal pay for equal work'. As a reasonable measure of use, a 5% benchmark is adhered to. If the use increases, consultations are in order. After nine months, 'equal pay for equal work' applies. A temporary agency worker who has worked at Volkswagen for 18 months is entitled to be eligible for permanent employment, provided he or she meets the qualification requirements. What is remarkable about this charter is that the commissioning client leads in these arrangements. This raises the question as to how to deal with the negotiating rights of temporary agency employers, who also have separate agreements with trade unions.

The IFA can be added to the international relations management toolbox. One IFA has been entered into with several multinational employment agencies that promote Convention 181. IFAs generally regulate part of what is also provided by Convention 181, such as the core conventions and provisions protecting employees with regard to wages, working hours, and occupational health and safety. Convention 181 continues to be valuable, containing many specific provisions that are not included in the IFAs. Therefore, IFAs do not replace Convention 181, but they can play an accompanying role in tackling bottlenecks relating to temporary agency work, such as employment insecurity, unequal pay, a weak trade union position, and excessive use of temporary agency workers.

Through supply chain provisions, attention may be paid to decent wages and other labour and employment conditions. Labour market provisions can prioritise permanent employment and encourage reasoned choices in decisions on the use of temporary agency work. Moreover, standards can be set in instances where excessive use is made of temporary agency workers. Thus, IFAs can play a complementary role. Moreover, IFAs provide trade unions with a prominent position in the increasing

globalisation. The Volkswagen Charter may be seen as a promising prospect for mature temporary agency relationships.

Attention must be paid to the equally justified interests of temporary agency employers. Scope for consultation between all parties involved in temporary agency work and opportunities for further synchronisation must likewise be guaranteed.

10.6 'EUROPEANISATION'

How has social law developed at the European level with regard to temporary agency work, and what does this mean for the value and scope of ILO convention 181?

The European Union has had a vast influence on social law development in respect of temporary agency work in Europe. Thanks to the increasing focus on the social dimension in the EU, temporary agency work emerged as an object of regulation. This was first the case when a question was raised as to how the rules coordinating social security should be applied. These regulations provided that only one social security system should apply: the system in the 'country of employment'. However, an exemption obtained (art. 4 Regulation (EEC) 1408/71), providing that the system in the 'country of residence' could continue to apply for a certain period. The question was whether this also applied to temporary agency work. In 1970, the European Court of Justice answered in the affirmative and in fact thus recognised the temporary agency business model.

The Höfner-Marcotron (1990) and Job-Centre (1996) cases jointly constituted a major breakthrough in European law on temporary agency work. These judgments discussed the monopoly position of public placement offices obtaining in various EU countries. The Court ruled that this monopoly violated European competition law. The judgments resulted in a de-monopolisation process in all countries concerned, providing scope for temporary employment services.

The issue of regulating temporary agency work in general had received some attention earlier on. Thus, a draft directive had been presented as early as 1982. By way of tackling distortion of competition (on the basis of art. 100A EC Treaty) an attempt was made to restrict atypical work, which included temporary agency work. Simultaneously, steps were taken to improve the health and safety of temporary workers and temporary agency workers. (on the basis of art. 118A EC Treaty). The latter was successful, resulting in Directive 91/383/EEC, but the attempt to restrict atypical work foundered.

Temporary agency work was also placed on the agenda for the development of the Services Directive and the discussions that were conducted on that score. The first

proposal started from the country-of-origin principle, intending that service providers could operate throughout the EU, under the conditions that applied in their country. Thus, European commissioner Bolkestein opted for the creation of a common market for services. The proposal met with considerable resistance. It was said that this would result in social dumping and to seriously erode the social dimension. As an alternative, the equal treatment principle was introduced, aiming to create a level playing field for both domestic and foreign service providers. Since hardly any regulations on temporary agency work existed, it should certainly be exempted from the Services Directive. In due course, the proposal was watered down considerably and amended from a social perspective, through which temporary agency work was exempted.

This had resulted in highlighting temporary agency work, and the Maastricht Protocol provided scope for considering a social dialogue that could possibly solve the issue of temporary agency work. This social dialogue took place, but prior to this, a Posting of Workers Directive was realised, which was to regulate cross-border work, including temporary agency work, in more detail. This amounted to the EU member states having to ensure that workers posted in their country from another member state would be guaranteed a series of core labour and employment conditions.

In practice, the directive, which also applied to cross-border temporary agency work, contained numerous deficits, such as inadequate access to and exchange of information, and inadequate cooperation and supervision. Also, jurisprudence on the directive proved disadvantageous for workers. For the European judge, the freedoms of the internal market outweighed the social aspects.

Eventually, this resulted in the Enforcement Directive, aimed at remedying the various issues. Those issues have still not been resolved by far. By now, seven EU member states (the Netherlands, France, Germany, Sweden, Belgium, Luxembourg and Austria) are advocating equal pay for equal work in the same workplace. However, nine other member states (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) have spoken out against what they consider to be harmful to the freedoms of the common market. As yet, the European Commission appears to follow the approach advocated by 'the seven' and has submitted a proposal to this end.

A social dialogue on temporary agency work was meant to solve the issue of the general legislation of temporary agency work. ETUC was clearly in favour, UNICE had doubts, but came round under pressure from CIETT. Unfortunately the dialogue failed after nine months of discussions in 2001.

From the start, the points of view diverged considerably and in the course of the negotiations they failed to move much closer together. The trade unions insisted on equal pay, i.e. a remuneration as would be applicable in the user company, unless other arrangements had been made by CLA. For labour and employment conditions other than wages and occupational health and safety, regulations could be left to the member states, following consultation with the social partners. The employers wanted the member states and/or social partners to decide who should be the comparable worker whose wages were to be leading in determining the remuneration. According to the employers, a strict reference to wages would also be in breach of European law (art. 137, par. 6, TEU). During the negotiations, the European Commission appeared to agree with this point of view, which was not conducive to the negotiating process.

In the course of the various negotiation rounds, further items had been added to the workers' wish list, for instance conditions of use, i.e. conditions to the deployment of temporary agency work, and various elements derived from Convention 181 and Recommendation 188. Eventually, the employers conceded that the user company reference was acceptable in respect of occupational health and safety, maximum working hours and minimum resting hours. However, it was not acceptable in respect of the remaining topics, including pay. Employers were willing to accept sectoral and categorial bans, provided they would be evaluated on a regular basis.

In the end, ETUC pulled the plug on the negotiations. A last concession by the employers' chairperson that the user pay reference might yet be acceptable for temporary agency workers with temporary contracts, was ineffective. It was now up to the European Commission to develop a proposal.

In 2002, the Commission presented its proposal. Prior to this, the social temporary agency partners had published their wish lists. They included that non-agency employment and the permanent employment contract would be the most common types of labour, while it was recognised and respected that temporary agency work could contribute to the economic and employment targets of the European Union. The wish list underscored the obligations regarding equal treatment ensuing from both the temporary employment agency's relationship with its workers and the temporary agency worker's relationship with the commissioning client and its personnel. Moreover, it included that – following consultation with social partners – member states would be asked to remove any impediments to the proper functioning of the temporary employment agency, on the understanding that legislation may be needed to combat any abuse.

The Commission's draft directive contained a total of 17 provisions, of which articles 4 and 5 can be regarded as core provisions.

Article 4 states that the member states must regularly and at least every five years review the restrictions or prohibitions on temporary work, and verify that they are still justified. If not, they must be lifted.

Article 5 prescribes at least as favourable treatment in respect of the essential labour and employment conditions, including seniority in the job, as a comparable permanent employee at the user enterprise, unless the difference in treatment is justified by objective reasons. Exemptions are allowed for:

- permanent contracts, if the temporary agency worker continues to be paid in the time between postings. ('German exemption');
- by CLA, on the condition that an adequate level of protection is provided for temporary workers ('Swedish exemption');
- the first six weeks.

The draft directive was strongly criticised. The British had both substantive and technical objections. The 'comparable worker' was not a viable concept and European law rules out the possibility of discussing pay at European level. Moreover, they had no tradition of collective bargaining, which facilitates the above-mentioned exemptions.

The Germans, whose legislation on temporary agency work included a 12-month period after which user-pay was mandatory, had also objected. An amended proposal could not resolve all the issues.

Academics raised doubts as to the feasibility of the equal pay principle. There were said to be sufficient international social law indications to make this principle objectionable.

No progress was made on the draft directive, until a breakthrough was effected in 2008. In the United Kingdom, a deal was concluded between employers, workers and government on a twelve-week 'period of grace' before the user pay would become effective. This agreement paved the way for a new proposal by the Commission.

In a joint declaration, the sectoral social partners on temporary agency work agreed, among other things, that the principle of equal treatment in respect of basic labour and employment conditions must be applied. Any impediments to the adequate functioning of temporary employment agencies must be identified and eliminated, on the understanding that abuse must be combated. Permanent contracts with the temporary employment agency may derogate from the principle of non-discrimination, if the worker continues to be paid between assignments. Derogation by CLA is likewise allowed, as is a so-called qualifying period. A new Commission proposal was effected largely along these lines.

In 2014 the Commission issued a report of the effects of the directive. It concluded that the provisions in the directive had been correctly implemented and applied, although the twin objectives of equal treatment and reconsidering the restrictions on temporary agency work had not yet been fully achieved.

As a result of the many derogation options provided for in article 5, no real effects may have been achieved in specific situations to improve the protection of

temporary agency workers. On the other hand, the review of the restrictions and prohibitions provided for in article 4 has mostly resulted in maintaining the status quo, and even to an extension of the restrictions and prohibitions, rather than having resulted in a new vision on temporary agency work in a modern flexible labour market. Jurisdiction has not yielded a broader scope either.

On the European front, the concept of 'flexicurity' has also drawn considerable attention. The concept plays a role in the attempt to arrive at a common employment policy through the Open Method of Coordination, i.e. by means of employment guidelines. This Luxembourg process focused on four main points, i.e. entrepreneurship, employability, adaptability and equal opportunities.

In order to encourage adaptability, as flexicurity was first termed, agreements to be concluded between social partners are advocated. These agreements ideally include flexible working arrangements, which should strike a new balance between flexibility and security.

Later on, the European Commission specifically addressed the concept, stating that four policy aspects were on the agenda:

- flexible and reliable contractual arrangements;
- comprehensive lifelong learning (CLL);
- effective labour market politics ELMP);
- modern social security systems.

In their social dialogue on temporary agency work, the social temporary agency partners focused on giving shape and substance to the flexicurity concept.

If we consider the extensive regulations on temporary agency work in the EU, it can be established that European law has issued regulations in all the fields provided for by Convention 181. Some are less far-reaching, for instance the status provisions on licensing and certification requirements; others reach further, for example on the equal pay for equal work principle in the Agency Directive, and the key provisions on the working and employment conditions in the Posting Directive. Is Convention 181 still adequate? The EU has regulated 28 topics relating to temporary agency work to a greater or lesser extent, while ILO convention 181 regulates 22 topics.

One might contend that this ILO convention regulates matters less extensively, but as a result has more focus. In that sense, it is adequate for the EU, albeit as a minimum regime.

Looking at those extensive EU laws and regulations on temporary agency work, the question also arises as to whether Convention 181 still has value. A number of aspects are worthy of attention. Firstly, Convention 181 provides focus and, as an international

covenant, it provides guarantees for the adequate protection of temporary agency workers and a proper functioning of temporary employment agencies. As a result of ratification, national governments commit themselves to developing regulations in accordance with the conditions laid down by Convention 181. This includes the fundamental labour rights. Through the Charter of Fundamental Rights, EU law also provides guarantees for those fundamental rights, but only to the extent that they ensue from EU regulations. This conditional binding force does not apply to a ratified covenant such as Convention 181. In this regard, the ILO provisions appear to be stronger than the relevant EU provisions.

Secondly, EU law also comprises contrasts and interpretation issues. The questions raised by, for instance, the Posting Directive cannot be answered unequivocally.

Thirdly, the ILO convention provides a better guarantee for continuity, as it can only be denounced once every ten years.

And lastly, it also provides a guarantee against the prohibition of temporary agency services. The essential merit of Convention 181 is that it conditionally allows service provision by temporary employment agencies. This does not tally with measures that render temporary agency services unfeasible, although specific prohibition may apply.

All in all, Convention 181 offers more focus, clarity and guarantees for respecting fundamental labour rights and continuity of the temporary agency services, also for the EU member states.

10.7 THE DUTCH CONTEXT

How has the Dutch temporary agency legislation developed; which complications have presented themselves, and how can this be assessed in relation to ILO convention 181?

In the Netherlands, work placement had long been the domain of private parties before it became a government concern. Prior to this government involvement, there was a federation of Dutch labour exchanges that can be seen as an important trailblazer of work placement in the Netherlands. During the First World War, this federation could not manage the rising unemployment, so that national work placement fell under government supervision.

The 1930 Placement Act legislated for what had more or less developed in practice. Distinction was made between a nationally operating system of public work placement services and forms of special work placement that were subject to licensing. For-profit placement was subject to licensing, but it was the intention that this system be discontinued. The policy aligned with the ILO's ideas at that time.

In addition to work placement, the 1960s Dutch labour market became acquainted with the phenomenon of manpower provision, which was taken to mean assigning temporary agency workers and posting workers.

Illegal subcontractors were well known, if not infamous, for forcibly recruiting workers and posting them illicitly. They had to be stopped. To this end, the Manpower Provision Act set out to protect the interests of good labour market relations and the interests of a socially strong position of the workers involved. The Dutch Manpower Provision Act remained a dead letter until 1970, when labour riots took place in the Waterweg area. This urged the then Minister to implement a licensing system on the basis of this act.

The 1960s and 1970s were characterised by a difficult relationship between the temporary agency sector and the Minister of Social Affairs and Employment. This only changed in 1982 after the swearing in of the first Lubbers cabinet, which in its first government declaration advocated a generous policy on temporary agency work.

Dutch work placement became more and more comprehensive. It came to be termed 'employment services' and the eponymous body – the employment services organisation – now also supervised manpower provision. This was regulated in the 1990 Employment Services Act, which also regulated the tripartisation of labour market policy.

Due to disappointing results, this tripartisation was reversed in 1996. In this context, the question was raised as to how manpower provision and private work placement should be regulated henceforth.

On being asked for advice, the SER recommended that under ILO Convention 96, which the Netherlands had ratified, a licence was required for private work placement. The views on manpower provision were less unanimous. Workers' representatives were in favour of licensing, and if the licensing system were to be revoked, some legal behavioural standards should at least be implemented, such as a ban on obstructions and a pay equivalence rule. The employers' representatives were in favour of abolishing the licensing requirement and opted for legislation on the scab ban.

In 1994, Minister Melkert introduced his 'flexibility and security' memorandum, which included his policy intentions with regard to temporary employment. He intended to abolish the licensing requirement, but to introduce legal standards, such as a pay equivalence rule, a scab ban and a ban on obstructions. Moreover, he aimed at improving the legal position of the temporary agency worker. Under strong pressure from the temporary agency sector, the 'flexibility and security' memorandum was presented to the Dutch Labour Foundation. This foundation presented a largely unanimous recommendation. It proposed henceforth to qualify the temporary agency relationship as an employment relationship, albeit one with a special charac-

ter, by providing the option of the so-called agency clause, which gave the commissioning client the authority to end this employment relationship. It also provided the option to conclude three fixed-term employment contracts in a three-year period. These new regulations were to have the character of statutory provisions enabling derogations by CLA. Moreover, the foundation recommended establishing a special 'dismissal guideline' for the temporary agency sector. While the pay equivalence rule and the scab ban could be maintained, the ban on obstructions was deemed expendable.

Meanwhile, the temporary agency employers ABU and NBBU on the one hand, and the FNV, CNV, Unie BLHP and LBV on the other, concluded a temporary agency covenant, agreeing to change the temporary agency relationship significantly. A special regime of 'the longer the work period, the more rights for the worker' was developed into a phase structure. During the first two phases, the temporary agency relationship legally ended at the end of the assignment; the third phase was characterised by a limited number (eight) of fixed-term employment contracts that could be concluded in a two-year period. The fourth phase constituted open-ended contracts. Apart from this 'growth contract' the temporary agency covenant included agreements relating to pensions and vocational training.

Minister Melkert's 'flexibility and security' memorandum, the temporary agency covenant and the STAR agreement comprised the fundamental elements of the new flexibility legislation, which have been further developed in the Netherlands Posting of Workers by Intermediaries Act (Waadi Act) and the BW (Dutch Civil Code).

In the summer of 1999, after hearing the Council of State, the Dutch Minister of Foreign Affairs presented Convention 181 to the Upper and Lower Houses of Dutch Parliament for tacit approval. The Minister deemed it desirable to raise or maintain as few obstructions as possible for (re)integrating jobseekers in employment. Private temporary employment or work placement agencies fulfil a useful intermediary function in this respect. The Minister indicated that Dutch law complied with the convention's provisions in all respects.

By the end of 1999 the Posting of Workers Directive was implemented through the Posting of Workers through the Netherlands Terms of Employment (Cross-Border Work) Act (WAGA Act).

Following the turn of the century concerns were raised about increasing fraud in the Dutch temporary agency sector. While the government was in favour of a licensing requirement, this was strongly opposed by the temporary agency sector, and the Lower House did not endorse the government proposal. Through a motion by the MP Bruls, a large majority of the Dutch Lower House preferred a system of self-regulation, which was to be periodically assessed, and a certification system. To this

end, the Dutch Labour Standards Foundation (SNA) was established. By the end of 2015, agencies were entered in the SNA register following certification. An estimated total of 12,000 agencies are thought to engage in manpower provision. Thus, there is a 'grey area' of approximately 8,000 temporary employment agencies. Since 2007, more than 500 enterprises have disappeared from the scene.

Apart from advocating this type of certification, the ABU has also dedicated itself to a conclusive approach of a registration requirement at the Dutch Chamber of Commerce. Minister Kamp has adopted this proposal and introduced a bill with a registration requirement for intermediaries posting workers. The measure was included in the Waadi Act as article 7a. As he did so, the minister was challenged to reintroduce a licensing system. However, after a thorough examination, the minister concluded that this would have considerable implications for the current system of public-private cooperation. There would be a risk that the private sector would cut back on or stop the efforts it had set in motion. This would not be right, since fraudulent practices can only be put an end to by intensive cooperation between the government and the sector. It would be complicated for the government to fill the gap the private sector would then leave behind. The means to do so were lacking, said the minister.

The Temporary Agency Work Directive was implemented simultaneously with the incorporation of the registration requirement through an amendment to the Waadi Act. The Waadi Act already contained a pay equivalence rule. This had to be adjusted to the directive. Instead of wages, benefits and other allowances that are owed in conformity with the wages, benefits and other allowances that are usual at the user enterprise, article 8 Waadi Act now provides the 'right to at least the same labour and employment conditions as those that apply to employees in the same or similar positions at the user enterprise, regarding:

- the wages and other benefits and allowances;
- conditions based on a CLA or another non-legal provision of a general nature that is in force within the enterprise where the assignment takes place, as regards working hours, including overtime, rest periods, work on night shifts, breaks, the duration of the holidays and work performed on public holidays.

The reviews of the restrictions and prohibitions of temporary agency work required by the directive were conducted by the Dutch Labour Foundation. However, this did not result in the lifting or amending of these restrictions and prohibitions. The temporary agency worker's rights to company facilities at the user enterprise, to information on vacancies, and the requirement to encourage vocational training during social dialogue were included in the Waadi Act. The labour co-partnership provisions were included in the Dutch Work Councils Act (WOR). Apart from the public-private

approach, Dutch temporary agency work legislation is strongly influenced by the CLAs on temporary agency work that have been agreed on since the 1970s.

Following a legislative development that could be described as positive, particularly since the Dutch government and social partners had finally come to an agreement, a turning point now appears to be within reach, where continuing consensus is increasingly harder to find. It is marked by the Dutch Security for Flexibility bill, which aims to restrict flexible labour in general, by means of proposals including the granting of severance pay when the temporary contract ends; a month's salary for every working year; changing the 3-in-3 rule into the 2-in-2 rule; a payrolling approach and restricting the application of the agency clause to 18 months. The proposal originated with the then opposition (SP/PvdA), but as a result of the 'recolouring' that arose through the Second Rutte cabinet, these ideas also ended up on the government table and even in the social partnership agreement concluded in the spring of 2013. This agreement dealt extensively with the need for a responsible use of external flexibility and flexible employment contracts. In this respect, the social partners suggested six routes:

1. combating improper use of flexible labour relations, such as sham arrangements and the foreign agencies routes;
2. enforcement and compliance;
3. better regulation of contracting responsibilities;
4. combating excessive use of legal forms of flexible labour;
5. improved structuring of so-called tripartite relationships;
6. investing in employability and training of flexible workers.

The Work and Security Act and the Act on Combating Sham Arrangements were important showpieces ensuing from this social partnership agreement. The Work and Security Act streamlined dismissal law and restricted flexible labour. Thus the 3-3-3 chain provision, i.e. a maximum of three contracts in a maximum period of three years with a three-month break in between assignments was changed into 3-2-6, i.e. a maximum of three contracts in a maximum period of two years with six-month breaks in between assignments. There were notice periods for fixed-term contracts exceeding six months, and there was a ban on probation periods for that type of contracts. In principle, a competition clause is forbidden for temporary contracts. After the legal period of 26 weeks, the agency clause could only be extended by another 52 weeks by CLA. On-call contracts were amended by shifting the principle from 'no work, no pay' to 'no work, still pay, unless…'.

As regards the regulations on temporary agency work, hardly any material changes were made. The agency clause for temporary agency work continues to be possible for 78 weeks, followed by a maximum of six (formerly eight) contracts in a four-year

period. All this had already been taken into account by the ABU CLA. The NBBU CLA had to be amended by reducing its maximum agency period from 104 weeks to 78.

The question is whether these amendments will actually lead to an increase of permanent contracts, as the act had intended. The signs do not appear to be overly positive. The developments are reminiscent of the saying: 'You can lead a horse to water, but you cannot make it drink'.

The Act on Combating Sham Arrangements is part of a more comprehensive set of instruments to tackle various forms of malpractice. This act deals mainly with supporting workers in the case of non-payment of the wages owed, or underpayment. To this end, sequential liability was included in the Dutch Civil Code. The guiding principle is that all the links in the chain that originates when other enterprises are commissioned are jointly responsible for the wages owed to the worker in that chain. If the worker does not receive the wages owed to him or her, he or she can consecutively make every link in the chain liable to pay the wages.

It was also arranged in the social partnership agreement that improvements should be made to the structuring of tripartite relationships. An approach to payrolling and a further analysis of these relationships was necessary in order to promote sustainable labour relationships that offer good prospects and fulfil justified employee and employer needs. The Dutch Labour Foundation was expected to submit an advice on this subject, but apparently has not yet managed to do so.

In 2013, the self-regulation of the temporary agency sector was called into question again. Minister Asscher wished to reassess the system of self-regulation and reconsider introducing a licensing system. This put the question 'licence or certificate?' back on the political agenda. In close consultation with all the stakeholders, a package of 28 measures was agreed on that should result in improving compliance behaviour and tackle fraudulence more effectively.

By the end of 2015, nearly all measures had been implemented. The minister appeared to be satisfied for the time being and thus continued to strive for adequately functioning self-regulation involving a distinctive hallmark, in combination with enforcement by the government. It is regrettable that the trade unions concerned, FNV and CNV Vakmensen, have since then ended their participation in the hallmark. They feel that the product development of the temporary agency sector is moving in a direction they find undesirable. They particularly do not want to support the legitimisation of new forms such as contracting and placement of self-employed workers.
The minister has introduced a bill that not only implements the Enforcement Directive, but also integrates the WAGA Act. The WAGA Act was repealed in June 2016, to be replaced by Terms of Employment Posted Workers in the EU Act (WagwEU).

The minister is also occupying himself with the issue of payrolling. A motion by the Member of Dutch Parliament Hamer, requesting equal treatment of payroll workers, which was adopted by the Lower House, compels the minister to take action.

Payrolling is a growing phenomenon that fulfils the need for outsourcing employership. However, it also raises questions: for instance, as to whether the flexibility legislation incorporated into Dutch Civil Law actually applies to this phenomenon and thus whether this would be at all acceptable. Academia is divided and jurisdiction yields variable judgments. The debate has particularly focused on whether there is an allocative factor, as is the case with traditional temporary agency work. For now, the minister appears to disregard the Hamer motion.

Reviewing the discussion on payrolling, it seems to me that we are dealing with a type of manpower provision that has also been regulated in Convention 181. Ricca already pointed out 17 forms of private mediation, including contract labour agencies and staff leasing agencies. In ILO terms, we are dealing with labour-only contracting, and it can be deduced from the history of the contract labour discussion that this is largely synonymous to temporary agency work. When the Dutch Lower House discussed the flexibility regulation, particularly the amendments to the Dutch Civil Code, it likewise adopted a broad definition of the secondment agreement. The Minister stated that legislation not only pertains to the agency employment relationship, but *to all other tripartite relationships* where the employer places the worker at the disposal of a third party within the framework of his business or professional practice, in order to perform work under supervision and direction of that third party.

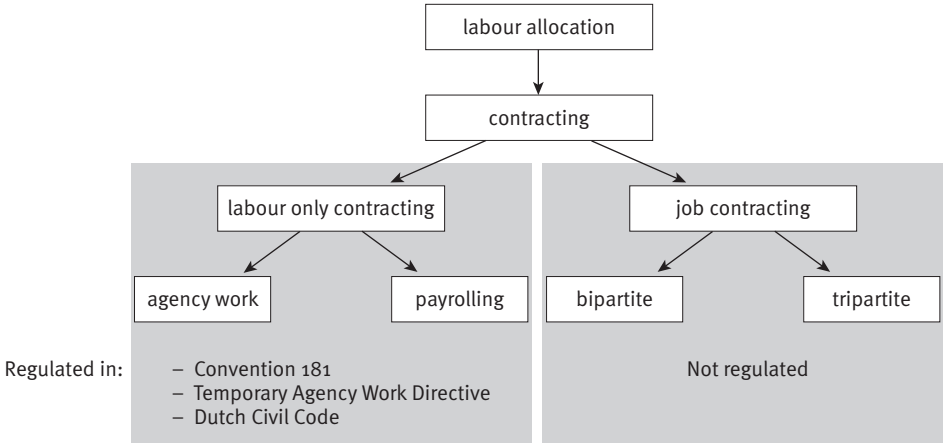
The discussion attempts to reduce the scope of temporary agency work through the necessary element of the 'labour allocation'. But who is to say that payrolling does not involve matching demand and supply?

A similar question might be asked in respect of contracting. In ILO terms, this amounts to job contracting, which, as we know, has not been regulated in international law. Nor has it been regulated in Dutch law. The same applies to the phenomenon of the self-employed worker. This type of self-employment yields income and labour cost benefits, which can be considered as unreasonable when compared with employment. Self-employment also raises doubts as to whether it does not undermine the financial basis of the social security system.

In the course of time, temporary agency work has been joined by various other forms of flexible labour. Ricca already remarked on the vast dynamism of this sector. During the past years (2003–2015) flexible labour has increased considerably (62%), while the number of permanent positions have been much reduced (–11%). During this period, the proportion of self-employed workers increased by 61%. Temporary agency work has not kept pace with the growth of flexible labour. The proportion

of on-call/replacement workers and self-employed workers grew substantially faster. With respect to the Netherlands, the OECD reports a sizeable increase in job insecurity, although it is balanced by a relatively modest income insecurity.

The question is also to what extent all this impels further regulations. The Netherlands easily complies with the standards set by Convention 181. Thus labour-only contracting has been regulated. What has not been regulated is bipartite and tripartite job contracting. Internationally and in the Netherlands, here is a loophole that should be acted upon.



10.8 TO CONCLUDE

To conclude, I shall answer the key question as to whether Convention 181 is (still) adequate in the light of what has been noted in the answers to the sub-questions.

There is evidence of unfulfilled wishes in respect of the more extensive international regulation of temporary agency work, for instance, further implementation of the equal treatment requirements, regulation of fixed-term contracts, a more extensive instrument (than Convention 181 is) for tripartite relationships, regulation of the use of temporary agency work, clarification of the trade unions' position in tripartite relationships. However, the question is whether this should be regulated by amending Convention 181. The Convention as such is clear, addressing the topics that need to be addressed and meeting a growing need. It is one of the most important ratified ILO conventions that have been realised since 1990.

As a minimum regulation, it is certainly sufficient. The deficits that have been noted can also be solved by means of specific regulations, such as are currently being developed.

Temporary agency work under Convention 181 more than meets the indicators used by the ILO for the concept of decent work. Only the aspect of job security leaves something to be desired. However, ILO convention 158 and the associated recommendation 166 that regulate this issue leave scope for deviation from the open-ended contract, which can still be considered the cornerstone of the employment system, even though employers request a revision. Now that deviations are possible and the convention appears to be somewhat controversial, one might wonder whether temporary agency work should be designated as not decent for this reason alone. The importance of Convention 181 in the battle against informal labour and human trafficking is also crucial. Nor has the developing human rights regime of the business sector substantially affected the adequacy and value of Convention 181. The convention is more specific in nature; it implies obligations upon ratification and takes fundamental workers' rights into account. Thus, it has retained its value independently from the human rights regimes.

The IFAS are important instruments for additional arrangements relating to temporary agency work. Making such arrangements complements rather than replaces Convention 181.

By now, the EU also has an extensive and growing regulatory framework for temporary agency work in place and may have put Convention 181 into perspective for its member states. Still, even for the EU member states, Convention 181 does have value. It provides more focus, clarity and guarantees for respecting fundamental workers' rights and for the continuity of temporary employment agency services.

The Dutch public-private regulatory framework for temporary agency work easily complies with Convention 181. The development and particularly the complications of this framework support the view that, apart from an ILO regulatory framework for labour-only contracting, which Convention 181 actually is, there should be an international and national regulatory framework for job contracting. This framework can also be based on the OECD Guidelines.

All in all, Convention 181 has values and is certainly adequate as a minimum regulation. Labour-only contracting has been decently regulated in this convention. This does not hold true for bipartite and tripartite job contracting. It has not taken shape at an international level. Drawing up an inventory on the Dutch development and complications makes clear that in addition to temporary agency work, other forms of flexible labour have emerged, such as payrolling, contracting and self-employment, demanding further regulation parallel to the regulation of temporary agency work.

This calls for an integral view on flexible labour, which will create a level playing field. In any event, Convention 181 combats informal labour and human trafficking, and indicates a need for further promotion of decent flexibility.

Bibliography

Abbott K. W. & D. Snidal (z.j.), *Three Things Distinguish Hard from Soft Law*, https://clg.portalxm.com/library/keytext.cfm?keytext_id=66.

ABU (2008), *Registratie en certificering tegen misbruik en uitzending* (report 15 May 2008), Lijnden: ABU.

ABU (2015), *Verbreding dienstverlening uitzendbureaus zet door* (press release 22 October), Lijnden: Algemene Bond Uitzendondernemingen.

Adecco Group (z.j.), *Adecco Group Human and Labour Rights Guidelines* (http://www.adecco.com/en-US/csr/Documents/adecco-group-human-rights-guidelines-2013.pdf).

Adecco Group (2014), CSR *Communication on Progress 2013/2014*, http://www.adecco.nl/SiteCollectionDocuments/adecco-csr-2013–2014.pdf.

Adecco Group (2015), CSR *Communication on Progress 2013/2014*, http://www.adecco.com/en-US/csr/Documents/adecco-csr-2014.pdf.

Adjovi, R. (2012), 'Understanding the African Charter on Human and Peoples' Rights', *Think Africa Press*, 5 nov. (http://thinkafricapress.com/international-law-africa/african-charter-human-peoples-rights).

Ahlberg, K., B. Berensson, N. Bruun, H. Kontouros, C. Vigneau & L. Zappalà (1999), *Fixed-term work in the EU; A European agreement against discrimination and abuse*, Stockholm: National Institute for Working Life & Swedish Trade Unions.

Ahlberg, K., B. Bercusson, N. Bruun, H. Kountouros, C. Vigneau & L. Zappalà (2008), *Transnational Labour Regulation; a Case Study of Temporary Agency Work* (Work and Society vol. 60), Brussels/Bern/Berlin/Frankfurt am Main/New York/Oxford/Vienna: Peter Lang.

Ahmed, G. (2011), *Private Employment Agencies in Marocco*, working paper no. 283, Geneva: International Labour Office, p. 9, 13.

Albeda, W., H. J. van de Braak & G. M. J. Veldkamp (1972), *Uitzendarbeid: ontwikkeling en verwikkeling*, Rotterdam: Universitaire Pers.

Andersson, Elffers & Felix (1982), *Achtergronden van uitzendarbeid*, The Hague: Ministerie van SZW.

Andersson, F., H. J. Holzer & J. Lane (2007), *Temporary help agencies and the advancement prospects of low earners* (working paper no. 13434), Cambridge MA: National Bureau of Economic Research.

Anker, R., I. Chernyshev, Ph. Eager, F. Mehran & J. Ritter (2002), *Measuring Decent Work with Statistical Indications* (working paper no. 2), Policy Integration Department Statistical Development and Analyses Group, Geneva: ILO.

Asscher, L. (2015), *Naar een nieuw sociaal contract: over de waarde van de middenklasse* (Drees-lezing), www.rijksoverheid.nl/documenten/toespraken/2015/09/24/dreeslezing-minister-asscher.

Asscher-Vonk, I. P. (1997), 'Flex en Zeker: de uitzendkracht', SMA (52) 7/8, p. 376–380.

Atleson, J., L. Compa, K. Rittich, C. W. Sharpe & M. S. Weiss (2008), *International Labor Law, Cases and Materials on Worker's Rights in the Global Economy*, St. Paul: Thomson West (American Casebook Series).

Autor, D. H. & S. N. Houseman (2010), 'Do temporary-help jobs improve labor market outcomes for low-skilled workers? Evidence from 'Work First'' *American Economic Journal: Applied Economics*, vol.2, no.3, p. 96–128.

AWVN (2014), *Een verantwoorde weg naar groei* (Manifest opgesteld ter gelegenheid van het AWVN-jaarcongres), The Hague: Algemene Wergeversvereniging Nederland.

Backer, L. C. (2009), 'Rights and Accountability in Development (Raid) v. Das Air and Global Witness v. Agrimex; Small Steps towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations', *Melbourne Journal of International Law* 13 (10) 1, p. 258–307.

Bain and Company (2007), *More work opportunities for more people; unlocking the private employment agency industry's contribution to a better functioning labour market*, Brussels: Eurociett.

Barbier, J. C. (2011), *Employment precariousness in an European cross-national perspective; a sociological view over 30 years of research*, presented 15th May 2011 Seminar, The standardisation of employment, Cologne University, p. 1–35.

Barbier, J. C. (2013), 'A Conceptual Approach of the Destandardization of Employment in Europe since the 1970's', in: M. Koch & M. Fritz (red.), *Non-standard Employment in Europe; paradigms, prevalence and policy responses*, Houndmills: Palgrave Mac Millan, p. 13–28.

Barnard, C. (2012), EU *Employment Law* (4th ed.), Oxford: Oxford University Press.

Bassanini, A. & Cazes, S. (2014), 'Non-regular employment, job security and the labour market divide', OECD *Employment Outlook*, OECD.

Bates, E. (2010) 'History', in: Moeckli, D., S. Shah & S. Sivakumaran (red.), *International Human Rights Law*, Oxford: Oxford University Press.

BCG (2011), *Adapting to Change; How private employment services facilitate adaptation to change, better labour markets and decent work*, Brussels: CIETT.

BDA (2012), *Fact Sheet*, 30-7-2012, Bundesvereinigung der Deutschen Arbeitgeberverbände.

Bekker, S. (2011), *Flexicurity; explaining the development of an European concept*, Nijmegen: Ipskamp.

Bekkum, R. van (1996), *Tussen vraag en aanbod; op zoek naar de identiteit van de arbeidsvoorzieningsorganisatie*, The Hague: SDU.

Benassi, C. (2016), 'Extending solidarity rather than bargaining concessions; The IG Metall campaign for agency workers', ETUI *Policy Brief, European Economic, Employment and Social Policy*, no. 1.

Benjamin, P. (2013), Law and Practice of Private Employment Agencywork in South Africa, working paper no. 292, Geneva: ILO.

Bergström, O., K. Håkansson, Isidorsson, T. & Walter, L. (2007), Den nya arbetsmarknaden; Bemanningsbranchens etablering i Sverige, Lund: Academia Adacta.

Berkhout, E. & E. van den Berg (2010), Bridging the gap, Amsterdam: Randstad.

Berkhout, E., A. Heyma & J. Prins (2013), *Flexibility@work 2013; yearly report on flexible labor and employment*, Amsterdam: SEO.

Bescond, D., A. Châtaigner & F. Mehran, 'Seven indicators to measure decent work: an international comparison', *International Labour Review* (2003), vol. 142, nr. 2, p. 179–212.

Betten, L. (red.) (1997), *Ongelijkheidscompensatie als roode draad in het recht* (Roodbundel), Deventer: Kluwer.

Bevers, E. M. (2015), 'Uitzenden of payrolling? Of is dat hetzelfde?' *Opmaat Arbeidsrecht* (Nieuwsbericht 16 maart, 144), http://www.clingendaeladvocaten.nl/pdf/pers52.pdf.

Bhorat, H. e.a. (2013), *The determinants of wage inequality in South Africa* (ILO Country Case Studies on Inequality), Geneva, ILO, unpublished.

Bienefelt, I. (2005), *Maatschappelijk verantwoord ondernemen; het dilemma van modern ondernemen* (masterthesis arbeid en organisatie van management), Rotterdam: Erasmus University (http://webcache.googleusercontent.com/search?q=cache:wwgzNr1uni4J:thesis.eur.nl/pub/3667/Bienefelt_282188LB%2520scriptie.pdf+&cd=2&hl=nl&ct=clnk&gl=nl).

Bijpost, L. (2015), 'Contracting: een nieuw fenomeen in het stelsel van arbeidsrelaties?', *Tijdschrift Recht en Arbeid* 4 (1), p. 13–17.

Blanchflower, D. G. (2015), *Flexibility@work; self-employment across countries in the Great Recession of 2008-2014* (part II , yearly report on flexible labor and employment), Amsterdam: Randstad.

Blanpain, R. (red.) (1999), *Private Employment Agencies; The Impact of ILO Convention 181 (1997) and the Judgement of the European Court of Justice of 11 December 1997* (Bulletin of Comparative Labour Relations), Berlin/Heidelberg: Springer.

Blanpain, R. (2012), *Hebben de vakbonden nog een toekomst? De vrijheid van vakvereniging naar internationaal, Europees en Belgisch recht*, Bruges: die Keure.

Blanpain, R. & Graham, R. (2004), *Temporary Agency Work and the Information Society* (reports given at the International Conference on Temporary Agency Work and the Information Society, Brussels 2003) (Bulletin of Comparative Labour Relations), The Hague/New York: Kluwer Law International.

Blanpain, R. & S. Marassi (2015), *Globalization and Transnational Collective Labour Relations; International and European Framework Agreements at Company Level*, Alphen aan den Rijn: Kluwer Law International.

Bondt, H. de & D. Grijpstra (2008), *Nieuwe grenzen, oude praktijken; onderzoek naar malafide bemiddelaars op de arbeidsmarkt, eindrapport* (sudy commissioned by SNCU), Leiden: Research voor Beleid.

Bonnet, F., J. B. Fiqueiredo & G. Standing, 'A family of decent work indexes', *International Labour Review* (vol. 142) 2003, no. 2.

Boonstra, K. (2010), '90 jaar ILO: 90 jaar roeien tegen de stroom in?', In K. Boonstra (red.), *Negentig jaar Internationale Arbeidsorganisatie* (Vereniging voor Arbeidsrecht, 38), Deventer: Kluwer, p. 1–22.

Boonstra, K. (2014), 'Decent work and globalisering: (on)verenigbare begrippen', in: E. Verhulp & G. J. J. Heerma van Voss (red.), *De waarde(n) van het arbeidsrecht, Liber amicorum voor prof. mr. Paul F. van der Heijden*, The Hague: Sdu, p. 1–12.

Boot, G. C., A. R. Houweling & M. J. M. T. Keulaerds (2015), *Parlementaire geschiedenis Wet werk en zekerheid*, The Hague: Boom Juridische Uitgevers.

Bosch, G., 'Towards a New Standard Employment Relationship in Western Europe', *British Journal of Industrial Relations*, Vol. 42, no. 4, December 2004, p. 617–636. Available at SSRN: http://ssrn.com/abstract=631263.

Bourdieu, P. (1998), *Contrefeux*, Paris: Liber Raisons d'agir.

Bregman, R. (2014), *Gratis geld voor iedereen*, Amsterdam: De Correspondent.

Bronstein, A. (2009), *International and Comparative Labour Law; Current Challenges*, London, Houndmills: Palgrave Macmillan/ILO.

Burchell, B., K. Sehnbruch, A. Piasna & Nurjk Agloni, 'The quality of employment and decent work: definitions, methodologies and ongoing debates', *Cambridge Journal of Economics*, first published online: december 4, 2013.

Buitenweg, R., K. Buitenweg & J. Temperman (2014), *Het sociale gezicht van Europa; een mensenrechtenperspectief*, The Hague: Boom Juridische Uitgevers

Buma, S. & P. Heerma (2015), 'Loonbetaling bij ziekte moet veel korter', *de Volkskrant*, 1 dec.

Business and Human Rights Initiative (2010), *How to do business with respect for human rights; a guidance tool for companies*, The Hague: Global Compact Network Netherlands.

C034 (1933), Fee-Charging Employment Agencies Convention (No. 34).

C096 (1949), Fee-Charging Employment Agencies Convention (Revised) (No. 96).
C181 (1997), Private Employment Agencies Convention (No. 181).
Cadbury, A. (1992), *Report of the Committee on the Financial Aspects of Corporate Governance*, London: The Committee on the Financial Aspects of Corporate Governance/Gee.
Capelli, P.H. & J.R. Keller (2013), 'A Study of the Extent and Potential Causes of Alternative Employment Arrangements', *Industrial and Labor Relations Review*, vol. 66, no. 4, p. 873–901.
Carey, M.L. & K.L. Hazelbaker (1986), 'Employment growth in the temporary help industry', *Monthly Labor Review*, vol. 109, no. 4, pp. 37–44.
Casale, G. (red.) (2011), *The employment relationship; a comparative overview*, Oxford: Hart.
Casale, G. & A. Perulli (2014), *Towards the Single Employment Contract; Comparative Reflections*, Oxford/Portland OR: Hart; Geneva: International Labour Office.
Cats, R. (2016a) 'Buitenlands bedrijf moet Nederlandse klus melden', *Het Financieele Dagblad*, 10 februari, p. 3.
Cats, R. (2016b), 'Vrij verkeer van diensten moet eerlijker en socialer', *Het Financieele Dagblad*, 19 april.
Cazes, S., S. Khatiwada & M. Malo (2012), *Employment protection and collective bargaining; beyond the deregulation agenda* (Employment Working Paper No. 133), Geneva: ILO.
CBS (2015), 'Positie werkkring en arbeidsduur: aantal vaste werknemers niet verder gedaald', 13 november, http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/arbeidsmarkt-vogelvlucht/korte-termijn-ontw/vv-positie-werkkring-arbeidsduur-art.htm.
CGU (2012), Amended Principals; Global Union Principals on Temporary Work Agencies, Council of Global Unions, Sixth Annual Meeting, Nyon, Switzerland, 23–24 januari 2012.
Chaignon, A. & C. Rousseau (2014), 'Les chômeurs bientôt livrés à des bureaux d'embauche privé?', *L'Humanité*, 15-12-2014.
Cheyvialle, A. (2016), 'En Italie. Renzi le réformateur a inversé la courbe de chômage', *Le Figaro* 1-2-2016.
Christe, D. (2001), 'Uitzendovereenkomst' in: R.M. Beltzer, E. Verhulp, K. Boonstra, D. Christe & J. Riphagen, *Flexibele arbeidsrelaties* (Monografieën sociaal recht 25), Deventer: Kluwer, p. 166–198.
Christensen, C. (2011), *The Innovator's Dilemma; The Revolutionary Book That Will Change the Way You Do Business*, Boston MA: Harper Business Review Press.
CIETT (2000a), *Possible Contents of a European Directive on Employment Agencies; Explanatory memorandum*.

CIETT (2000b), *Orchestrating the Evolution of Private Employment Agencies towards a Stronger Society*, Brussels: CIETT.

CIETT (2014), *Economic Report; 2014 Edition (based on data 2012/2013)*, Brussels: CIETT.

CIETT (2015), *Economic Report; 2015 Edition (based on data 2013/2014)*, Brussels: CIETT.

CIETT & Euro-Ciett (2015), *Public Affairs Report*, no. 6.

Clement, W., W. Matthieu, S. Prus & E. Uckardesler (2010), 'Precarious lives in the new economy: comparative intersectinal analysis', working paper, in: L. F. Vosko (red.), *Gender and the Contours of Precarious Employment*, London/New York: Routledge, p. 240–255.

Cliteur, P. B. (1999), *De filosofie van mensenrechten* (2e druk), Nijmegen: Ars Aequi Libri.

Colucci, M. (2004), 'Italy', in: R. Blanpain & R. Graham (red.), *Temporary Agency Work and the Information Society* (reports given at the International Conference on Temporary Agency Work and the Information Society, Brussels 2003) (Bulletin of Comparative Labour Relations), The Hague/New York: Kluwer Law International, p. 143–158.

Commissie EG (1993), *Groenboek Europees Sociaal Beleid, Opties voor de Unie*, COM(93)551, Brussels/Luxembourg.

Commission of the European Communities (1985), *Completing the Internal Market; White Paper from the Commission to the European Council*, COM (85) 310, Brussels.

Commission of the European Communities (2006), *Modernising labour law to meet the challenges of the 21st century*, Green Paper, COM(2006) 708 final, Brussels.

Commission of the European Communities (2008), *Report on the* EU*-contribution to the promotion of Decent Work in the world*, SEC(2008) 2184, Brussels.

Commissie van de Europese Gemeenschappen (1994), *Europees Sociaal Beleid; Toekomstige Acties voor de Unie, een Witboek*, COM(94) 33, Brussels: Directoraat-Generaal Werkgelegenheid, Industriële Betrekkingen en Sociale Zaken.

Compa, L. A. (2000), Unfair Advantage; Workers Freedom of Association in the United States under International Human Rights Standards, New York: Human Rights Watch.

Compa, L. A. (2010), A *Strange Case; Violations of Workers' Freedom of Association in the United States by European Multinational Corporations*, New York: Human Rights Watch.

Company Law Review Steering Group (2000), *Modern Company Law for a Competitive Economy; Developing the Framework*, London: DTI.

Connors, J. & M. Schmidt (2014), 'United Nations', in: D. Moeckli, S. Shaw & S. Sivakumaran (red.), *International Human Rights Law* (2nd edition), Oxford: Oxford University Press.

Cotton, E. (2015), 'Transnational regulation of temporary agency work, compromised partnership between Private Employment Agencies and Global Union Federations', *Work, employment and society*, vol. 29 (1), p. 137–153.

Croucher, R. & E. Cotton (2011), *Global Unions, Global Business; Global Union Federations and International Business* (2e dr.), Faringdon: Libri.

Da Costa, I. & U. Rehfeldt (2011) 'Transnational Restructuring Agreements: General Overview and Specific Evidence from the European Automobile Sector', in: Papadakis, K. (red.), Shaping Global Industrial Relations: *The Impact of International Framework Agreements*, Geneva/London: International Labour Office/ Palgrave Macmillan (Advances in Labour Studies), p. 143–163.

Dam, C. van (2008), *Onderneming en mensenrechten; zorgvuldigheidsnormen voor ondernemingen ter voorkoming van betrokkenheid bij schending van mensenrechten*, The Hague: Boom Juridische Uitgevers.

Dam, C.C. van (2015), *Enhancing Human Rights Protection: a Company Lawyer's Business* (inaugural lecture), Rotterdam: Rotterdam School of Management.

De Felice, D. (2015) 'Business and Human Rights Indicators to Measure the Corporate Responsability to Respect: Challenges and Opportunities', *Human Rights Quarterly* 37 (2), p. 511–555.

Dekker, F., R. v.d. Veen & B. Peper (2012), 'Herziening van sociale zekerheid; het perspectief van flexwerkers en zelfstandigen', *Beleid en Maatschappij* (39) 3, p. 297–310.

Dekker, W. (2016), 'CNV wil tarief zzp'ers in cao vastleggen', *de Volkskrant*, 7 March.

Dekker, W. & E. van den Outenaar (2014), 'Tien keer zoveel toezicht maar meer schandalen' (interview met Paul Fentrop, oud-hoogleraar Corporate Governance), *de Volkskrant*, 15 November 2014.

De Stefano, V. (2016), *The rise of the 'just-in-time workforce': on-demand work, crowdwork and labour protection in the 'gig economy'* (Conditions of Work and Employment Series no. 71), Geneva: ILO.

Dijkema, J., P. Bolhuis & M. Engelen (2006), *Grenzen verleggen; een onderzoek naar grensoverschrijdende arbeidsbemiddeling in 2006* (final report study commissioned by ABU), Leiden: Research voor Beleid.

Dooyeweerd, H. (1935), *De wijsbegeerte der wetsidee. Boek 1; de wetsidee als grondlegging der wijsbegeerte*, Amsterdam: Paris.

Doussard, M. (2013), *Degraded Work; the struggle at the bottom of the labor market*, Minneapolis/London: University of Minnesota Press.

Drahokoupil, J. (2015), *The outsourcing challenge; organizing workers across fragmented production networks*, Brussels: ETUI.

Drongelen, J. van & W. J. P. M. Fase (2005), *De Wet allocatie arbeidskrachten door intermediairs (Waadi)*, Zutphen: Paris.

Drongelen, J. van & A. D. M. van Rijs (2012), *Wet allocatie arbeidskrachten door intermediairs; implementatie van de Uitzendrichtlijn* (Parlementaire geschiedenis arbeidsrecht 1), Zutphen: Paris.

Drongelen, J. van & A. D. M. van Rijs (2014), *Wet allocatie arbeidskrachten door intermediairs; Wet registratieplicht intermediairs die arbeidskrachten ter beschikking stellen* (Parlementaire geschiedenis arbeidsrecht 2), Zutphen: Paris.

Drouin, R.-C. (2010), 'Promoting Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges', *Comparative Labor Law and Policy Journal*, vol. 31, no. 3, p. 591–636.

Duran Lopez, F. & F. Martinez Rodriques (1999), 'Spain', in: R. Blanpain (red.), *Private Employment Agencies; The Impact of ILO Convention 181 (1997) and the Judgement of the European Court of Justice of 11 December 1997* (Bulletin of Comparative Labour Relations), Berlin/Heidelberg: Springer, p. 313–334.

Ebisui, M. (2012), *Non-standard workers; good practice of social dialogue and collective bargaining* (Working paper no. 36), Geneva: ILO.

Eck, S. van (2013), Agency work in Namibia and South Africa; issues gained from the decent work agenda and the flexicurity approach (draft), Paper prepared for the Labour Law research network (labour law) international conference, Barcelona, 14–15 June 2013.

Eichhorst, W & V. Tobsch (2013), *Has atypical work become typical in Germany? Country case study on labour market segmentation* (Employment Working Paper no. 145), Geneva: ILO.

Eijsbouts, A. J. A. J. (unpublished, for perusal), *Corporate Codes as private regulatory instruments on corporate governance and responsibility and their enforcement*.

Eijsbouts, A. J. A. J. (2010), 'Elementaire beginselen van Maatschappelijk Verantwoord Ondernemerschap' in: A. J. A. J. Eijsbouts, F. G. H. Kristen, J. M. de Jongh, A. J. P. Schild & L. Timmerman (red.), *Maatschappelijk Verantwoord Ondernemen; preadviezen, Handelingen Nederlandse Juristen Vereniging*, 140 (1), Deventer: Kluwer, p. 50.

Eijsbouts, A. J. A. J. (2011), *Corporate responsibility, beyond voluntarism; Regulatory options to reinforce the licence to operate* (inaugural lecture), Maastricht: Maastricht University Press.

Eijsbouts, A. J. A. J. (2012), 'Mensenrechten in bedrijf. De UN Guiding Principles on Human Rights 2011, een nieuwe hoeksteen van maatschappelijk verantwoord ondernemen', *Ars Aequi* (11), p. 812–822.

Eijsbouts, A. J. A. J., F. G. H. Kristen, J. M. de Jongh, A. J. P. Schild & L. Timmerman (2010), 'Maatschappelijk Verantwoord Ondernemen: naast, in of met recht?', in: A. J. A. J. Eijsbouts, F. G. H. Kristen, J. M. de Jongh, A. J. P. Schild & L. Timmerman

(red.), *Maatschappelijk Verantwoord Ondernemen; preadviezen, Handelingen Nederlandse Juristen Vereniging*, 140e jaargang (1), Deventer: Kluwer, p. 28 e.v.

Elkington, J. (1997), *Cannibals with Forks; The Triple Bottom Line of 21st Century Business*, Oxford: Capstone.

Esveld, N. E. H. van (1968), 'Arbeidsrecht', in: H. L. Bakels (red.), *Nederlands Recht in kort bestek* (2e dr.), Deventer: Æ. E Kluwer, p. 307.

ETUC (2010), *A revision of the posting of workers directive; eight proposals for improvement, final report from the* ETUC *expert group on posting*, Brussels: ETUC/CES.

Euro-Ciett (2007), *At the heart of Flexicurity; the contribution of private employment agencies to flexicurity and a better functioning labour market in Europe*, Brussels.

Euro-Ciett/Uni-Europa (2007), *Joint Declaration within the framework of the 'Flexicurity debate' as launched and defined by the* EU *Commission*, Brussels.

Euro-Ciett/Uni-Europa (2008) *Joint Declaration on the Directive on working conditions for temporary agency workers,* Brussels.

European Commission (1993), *Growth, competitiveness, employment – The challenges and ways forward into the 21st century – White Paper*, COM 93 (700), Luxembourg: Office for Official Publications of the European Communities.

European Commission (2008a), *Commission recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services*, PB, 4.4.2008, C85/1.

European Commission (2008b), *Report from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions on the application of Directive 2008/104/EC on temporary agencywork*, SWD (2014) 108 final, Brussels: European Commission.

European Commisson (2012), *Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, COM/2012/0131 final-2012/0061 (COD).

European Commission (2016), *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, COM (2012) 286 final.

Fashouin, T., M. Tiraboschi, M. Sargant & M. Ori, (2013), *Vulnerable Workers and Precarious Working*, Cambridge: Cambridge Scholars.

Fichter, M. & M. Helfen (2011), 'Going Local with Global Policies: Implementing International Framework Agreements in Brazil and the United States', in: K. Papadakis (red.), *Shaping Global Labour Relations; The Impact of International Framework Agreements*, Houndmills: Palgrave Macmillan, p. 85–115.

Financieele Dagblad, Het (2014), 'Flex bestrijden is achterhoedegevecht', 4 December.

flexmarkt (2014), 'TNO: flexarbeid groeit naar 30% in 2020', 19 mei, http://www.flexmarkt.nl/Branche-Informatie/Algemeen/2014/5/TNO-flexarbeid-groeit-naar-30-in-2020-1524866W/.

FNV (2015), *Contracting, balletje-balletje op de arbeidsmarkt* (rapport), https://www.fnv.nl/site/nieuws/webassistent/l.vermeulen/Ontduiking_uitzendcao_middels_contracting_levert_bedrijven_miljoenen_op/rapportage_contracting.pdf.

Fullerton, A., L. D. Robertson & C. J. Dixon (2011), 'Re-examing the relationship between flexibility and insecurity', *Research in the Sociology of Work*, Vol. 22: 9–41.

Gaag, A. van der (2013), 'Flex en zeker opnieuw uitgevonden', in: A. van Halem (red.), *Sociaal Akkoord 2013; arbeidsmarkt in beweging*, Alphen aan den Rijn: Vakmedianet, p. 45–55.

Gallin, D. (2008), 'International framework agreements: a reassessment', in: K. Papadakis (red.), *Cross-border social dialogue and agreements; an emerging global industrial relations framework?*, Geneva, International Institute for Labour Studies/ILO, p. 15–41.

García Pérez, J. I. & F. Muñoz-Bullón (2003), 'Temporary help agencies and occupational mobility' (working paper #03–41 (10)), Business Economics Series, http://docubib.uc3m.es/workingpapers/wb/wb034110.pdf.

Garcia, R. J. (2012), *Marginal Workers*, New York/London: New York University Press.

Gardner, H. (2016), *The Failure to Prevent World War I: The Unexpected Armageddon*, Abingdon/New York: Routledge.

GDFPSS/ILO (2011a), Private Employment Agencies; promotion of decent work and improving the functioning of labour markets in private services sectors, Issues paper for discussion at the Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors, (18–19 okt. 2011), Geneva: Global Dialogue/International Labour Office.

GDFPSS/ILO (2011b), Final Report of the discussion, Global Dialogue Forum and the role of Private employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors, (18–19 okt. 2011), Geneva: Global Dialogue/International Labour Office.

Givord, P. & L. Wilner (2014), 'When does the Stepping-Stone Work? Fixed-Term Contracts versus Temporary Agency Work in Changing Economic Conditions', *Journal of Applied Economics* 30 (5).

Goldschmeding, F. J. D. (1977), 'Uitzendformule in het arbeidsbestel van de toekomst' in: F. van Haasteren (red.), *Uitzendbureaus ter sprake*, Scheveningen: Stichting Maatschappij en Onderneming, 1977.

Goldschmeding, F. J. D. (1998), *Flex werkt* (Sinzheimer-lezing), Amsterdam: Hugo Sinzheimer Instituut.

Govaers, M. M. & A. J. P. van Beers (2013), 'Handhaving detacheringsrichtlijn: hoe te ontkomen aan ketenaansprakelijkheid?', *Tijdschrift voor Recht en Arbeid* 8/9 (nr. 68).

Graaf, P. de (2015), 'Gemeenten willen bijstand versoepelen', *de Volkskrant*, 7 December.

Grapperhaus, F. B. J. (2003), *Equal pay for temporary agency workers; taking a closer look at the draft directive on working conditions for temporary agency workers*, Deventer: Kluwer.

Grapperhaus, F. B. J. (2015), *Euro-Ciett legal seminars*, 24 June 2015.

Grapperhaus, F. B. J. & M. Jansen (1999), *De uitzendovereenkomst*, Deventer: Wolters Kluwer.

Grijpstra, D. H., D. J. Klein Hesselink, P. M. de Klaver & E. P. Miedema (1999), *Eerste ervaringen met de Wet flexibiliteit en zekerheid; een onderzoek onder vier steekproeven van werkgevers, uitzendwerkgevers en flexwerkers in februari/maart 1999*, Leiden/Hoofddorp: Research voor Beleid/TNO Arbeid.

Haar, B. P. ter (2012), *Open method of coördination; an analysis of its meaning for the development of a social Europe* (diss. RUL) (Meijersreeks 207), Leiden: Leiden University Press.

Haasteren, F. C. A. van & M. van Overeem (1976), *Arbeid à la carte*, Scheveningen: Stichting Maatschappij en Onderneming.

Hall-Jones, P. (2008), *Beyond the numbers game*, http://www.newunionism.net/library/member%20contributions/news/Union%20Federations%202000–2007.htm.

Hasan, R. & K. R. L. Jandoc (2009), *Quality of jobs in the Philippines; comparing self-employment with wage employment* (ADB Economics Working Paper Series No. 148), Manila: Asian Development Bank.

Hayter, S. & M. Ebisui (2013), 'Negotiating parity for precarious workers', *International Journal of Labour Research*, 5 (1).

Hayter, S. & V. Stoevska (2011), *Social Dialogue Indicators; International Statistical Inquiry 2008–09 (Technical Brief)*, Geneva: ILO.

Heerma van Voss G. J. J. (1996), 'Flexibilisering en individuele arbeidsovereenkomst', in: F. J. L. Pennings (red.), *Flexibilisering van het sociaal recht* (Monografieën Sociaal Recht 6), Deventer: Kluwer, p. 17–37.

Heerma van Voss, G.J.J. (1999), *Goed werkgeverschap als bron van vernieuwing van het arbeidsrecht* (reeks Vereniging voor Arbeidsrecht, 29), Deventer: Kluwer.

Heerma van Voss, G. J. J. (red.) (2008), *Decent Work op de agenda; Nederland en de normen van de Internationale Arbeidsorganisatie*, The Hague: Ministerie van Sociale Zaken en Werkgelegenheid.

Heerma van Voss, G. J. J. & B. Barentsen (2015), *Inleiding Nederlands sociaal recht*, The Hague: Boom Juridisch.

Heerma van Voss, G. J. J., V. J. A. Süto & S. R. Spoelder (2006), *Advies Wetgevingsimplicaties Implementatie Maritiem Arbeidsverdrag*, Leiden: Leiden University.

Heijden, P. F. van der (1999a), 'Een nieuwe rechtsorde van de arbeid, op zoek naar een andere architectuur van het arbeidsrecht', in: P. F. van der Heijden, R. H.

van het Kaar & A. C. J. M. Wilthagen (red.), *Naar een nieuwe rechtsorde van de arbeid? Bundel ter gelegenheid van het tienjarig bestaan van het Hugo Sinzheimer Instituut van de Universiteit van Amsterdam*, The Hague: Sdu, p. 1–20.

Heijden, P. F. van der (1999b), 'Rechtsontwikkeling binnen de internationale arbeidsorganisatie, preadviezen', *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, nov. 1999, Kluwer.

Heijden, P. F. van der (2004), *Westenwind; van werknemersinvloed naar aandeelhoudersmacht*, Amsterdam: Balans.

Heijden, P. F. van der (2013), 'Internationale Stakingsrecht onder spanning', *Nederlands Juristenblad* 25 (2013), p. 1638.

Heijden, P. F. van der (2014a), 'Uitbreiding van handhavingsmechanismen fundamentele arbeidsrechten; is meer ook beter?' *NJB* 12.

Heijden, P. F. van der (2014b), 'Een arbeidsbestel voor alle werkende Nederlanders', *S en D*, 71/6 (dec.), p. 47–52.

Heijden, P. F. van der & F. M. Noordam (2001), 'De waarde(n) van het sociaal recht. Over beginselen van sociale rechtsvorming en hun werking', *Handelingen Nederlandse Juristen Vereniging*, 131 (I) (preadvies), W. E. J. Tjeenk Willink, Deventer, p. 7 e.v.

Heijden, P. van der & R. Zandvliet (2014), *Enforcement of Fundamental Labor Rights; The Network Approach: Closing the Governance Gaps in Low-wage Manufacturing Countries*, The Hague: The Hague Institute for Global Justice.

Hendrickx, F. (2011), *Labour Law for the United States of Europe*, Tilburg: Tilburg University.

Henrad, K. (2008), *Mensenrechten vanuit internationaal en nationaal perspectief*, The Hague: Boom Juridische Uitgevers.

Herdersche, G. (2015), 'Ziektewet moet ook gelden voor zzp'er,vindt CDA', *de Volkskrant*, 1 December

Herzfeld Olssen, P. (2011), 'The ILO Acquis and EU Labour Law', in: M. Rönnmar (red.), *Labour Law, Fundamental Rights and Social Europe* (Swedish Studies in European Law, Vol. 4), Oxford/Portland OR: Hart, p. 27–56.

Hofs, Y. (2016), 'Waarom zzp'ers de economie te gronde richten, *de Volkskrant*, 23 January.

Holdcroft, J. (2012), The Triangular Trap; unions take action against agency labour, Geneva: IndustriAll.

Hoogeveen, E. M. (2007), 'De inlener en het werkgeverschap'. *Arbeidsrechtelijke annotaties* 3, p. 4–35.

Houte, Y. A. E. van (2011), 'Uitzending en payrolling: overeenkomst en verschil', *ArbeidsRecht* 36 (juni/juli) p. 9–13.

Houte, Y. A. E. van, A. L. Müntz, M. Tanja & W. A. M. Plessen (2004), 'De nieuwe uitzendcao: Betere Flex en Zeker?', *Sociaal Maandblad Arbeid* 3 (4 april), p. 186–191.

Houweling, A. R. & M. J. M. T. Keulaerds (2015), *Wet werk en zekerheid; geconsolideerde wettekst titel 7.10 BW inclusief overgangsrecht en gedelegeerde regelgeving* (3rd ed.), The Hague: Boom Juridische Uitgevers.

Houwerzijl, M. S. (2004), *De Detacheringsrichtlijn; over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Europese Monografieën 78), Deventer: Kluwer.

Hussmanns, R. (2003), *Statistical definition of informal employment; guidelines endorsed by the Seventeenth International Conference of Labour Statisticians*, Geneva: ILO, Bureau of Statistics.

Hveem, J. (2013) 'Are Temporary work agencies stepping stones into regular employment?', *IZA Journal of Migration*, vol. 2, no. 21, p. 1–27.

Hyman, R. (2002), *The International Labour Movement on the Threshold of Two Centuries; Agitation, Organisation, Bureaucracy, Diplomacy* (paper presented at the workshop 'The International Labour Movement on the Threshold of Two Centuries'), http://www.arbarkiv.nu/pdf_wrd/Hyman_int.pdf.

Ichino, A., Mealli, F. & Nannicin, T. (2008), 'From temporary help jobs to permanent employment: what can we learn from matching estimations and their sensitivity?', *Journal of Applied Econometrics*, vol. 23, no. 3, p. 305–327.

IDEA Consult (2015), *How temporary agency work compares with other forms of work*, Brussels: Euro-Ciett/Uni-Europa.

ILC (1919), International Labor Conference, first annual meeting, Oct. 29, 1919–Nov. 29, Washington DC, USA.

ILC (1932a), International Labour Conference, 16th session 1932, *Abolition of Fee-Charging Employment Agencies*, Geneva: International Labour Office.

ILC (1932b), International Labour Conference, 16th session 1932, *Records of Proceedings*, Geneva: International Labour Office.

ILC (1933a), International Labour Conference, report, 17th session, Geneva 1933, *Abolition of Fee-Charging Employment Agencies*, Geneva: International Labour Office.

ILC (1933b), International Labour Conference, 17th session, 1933, *Records of Proceedings*, Geneva: International Labour Office.

ILC (1944), International Labour Conference, 26th session, Philadelphia 1944, *Records of Proceedings*, Montreal: International Labour Office.

ILC (1946), International Labour Conference, 30th session, Geneva 1947, report V(I) *Employment Service Organisation*, Montreal: International Labour Office.

ILC (1947a), International Labour Conference, 31st session, San Francisco, 1948, report IV(I) *Employment Service Organisation*, Geneva: International Labour Office.

ILC (1947b), International Labour Conference, 31st session, San Francisco, 1948, report IV(II) *Employment Service Organisation*, Geneva: International Labour Office.

ILC (1948), International Labour Conference, 32nd session, Geneva, 1949, report X(1), *Revision of the Fee-Charging Employment Agencies Convention, 1933*, Geneva: International Labour Office.

ILC (1994), International Labour Conference, 81st session, Geneva, 1994, report VI, *The role of private employment agencies in the functioning of labour markets*, Geneva: International Labour Office.

ILC (1997a), International Labour Conference, 85th session, 1997, report IV(1), *Revision of the 'Fee-Charging Employment Agencies Convention'* (Revised), 1949 (no. 96), Geneva: International Labour Office.

ILC (1997b), International Labour Conference, 85th session, 1997, report VI(2), Contract labour, sixth item on the agenda, Geneva: International Labour Office.

ILC (1997c), International Labour Conference, 85th session, 1997, report VI (6), Contract labour, Geneva: International Labour Office.

ILC (1997d), International Labour Conference, provisional record, 85th session, sixth item on the agenda, Report of the committee on Contract labour, Geneva: International Labour Office.

ILC (1997e), International Labour Conference, 85th session, 1997, report VI(2), Contract labour, Geneva: International Labour Office.

ILC (1998a), International Labour Conference, 86th session, 1998, report V(2A), Contract labour, Geneva: International Labour Office.

ILC (1998b), International Labour Conference, 86th session, 1998, report V(2B), Contract labour, Geneva: International Labour Office.

ILC (1998c), International Labour Conference, 86th session, 1998, Report of the Committee on Contract labour, Geneva: International Labour Office.

ILC (1999), International Labour Conference, 87th session, 1999, Report of the Director-General: *Decent Work*, Geneva: International Labour Office.

ILC (2001), International Labour Conference, 89th session, 2001, Report 1(A) of the Director General: *Reducing the decent work deficit, a global challenge*, Geneva: International Labour Office.

ILC (2003a), International Labour Conference, 91st session, 2003, report V, *The scope of the employment relationship*, Geneva: International Labour Office.

ILC (2003b), International Labour Conference, 91st session, 2003, Provisional record, Geneva: International Labour Office.

ILC (2006a), International Labour Conference, 95th session, 2006, report V(1), *The employment relationship*, Geneva: International Labour Office.

ILC (2006b), International Labour Conference, 95th session, 2006, report V(2A), *The employment relationship*, fifth item on the agenda, Geneva: International Labour Office.

ILC (2006c), International Labour Conference, 95th session, 2006, report V(2B), *The employment relationship*, Geneva: International Labour Office.

ILC (2006d), International Labour Conference, provisional records, 95th session, *Report of the committee on the employment relationship*, Geneva: International Labour Office.

ILC (2010a), International Labour Conference, 99th Session, 2010, report III (Part 1B), *General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization; third item on the agenda: information and reports on the application of Conventions and Recommendations*, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Geneva: International Labour Office.

ILC (2010b), International Labour Conference, 99th Session, 2010, Committee on the Application of Standards at the Conference, *Extracts from the Record of Proceedings*, Geneva: International Labour Office.

ILC (2013), International Labour Conference, 102nd session, 2013, report VI, *Recurrent discussion on the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalization*, Report of the Committee for the Recurrent Discussion on Social Dialogue, Geneva: ILO.

ILC (2014), International Labour Conference, 103rd Session, 2014, reports V(1) en V(2), *Transitioning from the informal to the formal economy*, Geneva: International Labour Office.

ILC (2015a), International Labour Conference, 104th session, 2015, report VI, *Labour protection in a transforming world of work; a recurrent discussion on the strategic objective of social protection (labour protection)*, Geneva: International Labour Office.

ILC (2015b), International Labour Conference, 104th session, 2015, *Resolution concerning the recurrent discussion in social protection (labour protection)*, adopted on 12 june 2015, Geneva: International Labour Office.

ILC (2016), International Labour Conference, 105th session, 2016, report IV, *Decent work in global supply chains*, Geneva: International Labour Office.

ILO (1951), *International Labour Conventions and Recommendations, 1919–1951*, Geneva: International Labour Office.

ILO (1998), *ILO Declaration on Fundamental Principles and Rights at Work* (http://www.ilo.org/declaration/lang--en/index.htm).

ILO (2000), International Labour Office, Governing Body, 279th session, 2000, second item on agenda, Report of the Meeting of Experts (in situations needing protection), Geneva: International Labour Office.

ILO (2006a), International Labour Office, Governing Body, November 2006, third item on the agenda, follow-up to resolutions adopted by the 95th session (2006) of the International Labour Conference and other matters arising.

ILO (2006b), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Geneva: International Labour Office.
ILO (2007a), *Guide to Private Employment Agencies; regulation, monitoring and enforcement*, Geneva: International Labour Office.
ILO (2007b), *The employment relationship; an annotated guide to* ILO*-recommendation no. 198*, Geneva: International Labour Office.
ILO (2008a), *Measurement of decent work; discussion paper for the tripartite meeting of experts on the measurement of decent work*, Geneva: International Labour Office.
ILO (2008b) *Tripartite meeting of experts on the measurement of decent work. Chairperson's report*. Geneva: International Labour Office.
ILO (2010), *General Survey concerning employment instruments in light of the 2008 Declaration on social justice for a Fair Globalization*, report III (part B) Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneva: International Labour Office.
ILO (2011), *Final report; Tripartite meeting of experts to examine the termination of employment convention 1982 (no. 158) and the termination of employment recommendation 1982 (no. 166)*, Geneva: International Labour Organization.
ILO (2012a), From Precarious Work to Decent Work; outcome document to the workers symposium on Policies and Regulations to combat Precarious Employment, International Labour Office, Bureau Worker's Activities.
ILO (2012b), *Decent Work Indicators; concept and definitions,* ILO *Manual*, Geneva: International Labour Office.
ILO (2013), *Towards the* ILO *centenary; realities, renewal and tripartite commitment*, report of the Director General, 102nd session, 2013, report 1 (A), Geneva: International Labour Office.
ILO (2015a), *Non-standard forms of employment; report for discussion at the Meeting of Experts on Non-Standard Forms of Employment*, Geneva: International Labour Office.
ILO (2015b), *Fair Recruitment Initiative; Fostering fair recruitment practices, preventing human trafficking and reducing the costs of labour migration*, Geneva: ILO.
ILO (2015c), *Conclusions of the Meeting of experts of Non-Standard Forms of Employment*, Geneva: International Labour Office.
IMF (z.j.), *The Power of Framework Agreements*, http://library.fes.de/pdf-files/gurn/00257.pdf.
IMF (2006), *Background to International Framework Agreements in the* IMF (Background paper prepared for the IFA World Conference Frankfurt am Main, Germany Sept. 26–27 2006), Geneva: International Metalworkers Federation.
IndustriAll (2014), *Negotiating Security; Trade union bargaining strategies against precarious work*, http://www.industriall-union.org/sites/default/files/uploads/

documents/STOP-PrecariousW-august2012/Bargaining_strategies/a4_precarious_work_en_web.pdf.

IOE (2005), *International Framework Agreements; an employers' quide* (updated version, september 2005), http://www.dgfp.de/wissen/personalwissen-direkt/dokument/79255/herunterladen.

IOE (2014a), Flexible forms of work; position paper of the International Organisation of Employers, Geneva: International Organisation of Employers.

IOE (2014b), *Measuring and monitoring progress on decent work*, factsheet, Geneva: IOE.

IOE/ICC/BIAC (2008), *Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights* (http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf).

ISF (2012), *Indian Staffing Industry Research 2012; turning available work into jobs*, Indian Staffing Federation, oktober 2012.

Jacobs, A. & R. Blanpain (1999), 'The Netherlands' in: *Private Employment Agencies; The Impact of ILO Convention 181 (1997) and the Judgment of the European Court Of Justice of 11 December 1997* (Bulletin of comparative labour relations 36), The Hague/London/Boston: Kluwer Law International, p. 299 e.v.

Jahn, E. J. & D. Pozzoli (2013), 'The pay gap of temporary agency workers – Does the temp sector experience pay off?' *Labour Economics*, Vol. 24, C, pp. 48–57.

Jahn, E. J. & M. Rosholm, (2014), 'Looking beyond the bridge. The effect of temporary agency employment on labor market outcomes' *European Economic Review* vol. 65, p. 108–125.

John F. Kennedy Presidential Library and Museum, *JFK on the Economy and Taxes*, http://www.jfklibrary.org/JFK/JFK-in-History/JFK-on-the-Economy-and-Taxes.aspx.

Johnson, J. & A. Nijberg (2010), 'Precarious work and precarious unemployment', in: L. F. Vosko (red.), *Gender and the Contours of Precarious Employment*, London/New York: Routledge, p. 194–210.

Joosten, A. & L. Sprengers (2014a), ''Times they are a-changin'; het Wetsontwerp werk en zekerheid: grote wijzigingen op komst', *OR informatie*, 40 1/2 (Feb.), p. 10–11.

Joosten A. & L. Sprengers (2014b), 'Power to the flex people; versterking rechtspositie flexibele arbeidskrachten', *OR-informatie* 6 (June), p. 18–19.

Kalleberg, A. L., 'Precarious work, Insecure Workers; Employment Relations in Transition', *American Sociological Review*, 2009 74:1, p. 1-22 (downloadable via asr.sagepub.com).

Kalleberg, A. L. (2011), *Good jobs, bad jobs; the rise of polarized and precarious employment systems in the United States, 1970's to 2000's*, New York: Russel Sage Foundation.

Knegt, R., D. J. Klein Hesselink, H. Houwing & P. Brouwer (2007), Tweede evaluatie Wet flexibiliteit en zekerheid, Amsterdam/Hoofddorp: Hugo Sinzheimer Instituut, Amsterdam University/TNO Arbeid.

Koch, M. & M. Fritz (red.) (2013), *Non-standard Employment in Europe; paradigms, prevalence and policy responses*, Houndmills: Palgrave Mac Millan.

Koeltz, D. (2013), 'Delivering public employment services; which model works best?', in: J. Heyes & L. Rychly (red.), *Labour Administration in Uncertain Times; Politics, Practice and Institutions*, Geneva: International Labour Office.

Kok, W. (2003), *Jobs, jobs, jobs; creating more employment in Europe*, report of the Employment Taskforce, European Commission.

Kolk, A. (2003), *Het eind van maatschappelijk verantwoord ondernemen, of het begin?* Amsterdam: Vossiuspers UvA.

Kolk, A. (2004), 'MVO vanuit bedrijfskundig en beleidsmatig perspectief: het belang van duurzaam management', *M&O: Tijdschrift voor Management en Organisatie*, nr. 4/5.

Koning, P. de (2016), 'Ontslagrecht ligt als een grauwsluier op de arbeidsmarkt', NRC-*Handelsblad* 1 maart.

Koopmans, T. (1962), *De begrippen werkman, arbeider en werknemer* (dissertatie UvA), Alphen aan den Rijn: Samsom.

Koopmans, T. (1999), 'Reflections on the Future of Labour Law', *RM Themis*, p. 75.

Kowalski, W. (2006), 'The Services Directive; legislative process cleans the first hurdle', *Transfer; European Review of Labour and Research*, 12, p. 231–49.

Kristen, F. G. H. (2010), 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A. J. A. J. Eijsbouts, J. M. de Jongh, F. G. H. Kristen, A. J. P. Schild, & L. Timmerman, *Maatschappelijk verantwoord ondernemen* (Handelingen Nederlandse Juristen-Vereniging, 140e jaargang 1), Deventer: Kluwer.

Kvasnicka, M. (2009), 'Does temporary help provide a stepping-stone to regular employment?', in: D. H. Autor (red.), *Studies of Labour Market Intermediation*, Chicago: University of Chicago Press, p. 335–372.

Lafler, N. J., 'Unionizing the Contingent Workforce: Squaring the NLRB's 2004 Decision in Oakwood Care Center with the United States' Obligations as a Signatory to the International Labour Organization', *American University International Law Review*, 29:2 (2014), p. 465–503.

Laparra, M., J. Barbier, I. Darmon, N. Düll, C. Frade, L. Frey, R. Lindley & K. Ludwig-Vogler (2004), *Managing Labour Market Related Risks in Europe; policy implications*, report of the ESOPE project (available on-line at www.economix.org/pdf/ECONOMIX-policy-report-ESOPE.pdf; accessed 28 March 2017).

La Tribune (2015), 'Le projet de loi, ratifiant la convention de l'OIT sur les agences d'emploi privées, est definitivement adopté', 7 maart.

Leupen, J. (2015), 'Nederlandse flexibilisering is voorbode voor Europa', *Het Financieele Dagblad* (online), 16 dec., http://fd.nl/economie-politiek/1130663/nederlandse-flexibilisering-is-voorbode-voor-europa.

Leupen, J. (2016a), 'MKB-Nederland: ontslagwet is mislukt', *Het Financieele Dagblad*, 2 March.

Leupen, J. (2016b), 'Werkgevers weigeren minimumtarief voor zzp'ers af te spreken', *Het Financieele Dagblad*, 15 January.

Leupen, J. (2016c), 'zzp'er verwacht schade door nieuwe wetgeving', *Het Financieele Dagblad*, 13 April.

Leupen, J. & J. Hinrichs (2016), 'Arbeidsmarkt radicaal anders', *Het Financieele Dagblad*, 15 maart.

Lew Chuk, W., M. Clarke & A. de Wolff (2011), *Working without commitments; the health affect of precarious employment*, Montreal/Kingston: McGill-Queens University Press.

Liemt, G. van, (2013), *Private Employment Agencies in the Netherlands, Spain and Sweden*, working paper no. 290, Geneva: International Labour Office.

Lillie, N. (2008), 'The ILO Maritime Labour Convention, 2006: a new paradigm for global labour rights implementation', in: K. Papadakis (red.), *Cross-border social dialogue and agreements; an emerging global industrial relations framework?*, Geneva: ILO/International Institute for Labour Studies, p. 191–217.

Loonstra C. J. & P. Th. Sick (2014), 'Het wetsvoorstel werk en zekerheid (33818) in vogelvlucht: dekt de vlag de lading?', *Tijdschrift Arbeidsrechtpraktijk* 7/1 (Jan.), p. 4–13.

Lörcher, K. (2011), 'Firing at will; the employer's response to the crisis', *Global Labour Column* (61), http://www.global-labour-university.org/fileadmin/GLU_Column/papers/no_61_Loercher.pdf.

Lubbers, R., W. van Genugten & T. Lambooy (2008), *Inspiration for Global Governance; The Universal Declaration of Human Rights and the Earth Charter*, Deventer: Kluwer.

Lucassen, J. (2000), *In search of work*, Amsterdam: International Institute of Social History.

Lundvall, K. & N. Strand (2014), *Quota rules on staffing agencies create distortions of competition*, Copenhagen/Stockholm/Brussels: Copenhagen Economics.

Luyn, A. H. van (2006), *Waarden en deugden; engagement in de Randstad* (gebundelde inleidingen van het minisymposium op 15 november 2006 in de Boskant), Kampen: Kok.

Lyon-Caen, G. (1996), 'By way of conclusion: labour law and employment transitions', *International Labour Review*, nr. 6, p. 697–699 (special 'Perspectives on the Nature and Future of Work').

Manpower Group (2013), *Sustainability Report; Sustainability in the Human Age*, http://www.manpowergroup.com/wps/wcm/connect/6e0f68e5–410a-40d5–9a16-fe0753819d63/2013-ManpowerGroup-Corporate-Sustainability-Report.pdf?-MOD=AJPERES.

Manpower Group (2014), *Sustainability Report; Sustainability in the Human Age*, http://www.manpowergroup.com/wps/wcm/connect/946ef638-d590-4415-9717-801713a6cec1/2014+ManpowerGroup+Corporate+Sustainablity+Report.pdf?MOD=AJPERES

MCCG (2016), *De Nederlandse Corporate Governance Code, voorstel voor herziening, een uitnodiging voor commentaar*, http://www.commissiecorporategovernance.nl/download/?id=2786.

McDowell, L. & S. Christopherson (2009), 'Transforming Work: new forms of employment and their Regulation', *Cambridge Journal of Regions, Economy and Society* 2009 (2): 335–342.

McKay, S., S. Jefferys, S., Paraksevopoulou, A. Keles, J. (2010), *Study on precarious work and social rights; carried out for the European Commission* (VT/2010/084), London: Working Lives Research Institute, Faculty of Social Sciences and Humanities, London Metropolitan University.

McKinsey and Company (2003), *Orchestrating the evolution of Private Employment Agencies towards a stronger society*, Brussels: CIETT.

Ministerie van Buitenlandse Zaken (2011), *De OESO-richtlijnen voor multinationale ondernemingen; aanbevelingen voor verantwoord ondernemen in een mondiale context* (Nederlandse vertaling), The Hague: Nationaal Contactpunt.

Ministerie van Financiën (2015), IBO *Zelfstandigen zonder personeel*, https://www.rijksoverheid.nl/documenten/rapporten/2015/10/02/eindrapport-ibo-zelfstandigen-zonder-personeel.

Molenaar, A. N. (1953), *Arbeidsrecht; Eerste Deel, Algemeen Gedeelte*, Zwolle: Tjeenk Willink.

Monash University, Castan Centre for Human Rights Law (2008), *Human Rights Translated; A Business Reference Guide*, zie: http://www.law.monash.edu.au/Castancentre.

Mulder, A. (2015) 'Verbod op uitzendbeperkingen in cao's', 10 feb., http://www.abu.nl/cms/showpage.aspx?id=12311.

Nauta, A. & C. de Dreu (2014), 'Asscher's wet berust op drijfzand', *de Volkskrant* 11 December.

NCP (2015), *Monitoring Eindverklaring NUON Energy N. V. en FNV Eemshaven 2014, september 2015*, The Hague: Nationaal contactpunt OESO-richtlijnen voor Multinationale Ondernemingen.

Nienhüser, W. & W. Matiaske (2006), 'Effects of the 'principle of non-discrimination' on temporary agency work: compensation and working conditions of temporary agency workers in 15 European countries', *Industrial Relations Journal*, vol. 37, no. 1, p. 65–77.

Nollen, S. D. (1996), 'Negative aspects of temporary employment', *Journal of Labor Research*, vol. 17, no. 4, p. 567–582.

Noort, W. van (2015), 'Werknemers on demand', *NRC weekend*, 17/18 January.

NRC (2015) 'De wet werk en zekerheid kan een naieve constructie blijken', 8 May.

OECD (2004a), *OECD Principles of Corporate Governance*, Paris: OECD Publications Service.

OECD (2004b), *OECD Employment Outlook 2004*.

OECD (2009), *Annual Report on the OECD Guidelines for Multinational Enterprises 2008* (Part II, Chapter 6: Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility) (http://www.oecd.org/corporate/mne/40889288.pdf).

OECD (2013a), *OECD Employment Outlook 2013*.

OECD (2013b), 'Protecting jobs, enhancing flexibility; a new look at employment protection legislation', *OECD Employment Outlook 2013*, p. 63–126.

OECD (2014), *How good is your job? A framework for measuring and assessing job quality, working party in employment*, Paris: OECD.

OECD (2015), *In it Together; Why Less Inequality Benefits All*, Paris: OECD.

OECD (2016a), *How good is your job? Measuring and assessing job quality*, Paris: OECD, http://www.oecd.org/employment/labour-stats/Job-quality-OECD.pdf.

OECD (2016b), *OECD Economic Surveys; Netherlands* (overview), Paris: OECD

OECD (2016c), *Implementing the OECD-Guidelines for Multinational Enterprises: the National Contact Points from 2000 to 2015*, Paris: OECD.

Ojeda-Avilés, A. (2014), *Transnational Labour Law*, Alphen aan den Rijn: Kluwer Law International.

Olsthoorn, M. (2015), *Flexible employment, precarious employees? Job-, employer- and institutional explanations for numerical flexibility, and its relation to precarious employment* (diss. UvA) , Amsterdam: AISSR, p. 227.

Oosterwaal, A., A. Wintershoven, M. Xavier, E. van Wijk, M. van Twuijver (2015), V*eilig oversteken; inspiratiegids voor van-werk-naar-werktransities; 10 Praktijkvoorbeelden*, Lijnden/The Hague/Leiden: ABU/AWVN/TNO.

Papadakis, K. (red.) (2008), *Cross-border social dialogue and agreements: an emerging global industrial relations framework?* Geneva: ILO/International Institute for Labour Studies.

Papadakis, K. (red.) (2011), *Shaping Global Industrial Relations; the Impact of International Framework Agreements*, Houndmills: Palgrave Macmillan.

Papapostolou, D. & J. Nurthen (2012), A look at the Indian Temporary Workforce Environment, Staffing Industry Analysts, Crain communications.

Paraskevopoulou, A., A. Fromm & N. Clark (2016), *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour*, Luxembourg: Eurofound.

Perulli A. (2003), *Economically dependent quasi subordinate (parasubordinate) employment; legal, social and economic aspects*, Brussels: European Commission, 2002, DV/47999.

Picchio, M. (2006), *Wage differentials and temporary jobs in Italy* (Discussion Paper No. 2006–33), Louvain-la-Neuve: Département des Sciences Économiques de l'Université catholique de Louvain.

Platzer, H. W. & S. Rüb (2014), *International Framework Agreements; An Instrument for Enforcing Social Human Rights?*, Berlin: Friedrich Ebert Stiftung.

Polany K. (1944), The Great Transformation, New York: Farrar & Rinehart.

Porthé, V., E. Ahonen, M. L. Vasques, C. Pope, A. Agndelo, A. Garcia, M. Amable, F. Benavides & J. Benach, 'Extending a model of precarious employment: The case Spain', *American Journal of Industrial Medecine*, 2010 (314): 417–424.

Pouchard, A. (2016), 'Ce que la première version de la "loi travail" changeait pour Michel, 50 ans, salarié', *Le Monde*, 4 March.

Prick, L. (2016), *Van Frankrijk móét je houden; Hoe de Fransen hun eigenheid verdedigen*, Amsterdam: Van Gennip.

Raad voor de jaarverslaggeving (2009), 'Richtlijn 400', *Uiting* 2009 (8) (http://www.rjnet.nl/Documents/Uitingen%202009/0000026826_RJ_Uiting_2009_8_Herziene_Richtlijn_400_Jaarverslag_en_Handreiking.pdf).

Raimondo, F. & F. Salvioli (2008), 'De Amerikaanse Verklaring inzake Rechten en Plichten van de Mens jubileert: van oorsprong tot toepassing', *Internationale Spectator*, jaargang 62, nr. 12.

Randstad (z.j.), *Randstad business principles* (http://www.randstad.com/about-us/corporate-governance/business-principles/).

Randstad (1995), *Werken aan de toekomst; jaarverslag 1994* (*Working on the future: annual report 1994*), Diemen: Randstad Holding NV, p. 19.

Randstad (2015), *How I became…; annual report 2014* http://ir.randstad.com/~/media/Files/R/Randstad-IR/annual-reports/annual_report_randstad_2014.pdf

Randstad (2016), *Tech and touch; annual report 2015* http://ir.randstad.com/~/media/Files/R/Randstad-IR/annual-reports/annual_report_randstad_2015.pdf

Rayer, C. W. G. (2014), *Wetgeving en beleid voor flexibele arbeid*, Deventer: Kluwer.

Renooy, P. & C. C. Williams (2014), Flexibility@work 2014; *Tackling undeclared work*, Amsterdam: Randstad.

Rodgers, G. (1989), *Precarious Jobs in Labour Market Regulation: the growth of atypical employment in Western Europe*, Genéve: IILS.

Rodgers, G., E. Lee, L. Swepston & J. van Daele (2009), *The ILO and the quest for social justice; 1919–2009*, Geneva: International Labour Office.

Rodgers G. & S. Rodgers (1989), *Precarious jobs in Labour Market Regulation; the Growth of A-typical Employment in Western Europe*, Brussels: IILS/Geneva: ILO.

Rodriquez, R., J. M. Miranda & J. J. Paris (z.j.), *Setting up a European Observatory on cross-border activities within temporary agency work*, Brussels: Euro-Ciett.

Rood, M. G. (1998), 'Naar een nieuw sociaalrechtelijk denkraam', in: F. M. Noordam (red.), *Sociaalrechtelijke oraties 1979–1999*, Deventer: Kluwer, p. 538.

Ross, A. (2009), *Nice work if you can get it; life and labour in precarious times*, New York/London: New York University Press.

Rossman, P. (2013), 'Establishing rights in the disposable jobs regime', in: Meeting the challenge of precarious work; a worker agenda, *Journal of International Labour Research*, Vol. 5:1, p. 23–40.

Ruggie, J. (2008), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (advance edited version), Human Rights Council, 8th session, agenda item 3 (http://webcache.googleusercontent.com/search?q=cache:Ig7GlkhLWfcJ:www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8–5.doc+&cd=1&hl=nl&ct=clnk&gl=nl).

Ruggie J. (2010a), *Draft Report to the General Assembly of the United Nations, posted for public review and comment until jan. 2011, about the Guiding Principles for the implementation of the United Nations Framework 'Protect, Respect and Remedy'.*

Ruggie, J. (2010b), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, Human Rights Council, 14th session, agenda item 3 (http://webcache.googleusercontent.com/search?q=cache:20BcrGo4_joJ:198.170.85.29/Ruggie-report-2010.pdf+&cd=4&hl=nl&ct=clnk&gl=nl).

Ruggie, J. (2011), *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*,

Human Rights Council (http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf).

Ruggie, J. (2014), *Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors*, september 9 2014, Institute for Human Rights and Business (http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business-html).

Rupert, J., J.W. Hengstmengel, R. Haan, F. Goldschmeding, P. van Geest & H. Commandeur (2015), *Kennen, dienen, vertrouwen; naar de bronnen van de Goldschmeding Stichting voor Mens, Werk en Economie*, Rotterdam: Erasmus University.

Schmid, G. (2010), *Non-standard labor force participation; a comparative view of the recent development in Europe*, Bonn: IZA.

Schneider, F. (2013), *Size and development of the shadow economy of 31 European and 5 other OECD countries from 2003 to 2013; a further decline*, http://www.econ.jku.at/members/schneider/files/publications/2013/shadeceurope31_jan2013.pdf.

Schömann, I. & C. Gueda (2012), *Temporary Agency Work in the European Union; implementation of Directive 2008/104/EC in the Member States*, Brussels: European Trade Union Institute.

Schout, A., J.M. Wiersma & M. Gomes Neto (2015), *The European Asscher agenda; a political and economic minefield* (Policy Brief november), The Hague: Clingendael.

Schrijver, N.J. (2014), *Internationaal Publiekrecht als Wereldrecht* (2e dr.), The Hague: Boom Juridische Uitgevers.

Schrijver, N. & J. VerLoren van Themaat (1989), 'Mensenrechten, ontwikkeling en democratie: een drieluik', in: N. Schrijver, G. Dijkstra & A. Alberts (red.), *Mensenrechten, voor armen weggelegd? Mensenrechten, ontwikkeling en democratie in Noord-Zuid perspectief*, Amsterdam: Evert Vermeer Stichting.

Sennett, R. (1999), *The Corrosion of Character; the Personal Consequences of Work in the New Capitalism*, New York: Norton.

SEO (2013), Flexibility@work, 2013; yearly report on flexible labor and employment, SEO Economic Research.

SER (2000), *De winst van waarden; advies over maatschappelijk verantwoord ondernemen, uitgebracht aan de staatssecretaris van Economische Zaken* (advies van 15 december 2000, SER 2000/11), The Hague: Sociaal Economische Raad.

SER (2008), *Statement International Corporate Social Responsibility*, The Hague: Sociaal Economische Raad.

Severino, R.C. (2013), 'ASEAN's Declaration advances human rights in Asia', *East Asia Forum*, 8 february (http://www.eastasiaforum.org/2013/02/08/aseans-declaration-advances-human-rights-in-asia/).

Shaffer, G.C. & M.A. Pollack (2010), 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', *Minnesota Law Review* (94), p. 706–799.

Shift & Institute for Human Rights and Business (2013), *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, European Commission (Directorat-General for Enterprises and Industry).

Slachter, M. (red.) (2014), *EU Labour Law; a Commentary*, Alphen aan den Rijn: Kluwer Law International.

Smis, S., C. Janssens, S. Mirgaux & K. van Laethen (2011), *Handboek mensenrechten; de internationale bescherming van de rechten van de mens*, Antwerpen/Cambridge: Intersentia.

Smit, C. B. A. (2014), *De Leidse fabriekskinderen; kinderarbeid, industrialisatie en samenleving in een Hollandse stad, 1800–1914* (dissertatie Utrecht University), Leiden: Uitgeverij Ginkgo.

Sol, E. (2000), *Arbeidsvoorzieningsbeleid in Nederland; de rol van de overheid en de sociale partners*, The Hague: Sdu.

Sperman, A. (2013), *Sector Surcharges for Temporary Agency Workers in Germany; A Way out of the Low-Wage Sector?* (policy paper no. 67), Bonn: IZA.

Spooner, D. (2014), Organizing precarious transport workers (prepared by the Global Labour Institute), Geneva/Manchester/New York/Moskou: International Transport workers' Federation, te downloaden via http://global-labour.net/2014/01/itf-launches-new-guide-organising-precarious-transport-workers/

Sprengers, P. (2013) *Disrupt or be disrupted*, 6-3-2013, Digital Economics, online kennisplatform, http://webcache.googleusercontent.com/search?q=cache:9xI-huscyG8J:www.digitaleconomics.nl/2013/03/06/disrupt-or-be-disrupted/+&cd=1&hl=nl&ct=clnk&gl=nl.

Standing, G. (2011) *The new dangerous class*, London/New York: Bloomsbury Academy.

STAR (2001), *Arbeidsvoorwaarden van uitzendwerknemers; de verhoudingen tussen uitzend-cao's en cao's van inlenende ondernemingen* (17 oktober), Dan Haag: Stichting van de Arbeid, Publication nr. 10/01

STAR (2012), *De visie van de Stichting van de Arbeid op payrolling, mede in het licht van de gevolgen voor werknemers als het gaat om ontslag*, http://www.stvda.nl/~/media/Files/Stvda/Nota/2010_2019/2012/20120511_payroll.ashx.

STAR (2013), *Perspectief voor een sociaal en ondernemend land: uit de crisis, met goed werk, op weg naar 2020; verantwoordelijkheid nemen én dragen, kansen creëren én benutten*, The Hague: Stichting van de Arbeid, te downloaden via http://www.stvda.nl/nl/publicaties/convenanten/2010-2019/2013/20130411-sociaal-akkoord.aspx.

Stellinga, M. (2015), 'De geest en de letter van Asscher's wet', NRC 16 mei.

Stevis, D. (2010), *International framework agreements and global social dialogue; parameters and prospects* (Employment Working Paper no. 47), Geneva: ILO.

Stiglitz, J.E. (2013) Adress to panel on Defending Human Rights (revised) Geneva, 3 dec. 2013 (http://www.globalpolicy.org/component/content/article/218-injustice-and-inequality/.

Stone, K.V.W. (2013a), *Green shoots in the labour market; a cornucopia of social experiments*, International Symposium for Employers on the Future of Work, December 2013, Geneva.

Stone, K.V.W. (2013b), 'The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries', in: K.V.W. Stone & H. Arthurs, *Rethinking Workplace Regulation, Beyond the Standard Contract of Employment*, New York: Russell Sage.

Stone, K.V.W. & H. Arthurs (2013), *Rethinking Workplace Regulation; Beyond the Standard Contract of Employment*, New York: Russell Sage.

Supiot, A. (red.) (1999), *Au delà de l'emploi; transformation du travail et devenir des droit du travail en Europe*, Paris: Flammarion/*Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford: Oxford University Press.

Sweeney, S. (2006), *Temporary Agency Work in the United States*, Dublin: European Foundation for the Improvement of Living and Working Conditions.

Sybesma-Knol, N. & P.F. van der Heijden (2000), *Rol en betekenis van de rechtsontwikkeling in de ILO*, Deventer: Kluwer.

Telljohann, V., I. da Costa, T. Müller, U. Rehfeldt & R. Zimmer (2009a), 'European and international framework agreements: new tools of transnational industrial relations', *Transfer: European Review of Labour and Research,* vol. 15, no. 3/4, p. 505–525.

Telljohann, V., I. da Costa, T. Müller, U. Rehfeldt & R. Zimmer (2009b), *European and international framework agreements; practical experiences and strategic approaches*, Luxembourg/Dublin: Office for Official Publications of the European Community/ European Foundation for the Improvement of Living and Working Conditions.

The Economist (2015), 'The on-demand economy; workers on tap', 3 jan.

Thornley, C., S. Jefferys & B. Appay (2010), *Globalization and Precarious Forms of Production and Employment; challenges for workers and unions*, Cheltenham: Edward Elgar.

Traversa, E. (1999), 'The role played by the Court of Justice of the European Community in opening up the market for private employment agencies', in: R. Blanpain (red.), *Bulletin of Comparative Labour Relations* 36 – 1999: The Hague/London/ Boston: Kluwer Law International, p. 155.

United Nations (2000), *Foundation for the Global Compact*, New York: United Nations (http://www.globalcompactfoundation.org/).

United Nations (2011), *Guiding Principles on Business and Human Rights; implementing the United Nations Protect, Respect and Remedy Framework*; United Nations Human Rights; Office of the High Commissioner, New York/Geneva 2011.

UWV (2016), UWV *Landelijke arbeidsmarktprognose 2016* (update 29 januari 2016), http://www.uwv.nl/overuwv/Images/Update%20Arbeidsmarktprognose%202016.pdf, p. 10.

Vacas-Soriano, C. (2015), *Recent developments in temporary employment; Employment growth, wages and transitions*, Dublin: Eurofound.

Verburg, L. G. (2013), 'Payrolling: over duiding en verbinding', *Ars aequi.nl/maandblad* (December), p. 907–914.

Verhofstadt, G. (2015), *De ziekte van Europa (en de ontdekking van het ideaal)*, Amsterdam/Antwerpen: De Bezige Bij, p. 24.

Verhulp, E. (2001), 'De ondergeschiktheid, het belemmeren en de ziekte van de uitzendkracht', *Nederlands Tijdschrift voor Sociaal Recht* (april), p. 101–107.

Verhulp, E. (2014), 'De arbeidsovereenkomst voor onbepaalde tijd als onbereikbaar statussymbool na inwerktreding Wetsvoorstel werk en zekerheid?', *Tijdschrift Recht en Arbeid* 24, 3 (March), p. 16–21.

Vermeulen, H., R. Schellingerhout, R. Sijbers, & E. van de Wetering (2014), *Uitzendmonitor 2014*, Lijnden/Nijmegen: ABU/ITS, Radboud University.

Visee, H., J. Mevissen, J. Timmerman & F. van der Woude (2015), *Zelfregulering in de uitzendbranche; het onderscheidend vermogen van het SNA-keurmerk* (final report), Amsterdam: Regioplan Beleidsonderzoekonderzoek 2015.

Voort, H. van der (2013), *Naar een drie-eenheid van co-regulering; over spanningen tussen drie toezichtregimes* (diss. TU Delft), Nootdorp: Sandedruk.

Vosko, L. F. (2000), *Temporary Work; the Gendered Rise of a Precarious Employment Relationship*, Toronto/Buffalo/London: University of Toronto Press.

Vosko, L. F. (2006), *Precarious Employment, Understanding Labour Market Insecurity in Canada*, 2006, Montreal/Kingston: McGill-Queens University Press.

Vosko, L. F. (2010), *Managing the margins; gender, citizinship and the International Regulation of Precarious Employment*, New York: Oxford University Press.

Vosko, L. F., M. MacDonald & I. Campbell (2009), *Gender and the Contours of Precarious Employment*, London en New York: Routledge.

Voss, E. (2016), *Representativeness of the European social partner organisations; Temporary agency work sector*, Dublin: Eurofound.

Voss, E., K. Vitols, N. Farvaque, A. Broughton, F. Behling, F. Dota, S. Leonardi, F. Naedenoen (2013), *The role of temporary agency work and labour market transitions in Europe; institutional frameworks, empirical evidence, good practice and the impact of social dialogue*. Hamburg: WMP consult.

Vrooman, C. (2016), *Meedoen in onzekerheid; verwachtingen over participatie en protectie* (oratie), Utrecht: Utrecht University.

Walsh, M. & J. Lowry (2005), 'CSR and Corporate Governance', in: R. Mullerat (red.), *Corporate Social Responsibility; The Corporate Governance of the 21st Century*, The Hague/Alphen aan den Rijn: IBA/Kluwer Law International, p. 37–60.

Waltermann, R. (2010), *Farewell to full-time indefinite-term employment ('normal employment')*, Expert report for the 68th meeting of the German Bar Association.

Walz, G. P., B. Frouws & D. M. Grijpstra (2010), *Grenzen stellen; omvang van en maatregelen tegen malafide praktijken in de uitzendbranche* (study commissioned by SNCU), Leiden: Research voor Beleid.

Weerd, P. de (2015), 'Stijging zzp'ers leidt tot excessen', *de Volkskrant* 11 november.

Weiss, M. (1999), 'Germany', in: R. Blanpain (red.), *Private Employment Agencies; The Impact of ILO Convention 181 (1997) and the Judgement of the European Court of Justice of 11 December 1997* (Bulletin of Comparative Labour Relations), Berlin/Heidelberg: Springer, p. 255–265.

Weiss, M. (2004), 'Germany' in: R. Blanpain & R. Graham (red.), *Temporary Agency Work and the Information Society* (reports given at the International Conference on Temporary Agency Work and the Information Society, Brussels 2003) (Bulletin of Comparative Labour Relations), The Hague/New York: Kluwer Law International, p. 127–142.

Wells, H. G. (1940), *The Rights of Man; or what are we fighting for?*, Harmondsworth: Penguin.

Wezenbeek, G. van (2009), *International Framework Agreements and Fundamental Social Rights; are International Framework Agreements Effective as an Instrument for Ensuring (Core) Labour Standards throughout Global Supply Chains?*, Zutphen: Paris.

Wilthagen, T. (2007), Flexicurity Pathways, interim report by the European Expert Group on Flexicurity, presented at the Flexicurity Stakeholder Conference organized by the European Commission.

Winnubst, M. E., P. Vroonhof & M. J. F. Tom (2015), *Payrolling in Nederland; de huidige bekendheid, markt en marktpotentie*, Zoetermeer: Panteia.

Witteman, J. (2016), ' "Volstrekt malafide praktijken" op Nederlandse scheepswerven', *de Volkskrant*, 5 March.

World Commission on the Social Dimension of Globalization, The (2004), *A fair globalization: creating opportunities for all*, Geneva: ILO.

WPEAC (2009), *Private employment agencies; temporary agency workers and their contribution to the labour market*, issues paper for discussion at the workshop to promote ratification of the Private Employment Agency Convention, 1997 (no. 181), Geneva: International Labour Office.

Zwemmer, J. P. H. (2012), *Pluraliteit van werkgeverschap* (Monografieën sociaal recht), Deventer: Kluwer.

Zwemmer, J. P. H. (2015), 'Contracting en arbeidsrecht; over schijnconstructies, juridisch houdbare varianten en de gevolgen van de Was en Wwz', *Tijdschrift Arbeidsrechtspraktijk* nr. 3 (april), p. 13–19.

Index

D

E

F

G

H

I

T

STUDIES IN EMPLOYMENT AND SOCIAL POLICY

1. W. Beck, L. van der Maesen & A. Walker (eds), *The Social Quality of Europe*, 1997 (ISBN 90-411-0456-9).
2. R. Blanpain, M. Colucci, C. Engels, F. Hendrickx, L. Salas & E. De Smyter, *Institutional Changes and European Social Policies after the Treaty of Amsterdam*, 1998 (ISBN 90-411-1018-6).
3. V. Lo: *Law and Industrial Relations: China and Japan after World War II*, 1998 (ISBN 90-411-1075-5).
4. A. Den Exter & H. Hermans (eds), *The Right to Health Care in Several European Countries*, 1998 (ISBN 90-411-1087-9).
5. M. Biagi (ed.), *Job Creation and Labour Law from Protection towards Pro-Action*, 2000 (ISBN 90-411-1432-7).
6. W. Beck, L. van der Maesen, F. Thomése & A. Walker (eds), *Social Quality: A Vision for Europe*, 2000 (ISBN 90-411-1523-4).
7. F. Pennings, *Introduction to European Social Law*, 3rd ed., 2001 (ISBN 90-411-1628-1).
8. J. Murray, *Transnational Labour Regulation: The ILO and EC Compared*, 2001 (ISBN 90-411-1583-8).
9. R. Blanpain & C. Engels (eds), *The ILO and Social Challenges of the 21st Century*, 2001 (ISBN 90-411-1572-2).
10. M. Biagi (ed.), *Towards a European Model of Industrial Relations? Building on the First Report of the European Commission*, 2001 (ISBN 90-411-1653-2).
11. J. Clasen (ed.), *What Future for Social Security? Debates and Reforms in National and Cross-National Perspective,* 2001 (ISBN 90-411-1671-0).
12. A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination,* 2001 (ISBN 90-411-1665-6).
13. R. Blanpain (ed.), *Labour Law, Human Rights and Social Justice 2001* (ISBN 90-411-1697-4).
14. M.-C. Kuo, H.F. Zacher & H.-S. Chan (eds), *Reform and Perspectives on Social Insurance: Lessons from the East and West,* 2002 (ISBN 90-411-1819-5).
15. P. Foubert, *The Legal Protection of the Pregnant Worker in the European Community,* 2002 (ISBN 90-411-1842-X).
16. M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe,* 2002 (ISBN 90-411-1885-3).
17. F. Pennings, *Dutch Social Security Law in an International Context,* 2002 (ISBN 90-411-1887-X).

18. T. Carney & G. Ramia, *From Rights to Management: Contract, New Public Management and Employment Services,* 2002 (ISBN 90-411-1889-6).
19. R. Blanpain & M. Colucci, *European Labour and Social Security Law, Glossary,* 2002 (ISBN 90-411-1905-1).
20. I. U. Zeytinoglu (ed.), *Flexible Work Arrangements: Conceptualizations and International Experiences,* 2002 (ISBN 90-411-1947-7).
21. J. Berghman, A. Nagelkerke, M. Boos, R. Doeschot & G. Vonk (eds), *Social Security in Transition,* 2002 (ISBN 90-411-1969-8).
22. R. Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law,* 2003 (ISBN 90-411-1980-9).
23. R. Blanpain & M. Weiss (eds), *Changing Industrial Relations & Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biagi,* 2003 (ISBN 90-411-2008-4).
24. J. Malmberg (ed.), *Effective Enforcement of EC Labour Law,* 2003 (ISBN 90-411-2160-9).
25. M. De Vos (ed.), *A Decade Beyond Maastricht: The European Social Dialogue Revisited,* 2003 (ISBN 90-411-2163-3).
26. M. Sewerynski (ed.), *Collective Agreements and Individual Contracts of Employment,* 2003 (ISBN 90-411-2190-0).
27. R. Blanpain & M. Van Gestel, *Use and Monitoring of E-Mail, Intranet and Internet Facilities at Work: Law and Practice,* 2004 (ISBN 90-411-22-66-4).
28. A. C. Neal (ed.), *The Changing Face of European Labour Law and Social Policy,* 2004 (ISBN 90-411-2312-1).
29. E. Sol & M. Westerveld (eds), *Contractualism in Employment Services: A New Form of Welfare State Governance,* 2005 (ISBN 90-411-2405-5).
30. F. Pennings (ed.), *Between Soft and Hard Law – The Impact of International Social Security Standards on National Social Security Law,* 2006 (ISBN 978-90-411-2491-3).
31. L. Dickens & A. C. Neal (eds), *The Changing Institutional Face of British Employment Relations,* 2006 (ISBN 978-90-411-2541-5).
32. G. Sebardt, *Redundancy and the Swedish Model in an International Context,* 2006 (ISBN 978-90-411-2503-3).
33. A.M. Świątkowski, *Charter of Social Rights of the Council of Europe,* 2007 (ISBN 978-90-411-2608-5).
34. M. Sargeant (ed.), *The Law on Age Discrimination in the EU,* 2008 (ISBN 978-90-411-2522-4).
35. G. Di Domenico & S. Spattini (eds), *New European Approaches to Long-Term Unemployment: What Role for Public Employment Services and What Market for Private Stakeholders?,* 2008 (ISBN 978-90-411-2614-6).

36. C. Welz, *The European Social Dialogue under Articles 138 and 139 of the EC Treaty: Actors, Processes, Outcomes,* 2008 (ISBN 978-90-411-2744-0).
37. M. Rönnmar (ed.), *EU Industrial Relations v. National Industrial Relations: Comparative and Interdisciplinary Perspectives,* 2008 (ISBN 978-90-411-2770-9).
38. F. Pennings, Y. Konijn & A. Veldman (eds), *Social Responsibility in Labour Relations: European and Comparative Perspectives*, 2008 (ISBN 978-90-411-2783-9).
39. F. Pennings & C. Bosse (eds), *The Protection of Working Relationships: A Comparative Study,* 2011 (ISBN 978-90-411-3289-5).
40. S. Devetzi & S. Stendahl (eds), *Too Sick to Work?: Social Security Reference in Europe for Persons with Reduced Earnings Capacity,* 2011 (ISBN 978-90-411-3426-4).
41. U. Becker, F. Pennings & T. Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security,* 2013 (ISBN 978-90-411-3233-8).
42. E. Ales (ed.), *Health and Safety at Work: European and Comparative Perspective,* 2013 (ISBN 978-90-411-4661-8).
43. F. Pennings, T. Erhag & S. Stendahl (eds), *Non-public Actors in Social Security Administration: A Comparative Study,* 2013 (ISBN 978-90-411-4917-6).
44. A. Neal (ed.), *Cross-Currents in Modern Chinese Labour Law,* 2014 (ISBN 978-90-411-4763-9).
45. B. Waas (ed.), *The Right to Strike: A Comparative View,* 2014 (ISBN 978-90-411-5007-3).
46. A. Ojeda-Avilés, *Transnational Labour Law,* 2015 (ISBN 978-90-411-5858-1).
47. A. Numhauser-Henning & M. Rönnmar, *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and Beyond,* 2015 (ISBN 978-90-411-4979-4).
48. A. Perulli & T. Treu (eds), *Enterprise and Social Rights*, 2017 (ISBN 978-90-411-8234-0).
49. Dr F. C. A. van Haasteren, *Decent Flexibility: The Impact of ILO Convention 181 and the Regulation on Temporary Agency Work*, 2017 (ISBN 978-90-411-9236-3).